THE NEW ZEALAND

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NEW ZEALAND INSTITUTE OF VALUERS

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The New Zealand VALUERS' JOURNAL

JUNE 1990

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Editorial Comment

While We Mean What We Say, Do We Say What We Mean?

An important part of the valuation process is imparting the results of our research and conclusions to our clients, whether by way of written reports, the completion of prescribed forms, verbal conversations or by formal declarations or Awards.

The importance of the communication cannot be over-emphasised, as it is from this that the specialised knowledge of the valuer is relayed to the client and may ultimately be used for wider distribution. It is therefore of paramount importance that great care is taken to say clearly what is meant.

Often in an attempt to achieve brevity, which seems to have become a "desirable" trend in recent times, basic but nevertheless important facts may be left out of our communication because we assume that these are facts of which our client is well aware.

However, these basic facts, while common knowledge to the interested parties, may well be pivotal to the result of a valuation or may indeed be the reason why a valuation has been commissioned. It is important that all the relevant facts and findings are disclosed and that what is meant is said.

The recent High Court case at Dunedin, reported in this issue, is a clear illustration of the importance of saying what is meant. This case revolved around two Awards completed by two valuers acting as arbitrators, setting out determinations of annual ground rentals. The Awards stated the annual rental in each case but made no mention of whether the determinations included or excluded Goods and Services Tax.

Evidence from both valuers at the hearing made it quite clear that it was their joint intention when making the Awards that the annual rentals were exclusive of GST, this being the common practice among valuers at the time. The decision of the Court, however, was that on the basis of legal precedence and in the absence of any qualifying statement in the Awards, the annual rentals as set out had to include GST.

The judgementmakes it quite clear that no steps had been taken prior to the hearing to have the Award remitted to the valuers, so in effect they had no opportunity to correct their ommission, but this consequence clearly illustrates how important it is that not only is what is said is meant but also that what is meant is said. The case also highlights the issue of GST relative to property transactions and an apparent tendency among valuers not to make declarations as to the positon regarding GST in the valuation figures.

While the importance of clear statements in regard to rental valuations is illustrated in the case by an outcome which was never intended or foreseen by the valuers, it may be that non-declaration in a similar manner for land and buildings assessments could have similar unforeseen results.

It is probable that the tendency not to declare GST status in land and buldings valuations has arisen through the uncertainty that can arise because the particular property can have a different value to each of the parties depending on their particular status for GST purposes. But, by saying nothing on this facet of the valuation in our communication to our client, we may well be confusing the situation to a greater rather than a lesser degree.

Whether our communication with our client be by written report or verbal conversation, it is important that as much factual information as possible is relayed so that the basis of the valuation, the findings of the research and the conclusions being drawn are clearly enunciated.

This is just as relevant to the description of the style, construction and use of a building as it is to the location, zoning and contour of a site and it is important that where any assumptions are being made that those assumptions are also clearly stated.

We must assemble the facts, make our decisions on which our assessments will be based, and declare all those facts in our communications. It is so important that we not only mean what we say but that we say what we mean.

Trevor J Croot

John Harcourt Memorial Award 1990: Edward Thomas Fitzgerald

The John Harcourt Memorial Award Committee comprising the President and the two Vice-Presidents, in terms of the Rules governing this Award, have muchpleasurein anouncing the bestowing of this Award on Edward Thomas Fitzgerald, a fellow of the South Canterbury Branch of the Institute.

The Award Rules provide that the awardee meets the criteria of having "given outstanding services to the Profession whether during the calendar year or over a longer period".

The Award Commmittee is unanimous in their view thatTed Fitzgerald has indeed rendered outstanding service to the profession in developing the substantial advances achieved using computer and electronic technologies, now well utilised within the Insititute and among members.

Ted has recently resigned from the Services Committee and as Chairman of the New Zealand Institute of Valuers Services Ltd, having been the chairman of the latter since 1987.

He has been the driving force behind the development of VALPAK, RENTPAK and DIARYPAK software programmes in support ofthe electronic sales data systems distributed through the Statistical Bureau (now the Services Committee) of the Institute.

The practical and commercial success of the Institute's electronic sales data (and continued microfiche) system has largely been due to his vision, drive and enthusiasm. He was also responsible for the development of the Institute's in-house electronic data conversion and disk copying service for the Statistical Bureau in 1988.

Ted was elevated to a Fellow of the Institute in 1989 and biographical details are contained in the citation published in the *New Zealand Valuers' Journal* in June 1989.

