THE NEW ZEALAND VALUERS' JOURNAL

DECEMBER 1990

CELEBRATING THE NATION'S 150 YEARS

NEW ZEALAND INSTITUTE OF VALUERS

Incorporated by Act of Parliament

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1938-1940 N H Mackie, Palmerston North
1940-1943 -G B Osmond, Auckland
1943-1947 A W A Sweetman, Auckland
1947-1949 O F Baker, Christchurch
1949-1950 - J A Wilson, Dunedin
1950-1951- O Monrad, Palmerston North
1951-1952- L E Brooker, Wellington
1952-1953- L A McAlisterWellington ,
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1954-1955- S E Bennett, Auckland
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1957-1958- V W Cox, Napier
1958-1960- G C R Green, Dunedin
1960-1962-J W Gellatly, Wellington
1962-1964 S Morris Jones, Wellington
1964-1966-M B Cooke, Christchurch
1966-1968 D G Morrison, Whangarei
1968-1970 A R Wilson, Napier
1970-1971 -J M Harcourt, Wellington
1971-1974- R S Gardner, Auckland
1974-1976- G M NiedererInvercargill, g
1976-1977- L M SoleRotorua ,
1977-1978- E J BabeWellington,
1978-1979- P G CookeNelson,
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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 mode of citation of this volume of *The New Zealand Valuers' Journal* is (1990) N.Z.V.J. December page.

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Guest Editorial

The Future of the Pan Pacific Congress

' was fortunate enoughto have had the opportunity to attend the 15th Pan Pacific Congress of Real Estate Appraisers, Valuers and Counsellors (PPC) in Seoul, Korea last month.

The last session of the congress was devoted to representatives from the participating nations addressing the role of the PPC in the future. As NZ representative in that session I gave my views of the Congress and its future. The key points raised are given below:

Before considering any proposals for future change, the present situation must be examined.

The conference was very successful because exceptional keynote speakers outlined the political, economic and social framework of the host nation to enable a better understanding of Korea.

The plenary session speakers addressed appraisal issues from the point of view of their various nations while the workshop sessions teased out ideas and allowed participation through question and comment.

Those attending had the opportunity to meet socially and discuss appraisal matters, as well as being allowed on stage to display, in song and actions, their national culture, or lack of it, to other nations.

There was also re-assurance the New Zealand valuers are not the only valuers exposed to rapid economic changes, and that problems thought unique turned out to be universal.

Looking at it from another perspective, the PPC is not designed as a vehicle to ensure valuation standards are set; the International Asset Valuation Standards Committee (TIAVSC) attends to that. PPC is not set up to define the last word in valuation technique and methodology; scholars, universities and journals provide that.

PPC is not an organisation to ensure valuers in member countries acquire comparable skills, various reciprocity agreements cater for that.

The PPC has been set up to provide opportunities, including opportunities for valuers from the Pacific countries to travel to a foreign country and gain ifrst hand knowledge in "valuation talk" of that country through the eyes of the valuers of the host nation; as well as opportunities to develop friendships, establish networks and gain a broad global perspective.

Out of this informality further professional developments like TIAVSC will be encouraged.

The widertheparticipationinPPC, the greater the advantages to all members. To that end as many Pacific countries as possible should be encouraged to participate. The onus is on the present participating nations to ensure that is achieved.

I do believe our profession is having some difficulty in deciding where we are placed in the overall scheme of commercial activities. We are disappointed we are not achieving the recognition we deserve.

If we consider ourselves to be part of an autonomous appraisal industry, we are deluding ourselves.

If we think we are part of the real estate industry, we belong alongside the real estate brokers and I observe most of us are not comfortable in that role.

We are part of the broad financial services industry working with business economists, financial analysts, and chartered accountants. I do not believe we are in competition with accountants, but complement their skills and expertise by being experts in analysis and appraisal of property, which after all is the major component of the capital assets of our various nations.

Valuers have a rightful and important place in the financial services industry so let's promote it and maybe use the PPC to explore the complementary relationships with others in the industry.

A major advantage of the PPC, and the envy of other organisations, is the simple yet effective administrative structure.

It would be a retrograde step to appoint a permanent secretariat with its attendant bureaucracy and cost. Hostnations knowtheirown"patch" best and can best organise the Conference on their own terms.

At the start of my address to the Congress, I said that before considering any proposals for change, the present situation must be examined. I discussed that fully and then addressed the direction of PPC in the future. What I said on that issue was...

"MORE OF THE SAME PLEASE"

Alex Laing

Alex Laing is *Senior Vice President of the New Zealand Institute of Valuers and he attended and presented papers to the Pan Pacific Congress held at Seoul, Korea in September 1990.*

1991 Annual General Meeting and Seminar

Enclosed with this issue of the journal is a Registration Form for the 52nd Annual General Meeting and Seminar of the New Zealand Institute of Valuers to be held in Christchurch on 22nd and 23rd April 1991. The venue for this Seminar is the Christchurch Town Hall with accommodation being at the nearby Noahs Hotel, both being sited upon the picturesque banks of the Avon River.

The organising committee cordially invites all members of the Institute and partners to attend. The committee is chaired by John Ryan with the committee comprising Gary Sellars, Gordon Whale, Errol Saunders, NigelJohnson, Cedric Croft, Alan Stewart, Clare Willes, Nicki Bilbrough, Chris Stanley, Michael Wright, Richard Gibbons, Ian Bunt, Terry Naylor and Shane O'Brien as Secretary.

Although having a distinctive Canterbury flavour, the programme will be of great interest to valuers from all parts of New Zealand. The programme covers the resurgence of the rural sector through to the increase in demand for residential sections and the impact of foreign investment on all aspects of the property market throughout New Zealand.

The programme starts on Sunday evening with early registration and an informal dinner, however we are anticipatingmany of you will fly in on the Monday morning where you will be met at the airport and taken to Noahs Hotel to check in. The Monday morning session will start with an overview entitled "Coming out of a Recession" with the keynote speaker being Mr Sandy Maier, the Wellington-based statutory manager or the Development Finance Corporation. Following this, Mr Peter Yeoman, a well known Christchurch civil engineer and tourist consultant, will speak on "Tourism versus Conservation". Mr Yeoman was instrumental in the development of the Mt Hutt Skifield and his current projects include the development of a gondola on Mt Cavendish in the Christchurch Port Hills. He has considerable involvement with the Conservation Department and Town Planning issues.

Later on Monday morning we will embark on a field trip to the north west side of Christchurch that will take in an Applefields orchard one of a number of developing orchards located on the city periphery and owned byApplefields Ltd. One of the Directors of Applefields, Mr Tom Kain, will address us at the later luncheon. We will then visit the Isaac Wildlife Farm a rapidly expanding and internationally acclaimed wildlife reserve that also has an increasing import/export significance. We will also visit a substantial residential subdivision in one of Christchurch's most developing areas, then on to a sit down luncheon at the recently refurbished Brevet Club, before returning by bus to the Christchurch Town Hall via the newly completed South City Retail Complex.

The afternoon session is entitled "Residential Subdivision" with two speakers; one presenting a developer's viewpoint and secondly a valuation viewpoint. The developer's viewpoint will be addressed by Mr Chris Wilson, principal of Suburban Estates, a well established local property development firm that has been involved in a number of successful developments within the city. The valuation viewpoint will be addressed by a valuer from Heron Todd White of Australia who will introduce an international flavour to a local topic. The afternoon will wind up at approximately 4.00pm with the 52nd Annual General Meeting of the NZ Institute of Valuers.

The Tuesday morning programme will commence with a champagne breakfast and speech from well known public speaker Mr Jim Hopkins. The first session after breakfast will address the topic of "Shopping Centres"from three viewpoints. Mr Tony Sewell, manager of Downer Developments Ltd in Christchurch, will speakon a developer's aspect and in particular his firm's involvement with the recently completed South City Mall, a substantial retail complex incorporating a supermarket with 30 retail stores. Mr Evan Harris, Director of H G Livingstone Ltd, will speak on a property manager's aspect, and the third speaker is a valuer from Jones Lang Wootton, Australia. The session will conclude with a panel discussion.

After lunch a session entitled "Foreign Investment" will be opened up to local accountants, financiers and solicitors who will be cordially invited to attend. The session will start with an overview presented by Professor John Baen of Lincoln University. Professor Baen holds the recently established chair in real estate and is a very lively and informative speaker. Mr Graeme Smolenski, a Queenstown developer, will then address the conference. Mr Smolenski has experience in both residential and commercial development and was extensively involved in the Nugget Point Hotel development in Queenstown and more recently the Millbrook Country Club development. This is a joint venture between Asian, Japanese and New Zealand investors and is a $20,000,000 resort development including two 18-hole golf courses and up to 500 condominiums.

Other speakers include Mr Roy Motram of the New Zealand Rural Property Investment Trust and Mr PaulTindill, Secretary of the Overseas Investment Commission, who will speak on the legislation relating to foreign investment. The session will be wound up by a panel discussion with formal closing of the conference at approximately 4.30pm by the Branch Chairman.

ThG social side of activities include a sponsored Cocktail Hour at the conclusion of the day on Monday followed by a formal dinner and social. At the conclusion of the Tuesday session there will also be a sponsored Happy Hour giving delegates ample time to mix. There will also be time to visit some of Christchurch's tourist spots.

We have also provided for a programme for partners accompanying delegates to the conference. Partners will be invited on the Monday Morning field trip as well as the Tuesday morning champagne breakfast with a proposed field trip taking in some North Canterbury vineyards, craft shops and rural activities.

This promises to be a very informative and enjoyable Annual General Meeting. We have provided a varied programme as well as encouraged as much social activity as possible so that everyone present will enjoy some real Canterbury hospitality.

We look forward to seeing as many of you as possible in Christchurch on 22nd and 23rd April next year and promise a great time and great Canterbury weather.Any queries relating to the programme or accommodation, please contract the Secretary of the organising committee, Shane O'Brien, PO Box 1397, Christchurch or phone (03)654 866, fax (03) 654 867.

Reuised Renistration Application Forms,:

Pat,enfiiah;applicants for registration are advised that theValuersRegistration Board has recently revised its registration; application form. For association withthis is a new form which requires appiicar tsto requestfrm their university acopy' of academic record tobe sent directtothe Board, copies ofthese farms pre available from all Braneh Secretaries.

LIST OF NZIV FELLOWS

The list of living fellows published in the September 1990 issue of the New Zealand Valuers' Journal omitted the name of

Wilson A R elevated 1978.

Obituary: Mr M B Cooke

Montague Burgoyne Cooke achieved eminence in all sectors of the rural property valuation profession during his long career, principally in Canterbury. In the educational and administrative spheres of the valuation profession Mr Cooke was extremely well known and in later years highly regarded as a Registered Valuer in private practice.

"Montie" Cooke was brought up as a child in a farming environment and attended Lincoln College from 1925 to 1927 when he completed the Diploma in Agriculture. Mr Cooke worked on Farms in various parts of New Zealand thereafter and for four years he managed the Seafield Irrigation Farm in Ashburton for the Lands and Survey Department. In 1936 he was appointed to the Rural Field Staff of the State Advances Corporation in Timaru. This was interrupted by a period in the Air Force in New Zealand during the War and a year with the Department of Agriculture in South Canterbury.

Mr Cooke joined the staff at Lincoln College in 1946, taking charge of short courses for Returned Servicemen. As the demand for these courses slackened off he took an ever-increasing interest in the Rural Field Cadet Training Scheme and in the Valuation and Farm Management Course. From 1951 he lectured in Rural Valuation at Lincoln College and was appointed Senior Lecturer in 1953. In this capacity he also conducted correspondence courses in Rural Valuation for the NZ Institute of Valuers and in addition acted as an examiner. Mr Cooke authored several textbooks published by Lincoln College and contributed articles to the NZ *Valuers Journal.*

Montie Cooke retired from Lincoln College in 1969 and for a period of 17 years until 1986 he practiced in association with Robertson YoungTelfer as a Registered Valuer in Canterbury, entering full retirement at the age of 80.

As well as being known to literally hundreds of students and staff during his 24 years at Lincoln College, Mr Cooke also rose to achieve considerable eminence in administrative circles. He was a member of the Valuers Registration Board for 12years from 1967 and during the period 1974 to 1978 he was an additional member of the Administrative Division of the High Court.

Mr Cooke's service to the valuation profession was outstanding. His interest in the affairs of the NZ Institute of Valuers commenced prior to 1938 since he was Secretary of the South Canterbury Sub-branch of the Institute from the inaugural meeting in 1938 to 1946 and subsequently served for many years on the Canterbury/Westland Branch Committee including a term as Branch Chairman. From 1959 until 1967 Mr Cooke was a National Council Member representing the Canterbury/Westland Branch of the NZ Institute of Valuers and was National President of the Institute in 1964 and 1965.

Mr Cooke was a Foundation Member of the Institute in 1948 and was elevated to Fellowship Status in 1949. In 1970 he received the ultimate accolade from the profession when he was unanimously elected a Life Member.

At the time of his death in Christchurch on 23rd August 1990 Mr Cooke was in his 85th year. He is survived by his wife Kathleen, a daughter and two sons.

Report of the October Council Meeting 1990

by the Editor

The mid-year meeting of the Council of New Zealand Institute of Valuers was held at the Evans Bay Room, Airport Hotel, Wellington on 29 and 30 October 1990.

The meeting followed a different format than usual in that an informal forum was held on Monday evening commencing at 7.00pm. The first session of the forum was led by Mr G J Horsley and in lively discussion the future structure of Council/Committees, the roles of the Executive Committee and the Presidential Triumvirate and the General Secretary were considered. The second session was conducted by Mr W A Cleghorn and Continuing Professional Development was the subject of discussion.

The Council meeting commenced at 8.30pm on Tuesday morning with a full attendance of Councillors. Apologies were received from Mr R E Hallinan, Immediate Past President and Messrs K J Cooper, E F Cordon and M A J Sellars all members of Executive. President R L Jefferies welcomed all Councillors, invited guests and members of Executive.

Minutes of the previous Council meeting were confirmed as a true and correct record of those proceedings.

Council ratified the following decisions determined by a previous postal ballot of Councillors: that a Branch panel consisting of the Branch Chairman or the Branch Councillor and two other members may be formed in special circumstances to conduct ANZIV applicant interviews; the appointment of Chairpersons for Standing Committees and Directors of NZIV Services Ltd.; to approve alterations to the NZ Institute of Valuers premises at level 5, 181 Willis Street, Wellington.

Council approved continuing "Affiliate" association with NZIV for Mr T P Boyd while on his overseas appointment.

Committee Reports Received and Discussed

Executive Committee

Mr J N B Wall, Chairman of Executive Committee, in an oral report referred to all the previous minutes of Executive. H advised that the restructuring proposals for Executives as discussed in the previous forum were in line with his thinking on the matter. He reported that architects had been appointed for the alteration work to the Institute offices and tenders have been received.

Professional Practices Committee

Mr J N B Wall, Chairman, reported that there are still a very significant number of outstandingcomplaints against Institute members and that hearings and decisions by the Registration Board are taking up long periods of time.

Publicity and Public Relations Committee

Mr R L Jefferies, Chairman, advised of the public relations exercises that had been undertaken through Consultus through the year and that further panels had been ordered for the "in-stand" display. The Committee recommends the continuation of the appointment of Consultus as the Institute public relations consultants.

Education Board

Mr W A Cleghorn, Chairman, reported that the recent computer seminars run throughout the country were successful for those who attended but the response by members was disappointing and a net loss was made. Valuing as a Career posters have been printed for distribution to secondary schools and an employers pack had been prepared giving information on the benefits of membership of the NZ Institute of Valuers.

Council agreed that second and third year and post graduate students at the three Universities will be supplied with a free copy of the New Zealand Valuers' Journal, Valuers Newsline and Branch Newsletters and that the student association fee be abolished.

Council agreed that the format for publication of Valuers Registration Board decisions lie on the table until the next Council meeting.

Mr Cleghorn reported on the steps to be taken by the Education Board to implement a Continuing Professional

Development programme for approval of the Council at the next Council meeting.

Council agreed that undergraduate awards be abolished and all funds be directed to post graduate study awards to a maximum sum of $9000 with up to three grants to be available each year to a maximum of $3000 per award.

Mr Cleghorn advised that a Real Estate Research Centre as a stand alone entity is not viable in New Zealand but consideration is being given by the Real Estate Institute of NZ, Property Management Institute and the NZ Institute of Valuers, the three sponsoring bodies, to investigating a joint research centre at Lincoln University.

Services Committee

Mr A P Laing, Chairman, reported that the contract with Valuation New Zealand for supply of sales data has been completed for the next two years.

Mr R M Stone reported that agreement has been reached with the Real Estate Institute of NZ for the sale to members of NZ Institute of Valuers of monthly sales lists of residential properties on a paper printed copy basis in all branch districts. He advised that the annual subscription cost has yet to be finalised.

Standards Committee

Mr G J Horsley, Chairman reported that the proposed Guidance Note on residential property has been distributed to members for comment and many submissions have been received. Following consideration of the submissions the proposed Guidance Note is to be redrafted and distributed again to members.

Council accepted the recommendation that all valuations produced by NZ Institute of Valuers members for non-residential properties should be stated as being "exclusive of GST" and that residential valuations should be stated as being "inclusive of GST if any". Council agreed that the Guidance Notes in the Code of Ethics dated October 1989 be withdrawn at the time that a new standard is issued. Council agreed that the standard for residential properties will be in two parts one of which will include valuations for mortgage security purposes. Council agreed to the incorporation of a Guidance Note in the existing Rule book following the Code of Ethics to include a requirement for members to comply with that Guidance Note and Standards.

Council agreed that the provisional residential standard as presented is to be adopted for a period of twelve months from January 1991.

Editorial Board

Mr W A Burgess, Chairman, advised that a sponsored speaking tour will not be held in 1991 as it has not been possible to find sponsors. He reported on the meeting of the Board held in Auckland on 8 June and another meeting is scheduled in December.

Editor of *The New Zealand Valuers' Journal* Mr T J Croot reported that production of the journal is continuing satisfactorily with a good flow of articles being received from the teaching staff of the Universities and from the annual Institute Seminar. However, he expressed some concern that more publishable material is not being received from the "grass roots" membership of the Institute. A new cover design for theJournal in 1991 is currently being selected and Councillors were asked to express their opinions on the selection of commissioned designs.

Council of Land Related Professions

The NZ Institute of Valuers representative on CLRP, Mr J P Larmer reported that the Council continues to represent the interests of the four institutes viz. Property Management Institute, Real Estate Institute, Surveyors Institute and Institute of Valuers.

University Foundations

Mr W A Cleghorn reported on the recent activities of the Massey University Foundation. Mr R L Jefferies reported on the Real Estate Valuation and Property Management Education Foundation activities. He advised that payment of the Grant from the Valuers Registration Board for the next two years had been received by the Institute. Council agreed that the funds be transferred to the Foundation.

The International Assets Valuation Standards Committee

Mr G J Horsley who is the current Chairman of TIAVSC reported on the recent meetings of the committee. Council acknowledged the time and work that Mr Horsley had dedicated to his position on TIAVSC.

Land Professionals Mutual Society

Mr A L McAlister the NZ Institute of Valuers representative on LPMS presented a report on the activities of the Society in which he stated that numbers of valuer members are being maintained and claims are at a reasonable level in comparison to previous years.

Westbrook House Body Corporate 66017

General Secretary MrJ G Gibson advised that some repairs are required to the roof and to the exterior fabric of the building and reports and costing for the work to be done are expected in the near future.

Financial Report

General Secretary Mr J G Gibson presented the financial report showing actual expenditure against budgets and forecasts for the end of year outcome which indicated a satisfactory financial position. Council agreed that the subscriptions for the 1991 year be set at:

Registered valuer		$320
Non-registered valuer		$160
Affiliates		$160
Overseas members		$100
Retired members	(Rule 14.1)	$50
	(Rule 14.2)	Free
Students		Free
Non active members		$160
Advancement and Entry fees		$30
Institute of Plant and Machinery Valuers Levy		$50

Council agreed that the annual subscription charge for *The New Zealand Valuers journal* would remain at $50 including GST and postage and packaging costs. The advertising rates in theJournal were confirmed at $350 plus GSTfor ahalf page and $600 plus GST for a whole page.

General Business

President R L Jefferies presented a report on the rules for conducting Council Meetings and following the full discussion that had taken place at the earlier forum, the matters raised are to be further considered by Executive together with the consideration of the future composition of Executive.

Council adopted procedures recommended by the General Secretary to be observed by Councillors for payment of expenses for attendance at Council meetings and these rules are to be included in the Councillors manuals.

Council agreed that in using designatory letters all intermediate members of the Institute must describe themselves in full as Intermediate member of the NZ Institute of Valuers. Affiliate members must also describe themselves in full as being Affiliated to the NZ Institute of Valuers.

Council received a report from the Presidential Triumvirate as representatives on the steering committee to consider a merger of NZ Institute of Valuers, Property Management Institute of NZ and NZ Society of Farm Managers.

Council agreed that the proposal for the appointment of deputy Councillors be referred back to the Minister for his advice on how this matter might be resolved.

Council adopted the proposals for a reciprocity agreement with the Royal Institution of Chartered Surveyors and expenses for the President of NZ Institute of Valuers will be met to attend the signing of the agreement in London.

The meeting was visited by Mr Sherwin Williams who gave a report on disciplinary matter brought to Council by the Wellington branch. Council adopted the recommendation of the Wellington branch.

The meeting closed at 4.45pm.

Choice of Interest Rate in Income Valuations

by S M Locke

The selection of an appropriate discount rate for use in discounted cash flow analyses remains a perennial problem which valuers confront. Although many rules of thumb have been developed, it continues as a troublesome area providing an easy point of attack for critics.' In this paper a formal model for estimating the correct interest rate for use in specific present value applications is explained.

The income method of valuation has gained wide acceptance in many applications and continues to grow as a primary approach to valuation. The simpler approach of driect capital sation of income is increasingly being recognised as totally inadequate. Although segments of the market continue to talk in terms of capitalisation rates, valuers are increasingly aware of the dangers of using this approach.

> "The notion that the contract rent, or passing rent, at a point of time can be divided by a single interest rate to give the value for a property is fraught with non-sustainable assumptions."

The notion that the contract rent, or passing rent, at a point of time can be divided by a single interest rate to give the value for a property is fraught with non-sustainable assumptions. Where in the rent review cycle is the asset? If the rent review were to occur three months after the valuation, then the capitalised value may alter significantly. Should contracts rents or market rents be used. Whipple (1989) discusses the question of inducements which artificially buoy the rental for capitalisation purposes. Economic and technological obsolescence which may alter the stream of flows in the near or distant future are ignored in the capitalisation approach. Further, it is assumed that the rental growth and increase in capital value will occur at the same rate, and this, in general, is not true.

Baum (1984 p.229) explores the implicit assumptions incorporated in the `conventional wisdom' which values the income stream as receivable in perpetuity. A similar treatment is provided by the American Institute of Real Estate Appraisers (1978). This includes assuming a replacement process about which Ring (1970 p 267) comments:

> *Improvementsplacedon land haveftnite economic lives; but improvements can replace old ones, and the cycle of replacement for all practical purposes can be conceived as extending on into infinity.*

Quarries, forests, fishing quotas and other revenue producing assets also require valuation using the income approach. The replacement possibilities in some instances, such as quarries are clearly differentz.

A recent survey paper by Mason (1989) examines the selection of gross income multipliers, gross rent multipliers and capitalisation rates in estimating the valuation for a rental property. He rejects these approaches as unsound, lacking a theoretical base, and representing a casual empiricism at fixed points of time in the market. Instead he advocates the use of a discount rate observing:

> There is a functional relationship between real estate discount rates and long-term Treasury bond rates (p86). The presumption is that in a capitalistic society, capital will flow to the highest return commensurate with risk, and an increase in the return to premier US Treasury debt will ultimately require an increase in the return to all other investment. Whenever cash flow models are used, discount rates are an important part of the appraisal process (p87).

How to calculate the correct interest remains problematical but not insoluble.

In Section 1 the net present value formula is presented. The need for a discount rate or series of interest rate for this formula is discussed. In Section 2 the alternative approaches, commonly used, for determining the interestrateare examined. While these may provide reasonable approximations, at various times, to the correct interest rate, it is found they lack any theoretical underpinning. While it is desirable to employ simple rules, it is essential that they be well founded. In the third Section a formal model known as the Capital Asset Pricing model is explained. This approach which has a strong theoretical base, is gaining wider acceptance in the property area. Finally, in Section 4 a summary of the argument is presented and the implications for valuation are discussed.

Professor Stuart Locke .BEe , Phd rs headof theDepartment of Property Studiesat Massey! University. He has held appointments at the Aus-' tralian National University, Victoria University; of Wel-' lingtan, Lancaster University rr Englan t, St Georges College in Jerusalem and University 'of Tasmania. He..; has also been director of the. TasnutnianPropertyDataBureauandconsultantin computer modell ng for investment analysts and management. Professor Locke has had many articles on property investmentanalysis, portfpliomanagementandfrnancingpublislied in numerous international property journals including previous contributions! to The New Zealand Valuers Journal.

FOOTNOTES:

1. The increasing tendency to litigate on claims of professional negligence requires that more attention is focussed on weak areas in the valuation paradigm.
2. Much work in the area of theoretical physics concentrating on quantum theories of gravity has recently been devoted to the nature of time and space in imaginary Euclidean space. It now appears that the possibilities for reversing the thermodynamic arrow of time are less likely and accordingly the probability that the quarry will be self replacing, in this universe, at least, is minimal (Hawkings 1989).

" The Capital Asset Pricing Model ..... which has a strong theoretical base is gaining wider acceptance in the property area.".

1. Present Value

A revenue producing asset provides a stream of future cash lfows. These flows may be either inflows or outflows depending on whether the net operating income (NOI) is positive and it exceeds cash disbursements of a capital nature such as refurbishments in a specific period. Capital flows such as sale of the asset or reclamation expenditures at the end of the mine's life also must enter into the valuations equation.

However, there is among property valuers some confusion regarding the format for DCF analyses. In particular it is common to discount the equity cash flows by the cost of equity capital and add the present value of the loan. This latter step involves inclusion of the debt service directly in the cash flows. Although this approach confuses the investment and financing decisions which in finance' have long been recognised as separate, valuers seem not to break free readily from old conventions. The inaccuracies resulting from this approach are explored by Kincheloe (1990) who observes that it is "theoretically indefensible and can cause investors to make less than optimal investment decisions", (p 95). The present value represents the now value which is financially equivalent to the project's uncertain future cash flows. The riskiness, measured by the potential variability in the future cash flows is an important consideration. Figure One is a time line illustration of the present value method. Cash flows per period are denoted as C, with the subscript indicating the actual period in which the lfow is forecast to occur.

Fig. 1 : Discounted Cash Flows

Time Period	0 ,	1 I	2 i	3	18	18	20
$ Amount							
Present Value							

Fig One..

There are two elements to the discounting issue. First, investors prefer money now rather than later. If you are offered $100 now or $100 in twelve months time, then you would accept the money now. At least you have the immediate use of it for consumption or you can invest it to receive interest. Interest reflects the time value of money. The decision to put the $100 in a bank at 6% per annum indicates that compensation of at least 6% is required when investing for tying up the money. Accordingly, if you are offered , with certainty, $100 now or $107 in twelve months, then the $107 should be accepted.

The second component in this decision calculus is risk. [4] Things in the future are less certain than the present. If you are prepared to wait for a future return, then there must be compensation for the risk involved.

This is in addition to the compensation for waiting, i.e. the time value of money. There must be a loading to reflect the riskiness associated with each particularinvestment. Butthepure time value of the money and the inherent risk associated with the venture are combined in the interest rate (i) used to discount the future cash flows. The formula is expressed in general form as equation 1 where the present value is calculated as:

$$PV = C_1/(1+i) + C2/(1+i)2 + C3/(1+i)3 + ... + C_n/(1+i)^n = \sum_{t=1} C_t/(1+i)t$$

" Estimation of the correct... cash flows is a critical element of the valuation process."

Estimation of the correct, or as close to correct as feasible, cash flows is a critical element of the valuation process. Projection of period by period inflows and outflows requires considerable skill. An important issue is whether taxation should be included in the analysis. It is now generally accepted that conducting income valuations in a vacuum ignoring taxation is meaningless because the maximum price which the asset can obtain in the market will depend on the most favourable taxation position prospective purchasers can achieve through the acquisition. Accordingly adjusted present values, incorporating taxation and taxation shelters directly attributable to the asset are recommended as the preferred approach (Locke 1990).

Subtraction of the initial investment, required at time zero, from the adjusted present values is known as the net present value. The decision rule is straight forward.

NPV	>0	accept
NPV	= 0	indifferent
NPV	<0	reject

This differs from the straight-forwarded DCF calculations by introducing the tax affect. Tax savings from shelters which the project creates should also be considered where the income valuation is being conducted from the perspective of a known client.

2. Heuristic Approaches to Interest Rate Determination

Various suggestions have been made as to the appropriate discount rate. Recently, Jefferies (1990 p22) in the context of discussing the valuation of leaseholds suggests a "comparison to Government Stock and First mortgage rates, plus risk and negotiability". The government bond rate is widely accepted as the minimum risk-free rate upon which loadings for risk mustbe added.

FOOTNOTES:

3. Copeland T E and J F Weston, *Financial Theory and Corporate Policy* write: "In particular, we shall see that some cash flows, such as interest on debt and repayment of principal on debt, should not be considered cash flows" (p91)

4. Morgan J P,*A New Measure ofIn vestment Risk,* Mimeo April 1990 comment "Risk has become much more important since the 1987 sharemarket crash, both in the way in which investment managers formulate and implement their strategies and the process by which clients hire and instruct.. the measurement of risk has not received much attention" (p1).

" The Government bond rate is widely accepted as the minimum risk-free rate upon which loadings for risk must be added."

The Royal Institution of Chartered Surveyors (1980 p 43) recommends that the appropriate required return is the yield on undated gifts, plus a margin of 2%. An arbitrary rule such as this implicitly places all real estate in the same risk class and ignores entirely any factors which influence the required rate of return and risk trade-off other than the yield on a specific government security.

However, the government bond rate plus, is a common approach. The amount of the additions required to reflect risk remains imprecise. The relationship between return and risk is central to the valuation process. The greater the risk involved, the higher the required return. Nevertheless, the measurement of risk is not straightforward. Sykes (1983 p 253) observes that:

> *The quantitative assessment of the degree of risk associated with direct acquisition of commercial property for investment purposes is practically non-existent. There is almost always a total reliance on unquantifted subjective feeling with no attempt to transform such a qualitative treatment into an analytically more acceptable and useful form.*

Vemor (1989 p266) discusses risk as it relates to cash flows, observing it is most likely that different sources of cash flow do not have the same degree of reliability which accounts for one dimension of risk.

Specifically the sources of flows or benefits which attract investors, according to Vernor, are of different degrees of uncertainty. Disaggregation into the various components assists in choosing an appropriate interest rate at which to discount the respective flows. He suggests:

> *It* is *important to know whether a particular investment property and its returns are driven by operating income, the tax shelter, or the speculative profits resulting from resale. (p267).*

Risk must be quantified for use in formal models. Libby and Fishburn (1977) review the evidence form experimental studies on the merit of various normative risk measures when applied in business decision contexts. Variability in outcomes is a widely accepted definition of risk in the finance area. Keynes (1937) identifies risk with dispersion of returns and Hicks (1946) accepts variance of returns as a risk measure. Variance or standard deviation, square root of variance, are now generally accepted as quantitative measures of an individual asset's risk. A tourist resort with highly volatile returns will have a larger variance of returns than a government bond with stable coupon interest payments.

Markowitz (1952) provides a major breakthrough in the understanding of the relationship between the fundamental variables or risk and return when assets are combined to form portfolios. The expected return for a portfolio is the sum of the expected returns of each asset weighted according to its proportion of the total value of the portfolio. However, portfolio risk as measured by the portfolio variance is not , in general, the weighted sum of the variances of each security in the portfolio. In particular the extent to which assets covary their returns move together over time,determines the magnitude of the risk reduction attributable to the diversification achieved by adding more assets into a portfolio., Portfolio variance is a function of individual asset variances and the covariance between each pair of different assets (Locke 1985).

The addition of more assets to a portfolio will in general reduce risk. However, there is a limit to the amount of risk reduction that can be achieved through diversification. At the limit the market portfolio contains all assets and is the most diversified portfolio available. Empirical evidence using financial securities indicates that a naively diversified portfolio consisting of eight to fifteen securities achieves the maximum amount of risk reduction obtainable through diversification (Brigham and Gapenskil985 p 55).

If risk can be reduced through diversification, then in an informed and efficient market assets will be priced according to their expected return and non-diversifiable risk, ie the risk that cannot be avoided. An analogy with a building site illustrates this point. The risk of injury may be reduced through the wearing ofprotective clothing including gloves andahard hat. Employees on the site are paid according to the work they undertake and an allowance or loading for danger is included. Employees are not paid more if they choose not to wear helmets, exposing themselves to unnecessary additional risk.

3. Capital Asset Pricing Model:

Asset pricing models occupy a central position in all aspects of finance relating to investment analysis and the valuation of securities. The capital asset pricing model (CAPM) is the most widely known and accepted of these models is gaining acceptance in New Zealand. The Commerce Commission in New Zealand recently endorsed the use of CAPM for determining the correct interest rate. The High Court finding in favour of the Commission's use of CAPM, on appeal stated:

> It is *not an exercise* in wisdom *to persist in error for the sake of consistency* (Auckland Bulk Gas Users Group vs Commerce Commission & Anor) Wellington M498/87.

Geltner (1989 p467) observes that:

> *The popularity of CAPM derives from the fact that it contains a kernel of "economic intuition", wrapped in a* parsimonious *and practical package. It "makes* sense" *enough, and is consistent enough* with *observed empirical reality, so that it sheds some useful light on what determines asset prices, without being too difficult to use.*

The capital asset pricing model states that assets are correctly priced relative to other assets when they yield a return commensurate with their non-diversifiable risk. This last term is also known as systematic risk and market risk. In formal terms CAPM is expressed as:

RA-Rf=bA(RM-Rr)
where RA is the return on an asset,
R. is the return on the market,
R is the risk-free rate, and
bA is the beta of the asset.

