The New Zealand VALUERS' JOURNAL

JUNE 1988 VOLUME 27 NUMBER 9

Official Publication of the New Zealand Institute of Valuers

NEW ZEALAND INSTITUTE OF VALUERS

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Contributions with a biographical note of the author should be typewritten and sent to the Editor, PO Box 27146, Wellington, who reserves the right to accept, decline or modify material. Views expressed by the editors and contributors are not necessarily endorsed by the New Zealand Institute of Valuers. Copies of manuscript should be retained by the author as they cannot be returned. Deadline: two months prior. Business letters, subscriptions and advice of changed address should be sent to the General Secretary, The New Zealand Valuer 1986 0. The mode of citation of this volume of *The New Zealand Valuers' Journal* is [1988] N.Z. Val. (page).

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Editorial Comment

Occupational Regulation - The Status Of The "Expert"

At the present time Government is conducting an investigation into occupational regulation. It is the view of many registered valuers that the abolition of the hallowed fee scale and permitting of registered valuers to "advertise" pales into insignificance compared with the proposal to abolish the registration of valuers.

The following are interesting extracts from a speech prepared for the Right Honourable Geoffrey Palmer, Deputy Prime Minster and Minister of Justice, given at the opening of the annual conference of the New Zealand Veterinary Association in Christchurch on 27 May 1988:

"We have recognised the need to question controlling occupations in this over-regulated country of ours."

"In a Labour Government the overall purpose of intervening to regulate any occupational activity must be to protect the man or woman in the street."

"Last year we convened a working party to look at these aspects of occupational regulation. At that time a proposed Veterinarians Bill had already been drafted." (As had a proposed revised Valuers Bill Editor)

"The present regime does not prevent anyone not registered as a Vet from carrying out Vets tasks, so long as they do not hold themselves out to be veterinary surgeons."

"It does not seem to me that if para professionals want to enter the field, they will be prevented from doing so. They simply cannot use the title `Veterinarians'."

The general tone of the Deputy Prime Minister's address was that he favours the continued registration of veterinarians, largely on the grounds that the welfare and preservation of animal life is involved and also because prescription drugs are involved. Is the moral, ethical, economic case for valuers less compelling, given the great potential to place large amounts of "innocent" money at risk?

The provisions of the currently proposed amendment to the Veterinary Surgeons Act 1956 are very similar in their general effect to those proposed in the revision of the Valuers Act which has been under consideration for some time now and is currently also being considered by the "Working Group on Occupational Regulation".

The question now being considered is:

Is there any necessity to continue with the registration of such professionals as valuers, veterinarians, architects, surveyors, engineers, medical practitioners?

As a professional group, do members of the New Zealand Institute of Valuers wish to retain registration? If so, why, and if not, why not? Within the Institute, there is clearly divided opinion on this question, and the pros and cons must be closely and logically examined.

Registration can be justified only if it is capable of achieving certain desirable objectives in a better manner than alternative structures could achieve the same objectives. This raises the next question, which is:

What is a suitable alternative structure?

The answer to that clearly is the New Zealand Institute of Valuers, operating without an independently constituted Valuers Registration Board with its attendant statutory backing.

The objectives being pursued in this exercise can be summarised as follows:

1. Achievement of a system which ensures accountability of valuers so as to protect the general public at minimum cost and inconvenience to that general public.

2. Attainment of continuously improving education standards.

3. Attainment of continuously improving technical and ethical standards.

The combined efforts of the Institute and the Valuers Registration Board over the past 40 years have seen a reasonable level of success in achieving all these objectives, so what is the reason now to deregulate and deregister?

There can be little doubt that the education and technical/ethical competence objectives can be achieved by the Institute, but what of the accountability/disciplinary objectives? It is interesting to note that in putting forward the new Veterinarians Bill, the Veterinary Association made it clear that it no longer wishes to have a role in the disciplinary process.

Does the New Zealand Institute of Valuers really want to see the current procedure for dealing with disciplinary matters totally deregulated, leaving the Institute with the onerous and expensive task of ensuring accountability within its membership? In the light of commercial experience, does the Institute really believe it can efficiently fulfil this function without the strength given by the statutory backing?

Anyone who has been associated with any of the numerous disciplinary hearings which have taken place in recent years will appreciate that valuers charged with incompetent or unethical conduct are normally very strenuously defended by very competent barristers. If the Registration Board is disbanded and the profession deregulated, there is a strong chance that effective accountability will disappear. Those within the Institute who find this proposition unacceptable or unbelievable should think long and hard on the administrative framework, extra finances and strong legal basis which the Institute will need in order to put in place a disciplinary process as effective as the one now in operation, let alone being able to implement some very necessary and overdue improvements to that system.

The questions must be put:

- Is the change in political attitude to regulation in itself sufficient reason to disband a system that has operated reasonably well for 40 years?
- Are there other changes and reasons for going down this path?
- In this litigious world, it is well known that professionals are attracting an increasing number of claims for professional negligence, and there is no evidence that this situation will change in the future. If the titles "registered valuer" or "public valuer" are removed, how will a public, which has enough difficulty now in differentiating between persons of variable expertise, decide upon ability?
- Why are our students and aspiring valuers striving to achieve a level of education and expertise sufficient to earn the term "registered valuer", only to find that the effort in gaining the title may be in vain?

Over the past 24 months, registered valuers have been placed under greater public and media scrutiny than at any time within the past 40 years and have reacted responsibly and in the public interest. The press has been vocal on many occasions within recent months in drawing public attention to such issues as:

- Have registered valuers led the public astray during the boom times?
- Was the "Gang of Twenty" employing (or manipulating) registered valuers?
- Deregistration of certain valuers for incompetence.
- Conviction of a person posing as a registered valuer.

None of these events have in any way indicated that the use of the term "registered valuer" is adisadvantage to the public. Rather,

COUNCILLORS 1988

Rear: G T Foster, M E Gamby, W A F Burgess, K E Parker, G Kirkcaldie, R V Hargreaves, G J Horsley E T Fitzgerald, A W Gowans, J N B Wall, J P Larmer, K M Allan. *Front*: J W Briscoe, K J Cooper, A L McAlister, R M Donaldson, R L Jefferies (*S Vice-President*), R E Hallinan (*President*), A P Laing (*J Vice-President*), J F McAuliffe (*President A.J.V.*), W A Cleghorn, T J Bernau, J G Gibson.

the media has challenged the profession to perform to a certain level of expertise.

The word "valuer" does not have the same public perception as lawyer, architect or chartered accountant. It is the word "registered" that gives the term professionalism (e.g. scan the yellow pages). Take away the word "registered", and it is hard to differentiate between a chattels valuer, a valuer of plant and machinery, a valuer of fine arts and jewellery, an unqualified property valuer, and a properly qualified valuer.

Of course there is the danger that the total profession will be downgraded in the public's estimation by those persons who can practise on the fringe but are not properly qualified to practise as property valuers. The press and the public will not differentiate between those valuers who are members of the New Zealand Institute of Valuers and those who are not, just as the public has never been able to differentiate between a real estate agent and a real estate salesperson. Even if the press makes it clear that the problem is not with an "Institute" valuer how can the public differentiate when the word "valuer" is the same no matter what organisation the valuer belongs to?

There is the possibility that other organisations will set up in competition with the "New Zealand Institute of Valuers" based on a lower level of education and expertise. On what basis does the public then choose? Must the public examine the qualifications of education, standing and experience of every professional before he/she is employed? It would be naive to suggest that this will occur in even most cases.

Should this all appear to be a little nebulous, consider the difficulty of a population deciding whether one particular qualification in medicine is as good as another without some overriding controlling body saying who may practise as a doctor of medicine and who may not. Why are dentists concerned? Why are taxi drivers concerned? Removal of control opens the way to abuse by those who have least to lose. If this was unimportant then the amount of press coverage that Registered Valuers have received in the past 12 months would not have taken place. There are very few registered valuers who do not take their responsibility seriously. Registered valuers appreciate the public perception of their profession, and are concerned that the public receives the best available advice on property valuation matters.

There can be only one valid reason for retaining the title "Registered Valuer". That must be public protection. The question must then be asked "How can the public possibly be served better by deregulation and removing the words `registered valuer' from statutes?". During the 40 years since the Valuers Act 1948 the term "registered valuer" has been written into a great volume of legislation, and has been accepted as the reliable determinant of what constitutes a professionally prepared assessment of a property's market worth.

In answer to the possible criticisms of restraint of trade or monopoly position, no individual is prevented from practising as a "valuer". Further, no individual is prevented from obtaining the status "registered valuer" provided that the person fulfils the necessary educational training through the universities, and then receives adequate practical experience to a point where he or she can demonstrate acceptable competence.

Registered valuers accept that there is a long-term responsibility to the profession and to the public good. Most serious errors in mortgage and asset review valuations do not emerge in the short term, and most only become apparent two or more years after the valuation has been completed. This is particularly true during a period of static or declining values following boom conditions. If there is any time during which it is most necessary to retain the term "registered valuer", it must surely be now when the public has the opportunity to assess the performance of registered valuers against their past actions. These valuers who have not performed up to a required standard can be deregistered. *The profession is accountable.*

Life Membership

Allen Lindsay McAlister

Lindsay's nomination was brought to the Council table by our immediate Past President, Graeme Horsley, and endorsed by the Wellington Branch Councillor, Graeme Kirkcaldie.

Lindsay's involvement with and service to the Institute covers a long period. In the early days he was a student Representative on the Wellington Branch Committee from where he became Branch Secretary, a Committee member and Chairman of the Wellington Branch in 1969/1970.

Lindsay was advanced to aFellow of the Institute in 1972. Until 1986 and fora long period of 19 years, Lindsay served the Institute as a member of the Executive Committee for 8 of those years he was Chairman of that Committee.

Lindsay also is the Institute's nominated Representative on the L.P.M.S. Insurance Scheme and in fact it was he who was largely responsible for the setting up of the present scheme.

For his services, and at the time he stepped down from the Executive Committee in 1986, Lindsay was awarded the John Harcourt Memorial Award. That wasn't the last we were to see of Lindsay however, since early in 1984 he had been appointed Chairman Co-ordinator of the 14th Pan Pacific Congress a role he willingly accepted notwithstanding the enormous commitment necessary. Undoubtedly, the 14th Pan Pacific Congress was an unqualified success. I can report that we have received numerous congratulatory messages as to the success of the Congress, and many experienced Pan Pacific attenders from both overseas and N.Z. have said that the 14th Congress was the "best ever". (And the friendliest ever.)

As Chairman Co-ordinator, Lindsay, in his unflappable manner, led the Organising Committee superbly. He allowed Committee members to work away in their own area of responsibility but was always in the background controlling and encouraging, and being ever mindful of his responsibility to Council to keep the budget on the credit side. His contribution to the Pan Pacific was enormous. In fact his contribution over many years to the Institute has been outstanding.

On behalf of Council it is my very great pleasure to place before you this recommendation and ask that this meeting endorse by acclamation the awarding of a Life Membership to Lindsay McAlister.

Members present endorsed the recommendation by acclamation whereupon Mr Hallinan declared Lindsay McAlister a Life Member of the NZ Institute of Valuers.

Citation For Fellowship

He is a graduate of the N.Z. Administrative Staff College Senior Executive course, presented a technical paper at the Pan-Pacific Congress of Valuers in Hawaii in 1986, and was the Valuer-General's nominee on the NZIV Council 1986-1987.

Iain is a well known identity in the profession, and is held in high regard for his knowledge and undoubted ability as a valuer. The Wellington Branch unanimously supports this recommendation for advancement to the status of Fellow of the Institute.

IAIN WILLIAM GRIBBLE

Iain Gribble, until September 1987, was Chief Valuer of the Valuation Department located in Head Office Wellington. He is now in practice in the Auckland office of Robertson Young Telfer Ltd.

Iain commenced his career as an urban field cadet in the Auckland office of the Valuation Department in January 1967, where he studied at Auckland University. Following completion of his studies for the Diploma in Urban Valuation in 1970, he was posted to New Plymouth. Iain's subsequent postings saw him move through a number of the department's offices. His abilities ensured his promotion to the position of District Valuer, Invercargill in 1975. He subsequently served in this position in Wellington in the period 1975-1980, then to Takapuna. He was then promoted to the position of Supervising Valuer, Auckland and in 1983 to the position of Assistant Chief Valuer, Head Office, subsequently to become Chief Valuer.

Iain qualified for both registration and Associate status of the Institute in 1971. His contribution to both the Institute and the profession at large has been significant as witnessed by the following attainments. He served as a member of the Wellington Branch Committee in the periods 1976-1980 and 1983-1987 being Branch Chairman in 1979-1980.

He was an examiner for the NZIV "Practical and Oral" examinations over the period 1976-1982, a written examiner for the subject Valuation IIB 1977-1984 and a specialist tutor in valuation for the N.Z. Technical Correspondence School 1974-1977. Iain was also a part-time lecturer in valuation subjects at Wellington Polytechnic 1976-1979.

REX HEMMINGSEN JENSEN

Rex Jensen is a Director and senior member of the Auckland valuation practice of Jensen Davies & Co. Ltd.

Rex was born in 1940, and was educated at Avondale College before starting a career as an architectural draughtsman before taking up an architecture cadetship with the Auckland Education Board in 1958. However he decided on a career change to valuation completing the Diploma in Urban Valuation from Auckland University in 1965.

His valuing experience began when he joined the Valuation Department in 1965, gaining registration in 1968, and was admitted an intermediate member of the Institute in 1969. He was advanced to Associate status in 1969.

Rex left the Valuation Department in 1969 to try his hand at developing home units while at the same time commencing a valuation practice as Rex H Jensen and Associates. Alan Davies joined him in 1972 becoming a partner in Jensen Davies and Co. in 1975 operating from offices at Greenlane, Auckland. The firm moved to offices in Remuera in 1977 and incorporated in 1987.

Rex has been actively involved as a leading public valuer in

Auckland, serving on the Branch Committee from 1976 to 1979 and being Branch Chairman in 1978. When the NZIV Annual General Meeting and Seminar was last held in Auckland, Rex was responsible for much of the organisation.

He has more recently exercised his organisational skills in being the convenor of a special sub-committee of the Council of Land Related Professions in organising the successful "Future Shock for the Land Professions" seminar in Auckland in 1987.

Rex is actively involved in community affairs, being a member of Newmarket Rotary, instrumental in the development of the gymnasium for the Blind Institute at Parnell, and a committee member of the National Children's Health Foundation (setup as a result of a Telethon).

Rex was remarried in 1983 and has two children by a previous marriage and is currently an expectant father (as at date of writing).

His interests include a passion for gallopers, having interests in horses and racing, and he is an accomplished trumpeter having only recently given up playing in a band.

Rex is held in high esteem by fellow valuers in the Auckland Branch, is always willing to lend a hand to and support Institute projects, and the Auckland Branch Committee unanimously supports his nomination for advancement to a Fellow of the Institute.

JOHN ALFRED STABLER

Jack Stabler is the District Valuer and a member of the Corporate Management Group with the Housing Corporation in Palmerston North. He also co-ordinates Corporation Valuation staff within the Central Region which extends from Wellington in the south and up to New Plymouth on the westcoast and Gisborne on the east coast.

Bom in October 1931, Jack spent his earlier years in Te Aroha before becoming a carpenter. While working in the trade he spent time in the South Island, especially around the Nelson area. He is an Associate Member of the N.Z. Institute of Building Inspectors. In 1956 he joined the State Advances Corporation as a Property Supervisor in Auckland and completed the Diploma in Urban Valuation at Auckland University in 1960. He moved to Hamilton in 1964 with the Corporation and was promoted to Senior Valuer Lower Hutt in 1967. Subsequently, he was promoted to Assistant District Valuer Hamilton in 1968 and then to District Valuer Palmerston North in 1970.

Jack was registered October 1965 and advanced to Associate Status in 1979. His service to the Institute has been substantial having been Chairman of the Central Districts Branch and having served on most sub-committees during his time in Palmerston North.

As well as the long service in the Branch Committee, Jack has given generously of his time to assisting students by acting as an examiner for the Institute's Practical and Oral Examinations for a number of years and more recently in instigation of Valuer Training Courses for Housing Corporation graduates both in valuation and building construction. This work has incorporated educational involvement with massey University and the Manawatu Polytech.

In his leisure time Jack is an active rugby and cricket follower, a brewer of some note, enjoys copper work and is a very active member of the West End Swimming Club, especially in the teaching of water skills to children.

He is married with two daughters and a son. Jack is known to always do more than his share and is most helpful at all times.

The Central Districts Branch appreciates Jack's contribution over the years and in return recommends unanimously his advancement to Fellow of the Institute.

JOHN ROBERT SHARP

Jock Sharp was born at Levin in 1932 and for the last 20 years has operated as a sole rural practitioner in the Waikato Region.

On obtaining University Entrance in 1949, Jock left school to join the Valuation Departmentas a Rural Field Cadet. He attended Lincoln College and graduated with a diploma in Valuation and Farm Management in 1954, commencing full-time valuing with the Department in Palmerston North in 1955. He was transferred to Blenheim in 1956 followed by periods in Nelson and Masterton before accepting the position of Field Officer and Valuer with Wright Stephenson and Company Limited in 1960, the year in which he became registered.

In 1969 Jock resigned to set up practice as a private valuer on his own account which he now continues in association with his farming pursuits and community activities.

Jock has been a very active member of the Institute of Valuers, particularly at the local level. He joined the Branch Committee in 1962 serving on practically all sub-committees, was Branch Chairman in 1970-1971 and continued on the Committee until 1980.

He also acted for many years as a member of the rural examination panel.

Jock Sharp's professional standing and his competence in the valuing profession are highly regarded in the Waikato. He sets and maintains a high professional standard, and his honesty and integrity are without question.

The Waikato Branch unanimously supports Jock Sharp's elevation to that of a Fellow within the Institute.

World Valuation Congress Advance notice

Auckland University will again be sponsoring the World Valuation Congress which is to be held in Singapore at the National University from 23 to 27 April 1989, inclusive. Promotional material will appear in future issues of *The New Zealand Valuers' Journal.*

DAVID JAMES OWEN ARCHBOLD

David Archbold is principal of the Hamilton Valuation Practice of Archbold and Co.

Born in 1944 and educated in Palmerston North, he was selected in 1961 as a Rural Field Cadet and graduated from Lincoln College in 1966 with diplomas in Agriculture and Valuation and Farm Management. He commenced work in the Gisborne office of the Lands and Survey Department in 1967 and subsequently served in the Department Office in Hamilton.

David resigned from the Department in 1974 to establish his own practice after having completed theNZIV Professional Urban Examinations in 1973. He became registered as a valuer in 1969 and has been an Associate Member of the Institute since 1970.

David was appointed a member of the Waikato Land Tribunal in 1979. His involvement with the Waikato Branch Committee commenced as Newsletter Editor in 1974 and also as a member of the practical and oral examination panel. He was elected to the Committee in 1980 serving on various sub-committees and is currently Branch Chairman.

For the last 13 years David's involvement in valuation work has gained him respect from the business community and his enthusiastic approach to valuation matters has earned him a reputation amongst his fellow members as alearnedvaluer of good repute and integrity.

The Waikato Branch Committee has no hesitation in recommending David Archbold's advancement to Fellowship status.

Honorary Membership
Lincoln W North

Councillors at their meeting had unanimously voted to bestow Honorary Membership on Lincoln W. North, an Appraiser of Canada. The President then presented the following citation:

"For many years Lincoln has been a great contributor to the 'internationalisation' of the valuing profession. In 1979 Lincoln was Chairman Co-ordinator of the Pan Pacific Congress held in Vancouver, and has been a regular attendee and participant in most Pan Pacific Congresses.

It will be recalled Lincoln conducteda lecture tour through New Zealand in March 1985. This was a very successful practical, educational programme in the valuation of investment property.

However, the service to the Institute which prompted the nomination, was Lincoln's contribution to the Arbitration Enactment performed on Day One of the 14th Pan Pacific Congress. With Rod Jefferies and Peter Mahoney the three valuers undertook the daunting task of orchestrating the exercise. Those who were there will know Arbitration Day was brilliant and an unqualified success. The Council of the Institute recognises Lincoln North's service to the NZ Institute of Valuers."

HONORARY POSITION EDITOR NZ VALUERS' JOURNAL

Due to unforeseen circumstances, we have to regretfully advise that Miss Cathy Heron has been unable to take up the position of Editor of the *NZ Valuers' Journal.*

The Institute now invites applications for this honorary position from Registered Valuers who have a commitment to the Profession and an ongoing interest in educational matters. The position of Honorary editor is supported by an Editorial Board and the General Secretary's office.

Whilst the *NZ Valuers Journal* is published in Auckland there are no requirements that the Editor reside in that city, attendance at the two annual meetings of the Council of the NZ Institute of Valuers is required as part of the Editorship.

A full "job specification" is available from the General Secretary's office together with details of the honorarium payable.

Registered Valuers who are interested in putting their names forward forthis position are invited to contact the General Secretary in Wellington phone (04) 847 094 or at Box 27-146, Wellington.

Report on the 49th Council Meeting and Annual General Meeting of the New Zealand Institute of Valuers

By the Editor

The 49th Council Meeting and Annual General Meeting was held in the conference room at the Quality Inn, Willis Street, Wellington, from Sunday to Monday, 1-2 May 1988.

The President, Mr R E Hallinan, welcomed all Councillors and invited guests, extending a special welcome to new Councillors G (Graeme) Kirkcaldie of Wellington, and re-elected Councillors T J (Tim) Bernau of Hamilton and E T (Ted) Fitzgerald of South Canterbury. In addition, Mr H R M (Morley) Donaldson was welcomed back as the Valuer-General's nominee, and the President of the Australian Institute of Valuers, Mr J F (John) McAuliffe, was welcomed as an invited guest.

Matters Arising

The general matters arising were noted and because of their relatively extensive nature were discussed under specific agenda items.

Honorary Membership

An Honorary Membership was conferred upon Lincoln W. North, Appraiser, of Canada. His citation is printed in this issue of the *Valuers' Journal.*

Life Membership

Mr A L (Lindsay) McAlister, was nominated for Life Membership for his untiring service to the Institute over a long period of years and a wide variety of avenues of service. His nomination received the unanimous approval of Council, and was later confirmed by the members in general meeting.

John Harcourt Memorial Award

No award has been made for the current year.

Advancement to Fellowship

The following members were elevated to the status of "Fellow of the New Zealand Institute of Valuers":

lain William Gribble,	Wellington (Auckland)
Rex Hemmingsen Jensen,	Auckland
John Alfred Stabler,	Central Districts
John Robert Sharp,	Waikato
David James Owen Archbold,	Waikato

NZIV Corporate Plan

MrJefferies' pre-circulated report was discussed. This discussion covered the following areas:

- The Objectives to be Achieved
- Disciplinary Provisions
- A Suitable Mission Statement

The matter was considered to be sufficiently complex to warrant a further Council meeting and the Corporate Plan was referred back to Executive for further consideration.

Committee Reports

The New Zealand Valuers' Journal

A motion was passed delegating to the Editorial Board, in consultation with the President, the appointment of a new Editor for *The New Zealand Valuers' Journal.* An Honorary Editor was to be appointed.Sufficient material is coming to hand in one form or another for the continued success of the Journal.

14th Pan Pacific Congress

The Congress Chairman, Lindsay McAlister, presented his report and spoke of the contribution by many members of the New Zealand Institute of Valuers. There had been 504 attendees. Councillors spoke of the appreciative comments received from many overseas delegates, and the general consensus was that the Congress had been a great success.

Education Board

Mr Laing addressed his pre-circulated report and assured Council that Otago University was assuming total responsibility for the Distance Teaching Seminars. Seminars were being mounted on a cost-recovery basis and members were to be soon advised of the venues and topics.

Discussion centred around the need for a close working relationship between the New Zealand Institute of Valuers and the three universities conducting approved valuation courses. Mr MacAuliffe, President from Australia, commented that the AIV regularly met with the educational establishments in Australia via their National Education Council.

It was considered that the universities needed more industry contact and this should be via the Education Board which should also provide a cross liaison with other universities for the exchange of ideas. It was made known to Council that the Education Board was undertaking market reserarch and user opinion on the quality of university qualifications.

During the discussion on the new Valuation 2 textbook, Mr Jefferies advised that a September completion date has been set with most chapters to hand and work was progressing at a steady pace.

Statistical Bureau

Mr Wall spoke to his report, and indicated that he could assure Councillors that the supply of sales data would continue. There is a growing overlap of the relationship and functions of the Statistical Bureau and the company, NZIV Services. There has been a growth in the number of subscribers to the Electronic Data Information.

Mr Fitzgerald spoke on the difficulties of GST and property sales. The question of GST has to be lived with. If it can be ascertained it will be shown.

There appears to be no practical solution at the present time. A sub-committee was set up to report back to the next Council meeting.

Mr Fitzgerald then spoke to his pre-circulated report on Electronic Data Sales Processing. He indicated that it was cost effective to re-develop the Sales Data Processing and run the programme in-house providing in-house support. Council approved the development of a new Electronic Data conversion and disk copying system for the Statistical Bureau.

Publicity and Public Relations

Mr Kirkcaldic thanked Councillors for the information which formed the basis of the Annual Property Market Report, released to branches and the media by our Public Relations consultant.

A media workshop for branch media spokespersons was

discussed, proposed and approved on the basis that branches funded their own travel costs, with the Institute funding the consultants.

Display stands had been acquired and had gone to branches as requested at the October Council meeting. The "instand" stand has been acquired and used at the Pan Pacific Congress.

Executive Committee

The Chairman, Mr Wall, addressed the question of replacement insurance certificates. He referred to the meetings with the industry between himself and Mr K Allan, and more recently between the industry and Messrs Hallinan, Gibson and himself.

Clearly, the matter needs to be addressed further as there was substantial discussion on this point and no clear directives could be given other than those already provided to members earlier in the year.

Council of Land Related Professions

Mr Jefferies, our member on the CLRP, reported on various matters including unification which were discussed at a meeting in May 1988, and the proposed CLRP constitution.

Mr Hallinan was appointed to represent the Institute on the unification working party. In addition to Mr Hallinan, Mr Laing was nominated as New Zealand Institute of Valuers' representative, with Mr Jefferies retiring from the position.

NZIV Services

The year had been profitable. Rentpak II would soon be marketed and the company proposed to take a lead in planning regional technology seminars with Education Board support.

Land Professional Mutual Society

Councillors expressed concern on the lack of reporting back to membership.

The Chairman, Mr McAlister, undertook to write to the LPMS and reactivate the need for members to obtain feedback on the experience of claims processed. Mr McAuliffe (President Australia) commented that professional indemnity insurance was being considered by the AIV program. Our sister organisation in Australia is looking at compulsory insurance. He indicated that that is what insurers wanted.

TIAVSC Assets Standards Committee

Mr Horsley advised that the Institute's Assets Standards Committee had met in Wellington and he had met with Mr Laing and MrJefferies when he had been in Dunedin and Auckland. The Committee was considering the adoption of the International Assets Standards criteria. The New Zealand Society of Accountants had asked for a degree of urgency to be taken.

Mr Hallinan congratulated Mr Horsley on his appointment of Chairman of TIAVSC.

50th Jubilee

Messrs Larmer and Bernau are the Councillors responsible for the 50th Jubilee Program.

They presented a joint paper suggesting possible activities, including document displays, film/videos and a history of the Institute.

The matter was discussed by Council and the proposals referred back to the sub-committee for further development and, where necessary, implementation. Council approved a budget of $10,000 to be allocated to the 50th Jubilee celebrations.

Valuers' Registration Board

Messrs McDonald, Young and Armstrong, on behalf of the Valuers' Registraton Board, met with Council. Mr McDonald congratulated the NZIV on the success of the Pan Pacific Congress. He went on to report on occupational regulation and indicated that the Registration Board sought the retention of the Act and the Board.

On the subject of work diaries for registrants, the Board proposed that a candidate for registration produce a work diary showing the three years' experience. The policy wasn't yet operative but would come. He proposed publicity in *The New Zealand Valuers' Journal* and at the universities.

Discussions took place on the question of reciprocity. The Valuers' Registration Board expressed its concern on the qualifications of some overseas persons in terms of the Act when compared to New Zealand qualifications.

There was considerable debate on the N.Z. qualifications. Mr MacAuliffe (President of Australia) spoke of the difficulties of upgrading courses and the need for correspondence courses in Australia.

He then assured members of the Board and Councillors that although some courses may have a "grading" which is lower than the current university courses in New Zealand, the level of teaching in many cases was equivalent to the higher grading.

The Registration Board members raised the difficulties which would be encountered in funding the Valuers' Registration Board in the future. There was a suggestion that the New Zealand Institute of Valuers and the Valuers' Registration Board should set up a working party to resolve the funding difficulties.

Mr R P Young's term on the Board as the Institute's member nominee expired on 30 April 1988. Mr Young's name was advanced as the N.Z. Institute of Valuers' nominee for a further term on the Registration Board.

Office Bearers Committees 1988

In terms of the Valuers' Act, Mr R L Jefferies was re-elected as Senior Vice-President. The various committee appointments are as follows:

Education Board	Mr W A Cleghorn (Chairman), J W Briscoe, G Cheyne. Two government representatives as recommended by Mr Donaldson
Statistical Committee	Mr J N B Wall (Chairman), Mr A W Gowans, Mr J G Gibson
Publicity/Public Relations	Mr G Kirkcaldie (Chairman), Mr R E Hallinan,Mr J G Gibson
Executive	Mr J N B Wall (Chairman), Mr K J Cooper, Mr K M Allan, Mr G Kirkcaldie, Mr E F Gordon
Asset Valuation Standards	Mr G J Horsley, Mr A P Laing, Mr K J Cooper

Annual General Meeting

The 49th AGM of the New Zealand Institute of Valuers was held in conference room 3 at the Quality Inn, Willis Street, Wellington, on Monday 2 May 1988.