He is principal of Fitzgerald and Associates Ltd, Timaru and is National Secretary of VAL-GROUP. He has been the South Canterbury Branch Councillor since 1985.

The Award Committee is satisfied that Edward Fitzgerald is a worthy ninth recipient of the John M Harcourt Memorial Award. A

Citation For Life Membership: Squire Lionel Speedy

Squire Speedy is known nationally as aprolific writer on valuation and associated topics and as a textbook author of renown.

Two of his texts, *Financial Appraisal* (1982) and *Land Compensation* (1985) have been published by the Institute and the Jubilee Index to *The Valuers Journal* records 23 separate articles of his published over the period 1955 to 1985 - a third of a century and two thirds of the 50-year history of the Institute. His other text, *PropertyInvestment:InflationEdition* (1980) was published by Butterworths, being a re-write of his earlier work *Property Investment.*

Not only that, Squire has given long service to the Institute in many other capacities, recently preparing the Institute's submissions on the proposed changes to the Historic Places legislation, and he is currently on the working party preparing submissions on the Government's proposed taxation of capital gains.

He also continues to be a Member of *The Valuer's Journal* Editorial Board, which was set up by Council in 1985.

Squire Speedy was made a Fellow in 1969 for his then outstanding contribution to the Institute and the Auckland Branch in particular, having been the Branch Honorary Auditor (in which capacity he continued to act for many years), as the Lecturer in Accounting (later changed to Financial Appraisal) in the Diploma course since 1965, and latterly the BPS Degree course at Auckland University until 1987.

In 1983, he was awarded the prestigious John M Harcourt Memorial Award for his outstanding services to the profession, particularly in the writing and production of his text *Financial Appraisal,* the publishing rights of which he donated to the Institute, currently out of print.

On the occasion of the Institute publishing in 1985 his text *Land Compensation* which he also assigned over the publication rights to the Institute, an annual prize known as the Squire Speedy Prize in Property Administration, was instituted to be awarded to the student doing meritorious work in the subject of Financial Appraisal in the BPA degreee course at Auckland University.

Born in 1924, Mr Speedy served three years' war service with the RNZAF including a year in the Pacific, returning to join his family Real Estate and Valuing firm of L L Speedy & Sons in 1942, and remains a principal of this firm practicing from Milford, Auckland.

Squire's interests andprofessional endeavours arewide, and not confined to Real Estate and Valuation. He is a Fellow of the Institute of Chartered Secretaries and Administrators, a Fellow of the New Zealand Society of Accountants, a Fellow of the Real Estate Institute of New Zealand, a member of the Property Management Institute, a Member of the New Zealand Association of Economists, and is also a Justice of the Peace.

In recognition of his long and exceptional service to the valuing profession, particularly in respect to his most successful publication of texts and articles over a long period, of now in excess of some 35 years, the Council of the Institute unanimously recommends to the 1990 Annual General Meeting that Life Membership be conferred on Squire Lionel Speedy. A

Fellowship Citations

HERBERT JAMES BLINCOE
Auckland Branch

Bert Blincoe is a a principal of Blincoe Yarnton & Co., Registered Valuers and Property Consultants, based in Auckland City. He was born in 1935, educated at Takapuna Grammar and completed his trade examination in building, joining the State Advances as property supervisor trainee in 1956. He took an interest in valuation and joined as a student member of the Institute in Auckland in 1958, completing the Diploma in Urban Valuation at Auckland University in 1963.

He worked fora time as a valuer with Barfoot and Thompson in Auckland and also spent three years in the Property Tax Division, Singapore as an expatriate valuer under the Colombo Plan,before returning to New Zealand in 1968. He joined the Fletcher Trust and Investment Co., and until 1971 was a development manager, working particularly on the Manukau City Centre development in association with Fletcher-Mainline-Dillingham consortium. He then worked for JBL Ltd as a development manager 1971-73, before entering private practice as a public valuer on his own account and as manager of a private development company. In 1981, the practices of H J Blincoe & Co. and Yarnton & Noble merged to form his present firm.

Bert obtained registration as a valuer in 1964 and advanced to Associate status in the same year. He was elected to the Auckland Branch committee in 1981 and served on a number of sub-committees over a five-year period, being Chairman of the Branch in 1984/5. He also became a Member of the Property Management Institute in 1978 and is an Associate of the Real Estate Institute of New Zealand.