Conceptually, CAPM states that the expected return on an asset (RA) is equal to the return yielded by a risk-free security (Re) plus a premium, bA(RM Re). The applicable premium has two components. First, there is the excess return on the market, RM R1, which recognises that even a very diversified portfolio has some risk associated with it. This market premium or excess return on the market is compensation for bearing the risk associated with that portfolio. Second, the bA term is an index of

non-diversifiable risk measuring the relationship between the risk of the individual asset and the risk of the diversified portfolio. Assets are priced according to their risk level but it is only the non-diversifiable risk which is rewarded.

Return in this con text refers to total return for a single period including the capital and income components. If the chosen period is a year, then the return on a section is:

$$R_t = (V_t - V_{t-1} + CA_t)/V_{t-1}$$

where VAO is the value of asset A at the beginning of the year,
VAlis the value of asset A at the end of the year, and
CAlis the netcash income of assetA obtained during the year.

Return on the Risk *free* Asset

Within the framework of CAPM the riskless rate according to Phillips and Ritchie (1983 p279):

> *Represents the pure price of time, which is among other things, the maximum return that one can realise by an investment in a financial asset without bearing risk.*

Risk in the context of CAPM refers to market risk, the risk that cannot be diversified away when the asset is held in an efficiently diversified portfolio. Fama (1976 p275) argues that, as CAPM is a statement of equilibrium conditions, it is necessary that the market clears at those prices. This requires that the value of Rf be such that the aggregate of demands and supplies of loans are equal.

The acceptance of the standard form of CAPM with a unique risk-free asset poses a problem as to which proxy is appropriate. If it is assumed that inflation is anticipated and impounded into the yield on government fixed-interest securities, then the issue to be considered is which of the alternative government bonds should be employed in an analysis. Peirson, Bird and Brown (1985 p165) argue that when CAPM is used for capital investment analysis the appropriate measure of the risk-free rate is the current yield on a government security whose term to maturity matches the life of the proposed project. In the majority of instances, Officer (1981 p43) feels it is probably appropriate to choose a long-dated security.

It is rare for projectors or assets to be single period assets with only a terminal return. A far more common situation is for regular periodic, or approximately regular, returns. CAPM is a single period model but may nevertheless be applied in multi-period situations. Research by Fama (1970) and Merton (1973 and 1980) indicates that the sequential, period by period application of single period analysis is appropriate. Long-run interest rates are, according to the pure expectations theory of interest rate determination, the average of the short-term rates expected to be in effect during the long-term (Malkiel 1970). It is, therefore, appropriate to use short-run government securities as a source of interest rates. This is supported by the additional consideration that the market for short dated instruments is generally more heavily traded and accordingly more reliable, in a statistical sense, when samples are drawn.

The more liquid short-term securities will impound any alterations to anticipated inflation more rapidly than longer term securities in a thinner market.

It is important that an appropriate, nominal Rft be risk-free rate at time t be used in the calculation of excess returns in CAPM. Roll (1969) discusses in detail the econometric consequences in the estimation of CAPM when there are errors of measurement in the return on the risk-free asset. If the risk-free rate varies from period to period, Rn/Rr, then failure to use R_{n} results in attenuation bias being an increase in the error resulting from any errors in the measurement of market returns, such as from the choice of the proxy index to calculate RM

Short-term Government paper such as Treasury Notes, are the most commonly used proxy for Rf and this is considered appropriate (Davis and Pointon 1984 p 80). Average market premium figures are available, such as those of Franks and Broyles (1979) who report that the average market premium, RM - Rr, for the period 1919-75 in Britain was 9.1%. In Australia for the decade commencing 1968 it is approximately 6% according to the Peirson, Bird and Brown (1985 p166) reworking of the Officer (1981) figures. Although these long term averages are available they must be viewed as averages which have all fluctuations removed. Accordingly, the use of a short term period by period Rf is preferred. In New Zealand evidence accepted by the High Court agreeing with the Commerce Commission's acceptance of CAPM, noted above, was for a market premium of 8%.

Beta

The beta coefficient (bA) may be estimated via linear regression using the market model:

$$RA = a + bARM$$

where RA is the return on Asset A, a
is a constant,
bA is the estimated coefficient, and
RM is the return on the market portfolio

This states that the return on asset A is alinear function of the return on the market portfolio (RM).

The relationship term bA measures the sensitivity of returns of asset A to movements in the returns on the most diversified portfolio available.

Walker (1989) observes:

> *At this point, the astute appraiser may contend that the analogy breaks down when the Beta factor is introduced. It would not be possible to quantitatively identify the covariance of possible future returns of the individual real estate investment with the covariance of the real estate market. While* this is *true, it is still possible to qualitatively assess the general relationships between the individual real estate investment, substituting the stock market as an alternative to the real estate market in general (p40).*

He illustrates the method by reference to an office project.

> Assuming *that the project is servicing its debt, the inherent risk is relatively low. Subjectively rating the risk of this investment against the stock market as a whole, the appraiser may argue that the major risk is the liquidity difference between investments in the stock market and the real estate investment (ie the inherent business risk of the real estate investment and the stock market are approximately equal). The appraiser might indicate a liquidity premium of ten per cent of the stock market over the real estate investment which would be analogous to a beta of 1.1 (p40).*

A more formal approach is to use surrogates for the type of property concerned and endeavour to develop empirical estimates of the likely range of the beta.

The sensitivity coefficent bA is in effect measuring the non-diversifiable risk of asset A. It is non-diversifiable in the sense that when the market moves the return on this asset is directly effected. If bA is say 1.5, then when market returns increase 10 per cent the returns on asset A increase 1.5 times 10 per cent, 15 per cent. In many instances a consistent time series of returns on

asset A will not be available. An ideal situation would use 60-monthly observations of RA. As monthly data are not available for specific sections of land a proxy must be used. The correct procedure is to use another security which exhibits similar return stream patterns. A property trust which holds predominantly CBD properties may provide a reasonable proxy.

The b coefficient estimated from the shares in the property trust requires adjustment for gearing (Brealey and Myers (1988) pp 184-7) to become the beta estimate for the property. The initial starting value of beta is typically obtained form either a published "beta book" or estimated as a time series regression of the market model.

In both of these approaches the equity selected is for a publicly listed company or an industry aggregate which is most similar to the investment under consideration. This is founded on the assumption that the future variability in the earnings of the property will follow apattern similar to those exhibited in the past by this company or industry index.

The beta (b) may be estimated via linear regression using the market model:

$$Rt=a+b1RM$$

Where R. is the return on an appropriate (ie exhibiting similar expected return characteristics) listed property trust.

Beta books are readily available on an annual basis. More up-to-date estimates are available, for a fee, from Stock Exchange Research Services and brokers. Direct estimation of beta via the market model, with security prices from the daily newspapers, is a means of obtaining an up-to-date estimate. There are a number of technical issues which arise when direct estimation is the approach adopted and care must be taken that appropriate diagnostic testing is undertaken.

The estimated beta obtained is an equity beta and reflects the variability in returns to equity holders. The investment under consideration is an asset. Accordingly is is the beta of the property portfolio which must be calculated. In general the property beta may be found according to Brealey and Mayers (1984 p 175) as:

$$\text{Property beta} = \text{Debt beta}\ [\text{debt}/(\text{debt} + \text{equity})] + \text{Equity beta}\ [\ \text{equity}/(\text{debt} + \text{equity})]$$

This de-gearing of the equity beta, that is removing the impact of the leverage provided by debt, should be undertaken as a matter of course.

4. Summary

Thenatureofvaluation is continuallychanging as new technology and new databases couple with a changing envrionment to require the adoption of improved methods. Recent trends toward more and more litigation can either be ignored, cause a siege mentality to develop or can be dealt with as a further exogenous variable that must be taken into consideration

Pardue (1990) discussing effective appraisal report writing devotes a whole section to "Plan your defense". He suggests:

> *Never write an appraisal report that depends on one or key points that cannot be defended. (p18)*

Some aspects Pardue considers may be taken as points of fact while others are frequently open to question. Among the latter group he lists "interest rates". (p18) It is essential that valuers move to recognise explicitly changes and developments in understanding regarding income valuation. Use of appropriate techniques such as the inclusion of debt servicing as a cash flow and continued resort to internal rate of return (IRR) need to be addressed. As Kincheloe (1990) observes:

The IRR does not have anything to do with the correct discount rate; the market determines discount rates. The IRR is merely the rate that on a present value basis equates the cash inflows and outflows so the NPV equals zero. Indeed, to solve for the IRR, the value of the investment must already be known. Therefore the IRR is an "after-the-fact" type of calculation (p94).

> " The Internal Rate of Return does not have anything to do with the correct discount rate; the market determines discount rates."

As the methods are refined the need to develop the methodology cannot be ignored. Acceptance of AdjustedPresent Values as the correct performance measure must go hand-in-glove with a comprehensive theory of interest rate choice. There is no, or little advantage, in improving the model without utilising correct input.

Data requirements for CAPM may not be readily available but it is contended that it is better to utilise a theoretically sound method approximately than to use a random method randomly. As improved data bases covering property return such as JLW Indices in Britain, Frank Russell Company in the United State and BOMA in Australia are further refined, addressing recent criticisms of appraisal bias more improvements are likely. [5]

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5. See Locke S M (1986) who analysed the JLW and Australian data considering auto-correlation, normality etc. and the apparently independent work of Geltner (1989) who does similar exercises on Frank Russell Company data in the United States.

Professional Negligence and Indemnity

by P J Mahoney

"Thou are weighed in the balance and found wanting"
The Prophecy of Daniel, V:27.

The topic of professional negligence and the valuer is one which has been addressed on several occasions over recent years, but nevertheless one which in today's society with emphasis on consumer rights, pressure groups etc, is likely to become more significant and contentious in the years ahead.

The question of professional negligence as it affects the valuer is only part of an increasing general trend in the western world for professionals and others to accept responsibility for their actions and advice in dealing with the public at large. Or perhaps, is it the public's refusal to accept any suggestion that the professional should not be answerable for his/her actions?

My paper is not intended to be a summary of all relevant cases nor an authoritative statement on the legal position of the valuer in respect of his professional work and duty of care. Rather, it is my intention to act as a catalyst in promoting discussion and eliciting the views of other practitioners on this particular topic.

At the outset, it is appropriate and necessary that we clearly understand the relationship between the valuer and his/her client. This is almost invariably one of a contractual nature, ie the valuer as an expert provides advice and service to another party on the basis that he/she will receive remuneration for the same.

The law on this particular relationship is clearly established and I refer to Halsbury's Laws of England, 3rd edition page 11, which clearly defines the duties and responsibilities of valuers as follows:

> *A person who holds himself out or purports to act as a valuer represents himself as having the skill and knowledge which a reasonably competent member of his profession or calling would have and it is his duty to his employer to use such skill, care and diligence as is reasonably required in the work which he has undertaken.*

Of the leading cases dealing with the duties and responsibilities of the valuer, perhaps the most significant and widely recognised is:

Baxter v Gapp & Co (1938) 4 All ER 457 where Goddard L J in his judgement stated:

> *His duty was first of all to use reasonable care in coming to the valuation which he was employed to make and he must be taken to have held himself out as possessing the experience and skill required to value the particular property. If he did not* know *enough about the property market, or the value of the property at the place where the property was situated, he ought to have taken steps to* have *informed himself of the values of the properties there, or of any circumstances which might affect the property. It would be no defence for instance, to say: I made this valuation, but the reason* why *my valuation was proved incorrect, if it* has *been proved incorrect, is that I was not a person, as you knew who practised in that locality...*

On the other hand, one also has to bear in mind very carefully the fact that valuation is very much a matter of opinion. We are all liable to make mistakes and a valuer is certainly not to be found guilty of negligence merely because his valuation turns out to be wrong. He may have taken too optimistic or too pessimistic a view of a particular property. One has to bear in mind that, in matters of valuation, matters of opinion must come very largely into account.

When this same case was taken to appeal (1939)All ErR 752 the decision was affirmed by Du Parcq L J where he stated:

> *It is of course quite clear that the mere fact that there is an over-valuation does not of itself show negligence. Gross over-valuation, unless explained, may be strong evidence either of negligence or of incompetence.* Ihave *no doubt that there* is in *this case gross over-valuation and one looks to see whether or not it can be seen that the Defendant* has *failed to take any steps which he ought to have taken, or to pay regard to matters which he ought to have paid regard. I think that upon investigation one finds that it is quite plain that he has paid no regard to matters which were of the most vital importance.*

" ...your client when instructing you is expecting the highest standard of expertise from his expert."

The above is a brief summary of the general principles of the law which applies to the valuer. Undoubtedly all of you will be familiar with these principles and will also be conscious that your client when instructing you is expecting the highest standard of expertise from his expert.

I would now like to address specific areas where we as practising valuers are probably most susceptible to possible claims for professional negligence.

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Liability to Client for Negligence

It is my understanding that in law, there is no negligence unless damage results. Nevertheless within many of our governing professional bodies, negligence on its own may give rise to a charge against a member or practitioner even though no damage has been caused.

In simple terms, negligence simply means the departure from proper and reasonable standards of skill expected of acompetent qualified professional person in whom the public has the right to expect a reasonable degree of skill and care.

I believe that most practising valuers recognise and accept this responsibility of duty and care to their instructing client. Some however, may not be aware that in law, even strangers to this contract between valuer/client may take action against the valuer if the report and valuation was negligently made and as a result the claimant suffered financial loss by relying on it.

This principle of responsibility to a third party is clearly stated in the renowned case of *Hedley Byrne and Co Ltd Vs Heller and Partners Ltd (1964) A.C. 465.*

This particular case dealt with a banker's liability but its significance lies in having established that the professional owes a duty of care not only to his client but to anyone who might reasonably be expected to rely upon such advice.

Since the Hedley Byrne decision, thepotential ofprofessional liability in all professions has become much clearer and to some even quite daunting.

In the valuation profession, the prospect of professional negligence/liability appears to rear its head in times of economic downturn following aperiod of intense and usually very buoyant market activity.

To illustrate some of the areas where we as valuers may encounter difficulties, I now refer to some specific cases: The *English Queen's Bench decision of* Mr Justice *Watkins in Singer and Friedlander Ltd v John D Wood and Co* (1977) 243 EG 212,295, is in my view an outstanding case for most valuers. This case dealt with a claim by a merchant bank which endeavoured to recover part of its losses sustained following an advance of funds on development land during a period of a rapidly rising market. The claim was lodged against the valuers by way of damages on the basis of a negligent valuation.

The underlying principle emerging from this case was that the defendant valuer fell below the standard reasonably to be expected of a competent professional man using reasonable care and skill and in doing so had grossly over-valued the security offered. It is also significant to note that one of the valuations cited in this particular case was based on unsupported assumptions, whilst one of the valuers involved in the claim even failed to inspect the site.

This decision highlights the risks a valuer takes in preparing a valuation withoutbeing fully versed in the locality, the specific market and with reliance upon unverified market data. In this case the valuer had to be extremely wary of making assumptions and lapsing into carelessness or over-confidence on a buoyant market.

Mr Justice Watkins in his summary of the proceedings stated:

> *"...that a confirmed value of a property or valuation undertaken prior to the effective date of claim* was *not necessarily conclusive of an excessive valuation, but gross over-valuation unless explained, may be strong evidence either of negligence or of incompetence...'*

However, perhaps the most outstanding part of Mr Justice Watkins' judgment where he awarded substantial damages against the valuer, were his comments contained in the following paragraph:

> *"If a valuation is sought at times when the property market is plainly showing signs of deep depression or of unusual buoyancy or volatility, the valuer's task is made more difficult than usual. But it is not in such unusual circumstances an impossible one. As Mr Ross said, valuation is an art, not a science. Pinpoint accuracy in the result is not, therefore, to be expected by he who requests the valuation. There is, as I* have *said, a permissible margin of error, the "bracket" asI have called it. What can properly be expected from a competent valuer using reasonable skill and care is that his valuation falls within this bracket. The unusual circumstances of his task impose upon him a greater test of his skill and bid him to exercise stricter disciplines in the making of assumptions without which he is unable to perform his task; and I think he must beware of lapsing into carelessness or over confidence when the market is riding high. The more unusual be the nature of the problem for no matter what the reason, the greater the need for circumspection."*

In reaching his conclusion, the judge found that the valuer concerned had the necessary special skill but fell well below accepted practice to such a degree that he produced a negligent valuation which could not have been produced by a valuer of average competence using the reasonable skill and care which could be reasonably expected of him.

In an Australian decision of Mr Justice Carmichael *Inez Investments* Pty Ltd v J L Dodd Australian Valuer April 1988, this particular case related to a block of development land at Port MacQuarie where it was claimed that the defendant valuer was negligent in making the valuation of the property without having regard to the purchase price.

The property was valued by the defendant in march 1974 at $144,000 and a valuation was submitted to a prospective mortgagee stating that the property could be used as security for the advance of first mortgage funds of up to $80,000. The property at the time had been purchased at a figure of $100,000.

The significant feature of this case was that the defendant was claimed to have grossly over-valued the property and negligently failed to take into consideration the price for which the property was being sold at the time of valuation. The plaintiff claimed that it would not have advanced the money it did, had it been aware of the true value of the property.

In answer to a question by the defendant's counsel as to whether it was necessary fora valuer to enquire into the purchase price of the property when making a valuation, two of the valuers indicated they felt it was a normal prerequisite for undertaking a valuation, though another was quite emphatic that he wouldnot enquire as to the purchase price, but rather would base his valuation entirely on comparable sales.

In his decision, Mr Justice Carmichael stated that he was satisfied that when a valuer sets out to determine the value of real estate for mortgage purposes, he should seek to ascertain the price at which the property could be expected to realise on the date at which the valuation is required. In respect of the defendant's claim that the valuer should not enquire as to the sale price, the Judge stated that although this practice is acceptable to some valuers, it cannot be acceptable as proper to a reasonable body of valuers. He went further to state that he did not think it was possible for a competent valuer to so ignore such a sale or take into account primary relevant evidence of valuation, namely, the sale price of the land to be valued.

I disagree with this statement, as the valuer should, in my opinion, come to his/her conclusion as to value independently of

being influenced by the reported sale price. As we all know, such a price maybe unrealistically low or high, possibly influencedby a number of factors namely: favourable financing, low deposit, forced sale conditions etc. From my experience, instructing clients in several instances following receipt of an independent valuation, have been able to renegotiate a sale price. As a personal observation, I usually discourage the practice of being told the selling price of the property. Rather I prefer to carry out my own investigations and inquiry then reach my own conclusion as to value. Naturally, I am interested to know of the sale price once I have come to my own conclusion and if necessary make any appropriate comments on the indicated price.

This particular decision of Mr Justice Carmichael following an action for negligence which the writer suspects was mainly as a result of gross over-valuation, raises the most intriguing question for practising valuers: is it incumbent upon practising valuers to make enquiries into the sale price of every property they are valuing, which may be the subject of a sale and purchase agreement. Whilst this may be the understanding of certain legal authorities, one cannot help but ponder at thereaction of instructing mortgagees, trustees, etc when the valuer on receipt of his instructions makes a driect enquiry as to the sale price.

It is the writer's opinion that such a widespread practice would do little to enhance the independent reputation of the valuer. However to put this matter in its perspective, the case is perhaps important in emphasising the need for the valuer, where there is limited comparable sales evidence available and in particular in relation to the "one off"or specialist type property, to make necessary behind the scenes enquires as to sale price, terms and conditions of sale etc. Upon receipt of such information, the valuer should then include such details in his report and comment upon the sale price in relation to his own independent valuation.

The English decision of *Corisand Investments Ltd v Druce and Co* (1978) 248 EG 315, 407 and 504 by Mr Justice Gibson is interesting from the point of view of a valuation for mortgage security purposes of a hotel property undertaken during a very buoyant period of the property market.

In his decision, the Judge spent some time considering the aspects of the speculative element in the property market which existed at the time and the obligation of the valuer to consider not only the present market value, but in particular whether the value was likely to be sustained in the future and could be readily realised on the forced sale of the property.

The Judge went further to state that he thought that the valuer should also ask himself whether the existing market is unduly influenced by national or other conditions of a temporary nature which may have caused something like an artificial boom in prices. Whilst it is essential that the valuer must value in accordance with market conditions at the precise date of valuation, the Judge felt that the purpose for which the valuation was required could and often would, affect the tone of the report and the matters therein mentioned as well as the monetary figure of the valuation.

In respect of the subsequent downturn in the property market, the Judge pointed out that he was quite sure that the valuer was not negligent, because he did not anticipate or suspect the impending collapse of the market, however he was satisfied that any ordinarily competent valuer had substantial grounds for knowing that any speculative content in his estimate of open market price estimated in boom market conditions might well not be maintained in the future or be readily realised on the forced sale of the property.

This case also gave rise to the degree of variation between valuations undertaken by reasonably competent valuers and it was stated:

> *"...that as between different valuers the sort of margin of difference which might reasonably be expected was plus or minus 15% from the supposedly right valuation".*

The July 1981 decision of Mr Justice Park Queen's Bench Division UK in *Yianni v Edwin Evans and Sons* (1981) 259 EG 969 is a case relating to a claim by a mortgagor in respect of a valuation undertaken on behalf of a mortgagee for the advance of mortgage funds.

Subsequent to the purchase of theproperty, it became apparent that there were noticeable defects in the structure of the dwelling which had not been referred to by the valuer and these particular structural faults seriously affected the value of the property. The valuer acknowledged that once these structural faults had been discovered the true value of the property was less than that indicated by the mortgage advance which was 80% of the purchase price.

The plaintiffs based their claim on the fact that the valuer on inspecting the property and reporting to the mortgagee should have been aware of such structural faults and if he had carried out his valuation in a competent manner, would not have made the recommendation of £12,000 and as a consequence the mortgagors/plaintiffs would not have suffered their loss.

The defendant claimed that the applicants in completing their mortgage application form disregarded the suggestion that applicants who wanted a survey for their own information and protection should consult an independent surveyor on their own account.

Mr Justice Park however, in his judgment considered it was not usual for a plaintiff to obtain his own survey and the valuer in reporting to the Building Society had a duty to advise the mortgagee of the serious faults which were evident in the property and which as a consequence, seriously affected the value of the security. Mr Justice Park then added that whist the booklet prepared by the Building Society Stated that the Society did not accept liability to prospective mortgagors in respect of the accuracy of the valuations, it was no defence to the valuer. The valuer knew that the valuation of the property would be passed on to the plaintiff, who, notwithstanding the Building Society literature, could rightfully place reliance on the correctness of the valuation in making a decision whether or not to purchase the property. The valuation report as such, had to be directed to the valuer of the property and to matters likely to affect its value.

This particular decision is significant in that the Judge stated that valuers who prepare valuation reports for the purpose of ascertaining whether property will provide sufficient security fora loan to mortgage applicants, are under a duty of care to such applicants. A relationship of "proximity or neighbourhood" therefore existed and as such it must be in the valuer' s reasonable contemplation that in making the valuation, it is to be relied upon and any carelessness in undertaking the valuation might be likely to cause damage to the applicant.

This decision therefore appears to be a reconfirmation of the earlier principles of the responsibility to third parties, as set out under the *Medley Byrne & Co Ltd v Heller and Partners Ltd.*

A decision from the Supreme Court of British Columbia by Mr Justice Gould on 28th March 1979 in the case *W J Esselmont v Harker Appraisals Ltd and B W Harker* provides interesting reading not only for the circumstances of the claim on behalf of the claimant, but also for the very clear language and decision of

Mr Justice Gould in his reference to certain statements made by the valuer ie. "reckless mendacity".

This particular case related to a claim by a third mortgagee that he was induced to make a mortgage loan based on a negligent appraisal. As a consequence of advancing the mortgage money, the claimant suffered considerable loss and in the judgment of Mr Gould, the claimant was awarded damages of some $303,546.

Some of the more significant features of this case were:

"The amount of unverified facts specified by the Appraiser in his report and facts which were considered salient to the assessment of the value of the property particularly based on a development approach. On the aspect of zoning, the defendant valuer/appraiser not only designated the wrong zoning in his report, but also quoted incorrect facts regarding subdivisional potential."

The Judge also made reference in his decision to correspondence received from the instructing mortgagor, where the client gave clear indications of his aspirations as to value and to which the valuer was obviously co-operative. In addition, the valuer was apparently fully aware of two genuine offers for the property received close to the date of valuation at prices of $850,000 and $750,000 respectively. These offers were apparently rejected by the mortgagor. The defendant valuer apparently had full knowledge of these offers when he prepared his report of September 1975 but disregarded these offers and assessed a value of $1,440,000 on a development approach and a value of $953,400 based on a market data approach.

Whilst this decision itself did not establish any new principles, it would appear that the decision itself based on all the evidence presented before the judge clearly indicated bias on the part of the valuer.

In summary, the judge found:

"In my view the appraisal is reckless, mendacious and irresponsible. It constitutes a gross over-valuation and its author fell far short of the standard of care which the law imposes on a professional appraiser."

An interesting New Zealand case dealing with valuer's responsibility and contributory negligence, is a High Court decision of Mr Justice J Jeffries in the case of *Kendall Wilson Securities Ltd v C T Barraclough and Barraclough Bros Ltd* (1986) 1 NZLR 576.

This particular case dealt with a valuation of a parcel of development land and the assumption made that industrial zoning would be achieved, whereas in reality the situation was that the land only had a future urban development zoning. As a consequence, the property was over-valued and the claimant who advanced mortgage funds suffered loss accordingly.

However, one of the more significant features of this particular case was the defendant's pleading of contributory negligence on the part of the plaintiff solicitors who instructed the valuer:

"If they or either of them were in breach of any duty to the plaintiff (which *is denied) the plaintiff s alleged loss was entirely caused or alternatively was contributed to by the plaintiff failing to exercise proper care in making the advances on the terms and in the circumstances that it did to the mortgagor, Mercantile Developments Ltd."*

Counsel acting on behalf of the defendant submitted that the plaintiff with solicitor's partners as its directors had a duty to exercise cautious judgment at the time of examination and reliance upon the valuer's report.

In his decision Mr Justice Jeffries was of the opinion that whilst the valuer had been negligent in his preparation of his report, the plaintiff himself was guilty of contributory negligence in that one of the directors of the plaintiff company failed to apply the ordinary skill and care of a solicitor responsible for advancing the trust funds to the mortgagor. The plaintiff was deemed to have been guilty of contributory negligence in that:

"...he had read a complicated report and without assessment, analysis as to its true meaning or further investigation of anykind, made an immediate, substantial advance of trust funds. The shortest period of calm, detached appraisement of the valuer's report would have revealed a speculative, flawed reasoning to its final recommendations."

The Judge further stated that he held that the plaintiff's failure to make a detached and professional examination of the financial viability of the borrowing company was a contributing cause to the losses sustained. Accordingly, Mr Justice Jeffries attached the degree of contributory negligence attributable to the plaintiff at 60%.

This particular case was subsequently appealed to the New Zealand Court of Appeal in November 1985. It was not disputed that the valuer owed a duty of care to prospective lenders to whom the borrower or their solicitors showed the valuation. However, the valuer claimed that the nominee company (Kendal Wilson Securities Ltd) could not claim on behalf of persons who had become contributories to it at any time subsequent to the advance unless those persons could show that they had relied on the valuation. The valuer also claimed that one of the principals of the nominee company had been contributorily negligent in failing to study the report and failing to investigate the borrower's financial position.

The three appellate Judges: CookeJ, McMullin J and Somers J, in their decision held:

"The valuer knew *his report would be shown to third parties to whom Mercantile Developments Ltd applied for finance and a solicitor's nominee company would be contemplated by the valuer as among prospective lenders. As between the valuer and the nominee company, the source of the funds and changes in the beneficiaries whose funds the company controlled were irrelevant. The valuer owed a duty to the nominee company to take reasonable care in the valuation, so that the funds administered by the company would not be lost by reliance on an erroneous valuation. On breach of that duty the valuer was liable to the nominee company to make good the loss offunds."*

On the question of contributory negligence on the part of th solicitor's nominee company, it was held that the nominee company was not negligent in relying upon the report prepared by the valuer but there was enough evidence to support the trial judge's finding that the nominee company was negligent in failing to investigate the mortgagor's financial stability. One of the judges in the High Court decision stated that he had no doubt that an ordinary prudent lender would enquire into the ability of a possible borrower to meet his obligation without resort to any proffered security.

Accordingly the Court of Appeal allowed the appeal by reducing the finding of contributory negligence on the part of the nominee company from 60% to 33.33%.

To my mind this is a leading case clearly identifying the obvious link between the lender and borrower. The case also raises the interesting question as to whether the user of a valuation report also had a duty of care?

The foregoing brief summary of some relevant cases has been presented for your consideration and possible reminder as to the principal responsibilities and obligations of the valuer in

carrying out his professional duty. It is perhaps pertinent to note that most of the cases quoted and others I have studied deal primarily with allegations of over-valuation and where the courts themselves have demanded evidence of gross over-valuation before deciding upon valuer's negligence or incompetence. Significantly, there are however few quoted cases where the valuer has been shown to be negligent in undervaluing a property as a result of which the instructing party has suffered loss.

Some examples of situations where such negligence or incompetence may arise include:

1. The obvious case of a valuer advising a vendor of the sale price of a property which under extremely buoyant market conditions is subsequently proven to be below the market at the time of undertaking the valuation and subsequent sale, and where proper enquiry was not undertaken by a valuer or appropriate comment on the effect of market conditions was not conveyed to the client in the report.
2. A gross under-assessment of a lease rental on behalf of lessor which if proffered to and accepted by the lessee may result in substantial monetary loss being sustained by the owner. Such a situation could well arise where the valuer/appraiser has relied upon inaccurate market evidence, possibly misread the lease documents or even adopted lease areas which were not checked and found to be incorrect, or even unknowingly excluded parts of the building.
3. Another area of potential liability in respect of under-valuation can include: certification of realisable values on a company share transfer, where the value of the "realty" has been determined by a qualified valuer and is subsequently proven to be incorrect and possibly onsold by the purchaser at a higher figure.
4. Under-valuation on reinstatement/replacement insurance valuations. With many buildings considerable care has to be taken to ensure that the replacement equivalent takes into account such factors as local authority requirements, changes in zoning, requirements for fire and protection services, provision of adequate on-site parking etc.

Indemnity

Having considered the pitfalls and areas of potential liability for those of us practising in the valuation profession, the obvious question is: how do we protect ourselves against any possible claim for negligence and consequent damages.

> " There are some practical ways in which we ....can minimise the likelihood of...an action being taken against us."

Whilst none of us would accept the old phrase: "it will never happen to me" when hearing of a colleague's misfortune in a professional negligence claim, it is a sobering fact of human nature, possibly a reflection of the pressures of our profession that many of us will during the course of our working life possibly be the subject of such an action.

How therefore, do we eliminate or minimise the possibility of a claim of professional negligence arising against us?

In all honesty I cannot say that I have the answers, though I suggest that there are some practical ways in which we as valuers/practitioners can minimise the likelihood of such an action being taken against us. To this end I submit to you for your consideration and comment the following "check list" to assist the valuer/appraiser in his every day task:

1. Instruction: It is absolutely essential that the valuer receives clear instructions as to the purpose of the valuation and preferably this should be in writing from the instructing party. Telephone instructions and other information similarly supplied, should be recorded and confirmed in writing.
2. Time Available: Beware of accepting instructions to undertake urgent work, particularly where there are serious time constraints imposed.
   Months or years later, the client or plaintiff will not be influenced or even sympathetic to a defence of having undertaken the valuation without time to fully investigate or complete the details essential to a professional valuation.
3. Specialisation: Do not accept instructions to undertake valuation work for specialist type properties or specific locations where you have little or no experience or competence.
4. Definition: The valuer should clearly define the basis of the valuation which he is undertaking and the purpose for which the report is required, as well as stating the effective valuation date.
   This definition together with any subsequent disclaimer may prove to be extremely beneficial to your legal adviser in any subsequent action or claim against you for possible negligence.
5. Inspection: It is imperative that the property being valued and all comparable evidence relied upon in undertaking the valuation assessment, is inspected by an experienced competent person who must be a signatory to the report.
   It is totally inappropriate for an unqualified staff member to undertake the inspection of the property and comparable evidence and then have the report counter-signed by one of the principals or senior staff. This exposes the principal to a possible personal claim for the error or incompetence of the employee.
6. Verification of Data: As valuation is a matter of considered opinion and indeed is recognised as an art rather than a science, then it is absolutely essential that the opinion so derived be based on verified and confirmed facts. (Refer *Singer and Friedlander).*
   All planning data and other material factors influencing the valuer including market evidence, lease details etc. should be confirmed by the valuer, with the authority and source of such information clearly recorded on the working file.
   If the valuer is not supplied with copies of relevant lease agreements, certificate of planning data etc. then this should be clearly stated in the report and the valuation made conditional upon such information being provided.
7. Accuracy: As all valuations by their nature are normally expressed in an arithmetical form, involving a series of rather simple arithmetical calculations, systems should be developed and put in place for cross-checking of all calculations together with relevant quoted market data. All calculations however should be proof-read from the typed manuscript and not merely checked off the working papers or notes which may already contain the mathematical error.

It is the view of many valuers and indeed the practice in some countries, that detailed mathematical calculations are not shown within the body of the report. Whilst this may have the advantage that if a mathematical error has occurred it may not be readily apparent, it is in my view essential that all detailed calculations be clearly recorded on attached working papers.

Proof-reading of the typed manuscript is a very important task and one where the original author often misses his/her own errors. In this regard, I believe that the practice of utilising an independent party for such proof-reading, is to be highly commended. I am aware of situations where retired appraisers, loans officers etc. familiar with the valuation process and methodology, are willing to undertake such work on a part time `call as required' basis.

8. Certification: Once the valuer signs the report then he/she accepts full responsibility for the contents of the report and is under a "duty of care" to those parties who rely and act upon the report. Whether the author of the report has received remuneration for his/her services or not, is immaterial to the contractual liability in preparing the report.