Mr Hallinan welcomed members to the meeting, which was attended by 34 members of the New Zealand Institute of Valuers and the invited guest, Mr MacAuliffe.

The minutes of the 48th AGM were passed as a true and correct record. The President spoke on the 49th Annual report and statement of accounts.

The worsening of the "Speculative Investment" in the Leadenhall Fund was discussed at length, with a number of members both for and against the actions taken by the Institute. The report and statement of accounts were adopted.

Mr N H Chapman was reappointed as Auditor. The recommendation of Mr A L MacAlister for Life Membership was confirmed. *Editor.*

Membership

Studentship

Allen, M L	Central Districts
Amos, S C	Central Districts
Borne, P A	Canterbury/Westland
Boyd, S J	Auckland
Brathwaite, P J	Central Districts
Chung, R	Central Districts
Coles, W M	Central Districts
Copland, R G	Canterbury/Westland
Creemers, M H	Central Districts
Croucher, D J W	Central Districts
Dalliessi, R M	Central Districts
Dick, L M	Central Districts
Dunn, L A	Wellington
Fischer, R J	Central Districts
Fraser, S A	Auckland
Grace, F R	Central Districts
Hamilton, A	Canterbury/Westland
Houchen, A J	Canterbury/Westland
Hudson, J K	Central Districts
Jackways, M R	Canterbury/Westland
Jeffries, N T W	Central Districts
Jones, K L	Central Districts
King, T M	Central Districts
Locke, J M	Central Districts
Lowry, J J	Waikato
McAlister, A G	Auckland
McCarthy, C N	Central Districts
McCulloch, M I	Central Districts
Molloy, B J	Central Districts
O'Donohoe, S F	Central Districts
Pocock, D G	Auckland
Rehu, A T	Central Districts
Robinson, B W	Canterbury/Westland
Sanders, K B	Auckland
Settle, B J	Central Districts
Taylor, A R	Canterbury/Westland
Thomas, A H W	Canterbury/Westland
Valentine, K T	Central Districts
White, D J	Central Districts

Intermediate Membership

Baxendine, R W	Nelson/Marlborough
Buckeridge, K E	Wellington
Butchers, P R	Wellington
Butland, S J	Wellington
Clarke, P J	South Canterbury
Corder, B J	Auckland
Cotton, P J	Otago
Crighton, TA	Otago
Dewar, R B	Wellington
Eaton, H D	South Canterbury
Gadsby, D J	Central Districts (Wanganui)
Harte, M R	Wellington
Hawkey, C C	Central Districts
Healing, C L	Wellington
Hobbs, A	Wellington
Lockhart, N R	Otago
Ludecke, R E	Hawkes Bay
McCowan, S	Waikato
Mackisack, S D	Waikato
O'Brien, S G	Canterbury/Westland
Pratt, D E	Central Districts (Wairarapa)
Teasdale, F J	Wellington
Veale, M J	Wellington
Washington, A P	Wellington
Wigmore, A M	Auckland
Yoeman, P M	Canterbury/Westland
Young, P D	Wellington

Advancement to Associate

Boyd, C D	Rotorua/Bay of Plenty
Collings, L 0	Canterbury/Westland
Gifford, K D	Wellington
Gillanders, M S	Wellington
Halstead, B E	Nelson/Marlborough
Hazwinkle, K B	Northland
Hindin, R E	Auckland
Julian, T W	Wellington
Murray, P H	Otago
Quaife, G S	Auckland
Stantiall, D M	Wanganui Sub-Branch

Resignations

Carstens, A H (Affiliate)	Auckland
Feyter, J A	Wellington
Fisher, W H (Retired)	Rotorua/Bay of Plenty
Gillett, R R M	Nelson/Marlborough
Hegarty, L B	Auckland
Jackson, E D	Waikato
Lush, G E	Auckland
McKay, J R	Gisborne
Masefield, R M	Taranaki
Rutherford, J J	Waikato
Smeaton, I G	Auckland
Thomson, J N	Central Districts
Turner, D W	Canterbury/Westland
Wilson, I G	Canterbury/Westland
Wilson, R J	Canterbury/Westland

Admitted as Affiliate

Freeman, J	Wellington
Pike, K	Wellington
Smith, D(Affiliate status as Plant & Machinery Valuer; brief C.V. supplied)	

Re-Admission

Barrett, B A	Auckland

Deceased

Crawshaw, G K	Gisbome
Jacobsen, A S	Auckland
Milne, R M	Otago
Walden, E H	Otago
Wilson, J R	Canterbury/Westland

Removed From Roll

Simkin, H L	Auckland

Retirements Rule 14(1)

Graves, J W	
Steele, D R	Wellington

Rule 14(2)

Marshall, B A	Wellington
Ormrod, E K	Wellington

New Property Moves At Massey

Massey University has boosted its property and valuation teaching and research in creating an industry-backed professional chair in Property Studies.

The new position will head this country's first independent university department in Property Management and Valuation established in January 1988 after a restructuring of Massey's Business Faculty.

Massey is advertising to fill the appointment for the beginning of 1989 academic year.

A Charitable Trust set up to raise private-sector funding to supplement Massey's contribution toward the position was officially launched in Palmerston North on Friday, 15 April.

Trust founder and prominent business figure, Sir Roderick Weir said significant support had already been generated for the proposal. "Initial approaches have drawn a very positive response. There is a high demand for well trained employees in the property industry, and with the increasing sophistication of the property market that demand can only increase in the future," Sir Roderick said.

"Massey has a strong practical tradition of training people who can go out and do a job, and the industry recognises that."

He said the initiative was also in line with Government calls for universities and the private sector to get together in developing new sources of funding for tertiary education.

Apart from Sir Roderick, other Trust members are Massey's Chancellor, Doug Easton, and Vice-Chancellor, Neil Waters, Massey Business Studies Dean, Professor Ralph Love, Brierley Cromwell Property Chairman, Graeme Bringans, Leyland RDC Managing Director, Barry Clevely, and Executive Director of General Properties Corporation, Bryce Barnett.

As well as helping to establish the new professorial position, the Massey Property Foundation also aims to fund property research. Recreational property, special purpose property, leasing concepts, and computer applications in property management and valuation are all current research areas Massey intends to expand.

Companies who contribute to the Foundation will participate in a scheme to provide employment positions for property and valuation graduates. Each company will be provided with detailed portfolios of students passing through Massey's property courses. Massey Business Studies Dean, Professor Ralph Love said the portfolio scheme would benefit companies in the high-cost recruitment area, as well as improving the University's service to its property graduates.

Professor Love said the University had a long-term commitment to property and valuation studies both in the urban and rural sectors, and this was reflected in the decision to create a concentrated department in the area.

"We have now focused our on-campus expertise in one place and that provides an excellent base to build on for the future."

Sir Roderick Weir, founder Management and Valuation Foundation Massey University, with representatives of the three land-based professions, (standing) Eric Keys REINZ, Warwick Till NZIV and Evan Harris PMI.

Student demand for property courses was booming with over 400 internal and extramural enrolments this year, he said.

Massey offers a Property Management and Valuation major through its BBS degree and diploma course, and arural valuation option in its Bachelor of Agriculture (BAgr) and Bachelor of Agricultural Science (BAgrSc) degrees.

Students can also undertake postgraduate studies in these areas.

Professor Love said there was a big extramural interest in the Diploma of Business Studies (Property Management option) particularly from industry professionals and from managers who wanted additional skills in the property area.

"In the public sector, for example, the Government Corporations and state owned enterprises are starting to realise they are sitting on some very large property assets which need to be managed professionally."

He said Property Studies was now recognised as a mainstream academic discipline, and Massey was working closely with Industry to ensure course content was up-to-date and accurately reflecting the needs of a rapidly changing marketplace.

Lincoln College
50 Years Of Education

By C S Croft, Senior Lecturer in Valuation

This year Lincoln College celebrates 50 years of valuation education. In 1938 some very astute and forward thinking people put together an advanced diploma course specialising in rural valuation and farm management, known as the Diploma in Valuation and Farm Management (Dip. VFM). This has been a highly successful course and continued until 1975 with approximately 950 people completing the one-year intensive advanced diploma over the 37 years it operated. It still is a highly respected qualification and its success was built around a strong emphasis on case study work (field trips) and the integration of the disciplines of both management and valuation. A feature of the Dip. VFM has been the adaptability of the graduates, many of whom have been involved in commerce in areas not related to agriculture.

The campus at Lincoln College

Professional Chair in Real Estate Valuation and Property Management

Fifty years after the first valuation course began in 1938, Lincoln College has now established a professorial chair in Real Estate Valuation and Property Management. Early in 1987 staff at Lincoln made an approach to the three property institutes for sponsorship of a chair for a period of three years, after which time the College would take over full funding. The institutes responded and the funding agreed to was a quarter share by each of the institutes and Lincoln College.

The establishment of the chair is a major development for Lincoln College and it is a recognition of the substantial contribution valuation and property courses have made to Lincoln College. It will enable Lincoln to strengthen its role as educators

lip,

of the property professionals, expand its post-graduate programmes and research, and increase involvement in continuing education to the professions.

Commerce Degree Programmes

Lincoln College valuation education began with a heavy rural emphasis with the Dip. VFM; however, this course did contain some urban single-family residential valuation. This was maintained in the Diploma's successor: the three-year Bachelor of Agricultural Commerce (B.Ag.Com.VFM option) which

VALUERS REGISTRATION BOARD

BOARD PRIZES

The Valuers Registration Board's prizes for the 1987 academic year have been awarded to:

Auckland University:	P D Todd of Auckland
Massey University:	M E Bibby of Waipawa
Lincoln College:	C L Healing of Lower Hutt

The awards, currently $500 each, are made by the University Councils on the recommendation of the appropriate Faculty or Professorial Board to the students showing the greatest promise of being successful valuers.

commenced in 1971 and graduated its first output of valuers in 1973. In 1976 the three-year Bachelor of Valuation and Property Management (B.Com.VPM) was introduced as a specialist degree in both rural and urban valuation. A small name change to the existing degree was made and B.Ag.Com. became B.Com.(Ag) to incorporate the non-agricultural content of the degree in Valuation and Property Management (B.Com.VPM) into the commerce programme.

The B.Com.VPM was a very successful qualification and, like its forerunners, had a heavy emphasis on case study work and the integration of valuation and management disciplines.

Research into the employment of these graduates, however, showed that by far the majority were working totally in an urban environment and the rural valuation content of their course was not used directly. This fact plus the need in the professions for more specialised urban valuation and property management personnel prompted a change to the totally urban B.Com.VPM introduced in 1986 and the phasing out of the dual rural/urban three-year degree in 1987.

Currently there are two valuation three-year degrees at Lincoln College, one totally urban (B.Com.VPM) and one rural (B.Com.Ag.VFM option). Also introduced in 1987 was a post-graduate one-year diploma. This enables students with degrees in appropriate areas to study courses made up of commerce degree subjects and essentially to "double major" in rural and urban valuation in four years or "double major" in rural or urban valuation and other commerce majors such as accountancy (ACA), financial management, marketing, economics, horticultural or farm management, and computer science.

Current Staff Levels

Professor:
to be appointed
Senior Lecturers:

T P Boyd (Urban)	MSc(Natal), SCV, ANZIM
C S Croft (Rural)	BAg.Com ANZIV
E G Moorhead (Rural)	B.Ag.Sc. ANZIV Val Prof (Rural)

Lecturers:

S W Binnie (Urban)	NZIV Prof (Urban) ANZIV FPMI
P B Nahkies (Urban)	Dip. VPM, NZIV Prof (Urban)

Anticipated future developments

a. further course developments currently under review which include a change in the degree structure to allow more options to be taken with the valuation courses (the concept of "majors" [20 units] rural or urban valuation and "minors", options [4 units] in other areas in the commerce programme).

b. establishment of a real estate research centre where many forms of real estate research can take place, funded from a variety of sources, in an environment where access to equipment and academic staff is available.

c. purchase of an interest or share in a commercial building in the Central Business District of Christchurch for specific teaching and demonstration purposes in Urban Valuation and Property Management.

Further enquiries about Lincoln College courses may be addressed to: The Valuation and Property Management Group, Lincoln College, CANTERBURY.

Staff at Lincoln College

TP Boyd *C S Croft* *E G Moorhead* *S W Binnie* *P B Nahkies*

Publications Received and Noted

By David Paton

DEMOLITION CLAUSES - GOODWILL KILLERS OR JUST GOOD SENSE?

New Zealand Property February 1988.

Colin Jenkins examines some of the legal issues of demolition clauses in lease agreements.

GROUND LEASES AGAIN: FREEHOLD IS FREEHOLD IS FREEHOLD

New Zealand Property February 1988.

A special feature by W K S Christiansen to clear up some misconceptions about leases.

THE APPRAISAL PROFESSION AN INDUSTRY IN TURMOIL?

Valuation February 1988.

Thomas M Brown highlights the need for a nationwide body to regulate the valuation profession in the United States.

RISK COMPONENTS OF CAPITALISATION RATES

Valuation February 1988.

A paper by S E Bolten, J Brockandt and M Mond reviewing the risk components which determine whether or not a business will receive future earnings.

REGIONAL SHOPPING CENTRES

The Valuer January 1988.

An in-depth look at the development and refurbishment of shopping malls and factors to consider when valuing them. A suburban mall in Sydney is used as a case study, by A Jones, S Euleston, B Churchill and T Clark.

RENTAL VALUATIONS A CHECKLIST

The Valuer January 1988.

Scott Keck gives a point-by-point approach to valuation of leasehold property.

COUNTRY HOTELS AND MOTELS

The Valuer January 1988.

A paper by E C Jewell-Tait on certain aspects of valuation concerning hotels, taverns and motels.

LEASEHOLD MOTELS, THE VICTORIAN DISEASE

The Valuer January 1988.

Philip Cosgrove outlines some good and bad points of motel leases.

DETERMINATION OF MARKET RENTAL

The Valuer January 1988.

Lester Martin relates the determination of market rentals to commercial buildings in Sydney's CBD.

CLOSER TIES BETWEEN INSTITUTES?

New Zealand Real Estate February 1988.

Editor Graeme McGregor comments on the NZIV Corporate Plan

WRIGHTSON REAL ESTATE: HOW IT SOLD A VILLAGE

New Zealand Real Estate February 1988.

An article on how Wrightson Real Estate won the limited budget section of the Marketing Institute Award with its campaign to sell TO Poi Village in the Waikato.

RETHINK NEEDED ON AUTHORITY HOLDINGS

Chartered Surveyor Weekly 18 February 1988.

The Audit Commission concludes that the local bodies in the U.K. can manage their property more efficiently and gives suggestions on how to do so.

PROPERTY OUTLOOK HIGH HOPES FOR HOUSES

Personl Investor April 1988.

Richard Didsbury reports that the market is presently full of opportunities for long-term investors.

RETIREMENT VILLAGES THE ULTIMATE DILEMMA FOR DEVELOPERS

New Zealand Surveyor February 1988.

A paper by John Bethell outlining the difficulties of developing a "Real Retirement Village".

HAND HELD COMPUTERS FOR PAPERLESS FIELD DATA COLLECTION

Assessment Digest January/February 1988.

Rebecca Walker describes the uses of the system for field data collection used in Palm Beach County, Florida.

REAL ESTATE SUPPLY AND DEMAND

The Quantity Surveyor March 1988.

Peter Cooke discusses the factors which affect the viability of major commerical developments.

UNITISATION THE NEW ZEALAND WORKING PARTY

Property Management April 1988.

An article by John Cameron outlining objectives and recommendations for shared property ownership, including guidelines for valuation of such property.

EFFECTIVE PROPERTY MANAGEMENT

Property Management April 1988.

Some hints on property management from W A Malinowski, Manager of Investments for BNZ.

HOUSING COSTS IN THE CONSUMER PRICE INDEX

Reserve Bank Bulletin March 1988.

Andrew Baseard comments on the conceptual treatment of housing costs in the CPI

High Court Decision Upholds Valuation Methods

The following recent High Court decision of Mr Justice Henry upholds the commonly accepted valuation methods used by valuers in applying "comparable evidence" to the property being valued. It relates to the fixing of a rent for an industrial property, the rent being fixed for a five-year term in circumstances where legal counsel for the lessee argued that the rent should not be adjusted from that which would apply if it were being *fixed for a two, or three-year term. In order to place the issues in perspective, the arbitration award which preceded and gave rise to the High Court hearing is also printed, with the consent of the lessor, lessee and sole arbitrator.*

The decision is believed to be an important one because in recent years several lawyers have argued that in the rent review process, valuers should not adjust rents to take account of differing lessor and lessee obligations, such as payment of land tax, ground rent, insurances and maintenance, and should not adjust the rental evidence to take account of differing periods between rent reviews. For reasons which are fairly obvious, valuers have *been unable to recognise any logic in this approach. The main legal basis for the argument appears to be that by adjusting for these items, a valuer is in effect amending the terms of the lease and that is something a valuer is not entitled to do in the rent review process. The argument appears to follow the following lines:*

"If, infixing a rental under a lease contract which requires the lessor to pay land tax, you increase the rental amount by the land tax component over the term of the review, you are in effect placing the land tax obligation on the lessee in defiance of the requirement of the lease contract which stipulates that land tax shall be paid by the lessor. You are therefore amending the terms of the lease."

Valuers appreciate that what is being done is the simple process of applying market evidence to the property being valued, making adjustments for differing lease terms as between those applying to the comparable evidence and those applying to the property being valued.

The following High Court decision supports the approach normally taken by valuers noting that it is proper valuation practice, and in accordance with legal principle, to have regard to comparable properties. The decision further notes that this process will usually involve a comparison of many factors as between the comparable property and the subject property and the making of appropriate adjustments for any distinguishing factors, including any relevant differences between the terms of the two leases being compared.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
M.157/87
UNDER the Arbitration Act 1908
AND
IN THE MATTER of an arbitration between JBL Consolidated (In Receivership) and Feltex International Limited

BETWEEN:	FELTEX INTERNATIONAL LIMITED Plaintiff
AND:	J B L CONSOLIDATED LIMITED (In Receivership) Defendant
Hearing:	24 March 1988
Counsel:	G R Dunning for Plaintiff R J Moody for Defendant
Judgment:	5 May 1988

JUDGMENT OF HENRY, J.

In this action the Plaintiff seeks to set aside an arbitration award published on 19 November 1986. The arbitration was to determine the rental payable fora five year term commencing 30 June 1985 for industrial premises situated at 15 Gabador Place, Auckland. The award of the arbitrator, Mr R P Young, a registered valuer, fixed the rent at $211, 831.00 per annum. Although there may well be defects in the way the matter has come before the Court, both parties are desirous of obtaining a definitive ruling on what is said to be a matter of general as well as particular importance. The procedural difficulties can I think best be met by treating the annexure to the award as constituting part of the award, and then enquiring whether there is error of law on the face of the record such as to require the intervention of the Court under its general jurisdiction. The annexure sets out in detail the reasons of the arbitrator. As I understood him, Mr Moody for the Defendant consented to such an approach if it would enable the Court to make a determination.

The lease in question is dated 30 June 1970 and is expressed as being for a term of seventeen-and-a-half years as from that date and ending on 30 December 1987 but with a compulsory right of renewal for a further twelve-and-a-half years, giving a final expiry date of 30 June 2000. Clause 2 of the lease provides for the rent to be reviewed every five years and is in these terms:

"2. AT the expiration of each five (5) year period during this Lease or any renewal of extension thereof the annual rental payable hereunder shall be reviewed and fixed for the five (5) year period following each such date of review by agreement between the parties or failing agreement shall be fixed by arbitration pursuant to the provisions of the Arbitration Act 1908 and its amendments but in any event shall not be less than the annual rental payable for the five year period immediately preceding each such date of review."

Accordingly a rent review was due as at 30 June 1985. The parties were unable to agree and the determination was left to the arbitration of Mr Young. The error of law relied upon by the Plaintiff concerns one of the steps taken by the arbitrator in the course of reaching his final award figure. The method of assessment to be adopted in such circumstances as these where no formula is laid down in the contractual documentation is the prerogative of the arbitrator. Here the arbitrator, as he was entitled to do, chose to have regard to rent payable under reasonably comparable leases of reasonably comparable properties. The great majority of those selected concerned leases executed some years after the execution of this lease and were instances in which rentals were fixed for a three-year period. The arbitrator proceeded to analyse the selected rentals into rates per annum for a square footage of building, as is commonly done. Having done that, he selected what he considered to be an appropriate rate for each of the differing types of structure of building included in the premises, such as office, mezzanine and warehouse, and applied that to the actual square footage in question. The resulting total was adjusted for various relevant factors and finally to allow for the fact that the rent was being fixed for a five year term. It is this last adjustment, representing an effective increase of 10%, which the Plaintiff now challenges. In the course of his reasons, the arbitrator also found that there was nothing in the lease or in the evidence adduced before him to show that fixing a "fair rent" would have given a different result from fixing it as being "fair market rental" or "current market rental". I turn now to the test properly to be applied by this arbitrator.

There are no express provisions in the lease governing the assessment of the rent under review, clause 2 merely stipulating for an "annual rental". It is therefore necessary to place some qualification on those words in order to give the clause business efficacy, because clearly the fixing of the rental of an arbitrator was not intended to be left to the capricious whim of the appointee. It is proper to infer a qualification to the written words, and that is done by inserting the word "fair" before the words "annual rental" where they first occur in clause 2. The necessary criteria for the implication *(Devonport Borough Council v Robbins* [1979] 1 NZLR 1) are made out, and such a construction has authority if it be needed (See for example *Beer v Bowden* [1981] 1 All ER 1070). It is also the construction sought to be placed on the clause by Mr Dunning, and one which was not in any way challenged by Mr Moody.

The term "fair annual rent" occurs in the Public Bodies' Leases Act 1969, and has been the subject of judicial consideration. It is now well established law in New Zealand that what is required to determine a fair annual rentis the application of the so-called "prudent lessee" test, which is said to have been laid down in *Drapery & General Importing Company ofNew Zealand (Limited) v The Mayor etc. of Wellington* (1912) 31 NZLR 598. In that case it was held that the valuers, in order to determine the fair annual ground rent of the land in question "must

ascertain what the prudent lessee would give forth e ground rent of that land for the term and on the conditions as to renewal and other terms etc. mentioned in thelease" (p. 605). That was followed in *Re Lund's Lease* (1926) NZLR 541, and then by the Court of Appeal in *In re Brechin & Drapery Importing Company Limited* (1928) NZLR 241. More recently the same principle was adopted again by the Court of Appeal *inWellington City v National* Bank *of New Zealand Properties Limited* (1970) NZLR 660. In particular at p. 671 North P. stated:

"In my opinion what the Umpire was saying was this: the principle laid down in the DIC case required him to ascertain what a prudent lessee would give as a ground rent of the land for the new term of 2l years. This being so, he was obliged tq consider what factors would be taken into account by aprdent lessee. In short he was only concerned with matters which will affect the mind and ultimately the judgment ofa prduent lessee in making his offer to the landlord."

Turner J. expressed similar views at page 678.

It is, however, necessary to keep in mind that the valuation must still be fair. The requirement of fairness means that it is not simply a matter of determining the least amount which the lessee will pay, as obviously he will pay aslittle as he can. Rather the enquiry is as to what a prudent lessee would pay for these premises, having regard to the term and conditions of the lease. This must represent the amount which he can reasonably expect to pay for the rights and obligations which are undertaken in the lease. That is where the element of fairness lies, as the lessee cannot expect to receive the benefits without payment of a fair consideration for them.

A similar test was applied by Tudor Evans J. in *Lear & Anor v Blizzard* (1983) 3 Al 1 ER 662. In that case it was held that renewal ofa lease at a rent to be agreed between the parties and in default at a rent to be determined by an arbitrator, required the arbitrator to determine subjectively what would be a fair rent for the lessor and the lessee in all the circumstances, taking into account all the considerations which would have affected the minds of the parties if they had been negotiating the rent themselves.

Such an approach also accords with that taken in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* (1981) 1Al I ER 1077 where the rent review clause was in terms similar to that contained in the present lease. There, Buckley LI said at p. 1088:

"In my judgment, in default of agreement between the parties, the arbitrator would have to assess what rent it would have been reasonable for these landlords and these tenants to have agreed under this lease having regard to all the circumstances relevant to any negotiations between them of a new rent from the review date."

The use of the word "reasonable" as opposed to "fair" is not significant, although I think it preferable to adhere to the latter terminology in the New Zealand context where the word now has a recognised meaning in determining leasehold rentals.

Mr Dunning went on to submit, and I think rightly so, that "market rent" does not necessarily equate "fair rent", because the former may exclude the subjective factors which could influence the determination of what is fair as between two particular parties. Although the distinction between market and fair rent does exist, in some circumstances the market rent may also represent the fair rent, and in others ascertainment of the fair rent may well warrant consideration of market rent. Here it was for the arbitrator to give such weight to evidence of market rent as he thought fit.

In applying the propertest it was therefore necessary forthe arbitratorto have regard to the terms of this lease, and the rights and obligations both of the lessor and the lessee. Of particular relevance is the duration of the lease, which was for a 30 year term, starting at an *agreed* annual rental figure and requiring that to be reviewed every five years. The arbitrator cannot ignore the fact that the rent he is fixing will be the fair annual rent for a period of five years. To put that factor to one side, and to give it no weight, would be wrong because it would leave out of account one of the very basic provisions of the lease itself, and thus result in actual or at the very least potential unfairness. To exemplify that one need only consider two extreme positions. For example the market, or fair, annual rent for certain premises under lease may well differ if the term for which it is to apply is one year from that which would apply if it were seven years, and differ again from that which would apply if the term were 21 years. The substance of Mr Dunning's submission, as I understood it, was that in some way the lessee here was disadvantaged because it had a benefit under the contract of rent being fixed for 5 years which was somehow being lost because a so-called "premium" was being added to what would be a fair annual rental for a three year term. It is difficult to see what element of unfairness results from that process of assessment, particularly in the light of counsel's concession that the adjustment would be appropriate in assessing the annual market rental. The lessee has the benefit of a five year term during which the rent cannot be increased. If the market recognises that that is worth more on an annual basis to a lessee than for example is a three year limitation period, it is not a necessary consequence that something unfair results if that additional value is reflected in the annual rent. The fallacy in the submission lies in the resulting need to ignore that term of the lease, which would result in a failure to apply the proper test.

It is proper valuation practice, and in accordance with legal principle, in making a valuation of this nature to have regard to comparable properties. That will usually involve a comparison of many factors as between the comparable property and the subject property, and making appropriate adjustments for any distinguishing factors and there will often be many. Included in these, when dealing with leasehold property valuations, will be any relevant difference between the terms of the two leases being compared. Only in that way can like be compared with like and overall fairness be ascertained.

As an alternative submission, and what I think was really the basis behind the first submission of unfairness, Mr Dunning contended that what the arbitrator had done here was in effect to vary the terms of the lease by doing something equivalent to introducing an intermediate review period. The basis for the submission lay in two reported cases. The first is *National Westminister Bank Ltd v B.S.C. Footwear Lid* (1980) 42 P & CR 90, a decision of the English Court of Appeal. There a lease contained a right of renewal for a (further) term of 21 years "at the then prevailing market rent". It had been held in the Chancery Division that the arbitrator fixing the renewed rent was entitled to determine a rent which was subject to periodic reviews during the 21 year period. Not surprisingly, the Court of Appeal overruled the decision at first instance and held that there was no such power vested in the arbitrator, who was bound to determine the rent, and could not impose a formula and redraft the lease by virtue of his award. His duty was to determine the rent which was to be payable annually throughout the term of the new lease. That is clearly distinguishable from the present case, in which the award neither directly nor indirectly provides for any further review during the 5 year period. What the arbitrator has done here is to fix the annual rent for the whole of the review period.

The second case is *Lear & Another v Blizzard* earlier referred to. Tudor Evans J. there heard an application to determine questions of law which had arisen during the course of the arbitration involving a rent review, including the following:

"Whether, having regard to the fact that a 21-year lease without further rent reviews during the currency of the term was provided for by clause 3(2) of the lease, a premium to take into account anticipated inflation during the currency of the term should be built into the new rent and, if so, whether it should be assessed at the level of the premium applicable in 1961 which should then be converted into a premium and applied to the current rental value or whether the percentage should be assessed by reference to the current market conditions at the date of renewal."

The Judge answered the question by holding that a premium is not be added to take into account anticipated inflation during the currency of the new terms.

If thejudgmentis to be read as holding that an arbitrator cannot take into account the fact that he is fixing a rental for a 21-year period, then I respectfully disagree. On my reading however, Tudor Evans J. was saying no more than apremium cannot be added to what is a fair annual rental over a 21-year period, a conclusion with which I do respectfully agree. One of the disadvantages of a 21-year term in times of inflation is that by the end of the term the rental is likely to be substantially less than current comparable market rentals, but that is something which is inherent in present day conditions. What cannot be done is indirectly to vary that term of the lease, by requiring an intermediate review or by adding a premium to compensate for possible inflation. That is not the present situation and does not represent the effect of this arbitrator's award. What he was required to do and what he did was to ascertain the fair annual rent to be paid by this lessee for these premises over the five year period, giving weight to evidence placed before him that a five-year term could be expected to command a higher annual rent than would a three-year term. In so doing no error of law was committed, and the terms of clause 2 of the lease on their true construction have been given effect by him. Indeed no question of law really arises.

The action to set aside the award is accordingly dismissed.

Counsel can submit memoranda as to costs if necessary. J S Henry, J.

Solicitors:

G R Dunning Esq., Feltex International Limited, Auckland, for plaintiff

Buddle Findlay, Auckland, for defendant

IN THE MATTER	of a memorandum of lease
BETWEEN	JBL CONSOLIDATED LIMITED (In Receivership) as Lessor
AND	FELTEX (N.Z.) LIMITED as Lessee
AND	
IN THE MATTER	of an Arbitration to determine the rental payable for the said premises for a five-year term effective from 30 June 1985.