He is highly regarded for his knowledge and experience as an urban valuer including all types of valuation and property consulting activities in the housing, industrial and commercial fields, including acting as an arbitrator and umpire in disputes.

He has alsobeen active in community andcivic affairs,being for four years an East Coast Bays City Councillor.

The Auckland Branch is unanimous in its recommendation that Bert Blincoe be elevated to the status of Fellow in recognition of the regard and repute he is held in by the commercial community and among other members of the valuing profession.

CHARLES NELSON CHAMBERLAIN
Auckland Branch

Nelson Chamberlain is a public valuer and property consultant/ developer on his own account in Auckland having been a long standing member of the Auckland Branch committee. He has taken a special interest in student affairs and in particular in liaison between the Branch and the University of Auckland.

Born in 1937, Nelson attended Massey Agricultural College 1957/8 completing a Diploma in Agriculture, and went on to Lincoln College completing a Diploma in Valuation and Farm Management in 1964.

He moved to Western Australia, being in private practice as a rural valuer in Albany for four years, before joining Robertson Bros. Joseph Charles Learmont Duffy Pty in 1968 practicing as an urban and rural valuer based in Perth.

He returned to New Zealand in 1973 joining C F BennettLtd and in 1984 became a Director of C F Bennet (Valuations) Ltd, when the valuation practice became a separate entity. He resigned in 1987 to take up a position as Auckland Manager of Neil Developments Ltd. He recently resigned from that position to practice on his own account and in running a private property development company.

He joined the Institute as an Intermediate member in 1967, maintaining his membership while in Western Australia, and gaining Associate membership of the Australian Institute of Valuers in 1969. He was advanced to Associate status of the NZIV in 1976, having registered in New Zealand in 1975. He also became a Member of the Property Management Institute in 1987.

Nelson was elected to the Auckland Branch committee in 1985 and has served on many of the sub-committees, most notably as convenor of the Education Sub-Committee from 1986 to present. He was Chairman of the Branch in 1987. His contribution, especially in the education field as a visiting lecturer at Auckland University and in organising practical assignments for students has been most appreciated by staff and students, as well as in his capacity as a member of the University/Institute liaison committee.

Nelson is highly regarded amongst the profession and the commercial community as a practicing valuer, though his interests are now more directed towards property development in recent years, currently on his own account.

The Branch committee is unanimous in its recommendation thatNelson's contribution to the profession be recognised by his elevation to the status of a Fellow of the Institute, on account of the regard he is held in by Branch members and the community.

STEWART DIGBY MORICE
Hawkes Bay Branch

Stuart Morice is a Registered Valuer and Farm Management Consultant and Principal of the Napier Practice of Morice and Associates. He was born in Gisborne in 1938 and educated at Napier Boys' High School. He was accepted as a Rural Field Cadet in 1956 and completed the Diploma of Valuation and Farm Management at Lincoln College in 1960.

Stuart then spent two years as a Farm Appraiser with the then State Advances Corporation in Blenheim before resigning and moving to Hawke's Bay to join the Stock and Station firm of Williams & Kettle Ltd. His involvement in the Real Estate

Department made Stuart's services as a valuer widely sought after and it was this special field of interest that prompted him to set up in private practice in 1976.

Stuart has served on the Hawke's Bay Branch Committee of the New Zealand Institute of Valuers for many years almost without a break up until 1988, including two years as Branch Chairman.

He has been a Branch Examiner for practical and oral examinations for rural candidates, and in 1978 he was appointed to the Land Valuation Tribunal, a position he still retains.

Other activities Stuart has been involved in include a very active membership of the Ahuriri Rotary Club, until recently, Chairman of the Petane Domain Board, and a strong parent supporter of Lindisfarne College. Stuart and his wife Lynne have two sons and one daughter. His main recreational activity is fishing while farming their Dartmoor property consumes any remaining spare time.

Stuart is held in particularly high regard by the Hawke's Bay Branch of the Institute as well as being highly respected throughout the business community of Hawke's Bay generally, as a valuer who is of undoubted integrity, impartiality and competence. The Hawke's Bay Branch is unanimous in supporting this recommendation of Stuart Morice's nomination for advancement to fellow of the Institute.

RONALD FRANKLYN FOWLER

Wellington Branch

Ron Fowler is a leading Wellington public valuer practising from the office of the national company Robertson Young Telfer Limited.

Ron's early education was at Blenheim and later St Patricks College, Silverstream, from where he joined the investment department of MLC Insurance in the late 1950s. Following a period of seminary education between 1960 and 1963, Ron joined National Mutual's office in Wellington working in the investment and property department.