" A disclaimer may, in the end, prove to be ineffective.".

9. Disclaimers: The use of disclaimers attached to most valuation reports is now a widely accepted practice and in most instances a requirement set down by the professional insurers.

Such disclaimers can include specific factors as: land title, survey,town planning structural reports etc.

Itismy view,thatinsteadofamulti-page list of disclaimers being appended to the report which may do little to enhance the valuer's general image) it is preferable to incorporate specific qualification clauses within the body of the report when dealing with such items as land title, survey, town planning etc.

A formal disclaimer clause(s) is undoubtedly required in specifying to whom the valuer accepts liability in preparing the report, and as to the specific purpose of the valuation and actual content. Case law however would appear to suggest that some disclaimers may be of limited if any use.

Whilst there have been recent decisions relating to disclaimer clauses: referB *TA ustraliaLtd and Anor vRaine and Horne PtyLtd* (1983) 3 NSWLR 221, a disclaimer clause contained in a contract may not always 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.

Therefore, a disclaimer clause if incorporated within the report must be precisely worded having regard to the nature and purpose of the valuation. However, depending on the circumstances of any given case, and legal interpretation placed thereon, such a disclaimer may in the end prove to be ineffective.

Indeed it is my observation and others within the profession in New Zealand, that case law suggests that general disclaimers are ineffective and that a well documented report with reference to confirmed market evidence will overcome most if not all claims for negligence. In other words, the report itself must clearly demonstrate "the duty of care" even if the answer itself is subsequently proven to be wrong.

In summary I would suggest that the answer to this particular problem or bogey of professional negligence, lies with ourselves and our own professional bodies. Personally, I believe that there are three separate and essential element which mustbe clearly evident and demonstrated in our every day professional advice:

1. Independence - whilst every valuation exercise involves the interests of a least two parties, it is imperative that the valuer rigidly maintains a position of independencewhich isessential toproviding obj ectiveadvice.
2. Honesty while very few negligence claims arise from intentional or premeditated dishonesty, the valuer can be dishonest both to himself and his client if he approaches his work in a flippant, careless or naive manner.

   In this respect, it is important to remind ourselves that as valuers all we really have to offer is our considered professional opinion. Once this opinion becomes suspect or questionable then what else have we to offer?
3. Competence because the practice of valuation covers such a wide range of activities and issues, most of which require an understanding of one ormore otherdisciplines eg law, town planning, agricultural science, conservation, building construction etc, it is unrealistic to expect that any person despite his/her degree of scholarship, has the necessary knowledge and practical skill required to produce an informed answer on every issue he orshe may encounter. Accordingly there is an absolute need for all members of our associated professional bodies, to maintain an ongoing education programme.

   This to my mind, requires active promotion by our respective professional bodies to implement and maintain a continuing education programme and encouragement of members to attend such seminars, workshops, conferences etc. This also demands a degree of sacrifice from many of the more experienced members of the profession in making themselves available to participate in such continuing education programmes particularly for those with specialist skills and knowledge.

To conclude my paper and possibly give some reassurance to any present who may feel somewhat apprehensive or nervous regarding the risks and contingent liabilities inherent in our particular field of professional endeavour, I would like to share with you a favourite passage of mine, included in an address given some 115 years ago by T De Witt Tannage:

As we all recognise, in the natural world there is a law as to storms and other elements of nature, so too there is a law *of trouble,* a law *of disasters and a law of misfortune, but the majority of the troubles of life are imaginary and most of those anticipated never come.*

References:

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Duty of Care: When, Why, How?

by R L Jefferies

Many current problems with troubled mortgages stem from ineptitude in lending polices and practices. So often when a loan goes wrong, the mortgagee(s) blame the valuer. The mortgagee, however, should first check the adequacy of the loan servicing ability of the borrower, and the quality of the personal/corporate covenant offered as the collateral for the loan. Second, the mortgagee should look at what went wrong with the lending procedures involved, in the nature of the appointment and instructions given to the valuer, and then the degree of consideration given to and reliance actually placed on the valuation in that process.

To look to the valuer as a "scapegoat" often smoke-screens the root cause of why the loan went bad in the first place! Some loans are doomed to failure before they start, your job is to pick them and avoid them.

Valuers cannot be expected to see those poor investments and alert you to them. They look, at the time of valuation, at the then value of the property offered as security. They may, if included in their instructions, make some comment as to the quality of the particular property as security over a future period , but valuations come with no guarantee or "crystal ball" predictions about the future. They can be no more than an expression of opinion based on current conditions.

Unfortunately some valuers have been misled by borrowers, which has contributed to some of the recently publicised losses. However, I reject the criticism that valuers have been instigators or active participants in fraudulent activities. None of the investigations by the Valuers Registration Board have found evidence of that. Some valuers may have been victims of such activities, and in some cases should have read the signs that they were being manipulated and have had the judgement to recognise and the fortitude to resist such activities by their clients.

However, too much publicity and media attention has been focussed on the few "bad apples" which have now been pruned from our ranks as efficiently as the law allows. There may still be minor pruning to be done, and this process will be continued as necessary to improve the welfare of all of us involved directly or indirectly in this lending business. The New Zealand Institute of Valuers for its part, is determined to uphold the highest standards of acceptable valuation practices and ethics.

While I don't dodge the recent criticism of my profession where it is well founded and deserved, much of it has been emotional and headline-seeking hyperbole and designed to draw attention away from the contributors to and the perpetrators of the misfortunes that have fallen on some.

Too many investors who sought the high returns being offered in now failed funds and companies are now looking for someone to blame. The truth is that all people in property share the common leveller of the market place. The property (and mortgage) market is in the process of adjusting to rapid change of fortunes and are-rating of investments in response to changes in the forces of demand and supply. All property people involved in this process, directly and indirectly, muststop blaming *that man behind that tree"* and roll up their sleeves and learn to work together and develop new systems, standards and relationships that act to protect investors while adjusting to the restructuring that is going on.

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Valuers are and will continue to play their part in thatprocess and in reflecting market changes in their valuations.

When something does go wrong and a valuer goes astray, the disciplinary procedures do work, albeit slowly and labouring under an archaic 50-year-old Valuers Act. The Institute has been pressing since 1984, through a joint working party with the Valuers' Registration Board, for reforms long overdue to improve many aspects of valuer registration and the efficiency of disciplinary procedures.

Unfortunately we are getting confusing messages from different arms of government. On one hand there are calls for more stringent standards, and tightening up of educational and ethical controls. On the other hand the Commerce Commission has forced us to remove many hard fought Clauses from our Code of Ethics on the grounds that they are objectionably restrictive and a restraint of trade.

The current occupational regulation review being undertaken by the Ministry of Commerce says that *"consumer welfare must be maximised"* while being highly critical of any *registration* or *certification* procedures that have a hint of *exclusivity* or monopoly for any organised professional grouping.

Currently, the Valuers Act 1948 provides for *compulsory membership* ie all registered valuers must belong to the NZIV. This presents the Institute with a situation where we must accept into membership all valuers who register, although we can object. The Institute cannot discipline its own *registered valuer* members, and is reliant on the statutory Registration Board in this area of professional standards maintenance.

The Government, through the Minister, has indicated thatwe may lose this compulsory membership status, and the profession is grappling with the implications of that, especially if coupled with registration being transferred to a generic registration board under a broad "Professions Act" or similar, such as is being advocated by the Economic Development Commission. Valuers are one of the 18 occupations for which statutory

registration is considered necessary by the EDC. That kind of generic re-regulation coupled with voluntary membership of the Institute will cause so much confusion in the minds of the public and users of valuations services, that we cannot see how the consumers' welfare can be maximised, it can only be undermined. Currently the Institute sets a Code of Ethics that all members must comply with, and issues high Valuation Standards in accordance with international standards.

How will the public or the mortgage lenders be protected, if they engage a "Registered Valuer" in such a new regime, who may voluntarily choose not to belong to the Institute and not subscribe to our Code of Ethics, participate in our Continuing Education programmes, follow our Valuation Standards, nor obtain the statistical and other Institute members services which enhance the practice of valuation in New Zealand.

In such a scenario, we will receive the criticism and complaints about registered valuers, who are not our members. While we will disown them, we will suffer, as will the public, from the damage they cause, depending on the efficacy of the generic state discipline that emerges.

The Council of the Institute is currently grappling with this possible scenario and it concerns us. We are currently plugging for an improved *status quo,* ie a new Valuers Act with continued compulsory membership. If we can't convince Government of that, then we will have to look seriously at a complete change of stance to one of actively seeking complete de-regulation. In this alternative there would be no *registered* valuers, with the Institute promoting a "Brand Name" for its members as the only acknowledged professional body giving adequate protection to their clients. However, we have spent 50 years promoting the use of the term *registered valuer* as being synonymous with membership of the Institute, and to now find the whole concept is under serious threat is of major concern to us and should also be of concern to the public and the mortgage lenders.

Nevertheless, my profession is ready to take on that challenge, if it happens and will provide the best services possible.

Duty of Care

How do the foregoing observations relate to the topic of Duty of Care? They are paramount to the whole question of the role that valuers play in the lending process, and to the creation of and upholding of lending practices and ethical valuation standards and which are at the very core of current problems.

Firstly, the valuer's duty of care stems from the instructions given to value a property.Too often the lender is careless in this area. The valuer's legal responsibility is primarily to the instructing client, and is dependent on the terms of that contract.

Secondly, the valuer is liable to any third party who is properly entitled to rely on the advice contained in the report, *for the purpose for which it was made and subject* to any effective limiting conditions and/or disclaimers.7I want to focus attention, however, on the role of the lender in contrast to the role of the valuer in the loan approval process and to suggest ways in which this may be improved for the benefit of us all. The best way to do this is to paint an unfortunately too familiar scenario.

What will it cost to value my house?

A purchaser having just signed up with an agent to buy a house approaches a lending institution to see what deals can be done on raising a mortgage. Amongst other information given, they are urgently requested to arrange an up-to-date valuation of the property. They are told the names of some "recommended firms" who will do one in a form acceptable to them, and to "ask around as to who can do it the quickest and cheapest".

The purchaser gets out the "Yellow Pages" and recognising some of the names mentioned, rings around getting quotes and seeing who can do it immediately. They specifically request a "Short Form" report or a "One Pager" as the loans officer said that would help speed the paper work and be cheaper.

They find the larger and better known firms will only do a full inspection, research and proper valuation and charge accordingly, even for a "brief report" for which there is little if any saving in time or cost, and/or they are not able to perform to such a tight time frame. Getting anxious, the borrower sees an ad for a $150 two-day valuation service and gets an instant response- ` of course, we're on our way".

Relieved, they arrange to pick up the valuation, pay for it, and read it over on the way to the lending institution. They find it is a pre-printed form with boxes ticked in the appropriate places for type, accommodation, standard of fittings and exterior. There is a one or two line handwritten comment at the end, including a sale of a nearby property that sold a year ago ata very much lower price, but no comment as to its comparability.

The loans officer seems genuinely relieved to see them and assures them that it all seemed OK and they would let them know the next day.

NOTE:

- There is no contract of engagement between the lender and the valuer.
- The valuation is not carried out independently of the purchaser, though the pre-printed form may say so.
- There is possibly no inspection of the property by a registered valuer, who may only be countersigning inspections made by unqualified commission employees.
- The report is brief to the point of often not providing a complete picture of the locality , construction, appointments, condition, nor a full investigation of recent comparable sales.
- The valuation figures may be totals only and not show how they are calculated.
- The employee is probably doing 5 to 10 of these per day, with an average inspection time of half an hour.

What is your Responsibility Here?

I believe it is in just these types of situations, such as I have described here, which is not confined to residential mortgages, that you as lenders have a responsibility: not just to the valuer, not just to the lender, but also to yourselves.

Lenders as a matter of course, and without considering what their advertising gurus have convinced them to say, should be telling their clients that the extra day or so to wait for and the cost involved in getting a full or "long form" valuation report, is money well spent and may save them more in the long run. You should advise your clients that you will arrange the valuations and recover the cost, if necessary adding it to the amount of the loan. On the basis of such a valuation, you as lender, and they as your *valued borrower* are better protected.

Equally, valuers have a responsibility to provide top quality work, and you should rely on known and reputable firms with a track record, and with whom you have developed a professional regard if only for your own ultimate protection.

FOOTNOTES:

1. The importance of incorporating a carefully worded and effective disclaimer to third parties is illustrated in a New South Wales Supreme Court case BT Austral is Ltd v Raine & Horne Pty Ltd (1983) 3 NS WLR 221; and in a more recent English Court of Appeal case Smith v Eric S Bush (a firm)(1987) 3 All ER 179, which according to the Chartered Surveyor Weekly 15 December 1988 is currently being decided on Appeal to the House of Lords. These follow an earlier Queen's Bench case Yian ni v Edwin Evans & Sons (1982) QB 438 where it was held that a negligent valuation could render the valuer liable to the mortgagor, even where the mortgagor had not seen the valuation and where a disclaimer formed part of the mortgagee's application forms, but because the loan was offered based on the report. In this case the property was structurally unsound.

Lender Reliance on Report

Some residential home lenders are probably making an advance of between $50,000 to $150,000 on the basis of these types of "reports".

The preceding scenario outlines a recent trend in an expanding and highly marketable "service" which merely satisfies the client's and the lender's immediate requirements. The valuer (if there is a registered valuer involved) is not however being used properly, nor are the required levels of expertise, care and adequate reporting standards being applied.

Mortgagees and mortgagors are not being adequately protected. Some of these types of "form reports" are designed to be multi-purpose ones for all types of properties, residential, commercial, industrial, and even horticultural and other types.

It is happening because of the competitiveness of the mortgage market and the keenness to get mortgage monies placed and earning interest as soon as possible. It is a driect result of the deregulation of the industry, coupled with the forced dismantling of the Institute's minimum scale of fees. These factors have combined to erode standards of care both by the lender and valuers in this end of the market.

When something goes badly wrong with some of the loan advances made relying on these types of unprofessional reports, the lender should ask: DID I GET WHAT I (or my borrower) PAID FOR? The "valuation service" in these cases is little more than a `rubber stamp' service and the valuer is little more than a cheap mortgage guarantor, and unlikely to be around or be of any substance when the chips are down.

Lenders' Duty of Care

The lender needs *firstly* to carefully check the borrower's ability to service the mortgage as in the event of a loss some liability may fall back on the lender or solicitor acting for the lender' if there has been a breach of duty of care in this area.

A lender secondly has a duty of care to ensure that the valuation that is being relied upon has been carried out upon driect instructions independent of the borrower. Further the valuer should not be "employed" by the borrower. The valuer, in most legislation covering lenders' powers, is required to be a person *reasonably believed* by the lender to be competent in valuing in the locality and the type of property being offered as security. *Reasonable belief* has not been tested, as far as I know, in the courts, but lenders have duty to see that fully competent valuers only are employed. Blind reliance on a form signed by a registered valuer may not be enough, and the lender has a duty to know the repute of the valuer and his/her firm. Care in the selection of the valuer is part of the duty of care of the lender.

Apart from limited specific legislative requirements, where a registered valuer is compulsorily used, there is no bar to unregistered valuers doing mortgage valuation work. However to rely on an unregistered valuers report could well be construed as *prima facie* negligence on the part of the lender.

However, I suggest that not only is the lender expected to exercise care in the selection of and in instructing valuers but they should pay for the reports so that a contract exists between the valuer and the lender. (It may be recoverable from the lender of course.) The primary responsibility must lie between the lender as client and the valuer as provider of the service.

The lender should read the valuation report very carefully to ensure the property is a sound one for the advance of funds. If a sale price is involved, it should be reasonably close to the valuation; if not it should be discussed with the valuer. Furthermore the report should make sense,not be based on unreasonable assumptions or potentials which may not be realised.

The Valuer's Duty of Care

The valuer should:

1. Accept instructions only if he/she or a qualified employee has experience in the locality and in the type of work to be undertaken.
2. Have sufficient time to complete the valuation report properly otherwise the request should be declined or extension to the deadline requested.
3. Obtain clear and precise instructions as to the purpose for which the property is being valued and who will be entitled to rely on the advice contained in the report.
4. Be instructed by the lender, look to the lender for payment and be in a client/valuer relationship with the lender. The valuer should look primarily after the lender's interests in assessing the worth of the property as a proposed security and report on all aspects of the property and surroundings that could also affect the security value in the future.
5. Obtain an up-to-date search of the title and latest government valuation.
6. Inspect the property personally if his/her signature is to appear on the report as certifying valuation and recommendation.
7. Accurately measure up the property recording full details of exterior and interior construction, appointments, condition and other data about the main buildings and other improvements.
8. If the property is tenanted or leased obtain and check all leasing documentation and outgoings.
9. If any structural deficiencies are suspected, call for an independent engineer;s or other expert's reportand make the valuation dependent on a satisfactory report if such is not available before completion.
10. Comparable sales should be sourced from databases for similar properties as close in location and time as the property being valued and inspected so as to make comparison with the subject property.
11. The valuation should be carried out by as many recognised methods as are appropriate and conveyed in a comprehensive valuation report to the client. If a"Form" report is used, it should fully and adequately describe the property, otherwise the valuer should supplement it with additional description and justification for the valuation and recommendation.
12. The report should be communicated directly to and remain confidential to the lender, or with consent of the valuer be made available to the borrower with an appropriately worded disclaimer, to prevent reliance being placed on the valuation for any other purpose without a separate or supplementary report of valuation being prepared for such other purpose.
13. The price being paid (if any) should not be disclosed to the valuer, and he/she should not make such an inquiry until the valuation has been completed. Then the valuer should be asked to comment on the price, perhaps in relationship to any significant variance from his/her valuation. (There may be good reasons for such a variance.) In cases of an overpriced property it can often assist the borrower in obtaining a reduction in the price, especially if the sale is dependent on financing.

The above outline is applicable to all types of valuations.

With a fully professionally completed valuation as outlined above the valuer and the lender should rest assured that all has been done to ensure that the proposed security has been assessed to a high standard. A

2. Ina New Zealand case that went to the Court of Appeal, *Kendall Wilson* Securities *Lid* v C *T Barraclough and Barraclough Bros Lid* (1986) 1 NZLR 576, it was held that though the valuer owed a duty of care to prospective lenders to whom the borrower or their solicitors showed the valuation, the principals of the nominee company had been contributorily negligent in failing to study the report and investigate the borrower's financial position.

Insurance Valuation Issues Arising From the Bay Milk Products Claim

by Paul Agius

The BMP claim revealed many issues which impact on the role of the valuer. This paper addresses those steps that valuers should follow to avoid some of the pitfalls. It also highlights some of the potential problems lying dormant within the insurance industry which have not been resolved.

Insurance Valuation

What is an Insurance Valuation. Chris Derry in his *Valuation of Plant and Machinery* defines the purpose of an insurance valuation as:

> *A Valuation is carried to provide the insured party with an accurate assessment of the value of risk for which he is responsible, arrived at with due reference to the terms and conditions of the insurance policy.*

Valuation of Process Industries

The procedure for valuing an industrial process plant is similar to valuing the assets, however some additional steps need to be taken because of the complexity of process plants.

In this respect thi s paper deals with the valuation for insurance purposes and not with valuations for financial or accounting purposes.

The paper addresses insurance valuations relating to large process plants and some of the points made may not be relevant to other types of assets.

Scope of the Insurance Valuation

The valuer must obtain clear instructions as to the scope.

Within the context of New Zealand insurance needs, there are three significant elements which affect the scope of the valuation.

a. The replacement estimate of the plant and equipment.
b. The replacement estimate of the building.
c. The assessment of the indemnity value of both plant and buildings.

This section will deal with Replacement Estimate, a later sections deals with Indemnity.

It should be noted that depending on the industry being valued, different specialists may require to address these important elements to arrive at a total wholesome valuation.

In determining the scope of assets to be valued the valuer must agree with the client and/or the broker the full extent of assets that are to be encompassed. We recommend that the valuer presents to the insured, a check list that itemises the types of assets to be considered. The attached Appendix A shows a typical "Property Designation" that is used by Beca.

This document in Appendix A is customised for each client. This is essential as the type of assets encountered in a dairy plant are significantly different to those encountered in any other type of industry be it a hospital or any office block.

The work put into defining the property designation helps the client and the valuer in :

a. aligning the valuation to the books of accounts, as normally stipulated in the insurance policy;
b. ensuring that no gaps or overlaps occur between the plant valuer and the building valuer;
c. ensuring that no gaps or overlaps occur between the various policies of the insured ie between: •
Material Damage Policy
• Motor Vehicle Policy
• Policies of Third Parties

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Terms of Insurance Policy

The valuer should be aware of the terms of the Insurance Policy, as far as they affect the Insurance valuations, and we should invite our clients to provide us with a copy of the Material Damage Policy so that we can align our valuation to the Policy needs. The wording of the Material Damage Policy incorporates certain features that affect the total insured value. Again this impacts on the scope of the insurance valuation. It also enables the Insurance Broker and the Insured to understand what cost aspects may be excluded from the valuations. Each Insurance Policy document tends to incorporate its own special feaures although many features are common.

If the definition of an insurance valuation shown above is accepted, then it is clear that the cost of reinstating the loss as provided for in the material damage policy goes beyond the value of the tangible assets insured. Typically the policy may provide for the Insurer to pay for:

a. claim preparation costs;
b. expediting costs;
c. the cost of opening up and testing for damages.

These costs can be quite significant and are not normally included with the "value at risk" unless the valuer is specifically requested to do so.

Accuracy of Valuation

The accuracy of a valuation determines the extent of exposure the insurer has to a potential loss. The insurance policy sometimes indirectly addresses this point in the provisions for "Average".

Many policies provide that if the Value at Risk exceeds the Sum Insured by more than a stated percentage, then the insured is deemed to be self insured in proportion.

It should be noted that although, in the BMP case there was no average clause, the accuracy of the valuation was at the heart of the whole dispute.

In Appendix B, we enclose a table of typical estimate tolerances that are accepted as industry practice and may help the reader to get a feel for the range of accuracies.

When we evaluate the relative accuracies of an insurance valuation, we need to remember that it has four distinct parts. Each has a different tolerance of accuracy; these parts are:

a. Instantaneous Replacement Estimate (item B of the usual Certificate of Valuation;
b. the indemnity value at the date of valuation (item A of the Certificate;
c. the inflationary provisions estimate (items D(i) and D(ii) of the Certificate);
d. the demolition and removal of debris estimate (item C of the Certificate).

Depending on the brief given to the valuer, we would expect that the Instantaneous Replacement Estimate would be somewhere between ±10% to ±20%.

We would expect that b, c, and d named above would have a progressively lesser accuracy in the order listed.

The constraints placed by the client and/or the insurance broker, through the level of fees, and/or lack of disclosure and/ or lack of access to details about assets, can reduce the accuracy of item a, above. One would hope that the accuracy is not pushed to be outside the ±30%.

The accuracy of a valuation is often confused with the amount of detail provided by the valuer. The provision of a detailed schedule itemising all the assets valued, can assist in evaluating the thoroughness and accuracy of the valuation. However the most important aspect is that the total value is correct, (within the scope agreed) and this is not necessarily the case with a detailed schedule.

Regulatory Upgrade

The Dairy Industry is subject to stringent regulations relating to the quality of the process plant. At present the food industry has probably more exposure to regulatory aspects than other industries. However as environmental issues gain more significance, this aspect will start to affect other industries.

The number of Acts and Regulations that impact the design and construction of a dairy plant is staggering. Appendix C shows a list of General Acts of NZ law that were in force at March 1987, that impacted on the design and construction of a dairy plant together with Acts that affected the manufacture, storage, distribution and sale of dairy products. Appendix D shows regulations that similarly applied at the time of the earthquake. All of the Acts and Regulations in some way affected the replacement cost estimate of a dairy plant as at March 1987. Many of these have been amended and replaced by other Acts, but there are still many in force.

Almost all policies stipulate that the insured is covered for cost "necessary to comply with any Act of Parliament or any Regulations". The valuer therefore needs to have a general understanding of these Acts, as far as they affect the Replacement Estimate of the Valuation.

The Valuer has no problem in allowing in his estimates for each item of the plant and each building and provision for it to be rebuilt to include regulatory upgrades. The problem arises when the configuration of the factory changes as a result of the loss. It may result in unforeseen aspects of regulatory upgrade coming into force.

At BMP where the replacement equipment would have necessitated changes in layout, the dimensions of the buildings and the specification of other items of plant would have been affected. An example was the butter factory. This building was not sprinkled and did not require sprinkling. As part of the reinstatement of the factory the gross floor area would have had to increase, precipitating the need to sprinkle the whole building, or to implement some other changes to the building to accommodate fire regulations within the building code.

Disaster Cost Inflation

One of the most significant lessons to come out of the BMP claim is the extra costs generated by disasters that affect a whole community.

Most policies are designed around fire hazard, with earthquake tacked on. In a fire situation, even a major loss is in itself a contained loss. The reinstatement of even a significant fire loss does not usually generate a general increase in prices.

When an earthquake hits a community it can create a massive demand through a widespread area. Labour and materials will increase in price accordingly.

We believe that this problem is not adequately taken into account in most insurance policies and needs to be addressed.

Aspartof the evidence prepared for this claim, Becaestimate that the increase in cost of reinstating the site as a result of the "Earthquake Factors" was in the order of 18% of all building costs (Reference Appendix E Analysis 2.)

This is not to be confused with what some people termed the "Edgecumbe Factor". The cost of reinstating a dairy plant in Edgecumbe would be expected to be greater than reinstating the same plant in Auckland, due to the extra costs of transport, accommodation, etc. Such costs should be included in the normal valuation, and are not due to the earthquake.

The 18% given above, is over and above the "Edgecumbe Factor".

Appendix E shows a summary analysis of cost of the Powder Plant Buildings at Edgecumbe that were built to replace the buildings written off by the earthquake.

Value at Risk EQC Issues

This section does not deal with the approach or methodology normally used by valuers to determine the indemnity values for certifying Insurance values. There are numerous papers which deal with this aspect.

This section addresses the pitfalls that a valuer (and for that matter a loss adjuster) will face in having to determine the value at risk at the time of the loss. In particular, it deals with the Insurance of the Earthquake and War Damages Act 1944 and subsequent amendments.

These issues were to be addressed as part of the court case and arbitration, but have remained unresolved due to the settlement out of court. Again it is not possible to detail all of this here but some examples are given to illustrate the problem.

Insurance of Land

The Commission by Virtue of the Extension to Land Cover Regulations 1984 insures land. This is to be contrasted with the usual insurance practice where land is almost always excluded from cover.

One of the points that arises from the court judgement is the implication that if a valuer leaves out a portion of property from his valuation, the insured is denied cover under the Act.

It is submitted that most valuers do not currently include within the indemnity valuation an allowance for the land insured by the Commission, and hence the provisions of the Act are negated with regard to land cover.

The question that arises is whether a valuer should include the value of land in the valuation.

Damage to Land

One item of claim within the BMP case, was the damage sustained by the land. The land at the Edgecumbe site suffered significant subsidence, which damaged the land. The land became more susceptible to flood inundation and this affected its market value.

The Commission and its loss adjuster have declined to indicate whether this item of claim is admissible.

Capitalised Interest

In determining the Replacement Estimate for an insurance valuation, the valuer excludes the cost of capitalised interest. The logic is that during reinstatement, the cost of rebuilding is financed by the Insurers and hence no interest is incurred by the insured.

However, with indemnity, the situation is different. If one considers the situation with a brand new building, the cost to the owner includes the cost of borrowed funds and if the owner is to be indemnified the indemnity payment must include the cost of interest charges.

It is submitted that the assessment of indemnity value must incorporate an element of capitalised interest commensurate with proportion of replacement cost insured.

Hardstand Areas

One item of claim that was strongly disputed by the Commission loss adjustors was BMP's claim for loss to concreted, tarsealed or paved areas.

At BMP, as on any industrial site, there were acres of heavy duty handstand areas where milk tankers and other goods vehicles are parked.

The loss adjuster (for the Commission) stated that this was excluded under the Act.To this day, no one has been able to show us where in the act or regulation such an item is excluded.

The Act specifically addresses the items excluded from cover and anything which is not excluded must therefore be covered by the Act. The Act excludes land, and road, and Street and path, and we submit that this cannot be taken to encompass hardstand areas.

Entitlement Guideline

We believe that the Commission must play a role in providing guidelines to industry as to what the Act entitles claimants to.

In the past the line taken by the Commission has consistently been: "We have no power to interpret the Act". We are sure this is based on sound legal advice.

However, the Act is being interpreted either by the Commission directing its loss adjusters, or by the loss adjusters interpreting the Act themselves.

All this is done in a non-transparent manner.

If a guideline or code of practice were published, it would enable interested parties to contribute to it. Ultimately, claimants can still challenge the guideline, as much as they can challenge the ruling of the loss adjusters.

The Standard Policy Wording

The policy is also sometimes referred to as an All Risk Industrial Policy. The clauses used in the BMP insurance policy are commonly used in many other policies. A standard form of industrial all risk policy is published by the Association of Insurance Brokers.

The problems BMP experienced in its claim with the insurers (FMC) and the Commission (EQDC) were in part due to long standing deficiencies in the standard clauses.

These were not particular to BMP or the practice it had followed, but featured in the industry as a whole. The fact that BMP's claim was large brought these deficiencies to the fore.

We do not propose to itemise all these aspects but instead deal with one aspect that was contentious in the BMP case,to illustrate the type of problem.

Emphasis on Buildings

The emphasis in the policy is on buildings. The form of policy must have originally been intended primarily for a building type of property where the risk insured was for the greater part of a Building, while "other contents" were a minor part of the risk.

Attention should be drawn to the fact that in most industrial plants the ratio of (reinstatement) value at risk, of building to plant is in the proportion of 3:10 and sometimes 1:9 and hence the emphasis on buildings is misdirected.

Attention is drawn to the wording of the typical Earthquake Memorandum and the Replacement Memorandum. The policy deals at length with the treatment of the buildings and only mentions plant (Other Property) in a cursory manner.

The policy dealt with buildings in a number of separate clauses and defined their treatment when destroyed and separately when damaged. When it came to plant, one clause lumps together the treatment for plant destroyed or damaged.

In practice, the settlement of plant is more complex than buildings. In the BMP case, the portion of the claim relating to building was close to agreement, whereas the difference between the parties on plant was considerable.

If a policy were to be specifically constructed for a process industry the clauses relating to settlement of plant would need to be extensive and far more detailed than they would be for buildings.

Summary

In summary we would recommend:

1. That valuers engaged on valuation of DairyPlants should:
   a. ensure that the Scope is clearly defined;
   b. site the Policy Document and check any valuation implications;
   c. incorporate a land value in their indemnity valuation;
   d. incorporate Capitalised interest in their indemnity valuation;
   e. clearly evaluate the regulatory impact on the plant and buildings in the event of reinstatement.
2. The Commission should put together guidelines or code of practice as to how the Act will be applied by its Loss Adjusters.
3. That a claimant faced with significant loss, should consider having his interests represented independently of the Insurers.
4. That a working party of those interested in these issues be convened to address these points in the interest of the whole industry.

References

Property Valuations Handbook B5 by CJ C Derry, published by College of Estate Management, Reading, UK.

Plant Design and Economics for Chemical Engineers by S Peters and Klaus D Timmerhaus, published by McGraw Hill.

Note that Appendices A, B, C, D and E are found on the following pages.

APPENDIX A

PROPERTY DESIGNATION
CHECKLIST FOR REPLACEMENT COST ESTIMATE

1. DIRECT COSTS

1.1 PURCHASED EQUIPMENT

All equipment listed on a complete flow sheet. Spare parts and non-installed equipment spares. Surplus equipment, supplies, and equipment allowance. Inflation cost allowance. Freight charges. Taxes, Customs Duty etc. Allowance for modifications during startup.

1.2 PURCHASED EQUIMENT INSTALLATION

Installation of all equipment listed on complete flow sheet. Structural supports, insulation, paint.

1.3 INSTRUMENTATION AND CONTROLS

Purchase, installation, calibration, computer tie-in.

1.4 PIPING

Process piping-carbon steel, alloy, cast iron, lead, lined, aluminium, copper, ceramic, plastic, rubber, reinforced concrete. Pipe hangers, fittings, valves. Insulation of piping, equipment.

1.5 ELECTRICAL EQUIPMENT AND MATERIALS.

Electrical equipment - switches, motors, conduit, wire, fittings, feeders grounding, instrument and control wiring, lighting, panels. Electrical materials and labour.

1.6 BUILDINGS

Process buildings substructures, platforms, support stairways, ladders, access ways, cranes, monorails, hoists, elevators

Auxiliary buildings administration and office, medical or dispensary, cafeteria, garage, product warehouse, parts warehouse, guard and safety, fire station change house, personnel building, shipping office and platform, research laboratory, control laboratory.

Special buildings cool and cold stores, silos and storage tank, associated foundations.

Maintenance shops electric, piping, sheet metal, machine, welding, carpentry, instrument.

Building Services - plumbing, heating, ventilation, dust collection, air conditioning, building lighting, elevators, escalators, telephones, intercommunication sytems, painting, sprinkler systems, fire alarm, computer network.

1.7 YARD IMPROVEMENTS

Site development- site clearing, grading, roads, walkways, railroads, fences, parking areas, wharves and piers, recreational facilities, landscaping.

1.8 SERVICE FACILITIES

Utilities steam, water power, refrigeration, compressed air, fuel, waste disposal, C.I.P.

Facilities boiler plant incinerator, wells, river intake, water treatment, cooling towers, water storage, electric substations, refrigeration plant, airplant fuel storage, waste disposal plant environmental controls, fire protection.

Non-process equipment office furniture and equipment, cafeteria equipment, safety and medical equipment, shop equipment, automotive equipment, yard material-handling equipment, laboratory equipment, locker-room equipment, garage equipment, shelves, bins, pallets, hand trucks, housekeeping equipment, fire extinguishers, hoses, fire engines, loading stations.

Distribution and packaging raw material and product storage and handling equipment, product packaging equipment, blending facilities, loading stations.

1.9 LAND

Surveys and fees. Property Cost.