AWARD OF SOLE ARBITRATOR

WHEREAS for the purpose of determining the rental payable under the said lease for the five-year term effective from 30 June 1985, the parties in an agreement dated 7 August 1986, appointed me Robert Peter Young of Auckland, Registered Valuer, as sole arbitrator between them.

NOW BE IT KNOWN that I, the said sole arbitrator, make this my award as follows:

1. As to the rent, I fix the sum of $211,831 (TWO HUNDRED AND ELEVEN THOUSAND EIGHT HUNDRED AND THIRTY-ONE DOLLARS) per annum.

2. I direct that each party shall pay its own fees and costs relating to legal counsel, witnesses and incidental expenses.

3. As to my own costs and fees, I fix the sum of $4,000 to be paid in equal shares by each party.

SIGNED by the said Robert Peter Young, Sole Arbitrator
DATED 19 November 1986

ANNEX TO AWARD

I have been appointed sole arbitrator in terms of an agreement dated 7 August 1986, between JBL Consolidated Limited (in receivership) and Feltex (N.Z.) Limited. I conducted my hearing on 7 August 1986, and the abovementioned agreement of the same date was amended by consent by deleting from clause 2, the words: "but shall state a case for the opinion of the High Court on any questions of Law that arise".

Mr R J Moody appeared as counsel for the lessor, and Mr G R Dunning appeared as counsel for the lessee. Valuation evidence was presented by Mr N K Darroch on behalf of the lessor and by Mr S I Jecks on behalf of the lessee.

The rent is to be fixed fora term of five years from 30 June 1985. The relevant wording of the lease contract is contained in clause 2 and is as follows:

"2. AT the expiration of each five (5) year period during this Lease or any renewal or extension thereof the annual rental payable hereunder shall be reviewed and fixed for the five (5) year period following each such date of review by agreement between the parties or failing agreement shall be fixed by arbitration pursuant to the provisions of the Arbitration Act 1980 and its amendments but in any event shall not be less than the annual rental payable for the five-year period immediately preceding each such date of review."

Legal submissions made on behalf of the lessee include the following:

"1. ONE of the matters of dispute between the parties is the question of whether in fixing the rental under an old long term lease which provided for rent reviews every five years, at a time when new long term leases commonly provide for rentals to be reviewed every two or three years a premium or percentage ought to be added to what would otherwise be the market rental to compensate the lessor for the effects of inflation over the extra time between reviews.

"2. IT is the lessee's submission that the practice of adding a premium or percentage to the rent that would have been payable had the rent been fixed for a two or three-year period (if such a practice exists) is contrary to law.

"3. IT is the lessee's further submission that the dispute on this matter raises a question of law and that a case should be stated by the arbitrator for the opinion of the High Court and the lessee requires the arbitrator to so state a case.

"4. NOTWITHSTANDING the lessee's submission that a premium should not be added to the rental the lessee will agree to the arbitrator fixing the amount of such premium without prejudice so that if upon the hearing of a case stated the High Court decides that such a premium is permissible the matter will not need to be referred back to the arbitrator again for decision on the amount of the premium.

"5. THE lessee's submission that a premium cannot be added to the rental is based on the judgment in a decision in the High Court in England, *Lear v Blizzard* (1983) 3 ALL ER 622 (Tudor Evans J)."

Legal submissions made on behalf of the lessor include the following points:

"2. THE word `review' as used in this clause is defined in the shorter Oxford English Dictionary as the act of looking further at something with a view to its correction or improvement. It is submitted that under this formulation the arbitrator is empowered to take into account all relevant considerations and matters of valuation practice in fixing the amount of the reviewed rental. The various English decisions on the matter largely involve different circumstances and are of limited assistance."

Mr Moody also presented further written and verbal submissions to the effect that the terms of the lease are among the many factors to be taken into account in fixing the appropriate rent, that

...the market distinguishes between rentals fixed for five-year terms and for three-year terms...

these lease terms include a requirement for the lessee to pay ground rent and for the rent to be reviewed at five-yearly intervals. He submitted that the question as to the effect of these terms on the annual rent are matters of valuation and not of law. He pointed out that both valuers have adjusted their rental evidence to take account of the five-year term and that in fixing the rent I cannot ignore the terms of the lease.

Mr Moody further pointed out that the evidence of both valuers is to the effect that the market distinguishes between rentals fixed for five-year terms and for three-year terms and, that other factors being equal, a rental for a five-year term cannot be the identical figure to a rental fixed for a three-year term. He submitted that I must simply decide the rent taking into account market conditions which apply when a five-year review is in question.

The relevant clause in the subject lease requires that the annual rent payable hereunder shall be reviewed and fixed for the five-year period following each such date of review by agreement between the parties or, failing agreement, shall be fixed by arbitration. The clause does not make mention of the concept of a"market rent" or a "fair rent". The wording is very similar to that which applied in the *Lear v Blizzard* case referred to by Mr Dunning. In that particular case the lease contract required the rent to be fixed: "at a rent to be agreed between the parties hereto or in default of agreement at a rent to be determined by a single arbitrator..."

In the *Lear* case, the Judge decided that:

"The rent to be determined by the arbitrator is a fair rent for these particular landlords and this particular tenant, accountbeing taken of all considerations which would affect the mind of either party to such negotiations."

The Judge further decided that:

"A premium is not to be added to take into account anticipated inflation during the currency of the new terms."

In the present case, counsel have not made any submissions as to the measure of formula I am to apply in fixing the rent. Mr Moody makes submissions on the meaning of the word "review" but I find this of little assistance.

The evidence submitted by both valuers clearly indicates that they were both endeavouring to assess and fix a "fair market rent" or a "current market rent". This is the measure almost always applied by valuers practising in Auckland, when confronted with the type of problem now being considered. Mr Darroch refers to the assessment of "a fair market rental for the subject premises" in his written reports and submissions. Mr Jecks does not make any similar reference to a "fair market" or a"current market" rent. However, it is clear from his submissions that in order to arrive at this figure he investigated and examined a large volume of market evidence (26 examples in all). It is clear to me that the rental he proposed is his assessment of a market rent, based on an analysis

of market evidence. He puts up no other formula, basis or method on which his rent has been assessed. His report notes:

"In comparing evidence we have had regard to the terms of the leases and the relevant dates together with the age of the premises and the particular location."

In dealing with the assessment of a rent for a five-year term, he further notes: "Therefore in recent years we would say that such an addition is both usual and reasonable in comparison with shorter terms, but the amount adopted could be in dispute."

Mr Jecks has therefore clearly based his rent on an analysis of market evidence, and has had regard to the terms of the leases which pertain to that evidence compared to the terms of the lease in the present case, including the fact that it provides for rent reviews at five-yearly intervals and provides for the lessee to pay the ground rent, among its other obligations.

The *Lear* case decided that in these circumstances the rent must be assessed subjectively, being the figure that this particular landlord and this particular tenant would have agreed to, having regard to all of the considerations which would have affected the minds of the parties if they had been negotiating the rent themselves. In the present case there is nothing in the evidence or in the lease contract itself which convinces me that such an approach would lead me to a different conclusion from that which I would have reached had the test been the fixing of a "fair market rental" or a"current market rental", which is the approach I believe both Mr Darroch and Mr Jecks have adopted. There is nothing in the lease itself or in the evidence which would constitute a basis upon which the lessee might reasonably argue to pay less than a fair market rental or the landlord to reasonably argue that the lessee should pay more than a fair market rental.

As is noted above, Mr G R Dunning is relying on *the Lear* case in making his submission that:

"The practice of adding a premium or percentage to the rent that would have been payable had the rent been fixed for a two or three year period (if such a practice exists) is contrary to law,"

and that:

> ...valuers giving evidence indicated quite clearly that the market rent for a property will be higher if the rent review term is five years...

"The dispute on this matter raises a question of law and that a case should be stated by the arbitrator for the opinion of the High Court and the lessee requires the arbitrator so to state a case".

Mr R J Moody, counsel for the lessor, in his verbal submissions to me states that this is a matter of valuation and not of law. He further points out that the affect on the rental assessment of the fact that the lessee is responsible for paying ground rent is also a question of valuation and not a question of law.

The judgment in the *Lear* case simply states that:

"A premium is not to be added to take into account anticipated inflation during the currency of the new terms."

The decision does not record what figure that premium may have been added to, and what the market conditions were with regard to the particular property in question.

In the present case both the valuers giving evidence indicated quite clearly that the market rent for a property will be higher if the rent review term is five years, than would be the case if the rent review term was two years or three years or a lesser period. This is a fact of the market and cannot be regarded as a question of law. The valuers did not say that they were adding a "premium", to take into account anticipated inflation during the currency of the new terms". Indeed, I believe that the use of the term "premium" is not appropriate. All the valuers were seeking to do was to fix a fair market rent for a five-year term. That rent is clearly higher than would be the case if the review term were two or three years but that does not mean that the rental so determined contains any "premium".

A rental cannot exist in isolation from or independently from a lease or similar contract. It is quite illogical to say that the terms of that particular contract do not have any bearing on the amount of the rent. In the present case both valuers also agree that the rental must be lower to take account of the fact that the lessee is responsible for paying ground rent to the Auckland Harbour Board. It would be quite illogical to suggest that the rent should be the same regardless of whether the lessor or lessee pays that ground rent and regardless of the obligations of the lessee and lessor for payment of other items, such as insurances, maintenance, land tax, etc. Similarly, the period between rent reviews cannot be ignored and it cannot be said that that period has no influence on the determination or assessment of a market rent.

> ...simply a fact of the market and a matter of valuation...

Accordingly, I agree with Mr Moody's submissions, that this is not a question of law but simply a fact of the market and a matter of valuation.

I turn now to the evidence presented by Mr N K Darroch and Mr S I Jecks, the valuers who gave evidence on behalf of the lessor and lessee respectively.

It is clearly accepted by both valuers that the appropriate rental payable for the subject property for the five-year term effective from 30 June 1985, must be based on an analysis of rents fixed for other industrial property. Accordingly, both valuers presented to me in summary form details of rents fixed for numerous other industrial properties. Mr Darroch's evidence comprised 19 other industrial properties for which rents have been fixed while Mr Jecks provided a summary of 26 industrial properties on which rents have been fixed.

I accept that in order to determine a rent for the subject property for the relevant five-year term, one must be guided to a very large extent by the rents which have been fixed or agreed on other industrial properties. The best guidance is of course provided where the "comparable evidence" is of similar size, age, construction, in a similar location, subject to similar or identical leasing terms, and where the rent has been fixed close to the same date and relates to the same rent review period.

Unfortunately, it is rare to find an adequate volume of rental evidence where all of these elements have a high degree of correlation with the circumstances applying to the property on which the rent is to be reviewed. One is therefore required to draw the most logical conclusions possible from the evidence which is available.

Since the rental to be applied to the warehouse portion is of greatest significance in the current exercise, I will confine my attention to this aspect. In support of his rental assessment of $3.65 p.s.f. per annum for the warehouse based on a three-year rent review period, Mr Darroch has scheduled 19 items of "comparable evidence" but has relied primarily on 12 of these cases. An examination of his evidence reveals the following pertinent facts:

- Most of the 19 cases were subject to rent reviews at three-yearly intervals; 4 cases were subject to review at two-year intervals, while 1 was subject to five-year rent reviews and 1 to four-year rent reviews.
- All of the 19 cases except 3 had rent reviews during 1985 or early 1986. Accordingly, most of the reviews were close to the relevant date of 30 June 1985.
- Of the 12 cases which he regards as the "best evidence", the rental rates for the warehouse portions range between $3.35 p.s.f.

per annum and $4.48 p.s.f. per annum after a time adjustment but before any other adjustments, e.g. for stud height, lessee/lessor obligations, building size, building quality, location, etc.

- Nine of the properties within his 12 "most comparable" list fall within a rental range between $3.60 p.s.f. per annum and $4.08 p.s.f. per annum.
- All of the properties in the list of 12 comprise older industrial buildings and many of these are similar in character to the subject property. In general terms however, I would regard most of these 12 properties as being slightly superior to the subject buildings but nevertheless comparable. Also in general terms, I believe that most of these 12 buildings are in slightly better locations than is the subject property.

In support of his rental assessment of $3.00 p.s.f. per annum for the factory/warehouse portion, again on the basis of a rent review at three-yearly intervals, Mr Jecks has quoted a total of 26 "comparable" properties. An examination of this evidence reveals the following factors:

- Sixteen of the 26 examples were subject to rent review in either 1983 or 1984. Many of these rents were fixed more than 12 months prior to 30 June 1985, and are therefore somewhat out of date. Mr Jecks has provided no schedule or analysis to time-adjust these rents.
- Most of the rents quoted appear to be subject to review at three-yearly intervals. However, 2 have rent reviews at two-yearly intervals, 1 at two-and-a-half-yearly intervals and 1 at three-and-one-third-yearly intervals.
- Of the 26 examples quoted, only 4 have rentals at or below Mr Jecks adopted rate of $3.00 p.s.f. per annum. Of these, 1 was fixed 14 months prior to 30June 1985; 1 was fixed some 10 months prior to 30 June 1985 subject operative date and relates to a building having approximately double the size of the subject building; and 1 was fixed almost exactly one year prior to the subject's operative date. The third example relates to the L D Nathan warehouse in MtRoskill, where the rent was fixed in May 1985 but relates to a building nearly three times the size of the subject building.
- The L D Nathan example is interesting but apart from its much larger size (which Mr Jecks conceded would reduce its rental rate), it is in a poorer industrial location than is the subject building. While the building quality is probably slightly better, the stud height is lower.
- Of the remaining 23 examples quoted by Mr Jecks, the rental rate for the warehouse portion ranges from $3.01 p.s.f. per annum up to $4.30 p.s.f. per annum with most of the lower rental rates having been fixed several months prior to the subject operative date of 30 June 1985.
- While most of the properties quoted by Mr Jecks as being "comparable evidence" involved buildings of a quality superior to that of the subject buildings, this does not apply in all cases and, on balance, the evidence does not support his assessment of $3.00 p.s.f. per annum for the subject factory/warehouse portion.
- All of the evidence quoted by Mr Jecks is analysed to show a higher rate on offices and amenities than is applied to the factory/warehouse portions. However, in applying this evidence to the subject property, Mr Jecks has adopted a flat rate of $3.00 p.s.f. per annum over the entire buildings, including offices and amenities. A lower rate is applied to the mezzanine level.

Having examined all of the evidence presented by both Messrs Darroch and Jecks, I believe that the examples quoted by Mr Darroch are generally more comparable both in terms of building quality and in terms of rent review dates. I also believe that this evidence goes a long way towards supporting his rental rate of $3.65 p.s.f. per annum on the factory/warehouse portions. However, I am inclined to accept the contention put forward by Mr Jecks that the subject buildings are of poorer quality than has been recognised by Mr Darroch, and accordingly reduce the rental rate on this portion to $3.50 p.s.f. per annum.

I accept Mr Darroch's assessment on the office/amenities portion and on the mezzanine portion.

Mr Darroch has allowed a rental on a canopy but pointed out at the hearing that he is not absolutely certain that this canopy was constructed by the lessor. No allowance has been made for this item by Mr Jecks and I have given the benefit of the doubt to the lessee by excluding this element.

The subject rent must be fixed having regard to the terms of the lease and these terms include the provision that the rent is reviewed at five-yearly intervals and that the lessee is responsible for paying ground rent to the Auckland Harbour Board. In my opinion, Mr Jecks has quite correctly deducted an allowance for the fact that the lessee pays ground rent and Mr Darroch has, again quite correctly, accepted Mr Jecks's deductions of $16,120 per annum. Mr. Darroch has made a further deduction of $4,000 per annum to allow for the inadequate supply of car parking, by comparison with the comparables on which he has relied. Again, I believe that such a deduction is appropriate and have adopted it.

The rent is to be fixed for a five-year term. Both Mr Jecks and Mr Darroch clearly indicate that the market rent fixed for a five-year term for any property must be higher than the rent fixed for three-year term for the same property, all other lease terms and factors being equal. Since their assessment of market rent is based on an analysis of rents generally fixed for a three-year-term,.both of the valuers have made an appropriate adjustment in order to reflect the higher market rent which they both believe would be payable having regard to the five-year term of the lease. In my view this is both appropriate and logical, and the adjustment must be made in order to reflect market conditions.

There is a difference of opinion between the valuers as to what the adjustment should be. Mr Jecks has added 7.5% while Mr Darroch has added 12.5%. While the cash flow analysis undertaken by Mr Darroch in support of his figure is of interest, there is no evidence before me that an allowance of the magnitude indicated has actually been accepted in the market. There is evidence that an allowance of 10% has been accepted in the market and accordingly I have adopted this figure.

The rental is therefore fixed as follows:

Office/amenities:	
1804 s.f. @ $5.50 p.s.f. per annum	$ 9,922.00
Open Mezzanine:	
2300 s.f. @ $1.75 p.s.f. per annum	$4,025.00
Factory/warehouse:	
56,785 s.f. @ $3.50 p.s.f. per annum	$198,747.00
	$212,694.00
Less: allowance for inadequate car parking	$4,000.00
	$208,694.00
Less: allowance for lessee's obligation to pay ground rent	$16,120.00
Market Rent on the basis of 3-year rent reviews =	$192,574.00
Market Rent having regard to 5-year rent reviews =	$211,831.00

Accordingly, I fix the rent at $211,831.00 per annum for the five-year term effective from 30 June 1985.

R P YOUNG

Commercial Property Mass Appraisal: A New Zealand System

By Anthony M. Beverley

Anthony M. Beverley is a property valuer with the Government Valuation Department, Wellington, New Zealand

The New Zealand Valuation Department (N.ZVD.) is presently examining systems facilitating the mass appraisal of both rural and commercial property. This paper aims to describe a system designed within the New Zealand real estate environment to achieve the mass appraisal of commercial property.

A review of the nature, organisational structure, objectives, data, computing, and other resources available to the N.Z.V.D. suggests that the N.ZV.D. has achieved the resources and capabilities necessary to develop and use a system of commercial property mass appraisal.

The nature of the market the mass appraisal system is attempting to replicate is a simplistic capitalised income approach to value for each property, disregarding any existing encumbrances to a freehold unencumbered value.

The structure, components, and component relationships of the system are described in detail. The variables underlying a straightforward capitalised income approach to value, together with the factors underlying land value, can be represented within a model consisting of a set of independent numerical units developed for each property. The system is structured to allow, at each values revision (reassessment), absolute ($) unit values to be substituted for the units within each model and applied to the physical quantities of the property to arrive at assessments of value.

The organisation, practicality, and efficiency of the system is briefly discussed. Aspects of the system which may need further research and development are outlined.

Introduction

The Valuation Department of New Zealand, as the central valuing authority within New Zealand, is charged with the task of compiling and maintaining a national valuation roll. The department has, for some time, been using a system of residential property mass appraisal, which has helped achieve a significant improvement in the efficiency of the department's residential property valuation programme. The department is now turning its attention to the development of systems facilitating the mass appraisal of both rural and commercial property.

This paper aims to describe a system designed within the New Zealand real estate environment to achieve the mass appraisal of commercial property, in line with the objectives of the Valuation Department. The paper briefly reviews the nature, organisational structure, objectives, data, computing, and other resources available to the Valuation Department, in order to describe the appraisal environment in which the system would operate and to illustrate the reality of achieving the system.

History and Objectives

The Valuation Department was created in 1896 under statute as the central valuing authority within New Zealand. As such, the department is charged with the task of compiling and maintaining a national valuation roll to a defined and unified standard, which is used for a wide range of private and public valuation purposes. The main thrust of the department's activities and resources is directed towards the periodic revision of value of every property within New Zealand.

Organisational Structure

New Zealand is divided into five regions, each under the control of a supervising valuer. These regions are in turn split into forty-six districts each under the control of a district valuer who is directly responsible for the maintenance and revision of the valuation roll for the district. Offices are located at twenty-seven centres and report to Head Office, situated at Wellington, through the regional centre.

The number of staff deployed in each office depends on the volume of work within the district. As of 30 September 1986, the department comprised 214 administrative and 340 valuing staff.

The department maintains a small Operations and Research Unit attached to Head Office. The unit maintains close contact with district offices and is responsible for the provision of mass appraisal assistance and the values adjustment facility (Mander 1984) for each district, as well as the research and development of computer-assisted techniques for the entire department.

Computer Resources

The department's computing resources comprise a centrally located (Wellington) database and processing facility, with non-intelligent terminals located in each of the twenty-seven district offices, linked by a communications network. The majority of the department's computer processing requirements are carried out by a Government Computing Centre operating on a bureau basis. The department now has more than ninety programmes developed to allow the extraction, manipulation, and analysis of information recorded in the database system. Individual offices are being geared to handle some processing requirements: microcomputers are presently being installed in each of the five regional centres.

Data Resources

The data maintained by the department fall within two general categories, district valuation roll (D.V.R.) data, and property sales data.

The department now has more than ninety programmes developed to allow the extraction, manipulation, and analysis of information recorded in the database system.

The D.V.R. database consists of extensive up-to-date data on each property within New Zealand (1,312,861) properties as of 31 March 1986), which covers all land and buildings in New Zealand, excluding roads and rail tracks. The property sales database comprises extensive data on every transaction of land situated in New Zealand, including part interest sales. Valuation roll data and property sales data are stored on separate database structures, but are interfaced to allow dual access to both storage mediums.

With respect to commercial property, the department maintains the individual and aggregate property data that will be extended with specific system data for the development and operation of a computer-assisted mass appraisal (C.A.M.A.) system.

New Zealand Commercial Property Market

Over the past decade, the commercial property market within New Zealand has undergone major change (Keys 1986). There is now a much greater number and spread of investors and developers. Despite a vastly increased interest and activity in the property sector, the New Zealand commercial property market operates fairly simply. In determining the price payable for a commercial property, buyers typically capitalise current market rentals by an appropriate rate of return and discount the resulting figure by any rental shortfall imposed by existing leases. A valuation on net rentals is often adopted, especially where the property faces additional ownership or operating costs, such as with leasehold land. At present, the majority of the market places little or no emphasis on more advanced appraisal techniques: discounted cash flow approaches and the concepts underlying the true investment value of income producing property are rarely considered by investors and would generally have no influence on the final price agreed to for a property.

Valuation Roll Values

The nature of the values that will be produced by the system, those values that must appear on the valuation roll, are closely controlled by the Valuation of Land Act of 1951 and amendments. The 1951 act requires the department to produce for each property an assessment of the capital value (C.V.), land value (L.V.) and value of improvements (V.I.), and provides a clear definition of the nature of these values.

The C.V. is defined as: "the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require". The valuation is determined assuming that no mortgage exists and that the property is not tenanted, leased, caveated, or subject to any charge, registered or unregistered, against the property.

The L.V. is defined as: "the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements had been made on the land". Under this definition, the value is assessed as if the land were vacant, with all surrounding improvements to each of the boundaries in place. The L.V. is assessed as the fair market price of the land as vacant, as indicated by sales of comparable parcels of vacant land.

The 1951 act distinguishes between land and improvements, and clearly defines `work' which is to be treated as part of the land. Briefly, with regard to urban property, all work directed at maintaining or improving the building platform (excavation, filling, drainage, and retaining) is treated as part of the land and reflected in the L.V.

The V.I. is defined as the added value the improvements give to the land at the time of valuation. Because the land is valued as if vacant, there is some conflict between the assessed C.V. and the sum of the L.V. and V.I. The department places the greatest emphasis on assessing a realistic C.V. and L.V. for each property and records the difference between these figures as the V.I.

Special Rateable Values

Under section 25E of the 1951 act, provision is made for the department to assess special rateable values (S.R.V.) of land which is used for any purpose that is an `existing use' within the meaning of the Town and Country Planning Act of 1977 and amendments. An existing use is a land use which is not in conformity with (exceeds) the provisions of the operative district planning scheme. Such a use arises when the use of the land was in place before the district scheme, or part provisions, became operative.

The Town and Country Planning Act provides for an existing use to continue. The assessed C.V. therefore, by definition, reflects the existing use value of the property. Under section 25E of the 1951 act the main roll C.V. is adopted as the special rateable capital value. A special rateable land value is assessed under section 25E on the assumption that the actual existing use would be the highest and best use of the land if vacant. The difference between this figure and the special rateable capital value is recorded as the special rateable improvements value.

Value Apportionments

Under section 41 of the 1951 act the department is required to provide, on request, an assessment of any owner or occupier's estate or interest in land. Apportionments of roll values are required for a significant portion of commercial properties. These are mainly used for rating and taxation purposes and are, therefore, closely scrutinised.

Rating apportionments are assessed, on request, for properties with more than one occupier. For commercial property, the department apportions roll values (C.V., L.V., V.I.) to each of the occupier tenancy areas on the basis of the proportion of rental to total property rental contributed by each occupier area. Leasehold apportionments are assessed on request for properties comprising part leasehold land. For commercial property, the leasehold land and portion of the building on leasehold land is treated as a separate property, and an apportionment of value assessed accordingly. Because the relativity of commercial accommodation of different types can change over time, value apportionments are reassessed at each values revision.

Annual Value

The Rating Act of 1967 and amendments allow for territorial local authorities to adopt a system of annual value rating (O'Keefe 1975). Under this act, annual value (A.V.) is defined as: "the rent at which the property would let from year to year, deducting therefrom 20010 in the case of houses, buildings, and other perishable property, and 10% in the case of land and other hereditaments: but in no case shall it be less than 5%

of the value of the fee simple of the property". At present, ten local authorities within New Zealand adopt an A.V. rating system. The department maintains an A.V. roll for six of these authorities, the remaining four choosing to compile and maintain their own A.V. roll.

Objection Rights

The 1951 act provides for any owner appearing on the roll, or the local authority affected by the valuation, to object to the values assessed. The department considers each objection with regard to the reality of value and the relativity of value and makes any amendment considered necessary. Both the objector and the department have the power to have the objection decided by the district court and have further powers of appeal to the High Court.

Present Valuation System

The main use of the D.V.R. is to provide the basis for the assessment of local authority rates. Under the provision of the 1951 act, the department is required to reassess values on the D.V.R. at intervals of not more than five years. At present, an actual revision cycle of five years exists for most districts. For the local authorities to whom the department provides A.V., the A.V. roll is revised on a triennial cycle, with the main D.V.R. revised every six years.

The proportion of commercial properties to total properties held on the D.V.R. is quite small, approximately 3.101o

The proportion of commercial properties to total properties held on the D.V.R. is quite small, approximately 3.107o as of 31 March 1986 (40,699 commercial properties of a national total of 1,312,861 properties). The revaluation of commercial properties absorbs, however, a significantly greater portion of the department's resources per valuation unit than the remaining urban properties. During the latest revaluation of Wellington City (operative 1 July 1984), for example, valuers in the field completed an average of thirty residential valuations per day, compared with an average of four commercial property revaluations per day (R. Twentyman, personal communication).

The system used in the revision of value of commercial property within a district is geared to high staff numbers. Each property is fully inspected in order to update the data held on the property and to assess rental and valuation levels: a valuation is then completed manually, effective to the date of revision.

Potential for a C.A.M.A. System

For a number of years the property market within New Zealand has been volatile. A problem of increasing concern to the department is that in the presence of rapidly changing prices, values assessed every five years are soon outdated and are of limited use (O'Regan 1985). The department is now under increasing pressure from a number of quarters to provide a more frequent revision of values appearing on the D.V. R.

This pressure comes at a time when the New Zealand economy has experienced major governmental intervention and change. Under the hand of the present Labour government, the existence, operation, and efficiency of all government departments is under close scrutiny. State departments are now being structured towards full or partial cost recovery under the user pays principle. As a result, they are undergoing pressure to refine and improve the quality of service, in line with user expectations.

In response to this pressure, the department is examining systems facilitating the more frequent revision of values within existing resource and budget limits. A C.A.M.A. system to assist the valuation of residential property (Mander 1984) was introduced in 1972 and has helped achieve a significant improvement in the efficiency of the revision of residential property values. The department has now achieved the organisational structure, the data, computing, and telecommunications resources, and the requirement, necessary for the development and use of an effective commercial property C.A.M.A. system.

Commercial Property Mass Appraisal System

The objective in developing the C.A.M.A. system for the valuation of commercial property (subsequently referred to as `the system') is to automate the valuation process. The system aims to produce estimates of the values (C.V., L.V., V.I.) that must appear on the D.V.R. for each commercial property, on a high volume basis, with sufficient precision to enable the final values produced to be implemented without manual amendment. The system also includes the assessment of annual values, value apportionments, and special rateable values, It follows the market approach in the assessment of C.V. in predicting for each property the variables underlying the capitalised income approach to value. The land value is assessed as the price that would be payable by the market for the land in a vacant state, as indicated by available market evidence. The V.I. is recorded as the difference between the assessed C.V. and L.V. of each property. The structure of the system is based on the concept that:

- the *relativity* of the earning potential of commercial accommodation of the same specific type (e.g. prime central business district [C.B.D.] retail; fringe C.B.D. retail; prime C.B.D. office), remains fairly consistent over time;
- the *relativity* of the level of market capitalisation for properties of the same specific type (defined below) is also fairly consistent over time, and
- the *relativity* of the per unit value of land of the same type (defined below) is, in general, consistent over time.

The system attempts to distinguish and group properties of the same type or highest and best use (Barrett and Blair 1981) within the appraisal area. It attempts to model for each property the relativity of the earning potential, level of market return, and per unit land value, as against other properties of the same type. A full inspection of each property is carried out in order to collect basic data on each property. A model consisting of a set of independent numerical constants or factors, each numerical constant from a predefined range, is developed for each property to represent the relativities. The system is structured to enable, at each values revision, absolute ($) unit values and a percentage rate of capitalisation to be substituted for the numerical constants within each model and applied to the physical quantities of the property to arrive at an assessment of value (C.V., L.V.).

Land Value

The L.V. assessment system involves establishing two independent numerical factors for each site, the separate factors representing the relative physical potential (site factor) and the relative per unit (frontage) value potential (unit value factor) of the site. The system is structured to allow, at each revision, an absolute ($) unit value to be substituted for the value factor and applied to the site factor to arrive at an assessment of value for each site.

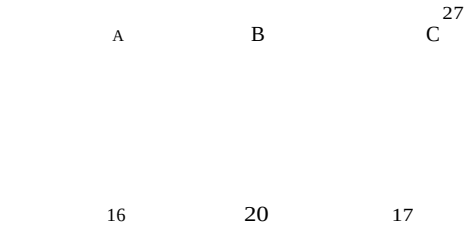
Numerical Site Factor

In developing the system, boundaries identifying areas of land of the same highest and best use are defined. A numerical site factor is determined for each site to represent the overall

FIGURE 1

Example of the Two Approaches to Determination of Site Factors

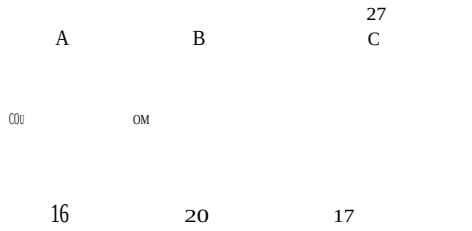
Approach one: computation based on the physical and special features of the site



Adopting Somers-Cleveland 30m standard depth table:

Site A Factor = 16m ' 30md (100%) C1 (115%) = 18.40
Site B Factor = 20m ' 30md (100%) 20.00
Site C - Factor = 17m • 31md (101.4%)
+ (10m • 31md 1101.4%1.31md v 1100% - 65.6%l)
= 20.73

Approach two: division of a verified land value by a per unit (frontage) land value



UMF = 30,000

Site A Factor = 5550.000/30.000 = 18.33
Site B Factor = S600,000!30.000 = 20.00
Site C Factor = 5625.000130.000 = 20.83

physical potential of the site relative to sites of the same highest and best use within the appraisal area, disregarding location and position. Site factors include physical characteristics (frontage, depth, shape, contour, corner influence, and so on), and special site factors (easements, rights of way, development restrictions, and so on).

A combination of two approaches will be used to determine individual site factors. The first involves a computation based on the physical and special features of the site in much the same way as factors developed for the unit meter frontage method (Jefferies 1978) of land valuation, with suitable allowances for contour, surrounding improvements, and other features. The second involves, for each site, a division of a verified land value by a per unit (frontage) land value, both values assessed at the same date. Figure 1 provides an example of both approaches.

Unit Value Factor

A numerical range capable of representing, on a relative basis, the range of per unit (frontage) land value levels within the area with respect to location and position only is developed for each area of land of the same highest and best use. A range of one to forty may be developed for an identifiable area of fringe C.B.D. office land, for example, a unit of forty representing the location and position with the greatest commercial potential and per unit land value, a unit of one, the location and position with the least potential and lowest per unit land value.

A unit value factor is determined for each site, from the appropriate range, to represent the per unit (frontage) land value of the site on the basis of location and position only, relative to other sites within the same highest and best use area.

Land value assessment. Prior to a general values revision, a search and analysis of market evidence will be carried out to determine the absolute ($) per unit (frontage) land values to be linked to each numerical range. The L.V. of each property is assessed via a computerised run of the system, multiplying in each case the site factor by the absolute ($) per unit land value substituted for the unit value factor. An example is shown in table 1.

TABLE 1

Example of Substitution and Land Value Assessment

Formula: Land value = site factor • revision unit value (substitute for the unit value factor).

Property	Site factor	Unit value factor	Unit value at 1/10186	Computed LV	Rounded LV
X	16.25	27	36.000	585.000	585.000
Y	21.20	30	40.000	848.000	850.000
Z	13.50	20	26.500	357.750	360.000

Capital Value

The model developed for each commercial property includes a number of independent constants designed to represent the relative earning potential and the relative market return for the property. At each values revision, absolute ($) per unit rental values, together with the appropriate percentage rate of capitalisation, are substituted for constants within each model These are applied to the physical quantities of the property to arrive at an assessment of C.V. The components of the system are potential gross income and capitalisation rate.

Potential Gross Income

From an inspection of each commercial property, each separately identifiable area of accommodation capable of sustaining a different level of rental (e.g., retail, showroom, commercial services, entertainment, office, car-parking, residential) is identified, and the net lettable area of each recorded.

A numerical range is determined for each type of accommodation, the range capable of representing the different levels of gross rental achievable for accommodation of that type within the appraisal area. For prime C.B.D. office accommodation of that type within the appraisal area. For prime C.B.D. office accommodation, for example, a range of one to fifty may adequately represent the relative range of rentals achievable. A unit of fifty would represent the earning capacity of space of the highest quality and amenities in the best location and position: a unit of one, the poorest C.B.D. office accommodation able to achieve the lowest C.B.D. office rentals.

The relative rental capacity of certain types of accommodation may be more adequately represented over two or more numerical ranges. This would allow for possible change over time in the relative earning potential of space of the same type in locations of differing economic potential.

For each commercial property, each `net lettable area' of accommodation is considered in isolation, and a numerical rental unit is determined from the appropriate range. This represents the level of rental achievable for the space relative to space of the same type within surrounding commercial buildings. The rental unit must encompass all the factors which contribute to the (per unit) earning potential of the space.

Prior to a general revision, a comprehensive search and analysis of market information will be carried out to deter-

mine the absolute ($) levels of gross market rentals to be linked to each rental unit range. Benchmark rentals could be identified to ensure that correct actual and relative rentals are linked to each rental unit range.

The prediction of potential gross income for each property as of the date of revision would then involve a computerised run of the system, substituting the absolute ($) rentals corresponding to the rental unit associated with each space within each building, applied to the physical quantities of each property.

For example, take a commercial property situated in a prime C.B.D. location, consisting of two areas of retail accommodation each able to achieve a different level of rental, one area of showroom and one of commercial service accommodation, three of office, together with two executive apartments, and twenty enclosed carparks. The data recorded for the property and the assessment of potential gross income as of, say, I October 1986, are shown in table 2.

TABLE 2

Example of Substitution and Potential Gross Income Assessment for a Single Commercial Property

Formula:

Potential gross income = $\sum_{i=1}^{n}$ net lettable area, . revision rental unit value (substituted for the rental unit,),

where n = total number of separate net lettable areas within the building.

Accommodation type	Net lettable area (s. M.)	Rental unit range	Rental unit	Rental unit value (1.10.86)	Assessed market -rental (8)
Retail	40.42	1-60	45	570	23.039
Retail	60.35	1-60	40	510	30778
Showroom	147.72	1-25	18	220	32.498
Community services	225.50	1-20	15	150	33.825
Office	405.60	1-30	18	185	75,036
Office	405.60	1-30	17	180	73,008
Office	121680	1-30	15	170	206856
Aartmentp	12525	1-15	11	200	25050
Apartment	105.77	1-15	11	200	21,154
Carparking	20p	1-25	19	'40 x 52	41.600
		Potential annual gross income			562.844

Capitalisation Rate

The relativity of the level of capitalisation adopted by the market for commercial properties of different types (type classified on the basis of location and highest and best use) can vary over time with changing market conditions and preferences. In periods of high market activity, return rate relativity between different classes (based on age, style, construction, quality, and so on) of property of the same type can also vary over time. The objective of the capitalisation rate section of the system is to enable prediction on a mass basis of the level of market capitalisation for each property, allowing for changes over time in the return relativity between properties of the same and different types.

In the initial development of the system, boundaries grouping properties of the same broad type would be established. Each broad group would be, where necessary, further subdivided into classes of property of the same age, style, construction, quality and so on, for which the relative level of market capitalisation would remain consistent over time.

For each class of property a numerical range is developed capable of representing the relative level of gross market capitalisation for the range of properties within the class. A numerical capitalisation rate unit is determined for each property, from the appropriate range, to represent the relative level of capitalisation that would be adopted by the market for the property.

Prior to a general revision of values, an analysis of market evidence will be carried out to determine the actual percentage rates of capitalisation to be linked to each numerical unit range, as of the date of revision.

Capital Value Assessment

The assessment of the C.V. of each property within the appraisal area would involve linking the assessed gross annual income with the predicted rate of capitalisation for each property. Rounding boundaries would be set within the computer programme amended for each value revision. A final C.V. would be assessed for the example property illustrated in table 2 as follows:

The assessment of the CV of each property within the appraisal area would involve linking the assessed gross annual income with the predicted rate of capitalisation for each property.

Assessed gross annual income	$562,844
Capitalisation rate prediction, say 8.5010	=.085
Comuted valuep	-$6621694, ,
Assessed capital value	$6,600,000

Value of Improvements

The computation of the V.I. of each property would simply involve a mathematical statement set within the computer programme, deducting in each case the L.V. from the C.V.

Value Conflicts

In certain instances, such as undercapitalised properties, the assessed L.V. may exceed the assessed C.V. In this situation the C.V. is simply equated to the L.V. and a nil V.I. recorded.

Special Rateable Values

The assessment of S.R.V. under Section 25E of the 1951 act would be included within the proposed system quite simply. The approach would follow the method developed for the assessment of the main roll L.V., which required a site factor and unit value factor to be developed for each site. An additional (special rateable) site factor would be developed for each existing use property to reflect the higher (existing) use of the site. At each revision, a special rateable land value would be assessed by applying the special rateable site factor to the ($) unit value substituted for the site unit value factor, in the same way as for the main roll L.V. assessment. The main roll C.V. would be adopted as the special rateable capital value; the difference between this figure and the special rateable land value would be recorded as the special rateable improvements value.

Value Apportionments

Briefly, the assessment of individual property value apportionments would be included within the proposed system as follows.

Rating Apportionments

Each occupier tenancy area is hypothetically treated as a `separate property' and a C.V. assessed for each: the system is designed to capture, for each occupier area, the relevant

property or property model data from the system or property database, and, from this, assess a C.V. apportionment concurrently with the total property roll value assessments. The apportionment of L.V. to each occupancy area would be based on the area's C.V. apportionment as a percentage of the total property C.V., applied to the total L.V. The V.I. apportionment for each occupier area would be recorded as the difference between the C.V. and L.V. apportionments.

Leasehold Apportionments

For leasehold apportionments, the leasehold land portion of a site is simply treated as a separate site and valued on the same basis as any other site. In the assessment of the C.V. apportionment, the leasehold portion of the property, that is, the leasehold land and portion of the building situated on leasehold land, is treated as a'separate property': the relevant property and property model data are captured from the system or property database, and a C.V. apportionment assessed concurrently with the total property roll value assessments. The V.I. apportionment is recorded as the difference between the C.V. and L.V. apportionments.

Annual Values

The inclusion of the assessment of A.V. within the system will be straightforward. The A.V. of the property is the annual rental for which the property would let, less a percentage deduction (for certain outgoings payable by the owner or occupier) as set out within the Rating Act of 1967 and amendments. The assessment of A.V. requires the gross annual rental estimated for the assessment of C.V. to be carried over and the appropriate percentage deduction taken from this. If the property comprises vacant land, the A.V. will be determined in a similar way to a normal ground rental assessment, based on a percentage of the value of the land.

Organisation of the System

It is envisaged that each office introducing the system will design and develop an independent system to suit local conditions. The necessary system and property data will be forwarded, in each case, to the Operations Section of Head Office for computerisation.

The ongoing precision of the system will require the periodic inspection of each property to verify and update, where necessary, individual property data and the model maintained for each property. A five-year inspection cycle will be maintained, together with an ongoing roll maintenance programme designed to update property data and values as a result of building permits and related work. The inspection programme will be carried out independently of the revision programme and will not be a necessary prerequisite for revision.

For each values revision, district offices will compile and forward the necessary revision (market) information to the Operations Section. Preliminary value estimates will be checked and verified, and following any feedback and possible reruns of the system, final values will be implemented. Any objections to values will be individually considered and manually amended, where necessary, from the district office.

Practicality of the System

The acceptability of any mass appraisal system is, in part, dependent upon valuers operating in the field gaining an understanding of, and a confidence in, the system. The basic concepts and the mechanics of the system described in this paper are very simple. Valuers with an uderstanding of commercial property should have no problem in understanding and using the system. Clear, detailed documentation is a necessity in the development, implementation, and ongoing maintenance of the system.

The greatest difficulty in developing and maintaining the system is establishing a correct relativity among the models developed for each property. Achieving a correct relativity is the key to the success of the system. In determining individual numerical units comprising each property model, a correct relativity between properties could be established using a combination of two approaches, benchmark units and previous value relativity. Benchmark units representing specific locations, positions, quality of space, or site aspects, and so on, could be identified. Individual units for each property could be determined by comparison to the appropriate benchmark with suitable allowances for differences in location, position, quality, or site aspects, and so on. Verified value levels or factors adopted for each property for a previous (manual) values revision could also be used as a basis for establishing relativity.

The major task in achieving an ongoing system is the initial development and implementation. Once an operational system is established, assimilating the information necessary for each run of the system will not be difficult. Individual offices will be organised to maintain the necessary up-to-date market evidence and, from this, to be able to compile quickly the information needed for a run of the system.

Efficiency of the System

The justification for committing the resources to develop and use the system will depend upon the question of efficiency. The efficiency of the system is critically dependent upon the accuracy of the final values produced. Value accuracy will depend, in large part, on achieving a correct relativity between property models and will determine the final acceptability of the system. Although methods of achieving relativity have been outlined, the question of accuracy will remain unsolved until some form of operational system is developed.

However, under a successful system, the minimum frequency of revision is controlled by the time involved in compiling the information needed for each run of the system. Individual offices will be organised to be able to compile this information quickly. Under the proposed system, for example, the annual revision of commercial property value is easily achievable.

A successful system would, therefore, result in a significant improvement in the efficiency of the commercial revision programme.

Further Research and Development

The above discussion does not attempt to detail the method of providing within the system for the valuation of special purpose commercial properties, both income-producing (such as motel, hotel, and restaurant complexes), and non-income-producing (such as civic chambers, auditoriums, specialised commercial buildings, and transport terminals).

The valuation of special purpose properties which are bought and sold on the basis of income involves developing a model for each property to represent the earning potential and market return attitudes, in much the same way as the models developed for typical C.B.D. properties. The specific structure and components of the models will be controlled by the specific aspects of the property type examined by the market in the assessment of value.

For commercial properties which do not generate an income, the replacement cost approach (Jefferies 1978) is often adopted for the assessment of value, in the usual absence of comparable sales evidence. The inclusion of the replacement cost approach in the proposed system is straightforward.

A model will be developed for each property to be valued using the replacement cost approach, consisting of a multiple (Riley 1972) and a depreciation/obsolescence (Jefferies 1978) factor. Given no alteration to the physical nature of the building, the multiple developed for each property will be maintained over time. The system will be designed to amend periodically, where necessary, the depreciation/obsolescence factor to reflect, over time, the increasing age and declining

quality or condition of the building. The system will be structured to apply, at each revision, the multiple together with the current modal rate (Jefferies 1978) to the physical quantities of the property to arrive at an estimated replacement cost new. This is reduced by the depreciation /obsolescence allowance, and the result added to the assessed L.V. of the property to arrive at an overall property value.

One aspect of the system which would benefit from further research and development is the section of the system designed to predict a rate of capitalisation for each property. The precision of this section is critical to the accuracy of the final values produced. The method of predicting a capitalisation rate for each property within the system is considered to be adequate. However, the accuracy of values and the system itself would benefit, over time, from modification aimed at improving the precision of the rate of capitalisation adopted for each property.

Concluding Comments

The New Zealand Valuation Department is at present under increasing and very real pressure to provide a more frequent revision of the values appearing on the D.V.R. The above discussion has concluded that the department has now achieved a position of defined objectives, the organisational structure, the data, computing, and personnel resources, and the requirement for the development and use of an ongoing system of commercial property mass appraisal.

The discussion has attempted to describe in some detail a system designed within the New Zealand real estate environment to achieve the frequent revision of commercial property value on a high volume basis. It is clear that, although the basic concept upon which the system is structured is simple, the system in its entirety is ambitious. The achievement of an effective system will involve considerable research and development, both initially and ongoing.

The final question of the acceptability of the system rests with the accuracy of the values produced. This question will remain unsolved until some form of operational system is developed. The first step to exploring the potential of the system is a pilot study aimed at developing and testing an operational system. The implementation of a successful system would result in a significant improvement in the efficiency of the department's commercial property revision programme and would facilitate more frequent revision of values in response to changing demands on the department.

It is clear that, although the basic concept upon which the system is structured is simple, the system in its entirety is ambitious.

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The Collapse of the NZ Rural Real Estate Market Its Causes, Lessons, Restructuring, National and International Repercussions

By Ray Chappell

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Introduction

My involvement with this topic is to discuss the restructuring of farms as a result of the collapse of the rural real estate market in New Zealand.

I would like to briefly recap on the circumstances leading to the need for rural restructuring, define what the basic problem is, and describe the policy driections the Rural Bank has selected to assist rural restructuring.

Without clearly identifying the problems it is not possible to discuss the policy options or the policy directions finally selected.

Causes

These have already been mentioned as:

1. Changes in world food production.
2. Changes in the relative worth of agricultural commodity prices.
3. Changes in the economic environment.
4. The drive for increased production through income support, incentive schemes.
5. The effects of inflation.

Anticipation of continued income support and continuing rising asset values resulted in farmers borrowing and financiers lending heavily against a perceived rapidly escalating equity. Farmers did not refuse incentives and, in fact, many saw it as their patriotic duty to rapidly expand their businesses.

Some did so through the purchase of additional land and assets, others through land development. Those servicing the sector were just as guilty as the farmers in encouraging and fueling this expansion.

The result of this expansion on rural land prices in New Zealand has been demonstrated. Between 1935 and 1976, land consistently traded at between 2.5 to 3.5 times Gross Farm Income, no matter what quality of land or where it was located.

As aresultof the changed economic direction that was signalled by the new Labour Government in late 1984, it was obvious that there was going to develop a situation in which incomes and asset values were likely to fall substantially.

In fact, by 1986 rural farm land was again trading at between 2.5 to 3.5 times Gross Farm Income. The paper equities generated by increased land prices and asset values vanished. What appeared to be rational investment decisions in the previous economic environment of the 1970s and early 1980s became poor and unsustainable financial propositions.

> ...by 1986 rural farm land was again trading at between 2.5 to 3.5 times Gross Farm Income...

The effects were particularly severe for those who borrowed to purchase properties in the late 1970s and early 1980s. They stood to lose the most but this also applied to those who borrowed heavily to develop properties.

Identification of Problems

The result of this changed economic direction created two problems. The first was that heavily indebted farmers had an inability to generate enough cash income to maintain their properties, have an adequate standard of living, and service their debt.

The second problem was that declining asset values meant that a substantial number of farmers ended up with little or no equity.

Scope of the Problem

In the past, downturns in agricultural incomes in New Zealand were usually cyclical. They had been self-correcting through better product prices and farmers producing more of the same product.

The changed international and national economic environment suggested that the downturn was not going to be cyclical.

It was obvious therefore that if the Rural Bank had correctly identified the likely effects of the changed economic environment on primary producers that is the likely downward trend in both farm incomes and asset values then some new solutions would have to be found to deal with the problem.

The Rural Bank accepted very early that a number of farmers, no matter what form of assistance was provided, would not survive the economic restructuring that was taking place in New Zealand. This decision was significant because we had not seen this happen in New Zealand for many years. The last time large numbers of landowners lost their farms was in the 1930s.

> ...My personal belief and firm conviction at the end of 1984 was that we were in for a long period of restructuring in the rural sector - at least 3 to 5 years...

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that we were in for a long period of restructuring in the rural sector - at least 3 to 5 years.

It was on this deeply held conviction that I determined that whatever policy initiatives the Rural Bank adopted they must be targeted.

It was only by targeting policy programmes that we would be able to stabilise agriculture and the adjustment process.

While relative stability tends to slow the adjustment process it had the following effect.

Firstly, it allowed farming leaders to grasp that changes were necessary and were going to take place.

Secondly, it allowed the farming community and those servicing the industry to come to grips with the need for change and to make changes to their own businesses that would enable them to survive.

Thirdly, it allowed land and other asset transfers to take place in an uncertain and depressed market at a pace which could be realistically absorbed by that market.

The Rural Bank during 1984, 1985 and 1986 set out the following policy initiatives to assist to restructure the rural land market. They may be dealt with in four phases.

Phase I: Internal Options

The following policy mechanisms were first used to restructure farmers' debt with the objective of keeping competent farmers on their farms:

1. Restructuring short-term excessive interest-bearing debt through refinance at market interest rates and at longer terms.
2. Extension and amalgamation of existing Rural Bank loans to terms not exceeding 25 years.
3. Postponement of principal until later in the season when the farmer had the income to pay.
4. Suspension of principal for the season usually to give the farmer time to consolidate his farming and financial positions.
5. Postponement or suspension of interest for the same reasons as above.

The objective was to restructure the financial position of competent farmers so that they could, after restructuring, maintain their properties, fully service all debt on a commercial basis and maintain a reasonable standard of living.

The second objective was to ensure that no competent, creditworthy farmer was forced to sell through failure by the Rural Bank to explore with him all the options available.

The third objective was not to provide assistance which would prop up indefinitely those farmers where it could be clearly established they had no medium to long-term future in the industry under the then prevailing market conditions.

The fourth objective, in those marginal cases where some form of temporary assistance was offered, was to point out to the farmer that this was to give the farmer time to exit in an orderly manner. It would be injudicious of the Bank to mislead a farmer into believing that such relief wouldbe available on acontinuing basis. This was particularly so when the indications were that in the long term the farmer could not remain on the property in the face of a complete lack of viability, a mounting and crippling debt situation coupled with a declining land value.

Phase II: Mortgagee Sales

During the initial phase of the downturn there was a widely held belief that adjustment of the industry was best done through mortgagee sales. After all, it got existing farmers out and new owners in at lower asset values and with a level of debt appropriate to future expectations of income.

It had been tried in the United States and Canada with quite tragic personal results and with banks ending up owning large areas of land half a million acres was not uncommon.

Mortgage sales of rural land recommenced in New Zealand in late 1985. The Rural Bank's strategy during this period in which other mortgagees were forcing sales on farmers and where the Bank held a mortgage, was that we would not buy in farms, if at all possible. We did not, under any circumstances, wish to become landowners.

This process was very successful in that other institutions knew the Rural Bank was not going to buy to keep asset values up at some artificial level. It enabled those in the industry, including my own staff, to come to the quick realisation that for most farmers there were new, much lower asset values. It enabled us to turn our attention to develop new policy initiatives.

Before moving off this topic, however, I would not like people here to think that the Rural Bank has no policy of exercising mortgage sales. Since 1985 we have been conducting mortgagee sales. We have done more in this area than any other institution

Phase III: Discounting

By the end of 1985-early 1986, it was clear that new policy initiatives would have to be put into place if existing owners were going to be able to remain on their farms and continue to farm on a viable basis.

These new initiatives were necessary as the level of debt on a very substantial number of farms was close to, or exceeded, the value of assets.

A change of ownership on the scale necessary was neither practical nor desirable, resulting as it would in substantial dislocation to the industry and the loss of considerable farming experience and talent.

The Government therefore decided that to assist with restructuring farm debt the Rural Bank would adjust its debt through discounting. Discounting was designed to achieve:

1. A reduction of debt.
2. A restructuring of the remaining debt on to a basis which could be serviced by the mortgagor.

The objective was to restructure the farmer's debt so that the farmer had the prospects of continuing to farm on a viable basis. Viability had to provide for:

1. Farm working expenditure at least up to maintenance levels.
2. An acceptable level of personal drawings.
3. Provision of normal debt servicing of both interest and principal.

The Rural Bank was a catalyst in this restructuring as generally it held prior security and therefore had a central role to play in the restructuring process.

It initiated the process and provided an inducement for other mortgagees to participate.

Any discounting or write-down in the Rural Bank's debt enhanced the position of subsequent mortgagees. Therefore, if the subsequent mortgagees were to benefit from discounting they had, in exchange for better security, to participate in restructuring farmers' debts.

It was essential to have the participation and co-operation of all creditors if debt restructuring was to be successfully achieved. Often it involved farmers and their creditors in "farm finance meetings".

At these meetings the asset and liability position and viability of the enterprise could be assessed and proposals for restructuring considered.

The process was one of weighing the various alternatives of each creditor and producing a resolution which allowed each creditor to secure his best option, while giving the farmer reasonable prospects of continuing to farm on a viable basis.

Restructuring arrangements varied widely and were dependent on the circumstances of each case, the relative risk, and the policy and expectations of individual lenders.

Undoubtedly, the scheme has had a positive effect. At its conclusion, about 5000 Rural Bank clients will have been restructured with the prospect of being able to operate on a viable basis. The response from the private sector financiers was also very positive.

Notwithstanding the success to date, however, the final success is dependent on much lower interest rates and a lower New Zealand dollar in relation to the U.S. and Australian dollars.

Phase IV

This generally deals with those who are unable to be restructured and whose level of debt and level of defaulting payments makes exiting inevitable.

In this case, the Rural Bank has three options. These are:

1. A mortgagee sale.
2. A petition to the court for an order of adjudication as a bankrupt.
3. A voluntary sale.

The option preferred by the Bank is to have the assets sold voluntarily. In those cases where the borrower is in default, the Rural Bank debt is exposed, and the mortgagor is prepared to fully co-operate in the voluntary sale of the assets, the Bank is prepared to make assistance available to assist in the exiting process.

The objectives are:

1. To deal with each case on a commercial basis.
2. To encourage the mortgagor to sell his assets as soon as possble to minimise losses to the Bank.
3. To enable the mortgagor to become re-established in a humane manner and with the least possible trauma.

It must be appreciated that the Rural Bank's problems are not necessarily the same as those that concern the mortgagor. The Bank's problem is essentially a financial one whereas the mortgagor's is more psychological and emotional in terms of the personal predicament and upheaval being faced.

The prospect of leaving the property with virtually little in the way of assets, finding suitable accommodation, and finding employment, in many cases outside the district, is a very stressful experience for those families whose lives have been disrupted by economic changes.

While there are some measures available through the Social Welfare Department to assist this transition, they do not always adequately meet the needs of the mortgagor.

The Rural Bank, for its part, is prepared to allow mortgagors to take with them all their personal household effects, family car, trailer, and other items such as tools, working dogs, horses, saddles, etc. Generally, these items can equate to a very significant value.

In addition, to assist the exiting process, the Rural Bank is prepared to offer an ex-gratia sum of up to $20,000, but this offer will only be made in those cases where the Bank is in a loss situation.

The ex-gratia sums are made on a strictly commercial basis and will be offsetby the additional costs the Bank would have incurred if it had to pursue the mortgagee sale option.

Should the farmer fail to co-operate in this process, the Bank will eventually employ the necessary legal remedy to recover as much as possible of its debt.

Summary

I have attempted to cover the circumstances leading to the need for restructuring, define what the basic problem is, and describe policy directions selected by the Rural Bank to assist rural restructuring.

You may ask how long does the Rural Bank see the final restructuring taking?

While I am confident the farm economy has turned the corner, there is still a long haul back to profitability for some farmers and there are some thousands who will not make it. It will take some years yet for the final adjustment to take place.

This is indicated by the thin market for the sale of assets and the lack of profitability and confidence in the sector. On the other hand, the farming situation has stabilised in most areas and there are a number of positive signs.

1987 saw over 2700 sales of farms, reversing a decreasing trend since 1981. Production costs are at a lower level than we have accepted in the past, and asset values are lower but much more stable and better reflecting the productive worth of the asset.

I have every confidence that the farming sector will eventually come out of this period of restructuring on a much better and sounder financial footing.

Capitalisation Rates Fact or Fiction

By T P Boyd

Terry Boyd-M.Sc., S.C.V., M.P.M.I., A.N.Z.J.M. is presently the senior lecturer in Property Management at Lincoln College. Prior to his appointment at Lincoln, he was a practising valuer mainly in South Africa for the past 15 years specialising in valuations involving litigation and portfolio valuations for Property Unit Trusts and Property Companies.

Introduction

Anyone involved in the acquisition, management or valuation of investment property must make a judgement on the capitalisation rate* or rate of return from the property. It is probably the single most difficult and volatile factor in pricing property. The methodology used in the marketplace is varied, subject to different interpretations and basically inaccurate. At times fictional rentals maybe inserted in place of factual ones. Most practitioners appear suspicious of discounting techniques and like to assess the capitalisation rate on the current net operating income (NOI).

> Most practitioners appear suspicious of discounting techniques

Others, particularly the recently qualified ones, attempt to estimate future income and use discount rates in their assessments.

I plan to contribute to this debate by jumping in boots and all in the hope of creating further thought and discussion on whether capitalisation rates are fact or fiction. My comments will apply to the marketplace situation and hence by "value or price" is meant the current open market value or price.

*Interpretations for "yield" terminology:

capitalisation rate the rate, as a percentage, at which income (NOI) from a property is capitalised to arrive at the market value;

rate of return (or yield) the rate or yield, as a percentage, that a property is returning on the market value;

discount rate *the* required rate, as a percentage, to convert future value to present value.

Present Schools of Thought

I will start with two statements which typify the problems involved:

1. "Sophisticated methods often create an illusion of exactness which the underlying assumptions do not warrant."
2. "Many investment properties are currently not receiving market related rentals and hence it is extremely difficult to use a single capitalisation rate on existing income, or on market related income, to establish the worth of the property."

The first statement is from *InvestmentDecisions and Financial Strategy* by R Pike & R Dobbins on page 276 and the second statement is my own.

There are two basic schools of thought in the marketplace. The first school, which I will call the "Realists", generally believes that through intuition and a good knowledge of the marketplace a single capitalisation rate can be chosen to apply to the existing or likely income. This rate is based upon comparable capitalisation rates of sold properties. This school would argue that making assumptions about future income, particularly beyond the period of an existing lease, is extremely difficult and results in greater inaccuracies than a single capitalisation rate on known or anticipated income. It will further argue that all the factors which have an impact on the value of that property can be incorporated in a single capitalisation rate.

> ...the capitalisation rate for property is a function of anticipated income and capital growth from the property.