1.10 COMMISSIONING

Commissioning specialist engineers, including overseas travel. Commissioning Consumables.

2. INDIRECT COSTS

2.1 ENGINEERING AND SUPERVISION

Engineering costs - administrative, process, design and general engineering, drafting, cost engineering, procuring, expediting, reproduction, communications, scale models, consultant fees, travel.

Engineering supervision and inspection, project management.

2.2 CONSTRUCTION EXPENSES

Construction, operation and maintenance of temporary facilities, offices, roads, parking lots, railroads, electrical, piping, communications, fencing. Construction tools and equipment. Construction supervision, accounting, timekeeping, purchasing, expediting. Warehouse personnel and expense, guards. Safety, medical, finge benefits, site canteens. Permits, field tests, special licences. Taxes, customs duty. Capitalised interest.

2.3. CONTRACTOR'S FEE

2.4 CONTINGENCY

APPENDIX B ACCURACY OF ESTIMATES

1. Order of magnitude estimate (ratio estimate based on similar previous cost data: probable accuracy of estimate over ±30 %
2. Study estimate (factored estimate) based on knowledge of major items of equipment; probable accuracy of estimate up to ±30 %
3. Preliminary estimate (budget authorisation estimate; scope estimate) based on sufficient data to permit the estimate to be budgeted; probable accuracy of estimate with±20 %.
4. Definitive estimate (projectcontrol estimate) based on almostcomplete data butbefore completion ofdrawingsand specifications; probable aGcu racy of estimate within ±10 %
5. Detailed estimate (contractor's estimate) based on complete engineering drawings, specifications, site surveys; probable accuracy of estimate within ±5 %

APPENDIX C GENERAL ACTS OF N.Z.

NO	ACT NAME	DESCRIPTION	DATE	ADMIN. BY	AA
1.	Agriculture(Emergency Powers) Act 1934	Establish Commission to regulate market and production of agriculture products, power and functions.	27 April 1934	MAF	MAF
2.	Boilers Lifts and Cranes Act 1950	Certification, inspection, safety of pressure vessels, boilers, piping and cranes and lifts.	1Jan1951	MOT	MOT
3.	Clean Air Act 1972	Air pollution control, clean air, emissions. Licensing of process, conditions of licence, smoke.	1 April 1973	Dept of Health	WDC
4.	Construction Act 1959	Safety, accidents, appeals, liabilities, duties of employers and works in construction work.	1 April 1960	DOL	DOL
5.	Co-operative Dairy Companies Act 1949.				
6.	Dairy Board 1961 (Reprint 1 May 1977)	Functions and powers of NZ Dairy Board. Marketing acquisition, pricing of dairy produce. MAF as agent of Board.	1 Sept 1961	MAF	MAF
7.	Dairy Industry Act 1952	Dairy Factory. Inspection, sanitation, sale, export, testing of milk and dairy produce. Conditions and regulations.	1 Jan 1953	MAF	MAF
8.	Dangerous Goods Act 1974	Licensing, inspection, storage, packing, and use of dangerous goods (gases, oxidising, flammable, corosive). Offences, penalties, restrictions.	1 April 1975	Dept of Internal Affairs	WDC
9.	Electric Power Board Act 1925.				BOP Electrical Power Board
10	Electricity Act 1968				
11	Factories and Commercial Premises Act 1981	Registration, inspection of factories, health, welfare, employment of workers in workplace.	Sept 1981	DOL	DOL
12	*Fire* Services Act 1975.	NZ Fire Services, establishment of NZ Fire Services Commission, Tire safety, organisation, personnel, adminstration.	1 April 1976	Dept of Internal Affairs	Fire Ser vices
13	Food Act 1987				
14	Food and Drug Act 1969				
15	Labour Department Act 1954	Officers powers, duties, regulations of Department of Labour.	1 Nov 1954	DOL	DOL
16	Land Drainage Act 1908	Powers and appointment of offices of Drainage Board, Accounts, bylaws, drainage, irrigation authorities, private owners, rates subdivision.	1908	Dept of internal Affairs	BOP Catchment Board
17	Local Government Act 1974	Functions, powers, administration of local authorities (councils). Rates, tax, development, roads, subdivision, water supply, water rates, sewage, stormwater, drainage.	1 December 1974	Dept of Internal Affairs	WDC
18	Health Act 1956	Administration of Dept. of Health. Powers and duties of Local Authorities in public health. Sanitary and sewage pollution of water courses. Concerns the welfare and health of the worker and public in the factory, workroom, shop or office.	1 Jan 1957	Dept of Health	WDC
19	Machinery Act 1950				DOL
20	Ministry of Transport Act 1968	Functions, powers, of Ministry of Transport. Includes administration of Boilers, Lifts & Cranes Act.		MOT	MOT
21	Noise Control Act 1982	Excessive noise, complaints, regulations.	1 June 1983	Dept of Health	WDC
22	Soil Conservation and Rivers Control Act 1941.	For conservation of soil resources and prevention damage by erosion. National Water& Soil Consergvation Authority, powers of functions of Authority. Catchment Boards, constitution, officers, proceedings, rates, powers and duties, bylaws of Boards.		MOW	B of P Catchment Board
23	Town and Country Planning Act 1977	Regional and district planning, control of development, district schemes, administration, control, powers and procedures.	1 June 1978	MOW	ACC
24	Water and Soil Conservation Act 1967.	National WaterandSoil Conservation, Authority. CatchmentBoard, functions, powers, applications and granting of rights for use and discharge of water and waste. Water quality. Application and inquiry of conservation order.	1 April 1968	MOW	B ofP Catchment Board

APPENDIX D STATUTORY REGULATION OF N.Z..

NO	ACT NAME	DESCRIPTION	DATE	ADMINISTERED BY	APPROVAL AUTHORITY
1.	Boilers, Lifts and Cranes (Fees) Regulations 1986.	Fees for examination of drawings, boilers and machinery.	1 June 1970	MOT	MOT
2.	Clean Air (Smoke) Regulations 1975	Minimum period emission of smoke, and exemptions.	1 April 1975	Dept of Health	WDC
3.	Construction Regulations 1961	Conditions for safe constuction of buildings. Site conditions, certificates, health and welfare, safety, lifting , scaffolding, guardrails, permissable working loads, ladders gas supply.	1 March 1961	Dept of Labour	Dept of Labour
4.	Dairy Factory Supply Regulations 1936	Regulations on supply and receiving of milk or cream in localities by dairies. Powers of NZ Dairy Board.	25 Sept 1936	MAF	MAF
5.	Dairy Factories (Licensing) Regulations 1936.	Regulations regarding application andissueofalicensefor use and operation of a dairyfactory. Terms and conditions.	5 March 1986	MAF	MAF
6.	Dairy Indsutry Regulations 1977	Registration of factories. Construction, alteration, contaminiation, hygiene, collection, storage, testing, grading, quality control, stores, transportation.	9 Dec 1977	MAF	MAF
7.	Dangerous Goods Regulations 1958	Marking, packing, conveyance storage, handling, safety precautions.	12 June 1988	Dept of Internal Affairs	DOL
8.	Drainage & Plumbing Regulations 1978	Provision for stormwater and liquid wastes, drainage, sizing,construction, sanitary fixtures, plumbing systems, pipes, fittings. Permit and inspection.	10 May 1978	Dept of Health	WDC
9.	Electrical Supply Regulations 1984	Conditions of supply of electricity by Electric Supply Authorities to clients. Engineering, costing, metering, consumer installation, generation statiions, maintenance, inspection.	1984	Minsitry of Energy	BOP Elect. Power Board
10	Electrical Wiring Regulations 1976	Technical. Design and construction requirements for installation of electrical work and equipment.	1 April 1976	Ministry of Energy	BOP Elect. Power Board
11	Factories and Commerical Premises Regulations 1981				DOL
12	Fire Services Regulations 1965	Protection of property agreement, registration of premises in rural areas, operation of emergency fires.	11 March 1965	Dept of Internal Affairs	Fire Service
13	FoodandDrugRegulations				WDC
14	Food Hygiene Regulations 1984	Registration of premises, conduct and use of premises, maintenance, hygiene, packing, storage of milk.	1 January 1975	Dept of Health	WDC
15	Food Regulations 1984	Labelling content, ingredients, conditionofallfoods,whether processed orunpocessed, including milk or milk products.	1 Nov 1984	Dept of Health	WDC
16	Health (Registration of Premises)	Application and issue of Certificate of Registration	26 May 1966	Dept of Health	WDC
17	Machinery Regulations 1950		1950	DOL	DOL
18	Milk Station Regulations 1979	Milk Stations. Registration (Certification of Registration) construction and equipment. Requirements for receiving, storage and processing and packing of milk from health and hygiene point of *view*	1 Sept 1979	MAF	MAF
19	Town and Country Planning Regulations 1978	Submissions, regional and district schemes, control of development, planning tribunal proceedings, enquiry, procedures.	1 June	MOW	WDC
20	Water & Soil Conservation Regulations 1968	Applications for rights to use and discharge into natural waters	3 April 1970	MOW	BOP Catchment Board
21	Water Supplies Protection Regulations 1961	Back Flow Preventer permit. Water supply, check valves, fees and inspection.	9 August 1961	Dept of Health	WDC

APPENDIX E: BMP POWDER PLANT COSTS

ITEM	ESTIMATED BASIC COSTS	ESTIMATED EARTHQUAKE COSTS	ESTIMATED TOTAL COSTS	
ANALYSIS 1				
PRIME COSTS	17,179,224	1,769,566	18,948,790	100.00%
PREL & GEN	1,717,922	363,869	2,081,791	10.99%
PROF & 0/H	1,288,442	132,718	1,421,160	7.50%
FEES	3,435,845	785,230	4,221,075	22.28%
SITOTAL	23,621,433	3,051,383	26,672,816	140.76%
INFLATION	1,299,648	120,113	1,419,761	7.49%
TOTAL	24,921,081	3,171,496	28,092,577	148.26%
	100.00%	12.73%	112.73%	

ITEM	ESTIMATED ALLOCATION OF COSTS	
ANALYSIS - 2		
PRIME COSTS	17,179,224	100.00%
PREL & GEN	1,717,922	10.00%
PROF & O/H	1,288,442	7.50%
FEES	3,435,845	20.00%
S/TOTAL	23,621,433	137.50%
EARTHQUAKE COSTS	3,051,383	17.76%
S/TOTAL	26,672,816	155.26%
INFLATION	1,419,761	8.26%
TOTAL	28,092,577	163.53%

Traditional Concepts of Maori Land and Implications for Assessing Values

by Judge A D Spencer

I have been asked to discuss traditional aspects of Maori land and whether it should be valued on a different basis from other land.

I shall first refer to "Maori Land" its legal definition as I see it at the present day. I emphasise that we are presently in evolving times, that the definition of "Maori Land" has not recently been put to test in the Courts. But I will put to you what, in my view, is the present position having regard to High Court and Courtof Appeal decisions in the last few years relating to the regard that should be had to the Treaty of Waitangi in the interpretation of our laws.

I shall then describe what I understand to be some of the traditional concepts held by Maori in relation to their land, that it indeed has cultural and spiritual significance which is not contemplated by the English concept of land being "real estate".

Secondly, I shall consider where valuation principles fit in to the current position, as I have interpreted it, incorporating traditional concepts associated with Maori land. This will include the question of valuing Maori land for local body rating purposes and I shall suggest some changes in our thinking.

A. MAORI LAND

The law relating to Maori land is found principally in the Maori Affairs Act 1953. It has been a part of the jig-saw of our General law, whilst it does acknowledge, of course, some Maori traditions, *eg* limitations on alienation of interests in multiply-owned land, it does not relate back to the founding principles of the relationship of Maori with land. It was not intended to, it is the descendant of "Native Land" legislation whose intention was principally to create titles to land and identify "ownership". Both of these concepts were alien to Maori tradition.

The Maori Affairs Bill 1987 is however, presently before Parliament. This will introduce many traditional concepts and will integrate the administration of the law relating to Maori land with the other changes in our general law by Parliament (eg the Resource Management Bill, the Conservation Act 1988 etc) and the interpretation of the law in having regard to the principles of the Treaty of Waitangi, by the Courts.

1. Maori Affairs Act 1953 and amendments

In S.2 of the Act, "land" is described as:

- Crown land other than Maori land not alienated from the Crown;
- Customary land vested in Crown but held by Maori under their customs;
- General land other than Maori land alienated from Crown;
- Maori land customary or Maori freehold land;
- Maori freehold land other than General land owned by Maori.

As a matter of practice, the interpretation of "land" has been applied with meanings consistent with English concepts of real estate. In recent years, however, there has been recognition of the provisions of the Treaty of Waitangi, not only in statutes but also in their interpretation by the Courts. In Huakina Development Trust v Waikato Valley Authority (1987) 2 NZLR 188,Chilwell J commented that "There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which infringes upon its principles is to be interpreted where it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material".

Accordingly, the principles of the Treaty, where proper, should be applied in statutory interpretation. By Article two the Crown guaranteed to Maori "the full exclusive and undisturbed possession of their lands..."

In dealing with Maori land (customary or Freehold land), since the Huakina decision, it is in my view necessary to apply to the Maori in their use of their land the concepts appropriate to their traditions rather than English concepts of real estate. Accordingly, traditional Maori concepts should be applied to Maori land (Customary and Freehold) and General land owned by Maori, as distinguished from General and Crown land in the Maori Affairs Act.

2. Traditional concepts of Maori land

Whilst mindful that I am not an expert on the traditional significance of land to Maori, I shall very briefly outline some of the concepts which I have found have been accepted by kaumatua in Taitokerau. First, it should be remembered that the tenure of Maori land did not convey a title to an individual.

- The practical significance of land

  Land of course had a practical value, for growing crops, providing shelter, etc. It could also be traded, to buy off an enemy or repay a favour to a friend in times of war. This most closely resembles English concepts of real estate and does not require elaboration.

- The cultural significance of land

  Not being a literate culture in the way the European and other civilisations may understand "literate", the land was most important culturally, It was the roots of the Whakapapa or genealogy of the people. It was the source of their identity. In oratory they identify themselves with reference to place, mountains etc which others will recognise. Indeed, many features of the land have names, not just mountains and rivers, but indiviudal rocks in the river etc. And all these names have meanings which relate to people who lived there (the tupuna or ancestors of the people) and things which happened there. Being found everywhere these named features were a part of their lives, they were tripping over them all the time. Accordingly, they became personalised and would be addressed as such in oratory.

  It is at the same time a constant recall of their history and an expression of an holistic view of man andenvironment, a unity with one another, a part of one another in cultural terms. It is the identity of person with place. Accordingly, ancestral Maori land is the identity of the Maori today; by ithe can trace his whakapapa or genealogy back to before "Pakeha" was thought of and the names of the places

This paper was presented to the Northern Regional conference of Valuation: New Zealand in June 1990 by A D Spencer, Judge of the Maori Land Court, Taitokerau.

on the land, with their meanings, weave into the vivid stories about the tupuna of that place.

- The spiritual significance of land

  The unity in cultural terms of person and place carries over to the spiritual traditions of Maori. Whenua (land) also means womb; hapu means pregnant, and also means the people of that place. This connection of the person with the land is epitomised by the tradition of burying the pito (umbilical cord) in the earth, signifying the relationship of the person with Mother Earth, the source of the strength and mana of the people.

This relationship between the person and place was regulated by concepts of tapu and interwoven with traditions relating to seasons, the moon etc in the use of nature's resources (land for crops, gathering seafood, etc). The relationships between the person and Mother Earth explain aspects of the social order, such as the role of women in Maori society. It all helps one understand the complete unity of the environment, of which man is just a part.

Accordingly the land is the mana and body of the tupuna. The marae is the spirit and memory of the tupuna.

3. "Use", Town Planning & Traditional Maori Land Concepts

Acknowledging realities, Maori land (except perhaps customary land) has titles. It is identifiable. Hence in our system its use is regulated by District Schemes etc.

Article Two of the Treaty guaranteed to Maori "the undisturbed possession" of their lands. But the word "possession" has a neutral meaning, it can mean possess to use or possess to keep in a passive sense.

Our planning law regulates the "use" of land and ignores the traditional Maori value of "keeping" in a passive sense. Hence, land is zoned for a supposed use eg Rural A, with an assumption that it is farm land, that, although unused, it is nevertheless "farm land". Non-use is not recognised.

The passive significance of land to Maori has been completely overlooked. The recent recognition of conservation or historical values by heritage orders whereby land can be given a non-use designation, does not embrace the Maori concepts of possession of land. To illustrate this attachment to the land without "using" it, the expression often used by Maori that someone stays at home to "look after the place" does not mean that it is intended that he will grub the thistles. It means that he retains the identity of the people and family with the place in both cultural and spiritual terms.

It could be argued that in the preparation of District Schemes there is now an obligation by reason of the application of traditional Maori concepts to Maori land in interpreting planning legislation, that the non-use significance I have just referred to should be given recognition in respect of ancestral Maori land.

B. VALUATION OF MAORI LAND

I shall not attempt to examine the principles of valuation law in relation to Maori land, clearly with application to traditional Maori concepts relating to land, valuation principles don't fit. But they can apply, with modifications in some cases, in the practical use of their land by Maori today. We need to distinguish between the purposes for which the valuations may be required.

Before embarking upon this discussion, however, we should recognise that, insofar as valuations express a notional market value, Maori land to which its owners attach their traditional values has no market value as such. Not only is it "not for sale" in a very basic sense of identity with and being a part of the people who "own" it, but in practical terms it does not enjoy the indefeasibility of title which attaches to land under the Land Transfer system. You may say, it is capable of being brought under that system. There is a potential there for it to have guaranteed title and should be valued accordingly. But then it wouldn't be Maori land would it? In my view, whilst land is Maori land it should be valued as such; it should be assumed its owners attach traditional values to that land. It should not be valued as Could-Be-General land.

Accordingly, for Maori land the valuer should not be relating its value to notional sales but rather should be expressing a relativity of values having regard to the purpose of the valuation. If the purpose of the valuation is to assess a market rental for a lease of the land, then the usual valuation principles will apply. If its purpose is to determine the relative interests of owner within a block of multiply-owned Maori Freehold land which the owners wish to partition, then their intentions as to its "use" will apply.

The point that I am making is that it is the purpose of the valuation and the intentions of the client for that property that are important. The owners of a commercial building will not, one assumes, want it valued as a poultry farm, although one never knows these days from what one hears of the commercial property market in the cities. Valuation NZ, acting for a local body valuing for rating purposes, will take into account its intentions for that property as expressed in its District Scheme. The question is, what is the purpose of the valuation and to what extent does that property permit the client to achieve his intentions for it.

I now propose to limit my consideration of these questions to the valuation of Maori land for the purposes of partition among owners, and for rating puposes.

1. Valuation of Maori land for Partition

In Taitokerau much of the Maori land is multiply-owned. People are wishing to identify separate areas so they, as indiviudals or families, can have the benefit of their work in developing it.

It causes me some annoyance when a small block of undeveloped Maori land, completely uneconomic for farming purposes, is the subject of a valuation which values it on a pastoral farming basis. There has been in recent years, a trend for Maori owners to return to Taitokerau from the cities, to build on their ancestral land. "Papakainga housing schemes" have become popular. These sometimes result in partitions being sought by the owners. It is not their intention to farm, they are looking for house sites. Instead of a value of $2,100 per acre X the number of acres, I want to know how many house sites are there in that particular portion of the land; what are the difficulties in building there in relation to sites on other areas (eg construction of access, provision of services)?

The answers to these sorts of questions, expressing relationships of interests among owners, tell me the "value" of that property in terms of the intentions that the owners have in their use of it. I am not asking for a detailed subdivisional proposal but an indication of relative values in respect of the intended uses of it. They may be expressed in monetary terms, to link in with approximate development costs. But clearly, because Maori land cannot, if the owners attach traditional values to it, be valued on the basis of a notional sale, the money equation is not as relevant.

Nevertheless it is useful to give a guide to the economics of developing that property for the purposes the owners propose, or whether it would be a more economic alternative to purchase an existing house in a nearby town.

You may ask, would that not open the way for an owner to obtain a valuation on the basis of achieving one intention (eg building on the land) whereas he has another intention, such as selling his share of the land? That can occur in any transaction. For example, a planning application to permit a certain use of the property may be a ruse for the owners to obtain a separate title to it, not carry out the "intended" development, and sell it. In the case of Maori land, the valuation will be subject to the scrutiny of both the Court and the owners. They may dispute the basis of the valuation if they so desire and have included"market values" if they thought they were appropriate and not adequately expressed in the valuations.

I do not propose, however, to go into any detail on this point now, discussing "before and after" methods. We can leave that to another time. I merely ask valuers to remember the purpose of the valuation and to express the value of that property in relation to the owners' intetnions for it.

2. Valuation of Maori land for rating

I noted earlier that one should assume that if land has a Maori land title, its owners attach traditional Maori values to it. I also concluded that valuing it on the basis of a notional sale or market value was inappropriate.

We appear to have an impasse. How can rates be uniformly assessed on properties in a community if a common yardstick is not applied to all? Under the present system, it would be difficult. I shall now discuss matters which I consider should be taken into account in valuing land under the present system and then suggest an alternative system.

a. Rating Valuations Under the Present System.

In the Huakina Case I referred to earlier, Chilwell J noted that several Acts may be interlinked to form "a comprehensive statutory scheme which exhibits a general policy available in the interpetation of any one of them". In the law relating to the rating of Maori land the Town and Country Planning Act 1977, the Valuation of Land Act 1951, the Rating Powers Act 1988 and the Maori Affairs Act 1953 all form a legislative nexus to which the priciples of statutory interprestation referred to by Chilwell J may be applied.

I am not now going to attempt to argue that, because the meaning of "land" is different by applying Huakina to Maori land as opposed to General land they should therefore be valued according to the different "values" which apply to them.

There are principles of administrative law which may precludethe application of theHuakina principles I have referred to for the purposes of administering rating legislation. I do consider, however, that in respect of the "use" of land the Huakina principle will apply and the traditional significance of land to Maori should be acknowledged within District Schemes. Ireferto S.3(1)(g) of the Town and Country Planning Act. Hence the designation should reflect the traditional Maori values I referred to earlier in respect of Maori land. I will now assume District Schemes do make this provision.

In carrying out its valuations for rating purposes as noted earlier, Valuation New Zealand will take into account the local authority's intentions for that property as expressed in its District Scheme. That the zoning of the land has a bearing upon its value is acknowledged in *McKee v Valuer General* (1971) NZLR476.

Accordingly, the zoning of the land is relevant to valuation and Maori land should be recognised as such by, for example, provision in the District Scheme for a Maori Purposes zone as in the District Scheme for the former Mangonui County Council.

If this were done, land which for example may otherwise be zoned to permit tourist development with aeon sequent higher value, maybe zoned to permit ancestral occupation of the property only ie. non-commercial, personal use which would be reflected in its value. It would thereby attract a realistic rateable value to its use or potential use.

I appreciate that by the *Addington* Raceway *Ltd Case* (1969) NZLR 327, the distinguishing features of Maori land (multiple ownership, limitations of title previously referred to etc) should be ignored. I do not consider that this case can now stand unchallenged. With the extension of statutory interpretation I have earlier discussed encompassed in a "legislative nexus" these distinguishing features which reflect traditional Maori concepts relating to land, must be taken into account.

Accordingly, limitations of title, uses to which the land can be put etc all the things which distinguish Maori land from General land, should be taken into account in determining value The lack of portability of title also is a practical limitation upon its market value.

Keeping within the uniform valuation principle of market value for all land for rating purposes under the current rating sytem, there is nevertheless an obligation to acknowledge the differences which impinge upon the concepts of notional sale as applied to Maori land in determining its value.

Before leaving this part of our discussion, there are one or two matters, while not strictly relevant, we should keep in mind.

The present system does allow for some lands to be assessed on special rateable values. I refere to S.25F Valuation of Land Amendment Act 1988 and S.174 Rating Powers Act 1988 which relate to land of historic or conservation values. It does not include Maori land unless it has these formally recognised values. Also, there areprovisions in theRatingPowersAct 1988 which apply to rating of Maori land which do not involve valuation of the land. First by 5.185 (5) of the Act, the Maori Land Court may apportion the rates due to an occupier to an amount it considers reasonable if the occupier occupies only part of the land. Secondly by S. 189, rates may be remitted or postponed at the discretion of the local authority.

b. A Preferred rating sytem

It is interesting to note that we have in New Zealand a predominantly land value system of rating. In the United Kingdom the basis for assessment is on the land's nett annual rental. Whilst our system of land tenure is derived from the United Kingdom, the predominant rating sytem in force in New Zealand is not.

Interestingly, there have been recent amendments to the Valuation of Land Act 1951 (which came into force on 29 June 1988). A definition of "annual value" was introduced into the Valuation of Land Act. Whilst alocal authority was permitted to adopt an annual value system of rating by S.7 Rating Act 1967 (now S.95 (1)(a) Rating Powers Act 1988) a corresponding provision had not been included in the Valuation of Land Act 1951 which would have permitted the compilation of the valuation roll on an annual value basis.

In my view, the annual value system of rating should apply to all land. The rationale behind our land value

system was probably to stop speculation in land by people holding on to it in an undeveloped state. It was also obviously a source of revenue to finance the development of community services. But now with the recent rationalising of local territorial authority districts there is a greater distribution of developed with undeveloped land in the respective districts. A local authority such as HokiangaCounty nolongerstandsalone. Besides, the system is inequitable. Owners of high value (e.g. coastal) undeveloped land pay substantial rates and usually do not receive services, principally because the land is undeveloped it is unoccupied and hence they are not there to use them even if provided. That cannot equate with user-pays! There are numerous other arguments which could be advanced.

In the case of Maori, land speculation and land are strangers. They hold the land for the cultural and spiritual reasons I earlier outlined. They are as trustees, generation to generation and in terms of use of services in rural areas, I consider it would be shown the Maori do not get their share by far.

Accordingly, the annual value system would be a fair system of rating, paying for what is used, which will enable the Maori who for whatever reasons do not wish to utiliseparts of theirland, to leave it in that state without imposition of a tax on their doing so.

CONCLUSION

We have imposed a system of land tenure by identification of ownership by title which has enabled us to settle this country in a manner consistent with our customs. The Maori have accepted that system; there has been an integration into a single community system. There has not been a separate reservation identity as for example with the Indians of North America and the Maori have, on the whole, accepted all the trappings of the system rates, town planning, valuations etc. But should we not be asking ourselves whether this system recognises the traditional Maori values which the Treaty of Waitangi guarantees? To take a simple example; if one objects to a valuation or a planning designation, what does one do? One gives notice of objection within the one or two months allowed. But if you were one of many owners in a multiply-owned block, what would you do? Nothing probably. You may not have received notice anyway because the responsible authority hasn't your address. Or your interest may be so small that you don't take a great deal of interest in it in the "ownership" sense. If you did want to do something about it, you would have to organise a family reunion. That couldn't be done within the time allowed for complying with the notice. Not to mention the expense.....

The Maori with interests in multiply-owned Maori land have not really participated in our system. This is reflected in Taitokerau in a quite common reluctance by Maori to succeed to interests in land of deceased family members, as identification of title exposes them to the "responsbilities" which Europeans attach to land. This lack of identification of ownership, and multiple ownership, have come to be used as a shield against the regulatory intrusion of rating and planning law into the Maori "keeping" their land in the passive sense. The Maori wants to retain their identity with the land itself (in cultural and spiritual terms) without being categorised as its "owner".

Acknowledging realities of the universality of our system of title and ownership, it is up to us to provide the means within that system of Maori both having the benefit of the "use" of their land, and paying fairly their rates for doing so, and the right to have their cultural and spiritual traditions respected, as was envisaged by the Treaty of Waitangi and that without being taxed for the "privilege". A

Better Communication and Marketing your Personal Services as a Professional Valuer

by J S Baen

Valuers are generally not trained to be "good salesmen", but rather to be conservative, professional, reserved and to seriously ponder before they speak or write. While the latter qualities are certainly hallmarks for New Zealand valuers, people skills required for marketing one's valuation expertise are almost never mentioned in the literature, much less stressed or facilitated by valuation firms, universities, orby the valuation profession.

Whether this is because of some "artificial" self imposed image of ourselves as a profession that is "beyond" marketing ourselves individually, as firms, or as a profession, is an interesting topic for discussion. Valuation as a career choice is an exciting, wonderfully diverse and interesting professional endeavour that deserves a higher public awareness profile and improved selfimageamongtheranks ofthosepractising valuation skills! How to inform the public and potential clients of our abilities and services is important for valuers to consider as a group of professionals. Improving our personal skills through better communication and marketing techniques can only help us grow as individuals, increase orereate increased market share of the valuation business and improve the public's perception of valuers as dealing with important and interesting issues within our society.

John Baen is *Professor of eul i state, Valuation and . Property Management a€ l incoln L!nzversity Can terbury. lie holds* a Bach 44 0:*Science degreefrom Texas AandMUniuerszty a Master of Urban Plan rung and a Doctorate to Philosophy of real estate `! development and planning also from;!Texas A<andM University.*

Professor Baen. has held various teaching po-' sittons at the University of North Texas and at North Lake College, Texas Hens also involved in property consul; nesses in Texas,

Cartoon by Jim Storey

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Whether we like it or not, we are all salespersons dressed in valuers' clothes, secretly seeking to "bud"likeflowers in the spring. With some encouragement, selfstudyand initiative, we can all benefit with some exposure to basic "self 'marketing skills which are most often referred to as "people skills".

MARKETING/SALESPERSON PROFILE

To be a good Salesperson you must:

Rank (how valuers generally rank; 1 = poor and 5 = good)

	Valuer's Rank*
1. Know yourself (plan and perceive what you want)	3
2. Know and understand others be people perceptive (Plan and perceive what clients want)	1
3. Be sensitive to both (1 and 2) (Listen to yourself and others)	2
4. Be Proactive rather than Reactive (be a wee bit more aggressive)	1
5.Know your product and your business (Valuers are highly trained/educated here)	5
6.Verbally communicate well and exhibit enthusiasm (no formal training here)	2
7.Communicate well with the written word	4
8.Have a good attitude toward all people	2
9.Be honest and ethical	5
10. Exhibit positive body language and mannerisms	2

*Vaiuers as a group. All individuals are unique, and of course this ranking is the author's personal opinion.

Better communication and self expression with others is a skill that needs to be developed by most people, but a need that is desired by all people.

Composition of a Sale

If we assume valuers are also salespersons involved in marketing:

1. ourselves;
2. our firm;
3. our valuation services and our profession;

let the contemporary marketing theory help us understand our current status and where we as a group could improve.

Composition of a Sale

Valuers arecconsistently improvingproductknowledge (15%) and technical skills (30%) which leaves individual attitude and self perception (55%) in need of serious consideration for improvement.

This area also includes many personal qualities that are expressed and defined by many to be "people skills". If a person's attitude is one of being shy, reserved, pompous or just plain stuffy, then his/her ability to create more business is severely limited.

A personal plan of action to better understand ourselves, improve our attitudes and create a plan of action, can be a very productive and rewarding exercise.

Transmission Factors in Communication

The valuer's written and analytical skills are essential for the practising professional.

Unfortunately, as the following chart indicates, non-verbal (body language) and verbal communication are vital communication forms of "people skills" that professional seminars and university training generally fail to address.

witte&semantic
skills 7%

Transmission Factors in Communication

As we consider a "self improvement" or better "self expression" plan of action, perhaps a brief discussion of improving the non-verbal and verbal communication transmission is in order, although only a brief consideration of these subjects can be presented.

Several very good books exist on these subjects and the serious "student of life" should spend time and effort studying and practising these skills.

Examples of Body Language Interpretation and Expression

Remember if a person scratches their head during a meeting it could just mean they have an itch! Watching people and their mannerisms is a fun and intriguing tool of communications that can be revealing your or others' thoughts and attitudes.

Developing these skills is an important advantage in life and business!

Consider the following traits in others as well as yourself; 1. Posture
2. Length/pace of steps
3. Professional dress
4. Hand shake style/firmness
5. Eye contact/eye movements
6. Facial expressions (frequency of frowns/smiles)
7. Arm, hand finger expressions about the fact
8. Leg, knee and foot gestures
9. Choice of chairs at meetings/power placement
10. Method and style of answering and returning phone calls
11. Active listeners identifying leaders in a crowd
12. Critical territorial distances of persons

Improving verbal skills

Both public speaking and daily business conversations are important professional and confidence building skills we all need to improve. Self improvement in this area requires a deliberate plan of action. A few suggestions are as follows:

1. While developing your own style of verbal communication, emulate those whom you respect.
2. Enrol in a public speaking course.
3. Study good speakers/communicators by being a good listener.
4. Improve your telephone techniques
   a. return phone calls promptly and often until you reach the customer;
   b. leave meaningful messages to reduce other person's requirements to reach you;
   c. improve your attitude and communication with secretaries and receptionists;
   d. pick up the phone by the second ring, answer with who you are, be genuinely enthusiastic;
   e. be aware of your posture.
5. Speak from notes rather than a prepared speech. You and your audience will enjoy your presentation more.

Identifying Communication Styles

While each person in this worldisaunique and special individual, there are tendencies and trends which have been developed by the behavioural scientists which deserve serious consideration.

Being aware that there are different types of people who respond and react to different styles of communication can be an important first step toward being a better communicator. The second important step is to determine what tendency or "type" person/communicator you are. The third and final stage is to become aware of different communication techniques that are effective with other "types" of people.

Conclusion

The professional valuer who desires to improve his/her marketing and communication skills has many opportunities and approaches to consider.

Better understanding of one's own personality and others, coupled with a disciplined and positive plan of action, can increase their effectiveness as professional valuers and more fulfilled individuals of society. A

Compiled by Leonie Freeman

Perception of valuation methodology and technology in the 1990s

by L Freeman

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This paper was presented attheNew Zealand Institute of Valuers Seminar held in New Plymouth April 1990.

he focus for valuation technology and methodology in the forthcoming decade falls, I believe, into three broad but inter-linking areas.