The second school of thought I will call the "Forecasters". It accepts that the worth of property is related to its existing and future income, and that anticipating the future income flow is all important in being able to assess its current value. However, as it rs exammmgf utun, mcome It is necessary to d l'scount tillsfuture income to present day valuesin order to establish its present worth. It would argue that the single capitalisation rate on existing or predicted income is extremely inaccurate. The multitude of factors influencing the capitalisation rate of a particular property specific market can ot be adequately incorporated i a single rate, according to the Forecasters.n n

Factors Influencing the Capitalisation Rate

Before proceeding to examine methods of using the capitalisation rate, let us look at the factors influencing the capitalisation rate.

In essence, the capitalisation rate for property is a function of anticipated income and capital growth from the property. However, the anticipated income and capital growth cannot be established with certainty; therefore there is a risk that the anticipated income and/or capital growth will not be achieved. It is vital to understand that risk is always present in the assessment of the market value of property and that a risk factor is implicit in the capitalisation rate.

I believe there are basically two major influences on the capitalisation rate. They are:

1. The marketplace

2. The property characteristics.

The marketplace, or more correctly the capital market, contains the external factors which have a strong influence on the capitalisation rate. The major variables within the capital market which have an effect on property are:

1. Financial rates, particularly debt interest and alternative equity investments;
2. Inflation expectations
3. Volatility of the marketplace.

The internal factors are the individual characteristics of a particular property. The major variables within the property which have an effect upon the capitalisation rate are:

1. The lease, being the rental and other conditions specified within the lease.
2. The tenant, particularly quality and compatibility.
3. The land, being the location, zoning and use.
4. The improvements, being condition, nature, age and function.
5. Management, being the quality of the administration; and
6. The operating expenses, being the property operating expenses and the proportionment borne by either party.

It is relatively easy to specify the determinants of the capitalisation rate in broad terms, but it is much more difficult to quantify the effects of each variable in a particular situation. In addition, there is a need to examine the likelihood of an assumption actually happening, i.e. the risk factor.

Despite the problems of defining and quantifying the determinants of the capitalisation rate, it is essential that the valuer or property manager uses all his/her skill and intuition to incoporate both external and internal factors within the capitalisation rate.

In fact, this person must not only ensure that all relevant factors are taken into accountbut should be conscious of the accuracy with which it is possible to define the determinants and the rate.

The major question now is what is the best way to establish the capitalisation rate which accurately takes into account the numerous factors influencing the anticipated income and capital growth from a property, and furthermore how to use the capitalisation rate and/or otherrates to arrive at the realistic market value of an investment property.

Proposed Methodology

My proposed method for using the capitalisation rate to arrive at the open market value of the property is based on three main concerns. They are:

1. In general the marketplace uses a single capitalisation rate on existing or proposed income and this is generally referred to as the Direct Capitalisation approach.
2. The Direct Capitalisation approach is extremely limited in its ability to take account of variation in income and capital growth expectations in the future, and the best way to take these changes into account is to estimate future income and capital figures and to use more than one capitalisation or discount rate.
3. In establishing the capitalisation rate and thereafter the market value, the valuer seldom attempts to define the accuracy of the resulting figure and does not incorporate a measure of uncertainty. This measure of uncertainty should be based upon the accuracy of the variables incorporated in the exercise.

My proposed methodology takes into account the concerns mentioned above and the need to be practical and uncomplicated. It differs from the common approach of using market rentals and adjusting for the shortfall from existing rents.

I prefer to assess value on existing rents and adjust to market conditions only when feasible in terms of the lease. My proposal incorporates these steps, as follows:

Step 1: Direct Capitalisation

The direct capitalisation approach should always be undertaken as an initial exercise and at times will be adequate as a final approach. On the other hand there will be other circumstances, particularly where future rentals differ substantially from market related rentals, in which this approach will be inadequate. However, it should always be used as an initial exercise and as a check exercise on the resultant figure from other methods.

Step 2: Future Cash Flows

At the beginning of this paper I mentioned that in many cases the actual rental being derived from a property is not in line with current market rentals. In fact, it cannot be anticipated that a property will always generate income close to market related figures. This is largely due to conditions within the lease which are binding on the parties and must be taken into account in any assessment of the open market value. In order to get over this problem it is necessary to estimate future cash flows based on existing lease conditions.

The basic stages of this approach are:

a. assess anticipated cash flows in various time periods;
b. make a decision on a terminal value of the property or capitilise in perpetuity when market rentals are achievable;
c. discount future income at a rate which adjusts the future value to present value and takes account of the accuracy of estimates of future cash flows; and
d the resultant value is the summation of the discounted cash lfows.

> ...it is extremely difficult to accurately assess a terminal value for a property many years into the future.

The major drawback with this approach is that the further into the future that rentals are assessed the more inaccurate the figures are likely to be, and furthermore it is extremely difficult to accurately assess a terminal value for a property many years into the future. I therefore believe that these exercises should be kept to a minimum future time period and as simple as possible.

I favour the following simple exercise developed from this approach. Firstly, for the time period within which it is anticipated that the rentals will not be market related, record the known and anticipated rental in the appropriate periods. Secondly, when the rental is expected to be market related, capitalise this rental in perpetuity. Obviously, the relationship of existing rents to market related rents will have to be examined and the rentals in the future periods will need to be discounted.

I will illustrate this approach by a hypothetical exercise:

Problem:

Assume that you are instructed to value an office building in Symonds Street, Auckland. For simplicity's sake the building has one tenant and the lease dates are:

Lease negotiated:	mid 1986
Lease commenced:	January 1987
Lease period:	5 years with no option for renewal
Rent review:	after 3 years, with arbitration to market rent. (Therefore, rent review Jan 1990, lease expires Dec 1991.)

You establish that the net operating income (NOI) for the 1987 year was $721,757 and you further estimate that the anticipated future income and its relationship to market rent is as follows:

Year	Net operating income	Actual rent as % of market rent
1987	$ 721,757	89%
1988	$ 719,400	67%
1989	$ 724,000	60%
1990	$1,225,000	100%
1991	$1,225,000	
1992	$1,470,000 (N.B. Tenants continued occupancy uncertain)	

Based on these assumptions, how would you calculate the current open market value?

My Solution

1. Direct Capitalisation

Try a direct capitalisation on the current year's (1988) income. The marketplace may suggest a relatively low yield of '6.0% because of rental level, situation, and all other internal and external factors influencing the capitalisation rate.

Therefore value is: $719,400 capitalised at 6.0%

$\frac{719,400}{.06}$ = $ 11,990,000, which rounds off to $12 million

However because of the state of the market, the lease and numerous other reasons, the market may capitalise this property at a different rate. Let us assume that the reasonable range is between 5.0% and 7.0%, thus:

Highest reasonable value: $719,400/5% = (say) $14.4 million

Lowest reasonable value: $719,400/7% = (say) $10.3 million

Note: Best estimate of value by direct capitalisation is $12 million but consider that the range of value could be from $10.3 million to $14 million because of substantial difference between existing and market rentals, uncertainty at end of lease period, falling interest rates, uncertain property market, etc.

2. Future Cash Flows

Schedule future cash flows and establish a discountrate for each period. Note the discount rate must take into account the degree of accuracy of estimated cash flow. Discount rates which I have chosen are: 14% for 1989 when rent level is specified in lease, 16% for 1990 and 1991 when rent will be adjusted to market rent which is unknown at present, and 18% for 1992 when both rent level and tenancy are unknown. Further I must specify a capitalisation rate in 1992 I assume a rate of 8% on market rental.

Calculation:

Year	NOI $	Discnt Rate	Years	Discnt Factor	Discnted NOI in '88 terms
1988	719,000			1	719,400
1989	724,000	14%	1	0.8772	635,093
1990	1,225,000	16%	2	0.7432	910,420
1991	1,225,000	16%	3	0.6406	784,735
1992	1,470.000 capitalised at8%				
	18,375,000	18%	4	0.5158	9,477,825
			Total		12,527,473

The most likely value from the cash flow exercise is $12.5 million.

If, however, each of the discount rates were to vary by 'I% the resultant value would range from approximately $12.9 million to $12.2 million. Furthermore, if the capitalisation rate were to vary by 11% (as in direct capitalisation exercise) and all the discount rates were to vary by 'I % then the combined range would be:

Highest reasonable range: $14.3 million

Lowest reasonable range: $11.2 million

It will be noted that the range from the second exercise is less than that of the first exercise despite the adjustment of both discount rates and the capitalisation rate. Generally, the analysis of the capitalisation rate as undertaken in the second exercise does tend to improve the accuracy of the end result. Furthermore, I would suggest that an assessment based on actual income, such as this, as opposed to adjusted market income results in a more conservative and realistic figure.

The merit of the future cash flow exercise above is that it partitions most of the external factors influencing the cap rate from the internal factors. In essence the external factors are taken into account in the capitalisation or discount rate used within the exercise, but the internal factors are largely accounted for by making estimates of the anticipated income growth from the property. To the extent that we are now separating the external and internal factors, it is likely that the final result will be more accurate provided the assumptions made in the exercise are reasonable.

The assumptions are of course the crucial issue in relation to the accuracy of the result. I have undertaken a variety of exercises to monitor the accuracy with which I have been able to assess anticipated income within various property portfolios. In relation to two property unit trusts which I have been instrumental in assembling, I have monitored the anticipated income growth at date of acquisition and the actual income flow from the properties over the past few years. The results of these exercises are as follows:

Property Portfolio No. 1
No. of properties in portfolio = 38

Variation between Actual and Anticipated NOI for each property

	one year in future	two years in future	three years in future
mean of difference	+ 3.98%	+ 12.19%	+ 4.93%
std. dev. of difference	18.23%	19.03%	22.37%

Property Portfolio No. 2:
No. of properties in portfolio = 20

Variation between Actual and Anticipated NOI for each property

	six months in future
mean of difference	+ 0.55%
std. dev. of difference	2.49%

Note: The difference between actual and anticipated income was calculated for each property in the portfolio by the formula:

$$\frac{\text{(Actual NOI} \quad \text{Anticipated NOI)}}{\text{Anticipated N I}} \times 100$$

The resultant means and standard deviations for the portfolios indicate the increasing difficulty of estimating future income as time periods increase. Note that after six months (Portfolio No. 2) the differences were still relatively negligible, but after one year (Portfolio No. 1) the average difference was almost 4%. This indicates that the actual income was exceeding the anticipated income. In the second year of Portfolio No.1, the market improved substantially and the gap between actual and anticipated income widened greatly on the average over 12%. In the third year the market receded and the gap narrowed.

The steady growth of the standard deviation over time indicates that the differences between actual and anticipated income for the individual properties were varying by greater amounts as the time period increased. I do not consider these figures to be atypical. I believe they demonstrate the substantial difficulties involved in assessing future income.

Another important issue in any cash flow exercise is to ensure that the discount rate used takes account of the uncertainty of the anticipated cash flows; in other words, it is essential that the discount rate include a factor for risk related to the uncertainty of the figures proposed in the exercise. This is the reason for using different discount rates in the exercise above. Single discount rate exercises are not capable of differentiating risk over time.

While I have outlined one approach which takes account of variations in future cash flows, there are several other acceptable methods. The most commonly used methods are the Internal Rate of Return (IRR) and Net Present Value (NPV) approaches. Both methods are popular and useful within their inherent restrictions. The Internal Rate of Return is an appropriate exercise for assessing the rate of return that a property will generate on capital for the specific period that the capital is in the project. It is the rate of return which equates the present value of the cash inflows to the present value of the cash outflows.

The net present value approach is extremely useful for obtaining a residual value that could be paid for a property provided the rate of return required during the project's life is known. The net present value shows the cash residual after all cash lfows have been discounted at the appropriate rate of return. It is particularly useful for township development exercises.

Step 3: Measurement of Accuracy

The measurement of accuracy of an assessment is an extremely difficult exercise and this is probably the major reason why valuers have tended to ignore this issue in their assessments. However, I believe it is the responsibility of the valuer to attempt to define the accuracy of his/her assessment which should be directly related to the quality of the background information upon which the valuation is based. The valuer cannot claim perfect accuracy in an imperfect marketplace and consequently should indicate a likely range of figures.

Possibly a reasonable way to assess the accuracy of the valuation is to attempt to establish statistically the standard deviation or the co-efficient of variation of the input data, and based on this information conclude that the resultant valuation figure may deviate by a specified figure from the assessed value. Alternatively, a more simplistic approach, as referred to in the exercise above, can be adopted which estimates the likely limits of a reasonable result.

Sensitivity studies which examine the affect of changes of a single variable, or several variables, on the resultant figure are also useful and informative. Sensitivity studies (or analyses) are easily performed within certain computer based programmes. I have no doubt that programmes which incorporate this type of analysis will be of great benefit to the valuer and his/her client in the future.

The most sophisticated measure of accuracy incorporating capitalisation rates for property is the simulation model. This model requires an estimation of the probability range of certain input figures and it computes through random selections the probability of a specific rate of return being obtained. It is useful if the input data can be accurately specified.

While certain measures of accuracy might appear as nightmares to some valuers, there are simple ways of specifying the likelihood of a resultant figure and these, if no more, should be done.

Conclusion

When attempting to establish the capitalisation rate for property it is essential that a careful analysis be made of all the factors that influence the capitalisation rate. These factors can broadly be categorized into external factors of the marketplace and internal factors of the particular property.

The market value of investment property is a function of the capitalisation rate and the income from the property; hence it is logical to capitalise actual (factual) income to arrive at the open market value. Fictional income, such as market related rent when the property rent is not market related and bound by lease, should not replace factual income; however, the valuer must take into account the difference between actual and market rent in his/her assessment.

It is necessary to use future cash flow analyses to assess the value of investment properties when the income varies from market levels but great care should be exercised in:

1. making assumption on future cash flows;
2. establishing discount rates;
3. establishing capitalisation rates or terminal values; and
4. keeping the time period to a minimum.

Linked to the assessment of the worth of an investment property is the responsibility to specify the accuracy of the assessment, thereby quantifying the degree of risk.

The task of the valuer and property manager will be made easier and more logical with the aid of simple and practical computer based programmes which are developed for New Zealand conditions. Such programmes will give the property profession more'accurate data and better exposure to probabilities. The computer will never become a decision making property professional but it has the ability of substantially enhancing the performance of the real property professionals.

Professional Indemnity Insurance

By David Miles LLB

David Miles, L.L.B. graduated in Law from the Univeristy of Melbourne in1968, and has been a partner in the Melbourne legal firm of Maddock Lonie & Chisholm since 1970. He was President of the Law Institute of Victoria from 1984-1985, and is currently a member of the Executive of the Law Council of Australia and the Victoria Law Foundation.

He has practised in litigation and insurance law for over 15 years.

He has been Chairman of the Solicitors Liability Committee in Victoria since April 1986. (This Committee was established by statute in 1985 and administers the Compulsory Professional Indemnity Insurance Scheme for Victorian Solicitors.)

The phrase "it will never happen to me" Is heard less often nowadays in conversations amongst professionals when talking of a colleague's misfortune in being served with a writ for professional negligence. It is a brave practitioner who can say, in our increasingly complex society, that they never have been nor ever will be negligent.

Any address dealing with professional indemnity insurance must of necessity examine the development of the law as it applies to professionals. However, this paper is not intended to be a case-by-case analysis and therefore reference to legal precedent is deliberately condensed.

What is proposed is a free ranging discussion of the following issues in the hope that out of the discussion will come some ideas for the future which will ensure that all professions remain viable careers and that consumer confidence and acceptance are maintained:

1. Should the professional be required to have a compulsory level of cover and, if so, what is the appropriate level?
2. What is the most equitable basis of calculation of a compulsory premium?
3. Should the liability of professionals be limited?
4. Should the insurance scheme be run by the profession or by insurance brokers on behalf of underwriters?
5. Should the profession self insure under a mutual scheme?
6. Risk management for professionals.
7. Understanding your insurance cover.
8. What to do if a claim is made against you.

The above matters will raise many ancillary issues some of which will be more important to some than others. The pessimistic view is that if we practise our respective professions successfully and with a reasonable volume of work for long enough, then we will inevitably fall short of the standard of care and be faced with a claim for professional negligence.

Today's professional, in whatever sphere of practice, has to cope with the increasing demand of modem society that he exercise his skill with reasonable care. Keeping one's skills up to date has never been more difficult. The professional must continue to educate himself if he is to perform to the standard required by the law.

It is essential that part of that education include knowledge of developments in the law relating to professional negligence so that he may guard against potential legal action. It is also essential to understand that adequate insurance protection against a claim for professional negligence, should it arise, is a cost of practice that he must accept.

Developments in the Law

Negligence is the omission to do something which a reasonable man would do, or the doing of something which a prudent and reasonable man would not do *(Blyth v Birmingham Waterworks Co.* [1856] LR 11 Exch. 781, 784). Upon this basis one who carelessly drives a motor vehicle and thereby injures another may be liable in ngeligence to pay damages to the injured party.

> Negligence is the omission to do something which a reasonable man would do...

A finding of negligence is the outcome of three quite distinct enquiries:

1. Did the defendant (in my example, this would be the careless driver) owe a "duty of care" to the plaintiff (the injured party)?
2. If so, did the defendant breach that duty?
3. And, finally, assuming a duty and breach of duty, did that breach cause the injury, loss and/or damage of which the plaintiff now complains?

Sometimes there is also a subsidiary enquiry as to whether that injury, loss or damage is too remote a consequence of the defendant's breach of duty.

Essentially, though, these are the three enquiries the three phrases which must be gone through in any negligence action. It is no less so when the complaint is of the negligent provision of information or advice, and involves the application of "special principles" specifically to the question of whether, and, if so, when, a duty of care is owed. According to general principles, a duty of care is owed whenever there is a sufficient relationship of "proximity" between the plaintiff and defendant. It is not simply enough to show the defendant could *reasonably have foreseen* that carelessness on his or her part may have resulted in the plaintiff suffering injury, loss or damage of some kind in order to establish a duty of care is owed. There must be proximity, in the sense of a nearness or closeness in the relationship between the parties. The issue is whether the relationship between the plaintiff and defendant was sufficiently proximate. Breach of duty - the second pre-condition to liability in negligence is essentially a factual matter. Having found that a duty of care exists, the courts decide what standard of care the "reasonable man" would have observed. If a defendant's conduct falls short of that standard, the duty of care will have been breached.

The careless motorist will, then, be in breach if his or her driving did not conform to the standard expected of the reasonably competent driver. The final enquiry the final pre-condition to liability concerns causation. The breach of duty must have been the cause of the plaintiff's injury, loss or damage. This means that the plaintiff must prove that:

a. "but for" the defendant's breach, the injury, loss or damage would not have occurred; and
b. subsequent to the defendant's act or omission there intervened no other event sufficient to breach the causal nexus between the breach of duty and the injury, loss or damage complained of.

Our careless driver will therefore only be negligent upon proof that "but for" his or her carelessness the plaintiff's injuries would not have occurred, and that there was no new or intervening cause.

So much for general principles. As I foreshadowed a moment ago, the special principles of negligence misstatements concern the "duty" issue whether the professional owes a duty of care. These principles have developed in response to the inadequacy, or at least unsuitability, of the reasonable foreseeability criteria. To subject a professional to a duty of care merely because he or she could reasonably have foreseen loss would be to ignore a crucial factor that the damage flows not immediately from the making of the statement, but from the recipient's reliance on the statement and his or her action or inaction which produces the loss, often being purely "economic" (as distinct from physical injury or property damage).

So we have these particular principles which define much more specifically (and restrictively) when a duty of care is owed, and it is to these I now turn.

Until the landmark case of *Hedley Byrne & Co Ltd v Heller & Partners*, an innocent but negligent misrepresentation could not give rise to an action unless the duty of care arose out of a fiduciary or contractual relationship. In 1963 the House of Lords, the highest judicial tribunal in the United Kingdom, recognised that a negligent misrepresentation may give rise to liability in a tortious action.

The case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 465, involved a plaintiff who suffered a financial loss after relying on a favourable credit report on a bank customer that subsequently went into liquidation. The House of Lords held that if aperson (who was not under any contractual or other obligation) gave information or advice to another in circumstances in which a reasonable man would know that he was being trusted and his skill and judgement were being relied upon, then unless responsiblity is clearly disclaimed that person has accepted a legal duty to exercise reasonable care and skill in giving the information. If he failed to exercise this care and skill and the person who relied on that information or advice suffered financial loss, then he would be accountable for such loss.

The members of the House of Lords were not unanimous in their analyses of the circumstances which gave rise to the relationship whereby a legal duty to exercise care in giving information arose. However, the seeds of increased professional responsibility were clearly sown.

There has been a divergence between the Australian and English Courts' interpretation of *HedleyByrne*. The High Court of Australia, in the cases of *MLC v Evatt* (1968) 122 CLR 556, *Shaddock v Parramatta City Council* (1981) 55 ALSR 713, and *San Sebastian Pry Ltd v Minister Administering Environmental Planning and Assessment Act* (1987) 61 ALSR 41, set out particular principles applicable to the duty of care issue. Insofar as there was a common statement of those principles, it was, I believe, in these terms, i.e. a defendant owes a duty of care whenever:

1. he or she provides information or advice on a "serious" matter,
2. it is known, or *should be known* that the plaintiff (or somebody in the plaintiff's position) would rely upon its accuracy;
3. the plaintiff does so rely in circumstances where it was reasonable to do so.

The *San Sebastian* case is notable if only to stress that a duty of care is owed when there is a sufficient relationship of proximity between the maker of the statement and the recipient, and that the element of reliance is likely to be the "crucial" factor in deciding whether there is such proximity. This has major implications for the situation where a person directs his or her statements to a class of persons with the intention of inducing members of the class to act or refrain from acting in reliance on the statement, in circumstances where he or she should realise that they may suffer economic loss if the statement is not true. The majority in the court were of the opinion that the reasonableness of the reliance will be a relevant factor in most cases, except where the statement was intended to operate as a direct inducement to act.

In summary, then, Australian courts have accepted the principle of *Hedley Byrne v Heller*, and stressed that the recipient of professional advice will need to make out "proximity" in order to establish a duty of care.

The proximity point was highlighted in the New South Wales case of *Burke v Forbes Shire Council* (1987) Aust. Torts Reports 68,929. This matter involved a council which was negligent in the provision of planning advice. It was held the council was liable not only to the plaintiffs who purchased the land on the basis of this information, but also to the guarantors of the plaintiff.

In the New Zealand case of *Scott Group Ltd v McFarlane* (1978) NZLR 453, and the English case of *JEB Fasteners Ltd v MarksBloom & Co* (1981) 3 All ER 583, auditors have been held to have a duty to foreseeable but unknown takeover bidders who relied on negligently prepared accounts. In the reasoning of both cases the test of reasonable foreseeability was the major determinant of liability. It is arguable, given the High Court's judgment in the *San Sebastian* case, that this would not be the law in Australia. As I mentioned before, it is "proximity" that determines whether a duty of care is owed, and the decision in both cases would need to be reconsidered in light of this.

In the New South Wales case of *BT Australia Ltd v Raine & Horne Pty Ltd* (1983) 3 NSWLR 221, valuers were held liable to unitholders in a unit trust for a negligent misstatement made to the trustee in a valuation report. The individual unitholders suffered economic loss not by themselves relying on the misstatement, but as a result of the trustee relying on the report and acting in the execution of an existing duty to the unitholders. The central point was that the valuer was aware of the use to which the valuation would be put. The valuer owed a duty of care to those who were not direct recipients of the report because of an awareness that the trustee would use it in the carrying out of its duties to the unitholders.

The decision in *Hedley Byrne* was embryonic and subsequent developments in law have extended the range of persons to whom a professional may be liable for negligent advice. Several questions arise for all professionals:

1. What constitutes a breach of duty?
2. To what extent am I liable?
3. Are there or can there be any restraints on my liability?

The level of care and skill required to be exercised by a professional is that of the reasonably competent practitioner.

1. The level of care and skill required to be exercised by a professional is that of the reasonably competent practitioner. Therefore, a valuer's actions will be compared to those usual practices or procedures of the profession. If there are differing approaches or schools of thought in respect of methods of valuation, the Court does not make a judgment on the legitimacy of one compared to the other, but rather determines whether the

valuer who provided the advice was reasonable in his choice of method. It might now be the law that provided one has followed an approach accepted as "proper" by a "responsible body" of professional opinion, no allegation of inadequate care or skill can succeed.

Such an approach is, in my view, reasonable, for the professional must be relied upon to assess that the basis of his judgement is sound.

In the case of valuers, there is some argument as to whether the Court should consider the type of work the valuer is retained to peform. Obviously, valuations are required for different purposes and may therefore quite legitimately lead to different results. For example, a mortgage valuation of premises does not necessarily reflect an open market valuation in the case of a forced sale *(CorisandInvestmentsLtd vDruce & Co* [1978] 248 EG 315). However, in the case of *Singer & Friedlander Ltd v John D Wood* (1977) 243 EG 212, it was stated that a valuation should reflect the opinion of the valuer in respect of the true market value of the land at the relevant time. It was irrelevant for what or by whom the valuation was sought!

Some might think that this is a very restrictive rule, having regard to the limited instructions one often receives. A prudent valuer would be wise to qualify his opinion carefully with reference to the parameters of his investigations and the purpose for which the valuation is intended. In other words, take care with the opinions expressed if instructions are limited, i.e. "don't stick your neck out".

A decision of the Victorian Supreme Court earlier this year, *Mendelson & Anor. v Duncan & Weller Ply Ltd* (unreported), found a valuer negligent in valuing partly constructed townhouses for intending mortgagees, not in respect of his estimate of the fair market value of the completed properties but in his estimate of the cost to complete the work.

The monies advanced were a fixed percentage of the value of the completed properties less the completion costs. Once the estimate was given and relied upon by the mortgagees to their detriment, it was then too late for the valuer to argue that he was not a builder and lacked the necessary expertise to make such an estimate.

2. It is an essential element of a claim for negligence against a valuer that the plaintiff prove the damage suffered is as a result of reliance on advice given.

This may be difficult to assess. For example, if a property was purchased at a figure assessed by a valuer and subsequently it is discovered that the property was overvalued, then the difference between the inflated and realistic figures would form the damages recoverable.

In determining what is the correct or realistic price, actual market value is not always conclusive.

However, if the property is negligently overvalued but in fact purchased at a realistic price, then the purchaser, although deprived of what he expected to be a bargain, has suffered no real loss and would be entitled only to nominal damages.

In determining what is the correct or realistic price, actual market value is not always conclusive. In the case of *Bell Hotels Ltd v Motion* (1952) 159 EG 496, the plaintiff sold his premises for £17,750 on the basis of a valuer's advice. The same property was resold almost immediately for £25,000. In assessing damages for the negligent valuation, the judge did not use the resale figure of £25,000 (as he considered it to be inflated), but accepted evidence that the property was realistically worth betwen £22,000 and £24,000 and awarded accordingly.

3. The courts are prepared to limit the liability of professionals in certain instances. It is generally accepted, at least for the moment, that advice which is given informally at a social function cannot be relied upon.

If there is a contract between valuer and client, an effective disclaimer clause may successfully limit liability if it is included at the time the contract is entered into. However, itmustbe pointed out that the courts will generally read down such a clause to limit its application.

...an effective disclaimer clause may successfully limit liability if it is included...

Indeed, a disclaimer clause contained in a contract may not protect the valuer from liability to a third party for negligent misstatements unless the advice is given on a "no responsibility" basis and it is reasonable for the valuer to rely on this exemption notice in the circumstances. In *BT Australia Ltd vRaine & Horne Pty Ltd a* clause in the report accepting responsibility to any third party user was ineffective to deny liability to the third party unitholders. There was no disclaimer for damage resulting to the third parties by the very use of the report for which responsibility was accepted; that is, the valuer was aware the recipient would use it in execution of his duties as trustee, and it was through this use the unitholders suffered economic loss.

A very recent decision of the English Court of Appeal in *Harris v Wyre Forest District Council, The Times* 22/12/87 held that a disclaimer contained in the defendant's loan application form to the effect that a valuation of the property was for its information only and that no responsibility was implied or accepted for the value or condition of the property meant that no duty of care was owed to the plaintiff when it was subsequently established that repairs originally recommended by the defendant's valuer, which were not carried out, rendered the property unsaleable. The words of the disclaimer were of fundamental importance and led the Court to find that it could not be said that the defendant ought reasonably to have recognised its answerability to the plaintiffs in making the valuation.

Therefore, as the cases show, a disclaimer clause must be precisely worded. Sometimes, though, a disclaimer will be ineffective. In cases where the Trade Practices Act 1974 (Cth.) applies, any attempt to oust the implied warranty as to the exercise of reasonable care will be void, and may lead to the commission of a criminal offence.

Finally, the liabiity of valuers is not limited to actions for negligence. Various jurisdictions have legislation covering advice which is misleading or deceptive. For example, in Australia, Section 52 of the Trade Practices Act 1974 (Cth.) has been extended by the Federal Courtin *Bond Corporation PtyLtd v Thiess Contractors Pty Ltd* (1987) ASC 55-557, to apply to professionals such as consulting engineers and valuers. It is not necessary for the professional to be incorporated because the Act extends to natural persons when the advice involves the use of postal, telegraphic, or telephone services or possesses some interstate element. More direct legislation can be found in Victoria's Fair Trading Act1985 which directly prohibits a person engaging in conduct that is "misleading or deceptive".

In endeavouring to digest the law on this subject, remember that if legal action should ensue, your actions will be judged with the benefit of hindsight.

That daunting reality can only cause us all, when forming conclusions, to think, and then think again.

Insurance Protection What are the Options?

The onus to act with reasonable care in pursuit of your daily professional task demands consideration of the need to insure against error. Any professional who claims immunity from the

likelihood of legal action for professional negligence fools only himself. This applies whether he practises on his own, in partnership or in association with others.

Any professional who claims immunity from the likelihood of legal action for professional negligence fools only himself.

The *Oxford Dictionary* defines a profession as: "A vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others or in the practice of an art founded upon it."

If we claim as practitioners the privileges and status of a profession, then we must assume the responsibility of being accountable to those who rely upon us. Acceptance of that responsibility demands that we consider how claims will be met if they are made against us.

Some professionals may argue that their personal affairs are so organised that if something does go wrong their personal assets will remain secure. Others may argue that the consumer should have regard to the security and reputation of individuals before seeking assistance, and therefore minimise the risk. In my opinion, such attitudes are unprofessional and unrealistic.

The consumer will select a professional by various means and the most striking advertisement or glowing recommendation is no real guide to the degree of skill ultimately applied. Specialist accreditation within a profesion may be a guide but no more. Generally the consumer of professional services will assume a standard for all and not seek to grade levels of skill, security or reputation. There are many other more important factors in the mind of the consumer when selecting a professional for a particular task, such as price, locality and efficiency of service.

In my opinion the professions have an obligation to ensure that, where damage is suffered by a client and it can be established that reasonable care has not been exercised, any judgment obtained should not be barren. For the vast majority of professionals, therefore, insurance cover is essential.

Those who do not share my view should be wary of the risks of the alternative. Arrangement of one's personal affairs so as to protect assets in the absenceof insurance is nowhere near as simple as it is often made out. Assets transferred to a trustmustbe paid for and the continuing control of those assets closely examined to account for later life (retirement or matrimonial problems). Statutory provisions to protect creditors in the event of an asset transfer are likely to be given extended meaning by the courts. The safest course is total disposal and surrender of control an option that any individual professional should consider with extreme care. Bankruptcy may avoid meeting liabilities but may also ruin a professional career. Indeed an act of bankruptcy to some professionals may mean the loss of the right to continue to practise the profession.

On balance, the risks of no insurance far outweigh the cost of adequate cover.

On balance the risks of no insurance far outweigh the cost of adequate cover.

The matters which are discussed hereafter are based almost exclusively on my experience over a number of years of being involved with compulsory professional indemnity schemes for lawyers in Australia (particularly the State of Victoria) and the United Kingdom where for almost 10 years a fixed level of insurance has been a compulsory pre-condition to the right to practice, and my years of practice as a litigation lawyer.

If I were to rely on that experience alone you would be entitled to suspect that my conclusions were coloured by habit and a sense of resignation.

However, you should understand that the reason that compulsory schemes have developed to their present level in Australia and elsewhere is because of the demands made upon them. Community attitudes towards professionals have changed; the law is developing to reflect those attitudes and so too is the attitude of my own profession towards prosecution of claims for professional negligence.

Lawyers are not the major protagonists of the growth of litigation in this area, although I confess that many of the traditional areas of common law litigation are diminishing (such as personal injury cases for industrial and motor vehicle accidents) and professional indemnity claims are more closely examined. The real impetus behind this trend in litigation comes directly from the consumer of professional services who is less inclined than previously to accept service that falls short of the appropriate standard.

Conventional Insurance

Developments in the law, consumer awareness and the inclination to litigate have made conventional insurance contracts for professionals a less attractive option. There is an increased exposure to the ups and downs of the world insurance market and premiums and level of cover are affected by disasters elsewhere in the world, even in areas outside the field of professional indemnity. When the market is tight only those professionals with good claims records can get insurance cover at affordable premiums. Premiums reflect the need for underwriters and brokers to make a profit, and contracts will generally be for one year only so that there will be a level of insecurity about long-term cover.

The conventional insurance contract has many pitfalls for the busy professional - particularly non-disclosure provisions. There is little, if any, direct contact with the insurer, and the claims handling and payment process is often a long-term affair.

Insurers will come and go in the market and there is no guarantee that when a claim reaches the stage of finality the relevant insurer will still be in business and able to meet the claim.

Compulsory insurance - with a secure established underwriter, although disliked and misunderstood by many is probably inevitable in the long term. A requirement that all members take out their own independent cover in the conventional market is unlikely to work because some members of a profession will be uninsurable, and others only at prohibitive premiums.

An approach by a profession as a whole will generally enable underwriters to provide less restrictive cover at more affordable premiums. The prospect of receiving a large premium pool in one amount from one source and dealing with a central claims administration has its attractions to underwriters and, in my experience, benefits the insured.

Compulsory Insurance

In 1978 the Solicitors in the State of Victoria were asked to endorse a compulsory professional indemnity insurance scheme. Initially the proposal met with a mixed reaction at a time when not all practices had any or any adequate cover. The scheme was ultimately endorsed without significant dissent. Such endorsement in my view showed a recognition of true professional practice and respect for the dilemma of the badly treated client.

Subsequently solicitors in the States of Queenlsand, New South Wales, South Australia and Tasmania followed suit. A compulsory scheme exists for all solicitors in the United Kingdom.

I acknowledge that in other professions there may be insufficient members or organisational structure to mount a

centrally run compulsory scheme.These difficulties, however, should not in my view, deter continued consideration of such a goal.

In cases where the Licensing authority is separate from the professional body, there may be many obstacles, and professions may be concerned to hand over another area of control to government or a semi government body.

In such circumstances the first step would be reform to overcome these obstacles, for if there is no central body with an all-embracing Master Policy, then a requirement that all members of the profession be insured before they are licensed to practice may mean that many will be denied cover by the conventional insurance market for reasons of unacceptable risk.

If professional careers are to remain viable in an age when clients demand high quality service at all levels then Compulsory Professional Indemnity Insurance cover is essential.

If the professions do not move to establish compulsory schemes in time they will be imposed by Government, because the electorate will demand such reform.

Setting the Premium

The basic requirement of a compulsory insurance scheme is that it must be possible to obtain reasonable minimum cover for all at an affordable premium.

What is an affordable premium is a matter that will produce considerable debate, particularly when it is complicated by the need to have an adequate premium pool to enable purchase of a reasonable level of cover per claim.

The three principal methods of calculation of premium are as follows:

1. a premium fixed at a percentage of gross fees in the area of practice;
2. a premium per head of principal in the practice; and
3. a premium per head of qualified persons in the practice, whether principal or not.

The selection of the appropriate method of calculation requires careful analysis of data to ensure that what is decided is broadly equitable for all. The compilation of this data to enable financially viable projections to be made can be an enormous task.

Where you have a mixture of levels of cover and terms of insurance with different insurers, and many members of a profession uninsured, a comprehensive survey of the profession is essential. But even then the information gathered will probably be inadequate by traditional insurance standards.

Having gathered what information you can, it is necessary to determine what course should be adopted to provide adequate cover for claims. The matters that need to be addressed are as follows:

a. What level of cover is to be provided for each and every claim?
b. Whether that cover is to be provided by a Master Policy scheme through an established insurer or a conglomerate of insurers through an underwriter?
c. Whether the fund should self insure with or without re-insurance?

The ability to gather meaningful data at the outset will pre-condition what course is to be followed. The more comprehensive the data the easier it will be to engage the conventional insurance market in discussions and enable early indications of the level of cover available and the premium to be levied. It will also make the decision as to self insurance, in part or totally, easier to determine.

If it is decided to pursue the "gross fee" formula then care needs to be taken as to what is defined as the area of practice for the purposes of that calculation. In practices of multi-discipline this could cause difficulties (e.g. Licensed Estate Agents and V aluers).

The gross fee approach may mean that the premium arrived at is considerably more than many are already paying on a voluntary basis with a perceived low level of risk.

The inexpert sole practitioner who occasionally dabbles in the area of valuations may in reality be a far greater risk than the highly geared multi-partner organisation operating in a capital city. The same may apply to the part-time practitioner.

In my opinion the "gross fee" method of calculation of premium for a compulsory scheme can only be considered where there are detailed claims statistics available over a number of years. It is unlikely that such statistics will be available prior to the setting up of a compulsory centrally administered scheme which uses some other method for premium calculation.

Whether the number of qualified persons in a practice bears a relationship to the risk will also only become evidence from claims statistics. Such a method of calculation may lead to dramatic increases in premiums for large organisations with excellent claims records and therefore alienate their support for a compulsory scheme.

Large organisations are likely to have few principals and a considerable number of qualified employees. To calculate the premium on principals only may mean that smaller organisations or sole practitioners will be required to pay an increased premium totally unrelated to risk having regard to volume of work.

On balance, I believe that the best method to begin with is that of assessing a premium per qualified practitioner in the practice with a reduction for employees, which is reasonable having regard to the responsibility of the principals of the business.

The compulsory scheme for solicitors in Victoria moved to this method in 1986, having previously charged a premium for principals only.

When the scheme was established in 1978 the premium was approximately $500.00 per principal in practice with a cover of $50,000 per principal per claim. In 1986 and 1987 the premium was $2,100.00 per principal and $700.00 per employee (equivalent to $2,493.00 per principal) for a sum insured per practice of $500,000 per claim. The relationship of the number of principals in the practice and the level of cover was discontinued.

The premium for 1988 is $2,289.00 per principal and $763.00 per employee (Equivalent to $2,717.00 per principal) again for a sum insured per practice of $500,000 per claim.

When the system of rating employees was introduced in 1986 it caused considerable administrative problems because of the need to keep track of employees as they moved around the profession. It has been necessary to establish a cut-off date for the assessment of premium and to provide some relief when changes occur shortly after that date.

The premium is assessed as payable by the employer and the practice has been that employees do not pay the premium themselves. The obligation is upon the employer to advise of a change of employment, and not upon the employee.

Self Insurance Full or Partial

A summary of compulsory schemes for solicitors in Australia for 1987-88 is set out in Appendix A.

You will note that the New South Wales scheme has the advantages of a larger premium pool in its own right, a better claims record and an absence of high level Stamp Duty which costs each Victorian principal approximately $145.

In Victoria we probably have to accept that, because of its larger premium pool, better claims record and absence of Stamp Duty, the New South Wales premiums and level of cover will be difficult to equal. We have approximately a 30% worse claims record and if we add in $400 per principal estimated top-up premium to increase the sum insured to $900,000, our cost per principal would stand at approximately 25% more than NSW.

The comparison set out in Appendix A should alert you all to yet another of the difficulties in establishing a compulsory scheme. Claims statistics will vary considerably from area to area and small numbers in a profession in a particular area do not necessarily mean that the level of claims will be reduced. The ability to command a large premium pool appears to have a direct effect on the level of cover and premium.

The obvious answer is to pool resources and develop one scheme for all members of a profession in the country. However, our experience has shown that to achieve that goal is likely to be a formidable task. For many of the problems which existed at a local level prior to the introduction of a compulsory scheme are

still evident when one seeks to marry individual schemes into a national cover.

The task of agreeing upon a uniform method of premium calculation and level of cover on a national basis once State-based compulsory schemes are established has proved extremely difficult for Australian lawyers, for it appears that a significant number may well be faced with reduced cover or increased premiums to facilitate uniform cover. This difficulty is compounded by the fact that solicitors in Australia are licensed by State law and do not have an automatic right of practice in every State.

It may be that many of the problems which apply to solicitors in Australia will not apply to other professions which are nationally based.

If there are no State or provincial boundaries to practice then a national scheme may be more viable at the outset.

Level of Cover

In setting the compulsory level of cover per claim it is necessary to examine closely what previous claims experience you have been able to gather and to remember that there will be a market for "top-up" insurance for those who require more.

In Victoria we have been of the view in the last two years that a level of cover of $500,000 per legal practice, per claim, is adequate. Our experience in the first eight years of our scheme's operation, and adjusting the value of claims to present day monetary value, is that there have only been seven claims that would exceed that limit, out of a total of 2,239. An increasing number of firms carry "top-up" insurance to various levels over and above the basic level of cover although the majority of practices do not, and see no need to do so. It isthe larger, or more specialised, commercial practices that see the need to do so.

In 1986 theaverage costperclaim was approximately $20,000. The percentage of claims per classification of practice and the percentage of estimated cost of claims was as follows:

	% of Claims	% of estimated cost of claims
Sole Practitioners	42.7	27.7
2-Partner Practice	17.8	16.3
3- to 6-Partner Practice	26.0	36.3
7 Plus Partners	13.5	19.7

The medium-size practice is the greatest cost to the scheme whereas sole practitioners have the highest percentage of claims.

The determination of the appropriate level of minimum cover is directly related to the magnitude of the above average error in the particular area of professional practice.

Limited Liability for Professionals?

In 1987 the Australian Council of Professions made the following policy statement on civil liability of professionals:

"The Council believes that it is in the interest of all recipients of professional services that all professionals be obliged to maintain as a requisite to their entitlement to practice a minimum acceptable reasonable level of professional cover and/or provide other equally satisfactory protection.

...the liability of professionals should be limited by appropriate legislation and/or by contract...

In view of these factors, the Council believes that governments should now accept in principle that:

a. in the interest of providing that the public users of professional services recover reasonable compensation; and

b. in the interests of maintenance of professional competence and integrity of professionals in the country, the liability of professionals should be limited by appropriate legislation and/or by contract. The extent and nature of that limitation may vary from profession to profession and from assignment to assignment, but should be linked with compulsory professional indemnity insurance and/or other equally satisfactory protection for the public."

Until recent times the view was held by many professionals, nyself included, that there should be unlimited liability. However, the problems of insuring against unlimited liability have increased consdierably in recent years. There is now increasing difficulty in securing adequate insurance cover at a reasonable premium as a direct result of the increase in number and size of negligence claims against professionals world-wide.

In other areas of civil liability, governments in Australia have accepted the need to limit the extent of cover in order to maintain an affordable premium. Recent reforms to Workers' Compensation and Compulsory Third Party insurance schemes in some States of Australia have either abolished or restricted the right to sue. Such reforms occured in New Zealand in the early 1970s and in various parts of the United States over the last decade.

Whilst these areas of insurance have greater political overtones than professional indemnity insurance, they are evidence of a trend towards acceptance of limitation of liability if a policy of "cover for everyone" is to remain viable.

The professions should not seek exoneration from liability merely a reasonable and appropriate limitation on the extent of liabiity.

This issue must be addressed by professionals and Government, on behalf of the consumer. Otherwise, there may be a threat to the continuation of the availability of professional services. There will develop increasing uncertainty about redress when claims are made against professional advisers. It may also hamper the growth of the professions and encourage those who continue to practise to take elaborate steps to ensure that their personal assets are never at risk. This can only be to the detriment of the consumers of professional services and the reputation of the professions.

In my opinion, particularly so far as the legal profession is concerned, limited liability would only need to affect very large claims. It goes without saying that in order for there to be a limitation of liability there would have to be compulsory cover at a level sufficient to provide adequate cover to the vast majority of clients.

Establishing a Compulsory Scheme

As I have already indicated the collection of data and claims statistics, and the establishment of a claims handling and administrative structure, are vital components of a compulsory scheme. The cost efficiency of this structure will have a direct effect on the amount of the premium pool that is available to pay claims, which, in turn, will have a direct effect on the level of premium.

If aprofessional scheme is required to engage consultants at all levels and not develop its own expertise then administration costs will be more difficult to control.

If the scheme is based upon a Master Policy wholly underwritten by insurers then there will be substantial claims administration costs and almost inevitably Insurance Brokers' commission.

The more removed the profession is from the day-to-day operation of the scheme the more difficult it will be for the profession to have sufficient input into the method of processing claims. It is my experience that the involvement of the practising professional at the initial claims handling level is invaluable. Whilst lawyers and others maybe required thereafter their taskcan be made easier by initial peer review and advice.

A scheme which has no element of self insurance will always be at the whim of the conventional insurance market and subject to dramatic premium variation depending upon the state of the world market, even though the variation in premiums may not be as a result of claims in a particular profession.

Should valuers in a particular country be subjected to excessive premium increases because of massive claims against accountants

world-wide? In recent times in the conventional market the answer has been "yes".

If it is feasible to do so a cushion can be created between a particular scheme and world trends by the taking of some risk and re-insuring the balance.

This is what is occurring with solicitors' schemes in Australia.

Whilst the scheme will be faced annually with the complex question of whether to re-insure or not, such a scheme has the benefit of accrued investment income adding to the pool available to pay claims. Annual review of the amount claimed from the re-insurer as against premiums paid for each and every claim cover will be an ongoing guide as to whether more or all of the risk on the each and every cover ought to be borne by the fund and whether it is ultimately prudent to move to true catastrophe cover only.

This is, I believe, the way all professional indemnity insurance schemes will have to develop, particularly if the conventional insurance market trends continue as they have in recent years. Limitation of liability for each and every claim will or course be an accelerating factor in such development.

Higher cover at a higher premium may be the price to pay for the peace of mind of knowing that the professional is totally covered.

I believe that the professions either individually or in appropriate groupings need to work towards limitation of liability and total self insurance, with catastrophe re-insurance. Efficiency of administration and self control will minimise costs and maximise investment income and hopefully therefore contain premium increases at an affordable level.

Risk Management

One of the other long-term benefits of the professionals, involvement at the grass roots level of administration of a scheme, will, I believe, be the development of meaningful risk management programmes.

Direct access by practising members of a profession to claim experience should form the basis of programmes to assess patterns of claims and to enable thereafter education, both basic and continuing, to be organised for the profession at large.

The misfortunes and misdemeanours of others need to be publicized and explained for the benefit of all. Advice about simple mistakes by some will lead to modification of procedures by others, although inevitably not all.

Involvement by members of a profession in the running and success of a scheme must, in my view, heighten interest, and make it easier to develop an awareness in the profession of the pitfalls which lead to claims.

It will be a long process and some "old dogs" will never be taught "new tricks" but in the long run we will have a more responsible profession with a better understanding of how claims occur.

The best risk management is to ensure that a high standard of learning and understanding is maintained for entry into a profession and that thereafter the education process is continued. It is essential that the professions do not divorce themselves from the education process. Whilst academics at universities and advanced colleges of education will argue that it is not their role to train professionals for future careers it must be acknowledged that that is where most graduates are headed. There must be a balance between practicality and the pursuit of higher learning. The profession must ensure that they have input into how the basic academic skills are taught and applied.

Perhaps of more importance in the future is the provision of continuing education. Too many mistakes are made by professionals out of ignorance of the current state of their art. Programmes to keep professionals up to date must continue to develop and in time we will all need to consider whether such programmes should be compulsory if one is to maintain the right to practise.

I Am Going To Sue You!

The threat of legal action causes most professionals a great deal of anguish. Many cannot accept that they are ever wrong or if they are that a client would have the audacity to seek redress. Out of ignorance many will ask, "What more could I have done?" For some their best is not good enough to satisfy the standard of care required.

If there is a threat of legal action the problem is obvious. However, in many cases circumstances which give rise to a claim amy not be detected at an early stage and the extent of the damage suffered may escalate.

Containment of claims can be achieved by early recognition of a problem and prompt action.

The problem of a claim being made against you should be treated no differently from other problems you encounter in daily practice.

You should evaluate the threat or circumstances and immediately seek the views of a fellow practitioner. If you remain in any doubt as to liability and you are insured you should immediately check the terms of your policy and report the circumstances in some detail. Failure to do so may result in a denial of indemnity.

You should make no admissions and do not compound the potential mistake.

Make sure that you clearly understand your liability to contribute towards the claim should indemnity be granted. Most policies will have an excess payable by the insured.

In clear cut cases early action by an insurer can contain the loss, resolve the problem, avoid embarrassment and allow you to get on with practice.

"Where Do We Go From Here"

If recent trends of claims against professionals continues then you may have gathered by now that I believe there are three essential ingredients for the future:

1. We must look to a greater involvement in the training of the professional of the future and ensure that education is a continuing requirement of professional life.
2. All professions should move towards the establishment of a compulsory professional indemnity insurance scheme with minimum cover and at least partial self insurance. In the absence of limited liabiity the cover should be adequate and a "top up" facility provided for those who require it.
3. The issue of limited liability for professionals must be addressed by all professions in consultation with Government.

In professions where there is currently no compulsion to insure there is an opportunity to develop a compulsory scheme and address at the same time limitation of liability. If a compulsory scheme is to be introduced and liability is to remain unlimited then it will be important to consider the needs of those who require cover over and above the level offered by the scheme. In this area of elective "top up" insurance there is scope to develop a further scheme on a "like for like" basis with the base cover.

This optional extra can be administered by the same personnel and, in my experience, provided there are sufficient numbers who require additional cover, may lead to further savings in premiums.

Appendix A

1. New South Wales adopted a partial self insurance scheme on 1 July 1987, with the Law Society's mutual fund bearing the first $100,000 of each claim to a total aggregate of $9 million, previous insurers providing cover for the balance of $800,000 each and every claim, making a total sum insured of $900,000.

Contribution per principal is $2,310 inclusive of stamp duty and made up of $1,380 to the mutual fund and $930 to insurers. Stamp duty in New South Wales is a nominal amount, presently about 350 per policy. To 30 June 1985, New South Wales aggregate loss ratio under the old scheme stood at 144%.

2. Tasmania has joined the New South Wales scheme and the contribution per principal for the year to 30 June 1988, is $3225 including 7.5% Tasmanian stamp duty. The base contribution of $3,000 is split approximately two-thirds to the mutual fund and one-third to insurers. To 30 June 1985, Tasmania's aggregate loss ratio stood at 219%.

3. Western Australia also has joined the New South Wales scheme at the same contribution as Tasmania but with the question of stamp duty still under discussion with the W.A. Government. They hope to get away with New South Wales policies and the nominal stamp duty there so that they will be back to the base $3,000 per principal. W.A. has not previously had compulsory insurance so that there is no record of claims experience.

4. South Australia has an arrangement with underwriters under which they self insure the first $50,000 with underwriters providing $700,000 additional cover, making a total of $750,000. Contribution per admitted solicitor is $1,831, which works out to about $2,400 per principal.

The 30 June 1985, South Australia's aggregate loss ratio under the old scheme was at 249%.

5. Queensland from 1 July 1987, has put in place an arrangement similar to New South Wales under which the Law Society self insures for the first $100,000 and underwriters provide additional cover of $400,000 to a total of $500,000. Contribution per principal is $3,955.

6. Victoria has been running its own self insurance scheme since 1 January 1986, the sum insured being $500,000. The contribution per principal in 1987 was $2,100 plus $700 for each employee solicitor. (This represents $2,493 per principal.) Loss ratio to 31 December 1985, stood at 183%.

Summary

New South Wales	$900,000 for $2,310 per principal
Tasmania	$900,000 for $3,225 per principal
Western Australia	$900,000 for $3,000 per principal (plus a possible $210 in stamp duty)
South Australia	$750,000 for approximately $2,400 per principal
Victoria	$500,000 for $2,493 per principal
Queensland	$500,000 for $3,955 per principal

Legal Decisions

CASES RECEIVED

Notice of cases received are given for members' information. They will be printed in The New Zealand Valuers' Journal as space prmits and normally in date sequence.

CASES NOTED

Cases "noted" will not normally be publishd in The New Zealand Valuers' Journal.
Copies of cases "received" and "noted" may be obtained from the Registrar of the Court under whose jursidiction the cases were heard. (A charge is normally made for photcopying.)

THE VALUERS' REGISTRATION BOARD

IN THE MATTER of an Inquiry pursuant to Section 32(2) of the Valuers' Act 1948

AND

IN THE MATTER of charges under Section 31(1)(c) of the Valuers' Act 1948\ against Michael David Eaton

DECISION OF A BOARD OF INQUIRY OF THE VALUERS' REGISTRATION BOARD

Members of the Board:	Mr M R Hanna (Inquiry Chairman) Mr R P Young Mr P E Tierney
Counsel:	Mr C T Gudsell for the Valuer General Mr L H Atkins for Mr Eaton
Date of Hearing:	23, 24 and 25 February 1988
Receipt of Closing Submissions:	23 April 1988
Date of Decision:	27 June 1988

THE COMPLAINT AND CHARGES

This inquiry arises as a result of a complaint dated 27 April 1987, lodged with the Valuers' Registration Board by Mr T W Brown, Manager of Lending, Trust Bank Eastern & Central, Hastings, which cites a valuation by Mr Michael David Eaton, Registered Valuer of Napier, dated 30 March 1987, and addressed to The Manager, Funding Consultants, South British Insurance Building, Station Street, Napier. The complaint notes that "the Bank is concerned with various aspects of the report, the major factor being the valuation figure of $3,200,000 in relation to the purchase price of $1,900,000".

The complaint relates to the valuation carried out by Mr Eaton for a commercial building generally known as the Broadbank Mall at Emerson and Dickens Streets, Napier, and of certain other contiguous land and improvements on the Dickens Street frontage, the whole being more particularly described in documents at the Hawkes Bay Land Registry as Lot 1 on Deposited Plan 14458, Lot I on Deposited Plan 3767, and part of the land in Deposited Plan 2683.

In terms of Section 32 of the Valuers Act, the complaint was referred to the Valuer-General who reported thereon to the Board on 28 July 1987. In terms of Section 32(2) of the Act the Board decided on 6 August 1987, that it was not satisfied that there were no reasonable grounds for the complaint and accordingly an inquiry was required.

The Hearing

A hearing was originally set down for 25 November 1987, but was adjourned at the request of Counsel for Mr Eaton and took place on 23, 24 and 25 February 1988.

The charges drawn against Mr Eaton had been duly notified to him on 14 October 1987, and were read at the hearing as follows:

1. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of your duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 *in that* you, in compiling a Valuation Report dated 30 March 1987 in respect of a property known as the Broadbank Mall situated at Emerson and Dickens Street, Napier, grossly overvalued that property.

2. Section 31(1)(c) of the Valuers Act 1948: That you have been guilty of such incompetent conduct in the performance of *your* duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 *in that* you, in compiling a Valuation Report dated 30 March 1987 in respect of a property known as the Broadbank Mall situated at Emerson and Dickens Streets, Napier, made a mortgage recommendation that was excessive.

When formally charged, Mr Eaton denied the charges.

Property Description

It is convenient at this point to briefly summarise the physical characteristics of the subject property as it was described to the Board by the valuer witnesses. The land is stated to lie in the Central Business District of Napier City, having a relatively narrow frontage to Emerson Street which lies in the heart of the retail area. That frontage is of about 10 metres and from that point the land runs back tojoin the centre of the rear boundary of a much larger area which fronts to Dickens Street which in turn is said to be a secondary but improving retail situation. The Dickens Street frontage is of about 66 metres and the area of the aggregated parcel is some 3951m2 of which about 445m2 is contained in the narrower portion fronting to Emerson Street. The land is said to be level overall and has the

additional advantage of access from two service lanes.

In March 1987 the main building on the site was a structure of three floors plus a basement which had been erected in 1975. It was generally of concrete construction and was said to have been built to standards sufficient to allow the addition of further floors at some future date. At the time with which we are concerned, the ground floor comprised a shopping mall with two levels of carparking above it and below some basement space leased as a restaurant/night club. The design of the mall allowed direct pedestrian access between Emerson and Dickens Streets, a flow said to be of increasing importance having regard to the general development of the C.B.D. The mall area was subdivided into 25 separate shops which were fully occupied as 19 separate tenancies. The remainder of the property comprised an area of vacant land fronting to Dickens Street while on the western side of that frontage stood an eldery, single storey concrete building generally known as Kerrs Furniture Mart. While not directly relevant to this hearing, it was confirmed by all the valuers that this building has since been demolished and that work has commenced on a major extension to the mall to cover the whole of the balance of the land fronting to Dickens Street.

The Evidence for the Valuer-General

Mr Gudsell opened with a brief summary of the evidence he proposed to present and then called Mr S W A Ralston, the Valuer-General. Mr Ralston submitted his formal report to the Board concerning the inquiry into the complaint which he had carried out underthe terms of Section 32(1) of the Valuers Act 1948. He confirmed that Mr Eaton had been registered under that Act in 1985 and that he held a current annual Practising Certificate in each of the years 1986 and 1987. Brief cross-examination and re-examination completed Mr Ralston's evidence after which Mr T Rawcliffe was called as the first valuer witness.

Mr Rawcliffe stated that he had more than 20 years experience as a valuer and that during the past 17 years he had been practising his profession in Napier, predominantly in the urban field and over recent years mainly in the commercial and industrial sectors. On 27 June 1986 (that is to say some nine months before the valuation which is the subject of this inquiry), he had valued the Broadbank Mall on behalf of the then owners and had assessed its worth at the sum of $2,260,000. Mr Rawcliffe submitted a copy of that document together with written evidence concerning the valuation exercise. He noted that the actual rental income at the time was $176,814 net from the shop tenancies and $24,528 from the carparking giving a total net annual income of $201,432. He then proceeded to make further adjustments to this income stream to rate all of the rentals at then current market levels resulting in a net maintainable income of $217,151, an amount which he capitalised at 11.75% to indicate a value for the shopping mall at $1,850,000. The balance of the property he treated as vacant land suited for re-development and based upon quoted comparable sales he assessed a worth of $410,000 for the sum total of $2,260,000.

In response to questions in examination-in-chief, Mr Rawcliffe noted that the property had subsequently sold in May or June 1987 at $1,900,000, but that had his June 1986 valuation been upgraded to March 1987 then he would have expected from general marketmovements that his assessment of value would have been of the order of $2,450,000. Mr Rawcliffe also stated that he had valued the property on a number of occasions but was not aware of any particular keenness to sell by the vendors. He had been associated with rental settlements in the mall over a number of years and regarded those rentals as being market related. Some had been disputed from time to time but none had been taken to formal arbitration. His written evidence had included schedules on which a number of commercial sales in Napier were analysed and he pointed out that none of these had been recorded at a yield below 10% and that the great majority fell in a range of 11% to 13%.

Mr Rawcliffe was cross-examined in considerable detail by Mr Atkins with particular reference to rentals of shops in the mall which had been due for review in the relatively short term. In response to specific questions he agreed that the potential to add further floors to the Broadbank Mall building could be seen as an advantage, but concerning carparking stated that he was not aware of any looming parking crisis in Napier. MrRawcliffe agreed with counselthat capitalisation rates depend to some extent on market conditions from time to time and noted that two post-date sales on his schedule, one in February 1987 and the other in September 1987, showed yields of 10.36% and 10.05% respectively. Of the two, he regarded the latter as the better comparison with the subject but pointed out that it was for a lease-back transaction concerning a modem office block occupied by a substantial local professional firm, and that the price was of the order of $1,050,000 and not the much higher level attributed to the Broadbank Mall. This point was reiterated in re-examination by Mr Gudsell.