1. Technology
2. Research
3. Education

1. Technology

Technology to a group such as the Manufacturing Association would mean something like change and improvement to their end product. But to a profession such as the valuing profession it means something completely different.

We are in a service industry and dealing with a product on which technology has little impact - land and buildings. Technology does, however, have considerable bearing on the communication of our service. More precisely on the speed of our communication.

Technology for valuers is meeting the demands of the end user. It has been forced upon us somewhat by the advancements in all areas around us.

It is a tool which helps to improve and make more efficient the various steps of the valuation process, such as data retrieval, analysis, and calculations. It does not, and will not make the decision for us.

This technology will mean something different to different people in valuation practice. These factors being dependent primarily on the location of your practice, whether you are in a large city, the number of valuers in your respective offices and the type of work that you actually do.

Examples of what technology can do for you are: • speed

- quality at a faster pace
- broader range of activities which you can provide
- enhanced professionalism and improved standards.

What must always be kept in mind is that technology such as computers in your office are another tool, an extremely comprehensiveand complex one, but nevertheless a tool. Its objective, like any other tool, is to improve the efficiency and profitability of your business.

Let's consider the applications of such technology for us. A job comes in, which now tends to be by phone or fax, rather than the mail of old.

Collation of relevant data is the first step. Sales and property information are easily accessible from Valpak and VNZ-Link respectively.

Your own in-house database system provides information such as rentals, analysed sales, building and outgoing details and any other pertinent information.

Armed with all this information the inspection is undertaken. Again, the analysis of data and calculations to determine the value are assisted by spreadsheets or specialist valuation worksheets or models.

Presentation of the final product, including the report, calculations, and graphs is another area which has had considerable improvements in recent years.

Very simplistically these are the main areas in which technology is impacting the valuation process at present.

In the future, who knows, I doubt if we would have to measure buildings and field notes may well be recorded by video.

The amount of information available will have continued to grow and explode and the written report may be a thing of the past or accompanied by other visual communication aids.

However the basic decision, that is what is the value of this property, will not alter. Let us contemplate briefly where things could go, and how this would affect our profession. I expect changes to occur on two distinct levels.

In individual practices in both the private and public sector we will see firms become more computer orientated. Things which now seem extremely new and radical will become a standard part of any practice.

Office systems which cover the full range of word processing, accounting, valuation and property systems will increase. Computers for valuers will become more accepted and people will become increasingly proficient in their use.

There will be standard worksheets for valuations, every bit of property information will be stored on central databases for easy access and retrieval, and valuers will inevitably have a computer on their desks.

I see the continued development of specialised systems, such as in-house property information databases, property and valuation systems, databases for relevant statistics and others not even thought about yet.

On a larger scale, we will see the computerising of the entire land information systems. Instead of having to go to the Land Transfer office for a Certificate of Title and the Council for a Government Valuation and another Department for something else, you will be able to sit down in front of your computer screen which by this time will be a standard feature of your

office. You will be able to log onto a large land information system database. This would provide data from many departments such as Survey and Land Information, Justice, Statistics, Valuation and all associated relevant bodies.

So, for example, if you wished to obtain all the property sales in a certain location over $250,000 in the past six months sold to people on a benefit, aged between 25 and 35, married with at least one child, you could do it. Don't ask me why you would actually want this particular information, but it does illustrate what sort of things you could do.

We will also see in the very near future, the availability of the Real Estate Institute sales available on disk for the valuer which will be able to be incorporated into Valpak.

We will have continued innovations and ideas such as that being discussed by Auckland University at the present time. They are considering the possibility of providing an information database for the property profession, which is to incorporate a number of different sectors of pertinent information.

I believe the changes will occur from two directions, one for individual people or practices coming up with a new idea which then slowly becomes used in other firms.

The NZIV I believe, also has the ability to formulate and assist in direction in terms of where things could be focussed and what priorities the profession has for new technological developments.

However, the fundamental issue is that technology will aid us in the way in which the valuation process is undertaken, and how we communicate our service, but will not to any significant degree affect the basic product which we deal with, namely land and buildings, and will not replace the end decision which we must all make in any valuation.

2. Research

With the increasing use of computers, we have available now vast amounts of information which can be obtained quickly and easily.

In line with this improvement in our information systems, the actual product or service we provide has been improving. The information we provide in valuation reports has dramatically increased. Analysis is much more detailed and the range and type of information required by clients has changed. They tend to ask far more questions rather than accept what has been written.

With this has come an increasing awareness of the need for research. I do not mean just the work students undertake as part of class projects at university, but rather solid, dependable, accurate and credible work into what is actually happening in the market. Such examples include research into the underlying economic forces that ultimately influence activity in the real estate market.

There is an increasing perception among a number of practitioners and associated bodies of the need for research. Accurate, independent and practical research work which realistically explains what has occurred is important and this provides the basis for helping predict what is likely to happen in the future.

The commercial property market in New Zealand is currently in a recession, and it is clearly a time for highlighting the need for such research.

It is possible that if better and accurate indicators of the market and the likely end results had been independently provided, we may not have found ourselves in quite the position we are currently faced with.

A large number of clients in many of the property related fields are requiring a wider range of property information. Analysed data trends and relevant research are increasingly coming to the fore.

The improvements in the technological field have resulted in a much greater access to information. This is likely to continue for some time. The standard of information required is changing and clients are expecting more.

What can we expect throughout the 1990s?

Again we will see changes at two levels. Valuation firms have changed in size in recent times.

In line with other professions there has been a trend towards amalgamation. National firms or associated and linked practices have become more common.

With the increase in size of some firms, resources have increased. Firms are increasingly perceiving the need to provide an enhanced service to their clients in terms of research. This is a trend which will continue and increase as we proceed in the 1990s.

On a larger scale, the various Institutes information services will improve especially as the potential for closer ties or amalgamation occurs.

One major focus which has been discussed in the last year between the Institutes is the establishment of a New Zealand Real Estate Research Centre.

This would be an independent establishment but would be a combination of the efforts of the interested property institutes in New Zealand in association with the property based universities.

Obviously a large number of important factors require consideration and clarification, including finance, location, objectives, structure, control and type of work undertaken. An objective would be to provide practical market research, and in an even broader context to benefit society by the wise management of our real estate resources.

3. Education

The link between the 80s and the 90s as we come to grips with changes in technology and information is education.

This will continue not only with respect to what is taught to our students at university level, but also an increasing focus on continuing education for the practitioners in the market - through such avenues as workshops, seminars, books and other educational tools.

One comment to leave you thinking. In an article in the *Valuers Journal* in 1975 discussing a computer conference in America, Rod Jefferies used a quote from Ralph Nader, who was then a well known American consumer rights advocate. He made a significant point in stating that to him

> *"The most important single function of a profession is to have the ability to pioneer new policies that are not brought into effect by market incentives and to introduce better ways of doing things before the customer has necessarily asked for them."*

Without the above attitude the changes that have occurred in the profession during the past 10 years would not have eventuated. I think it imperative that we keep this in mind as we and our profession head into the new decade of the 1990s.

Finally, a quote from Thoreau:

> *Things do not change we change.* A

What's New?

by D Bidwell

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Of all the professions, Valuation appears to be extaordinarily well served in the area of data handling technology. The computer has become a familiar tool and the manipulation of information an everyday skill. Dedicated programmes are well established. Research continues in an open environment so that application of results is immediate.

All of which is in character with the strenuous efforts being made to provide the uniformly high standards of professional and technical service required by today's clients. It is therefore surprising to discover that many Valuers have virtually no knowledge of systems and programmes beyond the manipulation of numbers and recall of data.

Why is this? Perhaps it is that some are merely coping with their present systems as a learned routine and are not really comfortable with the computer. Yet even those who are adept in the skills of Lotuts and Quattro are not always aware of other applications. Again, articles on electronic data handling are often heavy with technical terminology which, to the uninitiated, can make for daunting and tedious reading. Or it could simply be thatpotential computer-based solutions have notbeen matched with the task.

These tasks are not only the familiar and traditional, but those evolving with changing markets, rules and opportunities. The property entrepreneur is out there identifying (even creating) the market and trying to satisfy it, lack of qualification, training, skills or tools notwithstanding. With a knowledge of the wider field of expert software relevant to property and the consulting professions the Valuer has the opportunity to provide an extended, expanded and economic range of services, develop new markets, make profits.

Computer Aided Draughting, or CAD, is well known, but little understood. It is in part the totally accurate recording storing and recalling of physical data. Its application to valuing is primarily in two areas.

Firstly, the accurate recording of data (buildings, surveys, etc) for subsequent measurement and editing of variables over any period of time.

Secondly, the identification and automatic measurement of zones and the production of reports thereon. Rental options can thus be explored and building efficiencies determined. Zones and floors can be aggregated and subdivided. This facility is not only available for buildings constructed from CAD drawings (amended by as-built measurement), it is a straightforward job to put existing properties into CAD.

Currently, the Valuer (or his subcontractor) measures a property and then draws same by hand. Measurements scaled from these drawings are only as accurate as the multiple applications of the human hand and eye and humidity-distorted paper allow. Calculations must still be derived from the figured (site recorded) dimensions. On a multi-storey building each floor must be measured and drawn.

With CAD only the editing of a layer is required to produce a complete new drawing accurate in all respects. CAD files can be easily modified at any time to record changes for the continuing accurate compilation of rental and insurance reports.

More detailed databasing is sometimes available which may be used to compile an automatic "bricks & mortar" schedule from the 3D record. The inclusion of rates will give a replacement figure for insurance or investment reports.

CAD also involves 3D imaging and modelling. Combined with photo-realistic rendering, video image background dynamic viewing, the limits are of purse rather than imagination. These features are primarily to sell a project or concept. Recently a major developer employed a consultant to do just this in Auckland. The results were impressive and successful. Note that not all CAD programmes have all the features referred to and many have none of them.

While project feasibility could involve CAD it may well start with Facility Management. FM also has a wide range of applications. It can be broadly described as a 3D graphic database. It is a decision support tool that provides a pro-active approach to the management of facility information. This tool provides the framework for effective strategic analysis of corporate real estate, facilities and space management. The seamless integration between a property and organisation relational database and facility graphics data allows the optimised location of organisational groups and activities within properties, buildings or floors, and preparation of alternative layout solutions. These capabilities enable effective churn management and space planning. It is not difficult to appreciate the value of FM to the property rental and management consultant.

As FM has both database exchange (ASCII) and graphics exchange (DXF) it is easy to transfer data and attributes to other software and vice versa. For example, existing properties drawn in CAD can be analysed in FM, client requirements developed in FM can be constructed in CAD.

Business management is that grab-bag of tasks, often ill-defined, usually done by a mixture of manual and database, spreadsheet and accounting software by the proprietor, clerical staff, consultation and/or anyone and often no-one. Latterly dedicated programmes have become available which address the functions and size of the professional practice. It is now practicable to have one integrated package, capable of handling all management (client, job, task, stage, staff, cost and invoice tracking; billing and accounts payable; general ledger and payroll; query reporting and marketing) with selected modules while still interfacing with standard word processing and database programmes for integrity of information.

A computer-based system with which Valuers may be unfamiliar is that of Scanning. A scanner maybe hand-held, about 100mm wide; desktop A4; or drawing size to AO and longer. Data can be recorded in and converted to a variety of formats depending on the end use intended. Output is via screen viewing, raster printing or vector plotting. In the latter format editing in CAD is possible. Scanning is useful to faithfully copy a wide range of documents including logos, titles, maps and plans as well as the obvious archiving of documents. Huge quantities of paper can be reduced to a laser disc or tape with rapid recall from

An Application of Multiple Regression To Valuation

This paper is the second in a series of articles dealing with the application of the statistical procedures - collectively referred to as regression - to the analysis and valuation of property.

by J D McFarlane & M J W Fibbens

The first paper in this series dealt with the application of simple linear regression to a valuation problem. The data, which consisted of rental values and physical characteristics of a number of premises in three shopping malls in a defined retail area, was analysed to produce a prediction of rental value using a number of single predictor variables.

The analysis indicated that the single predictor variable "shop area" performed consistently better than the other single indicators used and did produce reliable estimates of rental values. In most valuation problems, however, the value of a given property will be influenced by more than just one single variable.

For instance, the single predictors other than shop area used in the previous analysis

- shop frontage
- time of the lease contract •

quality of location

may well contain information relating to the rental value over and above the variable shop area.

This paper will develop multiple linear regression models to allow the prediction of rental values from a number of predictor variables. It is not intended in this article to give a general introduction to multiple linear regression. However, the interested reader may like to consult one of the general references provided at the end of this article.

It may be worthwhile mentioning at this point that while the first three factors (area, frontage and time of lease) were obtained directly from lease documents and measurement of the premises, the fourth factor (relating to the quality of location) was derived from a physical inspection of all of the retail premises in the study area. Retail shops were graded on a nine-pointLikert scale (see, for example, Tull and Hawkins, 1987) with "one" representing the worst possible case and "five" representing an average premises.

For example, looking at the data in Table 1(overpage), Shop Number 5 in Mall 1 with a rating of 8 represents a shop well above average in terms of location. On the other hand, Shop Number 11 in Mall 2 with a rating of 3 represents a shop will below average. This ranking, which admittedly is a subjective one, could be made more objective through the use of pedestrian lfow data within and between malls, head counts in individual

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continued from previous page

detailed indices. Large scans are available from consultants who can also advise on management and recall systems. Even those programmes and functions which the Valuer considers familiar are undergoing continual development and, while change-for-change-sake is an expensive exercise, it is well to keep an eye out for the advantageous move.

Speed and friendliness, options, size and features have made considerable advances in databases and spreadsheets since the ubiquitous 123 and dBase first hit the market. Faster software may well defer an expensive hardware upgrade.

However, so much developmental work has been based on specific format that one should proceed cautiously when considering upgrading this category of software. Portability, flexibility and versatility are claims that need to be verified to ensure continued access to the research referred to and to existing records.

Dedicated Desktop Publishers can be very sophisticated and are of particular interest to those wishing to prepare brochures and elaborate reports. Word processors with DTP features (prepare reports with emphatic fonts, PostScript format, graphs and diagrams, windows, colour separation) are already on the market. Scalable fonts, kerning and columnar setout are common. Spelling checks, thesaurus and even grammar checks are now familiar. A little research is justified as the old order is clearly giving way to the new, but not all are equal. Certainly there need to be no typewriter in the efficient office. Utility programmes seem to appear on every Valuer's screen. While they may be used in lieu of learning DOS they do have advantages and avoid many potential pitfalls.

These too are continually evolving. New and enhanced features pertinent to the Valuer are archiving (using compression without loss of viewing), backup andrestore, file comparison, format options and windows.

Of the foregoing, there are some programmes and procedures which are familiar to most Valuers. Upgrading and implementation is therefore a choice to be made internally at some convenient time as little is involved in training or hardware configuration.

However, the selection and installation of new programmes needs planning. Training, support and the hardware platform need be assured and advice sought to enable an informed choice to be made.

Consultant services are the logical option for CAD data as these are expert systems requiring skills not normally found in the Valuer's office. the hardware platform is also considerably more sophisticated and would be under-utilised. As this substitutes for time and cost already required or relates to an extra chargeable service, it should increase profitability. A

premises or, as commonly occurs, through requiring a tenant to indicate his/her gross or net income.

The multiple regression process will, in fact, product results which are quite similar to the conventional judgemental process in valuation. In the use of conventional techniques, valuers will attempt to determine value from a complex web of data relating to the market.

It may be claimed that the technique of multiple regression provides a means by which this process may be more mathematically formalised.The type of regression used in this article will be step-wise multiple linear regression. Later articles in this series will examine some non-linear models applied to both this data and other data sets.

TABLE 1

Mall	Shop No.	Rental Value	Area	Frontage	Time	Rating
1	1	17808	51.31	7.7	2.50	7
1	2	16674	53.05	5.9	.50	6
1	3	17400	53.05	5.8	2.75	6
1	4	6000	8.02	4.0	2.00	5
1	5	17528	53.67	5.3	1.50	8
1	6	16078	47.73	5.3	.50	7
1	7	15602	48.65	5.3	.50	6
1	8	15105	48.40	5.3	2.50	6
1	9	15237	48.34	5.7	2.50	6
1	10	17797	66.75	5.7	1.50	6
1	11	36295	157.11	11.4	1.50	9
1	12	28015	103.22	6.9	2.50	9
1	13	21438	67.11	4.9	1.25	8
1	14	15900	49.73	3.5	2.50	8
2	1	13000	41.87	5.6	2.75	5
2	2	15100	54.00	5.6	2.75	6
2	3	40585	167.84	14.0	2.75	5
2	4	13740	86.22	7.0	3.00	4
2	5	13000	41.87	5.6	2.75	6
2	6	10000	52.00	6.3	2.90	4
2	7	9000	37.60	6.3	2.80	4
2	8	6800	37.30	5.6	3.00	4
2	9	49200	331.00	14.0	2.91	6
2	10	7280	77.50	7.7	4.00	4
2	11	7800	96.00	7.7	4.00	3
2	12	21207	153.58	14.0	5.83	4
2	13	11200	81.20	7.7	3.50	3
2	14	9200	50.24	5.6	3.25	3
2	15	15200	128.27	14.0	3.25	6
2	16	10350	64.10	8.4	4.00	3
2	17	7280	77.50	4.9	4.00	3
3	1	15641	53.0	5.1	2.25	5
3	2	14838	50.00	5.1	2.40	5
3	3	16038	50.00	5.1	1.50	5
3	4	17640	50.00	5.5	4.00	5
3	5	17226	52.90	5.3	3.75	4
3	6	26265	115.00	10.3	2.30	4
3	7	12316	52.00	5.1	1.75	3
3	8	12315	52.00	5.0	1.30	3
3	9	12644	52.00	5.0	3.75	3
3	10	17596	71.00	10.0	3.60	4
3	11	10104	29.73	5.0	2.25	3
3	12	12315	52.00	5.4	2.25	3
3	13	14831	65.00	6.8	2.25	4
3	14	29007	157.93	16.5	2.75	5
3	15	19166	83.61	4.0	2.75	4

NB. In the Time column, the values are the number of years since the beginning of 1983 which is represented as 0.

The general model for multiple linear regression is:

$$Y = a_o + a_1X_1 + a_2X_2 + \ldots\ldots + a_eX_e + \text{error}$$

where

Y is the dependent variable

X1X2....., X. are the predictor variables, n being the number of such variables

ao,al,..... ,a, are coefficients associated with each of these predictor variables and the error term allows for small departures of the data from a determined or estimated value.

For our data, the dependent variable Y, is rental value; n is 4 and the four predictor variables are area(X1), frontage(X), time of lease contract (X) and rating of location (X4).

In a step-wise regression, the indicator variables are included in (or removed from) the model one at a time depending on the additional information relating to the dependent variable (rental value) contained in a particular indicator variable over and above the model produced to that time.

With step-wise regression, all the predictor variables may not appear in the final model (in effect, the coefficient of any variable not included in the final model set as zero). As such, step-wise regression is parsimonious in that unnecessary predictor variables will not be included in the final model. An example of the printout from a step-wise multiple linear regression analysis is given in Table 2.

The analysis is for the data from Mall 1. This printout was generated from the statistical package "Microstat" (Ecosoft Inc 1983) and similar analyses would be produced by any of the other commonly used statistical packages SPSS, BMDP, Minitab, SAS, etc.

Referring to the printout (Table 2), in Step 1, the computer program enters shop area as the first variable to be included in the model.

This is as it should be since we know from the earlier simple linear regressions (MacFarlane and Fibbbens 1989) that shop area was the best single indicator of rental value. The program calculates a constant factor of $6,044.81 with an area coefficient of $201.19 per square metre as before. At the end of Step 1, the equation for estimated rental value is:

Annual rental value = 6044.81 + (201.19 x area)

The basic statistics provided by the package indicate an r squared (r2) value of .9735. That is, the program indicates that 97.35% of the variation in rental price may be explained by variation in area.

While this coefficient of determination (r2) is extremely high, it is possible that subsequent steps in the regression analysis may explain even more of the variation in annual rental value.

In the second step of the regression analysis the computer package enters location rating as a second predictor variable. It does so because of all the variables not included in the model at Step 1, the variable location rating has the most additional information about rental value. The following mathematical model results.

Annual rental value = 1574.48 + (177.23 x area) = (856.71 x rating)

In this second step of the multiple regression analysis the package calculates an r2 value of .9844. That is, the equation including the two variables, location rating and shop area, explains 98.44% of the variation in the annual rental value.

The improvement form 97.35% to 98.16% may not look to be very great, but since 100% is the maximum, Step 2 has explained nearly an additional third of the unexplained variation in Step 1.

TABLE 2

Step 1. Variable: Area Entered
Dependent Variable: Rental Valuation.

Var.	Regression Coefficient	Std Error	F(1,12)	Prob
Area	201.1933	9.5772	441.319	.00000
Constant	6044.8109			

Std Error of est = 1170.8187
r squared = .9735
r = .9867

Analysis of Variance Table

Source	Sum of Squares	OF.	Mean Square	F Ratio	Pro
Regression	604967173.0857	1	604967173.0857	441.319	7.844E-11
Residual	16449798.1285	12	1370816.5107		
Total	621416971.2143	13			

Variables no in equation

Name	Partial rA2	Tolerance	F to Enter	Prob.
Frontg	.0151	.2842	.169	.6889
Time	.0031	.9994	.034	.8567
Rating	.4121	.4413	7.709	.0180

Step 2 Variable: Rating Entered
Dependent Variable: Rental Valuation

Var.	Regression Coefficient	Std Error	F(1,11)	Prob	Partial rA2
Area	177.2299	11.5464	235.605	.00000	.9554
Rating	856.7072	308.5515	7.709	.01801	.4121
Constant	1574.4846				

Std Error of Est = 937.6757
Adjusted r squared = .9816
r squared = .9844
multiple r = .9922

Analysis of Variance Table

Source	Sum of Squares	OF.	Mean Square	F Ratio	Pro
Regression	611745378.4066	2	305872689.2033	347.885	1.139E-1
Residual	9671592.8076	11	879235.7098		
Total	621416971.2143	13			

Variables not in equation

Name	Partial r12	Tolerance	F to Enter	Prob.
Frontg	.0704	.2211	.757	.4047
Time	.0004	.9874	.004	.9524

The package stopped after two steps with the variable, frontage and time of lease contract, omitted. In this analysis neither of these variables contains any significant additional information to that provided by shop area and location rating alone.

. In the first paper in this series we indicated that a statistical analysis of data revealed that rents were in apparent decline in the period studied, but that analysis indicated a considerable degree of unreliability in using the time variable. Additionally, while shop frontage will frequently be an important variable in determining rental value within retail areas, within the subject area there is a degree of uniformity in depth. Therefore, in this instance, the use of frontage as a predictor variable will provide very little additional useful information to that provided by the predictor variable shop area.

This is the problem of multi-collinearity, much discussed in relation to multiple linear regression. It is important to point out that this is a major problem when trying to interpret the individual coefficients which arise from the analysis, for example the $177.23 per square metre in the above model. That the multi-collinearity exists between the indicator variables in a particular model, is usually apparent from the large standard error of the estimated coefficients.

However, multi-collinearity is not a problem when it comes to using the above model for prediction. In this series of papers it has been emphasised that our interest is almost solely on using the derived model for prediction in our case the prediction of annual rental values.

Prediction of annual rental values using the model

In the earlier paper, we used the simple linear regression model to predict the annual rental value of a selected shop in Mall 1. The selected shop had an area of 81.37 square metres, a frontage of 6.7 metres and a location rating of 8. The predicted annual rental value is therefore:

Annual Rental Value = 1574.48 + (177.23 x 81.37) + (856.70 x 8)
= 22849.29

This modifies the previous estimate of $22,415.64, derived on the basis of shop area alone. Naturally these two estimates would be rounded of in the normal manner.Regression package will frequently provide a table of residual values. These residual values are simply the difference between the observed (rental) value and that predicted by the model at each data point. If the model is appropriate the residuals should be random. Graphing the residuals against each predictor variable in turn and looking for patterns will indicate the efficacy of the model.

Detection of pattern indicates that the residuals are not random and the fitted model is not making allowance for an observable (and therefore predictable) feature of the data. Either a different multiple linear regression model or a non-linear model should be fitted to the data in such a case.

Table 3 is an example of a set of residual values and records the actual rent paid in the column "observed". Rent calculated by the multiple regression model is recorded in the column "calculated". The "residual" column simply records the difference between the observed and calculated figures.

A close examination of the table reveals that in most cases the residuals are quite small. In fact, the question may well be asked., "Would two competent and qualified valuers, given data from an analysis of rents in the area, produce results as close as those above?". The answer to this rhetorical question may well be no. In two instances the calculated rent varies by $45 and $47 from the actual rentpaid while in a number of other instances the estimate of rent is quite close to the observed rent. However, some estimates vary from the observed rents by figures in excess of $1,000. While some of this variation may be due to inherent inadequacies in the model (the assumptions of linearity or equal variance for all data points, for example), some of the variation may be explained by individual transactions being out of line.

An analysis of all rentals within the study area indicates that some tenants are paying substantially more than the apparent market rate for space within the study location. On the other hand, other tenants are paying rents which are apparently below optimum market value. The existence of out of line transactions will exert an influence over the performance of the multiple regression model. However, the multiple regression analysis does alert the valuer to leases which may require further examination.

TABLE 3

	Observed	Calculated	Residual	Standardised Residuals -2.0 0 2.0
1	17808.000	16665.102	1142.8982	
2	16674.000	16116.775	557.2254	*
3	17400.000	16116.775	1283.2254	*
4	6000.000	7279.404	-1279.4044	*
5	17528.000	17940.072	-412.0716	*
6	16078.000	16030.619	47.3813	*
7	15602.000	15336.963	265.0370	*
8	15105.000	15292.656	-187.6556	*
9	15237.000	15282.022	-45.0218	*
10	17797.000	18544.824	-747.8245	*
11	36295.000	37129.441	-834.4410	*
12	28015.000	27578.521	436.4790	*
13	21438.000	20322.042	1115.9584	*
14	15900.000	17241.786	-1341.7857	*

Results from all malls

Mall 1. The analysis for Mall 1 (the final step) provides the following model:

Annual rental value = 1574.48 + (177.23 x area) + (856.70 x rating)

It should be noted from the analysis that the shop area coefficient showed a standard error of $11.54 but the location rating coefficient showed a standard error of $308.55 indicating that the shop area coefficient is more accurately determined than is the location rating coefficient.

The coefficient of determination (re) is 0.9844. Thus 98.44% of variation in value may be attributed to variation in shop area and location rating factors.

Mall 2. The final step of the analysis for Mall 2 provides the following model;

Annual Rental Value =14376.61 + (149.72 x area) + (-3842.79 x time)

While the area factor has a standard error of only $16.44, the factor for time shows a standard error of $1498.26. The r2 factor is .8585 and this may be interpreted as indicating that only 85.85% of the variation in the annual rental value has been explained by the model for Mall 2.

It is interesting to note that the variables used in the model for Mall 2 are different from those used in the model for Mall 1. This reflects directly on the question of comparability.

Data from Mall 2 will be a relatively poor predictor of rental performance in the other malls studied.

A perusal of the raw data relating to rents in this mall indicates a wide fluctuation in rents expressed on the basis of dollars per square metre per annum.

This may well reflect some imprudence on behalf of the parties to the lease transactions. Simply, it would appear that many of the lease agreements could be considered to be out of line transactions.

Mall 3. The analysis provides the following final model:

Annual rental value = 904.97 + (135.84 x area) + (1673.50 x rating)

Again it will be noted that the area coefficient has a standard error of only $13.24 while rating shows a substantially larger standard error of $502.26. In this instance the coefficient of determination (r2) is.9281 which is substantially better than that obtained for Mall 1.

Again, most of the estimates of annual rental value fall into an acceptable range and , at the very least, the application of step-wise regression techniques in the appraisal of rents in Mall 3 would provide a most valuable check method.

Conclusion

The application of step-wise multiple regression has, in these instances, provided a satisfactory mathematical solution to the problem of rent determination within each shopping mall. Where the regression model provides a reliable estimate of value, as indicated by an r2 value approaching 1.0 and relatively small residual values, it can be directly applied to the assessment of value.

However, where the model does not provide a particularly adequate representation of the data, the valuer may need to further examine the data to ensure that all relevant information has been included.

If all relevant information has been included it may be that the assumptions of multiple linear regression are not appropriate for the data.

In this instance, the application of non-linear regression, or transformation of the data (which will be addressed in later articles in this series) may be appropriate. However, the valuer should also be aware of possible factors relating to the data itself including:

- the data is highly unreliable; or
- the data consists of a number of distinct groupings of properties which are not themselves comparable (for example, in the data set considered above, data from the three (3) malls cannot be treated as one set of comparables).

It can be seen that multiple regression techniques closely parallel, and supplement the conventional techniques of property valuation.

Further issues relating to the application of regression techniques to the valuation process will be addressed in future articles. A

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1163/85

BETWEEN KENNETH WILLIAMS & CO LTD a duly incorporated company having its registered office at Papakura and carrying on business as Property Developers

Plaintiff

AND DAVID JOHN THOMAS of Manurewa, Tax Inspector and PAMELA THOMAS, his wife

Defendants

AND BELTONS REAL ESTATE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as land agents

Third Party.

Hearing: 6 & 7 March 1989
Judgment: 12 May 1989
Counsel: D F Dugdale and M N Tolich for Plaintiff
P J Edwards and S Benson for Defendants
W Akel for third party (given leave to withdraw)

JUDGMENT OF HENRY J

On 29 June 1984 the Defendants Mr and Mrs Thomas entered into a written agreement to purchase from the plaintiff Kenneth Williams & Company Limited a property known as Lot 17 Justamere Place, Weymouth, in South Auckland. The property in question was a section which formed part of a subdivision carried out by the Plaintiff. The price stipulated in the agreement was $26,500.00 payable as to $2650.00 by way of deposit, the balance in cash being due on 29 June 1985. Settlement of the transaction has not yet taken place, although pursuant to the agreement the Defendants have constructed a residence on the property which was substantially completed by May 1985. The Plaintiff company now sues for recovery of the balance of the purchase price which together with an amount due for rates apportionment totals $23,989.44 and it also seeks interest on that sum at the contractual rate of 16% per annum as from the settlement date finally stipulated of 5 August 1985. The Defendants have counterclaimed, also pleaded as a set-off, for damages totalling $75,000.00 arising from alleged misrepresentation and breach of contract. The Third Party was joined by the Plaintiff in respect of the counterclaim, but during the course of the hearing matters as between those two parties were resolved and Mr Akel for Beltons Real Estate Limited was then given leave to withdraw.

The action centres around the counterclaim, the basis being that the Justamere Place subdivision was promoted as one having certain quality features, in reliance upon which the Defendants constructed a substantial good quality residence. As events have now turned out this residence is out of keeping with the actual nature of the subdivision as it ultimately developed, resulting in a loss of value of the home and property as a whole. Three alternative causes of action are pleaded, being misrepresentation, breach of terms of the contract for sale and purchase, and breach of the terms of an oral contract collateral to the contract for sale and purchase. The representations and terms in question are identical in each case and are set out in the amended pleadings as :

(a) That the Plaintiff company had not sold nor would be selling any of the sections in the Justamere Place subdivision for the construction of group housing" or the construction of "low cost housing" or "rental housing" and/or

(b) That the Plaintiff's subdivision at Justamere Place would be for the construction of ahigh quality prestige residential estate and that only the construction of high quality housing would be permitted.

At the conclusion of the case for the Defendants, Mr Dugdale applied for a nonsuit but having been put to election adduced evidence in the proceeding. Decision on the nonsuit application was therefore reserved.

Mr Kenneth Williams, governing director and majority shareholder in the plaintiff company, has been involved in the building trade since 1949. That involvement has included the construction of a large number of houses, and also the subdivision of land for development purposes. One of these subdivisions was Waimahia Avenue, Weymouth, consisting of some 25 building sections carried out;in about 1972. In 1983 the company decided to subdivide another area of land owned by it adjacent to Waimahia Avenue, the subdivision becoming known as Justamere Place and comprising some 24 residential sections. Justamere Place runs off the end of Waimahia Avenue which is also the source of access to the Justamere development from Weymouth Road and the areas of Manurewa and Papakura.

In March 1984 the Plaintiff wrote to a number of real estate agents in Manurewa advising them of the subdivision which was then due for completion in mid-April that year and seeking estimates of the market value for the sections. The letter stated: "These sections are aimed at the better than low-cost price bracket." As a result the Third Party, Beltons Real Estate Limited, was appointed sole agent for sale purposes for a period of six months from 21 May 1984. The sections were priced from $23,500.00 to $30,000.00 The subdivision was advertised in the `New Zealand Herald' and also in the `Courier', the latter advertisement containing the following passage:

> *"New release of prime sites, in this most sought-after locality. Situated in a secluded cul-de-sac of executive homes being a continuation of the previous stage already developed in Waimahia Ave. Remember, only 24 sites available."*

There was also a sign erected on the subdivision entrance which contained a reference to "this exclusive subdivision."

In 1984 Mr and Mrs Thomas were living at 8 Gibbons Road, Manurewa, and they also owned a section at 24 Gibbons Road. It was their intention to sell no.8 and then to build a larger home on no.24 to meet their family needs, and for that purpose they had plans prepared by an architectural draughtsman. Mrs Thomas noticed one of the `Courier' advertisements for the Justamere Place subdivision, she contacted the agents, and Mr Laird from Beltons consequently called to see them. There was some discussion as to the proposed new home being too big and not in keeping with the Gibbons Road area, during the course of

which Mr Laird referred to Justamere Place and also other subdivisions known as Conifer Grove and Wattle Downs also in the South Auckland area. Mr Laird took Mr and Mrs Thomas to Justamere Place. During the course of this visit Mr Laird stated that the intention was for Justamere Place to be similar to and in effect a continuation of the Waimahia Avenue subdivision, and I am satisfied that he said the houses would be good quality and that there would be "no group housing, no low-cost housing, and no State rentals." The Thomases were favourably impressed by their inspection and selected Lot 17 as appropriate for their needs. It is of some significance that a plan of the proposed house was (according to Mr Laird) required to be submitted to Mr Williams with any form of agreement. Mr Laird thought he had only an artist's sketch of the Thomas proposals, but having heard Mr and Mrs Thomas I am satisfied that he was given the draughtsman's plan earlier referred to, perhaps only page 1 of the set produced in evidence, which depicts the house from the four elevations. Although Mr Williams had no recollection of seeing a plan or sketch of the house, I have no doubt that one was submitted to him and that this was done in pursuance of instructions issued by him to the real estate agent. Mr and Mrs Thomas were then advised by Mr Laird that the proposed house was acceptable to the developer, and terms of agreement were negotiated and completed including the provision of a condition as to sale of no.8 Gibbons Road. The sale of Lot 17 evidenced by the agreement dated 29 June 1984, was the firsteffected in the subdivision. Construction of the house commenced about October 1984 and was substantially completed about May 1985.