The Board's view of Mr Rawcliffe's evidence was generally favourable. He provided a range of carefuly analysed comparable evidence to support his conclusions and was not seriously shaken at any point in cross-examination.

It is fair to observe that he showed some reluctance to consider the possible validity of differing viewpoints, but it is the Board's opinion that in completing his valuation on 27 June 1986, and in later adjusting that figure to 30 March 1987, he adopted a sustainable and prudent valuation approach appropriate to the circumstances.

The second valuer witness for the Valuer-General was Mr K E Parker who has been a District Valuer for the Valuation Department in Napier for about nine years. Mr Parker has a wide range of experience, both in the Hawkes Bay and other parts of the country. Mr Parker had been responsible for the valuation of the Broadbank Mall in the quinquennial revaluation of Napier City as at 1 July 1987, at which time the capital value of the proerty had been assessed at $2,400,000. Mr Parker provided written evidence in support of that assessment including detailed schedules of the improved and vacant commercial sales which, with one exception, pre-dated his own valuation though several were subsequent to the valuations of either Mr Rawcliffe or Mr Eaton. Since the revision of the Government valuation, Mr Parker had been instructed by the Valuer-General to review his assessment back to the date of Mr Eaton's valuation, that is to say 30 March 1987. It was his view that there was no evidence of change over that three-month period and he considered that the value of $2,400,000 would have applied equally at that earlier time. His principal approach to the valuation had been by a capitalisation of net income for which information effective January 1987 had beenprovided by the then owner. That net income was stated as $219,468 including a peppercorn amount of Kerrs Furniture Mart, and Mr Parker had made adjustments to bring the income to current market levels while excluding the Kerrs rental. He believed the fair market rental potential as at 1 July 1987, to be some $248,000. He said that, "Commercial properties in Napier/Hastings generally sell in the range of 11% to 13.5% net," and after due consideration had adopted 12% net for the valuation of the subject property, indicating a worth for the Broadbank Mall of $2,068,000 to which a further $326,000 was added as the value of the land, and the capital value rounded to $2,400,000.

Under examination Mr Parker expressed the view that the appropriate mortgage recommendation of this sort of property would be in a range of 50% to 55%, subject to capacity to service borrowing costs from income. He observed that a multiplicity of tenancies substantially increases the problems of management and that this was a consideration in his adoption of a 12% yield for the valuation process. Under cross-examination Mr Parker stated that he was aware of the May 1987 sale at the time that he made his valuation and agreed that the property had not been aggressively marketed. He knew that the mallbuilding had been designed for further additions but considered that a prudent buyer would not allow for that factor having regard to the current state of the office market in Napier.

On the completion of Mr Parker's evidence, the case for the Valuer-General was closed and Mr Atkins opened the case for Mr Eaton.

The Evidence for Mr Eaton

In opening, Mr Atkins stated that Mr Eaton had been asked to value the property in partupon a hypothetical basis and that there was a clear distinction between the mall and the other land. In particular, his instructions had envisaged the total refurbishing of the Kerr's Furniture Mart building.

When Mr Eaton was called to the stand he stated that he had some 18 years' experience in the valuation of property. From 1970 he had been Valuation Assistant to a Mr H L Simkin and he had completed the NZIV professional examinations in 1982. In 1985 he was registered and he commenced in practice as a Public V aluer in May 1986. In Match 1987 he was instructed to value the Broadbank Mall and its contiguous land by a Mr Hogg on behalf of prospective purchaser, Altaire Investments Ltd. His instructions were to value the mall and vacant land as inspected, but to include the furniture mart building as if it had been upgraded to substantially improved levels. In comment he noted that the property comprised the mall of 25 shops and basement, upper level carparking, the vacant land used for carparking on Dickens Street, and the furniture mart building. This was a very large site overall with dual frontage and benefiting from the fact that while five years previously Napier had tended to develop in an east-west direction, a shortage of land had since pushed development to the south. He pointed out that on local pedestrian count figures the Emerson Street frontage to the mall ranked sixth in 1986, but had advanced to second busiest location in Napier by 1987. Mr Eaton had noted that he had made inquiries at the Napier City Council concerning the capacity of the building for further addition and had established that under present ordinances it could accommodate two further carparking levels plus four floors of offices. He said he thought this to be important.

As to the vacant land and mart, Mr Eaton had assumed the building, if upgraded, to be capable of generating an income of $47,720. In fact, however, this upgrading did not occur and the mart was demolished in November 1987, and is now part of the site for redevelopment. As to the income from the mall, he had been provided with a printout of rentals by agents in whose hands the property was for sale but he was not aware of the asking price. In dealing with the rentals he did not adjust to current market levels except for three shops which were due for review prior to October 1987, choosing instead to allow for growth potential by an adjustment to the rate used for capitalisation into value.

The Board had some difficulty in following, through Mr Eaton's evidence, the procedures used by him in the valuation which later became the subject of this inquiry. For example, it appeared that in dealing with the rental income Mr Eaton had relied upon the printout provided to him on the basis that it included Goods & Services Tax. When he made the subsequent adjustments for the three shops due for early review, he excluded GST. At the same time he was under the impression that the income from the carparking portion of the main building was stated inclusive of GST but exclusive of building operating expenses, a proposition

which later proved to be incorrect. Accordingly, he adopted an "estimated maintainable gross income" which included GST of $327,460 and an "estimated annual cash flow" which excluded GST of $294,714. By capitalising the former figure at 11%, he arrived at a value of some $2,977,000 and by capitalising the latter at 9%, he arrived at $3,274,000.

All of the above is as set out in Mr Eaton's report. During examination and cross-examination, however, a number of inconsistencies became apparent and it is convenient therefore to record the amounts which were finally agreed upon by Mr Eaton and by both counsel as being the actual net rental structure exclusive of GST against which he had worked. This was:

Net Mall Rentals	$183,582
Net Mall Carpark Rentals	$ 26,720
	$210,302
Plus potential rental for three mall shops to be reviewed	$ 8,400
	$218,702
Plus Vacant Land Carparking	$ 9,925
Plus potental rental from upgraded Kerrs Mart	$ 47,720
Total Net Maintainable Income	$276,347

By our calculation this is in fact a yield of 8.63% on a valuation of $3,200,000.

In answering questions from Mr Atkins concerning capitalisation rates, Mr Eaton confirmed that in the event he applied a yield of 9.3% against the net maintainable income stated in his report. He felt there to be a vast potential for growth in carparking rentals and that the existing shop rentals were low with a potential for growth. He believed that capitalisation rates applying in the market at large in Hawkes Bay were generally stable at the time though with a slight downward trend, but could find no other commercial sales which he regarded as being directly comparable.

Cross-examined by Mr Gudsell as to the inquiry which he had made to establish the range of local retail rentals at the time of valuation, Mr Eaton replied that he had fairly full office records. He agreed, however, that he stated in his report that the actual mall rentals (which had been assessed by Mr Rawcliffe) "compared well with those being obtained for similar premises in the Napier C.B.D.". Mr Eaton agreed that he did not dispute any of the figures and analysis given by either Mr Rawcliffe orMr Marker, but stated that in having an overview of the property he could see a potential for it and that in his opinion his anticipation of that potential had been home out by subsequent events. He agreed that he did not know of sales in excess of $1,000,000 which disclosed net yields in a range of 9% to 10% except that previously quoted at $1,050,000 at 10.05%, but pointed out that if the refurbishing of the Kerrs Furniture Mart was removed from his valuation the assessments by the three valuers would compare as follows:

Mr Rawcliffe	June 1986	$2,260,000
Mr Eaton	March 1987	$2,918,000
Mr Parker	July 1987	$2,400,000

When further questioned by Board members, Mr Eaton was referred to the file from which his original valuation was made. He stated that the leases were not available for his perusal and agreed that it would have been prudent to record in his report that they had not been read by him. He had no breakdown of the scheduled operating costs and was not aware that the mall was managed day-to-day by a firm of chartered accountants. He said that it was his practice to obtain details of operating costs but that he did not do so on this occasion.

Mr Eaton specified four sales which were included in his file as comparables, stating their respective analysed net yields to be 10.26% on a price of $600,800, 12.1% on $1,200,000, 13.5% on $1,000,000 and 11.2% on $640,000 over the period July 1985 to October 1986. He considered that the ruling rate for a block of shops in the main street at valuation date would have been based upon a yield of about 10.5%. He had made no calculations to adjust the market evidence to the rate he had used for his valuation, but had looked forward to the dozen or so rental reviews due in the mall in the course of the following 18 months. He had not calculated what they might mean by discounted cash flow or similar analysis, though he had been satisfied that his projections forgrowth were not unduly high. He had put a lot of weight on that. Notwithstanding that he had done no formal calculations to justify a reduction from a rate of say 10.5% to the level finally adopted, he believed the property to be unique, and his initial capitalisation at 9.3% was necessary to adequately reflect other value components such as vacant land, upgrading of Kerr's Furniture Mart, extra foundation strength for further carparking, and a tower block and pedestrian flows showing an increase. Mr Eaton was not able to be very specific as to the real benefit of these potentials and readily agreed that there was no market evidence to support a reduction from I1+%a to 9.0% as a capitalisation rate at the $1,000,000 value level.

In response to other questions, Mr Eaton acknowledged that his previous experience had not included any retailproperty of the size or characteristics of the Broadbank Mall. He agreed that if the Kerr's Furniture Mart building had been excluded and the whole of the balance of the block treated as redevelopment land of some 1500 sq.m., the value of that item on his stated value rates would have been about $525,000. Further, if that amount *were* deducted from the figure of $2,918,000 (which was his valuation figure excluding the Kerr's Furniture Mart refurbishing), the net value to the mall was about $2,400,000. Given that the maximum net income he had projected for the mall was only $210,302 as at March 1987, he proceeded to calculate the actual net yield on the mall alone to be only 8.76%, or if rental growth to October 1987 was included the yield became 9.11% from $218,700. He agreed that it was fairto say that any closer examination of his valuation procedures tended to worsen the problem rather than to improve it, and said that with hindsight he would have used a higher capitalisation rate which would have meant a lower value. He did not believe that he had overvalued the property, despite the difficulty in substantiating that proposition against the evidence. He felt this to be a "one-off" property and he valued it accordingly.

Finally, to this questioning Mr Eaton said that he had not felt under pressure from his principals to establish a high valuation on the property. He had been aware that they contemplated purchase, but did not know any details.

This completed Mr Eaton's evidence and it was agreed that the inquiry should be closed at that point to allow counsel to present their final submissions in writing.

Final Submission

The written submission of Messrs Gudsell and Atkins were duly received by the Board members on 23 April. Both documents were lucid and detailed and each provided Board members with an interpretation of the evidence which has been of assistance to the Board in reaching its conclusion. Indeed, the Board would wish to record its appreciation of the contribution which both gentlemen have made to this inquiry.

The Board's Conclusions

This long and complex inquiry has not been made easier by the fact that Mr Eaton's original valuation was in part based upon the premises of the Kerr's Furniture Mart refurbishing, a prospect which in fact did not eventuate and which was not even contemplated by the other valuers. Setting aside any matters which might have arisen from Mr Eaton's treatment of that part of his instructions, we can simplify the position at the end of the hearing relative to the combined value of the Broadbank Mall plus all of the balance of land on a redevelopmentbasis, by stating it as follows:

Valuer	Purpose	Effective Date	Valuation
Rawcliffe	Market valuation	6/86	$2,260,000
Eaton	Market & mtge. val.	3/87	$2,918,000
Rawcliffe	This inquiry	3/87	$2,460,000
Parker	This inquiry	3/87	$2,400,000
	Sale	6/87	$1,900,000
Parker	Govt valuation	7/87	$2,400,000

Basic to the arguments of Messrs Rawcliffe and Parker has been their evidence of recorded rentals, sales and yields current in the marketplace at or about March 1987. In response, Mr Eaton contends that while he was aware of either the detail or the generality of the market data, he perceived the Broadbank Mall to be a unique property with a potential which justified exceptional treatment. Both he and his counsel go further and claim that subsequent events have tended to prove him correct.

From that brief summation, the Board can move to consider the charges.

We should say plainly that in our view the technical procedures and logic which were applied by Mr Eaton in reaching his valuation were totally inadequate. He was not able to demonstrate to us anything which could justify many of the actions he had taken, in particular by reducing the capitalisation rate on the mall by almost 1.4% from his own estimate of 10.5% for similar property or by 2.6% or more from the levels adopted by the other valuers. Nor could he explain the decisions he had made in respect of outgoings where it was clear that he had either utilised unchecked data or had made factual errors in the preparation of his report. Furthermore in this complex valuation exercise, the largest of his career, he made no effort to check his conclusions by the application of well-established techniques for calculating the impact of future cash flows, notwithstanding thatthefull weight of his valuation hinged upon his perception that there was some significant future potential which justified his decision. Put bluntly, in completing this valuation Mr Eaton showed himself to be, by any professional standard, not only technically inadequate, but also careless, inaccurate and perhaps gullible.

Having said all of that, however, Charge I alleges only that he was incompetent by virtue of grossly over-valuing the property. In that respect, it is the Board's opinion on the basis of the evidence presented before it that the fair open market value of the Broadbank Mall and its associated land, excluding a refurbished Kerr's Furniture Man, almost certainly lay in a range $2,400,000-$2,500,000 as at 30 March 1987, notwithstanding the subsequent sale at $1,900,000.

When adjusted for comparability, Mr Eaton's valuation exceeded that upper

level by about 17%.

The Board most certainly does not wish to be seen as establishing any precedent as to the margins beyond which valuations may be seen as being either too high or too low. Clearly every instance is different and in each the circumstances are unique, and there can be no hard and fast rules. In this case, however, the question of potential is at large and we do not feel able to ignore the arguments which were raised in that area by Mr Atkins. We must have a regard to the very high standard of proof required in a case of this type and conclude therefore that while Mr Eaton most certainly over-valued the property, he did not in all the present circumstances quite so grossly over-value it that we could reasonably find him to be incompetent on those grounds. While making that determination the Board records its belief that the matter came very close to proof, but that since some area of doubt remained the benefit of that doubt must be given to Mr Eaton.

Charge 2 was to the effect that Mr Eaton made a mortgage recommendation against the property which was excessive. This area of the inquiry was not touched upon in much detail by either counsel, but we note that Mr Eaton's recommendation for an advance was stated at $2,000,000 against his total valuation of $3,200,000 and thus represented 62.5%. If both Kerr's Furniture Mart and the vacant land are excluded, his valuation of the mall alone approximates $2,400,000 and a 62.5% recommendation on that would amount to $1,500,000. We note that borrowing even at an interest rate as low as 20% would require $300,000 to service, but that it is agreed by him that the maximum net income from the mall was only about $218,000. This is superficial commentary which does not necessarily cover all of the relevant considerations, and since we are sensitive to the passing attention drawn by the question of the mortgage recommendation at the hearing, we do not propose to take the matter much further. Suffice it to say that these first leads do not seem to be pointing in a very happy direction.

Board's Decision

Having regard to the nature of the charges, the evidence it has heard, and the responsibilities it carries in administering the provisions of Sections 31 and 32 of the Act, the Board concludes that it cannot find that the charges as drawn against Michael David Eaton are proven, and accordingly it dismisses both.

We wish to record, however, our grave dissatisfaction with many aspects of Mr Eaton's performance in the completion of the subject valuation. His rela ve youth and inexperience are no excuse, and indeed should have been the r eason foni maximising the prudence, care and professionalism he brought to his task. We trust that for the sake of his future career, Mr Eaton will take these strictures to heart, and that the force of our concern will be recognised and responded to by all other registered valuers.

M R Hanna
Inquiry Chairman

The succeeding case, J Rattray and Son Ltd vs *I R Telfer and Anor, highlights the recent attempts made to overturn or influence the outcome ofArbitrations. (G.U.S. PropertiesLtd and Government Life Insurance Corporation.)*
There is a growing tendency for arbitrations to be influenced by Court decisions or legal precedent. The task of a sole arbitrator or Umpire in this area is becoming more onerous.

Editor.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 417/86

IN THE MATTER of Section 11 of the Arbitration Act 1938

BETWEEN: J. RATTRAY AND SON LIMITED a duly incorporated Company having its registered office at Christchurch

Plaintiff

AND

IAN ROBERT TELFER of Christchurch, Registered Public Valuer

First Defendant

AND

DIMITRI RICHARD COCOREMPAS of Christchurch. Company Director

Second Defendant

Hearing: 7 August 1987

Counsel: E. D. Wylie for Plaintiff
R. J. De Goldi for First Defendant
T. C. Weston for Second Defendant

Judgment: 23 October 1987

JUDGMENT OF WILLIAMSON, J.

The plaintiff seeks an order setting aside an arbitration umpire's award. Initially the proceedings sought an order pursuant to s.11 of the Arbitration Amendment Act 1938 requiring the arbitrator to state a special case on matters of law but, at the commencement of the hearing, leave was sought and given to amend the pleadings to ones for orders pursuant to s.ll or s.12 of the Arbitration Act 1908. The grounds advanced for such orders were that the arbitrator had misconducted himself by failing to decide the matter in accordance with the terms of the agreement between the parties or that there was an error of law on the face of the award.

Facts

The Plaintiff leases shop premises on the Nayland Street frontage of Sumner Village from the Second Defendant. They are used as a dairy. The lease is for a term of nine years commencing on the 24th May 1982 and terminating on the 23rd May 1991. The initial nett annual rent was $4,792.50. After three years the lessor had the right to review the rent payable for each three yearly period of the lease upon the basis of a rental agreed upon by the parties, or in default of agreement to be fixed by arbitration. Clause 6(f) of the lease deals with arbitration in the following terms:

> "(f) AND IT IS HEREBY FURTHER AGREED AND DECLARED that if any difference or dispute shall at any time or from time to time arise between the said parties hereto touching the interpretation construction or application of any provision in these presents or any clause or thing herein contained or relating thereto or the rights or liabilities of either of the parties under these presents or what under the particular circumstances for the time being should be done by either of the parties to these presents in order to carry out the true intent and meaning hereof such question or difference shall forthwith be referred to the arbitration of two indifferent persons one to be chosen by each of the parties hereto and such person shall appoint a third person or umpire and if either of the parties hereto shall neglect to appoint an arbitrator for the space of seven days after a notice in writing so to do shall have been given to it by the other party of shall appoint an arbitrator who shall refuse to act then the arbitrator appointed by the other party shall have the final decision alone and further that such arbitration shall be conducted unde the provisions of Arbitration Act 1908 PROVIDED ALWAYS that this provision shall not be a bar to any action at law or any other proceedings to recover any rent in arrear or any other liquidated sum owing by the Lessee to the Lessor."

The first three yearly review was due in April 1985. Agreement was reached for the twelve month period until April 1986 upon the basis of further increases taking place for the remaining two years of the three year period. Apparently the parties later agreed to refer the matter of increased rental to arbitration. Mr Lucas of Davis Halibutton Lucas was appointed as an arbitator by the Plaintiff, while Mr Smith of Schultz Knight and Associates was appointed as an arbitrator by the Second Defendant. Mr Lucas and Mr Smith endeavoured to resolve the dispute but could not agree. In accordance with clause 6, they then appointed the First Defendant to act as umpire. Written and oral submissions were made. Mr Lucas proposed a rental of $5,418 per annum, representing $9 per square foot for the premises which consist of 602 square feet, whereas Mr Smith contended for a rental of $6,772.70 per annum, or $11.25 per square foot.

On the 2nd September 1986 the umpire delivered his award setting the annual rent for the new term at the sum of $6,622 per annum, that is $11 per square foot. Prior to delivering his award the umpire had not only received written submissions from each of the arbitrators nominated by the parties, but had also conducted a hearing on the 7th August 1986 at which evidence was received from the arbitrators as well as from Mr D. Lloyd and Mr B. Simmons on behalf of the Plaintiff. The award was in a normal short form. There

was also a two page explanatory sheet. The First Defendant there summarised the dispute between the parties by saying that the submissions for the Second Defendant rested on comparable rental evidence of other shops in the block and a fair return on the capital invested, while the Plaintiff's evidence and submissions rested on the contention that there were too many shops in Sumner and that a dairy operation could not afford to pay the rental suggested by the Second Defendant. The umpire referred specifically to the evidence of the restriction in the lease for use of these premises as a dairy and to the lack of success that the Plaintiff's sublessees had experienced up to that point. He then stated:

> "For many years the Courts have found that a substantiated comparable evidence in valuation matters must be the most compelling evidence and I believe that the landlord's valuer has tended to demonstrate this. While one may have some symphathy for the tenant's lack of ability to pay the rent suggested as a dairy operator, there was no evidence submitted to satisfy that shopping centres generally have been let on the basis of an individual tenant's ability to pay in terms of the particular type of business he undertakes. There just does not seem to be any precedent to adopt this view so that it is really necessary to adhere to the principle of accepting rental evidence, particularly in a case where there is a lot of rental evidence available."

Plaintiff's Submissions

The basic point made by Counsel for the Plaintiff was that the umpire had failed to have regard to the contractual arrangements between the Plaintiff and the Second Defendant, particularly in-so-far as they restricted the use of the premises to a dairy or to another use permitted by the lessor in writing. He contended this resulted from the umpire relying almost entirely upon the evidence of other comparable rentals of shops in Sumner. He submitted firstly that this approach by the umpire constituted misconduct because he was failing to decide the dispute in the context of the agreement between the parties and secondly that the following errors of law were manifest on the face of the record: namely that the First Defendant:

> "1. Misdirected himself in basing his award only upon evidence of comparable rentals of other shops in the block.
> 2. Failed to take into account relevant considerations, namely the evidence of rentals paid for other properties in the Sumner area other than in the block owned by the landlord Mr Cocorempas, and in particular failed to take into account evidence relating to vacant premises, and evidence relating to fair market levels.
> 3. Failed to take into account relevant considerations, and in particular failed to take into account evidence that J. Rattray and Son Limited as lessee had been unsuccessful in its proposals to sublease the premises.
> 4. Erred in law in holding that there had been no evidence submitted to satisfy himself that shopping centres generally had been let on a basis of an individual tenant's ability to pay in terms of the particular type of business he undertakes.
> 5. Reached a conclusion which on the facts were supported by no evidence, or was a conclusion which no reasonable arbitrator properly directing himself in law could have reached."

Submissions for the First Defendant

In view of the correspondence which had passed between the Plaintiff and First Defendant, and because the proceedings originally sought an order obliging the First Defendant to state a case, Counsel for the First Defendant made a number of submissions with the object of assisting the Court. General submissions were made that:

1. The process of arbitration is essentially a contractual one and consequently it was not normally reviewable. Counsel contrasted this to the situation in review proceedings under the Judicature Amendment Act 1972. He claimed that the approach taken by Counsel for the Plaintiff was more applicable to that type of proceedings.
2. The supervisory jurisdiction of the High Court over arbitrators is restricted to ensure that the process continues to be a speedy and inexpensive one.
3. The facts in dispute are entirely for judgment by the arbitrator.
4. Error of law is only reviewable in so far as it appears on the face of the record.
5. The face of the record, so far as an arbitrator's award is concerned, is only that part of it which the arbitrator intends to be part of the award.

In more specific submissions Counsel contended:

1. That the explanatory document did not form part of the award.
2. It had not been demonstrated that there was any error of law on the face of the record. The umpire was using the special knowledge he had as a valuer to weigh the effect of valuations made by the arbitrators appointed by each party.
3. Even if the Court considers all of the material put forward by the Plaintiff, it would be inappropriate to conclude that any error was one of law rather than fact.

Submission for Second Defendant

Counsel for the Second Defendant commenced by adopting the submissions made on behalf of the First Defendant. He also contented that:

1. The award involved only the document labelled as an award, and did not include the explanatory two page document or any part of the evidence.
2. The jurisdiction to set aside an arbitrator's award for error of law was one which should be rarely exercised.
3. There could be no question in this case that there was no evidence before the umpire upon which he could have made the award.
4. While misconduct may include many various types of conduct on the part of an umpire, it did not include matters relating to sufficiency of evidence.

Misconduct

Section 12(2) of the Arbitration Act 1908 provides:

> "Where an arbitrator or umpire has misconducted himself or the proceedings or any arbitration or award has been improperly procured, the Court may set the award aside."

What constitutes misconduct is described in paragraph 622 of Halsbury's Laws of England, 4th Edition, Volume 2 page 330. Clearly the list of instances of misconduct set out in that paragraph is not an exhaustive one. *Steel* vs. *Evans (No.* 2) [1949] NZLR CA 557. It is not misconduct to come to an erroneous decision on the facts, and even gross inadequacies in the quantum of an award against related evidence will not support a charge of misconduct such as to enable the award to be set aside. *Mayor of Wellington* vs. *Aitken, Wilson and Co.* [1914] 33 NZLR 897 and *Wilson* vs. *Glover* [1969] NZLR 365.

In this case the misconduct relied upon by Counsel for the Plaintiff was an alleged failure by the First Defendant to decide the dispute in accordance with the agreement of the parties, namely the agreement to lease which contained a restriction as to the use of the premises.

One of the examples of misconduct mentioned in Halsbury paragraph 622 is when an arbitrator fails to comply with the terms, express or implied, of the arbitration agreement. The examples given of *London Export Corporation Ltd* vs. *Jubilee Coffee Roasting Co. Ltd* [1958] 1 All ER 494, 1958 1 WLR 271 confirmed on appeal at [1958] 2 All ER 411, 1958 1 WLR 661 and *Margulies Bros Ltd* vs. *Dafnis Thomaides and Co. Ltd* [1958] 1 All ER 777, 1958 1 WLR 398 are illustrations of irregularity in procedure. Indeed in the first case Diplock J. said that the term `irregularity in procedure' is a more appropriate term than misconduct.

The terms which might be implied in an arbitration agreement are set out in paragraph 534 of Halsbury 4th Edition Volume 2 page 273. Normally an arbitrator is required to decide the dispute in accordance with the ordinary law. See *Chandris* vs. *Isbrandtsen-Moller Co. Inc.* [1951] 1 KB 240, [1952] All ER 618. Counsel for the Plaintiff argues that a failure to have regard to the restrictive business provisions in the lease is a failure to decide the dispute in accordance with the ordinary law and therefore would amount in effect to a breach of the arbitration agreement. To accept this submission would, in my view, strain the meaning of misconduct, since the alleged failure is not a procedural one. Even if it were accepted that the umpire in this case had failed to have regard to the terms of the actual lease between the parties that would be an action related particularly to the agreement to lease rather than the agreement to arbitrate. In any event I am not satisified on the evidence that the umpire did fail in the manner alleged.

No other satisfactory basis for a finding of misconduct was made out and accordingly I have no hesitation in rejecting the Plaintiff's argument in this respect.

Error of Law on the Face of Award

Counsel for the Plaintiff relied principally on his submissions under this heading. There is no doubt that the Court has jurisdiction to set aside an arbitrator's award for error of law on its face. See *University of New South Wales* vs. *Max Cooper and Sons Pty Ltd* [1979] 35 ALR 219, *Kenneth Williams and Co. Ltd* vs. *Martelli* [1980] 2 NZLR 596 at 602 and *Attorney-General* vs. *Offshore Mining Co. Ltd* [1983] NZLR 418 at 421. It is a discretionary power of a general and unfettered nature. *Parsons* vs. *Farmers M.I.A.* [1972] NZLR 966 at 973.

The general approach to applications of this nature is thoroughly discussed in the judgment of Thorp J. in the case of *Kenneth Williams and Co. Ltd* vs. *Marteilli.* He said (page 605):

> "It may be that there is no simple solution to the dilemma discussed by Donaldson J. and in *Russell,* and that in the nature of things there must always be a conflict between principle and expediency, between the desire to obtain perfect justice and the need for a reasonably prompt determination of disputes, particularly the commercial disputes which form the subject of most arbitral work.
>
> Though it is not necessary for the determination of the present application that I try to resolve that dilemma or make any general redefinition of the Court's powers to set aside or remit awards, it is necessary to decide whether the *Max Cooper* decision should be regarded as affecting the general approach which should be taken by the Court to the exercise of its discretion to set aside or remit awards, in particular whether it has altered the assessment of what constitutes `error of law on the face of the award'.
>
> On the first and more general question, my conclusion is that it is not possible to read the *Max Cooper* decision merely as a .ninor gloss on the cases which preceded it."

And further, on page 606:

> "I read the judgment as an affirmation of the special value of arbitration to the commercial community, and a recognition of the need, if that value is to be freely available, for a more restricted control of arbitration by the Courts.
>
> On the more limited question of the effect of the *Max Cooper* decision on the meaning of `error of law on the face of the award', the three portions of the judgment which will again demonstrate a change in direction are:
>
> 1. (At p.262): `... to make [the award] vulnerable what the error is must appear upon its face as a matter of actual exposition, not one of inference only':
> 2. (Again on p.262): `... if there be ambiguity in the terms of an award the Court should lean in favour of a construction which does not involve treating it as intended in itself to expose to everyone who reads it the actual process of legal reasoning by which the arbitrator arrived at his decision': and
> 3. (On p.264): `Reference in the award to the existence of other documents is of itself neutral; it raises no presumption of incorporation as part of the award. Unless the intention to incorporate is clear, the presumption, as their Lordships have already said, should be against incorporation.'
>
> Those passages seem to me in such contrast to the language used in the decisions upon which the applicant initially relied, such as the decisions in *Northumberland Compensation Appeal Tribunal, Baldwin and Francis,* and R vs. *Board of Industrial Relations (Alberta),* as to compel the conclusion that the Privy Council thereby declared that the term `error of law on the face of the record', should not have the same meaning in arbitration law as it is customarily given in the wider field of administrative law.
>
> For my part I see no cause to lament that conclusion. There are obvious reasons for distinguishing the situation of those who have chosen arbitration as a means of determination of their rights from that of the general body of citizens enmeshed without option in the multitudinous administrative jurisdictions which make up the modern welfare State and which provide the subject-matter of most decisions in the developing field of administrative law."