Shortly before the balance of the purchase became payable the following month, Mrs Thomas received advice that some six sections had been sold to the Housing Corporation of New Zealand. That in fact was the position, the six sections being immediately to the north of Lot 17 and known as Lots 11-16 inclusive. Residences have now been constructed on those sites, three of them each comprising two State rental units and three being rental houses. Further development has also occurred, the Housing Corporation purchasing on an on-sale basis from another developer two further sections on which "equitishare" houses have been constructed, and most if not all the remaining sections now have residential buildings erected on them. They have been described in general as being "low cost housing."

The negotiations leading up to the formation of the contract between the parties and which give rise to the issues ofrepresentation and of oral contractual obligations were conducted by Mr Laird on behalf of the vendor company, and Mr and Mrs Thomas as purchasers. Unusually, the primary evidence on these issues was adduced only by the Defendants, the Plaintiff calling no competing evidence as to what was said or what was agreed to leading up to and concluding with the execution of the contract. I was favourably impressed by both Mr and Mrs Thomas as witnesses and I am satisfied that the substance of their evidence as to what transpired leading up to the final execution of the contract is true. They were wanting to improve their standard of housing, and were led to believe that Justamere Place would be a development of a good standard, equivalent to that which was evident in Waimahia Avenue. The evidence from the real estate agent directly involved with negotiations, Mr Laird, was generally confirmatory of that given by Mr and Mrs Thomas.

The written agreement for sale and purchase does not contain any provision governing the standard of development either of Lot 17 itself or of the remainder of the subdivision. Although implied terms to the effect I have earlier set out are contended for, I do not think\ the written document can possibly be so construed. The necessary pre-requisites for implication are simply not present, and in particular neither of the terms pleaded are necessary to give the written agreement business efficacy.

There are also difficulties in the way of the cause of action based on misrepresentation. The evidence establishes that the sale to the Thomases was the first effected in the subdivision, and therefore the only possible misrepresentation could be as to the intention of the vendor at the time of the contract, the statements relied upon being related to the future development of the subdivision. Overall, I am not persuaded that any statement whether made by Mr Laird as agent with ostensible authority or contained in the advertising material, failed to represent the genuine intention of the developer as at June 1984. On the contrary, I think what happened was that a subdivision of a good quality standard similar to Waimahia was intended, but that for market reasons the expected sales did not eventuate. Mr Williams therefore, when the opportunity arose, elected to sell, in particular to the Housing Corporation, for practical financial reasons. An essential element of this cause of action is therefore lacking adequate evidentiary weight.

There is however in my mind no doubt that clear statements as to the quality of the subdivision were made and conveyed to Mr and Mrs Thomas both by Mr Laird and the newspaper advertisement, the general context of which alsobeing confirmed by the placard referring to an "exclusive" subdivision. The question is whether those statements formed the basis of a collateral contract between the parties with binding effect. For any such statement to have contractual effect the evidence must establish an intention by the parties that there should be contractual liability in respect of the accuracy of the statement (Heilbut Symons & Co v Buckleton [1913] AC 30,51]. It is also established law that a collateral contract in this sense must be strictly proved, the effect of it being (here) to add to the terms of the principal contract which has been reduced to writing. It is necessary first to analyse the statements relied on and the context in which they were made. Mr Laird, whose ostensible authority as agent for the Plaintiff to make the statements referred to in evidence is not in question, was under instructions to submit for approval a copy of proposed development plans to the Plaintiff vendor with any agreement for sale and purchase, a course which was adopted and completed in the present instance. The subdivision was promoted as "exclusive" and Mr Laird stated it would be a good quality standard of housing, with no group housing, no low cost homes, and no state rentals. Waimahia was stated as being the standard which would be achieved. The vendor, through Mr Laird, was aware of the intentions of the Thomases to upgrade their position and also had express knowledge of the type of building intended to be erected by them. I am satisfied from the totality of the evidence that it was intended that these statements were to be contractually binding and that Mr Laird was warranting their accuracy.

In reaching that conclusion I have given full weight to the several factors urged by Mr Dugdale, including in particular the absence of any covenant such as is frequently contained in agreements when certain standards for development of a subdivision are designated. That is an important factor, but it does not necessarily negate, and in this case it does not negate, the existence of a collateral undertaking. Mr Williams intended the subdivision to be good quality and to a standard commensurate with Waimahia and did not anticipate low cost or Housing Corporation type development. Mr Dugdale understandably

also emphasised the lack of ultimate control which the Plaintiff could exercise over actual development, whether on the part of the Thomases or any other purchaser, because of the absence of any appropriate covenant. That again is a pertinent factor, and one which I have taken into account. That absence is not inconsistent with the undertaking which I find was given with contractual intention that the subdivider would not itself sell sections to persons who intended to or were known to be likely to develop contrary to the assurances I have detailed. The terms "low cost housing", "group housing", "State rentals", all of which I find were used in the contractual sense I have been discussing, are not so uncertain as to be without binding legal effect in the context of this case.

I am therefore satisfied that the existence of a collateral contract has properly been proved under which the Plaintiff undertook not to sell sections for group housing, low cost housing, or State rentals. It was implicit in that undertaking that sales would only be to persons likely to construct residences of such a quality that the subdivision as a whole would be in keeping with the Waimahia subdivision.

I find that the sale of six sections to the Housing Corporation was a breach of that undertaking, whether or not the Plaintiff at the time of sale had actual knowledge of the Corporation's intention to erect rental units. This sale of a block of sections to the Corporation was in direct conflict with the assurances given as to the nature of the subdivision the Plaintiff was promoting and contrary to their spirit and intendment. Breach of contract is therefore established.

The next question which arises is whether damage has resulted to the Thomases as a consequence of the breach, and if so the extent of that damage.

The only evidence as to value was given on behalf of the Defendants by Mr M A Clark, a registered valuer. His approach was to assess the present market value of the property and to compare that with his assessment of its value "on the assumption that the subdivision continued as originally advertised and assuming it contained above average to good quality residences." I accept Mr Clark's opinion that the Thomas residence is out of character with the other properties in Justamere Place, in the sense that it is superior to the other housing which he described as below average to average standard.

Although Mr Clark's assumptions for comparative purposes could be said to be lacking in definition and are not expressly related to the contractual terms now under consideration, I think in broad terms they reflect the effect of those terms, and his valuations can be used as a sound basis for assessing the question of loss arising from breach. I am also satisfied on the evidence that the block sale to the Housing Corporation very largely contributed to an overall difference in value such as is detailed in his evidence.

The Housing Corporation development occurred at a reasonably *early* stage, and the clear inference is that this sale has had an overall effect on the consequent final development of the area. The breach is therefore causative of a loss in value of the Thomas property. The Plaintiff's application for non-suit is accordingly now dismissed.

It is accepted by Mr Dugdale that the measure of damages is the loss in value of land and buildings properly attributable to the breach, the question of foreseeability notbeing an issue. The first question is at what time loss is to be assessed. Mr Edwards for the defendants submitted it should be at the date of hearing, Mr Dugdale on the other hand contended for the date of breach.

The general rule is that damages are assessed as at the date of the breach (Stirling v Poulgrain [1980] 2 NZLR 402; Johnson v Agnew [1980] Ac 367; Miliangos v Frank (Textiles) Ltd [1976] AC 443). The purpose of the award of damages, namely to put the party subject to the breach in as good a situation as if the contract had been performed, is thereby met. It is however recognized that in certain circumstances the Court may depart from the general rule in a particular case to achieve a fairer solution. (Johnson v Agnew sup.cit.)

I can see no justification for departing from the general rule in the present case. The breach was known to the purchasers by May 1985 and at that time or shortly thereafter the damage was sustained. Although initially sought by way of relief in the pleadings, no question of specific performance arises, the contract has remained on foot with termination not being an issue, and it will be fully executed on resolution of this claim. The principles relating to damages in lieu of specific performance therefore have no application. A rising market, which is what the valuation evidence indicates existed in mid-1985 would place the purchasers under a duty to sell in mitigation in any event at or about that time, and any additional loss because of rise in values generally should not be the responsibility of the vendor. No other circumstances were urged by Mr Edwards as warranting the application of a special principle and accordingly I hold that damages are to be assessed at June 1985.

I turn therefore to the valuation evidence, which was confined to that given by Mr Clark.

In carrying out his valuation as at June 1985, Mr Clark first ascertained the replacement value of the building which he fixed at $152,959.00 to which he added a land value of $26,500.00, giving what he termed an indicated value of $179,459.00. He then proceeded to deduct 10% for market factors, giving a final figure of $161,500.00 for the value "assuming the subdivision had continued as originally advertised." His comparative figure for the actual value at June 1984 was $116,000.00 and was reached after fixing a land value of $17,500.00 and a 32% reduction for market factors, giving a difference of $45,500.00.

No competing evidence was adduced, although Mr Dugdale did challenge the appropriateness of the market factor assessments in particular. He also properly stressed the need for the Court to stand back and take a common sense broad look in determining what loss in fact resulted from the breach in question. There is the fact that the house is, on the evidence, probably superior even for the subdivision as warranted, and there is also the uncertainty as to precisely how the subdivision would have finally been developed had the vendor not been in breach. The subdivision as it now is cannot be said to be out of place in the overall area, and there are still large tracts of undeveloped land adjacent and nearby, the nature of their development being uncertain even at this time. Adopting the broad approach suggested by Mr Dugdale, I have concluded that a proper figure to attribute as the loss resulting from the breach I have found is the sum of $40,000.00.

The balance of the purchase price remaining unpaid is agreed at $23,989.44. Settlement of the transaction was due on 5 August 1985 and interest is sought by the Plaintiff from that date at the rate of 16% per annum, the claim for interest being based on clause 3.3 of the agreement for sale and purchase which provides:

> *"3.3 If from any cause whatever save the default of the vendor any portion of the purchase price is notpaid upon the due date for payment the purchaser shall pay to the vendor*

interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment; but nevertheless this stipulation is without prejudice to any of the vendor's rights or remedies."

Late settlement interest is stipulated in the agreement as being 16%. Although argument was addressed to whether the vendor was in default within the meaning of clause 3.3, I think the first enquiry is whether this question is determined by the principles of set-off. If the purchasers are entitled, as they have pleaded, to set off the damages suffered by them arising from the breach against the balance of the purchase price, then as at the date of settlement there was no balance owing, it having been expunged by the operation of the set off. Set-off is a ground of defence which if established affords an answer to the plaintiff's claim wholly or pro tanto. A defendant is relieved from the obligation to make payment on the due date to the extent of the set-off. (Halsbury's Laws of England Vol.42 paras.409, 410; *Federal Commerce and Navigation Ltd v Molena, Alpha Inc. and Ors* [1978] 3 All ER. 1066, 1077). It must follow if the doctrine applies that as at the settlement date (5 August) no part of the purchase price remained owing which could attract penal interest.

The nature of set-off both at law and in equity was considered recently by the Court of Appeal in *Grant & Anor v NZMC* Limited, CA. 53/88 18 August 1988. Afterdiscussing the earlier authorities and in particular the differing approaches evidenced by *Hanak v Green* [1958] 2 QB 9 and *Rawson v Samuel* (1841) Cr. & Ph. 161 as to what is considered necessary to constitute an equitable set-off, Somers J. said at pp.9-10 :

`But the administration of law and equity in one Court has inevitably meant that the two bodies of law have been much affected by each other. Over the years words such as `unconscionable' and `inequitable' have drawn closer to more objective concepts such as fair, reasonable, and just. Hanak v Green may evidence that trend.

`In that case to allow the cross-claim as a set-off was described* as *fair' and to disallow* it as *`manifestly unjust' : see [195812 QB at p.24.

The principle is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiffs' claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect inter-dependent, judgment on one cannot fairlybe given without regard to the other, the defendant's claim calls into question or impeaches the plaintiffs demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract."

The approach is similar to that now adopted by the English Courts, see for example *British Anzani (Felixstowe) Ltd v International Marine Management* (UK) Ltd [1979] 2 All ER 1063. It is to be noted that the claim and cross-claim need not arise out of the same contract, nor is it any bar that the cross-claim is one for unliquidated damages. In the present case the Plaintiff's claim is for the balance of the purchase price; the Defendant's claim is forbreach of a collateral contract, the result of which was a significant loss in the value of the property purchased and of the building erected on it. The two claims are interdependent, and in my judgment so linked that judgment on one cannot fairly be given without regard to the other. The claim of the purchasers impeaches that of the vendor, the latter's breach of contract being directly related to its claim for the balance of the purchase price. The sale was of a particular lot in a subdivision upon which the vendor knew a residential building of a certain quality was intended to be erected, and that factor was an integral feature of the negotiations resulting in the contract for sale.

Accordingly in my judgment the Defendants were entitled to set-off their claim for damages against the claim for the balance of the purchase price, liability for which is therefore discharged because it is less than the cross-claim. That this provides a just result is I think unquestionable in the circumstances of this case.

The cross-claim therefore defeats the claim of the Plaintiff and the Defendants are entitled to judgment for the difference between the two claims, namely $16,010.56 together with interest at the statutory rate which in the circumstances is to be calculated from the due date for settlement, 5 August 1985.

The Defendants are also entitled to costs according to scale as on a claim for $40,000.00, together with disbursements and witnesses' expenses to be fixed by the Registrar.

Solicitors:

Rice Craig Herbert & Frankovich, Auckland, for plaintiff

McVeagh Fleming & Co, Auckland, for defendants

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No. 518/90

IN THE MATTER of the Arbitration Act 1908

BETWEEN SUN ALLIANCE INSURANCE LTD

PI in iff

AND JACKSON RUSSELL DIGNAN ARMSTRONG

Defendant

Hearing: 18,19 June 1990

Judgment: 19 June 1990

Counsel: R 0 Parmenter for Plaintiff

A P Randerson for Defendant

(ORAL) JUDGMENT OF BARKER J

The plaintiff is the owner of a building in Shortland Street, Auckland called `Sun Alliance House'. The defendant firm of solicitors is the tenant of two floors of the building pursuant to a deed of lease dated 20 March 1978 and a deed of renewal dated 24 August 1987.

The parties have agreed on a further renewal of the lease but have not been able to agree on the rental to be paid for the renewed term. The lease provides that in default of such agreement, then the rent is "to be fixed by arbitration in pursuance of the provisions of the Arbitration Act 1908" ('the Act'). For the final 2 years of the renewed lease the rental is not in any event to be less than the rental for the first 3 year term.

There is no dispute that under S.4 and S.6 (1)(a) of the Act, there is to be a reference to a single arbitrator; the parties cannot agree as to who that single arbitrator should be. The Plaintiff submits that the single arbitrator should be a valuer and has submitted three names. The defendant submits that the single arbitrator should be either a retired Judge or a Queen's Counsel,

i.e. someone with a legal background. Several names have been suggested in support of either view; there is no question but that the persons nominated in each category are well qualified in their respective fields. One anticipates that, once this Court has given an indication as to whether the arbitrator is to be a valuer or a lawyer, the parties will be able to agree on a suitable person.

The plaintiff submits that the arbitrator should be a valuer who will not need to be educated in the principles of valuation practice and can draw on his or her own skill and experience. The defendant submits that a lawyer or retired Judge is quite equal to the task, frequently encountered in the legal profession, of deciding on an appropriate rental for the renewal of a lease. The defendant also submits that there are a number of legal issues, to which reference will be made later.

The deponent in support of the plaintiff's assertion, Mr Hutchison, a valuer, opines that it is not desirable nor necessary to have a lawyer appointed sole arbitrator or umpire. I deprecate the increasing tendency of deponents expressing opinions on the very question that the Court is to determine. He goes on to say that the appointment of a lawyer is not in the best interests of the parties to that arbitration, without saying why that gratuitous comment is justified. He deposes also (a) "It will be necessary for the parties to educate him or her on the principles and methodology of valuation. A valuer's skill, experience and judgment cannot readily be passed onto a lawyer within several hours"; and (b) "I have not yet been involved in an arbitration where a lawyer has been appointed as umpire or sole arbitrator. Such appointments are generally only made where there are legal issues in dispute." He also stated that most rental disputes are "an everyday occurrence in the valuation industry." I am surprised he did not refer to his profession as such.

Mr Wilson, a member of the defendant firm, deposed that, in addition to the straight question of determining the rental, there are a number of legal issues which he sees as likely to arise, including the question of land tax which has now assumed greater significance in view of recent changes in land tax rates. The lease itself does not make the tenant liable to land tax; there is apparently a question whether, in assessing the rent, the landlord is entitled to include land tax as something for which the tenant should include in the rental, despite the absence of reference in the lease.

Next Mr Wilson says that there are legal questions arising out of a suggestion made to him by the plaintiff's representatives that an arbitrator could not look at any rentals settled after the date on which the rent review is to be determined and also whether a valuer is able at law to resort to a device known as "two-tier market" to resist evidence of a decline in rental review situations.

I express no views on these matters; they seem to have been genuinely raised as matters which may be relevant in the arbitration.

Mr Parmenter relied on two decisions of Heron J: *Harbour City Realties Limited v Hooson's Menswear Limited (20 December 1988, M.372/88, Wellington Registry)* and *Government Life Insurance Corporation v The Attorney General & Ors* (30 March 1988, C.P.459/86, Wellington Registry).

The first case was an application to appoint an umpire. The second was a review of an arbitration award. Counsel relied upon the statement in the Harbour City case by the learned Judge

> *"I think in the specialist area of commercial rental valuations it is essential to have a valuer as an arbitrator. What is being argued for by the landlord is that there is a quirk in respect of this lease which required a different approach to the valuation. It must be remembered, however, that this is an enquiry into the full market rent."*

Those statements must be read in the context of a lease which provided that the rent was to be determined "by two arbitrators, being persons competent in rental valuations, one appointed by each party." The lease went on to provide that "the two arbitrators are then to determine the full market rent. If they are unable to agree then an umpire appointed by the two arbitrators is to determine the rent."

In view of their failure to appoint an umprie, the Judge had to do so for them; in the circumstances of that case, Heron J appointed another valuer as umpire. Heron J went on to say:

> *"The only cases where lawyers seem to playa part are where there are easily recognisable questions of construction, or where provisions of the Public Bodies Leases Act 1969 apply "*

With the greatest respect, I do not think it is necessarily essential to have a valuer as an arbitrator in all commercial rental valuations.

I should have thought that retired Judges or leading barristers are perfectly able by their experience and training to resolve competing evidence in technical areas; there could be difficulties in a valuer relying on matters within his own knowledge which may not necessarily have been mentioned to the parties; if he or she does mention them to the parties, they then have to go away and discuss their response.

I am more attracted, with respect, to the comments ofJeffries J in another case involving appointment of an umpire, namely , *Government Life Insurance Corporation v Wellington Hospital Board* (13 July 1989, M.233/89, Wellington Registry). The two arbitrators were unable to agree on the professional qualifications of the umpire. Jeffries J referred to the *Harbour City* case and the dictum of Heron J stating

> *"It seems from the judgment of Heron J he was primarily guided by the stipulation on qualifications of both arbitrators in the agreement."*

Jeffries J made this general statement on the involvement of lawyers as arbitrators, which I respectfully adopt

> *`In the present state where the originally appointed arbitrators are in dispute on the market rent and cannot even agree on the qualifications of the umpire they are in a distinctly adversarial stance. In those circumstances this Court is of the view a lawyer trained in balancing opposing viewpoints, especially when firmly held and expressed, is the better qualified.*
>
> *Furthermore the Court largely rejects the contention of applicant's deponent that with a lawyer umpire the parties `would be required to educate the umpire to a degree of understanding of the principles of valuation.' The parties in choosing a lawyer umpire would select one of sound commercial background in which an appreciable part of his experience would have been with property owning commercial clients.*
>
> *In his capacity as a lawyer throughout his professional life he would have been examining valuation reports not simply for rental reviews but for purposes over a wide spectrum of his practice. Such a lawyer becomes very familiar with the main strands of valuation theory even if he does not have the narrow technical expertise possessed bya qualified valuer."*

Later he said of retired Judges

`In the years he or she would have sat as *a Judge there would have been countless times he or she would have been called upon to have at least a working knowledge and understanding of complex technical evidence.* Likewise *for a lawyer engaged in litigation in the Courts.*

"I hasten to add that valuers throughout their professional lives are required to act fairly and impartially and have a sound grasp of those principles as well as the technicalities of valuations. The Court opts for a predominantly legally trained umpire in this particular dispute because it has become plainly adversarial requiring a professional man familiar in dealing with such situations."

I note immediately that in this case there has not been the adversarial stance taken by the two arbitrators in the Wellington Hospital Board case. There the Court was told that the umpire would in fact have to make the decision himself as if appointed sole arbitrator.

I note also that many rental valuation arbitrations are done perfectly satisfactorily by valuers. There is nothing to suggest that the valuers nominated here are other than fully experienced in their profession and have conducted arbitrations satisfactorily.

Another case of similar thrust to the *Wellington Hospital Board* case was referred to by Mr Randerson: In *Re A Lease Auckland City Corporation to GreyBuildingsLtd* (1933) NZLR 185. There the Court was asked to appoint an umpire on a rental renewal arbitration. One of the parties objected to the nomination of a retired Supreme Court Judge. As to that objection Smith J said at 192

"Jr is clear, however, that a person with knowledge of legal principles has in some respects expert qualificationsfor the duty offixingavaluation such asisrequired. Principles laid down by the Courts have to be kept in mind when the valuation is being made."

The only New Zealand authority on whether the sole arbitrator should be a lawyer or some other professional is the judgment of Sinclair J in *Mainzeal Construction Limited v W.L. Tyrie & Co Ltd* (C.L.19/87, 20 August 1989, Auckland Registry).

There, Sinclair J was asked to rule whether a retired architect or a lawyer should be the sole arbitrator in respect of a dispute concerning construction of a library building for Dunedin City. It is clear from the judgment that the dispute was a highly technical one, involving matters of construction practice. Sinclair J had no hesitation in ordering that the appropriate person be the one with experience in the construction industry. With respect to His Honour, I should have come to entirely the same conclusion on the facts of that particular case, even although there were said to be some legal issues which would have come before the arbitrator. But the Judge held that determining whether work was completed in accordance with the specifications was a matter where the retired architect was far more competent to rule than the nominated barrister.

Sinclair J quoted with approval the decision of McPherson J in the Supreme Court of Queensland: *Commonwealth of Australia v Citra Construction Limited* (1985) 2 BCL 235. It seemed clear from the report available to Sinclair J that, on the facts of that case, McPherson J had concluded that the dispute was one in which engineering knowledge and expertise was likely to prove 'vital' and that questions of fact, for which technical skill and comprehension were critical, were logically and practically anterior to a resolution of the questions of construction of the contractual provisions. Sinclair J found the case before him similar.

I do not regard those authorities as of great assistance, other than that they show that every case must be decided on its own facts. In the present case, on balance and not without some hesitation, I rule in favour of the lawyer or retired Judge as the arbitrator. That is not to say that valuers would not be or should not be used for rental review arbitration. If this had been a "two arbitrators plus umpire" situation, I should have thought it probably desirable to have the arbitrators as valuers, leaving possibly the identity of the umpire to be decided in the light of the wording of the particular lease and circumstances.

However, the exercise which is called upon here, does not in my view, involve a profound knowledge of valuation practice. The exercise is a pretty routine and common one that of fixing a rental for the renewed period of a lease, a situation with which any experienced lawyer or retired Judge would have had contact many times in the course of his or her professional career. Such a person is accustomed to hearing competing evidence which would no doubt be called by the parties and would be used to decide which of two experts is to be accepted.

The principles of valuation or evidence of rental of comparable leases are to be used as a guide; no doubt this principle would be well known to such an arbitrator. One should have thought that, in respect of this relatively small amount of office space, there would exist other comparable buildings in central Auckland; evidence of the rental of these could easily be given to the arbitrator. What tips the scales in favour of the lawyer arbitrator on the facts of this case are the possible legal questions mentioned in Mr Wilson's affidavit and which I have mentioned. I do not know whether these will necessarily appear but certainly Mr Wilson seems to have had some prior warning that they will appear in the arbitration.

It is too simple to say that the arbitrator, if a valuer, can state a case for the opinion of the Court or that an arbitrator's award is susceptible to review in this Court on the grounds of technical misconduct. One would hope that the parties would want to save that particular expense of resort to the Court under either means; if the decision on legal issues were from some person of legal standing, then one would hope that the parties might feel able to accept that decision as having been made by somebody competent to assess competing evidence of a technical kind, such as valuation evidence must be.

I repeat that this decision is purely on the facts as presented to me and is not to be interpreted as saying that in this situation there should or should not be a lawyer as distinct from a valuer. However, as to the competence of lawyers in this kind of valuation exercise, I note the comments of Jeffries J, which I adopt, which seem to echo in more detail the stance taken by Smith J as long ago as 1933.

Therefore, in the exercise of my discretion, I indicate that the proposed arbitrator is to be a retired Judge or apractising lawyer. I hope that the parties will be able to agree as to the identity of a suitable person. If not, liberty to apply is reserved.

The defendant, having succeeded, is entitled to costs. If counsel cannot agree I shall accept memoranda. Liberty to apply in respect of costs is reserved.

Solicitors: Brandon Brookfield, Auckland for plaintiff
Jackson Russell Dignan Armstrong, Auckland, for defendant.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP. 227/87

BETWEEN SLATER WILMHURST LTD a duly incorporated company having its registered office at Upper Hutt and carrying on business as a property developer
First Plaintiff

AND CHARISMATIC PROPERTIES LIMITED a duly incorporated company having its registered office at Lower Hutt and carrying on business as a property developer
Second Plaintiff

AND CROWN GROUP CUSTODIAN LIMITED a duly incorporated company having its registered office at Wellington and carrying on business as a property developer
Defendant

AND BELL, GULLY, BUDDLE WEIR a partnership having offices at Wellington and Auckland, solictors
Third Party

Hearing: 26,27,28,29 June 1990
Judgment: 21 September 1990
Counsel: R J B Fowler and R M P Jefferis for Plaintiffs
J L Marshall and J King for Defendant
S Williams and C Hubbard for third party

JUDGMENT OF GALLEN J

The first plaintiff is a property development company which was formed in 1976 and according to the evidence, specialises in medium sized commercial developments including retail premises. It has now been involved in the provision of retail premises for Hallensteins Limited on 5 occasions, the Para Rubber Company Limited on 6 and for Whitcoulls Limited on 3. While it has been involved in the development ofpremises for others, it has also from time to time acquired properties to hold on its own behalf.

In 1980 Mr Slater a driector of the plaintiff learned that Hallensteins were interested in re-locating in Lower Hutt. After discussing the matter with the head office of the Hallensteins company and obtaining details of what was required, the first plaintiff identified a suitable property and negotiated a conditional purchase contract from the owner. While the premises were intended for Hallensteins and were purpose-built to Hallensteins' requirements, the arrangements made were for the property to be owned by the company known as the Dalgety Staff Pension Fund, Dalgety Custodians Limited. On 13 August 1980 Hallensteins Properties Limited (hereafter referred to as "Hallensteins") wrote to the first plaintiff, commenting on the lease proposals. There was a postscript to this letter which is in the following terms:-

> *"At this stage we* have *not gone into details to be contained in the formal lease document but one condition would be to have the first right of refusal to purchase the building in the event of the owner deciding to sell."*

While the first plaintiff remained responsible for the overall development, the negotiation of the lease between Hallenstein Properties Limited and Dalgety Custodian Limited was dealt with by the solicitors for the respective parties. In the case of Dalgety Custodian Limited, Bell Gully and Co as it then was (hereafter referred to as "Bell Gully") and in the case of Hallenstein Properties (hereafter referred to as "Hallensteins"), Cook Allen of Dunedin. In their formal instructions to their solicitors, Dalgety Custodian Limited drew attention to the proposal of giving the tenant, Hallensteins, a right of purchase. A lease was accordingly drawn up and contained the following provision:-

> 14, ONLY so long as the said Hallenstein Properties Limited, Hallenstein Bros. Limited or any wholly owned subsidiary of that company is Lessee, if at any time during the term hereby created or any renewal thereof the Lessor should be desirous of selling the premises the Lessee shall have the first right to purchase the same upon the subject to the terms and conditions hereinafter set out viz:-
>
> (i) The Lessor shall give notice in writing to the Lessee specifying the price and date of possession with all other terms and conditions upon which the Lessor desires to sell the demised premises to be as contained in the annexed form of Agreement attached heretomarked "A" and such notice is hereinafter termed "the Landlord's Notice."
>
> (ii) The Lessee may within twenty eight clear days after receipt of the Landlord's Notice give notice in writing to the Lessor of its intention to purchase the same at the price and upon the terms and conditions specified in the Landlord's Notice.
>
> (iii) If the Lessee shall not within the said period of twenty eight days so notify the Lessor of its intention to purchase the demised premises (as to which time shall be of the essence) or if the Lessee shall notify the Lessor that it does not propose to purchase the same the Lessor shall be at liberty to sell the demised premises to any other person or persons at a price not less than the price stated in the Landlord's Notice and upon terms and conditions similar to those stated in the said Landlord's Notice.
>
> (iv) The Lessor shall not be entitled to sell the demised premises to any other person or persons at a price less than that stated in the Landlord's Notice or on terms and conditions more favourable to a purchaser than those stated in the Landlord's Notice without first giving a further Landlord's Notice under subclause (i) hereof specifying the altered price and terms and conditions whereupon the provisions of subclauses (ii) and (iii) and this subclause shall apply mutatis mutandis to any such alteration of the price, terms and conditions specified in any such further Landlord's Notice or Notices."

It should be noted that the term "the lessor" is defined in the recitals as "hereinafter with its successors and assigns called `the lessor"'. The building was completed on 20 July 1981 and the lease dated and commenced on 21 July 1981. Although of course Bell Gully would have retained details of the transaction on the office file which related to it, the certificate of title for the land and the executed copy of the lease were forwarded to Dalgety Custodian Limited for safekeeping. These were not retained or held by Bell Gully. The first plaintiff having completed its obligations, then moved on to other things.

The lease provided for a review of rental from time to time and such a review was undertaken in 1984. Dalgety Custodian

Limited sought advice from the firm of Darroch, Simpson and Co as to the appropriate rental and Mr Nyberg of that firm forwarded a valuation report dated 28 June 1984. This report assessed an appropriate rental for the premises occupied by Hallensteins at $113,141 p.a. That seems to have been accepted by both parties and the rent was accordingly reviewed at that figure from then on.

The firms of Dalgety and Crown having merged, not only did some properties become surplus but it became necessary to consider the fact that the merged company was now operating two quite separate pension funds. Dalgety Custodian Limited sought a valuation of the various properties held on account of the pension fund. The valuation of the Lower Hutt property was sought from Darroch Valuations and a valuation prepared by Mr Nyberg dated 17 November 1986, a valuation prepared as at the date of inspection which was 30 September 1986. That valued the total of land and improvements at $1,625,000.

In the meantime, the driectors of the plaintiff company had come to the conclusion thatrentals in respect of commercial and retail properties were likely to increase but that interest rates were likely to decline. They therefore made the business decision that it would be desirable to acquire property and hold it and particularly that it would be desirable to acquire properties which they had previously developed. The advantage in such situations arose from the fact that the plaintiff company would be fully familiar with all the surrounding circumstances. The plaintiff considered that the property at Lower Hutt occupied by Hallensteins was a particularly attractive property for a number of reasons. Accordingly on 5 November 1986 Mr Slater wrote to the general manager of Crown Corporation Limited in the following terms:-

> *"Our Company designed, built and leased this property for theDalgeryPension Fund some time ago. Although we have no reason to believe that the property might be on the market,* we have *been approached by various business associates who would like us to form a partnership to buy the building back. Could you please advise whether the property might be able to be purchased and if so at what price."*

It appears that Mr Salter also rang a MrBrabyn who was then the general manager, administration of Dalgety Crown. Mr Brabyn said that he informed Mr Slater that the pension fund could be interested in selling as the superannuation fund was being wound up. He requested the proposal to be put in writing which is the reason why the letter was written. There was no discussion in the conversation regarding the Hallensteins tenancy. Upon receiving the letter, Mr Brabyn arranged for it to be submitted to the trustees. Mr Brabyn thought that he also probably would have discussed the matter with Mr Nyberg but he did not have any actual recollection of this.

In aletter addressed to the plaintiff dated 19 November 1986, the defendant which was by then the owner of the property, indicated that it would be prepared to sell the property to the plaintiff for $1.8m. That is the first time that any price had been mentioned and it is significant that the price originated from the defendant. Mr Slater telephoned Mr Brabyn and pointed out that the sale was not being conducted through a real estate agent so that no commission would be payable. He indicated that the commission would have amounted to $30,000 and that in the circumstances it would be not unreasonable to reduce the purchase price by $15,000, thus both parties would get the benefit of avoiding the payment of commission. Mr Brabyn agreed to this and Mr Slater agreed to submit a formal offer. A formal offer was submitted by the plaintiff and the letter is dated 28 November but it appears that the offer was not delivered to the first defendant until 2 December. The offer was in the form of an agreement for sale and purchase. The offer gave the legal description of the land but did not show any encumbrances and made no reference in the description to the lease to Hallensteins which was in fact a registered lease. It provided for a purchase price of $1,785,000 with a deposit of $20,000 and in a section headed "details of tenancies" provided as follows:-

Renj	Term:	Right of Renewal:
HallensteinsBros. $113,141.00	21 years	Nil (Headlease)
Horizon Bookshop	12 years	(Sublease)

Up until this stage there had been no mention by anybody of the particular right of Hallensteins to a first refusal in respect of any sale of the property.

The first defendant referred the matter immediately to its solicitor Mr Barker at Bell Gully. That firm and Mr Barker had had a long and close association with the defendant and its predecessor as well as with the principal company Dalgetys and subsequently with Dalgety Crown Limited. Not only did Mr Barker have a close personal relationship with the officers responsible for controlling the defendant but Mr Barker was aware that they were astute businessmen accustomed to dealing with property and well aware of the general nature of the legal requirements associated with property transactions. Mr Barker said and this was not controverted, that he was telephoned and asked to deal with the matter with some urgency. The letter seeking action of the second defendant was in the following terms:-

Re: Property 224-250 Hiah Street Lower Hutt

Enclosed please find copy of Agreement for Sale and Purchase relating to the above property.

Before signing this document we would ask that you please certify same to be in order."

The first defendant did not forward to Mr Barker either the certificate of title or the lease, sending only the agreement for sale and purchase. Mr Barker had been involved with the negotiation of the lease some 5 years before but he said and I accept, that he has no recollection of the particular transaction and I have no doubt that he would have dealt with many matters subsequently for the plaintiff. Mr Barker did not check with his earlier file. Being aware that the first defendant held the certificate of title, he did not think it necessary to obtain a search of the title from the Land Transfer Office, nor did he recollect that there was a registered lease in respect of it. He perused the document which was forwarded to him for certification and on the same day, 5 December which was a Friday, sent it back with an accompanying letter which is in the following terms:-

> *"We refer to your letter of 4 December received today. We have perused the Agreement and confirm it is in order for execution.*
>
> *While Slater WilmshurtLimited can nominate the purchaser which could be a $2 company, the purchaser cannot take possession until all the purchase price has been paid and there will be a $50,000 deposit in total.*

The contract is only conditional upon the purchaser arranging f nance in 14 days; not upon approving the leases. We presume the details of the tenancies on the first page are correct.

Could you please let us have *the original lease documents in due course and also the Certificate of Title."*

On the same day Mr Brabyn informed one of the directors of the plaintiff that the price had been accepted and the offer had been referred to the first defendant's solicitors. On 5 December 1986 the documents having been delivered by hand to the first defendant, the agreement for sale and purchase was executed under seal by the first defendant and by letter dated 5 December 1986 the agreement for sale and purchase was sent to the plaintiff.

The agreement at that stage was conditional upon the plaintiff arranging sufficient mortgage finance to complete the transaction, that to be done within 14 days from acceptance of the offer. It will be recalled that the original letter suggested that a partnership might be involved in the purchase. Mr Slater said that he had made an approach to a commercial real estate office to enquire as to whether there might be some other person or body interested in purchasing the land in partnership. On 9 December 1986 that particular conversation took place. On 10 December 1986 a principal of the real estate agency approached Mr Slater advising that that agency had a party interested but only on outright purchase of the property. On the same day a conditional offer was received from Cromwell Corporation Limited (hereafter referred to as "Cromwell"), another property developer offering to purchase at a sum of $2.435m. Mr Slater indicated that that sum was unacceptable.

It is now necessary to make reference to the second plaintiff. That was then a company having the same shareholders and directors as the first plaintiff. It was a company described by Mr Slater as being a "shelf company". By that he meant a means of entering into partnership transactions in respect of property purchase. Mr Slater said that he and his co-shareholder in the first plaintiff were reluctant to have a partnership arrangement in respect of properties through that company and arranged for the second plaintiff to be available for that purpose. The pleadings indicate that:-

> 8A. ON the 5th day of December 1986 by a Declaration of Trust in writing between the First Plaintiff of the one part and the Second Plaintiff of the other part the First Plaintiff declared and acknowledged that it executed the agreement referred to in paragraph 3 hereof as trustee for the Second Plaintiff and therefore it be found that the First Plantiff suffered no loss as having no legal or beneficial interest in the agreement at the material dates then in the alternative:
>
> (i) The First Plaintiff sues as trustee for the Second Plaintiff in respect of such Declaration of Trust; and/or
>
> (ii) The Second Plaintiff sues as beneficiary pursuant to such Declaration of Trust."

An offer was then made by Cromwell to purchase at$2.587m. Mr Slater indicated that that offer would be accepted and he referred it to the solicitors to the first plaintiff, Messrs Phillips, Shayle, George and Company and in particular to Mr Thomson. The offer was subject to a special condition:-

> "3. Cromwell Corporation shall be allowed to negotiate the rental review with Hallensteins Brothers Limited of Dunedin. Should the rental achieved be less than $219,359 the purchase price shall be reduced at a capitalisation rate of 8.5%. Should the rental exceed $219,359 there is to be no alteration to the purchase price."

Those conditions were acceptable to the plaintiff. Accordingly the plaintiff no longer had any concern over financing its own purchase and on 15 December Mr Slater instructed his solicitors to advise the defendants that the contract the subject of these proceedings, was unconditional. On the same day the solicitors for Cromwell requested a copy of the Hallensteins' lease and Mr S later requested by facsimile that the first defendant make a signed copy available to the solicitors concerned. On 15 December 1986 the plaintiff's solicitors reported to the plaintiffs in the following terms:-

> "We now enclose a copy of C.T. 450/52 for your records.
>
> You will note that the property is in the name of Dalgety Custodian Limited at Wellington. We assume that this is the same company referred to as Crown Group Custodian Limited in the Agreement for Sale and Purchase. We are taking steps to confirm this with the vendor's solicitors.
>
> You will note from the Title that the following encumbrances exist:
>
> 1. Fencing Agreement in Transfer 213031;
> 2. Surrender of the right to overhang guttering created by Transfer 366741;
> 3. Restrictive covenant in Transfer 673421;
> 4. Lease 501826.1 to Hallenstein Properties Limited.
>
> The Fencing Agreement is no longer applicable. The right to overhang guttering was, in fact, surrendered and accordingly, no longer affects the Title.
>
> The restrictive covenant was effective only for a period of 15 years commencing on the 1st day of January 1966 and accordingly, the same no longer affects the Title.
>
> The Lease is obviously current and you are aware of the terms and conditions in respect thereof. We have a copy of the Lease on file and can provide a copy for you if you so wish. The purchase is, of course, subject to the registered Lease in favour of Hallenstein's.
>
> Please confirm by telephone that the property shown on the attached plan corresponds with that inspected by you. We also look forward to receiving your advice regarding availability of finance which is to be confirmed on or before the 19th day of December 1986."

It will be noted that there is no reference in this letter to the right of first refusal as far as Hallensteins are concerned. On 17 December 1986 after receiving a copy of the lease, the solicitors for Cromwell telephoned Mr Slater asking whether the defendant had cleared the right of refusal to Hallensteins. Mr Slater replied that he imagined that had been done but he telephoned the plaintiff's solicitor to ask him to check. Mr Slater also informed the defendant that the first plaintiff was purchasing in trust for the second plaintiff. This was the first direct reference to the right of first refusal to Hallensteins. None of the appropriate officers of the first defendants had remembered this provision nor had any approach been made to Hallensteins.

On 7 January 1987 Mr Slater rang the first defendant to enquire as to the outcome of the Hallensteins' right of refusal. On 13 January 1987 Mr Cameron of the first defendant telephoned Mr Slater and informed him that Hallensteins had indicated it intended to exercise its right and had done so. During the course of that telephone conversation Mr Slater advised Mr Cameron that the first plaintiff had on-sold the property to Cromwell for a substantial sum and that it would be

the intention of the firstplaintiff to sue for specific performance. Mr Cameron asked Mr Slater whether Mr S later had been aware of theright of refusal and Mr Slater told him that he had not been. Hallensteins having exercised its right it was impossible for the defendant to complete and the deposit was returned.

The firstplaintiff then initiated these proceedings seeking to recover the difference between the price which it had negotiated with the first defendant and that which it had negotiated with Cromwell in the on-sale. Subsequently when the defendant raised as a defence the allegation that the plaintiff did not have a sufficient status to maintain the proceedings because of the rights of the second plaintiff, the second plaintiff was joined as a plaintiff. The defendant also joined the first party and to complete this account of the factual background, the shares in the second plaintiff were sold to anotherparty who has indicated in writing that it does not make any claim in respect of any damages recovered and if damages are recovered by the second plaintiff, will account for these to the first plaintiff. It is against this background that these proceedings fall to be considered.

The first cause of action relied upon by the frist plaintiff is that the defendant breached an unconditional contract as a result of which the first plaintiff has suffered loss and it claims the amount of that loss. Further, it alleges that if the declaration of trust in favour of the second plaintiff is relevant, then if the first plaintiff has itself suffered no loss, then it sues as trustee on behalf of the second plaintiff or the second plaintiff itself sues as beneficiary. Secondly, the plaintiffs contend that the first plaintiff was induced to enter the contract by a misrepresentation that the defendant was able to sell and that in consequence it has suffered loss in terms of the difference between the purchase price and that which Cromwell was prepared to pay amounting to $700,000.

The first defendant contends first that there is neither breach nor repudiation in the circumstances. As a second defence it contends that the first plaintiff has no beneficial interest in the agreement and no standing. Thirdly it pleads that the first plaintiff was in a fiduciary relationship with the first defendant and is in breach of that relationship by failing to disclose the right of first refusal to Hallensteins. Next it contends that the first plaintiff is a real estate agent subject to the provisions of ss.63 and 64 of the Real Estate Agents' Act 1976 and since there was no consent or independent valuation as contemplated by those sections the agreement is voidable at the option of the defendant and was avoided by the sale to Hallensteins. Next it contends that there was an implied term in any agreement entered into that it was conditional upon the Hallensteins' right of first refusal. Next it contends that there is mistake in terms of the Contractual Mistakes Act 1977 in respect of which the defendant is entitled to and does seek relief and finally, it contends that if the defendant is in breach, then the first and second plaintiffs are prevented by the rule in *Bain v Fothergill (1874)* L.R. 7 H.L. 158 from recovering damages other than expenses. As between the first defendant and the third party, the first defendant contends that the third party was in breach of its contractual obligations to the second defendant in failing to draw to its attention the rights of Hallensteins in terms of the lease and in certifying the transaction without reference to that particular obligation.

In this case there is no doubt that an agreement was entered into between the first plaintiff and the defendant and that that agreement was unconditional. The defendant has not complied with its obligations in terms of that contract, nor is it in a position to do so nor do I think that that position is affected by the relationship between the first and second plaintiffs. Given the trust relationship between them then the first plaintiff as trustee would have had an obligation to pursue the rights of the beneficiary nor do I think that the position is affected by the subsequent sale of the interest in the second plaintiff. Thatentity remains extant and whatever arrangements may have been entered into between the original shareholders and the purchasers of the shares, is outside the ambit of these proceedings. While I appreciate the reasons why the matter is pleaded as it was I think it is an unnecessary complication to deal with the dispute as other than a dispute between the first plaintiff and the defendants and indeed counsel largely recognised this and devoted submissions almost entirely to the other more substantive issues. Accordingly I propose not to deal further with this aspect of the matter.

The plaintiff has proved the contract that it has not been completed and I conclude (subject to the question of implied terms dealt with later), the defendant is in breach of its obligations. I am satisfied that the plaintiff has established a breach of contract for which it is entitled to recover.

No doubt having in mind the practical consequences, Mr Marshall dealt first with the submissions based upon the rule in *Bain v Fothergill (supra).* This is not a rule which is frequently invoked in the New Zealand situation because of the guaranteed title under the Land Registry system. The rule is summarised in the headnote to the case itself which was decided in the House of Lords in 1874 (see [1874-80] All E.R. Rep. Ch.D 83) in the following terms:-

> *"Where, on a contract for the sale of land the vendor, in the absence of any fraud and any expressed stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he has paid one."*

In the particular case the vendors were the lessees of a mining royalty. They had covenanted not to assign without the consent of the lessors. Lord Chelmsford said at p.87:-

> *"There is no reason to think that the respondents were not acting throughout under a* bona *fide belief* that the *lessors' consent might be obtained at any time upon application."*

In fact after some negotiation the lessors refused their consent and the lessees were therefore unable to perform the contract of the sale of their interest. Lord Chelmsford said at p.87:-

> *"They were prevented from performing their contract, not from any wilful act or fraud on their part, but by* an *unexpected defect in their title, which it was beyond their power to cure."*

It was held that the purchasers were entitled to recover their deposit and the expenses incurred in investigation but not damages for the loss of the bargain. In *Fleming v Munro* (1908) 27 N.Z.L.R. 796, Cooper J. accepted that the rule in *Bain v Fothergill* applied in New Zealand and said at p.800:-

> *"7n my opinion the reasons given byLord Chelmsford* show *that the rule is applicable to the circumstances of this Dominion and I think it is the law here* as well *as in England."*

In *Staples v Lomas* 1944 N.Z.L.R.150, the plaintiff made an offer in writing to purchase the defendant's house. The offer required vacant possession to be given and taken on or before 19 December 1942. The offer was accepted and a sum paid in part payment of the purchase money. The house was in fact tenanted at the time and it was found that the tenant honestly intended to

vacate the premises. The plaintiff relying on the tenant's statement of intention to vacate, sold his own house and agreed to give vacant possession of it. The tenant however was unable to find other suitable accommodation and took advantage of the then Fair Rents Act 1936. The tenant refused to give possession and the defendant was therefore unable to give vacant possession as required by the contract. Myers C.J. accepted the views expressed by Cooper J. and said at p.153:-

> *"I consider that as a Judge of first instance I should follow that decision .....Even if there be any limitations upon the application of the rule to New Zealand conditions, I see no reason why it should not apply where the failure to make title is caused by a third party relying on rights created by a statute such as the Fair Rents Act, 1936."*

In *Waring v SJ. Brentnall Limited* (1975) 2 N.Z.L.R. 401, Chilwell J. had to deal with a situation where the plaintiff entered into a written agreement to purchase a vacant lot from a defendant and paid a deposit. The defendant had entered into an agreement to purchase 10 lots, one of which the defendant genuinely believed was the particular lot which it had agreed to sell to the plaintiff as did the solicitors concerned. When the plans of the lots were deposited the defendant found that the particular lot was not one of the lots purchased and it was therefore unable to complete the sale to the defendant. The plaintiff sued the defendants for the return of the deposit and for the increase in value of the particular lot. The rule in *Bain v Fothergill* was pleaded. The submission was made to the Judge that the rule had no application to land subject to the Land Transfer Act. The defendant specifically contended that the rule in Bain v Fothergill did not apply in New Zealand where the issue was a question of title in the narrow sense of that word to land the subject of the Land Transfer Act 1952. Chilwell J. pointed out that the reason for the rule as it arose in England was the difficulty in making a good title to English land, a difficulty which does not apply in New Zealand because of the certainties of the Torrens system of registration of land. He considered that the reasoning of Cooper J. in *Fleming v Munro* could be regarded as doubtful and was in any event on the particular point obiter. Chilwell J. considered all the New Zealand authorities where reference had been made to the rule and also a number of Australian authorities. He pointed out that as early as 1863 the Court of Appeal in *Slack and Le Fleming v Lockhart* (1873-74) 1 NZ Jurist, Appendix (i), had doubted that the rule applied to sales of land in New Zealand but made no positive ruling. However he drew attention to the fact that in *Jacobs vBills* 1967 N.Z.L.R.249, McGregor J. applied the rule where a vendor was restrained from selling in breach of trust known to the purchaser but expressed the obiter opinion that in view of the provisions of the Land Transfer Act the rule can seldom have application in New Zealand.

Chilwell J. pointed out that the rule had in fact been applied in New Zealand in three cases. In *Conn v Bartlett* 1923 G.L.R. 729 where Salmond J. had to deal with a situation where a vendor had sold a lease of a shop at a time when the lease had expired and under circumstances which precluded him from perfecting his right of renewal. In *Staples vLomas* (supra), Myers C.J. had applied it where a vendor was unable to give vacant possession because of a statutory tenancy and in *Jacobs v Bills* (supra), McGregor J. applied it where beneficiaries under a trust prevented their trustee from committing a breach of trust known to the purchaser. Chilwell J. expressed the view:-

> *"It is my judgment that a general application of the rule would be out of tune with conveyancing practices in New Zealand having regard to the precision and certainty which the provisions of the Land Transfer Act 1952 have created. It seems to me that the most that can be said is, as was said by McGregor J., that the rule can "seldom" have application in New Zealand when the land is subject to the Act."*

In the particular case where the defendant could have ascertained from his own agreement to purchase that he had no right to sell the particular lot, then we could not rely on the rule in Bain *v Fothergill.*

In *Souster v Epsom Plumbing Contractors Limited* (1974) 2 N.Z.L.R. 515, McMullin J. found that the rule in any event had no application in the case before him but he expressed the view that although the rule applied in New Zealand, the opportunities for its application must be rare, following the comments of McGregor J.

As a resultof the terminology used *in Bain vFothergill* itself, the rule has always been expressed in terms of title and it is for this reason that doubts have been expressed as to whether the rule applies in New Zealand. The problem as to establishing title in a technical sense which exists under the English system has been avoided in this country by the Land Transfer registration system. However in *Bain v Fothergill* itself, the problem was not the difficulty of establishing title but of making it. The real problem the vendors faced was their inability to transfer because they lacked the necessary consent of the lessor. That situation has little or nothing to do with technical difficulties in establishing title although no doubt the rule would be applicable in such cases. The problem which arose in *Bain v Fothergill* would be just as likely to arise under New Zealand conditions where guaranteed title in fact exists. When looked at in that light the cases where the rule has been applied in New Zealand are consistent.

They all involve not an inability to establish title but rather an inability to transfer what the vendor contracted to transfer as the result of the intervention of some supervening factor for which the vendor was not responsible. Whatever the basis for it, on three occasions at first instance the Courts in this country have held that the rule may be applied to situations where the vendor was prevented without his own fault, from performing a transaction into which he had entered as a result of some supervening circumstance. Looked at in that light, the underlying principle would be that where in respect of transactions involving transfers of an interest in land, a vendor enters into the transaction without fraud and genuinely intending to transfer an interest which he would be able to transfer at the time of entering into the agreement but is prevented from actually performing the contract because of the intervention of some supervening fact for which he is not responsible, then the purchaser is limited to a recovery of the deposit, expenses incurred in connection with the transaction and interest in the sum so expended.

In the case of Bain v Fothergill the vendors were prevented from transferring the interest by the refusal of the lessor to consent to the transfer. The vendors believed at the time of entering into the transaction that they would be able to complete it and had no reason to believe that the restraint upon their exercise of a power which would otherwise have been available to them would be exercised. A similar situation arose in *Staples v Lomas* and in *Jacobs v Bills.*

In *Clasper vLawrence and Others* (unreported, Christchurch Registry Cp. 109/87, judgment delivered 17 July 1990) Tipping J. had to consider the question in relation to land which had been accidentally sold to 2 separate purchasers. In the circumstances of that case he held that the rule did not apply but did accept that on rare occasions it would apply in New Zealand. He expressed the view that a vendor could only take advantage of the rule if

he could show (a) that he neither knew nor ought to have known of the defect in title, or if aware of it, he believed on reasonable grounds that the defect was curable by the time of settlement and (b) that he took all steps reasonably open to him to cure the defect. I agree with that formulation.

It then becomes necessary to consider whether the circumstances of this case place it within the same category of cases either driectly or by analogy. Here the defendant had every right to sell the interest in the land concerned. It had title and the ability to dispose of it but however was subject to the rights of Hallensteins which the defendant had overlooked. If the defendant had believed that Hallensteins would not exercise that right, then I think the case would clearly come within the ambit of the decisions where the rule has been applied. Does the fact that it did not have their belief but had overlooked the fact that the right existed, change the situation?

In this case the defendant had no belief that Hallensteins would not exercise its right. It had simply never adverted the possibility that it might because it had overlooked or forgotten that the right existed at all. The situation therefore differs from all the cases to which reference has been made since in all of them *the Courts were in a position to find that* as *in Bain v* Fothergill itself, the person entering into the transaction was aware of the difficulty but believed that in the circumstances it would not create an impediment. The defendant cannot say here that it believed Hallensteins would not exercise the right. It simply had no idea whether Hallensteins would exercise the right ornot since it had overlooked that the right was inexistence at all. The defendant had the lease in its possession which a perusal would have shown contained the particular clause. Further, the lease was registered so that a search of the title would have indicated the position. In *Bain v Fothergill* itself, Lord Chelmsford referred to the fact that the respondents were acting under a bona fide belief that the lessors' consent might be obtained at any time upon application. In *Staples v Lomas* the vendor believed on reasonable grounds that the tenant would not rely upon his rights in terms of the Fair Rents Act. This case bears marked similarities to *Waring v SJ. Brentnall Limited* (supra). For similar reasons, I am of the view that under the circumstances of this case, the rule cannot apply.

The defendant also relied on a defence of mistake and the provisions of the Contractual Mistakes Act 1977. First it was contended that the provisions of s.6 (1) (a) (i) applied in that it was alleged Mr Slater and therefore the first plaintiff, was aware of the existence of the right of first refusal which was not drawn to the attention of the defendant. I accept Mr Slater's evidence that he did not recall that this right existed. I found his evidence convincing on the point and it is in any event supported by the fact that none of the other persons connected with the transaction recalled it either. S.6 (1) (a) (ii) may however have application. Mr Marshall submits that both parties were influenced in their respective decisions to enter into the contract by the same mistake, that is that neither adverted to the fact that Hallensteins had the right which it did in terms of the lease.

Mr Fowler submitted that even if that were so, it did not amount to a mistake for the purposes of the Contractual Mistakes Act. Rather he says that there was no mistake, simply a situation where a third party was entitled to exercise a right which it chose to exercise. He submits that the failure of the defendant to remember that right existed was not a mistake on which it can now rely. This question raises matters of very considerable difficulty. The term 'mistake' is defined in the Contractual Mistakes Act 1977 as being - "Mistake" means a mistake, whether of law or of fact."

The members of the Contracts and Commercial Law Reform Committee recommended in their report of May 1976 that the term "mistake" should be defined for the purposes of reform of the law relating to mistake and in the draft Bill which they submitted, did provide such a definition. That did not appear in the Act as passed. However the draft as proposed would not have necessarily resolved the question at present at issue. S.5 of the Act states that it is to be a Code and that the Act is to have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted. I think it must follow that if the situation amounted to mistake before the passing of the Act, it could hardly be said not to constitute a mistake now for the purposes of the Act. In *Waring v S.J. Brentnall Limited* (supra), Chilwell J. considered that for the purposes of applying the rules of equity the situation in that case amounted to a mistake. That contract dealt with the sale and purchase of a section which the vendor did not in fact own although the vendor could have ascertained by searching his own agreement for sale and purchase as well as public records, that he did not own it. Chilwell J. considered whether it was appropriate to grant relief in equity and in the circumstances of the case considered that it was not but at least he was able to contemplate the possibility that relief might have been available. Under those circumstances I think that if there is a doubt over the bringing of the situation within the specific provisions of s.6 of the Contractual Mistakes Act, that doubt should be resolved in favour of the contention that the situation involved a mistake for the purposes of the Act where it would have been sufficient to give rise to the equivalent equitable jurisdiction before the passing of the Act.

Mr Fowler however submits that even if that were so, the conjunctive requirements of s.6 (b) have not been met. He submits that there was no substantially unequal exchange of values, nor any imposition of an obligation substantially disproportionate to the consideration therefore. If the plaintiff is right, there is a very substantial obligation quite disproportionate to the consideration received. The defendant so far from receiving the price of the land would be obliged to pay out a sum in excess of that which it expected to receive. I think it follows therefore that the Contractual Mistakes Act does apply and it is therefore encumbent on me to consider whether or not it is appropriate to grant relief in terms of s.7.

In this case both parties were originally aware that the lease contained the right of first refusal which has given rise to the difficulties between them. Both I accept had forgotten its existence. Nevertheless the lease was registered and it follows that the term was a matter of public notice. Both could have ascertained that the particular problem existed. However in *Waring v SJ. Brentnall Limited,* Chilwell J. in considering the equities of the situation in that case said at p.4 10:-

> *"Furthermore, it is a clear principle of the law relating to vendor and purchaser that, subject to a purchaser's right to rescind brevi manu, a vendor by entering into an agreement to sell land, does not thereby affirm that, at the date of the agreement, he is the owner of the land, or even in possession of it; but he promises that when the time comes for making his title he will be prepared to do so. See Stonham on Vendor and Purchaser (1964) paras. 202 and 1029, Rosel v Adam (1876) 2 VL.R. 170(L),R. v Cunningham (1899)1 W.A.L.R. 91, and Elliott v Pierson (1948) 1 All E.R. 939. This being the case, even if the plaintiff knew on, or at any time after, the signing of the agreement that the defendant had no proprietary right in lot 110 he was entitled to rely upon the defendant's obligation to get it in for the plaintiff by the date for completion of the agreement. On this aspect of the case alone, in my judgment, the defendant is not entitled to be*

relieved in equity from his failure to provide title to lot 110 for the plaintiff."

By analogy it could be said that in this case even if the purchaser had been aware that the lease contained the particular clause, he could have assumed that the defendant had obtained the necessary waiver by the lessee or might have been prepared in any event to buy it subject to the obligation which it would also have imposeed upon it. In the statement of principle contained in *Solle v Butcher* (1950) 1 K.B. 671, it is stated per Denning L.J. (p.672) that "A contract was liable in equity to be set aside, if the parties were under a common misapprehension either as to facts or as to their relative and respective rights", which would seem to be the case here, "provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault." The place of fault in situations such as that before the Court was also examined by the Contracts and Commercial Law Reform Committee. The Committee said at p.6:-

It seems to us that carelessness while it may be relevant in apportioning any loss that has been occasioned to the parties as a result of their transaction is not a helpful criterion in determining whether the other party to the contract should be entitled to enforce his expectation interest and thus make an unwarranted profit from another's carelessness."

In this case such a comment does not categorise the action of the plaintiff. The plaintiff does stand to make a profit in this case from the on-sale but that was nothing to do with the carelessness of the vendor. Had the first defendant been without fault, then there would have been a much stronger argument for the application of the rule in *Bain v Fothergill* which would have been a reasonably appropriate way of dealing with the matter and which in any event could provide some measure for the purposes of what is an appropriate award in terms of s.7. Here there is no mistake over the identification or extent of the land or its nature, nor is there any mistake over its value. The first defendant cannot as a result of its own omission rely upon the rule in *Bain v Fothergill* and I think that in the circumstances it ought not to be able to achieve the same effect by relying upon a discretionary remedy under the provisions of s.7 of the Contractual Mistakes Act.

In the circumstances of this case I am of the view that no relief should be granted in terms of the section. If there is a loss to bebome then that loss should be home by theparty responsible for it, which in this case is clearly the first defendant. I note too that the price was fixed by the defendant, not by the plaintiff.

The next defence upon which reliance is placed is the allegation of breach of fiduciary duty. This depends on an allegation that the involvement of the plaintiff in the original development gave it an opportunity to obtain special knowledge with relation to the property, it remained fixed with fiduciary obligations towards the defendants because of its original involvement and that under those circumstances it was under an obligation to disclose to the defendant that the price for which the defendant was selling the property was substantially an under-value. The situation is not one of those such as trustee and beneficiary where the obligation is at the very highest level. This was a business transaction and treated by all the parties as such. There is no evidence to support a contention that the plaintiff based its position upon any information which it had obtained at the time of the original negotiations and which influenced it in terms of value or that the defendant was in any way disadvantaged as a result of the possession by the plaintiff of special knowledge. The original price was fixed by the defendant, not by the plaintiff. Whatever residual relationship may have remained, I do not think that the defendant is entitled to succeed in respect of these allegations.

In coming to this conclusion I do not overlook the fact that there were allegations that the plaintiff deceived the defendant by suggesting that it was acting on behalf of other purchasers. I do not think the approach was a dishonest one, nor do I think that there is any disadvantage to the defendant in the plaintiff approaching the matter in this way.

The next defence relates to the Real Estate Agents Act and is analagous to the defence which relies upon allegations of breach of fiduciary duty. For the purposes of the Real Estate Agents Act 1976 the term "Real Estate Agent" is defined in s.3. S.3 (1) is in the following terms:-

"For the purposes of thisAct, every person shall be deemed to be a real estate agent who acts, or who holds himself out to the public as ready to act, for reward as an agent *in respect of the sale or other disposal of land or of businesses (either with or without* any *interest in land) or the purchase or other acquisition of land or of businesses (either with or without any interest in land), or in respect of the leasing or letting of land, whether or not that person carries on any other business."*

S.3 (2) provides for certain exclusions. S.3 (3) applies to two or more persons. S.3 (4) extends the definition. S.3 (5) provides an exclusion. S.3 (6) also provides an exclusion.

In *Property Promotions v Police* 1968 N.Z.L.R. 945, 946, Woodhouse J. said:-

"As a *matter of construction] do not think that the definition comprehends every activity no matter how limited but which might happen to run parallel with some part of the activities of real estate agents ..... The definition must be read* as *a* whole, *and I think the construction I have put upon it* is *clearly indicated by the fact that in terms it takes notice not merely of* what *is actually done by the agent but what he stands ready to do..... The intention of the Act seems plain enough. It is to regulate in the public interest* the activities *of those who will be engaged as agents in promoting contractsfor the sale or other disposition of land; and those who for* this *reason are likely to be handling monies related to those contracts....The essence of the work of a land agent* is *the completion of contracts by active promotion at all levels..."*

In the particular case the provision of an information service designed to enable those directly concerned to conduct their own dealings, was held not to contravene the Act. In *Kilgour v Loeber* (1984) 2 N.Z.L.R. 656, Prichard J. was concerned with a situation where the owner of property had asked a friend to assist her to sell a section of land. The friend was not a licensed real estate agent. He was a carpenter. He advised as to the price, advertised the section at his own cost on the basis that the owner had agreed that he could keep any money paid in excess of $16,000. There were several responses to the advertisement. A prospective purchaser who had first called on the owner was told to see the friend. The friend showed the prospective purchaser a copy of the certificate of title and negotiated a price. He then referred the matter to the owner's solicitor. Prichard J. followed the comments of Woodhouse J. (as he then was) in *Property Promotions v Police.* He accepted that the question was one of degree. He concluded that the activities of the claimant did not include all the duties normally carried out by persons engaged in the business of acting as real estate agents. He concluded that

he was entitled to claim and was not in breach of the Act.

On the facts of this case, while it is true that the initial approach by the plaintiff suggested that it was acting on behalf of a group of which it might or might not have been a member, the true facts were that it was making the approach on its own behalf. It would I think be stretching the situation to say that the plaintiff was acting as a real estate agent and in my opinion on the facts of this case it does not come within the definition contained in the Act. The provisions of ss.63 and 64 of the Act do not therefore in my opinion apply and the defence must fail.

The next defence upon which the defendant relies is an allegation that the contract was subject to the unexpressed but implied term that the whole was subject to Hallensteins not taking advantage of the rights conferred upon itby the lease. The defendant relied upon the decision of the Court of Appeal in *Devonport Borough Council v Robbins* (1979) 1 N.Z.L.R. 1. Cooke J. (as he then was) referred to the decision of the Privy Council in *BP Refinery (Westernport) Pry Ltd v Shire of Hastings* (1977) 16 A.L.R. 363 where Lord Simon of Glaisdale referred to the conditions before an implied term could be inferred. This must be reasonable and equitable, necessary to the business efficacy of the contract so that the contract would not be effective without it, so obvious that it goes without saying capable of clear expression and does not contradict any express term of the contract. Cooke J. also referred to the test in the minority judgment in the same case in that it is necessary to make the agreement work and corresponds with the evidenced intention of the parties underlying the agreement.

While from one point of view it is true to say that in this *particular case the various criteria discussed in the BP Refinery v Shire of Hastings case* apply, I do not think that there can be an implied term where the evidence clearly suggests that the particular term was not only not present to the minds of the parties when they considered the matter, but if it had been it is by no means clear that the term would have been included or if included, in the sense for which the defendant contends. I do not think that the contention as to implied term can succeed in this case. The fact that neither party adverted to the particular problem is not sufficient to give rise to an implied term to deal with a matter which was not forseen and the reaction to which may well have differed from the term which the defendant now says must be implied.

Even from the point of view of the plaintiff, there need have been no implied term. The plaintiff with knowledge either actual or constructive of the particular term, might well have assumed that the defendant had cleared the position with Hallensteins and could well have been prepared to take the property subject to the particular restriction, purchasing perhaps on the basis of the rental which it would have expected to get.

Since in my view none of the defence raised can succeed, it is necessary to give consideration what would in that event be an appropriate quantum of damages. The plaintiff starts from the proposition that the most satisfactory evidence is the price contained in the unconditional agreement from Cromwell which was $700,000 higher than the price which the plaintiff had agreed to pay the first defendant. The plaintiff says that this clearly represents the price which a willing buyer was prepared to pay a willing vendor, but I do not think the matter is as simple as that. First the price was not an absolute one. It represented a figure which the parties thought justified in terms of the estimated rental, but the contract contained an escape clause which effectively allowed for a reduction in the price on a proportionate basis if the rental fixed in respect of Hallensteins on the contemplated rental review was not as high as that which gave rise to the price which Cromwell had offered. That reflects the fact that from the point of view of a commercial investor the yield was a very significant factor in determining what the value of the property was. Further, no evidence was called from Cromwell. That company I was informed, had suffered as a result of the sharemarket crash and resulting drop in property values and has now been absorbed within the Brierley organisation

Leaving aside this aspect, the plaintiff relied upon a valuation obtained from a Mr Wall who valued the premises for the plaintiff and also for Cromwell..