I have quoted these passages at some length because they provide the framework for consideration of the submissions made by the Plaintiff's Counsel and are directly related to a number of the submissions which were made concerning the applicability of administrative law decisions. Within this framework I now consider what constitutes the basis of the award and whether error has been shown on the face of it.

The Award

The Plaintiff claims the award consists of the short document labelled `Umpire's Award' which is dated the 2nd September 1986, together with a two page explanatory note. The First and Second Defendants, on the other hand, claim that the award includes only the short form dated the 2nd September 1986. Consideration of what constitutes an award was the subject of decision in the case of *Manukau City Council* vs. *Fletcher Mainline Ltd* [1982] NZLR 142. It was there held, by a majority, that the 107 pages attached to the formal award and correspondence labelled `Reasons for Award' were part of the face of the award. Somers J. said (at page 161):

> "The contemporaneous delivery of the award and reasons, physical connection of the same by the arbitrators and the internal references of the one to the other, together make it clear in my view that the arbitrators intended the whole 119 pages to be read together as an award. It constitutes a physical, verbal and intended unity."

After reviewing the authorities, which also have been cited to me in this case, namely *Gold Coast City Council* vs. *Canterbury Pipelines (Aust.) Pty Ltd* [1968] 118 CLR 58, *Champsey Bhara and Co.* vs. *Jivraj Balloo Spinning and Weaving Co.* [1923] A.C. 480, *Max Cooper and* Sons *Pty Ltd* vs. *The University of New South Wales* [1979] 2 NSWLR 257; 54 ALJR 21, and *The General Valdes* [1982] 1 Lloyds Rep. 17, the Court of Appeal Judges agreed that the composition of the award depended upon the arbitrator's intention and that intention was normally a matter for inference from the documents prepared by the arbitrator. In the case of *Manukau City* vs. *Fletcher Mainline* the Judges differed as to the inferences which could be drawn. They had regard to matters such as the physical attachment of the documents, the reference in one document to the other, the time of their delivery and the way in which they related one to the other.

So far as this case is concerned the only evidence before the Court is that contained in the two affidavits of Derek Lloyd. The first affidavit refers to the arbitrator's award but does not attach a copy or indicate the date when it was received by the Plaintiff or whether or not it was accompanied by any other documents. The second affidavit of Mr Lloyd annexes a copy of the one page award together with a copy of the lease. The two page explanatory document was handed to the Court by Counsel for the Plaintiff. Counsel for the Defendants did not consent to this material becoming evidence before the Court, but agreed to it being received de bene esse. It follows that there is no evidence as to the time of delivery of the two page explanatory document in relation to the time of delivery of the formal award. There is no evidence that they were physically annexed in any way. Also neither document refers to the other. Certainly a reading of the explanatory document suggests that it may have been prepared by the umpire prior to or at the time of his award. It is not headed in any specific way or labelled so as to identify its purpose. The explanatory document is on the business letterhead of the umpire, whereas the award is clearly prepared as a formal document headed `Umpire's Award' and entitled as a formal legal document.

After considering carefully both documents and the evidence available to me, I am unable to conclude that the umpire's intention was that the explanatory document should form part of the award. Accordingly, in my view, the fact of the award consists only of the one page formal document dated the 2nd September 1986 and headed `Umpire's Award'.

Error of Law

No proposition of law is disclosed on the face of the award consisting of the above document. Accordingly I conclude that the Plaintiff has not shown any error of law justifying the remission or the setting aside of the award.

Even if the explanatory two page document did form part of the award, then I do not consider that any error of law has been shown. On the authority of *Thomas Bates and Son* vs. *Wyndham's Ltd* [1981] 1 All ER 1077 at p.1087 Counsel for the Plaintiff argued that the rental clauses in this lease (i.e. Clause 5(g) and (h) should be interpreted as providing for a rental `as it would have been reasonable for this landlord and this tenant to have agreed under the lease'. I accept that as an appropriate construction of the clauses contained in this lease. It, however, does not require an umpire to disregard market rentals or to discount market rentals but rather to consider the rental having regard not only to market criteria which one party may urge on him but also to have regard to the particular features of the property or lease which either party may stress as relevant to any agreement or arbitration of rental for the premises.

The umpire, who was a valuer chosen by the arbitrators nominated by each of the parties to the arbitration, has used his skills and expertise as a valuer to conclude the appropriate rental for the continued lease of these premises. In doing so he has specifically referred to the evidence concerning the use of these premises as a dairy and the difficulties experienced by the Plaintiff in arranging for the premises to be sublet as a dairy. Also specific reference was made to the problems experienced by the three sublessees. In these circumstances it would be inappropriate to conclude that he did not have regard to this evidence in arriving at a conclusion concerning rental. A valuation judgment, based upon the umpire's knowledge and experience, on these issues was what the parties sought. After hearing the evidence the umpire preferred to rely substantially on the evidence of comparable rentals. North P. in the case of *Wellington City* vs. *The National Bank of New Zealand* [1970] NZLR 660 expressed the position generally concerning rental valuations in this way (page 669):

> "Of course if a lease for example contains a formula for fixing a rent the arbitrators or the umpire must comply with the directions given to them in the instrument, but short of anything like that the method of valuation which finds favour with the arbitrators or the umpire is essentially a matter for them."

Despite the skill of the Plaintiff's Counsel in endeavouring to analyse the umpire's explanatory note, I am not brought to the view that there was in fact any error of law as contended in paragraphs I to 4 of Clause 5 of the Statement of Claim.

The fifth error of law contended for by the Plaintiff was that the First Defendant reached a conclusion which, on the facts, was not supported by evidence or was a conclusion no reasonable arbitrator properly directing himself in law could have reached. Such a question sometimes suggests that is has been posed in an effort to convert what are truly questions of fact into a question of law. It is a formulation of a question of law which received the approval of the House of Lords in the case of *Edwards (Inspector of Taxes)* vs. *Bairstow and Another* [1955] 3 All ER 48. The good sense of an appellate Court proceeding on this basis is explained in the judgment of Viscount Simonds at page 53 in this way:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence, or on a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is, therefore, a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way."

Even if the case is approached upon the premise that the face of the award includes the two page explanatory document, it would not be reasonable to include as part of the award the various copies of written documents which were handed to me by Counsel for the Plaintiff. I do not accept his contention that I am entitled to have regard to these documents because the First Defendant referred to `evidence' in the explanatory note. There is no cross reference between the explanatory note and the other documents. Also it is clear that the First Defendant heard other evidence of which no transcript or record has been submitted to me. A review of all the material which was produced to me does indicate that, even in that material, there is evidence on which a reasonable arbitrator could arrive at the result which the First Defendant did. In all valuation matters there are areas where opinions may differ, but the fact that the First Defendant, after being made aware of the Plaintiff's problems with these premises and the terms of the lease, chose to rely upon comparable rental value evidence is not a sufficient basis upon which to rationally conclude that no reasonable arbitrator could have reached the decision.

Conclusion

For the reasons I have set out this application is dismissed. The Defendants are entitled to their costs and disbursements. I fix the costs in respect of each Defendant at $600. Any disbursements are to be fixed by the Registrar.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
C.P. No. 1131/87

UNDER THE Arbitration Act, 1908

BETWEEN: GILTRAP GROUP HOLDINGS LIMITED

Plaintiff

AND

R. C. DIMOCK LIMITED

First Defendant

AND

R. L. JEFFERIES

Second Defendant

Hearing: 24 September 1987

Counsel: Mr N. J. Carter for Plaintiff
Mr D. Burt for First Defendant
Mr Keyte for Second Defendant

Judgment: 12 October 1987

This is a follow up High Court Decision over costs re the R. C. Dimock Ltd vs. *Giltrap Group Holdings Ltd case and Award (see September 1987 issue `The New Zealand Valuers'Journal' Vol.27 No.7 p.332).*

JUDGMENT OF MASTER TOWLE

This was an application for Summary Judgment brought by the Plaintiff as the tenant of a building belonging to the First Defendant, seeking orders setting aside an order made by the Second Defendant as a valuer made as part of an arbitration award that each of the Plaintiff and the First Defendant should pay one half of his legal costs and remitting for further consideration by the Second Defendant the question of payment of these costs and also the question of costs and expert witnesses' fees as between the Plaintiff and the First Defendant incurred during the arbitration. The Second Defendant took no part in the proceedings and agreed to abide by the decision of the Court and on this basis I allowed Mr Keyte to withdraw from the hearing.

The circumstances were that the Plaintiff is the owner of premises at 103 Great North Road, Auckland, leased to the First Defendant for a term of 21 years commencing on 28th May 1982. Rental was fixed at $75,000 for the first three years with a review after that time and provision for arbitration if the parties could not agree on the adjusted rent. In terms of the lease a reference to arbitration was made to the Second Defendant who, after hearing extensive evidence from the valuers, made an interim award on 5th February, 1986 but at a subsequent hearing on 4th June 1986, he was requested by Counsel for the parties to state a case to the Court which he did. This matter came before Barker, J. who, in a reserved judgment given on 16th June 1987, determined that the rental to be paid for the next three years of the lease should be $162,900.00 per annum. In making this finding, His Honour directed that the costs of the arbitrator in respect of the case stated should be paid by the landlord on a solicitor and client basis, and also awarded $1,500 to the Plaintiff in respect of the proceedings before him.

In his judgment, His Honour referred to the fact that the arbitrator, in making his interim award, had decided that each party should pay its own costs on the actual arbitration hearing and should share equally the arbitrator's costs. That decision was part of his award which was not part of the case stated. The arbitrator had also ruled that the landlord and tenant should meet his own additional costs and legal costs involved in the reference to the High Court equally, unless the High Court ordered otherwise which in fact it did as mentioned in the previous paragraph.

The present application by the Plaintiff is to seek an order by Summary Judgment procedure that the matter should be referred back to the arbitrator again for reconsideration of the original order that costs should be shared equally. In an affidavit in support of the application sworn by a Mr M. R. Litchfield, a solicitor employed by the Plaintiff's solicitors, he exhibited copies of the arbitrator's award, the case stated as well as Barker, J.'s decision and also copies of correspondence passing between the Plaintiff's solicitors and the solicitors for the First Defendant concerning the question of the earlier costs in which a claim was made that the arbitrator had made an error of law in awarding that costs be shared equally as the tenant had been wholely successful. That affidavit deposed as to Mr Litchfield's belief tht neither Defendant had a defence to the allegations in the Statement of Claim.

At the outset of the hearing, I questioned the propriety of any solicitor for a party swearing an affidavit in support of an application for Summary Judgment and that this appeared in clear breach of the requirement of Rule 138(2)(b) of the Rules. Although Mr Carter correctly pointed out in response to this criticism that the matters deposed to by Mr Litchfield were purely matters of record, I believe it is an undesirable practice that any solicitor should depose to matters in this way and the affidavit ought more properly to have been completed by a director of the Plaintiff company who could have expressed his belief on behalf of the company that the Defendants have no defence to the claim. In the absence of any objection by Counsel for the First Defendant and as there was no question of prejudice to any party, I allowed the application to proceed.

In support of the Plaintiff's claim that the arbitrator had erred in law, I was referred to two authorities, namely *Figueiredo (L) Navegacas S. A.* vs. *Reederei Richard Shroeder K.* G. [1974] 1 L. R. 192, and to *Tramountana Armadora S. A.* vs. *Atlantic Shipping Company S. A.* [1978] 2 All E. R. page 870, from which Mr Carter extracted the proposition that an arbitrator, in dealing with costs, must exercise the discretion vested in him judicially. Even if there is no obligation for him to state reaons why he makes an award relating to costs, it may be preferable for an arbitrator to give reasons which would save the parties being put to the expense of trying to ascertain what exactly were his reasons. He went on to submit in reliance on those authorities that if the award does depart from the general rule that costs be awarded to a successful party but bears on its face no statement for the reasons supporting that departure, the party objecting to the award may bring before the Court such evidence as he can as to the grounds or lack of grounds bearing on the unusual exercise of that discretion.

Those cases are authority for saying that this would apply not only in an extreme case where a successful party had been ordered to pay all the costs of an unsuccessful party as well as the costs of the award, but also to a case in which a successful party has been made to bear his own costs and pay half the cost of the award. He submitted that there had been a patent departure from this rule that, without giving any reasons for his actions, there arose a rebuttable resumption that the arbitrator had erred in law and acted in an unjudicial manner to an extent justifying the intervention of the Court. He also referred me to relevant passages in Russell *on Arbitration* 20th Edition, page 335, where the principles from the two authorities were analysed and explained.

He submitted that there was no reasonable defence available to the First Defendant to the Plaintiff's application to have the order remitted back to the Second Defendant, but advised at the hearing that a claim in the original application for costs against the Second Defendant valuer, was not being proceeded with.

In opposition, the First Defendant filed notice with a supporting affidavit by a solicitor partner of the firm which acted for the First Defendant, deposing that a transcript of the submissions made to the arbitrator before he gave his award, disclosed that both Counsel for the lessor and lessee had made submissions on the question of costs which he had considered. At the hearing, Mr Burt for the First Defendant, submitted that the authorities relied upon by Mr Carter took the position too far, and that there were no allegations in the Statement of Claim or in the supporting affidavit to show that the arbitrator had not exercised his discretion in a judicial manner, merely an allegation that he was wrong to order the Plaintiff and First Defendant to share his costs equally. The Statement of Claim did not specify the error of law alleged to have been made by the arbitrator and there was no evidence before the Court by the Plaintiff to show how the arbitrator had reached his decision. He referred particularly to the last two sentences of Barker, J.'s judgment where he said:

> "The question of the costs of the hearing for the arbitrator was a matter for him. If it is alleged he has made an error of law then the tenant has other remedies."

He argued that the basis of Mr Carter's submissions were based upon the fact that the Plaintiff tenant had succeeded in the reference to the Court in that the learned Judge had found for a lower figure contended for by it and not for the landlord's higher figure of $189,400. To that extent, the success of the Plaintiff's claim was recognised by an appropriate award of costs made by His Honour on the High Court reference.

Quite different considerations applied to the hearing before the arbitrator himself. His decision must be seen in the context that the parties came to seek adjudication on their conflicting claims as to how much the rental should be increased above the $75,000 per annum over the first three years of the lease. The figure contended for by the tenant and eventually upheld in the High Court was for an amount of $162,900 and of itself an enormous increase on the previous rental even though the arbitrator did not go for the higher figure contended for by the landlord. The situation is common in an inflationary period where both parties, while accepting that substantially increased rentals are justifiable, cannot agree on a figure and it is left to an arbitrator to adjudicate. Such a situation is not, in my opinion, on all fours with other forms of arbitration where an arbitrator frequently has to determine matters of the conduct of the parties and resolve arguments as to the costs of reinstatement following upon for example, serious fire or mechanical breakdown. I am far from satisfied on the papers before me that the Plaintiff company or anyone else on its behalf, could depose as to a belief that there was no defence to an allegation that the arbitrator was wrong in law in ordering the First and Second Defendants to pay one half of the costs. Furthermore, I question whether this is the sort of application that can appropriately be dealt with by way of Summary Judgment procedure even if I were to be satisfied that there is ground for saying that the arbitrator clearly erred in law and that the matter should be referred back to him for further consideration.

The application for Summary Judgment is accordingly refused and I allow costs in favour of the First Defendant in the sum of $750.00 and in favour of the Second Defendant of $250.00.

Master R. P. Towle

NEW ACQUISITIONS TO NZ INSTITUTE OF VALUERS' LIBRARY

The central office of the Institute of Valuers is pleased to acknowledge the donation by the American Institute of Real Estate Appraisers of the following textbooks which are now in the Institute's Library.

Appraising the Single Family Residence	George F Bloom, Henry S Harrison
The Appraisal of Real Estate 9th Edition	American Institute of Real Estate Appraisers
The Dictionary of Real Estate Appraisal	American Institute of Real Estate Appraisers
The Uniform Residential Appraisal Report	Arien C Mills

These texts will be reviewed in later issues of the *NZ Valuers' Journal*.

New Acquisition for NZ Institute of Valuers' Library

THE VALUATION OF INDUSTRIAL PROPERTY

A Classified Annotated Bibliograph

Author: Robert M Clatanoff

Published: International Association of Assessing Officers, 1313 East 60th Street, Chicago, Illinois 60637, United States of America

Bibliographic Series No. 12

This 73-page bibliography contains an annotated reference to the valuation of industrial property under the following chapter headings:

Introduction
Bibliography
1. Assessment and Mass Appraisal of Industrial Property
II. Valuation of Industrial Property
- A. Appraisal of Industrial Property
  - 1. Very Large Structures
- B. Appraisal for Business and Investment
- C. Appraisal in an Adversarial Setting

III. Appraisal of Specific Types of Industrial Property
- A. Industrial Condominiums
- B. Industrial Land
- C. Industrial Parks, Districts, and Zones
- D. Manufacturing Plants
- E. Petroleum Refineries, Terminals and Tank Farms
- F. Special Use Industrial Property
- G. Truck Terminals
- H. Warehouses
  - 1. Waterfront Property

IV. Industrial Taxation, Location, and Neighbourhood Effects
V. Bibliographies
VI. Author Index
VII. Directory of Serials Cited

References cited are worldwide and include *The NZ Valuers Journal* (R L Jefferies & J W Gellatly). The annotation succinctly describes the content of the articles referred to.

The text would prove a valuable reference for a practitioner's library. The price to I.A.A.O. members if $12.50 US (approx. $25.21 NZ).

The attached list of Serials cited has been marked * where held in the Institute's library.

VII. Directory of Serials Cited

** AIM* (Appraisal Institute Magazine)
-see *Canadian AppraiserIL'Evaluateur Canadien.*

AREUEA Journal. Journal of the American Real Estate and Urban Economics Association, c/- Jeffrey D Fisher, School of Business, Indiana University, Bloomington, IN 47405.

American Real Estate and Urban Economics Association Journal see *AREUEA Journal.*

Appraisal and Valuation Manual
-see *Valuation.*

Appraisal Digest
Quarterly. Journal of the New York State Society of Real Estate Appraisers, a division of the New York Association of Real Estate Boards, 11 N. Pearl St., Albany, NY 12207.

**Appraisal Journal*
Quarterly. Journal of the American Institute of Real Estate Appraisers, 430 N. Michigan Ave., Chicago, IL 60611.

Appraisal Review
Quarterly . Journal of the National Association of Independent Fee Appraisers, 7501 Murdoch, St. Louis, MO 63119.

Appraisal Review and Mortgage Underwriting Journal
Three times per year. Journal of the National Association of Review Appraisers & Mortgage Underwriters, 8715 Via de Commercio, Scottsdale, AZ 85258.

Appraisal Review Journal
-see *Appraisal Review and Mortgage Underwriting Journal.*

Area Development
Monthly. Editorial offices at432 Park Ave. S., New York, NY 10016.

Assessment Administration
Annual. Proceedings of the (number) International Conference on Assessment Administration; ceased 1967. International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

**Assessment Digest*
Bi-monthly. Magazine of the International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

Assessor's Data Exchange
Quarterly. Ceased vol. 6 no. 4 (1986-87). Subscription service of the International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

**Assessors Journal*
Quarterly. Ceased vol. 15 no. 4 (1980). Journal of the International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

Builder
Weekly. Magazine of the National Association of Home Builders, 15th & M Sts. NW, Washington, DC 20005.

California Real Estate Magazine
Monthly. Magazine of the California Association of Realtors, 525 S. Virgil Ave., Los Angeles, CA 90020.

Canadian Appraiser/L'Evaluateur Canadien
Quarterly. Magazine of the Appraisal Institute of Canada/ Institut Canadien des Evaluateurs, 93 Lombard Ave., Suite 309, Winnipeg, MB R3B 3B1.

Commercial and Industrial Real Estate
-see *California Real Estate.*

Growth and Change: A Journal of Public, Urban, and Regional Policy
Quarterly. Journal of the Center for Business and Economic Research, College of Business and Economics, University of Kentucky, Lexington, KY 40506.

IAO Journal
Biannual Journal of the Institute of Assessing Officers of the New York State Assessors' Association, Inc., P. O. Box 108, Spencerport, NY 14559.

**International Assessor*
Monthly. Magazine of the International Association of Assessing Officers; ceased 1977. International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

International Property Assessment Administration
Annual. Proceedings of the (number) International Conference on Assessment Administration; published for the years 1968-1975. International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

Journal of Property Management
Bimonthly. Magazine of the Institute of Real Estate Management of the National Association of Realtors, 430

N. Michigan Ave., Chicago, IL 60611-4090.

Journal of Urban Economics
Bimonthly. Journal published by Academic Press, Inc., 1 E. First St., Duluth, MN 55802.

Journal of Valuation
Quarterly. Journal published by Henry Stewart Publications, 88 Baker St., London W1M 1DL, England.

Land Economics
Quarterly. Journal published by the University of Wisconsin Press; editorial office at 427 Lorch St., Room 109, University of Wisconsin, Madison, WI 53706.

Land Review
Monthly. Ceased publication? Newsletter of the Homer Hoyt Institute, 1133 15th St., Suite 1250, Washington, DC 20005.

**New Zealand Valuers' Journal*
Quarterly. Magazine of the New Zealand Institute of Valuers, Westbrook House, 181-183 Willis St., P.O. Box 27146, Wellington, New Zealand.

Proceedings of the (number) Annual Conference on Taxation (date).
Annual. Proceedings of the annual conference of the National Tax Association/Tax Institute of America, 21 E. State St., Columbus, OH 43215.

**Property Tax Journal*
Quarterly. Journal of the International Association of Assessing Officers, 1313 E. 60th St., Chicago, IL 60637.

**Real Estate Appraiser*
-see *Real Estate Appraiser and Analyst.*

**Real Estate Appraiser and Analyst*
Quarterly. Journal of the Society of Real Estate Appraisers, 645 N. Michigan Ave., Chicago, IL 60611.

Real Estate Evaluation Guide
Monthly Subscription service of E.H. Boeckh Co., Division of American Appraisal Associates, Inc., 615 E. Michigan, P.O. Box 664, Milwaukee, WI 53201.

Real Estate Issues
Semiannual. Journal of the American Society of Real Estate Counselors of the National Association of Realtors, 430 N. Michigan Ave., Chicago, IL 60611.

Real Estate Review
Quarterly. Journal published by Warren, Gorham & Lamont, Inc., 210 South St., Boston, MA 02111.

Real Estate Today
Monthly. Magazine of the National Association of Realtors, 430 N. Michigan Ave., Chicago, IL 60611.

Regional Science and Urban Economics
Quarterly. Journal published by North-Holland Publishing Co., Box 211, 1000 AE Amsterdam, Netherlands.

Revenue Administration (date).
Annual. Proceedings of the annual meeting of the National Association of Tax Administrators, c/o Federation of Tax Administrators, 444 N. Capitol St., Washington, DC 20001.

SIR Newsletter
Ten times per year. Now *SIR Reports.* Newsletter of the Society of Industrial and Office Realtors, 77714th St. NW, Suite 400, Washington, DC 20005-3271.

Technical Valuation
-see *Valuation.*

Urban Land
Monthly. Journal of ULI-TheUrban Land Institute, 1090 Vermont Ave. NW, Washington, DC 20005.

**Valuation*
Semiannual. Journal of the American Society of Appraisers, P.O. Box 17265, Washington, DC 20041.

**Valuer*
Quarterly. Magazine of the Australian Institute of Valuers, 5 McKay Gardens, Unit 3, Turner, A.C.T. 2601, Australia.

BOOK REVIEW

NEW PUBLICATION AVAILABLE FROMGENERAL SECRETARY (INDENTED FROM AUSTRALIA)

Valuers Liability: A Loss *Prevention Manual*

Lindsay T Joyce and Keith P Morris
Price: on request
100 pages
Published by The Australian Institute of Valuers & Land Administrators Incorporated

The preface to this publication states:

"Following a recent upsurge in the number of claims being made upon valuers for professional negligence, we thought that the time was appropriate to prepare a Loss Prevention Manual setting out some of our experiences in the area of professional negligence.

From our experience in professional negligence cases, professional indemnity insurance and valuation registration/professional administration, there appeared to be a need for more familiarity with the problems that have led to claims against valuers.

We are mindful that like all attempts to set down in writing our experiences, there will be shortfalls. Understandably no written manual or text could cover every conceivable problem area.

However, we hope that the chapters in this manual will provide some assistance to those practising valuation, those teaching valuation, those learning valuation (which should be almost everybody who will read this manual), as well as those who may become involved with valuers' problems from time to time.

If preparation of this manual leads to one less case being brought against valuers then we will have achieved our aim.

However, we hope that any assistance or knowledge that may be imparted by the contents of this manual will lead to an even greater reduction in the number of claims against valuers.

Finally, it is apparent to us that valuation is a most complex and exacting profession. However, it seems that there are many practising valuers who do not appreciate the complexity of their profession, and therefore do not give it the respect and consideration that the profession deserves and the public demands."

The authors of this publication are Mr Joyce, a solicitor of the Supreme Court of N.S.W. and of the High Court of Australia and Mr Norris, a fellow of the Australian Institute of Valuers, President of the N.S.W. Division. He is also a solicitor of the Supreme Court of N.S.W. and of the High Court of Australia.

The text is divided into eight chapters and contains a comprehensive table of cases and glossary of terms.

Chapter headings are:

1. Who is a Real Estate Valuer?
2. Legal Liability of Valuers for Professional Negligence
3. Pitfalls of Practice
4. Valuers Case Histories
5. Valuers Case Studies
6. Insurance
7. Registration of Valuers
8. Valuers as Expert Witnesses

Glossary of Terms
Chapters include bibliography and references for further reading. The law stated is in Australia.

Chapter One defines who is a real estate valuer under the specific heads of sole practice, partnership, corporation, employee valuers, government valuers, and who is a valuer and what is a valuation.

Chapter Two discusses the duty of care owed by the valuer to the client (including the impact of limiting conditions); negligence (including an exhaustive treatment of the case law on this topic); valuers as arbitrators; damages (including a comprehensive analysis of the various heads of damages); standard of care expected of valuers; limitation periods; and disclaimers (including the "form" of disclaimers and case law on their effect).

Chapter Three discusses some of the pitfalls of practice (instructions misunderstood, deadlines missed, etc.) and methods of loss prevention. Also discussed here are the widening scope of valuation practice and the need to keep records, communicate with the client, check on employees' work and exercise diligence without haste.

This chapter includes some very interesting and pertinent comments on record keeping, recording instructions and verification of information given. There is a comprehensive section on "reports" which should "express clearly, precisely and accurately the valuer's opinion".

Under the heading of "mortgage valuations" within this chapter, reference is made to a Valuers' Registration Board (of N.Z.) decision and to a citation from page 209 of the (old) Principles & Practice of Urban Valuation in N.Z. Concluding this chapter are some observations on qualification clauses.

Chapter Four discusses 18 case histories ranging over such topics as the thoroughness of property inspection, title searches, misrepresentations, reliance or information from others, responsibility for action of "juniors", "roadside" inspections, etc.

Each "case" is ended with a "conclusion" drawing out the principles of the case.

Chapter Five deals with 11 case studies, many of which will be known to valuers in N.Z. and includes *INEZX Investment Pty Ltd, Baxter v F W Gapp Ltd.* and *Singer & Friedlander Ltd.* Each case is presented with a summary of the facts and a conclusion.

Chapter Six discusses the principles of insurance under the headings of: principal features of a professional indemnity policy, what is a claim?, what amounts to a circumstance likely to give rise to a claim?, how can valuers be sure they are insured?, what does the policy cover?, how much covering should a valuer have?, should valuers have insurance in the event they retire or change professions or occupations?, does the policy have terms and conditions?, what do valuers do if a claim is made upon them?

Chapter Seven deals with registration of valuers and the particular acts current in Australia. (For New Zealanders considering emigration or reciprocity, this section will be of particular interest.) The chapter concludes with a statement of the rules of conduct and code of ethics pursuant to the respective acts.

This chapter also draws upon the procedure for pursuing disciplinary measures under the various acts and cites again New Zealand experience in these areas.

The final chapter, Chapter Eight, is entitled "Valuers as Expert Witnesses". The circumstances in which court appearances may arise are discussed together with the demeanour of the valuer.

This is an excellent text which should be a compulsory study document for all valuation students and which should be readily at hand for every valuer. It is highly recommended.

John Gibson

NOTICE TO ALL MEMBERS

OUTSTANDING SUBSCRIPTIONS

Rules 29 32, 108 112

Your Executive committee recently considered the question of notice to members of overdue subscriptions.

It is the members' primary obligation to inform the Branch of any change of address in order that correspondence may be sent to the correct address.

Members travelling oveseas should advise this office of their forwarding address for the journal and other correspondence.

Notice of subscriptions due are advised to members by personal mail in December of each year. Payment is due by I January of the following year.

Executives have asked that the consequences of late or non-payment be drawn to members' attention and for this purpose the provisions of Rule 29 are stated below.

Members' assistance in prompt payment of their subscriptions is very much appreciated. Prompt payment substantially assists the Institute's cash flow, and assists in keeping subscriptions at a modest level.

29. If any member's subscription is overdue for three months, notice of such fact shall be sent to him by the General Secretary, and if he omits or neglects to pay his subcription within one month next after the date of such notice, the following action shall be taken:-

(a) If he is a registerd valuer, application shall thereupon by made to the Registrar to remove that member's name from the Register under Section 30 of the Act

(b) If any other case, the member's name may be removed from the roll of members of the Institute and from the date of such removal he shall cease to be a member, but without prejudice to the right of the Council to recover all arrears, including the subscription for the year then current.

For those who do overlook payment a reminder is usually sent with notice of the AGM. Non payment following that advice normally results in the action provided for under Rule 29 being implementd.

John Gibson
GENERAL SECRETARY

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