On 25 February 1987 Mr Wall valued the property concerned as at 1 April 1987 at $2,450,000. Mr Nyberg for the Dalgety Pension Fund, had valued the property in September 1986 at $1,625,000. On 13 November 1989 Mr Nyberg prepared a valuation as at 13 January 1987 for the defendants. He then came to the conclusion that the appropriate figure was $1,900,000. Finally a valuation was obtained on behalf of the third party from a Mr O'Brien. This was dated 20 June 1990 and also involved a valuation as at 12 January 1987 and 1 April 1987. Mr O'Brien's view was that at 13 January 1987 a proper valuation was $1,767,000 and as at 1 April 1987, $1,780,000. All three valuers are highly qualified, well respected members of their profession. All three are entitled to respect for their opinions. All three approached the matter with care and according to well recognised principles and methods of approach. Unfortunately, it is impossible to reconcile the results. They differ because in approaching the matter all three have placed a different emphasis on different aspects. All three were asked to identify the reasons why they had arrived at substantially different conclusions and certain differences were identified.

Mr Wall had used a different area in calculating rental values from that which was adopted by Messrs Nyberg and O'Brien. Mr Wall did not measure the premises but not unreasonably accepted figures which were communicated to him. Messrs Nyberg and O'Brien both measured the premises and arrived at a similar result which yielded a rather smaller area than that which Mr Wall had accepted.

The building was divided into two retail premises. Of these a part was ground floor retail space and a part was mezzanine lfoor. All the valuers agreed that it was appropriate to distinguish in rental terms between the ground floor retail area and the mezzanine area. Mr Wall took the ground floor area at 790.326 sq.m.; Mr Nyberg at 762.57 and Mr O'Brien at 769. In the mezzanine area, Mr Wall had taken 131.35; Mr Nyberg 121.58 and Mr O'Brien 122.06. The rental rates for the prime area varied between $319.07 per sq.m. and $285 per sq.m. The mezzanine, between $142.84 per sq.m. and $74 per sq.m. but with those figures the the difference obviously results in a substantial total difference which will reflect in the capitalised value.

While I accept the genuineness of Mr Wall's approach, in the circumstances I think I am also obliged to accept that the figures based on actual measurement must be considered as preferable.

Secondly, the valuers differed as to that part of the retail area which was to be considered as prime retail space and therefore valued at a higher rental. The retail premises which comprised the building consisted of a substantial area occupied by Hallensteins and a rather long narrow area with a comparatively small frontage to the main street with a long frontage to a side street, occupied by Horizon Books. Mr Wall valued the whole of the Horizon Books area as primeretail space and valued 14m. in depth from the street as prime retail space in respect of Hallensteins. Messrs Nyberg and O'Brien both proceeded on the basis that it was appropriate to zone an area of 15.24m. in depth from High Street as prime retail space. The reasoning

behind the acceptance of a part area as prime and the balance as secondary, is the assumption that from a retail point of view only the front part of the premises can be regarded as likely to attract passing pedestrian interest. Messrs Nyberg and O'Brien insisted that the approach which they had adopted was that generally accepted in the Wellington and Lower Hutt areas. Mr Wall said that it depended upon the acceptance of a textbook principle, that that principle itself was dependent on a more complex calculation involving frontage areas. He contended that in the absence of the more complex calculation it was inappropriate to approach the matter as Messrs Nyberg and O'Brien had done. He also took the view that the corner site of the area occupied by Horizon Books justified a prime rental for the total area. Messrs Nyberg and O'Brien discounted the advantage of the area fronting on Waterloo Road, maintaining that this did not carry a sufficient number of pedestrians to amount to any particular advantage in terms of retail attraction. They also considered that Horizon Books premises suffered from a substantial detraction in that the splayed corner at the front cut down the display space in that part of the premises which was most likely to draw the attention of passers-by.

After considering the matter I have come to the conclusion that I prefer the view of Messrs Nyberg and O'Brien on this aspect of the matter. While I appreciate the comment made by Mr Wall as to the rather more complex nature of the appropriate calculation and can accept that the length of frontage may well play a part in situations such as this, overall considerations apply. It is apparent that the premises occupied by Horizon Books had the disadvantage of being extremely long and narrow but perhaps most significantly the premises were originally designed and built for Hallensteins. Under those circumstances it seems to me most likely that that company would have ensured that it obtained the greatest advantage in designing premises for its own occupation and that this would tend to suggest that the premises occupied by Horizon Books were less attractive, not only in terms of size but in terms of position and the other aspects to which the valuers referred.

Perhaps the most significant difference however between the valuers is their estimation of the rentals which premises could be expected to generate on the rental re-assessment which was due to take place later in the year of the abortive purchase. Mr Wall accepted the assessment which the plaintiff made but I hasten to add that Mr Wall was at pains to point out that he examined those assessments with care and came to the conclusion that he was able to accept them because he agreed with the principles upon which they had been calculated. While those figures were furnished to Mr Wall by Mr Slater, they were actually arrived at by a real estate agent who was not called and whose method of calculation and approach to assessment of rent was not therefore the subject of questioning in the proceedings. Those figures however had the advantage that they were prepared at the time. Mr Nyberg arrived at the figures which he used for rentals from the overall rental material which had been accumulated within the organisation of which he was a member and which was substantially involved in the Lower Hutt commercial and retail area. Mr O'Brien had made his own assessment based on a comparison of other equivalent rentals but both Mr Nyberg and Mr O'Brien had the disadvantage of having to calculate back and this raises a matter which Mr Wall contended is one of the principal reasons for the difference between the valuations.

In late 1986 and early 1987, all parties were agreed the demand for investment properties was such and the rentals which retailers were prepared to pay resulted in combination in a property market which could be described as `booming.' It was described by one of the valuers as `heated' and by another as `perhaps over-heated'. Leaving aside descriptive adjectives, there is no doubt that there was a considerable amount of speculation in property and property values were rising as they had been over a period. Indeed it would be pertinent to observe that for many years property values had not declined but rather persistently gone up. It will be remembered that the plaintiff wished to acquire the property because it considered that rentals were bound to rise and interest rates were likely to drop, resulting in a better return for investors. That whole situation changed with the sharemarket crash in October 1987 and the resultant very substantial downturn in the property market.

Mr Wall contends that he made his valuation at the time and that it reflected the general confidence in consistency of rising values which was the generally held view at the time. He says that by contrast Messrs Nyberg and O'Brien even unconsciously, are bound to reflect the hindsight which is inescapable in respect of later valuations. It is true that the willing purchaser in early 1987 would not have had in mind the disastrous situation which developed towards the end of the year. However both Messrs Nyberg and O'Brien have made a conscious effort to avoid being influenced by the knowledge that is now possessed by valuers and have as far as possible, confirmed the conclusions at which they have arrived by reference to comparable values and sales.

There are two other factors which must be borne in mind. The first is that a new government valuation was carried out in 1988. That value was $2,130,000. It cannot however be regarded as a decisive figure. The government valuation although it is required to be a market valuation, is carried out in a different way and for different purposes. It was described by one of the witnesses as being a mass valuation, that is it is designed to deal with individual properties but as part of an overall valuation which will reflect general movements. However the government valuation was more than a year later so that different considerations would have applied. It would of course have taken into account the general downturn which occurred following the sharemarket crash. Mr O'Brien considered that it was inappropriate even to take it into account and did not ascertain it at the time he carried out his valuation. The government valuation fixes obligations in respect of outgoings such as rates and land tax. It is therefore important to a land owner to ensure that as far as possible it is not over-stated. Even so, it is a higher figure than that arrived at by either Messrs Nyberg or O'Brien although it is lower than that which Mr Wall put forward. Taking into account that it is made for different purposes and that it was made after the disastrous effect of the stock market crash, it is an indication that in 1988 the value was in the vicinity of that figure. Secondly, there is the question of the actual assessment of the rentals. Although those rentals were in fact assessed after the stock market crash, they were required to be assessed as at July 1987 before that crash occurred and ought therefore to reflect the general expectation of landlords and tenants at that time. Nevertheless, the necessity to arrange for a return on properties must mean that even although the basis is the rental appertaining at an earlier time, they will reflect the realities of the situation. If they did not, a tenant would move to other equivalent premises.

The plaintiff in this case agreed to buy the property at the relevant time at a figure of $1,785,000 and the property was offered in accordance with the lease to Hallensteins. That company was prepared to buy at that price. Mr O'Brien's valuation is $5,000 less than that figure and some $20,000 less than the figure which the plaintiffs were originally prepared to pay if there had not been some allowance made in respect of the

contention over real estate agent's charges. While therefore I accept the genuineness of the approach adopted by Mr O'Brien, I do not think it can reasonably be said that the conclusion he has reached represents the way in which willing vendors and purchasers approached the matter at the relevant times. At the other end of the scale, I am not prepared either to accept the conclusions which Mr Wall reached. I do not accept the areas upon which he based his conclusion or the position he adopted in terms of prime and secondary and retail areas. Further, I have considerable reservations about the rental figures which he adopted since these are substantially higher than those which were ultimately achieved.

Arriving at rental figures is difficult. Mr Wall assumed that an appropriate rent for Horizon Books at the re-assessment would be $73,000 p.a. It was actually fixed subsequently at $40,000 p.a. but that of course would reflect the differing situation although it was technically required to be as at July 1987 before the substantial changes in property values occurred. Mr O'Brien assessed it at $47,000 but this does not provide any very satisfactory assistance as of course we do not know what rental would have been charged to Hallensteins if they had remained a tenant instead of the purchaser.

In the end I have reservations about Mr Wall's valuation for the reasons already mentioned but I also have reservations about the valuations of the other valuers. Expressed in general terms Mr Wall indicated that he thought the difference between them was a failure on the part of the other valuers to accept the effect which theproperty boom had on the market generally and on this market in particular at the time and I think there is some merit in this contention. The evidence for that conclusion is contained in the fact that the plaintiff and Cromwell both wished to purchase it and given the opportunity so did Hallensteins. The attractiveness of the property would therefore suggest that the price was low in the estimation of business people who had in mind investment in property. On the other hand I also have reservations about the rental upon which Mr Wall has substantially based his valuations. They are very considerably higher than those considered appropriate by the other valuers and they do not equate with the rental value ultimately fixed in respect of the Horizon Books property, even although I accept that that must have reflected to some extent the changed economic climate even although it was required to be made before the major events which affected that climate.

I have given some consideration to the possibility of trying to arrive at some composite valuation by taking those aspects of the valuation before me which on the evidence I am prepared to accept, but on reflection I am not prepared to do this. First such a calculation is difficult to make on the material I have but perhaps more significantly even although a valuation may be dissected and justified in terms of its components, it is in the end a composite overall opinion which reflects the experience and general view of the person making it. One factor influences another in arriving at that conclusion and to take one in isolation may be therefore to involve a distortion which affects the validity of the ultimate answer. The government valuation made as at 1 July 1988 and on a falling market, was $2,130,000. I accept that there are factors which affect that as a guide, not the least of which is that it was made more than a year after the date appropriate for the determination of the loss in this case. I accept too that it was made for different purposes and possibly on a different basis and it has certainly not been analysed before me or justified. It does however no doubt take into account all the preceding events and on the whole I think it best reflects an appropriate approach in resolving the matters in dispute here.

Accordingly I find that for the purposes of damages, that is the figure which is to be taken and that the plaintiff would be entitled to damages arrived at by taking the difference between the sum for which it could have purchased the property and the government valuation.

That leaves the question of the claim between the defendant and the third party. It is unfortunately a matter which raises major difficulties. The relationship between the defendant and the third party was undoubtedly contractual and whether or not there has been any breach of the obligations imposed by that contractual relationship, depends upon its extent of and the obligations which the third party accepted in respect of it. Reference was made to the comments of Woodhouse J. (as he then was) *in Bannerman Brydone Folster and Company v Murray and Another* 1972 N.Z.L.R. 411 where he said at p.429 that a solicitor:-

> *must measure up to the degree of professional competence which would be exercised by the reasonably competent and careful solicitor in the particular circumstances. However the circumstances can vary greatly.....the exact nature of the duty really depends upon* what *it can fairly be said the solicitor has been employed to do."*

The instructions to the third party were contained in the letter of 4 December 1986 which expressly asked that the agreement for sale and purchase which had been enclosed, was to be certified to be in order before it was signed by the defendant. When asked what he understood what this meant, Mr Barker said at p.58, 1.15:-

> *"What I would do was to look at the document on the face of it and to see if there were* any *matters which I considered required clarification, qualification or comment."*

Mr Barker was then asked to give examples of matters on which he would have considered comment appropriate and he said at p.58, 1.17:

> *"While I would be given documents by the company and I would be only required to look at the documents as supplied by the company, there could be occasions where from the face of the document there would be matters which sho uld be commented on, e.g. if you could see from the contract that property had an area with a legal description showing an area greater than 5 acres, then that would alert you to the fact that Land Settlement Promotion Act consent may be required."*

A further example given by Mr Barker related to the possibility that an overseas purchaser might be disclosed. In other words, what Mr Barker accepted as appropriate was that if there were any legal considerations arising on the face of the documents which might affect the client, then it would be appropriate to draw such matters to the attention of the client.

In this case, there was nothing on the face of the document to draw anyone's attention to the fact there there was a right of first refusal granted to the tenant under the lease. All parties agreed and I accept, that it would have been quite unreasonable to expect Mr Barker or anybody in his office to recall from the previous transaction that such a right existed. It was also accepted however that had a land registry search of the property been done, that would have disclosed the existence of the registered lease and as I understood the expert evidence in relation to the obligations of the solicitor, it was not in dispute that when it was discovered that a registered lease was in existence it would be appropriate to obtain that and consider it as well. Mr Barker did not consider it necessary to obtain a search of the title and he did not do so because he was aware that the actual title documents were held by the defendant. Further,

he dealt with the whole matter in the context of the fact that his long association with the persons concerned had led him to believe that they were astute businessmen, well acquainted with the legal aspects of property transactions, needing only unusual matters brought to their attention. Mr Barker put it on the basis that he would not have been thanked for doing a clause by clause analysis of a common transaction of a kind with which the client would have been very familiar.

There are two aspects of the matter to which attention needs to be given. The first is whether or not Mr Barker should have obtained a search of the property. The second, whether the fact that he was alerted to the existence of tenancies because this appeared on the face of the document, required him to peruse the legal documents creating those tenancies. As far as the obligation to search is concerned, the two expert witnesses called disagreed. Mr Connor said:-

> *"In the circumstances I believe that it would be reasonable for a solicitor so requested to obtain a search of the title to the property, and a search of* any *encumbrances on the title (leases, mortgages, etc.). Where the property is subject to a lease it would be reasonable to search through the lease and check its terms."*

On the other hand Mr Dunphy was asked the following questions at p.88 1.12:-

> "Q. I put it to you that it is a basic rule that when a solicitor is asked to peruse an agreement for sale\and purchase, that he searches the title?
>
> A. Not in every case, I don't agree with that, that is a canon of perfection often held up by the virtue of hindsight.
>
> Q. It is not difficult to search the title?
>
> A. No it is not difficult but it is not always necessary, that's my point.
>
> Q. Do you accept it is a prudent thing to do?
>
> A. Yes.
>
> Q. In this case if Mr Barker had searched the title he would have seen there was a registered lease on the title?
>
> A. Yes.
>
> Q. In that situation the prudent thing to do would be to search the lease?
>
> A. Yes it would."

I am therefore faced with a situation where two experienced conveyancers of high reputation have expressed divergent views on the obligations as to searching and it is with some diffidence that I accept the responsibility of choosing between the opposing views which they put forward. First I accept that the obligation imposed upon the third party is affected by the fact that he was dealing with persons who were experienced in property transactions, who were well aware of the legal aspects of such transactions and that it was therefore unnecessary to deal with elementary matters which might have been appropriate in the case of an inexperienced vendor or a person whose background was not such as to lead them to be aware of the pitfalls relating to such transactions. Secondly, there was clearly no obligation on the third party to advise as to the desirability or appropriateness of the transaction itself. That was a matter involving business expertise and was the responsibility of the vendors themselves. Thirdly, what the defendant actually sought was an assurance that the form of the document was appropriate to effect the transaction, the nature and substance of which was revealed by the document itself. Fourthly, it was the responsibility of the third party to consider whether there were any legal aspects of the transaction so revealed which required either further investigation or comment.

Put in another way, what I think the defendant was seeking was an assurance that in signing the particular document it was not involving itself in legal problems, whether they arose from the form of the document or any aspect of the transaction revealed by the document itself.

The agreement bound the defendant once it was signed, to transfer a particular defined area of land at an ascertained price. The definition of the land was therefore important. If for example it had been mis-stated in the documents, that could have given rise to legal problems for the defendant and since the document was prepared and submitted by the purchaser, that is an area where I think the vendor was entitled to the protection of having the description checked. I think that follows even although the defendant was in possession of the title itself. The legal description of a piece of land is a technical matter and requires precision. In respect of that aspect of the matter I think a search was necessary.

Further, the agreement indicated that the land had no encumbrances registered against it. Once again, although the document was submitted by the purchaser for signature, undisclosed encumbrances might form the subject of argument at a subsequent stage. There was in fact a registered lease in this case which was not shown as a part of the document. While the responsibility of this aspect of the matter might well have primarily lain on the purchaser who prepared the document, there must be some possibility even if slight, that the signature of the document and the form in which it was submitted might be regarded as giving some kind of warranty that the land was not subject to any encumbrance, including that Also as counsel pointed out, there is the possibility that the title was subject to a caveat. All these are matters which a search would have revealed.

The approach which Mr Barker adopted and which was substantially accepted by Mr Dunphy was that in the circumstances of this case that kind of checking was unnecessary bearing in mind the experience of the defendants coupled with the fact that it actually held the title documents. Mr Dunphy accepted that a search would have been prudent and after considering the matter, I have come to the view that the possibilities to which reference has been made would have been sufficient to require a solicitor to take the step of actually searching the title and providing an independent check of the description of the land. I am reinforced in this view by the fact that that involves confirmation as to a legal aspect of the document and is not to be confused with advice as to the desirability of the transaction itself.

I also think the reference to tenancies required some further consideration. These might have contained allegations which could have led to subsequent disputes and a perusal would have indicated the rights which have caused difficulty here. Mr Barker in his certifying letter indicated he had not perused the tenancy but I do not think this avoids any liability for not doing so.

Accordingly I conclude that the defendant has established as against the third party, that there was a breach of the obligations imposed upon the third party in terms of its retainer relating to the transaction.

It follows therefore that the defendant is entitled to recover from the third party such sums as it is obliged to find in respect of the plaintiff's claim. The plaintiff is entitled to judgment against the defendant for the sum of $345,000 as calculated above.

The defendant in its turn is entitled to recover such sums from the third party. The actual figures are matters for the parties and their advisors to now determine.

The plaintiff is entitled to costs on scale from the defendant

which is entitled to recover such costs, together with its own costs, again on scale, from the third party. Disbursements are to be fixed by the Registrar.

The matter was difficult and complex and in each case I certify for second counsel. Leave is reserved to any party to apply further.

Solicitors for Plaintiffs: Messrs Phillips, Nicholson,Wellington
Solicitors for Defendant: Messrs Buddle, Findlay, Wellington
Solicitors for Third Party: Messrs Kensington, Swan,Wellington

IN THE COURT OF APPEAL OF NEW ZEALAND
CA. 139/89
BETWEEN KENNETH WILLIAMS AND COMPANY LIMITED
Appellant
AND DAVID JOHN THOMAS and PAMELA THOMAS
Respondents

Coram: Bisson J
Hardie Boys J
Williamson J
Hearing: 10 August 1990
Judgment: 24 August 1990
Counsel: D F Dugdale for appellant
P J Edwards and R A A Weir for respondents

JUDGMENT OF THE COURT DELIVERED BY BISSON J

This is an appeal from a judgment of HenryJ delivered in the High Court at Auckland on 12 May 1989. The appellant failed on its claim for $23,989.44, being unpaid purchase money, the respondent having succeeded on a counter-claim in the sum of $40,000 for damages for breach of a collateral oral contract. Judgment was accordingly given for the respondents in the sum of $16,010.56 together with interest at the statutory rate from 5 August 1985 to the date of judgment.

The appellant had developed a subdivision comprising 24 residential sections known as Justamere Place, Weymouth in South Auckland. The first section to be sold was Lot 17 to the respondents for $26,500.00. They paid a deposit of $2,650.00, the balance being payable 12 months later on 29 June 1985 or upon the purchasers earlier reselling the land. Plans for the house which the respondents intended to build on the section were approved on behalf of the appellant and the parties then entered into a written contract. The house was then erected, being substantially completed by May 1985. The appellant then claimed payment of the balance of the purchase price which, together with an amount due for rates apportionment, totalled $23,989.44. This figure is not disputed. The case turns on the counterclaim which is based on allegations that the appellant had represented to the respondents that,

a. it had not sold nor would be selling any of the sections in theJustamere Place subdivision for the construction of group housing or the construction of low cost housing or rental housing and/or
b. its subdivision at Justamere Place would be for the construction of a high quality prestige residential estate and that only construction of high quality housing would be permitted.

The respondents owned a vacant section in Manurewa upon which they had proposed to build a home but decided it would not be a suitable site after being attracted by an advertisement in the "Courier" to the Justamere Place subdivision which included the statement:

"New release of prime sites, in this most sought after locality. Situated in a secluded cul-de-sac of executive homes being a continuation of the previous stage already developed in Waimahia Avenue. *Remember* only 24 sites *available."*

The respondents consulted Mr Laird of the real estate agent for the appellant, being at that time the sole agent, and were told that there would be "no group housing, no low cost housing and no state rentals on the subdivision". However, shortly before the balance of the purchase money became payable, the respondents discovered that six sections near to Lot 17 had been sold to the Housing Corporation of New Zealand, namely Lots 11 to 16 inclusive. Residences have now been constructed on those sites, three of them each comprising two state rental units and three being rental houses. Further development has also occurred, the Housing Corporation purchasing on an on-sale basis from another developer two further sections on which "equitishare" houses have been constructed and most, if not all remaining sections now have low cost residential buildings on them.

The written agreement for sale and purchase did not contain any provision governing the standard of development either of Lot 17 itself or of the remainder of the subdivision. Henry J held against the respondents that the appellant had misrepresented the nature of the subdivision, stating that.

"...the only possible misrepresentation could be as to the intention of the vendor at the time of the contract, the statements relied upon being related to the future development of the subdivision."

The Judge held that the appellant had correctly stated its intention for the subdivision when the sections were put on the market but when the expected sales did not eventuate, it elected to sell to the Housing Corporation when the opportunity arose for practical financial reasons. It is difficult to distinguish between a representation as to the appellant's intentions and a representation as to the nature of the subdivision but there has been no cross-appeal on this point.

The Judge also held against the representation which we have set out qualifying as implied terms of the written contract.

The Judge was favourably impressed by both Mr and Mrs Thomas as witnesses and was satisfied that the substance oftheir evidence as to what transpired leading up to the execution of the contract was true. They were wanting to improve their standard of housing and were led to believe that Justamere Place would be a development of a good standard equivalent to that which was evidenced in the adjoining Waimahia Avenue. The evidence of the real estate agent they dealt with was generally confirmatory of that given by the respondents. They had not dealt directly with Mr Williams of theappellant company but the real estate agent's ostensible authority was not in question.

However, the Judge held that there had been clear statements referring to an "exclusive" subdivision and that these statements formed the basis of a collateral contract between the parties with binding effect. He said:

"The subdivision was promoted as 'exclusive' andMrLaird stated it would be a good quality standard of housing, with no group housing, no low cost homes, and no state rentals. Waimahia *was stated* as *being the standard* which *would be achieved. The vendor, through Mr Laird, was aware of the intentions of the Thomases to upgrade their position and also had express knowledge of the type of building intended to be erected by them. I am satisfied from the totality of the evidence that it was intended that these statements were to be contractually binding and that Mr Laird was warranting their accuracy.....*

`I am therefore satisfied that the existence of a collateral

contract has properly been proved under which the Plaintiff undertook not to sell sections for group housing, low cost housing or state rentals. It was implicit in that *undertaking that sales would only to be persons likely to construct residences of such a quality that the subdivision as a whole would be in keeping* with *the Waimahia subdivision."*

The Judge took into account matters raised by Mr Dugdale against such a collateral contract, in particular that there was no covenant as one might expect in the written agreement for sale and purchase and Mr Dugdale emphasised the lack of ultimate control which the appellant could exercise over actual development. However, the Judge held that absence of ultimate control was not inconsistent with an undertaking given with contractual intention that the sub-divider would not itself sell sections to persons who intended to or were known to be likely to develop contrary to the assurances being given.

The Judge held that the sale of six sections to the Housing Corporation was a breach of the undertaking and collateral contract, being in direct conflict with assurances given as to the nature of the sub-division the appellant was promoting and contrary to their spirit and intendment.

TheJudge heard evidence upon which he assessed damages. Mr Clark, a registered valuer who had been in private practice for nine years in South Auckland, gave evidence that in his opinion the value of the respondents property as at June 1985, being the date of breach of the oral collateral contract, if the subdivision had continued as originally advertised, assuming it would contain above average to good quality residences, was $161,500.00 and that its market value in June 1985 was $116,000.00. Based on this evidence the loss in value was $45,500.00. No competing evidence was adduced. The Judge took into account:

"There is the fact that the house is, on the evidence, probably superior even for the subdivision as warranted and there is *also the uncertainty as to precisely how the subdivision would have finally been developed had the vendor not been in breach. The subdivision as it now is cannot be said to be out of place in the overall area, and there are still large tracts of undeveloped land adjacent and nearby, the nature of their development being uncertain even at this time."*

The Judge adopted the broad approach suggested by Mr Dugdale and concluded that a proper figure to attribute as the loss resulting from the breach was $40,000.00. Accordingly, the appellant's claim failed and judgment was given for the respondents for the amount by which the damages exceeded the claim of the appellant.

The first issue raised by Mr Dugdale in support of the appeal was whether the vendor's statements about the future of the subdivision were contractually enforceable promises. Mr Dugdale did not dispute the Judge's findings of primary facts but contended that the issue he has raised was a matter of inference in which this Court was not inhibited from forming its own views. The basic issue, as he said, is whether on an objective examination of the words and conduct of the parties it can be concluded that they intended a contractually enforceable promise. There is some force in the first submission that no express contractual term had been included when the contract for the sale of the section had been reduced to writing and signed by both parties after they had been independently advised and amendments made by their separate solicitors. In such circumstances Mr Dugdale submitted that the allegation of a collateral oral promise should be regarded with suspicion. See *Heilbut Symons & Co v Buckleton* (1913) AC 31 at p 47.

"Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to themmustbe clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary *them by suggesting the existence of verbal collateral agreements relating to the same subject matter."*

Mr Thomas said in his evidence that he did not raise the question of a covenant concerning the standard of housing for the subdivision with his solicitor as, although he considered this important to him, he relied on the representations which had been made to him by the advertisement in the newspaper and the representation made by Mr Laird as agent for the vendor. There was also evidence that the insertion of such a covenant was discussed by Mr Laird with Mr Williams of the appellant company but that Mr Williams had confirmed Mr Laird's suggestion that because the standard of the subdivision would be high enough, a covenant was not really necessary.

It is true, as Mr Dugdale submitted, that a contractually enforceable promise must achieve a minimum standard of certainty. While there may be some uncertainty in what the required standard of housing might be in an "exclusive" subdivision, this case turned on a precise representation that there would, inter alia, be "no State rentals", the very thing which took place. The language in which that representation was made was positive, unconditional and not a mere statement of intention. The question whether that representation amounted to a promise intended to be contractually enforceable was answered, we thought effectively, by Mr Weir when he submitted that the circumstances supported such an inference. Those circumstances were that the respondents wanted to upgrade their home by building a substantial new house in a desirable locality and it is to be inferred that the appellant wanted to make the first sale of a section in its subdivision to a purchaser able to seta standard of housing to meet its intentions of establishing an exclusive subdivision of executive homes. The appellant accordingly, through its agent, sought and approved the plans of the house to be erected by the respondents. It relied on that representation by them when it signed the contract. Similarly, the respondents relied on the agent's representation that there would be "no group housing, no low cost housing and no state rentals" when they signed the contract.

In *Sheppard v The Council of the Municipality of Ryde* (1952) 85 CLR 1 The High Court of Australia, after expressing the reluctance of courts to hold in favour of a collateral promise, the chief reason being that one would expect to find its place naturally in the principal contract, went on to recognise the existence of such a promise by the Corporation in its housing scheme that there would be two parks opposite the house property the appellant elected to purchase. While the facts are more compelling in that case because of the existence of a plan which showed the existence of the parks in the housing subdivision, the following passage in the judgements delivered by Dixon, McTiernan, Fullagar and Kitto JJ is apposite to this case:

"Doubtless the main contract might have *included a clause by which the Council undertook not to depart from the housing scheme. But it seems to be not unnatural that the parties should treat the contract as devoted to the purchase of the lot which the individual purchaser acquired, the existence and stability of the project of which the transaction was an outcome being presupposed as something antecedent upon which the purchaser might implicitly rely."*

We are satisfied that Henry J was right to regard the agent's representation, in particular that there would be no State rental housing, as a promise intended to be relied upon as a contractual undertaking and a promise made to encourage or induce the respondents to enter into the contract to purchase Lot 17, a promise which they relied upon. As the oral promise does not contradict the terms of the written agreement it can be enforced as an oral collateral contract. In the words of Cheshire & Fifoot's Law of Contract 7th New Zealand Edition at p 77

> *"...the collateral contract can be a most useful instrument to enable justice to be done without offending orthodox views of contract."*

Mr Dugdale's next issue was whether the Judge was right in holding that there had been a breach of collateral oral contract by the sale of six lots to the Housing Corporation. He submitted that the Judge failed to take into account the evidence that the consequences of the sale to the Housing Corporation were not to lower the quality of the neighbourhood. Mr Dugdale pointed to the following passage in his cross-examination of MrLittingham, the manager in charge of the Manukau Housing Corporation's rental programme:

> *"What would you say to the suggestion that in some way this Housing Corporation property taints the subdivision so as to lower the value of the Thomas property and others? The Corporation realised that the subdivision was of a higher nature than maybe we have been involved in the past, but we had a good deal,* and we *therefore made those houses brick veneer in order to go in with the environment that was supposedly going to be there. And would you agree that they look well and are in* no way *incongruous with the adjoining Thomas* house? *My opinion? To me they suit and blend in with that subdivision at the end."*

However, in his evidence in chief this witness compared the cost factor of the rental houses of the Housing Corporation with the house of the respondents in this way.

> *"The Housing Corporation houses, as a general statement, are more towards the medium to low quality of housing, low cost housing. If you regard the Thomas's house as high quality housing."*

Another witness, Mr Kirk a real estate agent of 22 years in residential housing and President of the Auckland Real Estate Institute, said that although he was surprised to turn from the Waimahia Road subdivision (referred to in the Courier advertisement) of very nice homes into Justamere Place to find a number of low cost houses, he found "two nice houses" at the end of the street, one being the respondent's house and the other next to it being a State Rental house (not one of the two unit rental houses). However, he also said that State housing would not be expected in an exclusive subdivision.

What we are concerned with in this case is the effect of the presence of three State rental houses and six State rental units in close proximity on the value of the property of the respondents. What is fatal to MrDugdale's submission that the consequences of the State rental houses was not to lower the quality of the neighbourhood is the following evidence of Mr Clark, the only qualified valuer to give evidence:

> *one cannot ignore the stigma which* is *attached to `state housing' and this alone is likely to put off any prospective purchasers even before they view the property. A main reason for this stigma is the fact that state housing generally produces greater instability with privatelyowned properties. While obviously not all of Justamere Place is to be developed with state houses, the mere fact that they adjoin the subject (property) to the northern side it would* have a *most detrimental affect on its saleability ifplaced on the open market."*

In our view Henry J was entitled to prefer the evidence of Mr Clark to the evidence of the other witnesses cited by Mr Dugdale and we agree with the inference drawn by the Judge that the sale to the Housing Corporation followed by the building of rental houses did lower the value of neighbouring properties, and the respondents' in particular.

Mr Dugdale's final issue was that the breach of the oral collateral contract was not causative of the damages awarded. This submission was based on the final question and answer in the following passage from Mr Dugdale's cross-examination of Mr Clark,

> *"And it's clear, is it not, that the assessments that you have helped us with are based on the way the whole Justamere subdivision has been developed? That is the basis of half of my figures. Yes. And the other half are on the basis of* what *would have been the position if the whole subdivision had been developed in* the way *you believe it was promoted? That is correct.*
>
> *And no-one has asked you to assess the effect of the sale of the six adjoining Housing Corporation sections on its own?*
> No."

However, in re-examination of Mr Clark's evidence was:

> *"Mr Clark, Mr Dugdale put to you that you have not assessed the effects on the Thomas property of the sale of the six Housing Corporation properties on their own? I have done* an assessment *of the property, which I read yesterday, which* is on *the basis of the six houses being sold to the Housing Corporation and I think three other to Fletcher Residential. However, I don't believe my figure would alter if it had only been on the basis of the six sections to the Housing Corporation.*

The point that Mr Dugdale makes is that there is no justification for the Judge drawing the inference that:

> *"the Housing Corporation development occurred at a reasonably early stage, and the clear inference is that this sale* has *had an overall effect on the consequentfinal development of the area."*

We do not consider it necessary to draw that inference although it might well be reasonable to do so. In our view, the evidence of Mr Clark which we have cited is sufficient upon which to hold it proved to the required standard that it was the sale of the six sections to the Housing Corporation and the use of them for State rental houses and units that depressed the market value of the respondents' property. It was that breach which was causative of loss to the respondents. The Judge said, in referring to Mr Clark's evidence:

> *"...his valuations can be used as a sound basisfor assessing the question of loss arising from breach. I am also satisfied* on *the evidence that the block sale to the Housing corporation very largely contributed to an overall difference in value such as is detailed in his evidence."*

However, adopting Mr Dugdale's broad approach and taking into account other contributing factors already cited, F-Ienry J reached a figure of $40,000.00 as "the loss resulting from the breach". Quantum is not challenged. Causation is challenged, but for the above reasons we support the Judge's finding-

For these reasons the appeal is dismissed. The respondents are entitled to costs of $2,500.00 together with their reasonable disbursements including travelling and any accommodation expenses as fixed by the Registrar.

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