Upon joining the Institute in 1965, Ron studied for the Professional Urban qualification and at the same time undertook a wide range of valuation work for the Association including loans, acquisition and property development studies.

Admitted to full membership of the Institute in early 1969, Ron was registered as a valuer in June of that year and some 12 months later advanced to the status of Associate of the Institute.

Ron served on the Wellington Branch committee and a number of its subcommittees during the 1970s taking particular interest in matters of a statistical and planning nature. Renowned as a very painstaking and thorough valuer in all hppraisal tasks he undertakes, Ron is well regarded as an original thinker in matters of valuation technique and the applied science.

In 1971, Ron joined the then valuing partnership of Gellatly, Robertson and Hanna, later became a partner in that firm which ultimately grew into the national chain today known asRobertson Young Telfer.

In an area of specialisation Ron Fowler is held by his colleagues both at local and national level as an expert in the valuation of shopping centres and also hotel. accommodation industry real estate. In both of these areas he has travelled widely throughout New Zealand and will be known to many valuers for the expertise and knowledge displayed in these areas. Ron has also presented evidence at a number of forums on valuation matters and is viewed as an expert on insurance aspects of valuing.

Ron is married with a near grown up family and has interests in home, school and church; like so many other successful practitioners, his counsel has been sought and is widely regarded by charities and church bodies for the management and good governance of their landed interests.

Ron Fowler is a highly respected valuer amongst his colleagues in Wellington and the wider business circle which he serves; he is a man of undoubted integrity and has shown himself to be an asset to the profession with his willingness to share his knowledge and expertise with valuers and clients alike. Ron has made a particularly valuable contribution to the Institute by the patient and professional mannerin which he has tutored younger valuers under training giving the educative benefit of his wisdom and ability. The Wellington Branch of the Institute is unanimous in recommending the elevation of Ron Fowler to the status of Fellow.

ANDREW McSKIMMING

Canterbury Westland Branch

Andrew McSkimming was born in Motherwell, Scotland, in 1935. After his family emigrated to New Zealand, he competed his secondary schooling in 1950 and between then and 1963 worked fora number of construction firms, Paynter & Hamilton, John Calder Ltd, and Fletcher Construction, obtaining Carpentry Trade and Advanced Trade Certificates along the way.

Between 1963 and 1969 Andrew worked as a Building Supervisor in the Maori Affairs Department in Wellington and Christchurch.

He joined the Valuation Department in Christchurch in July 1969 having commenced sitting the New Zealand Institute of Valuers Professional Examinations in 1965. Andrew completed these in 1967, and was promoted to Senior Valuer in 1974. He was appointed District Valuer, Christchurch in 1979, a position he currently holds.

Andrew was Registered as a valuer in April 1971 and became an Associate of the Institute in the same year.

During his time as Senior Valuer he was responsible, from early 1976 to mid-1978 for administering the Urban Valuer Cadet Training Scheme in the Christchurch Office of the Department, which brought him into contact with many trainee valuers who now hold senior positions in bothpublic and private practice.

At about this time he also contributed in an impressive manner to the affairs of the local Branch of the Institute, serving on the Committee for some years, culminating in holding the position of Branch Chairman for two years in 1983 and 1984. Andrew continues to actively support Branch activities.

The Canterbury/Westland Branch Committee unanimously recommends that Andrew McSkimming be advanced to the status of Fellow.

Robert Lester Engelbrecht

South Canterbury Branch

R L (Bob) Engelbrecht is a principal of the Ashburton farm management consultancy and valuation firm of Engelbrecht Royds & Co. He became registered as a valuer in 1969 and an Associate of the NZ Institute of Valuers in 1978.

Bob graduated from Lincoln with a Diploma in Agriculture (1965, Gold Medallist with distinction) and a Diploma in Valuation and Farm Management (1966, Gold Medallist with Honours) then immediately commenced work throughout Mid Canterbury specialising in farm management consultancy.

He has become widely recognised for his expertise with diverse mixed farming enterprises and particularly the use of irrigation. His wide knowledge and understanding of farming, and his reputation for thorough research and knowledgeable judgement have earned his wide respect in the field of rural valuation. He has appeared in various court and tribunal hearings and demonstrated a particular ability as an erudite expert witness in both valuation and farm management matters.

Bob was a founding member of the NZ Society of Farm Management, and is a Fellow of that Society. He has also served the NZ Irrigation Association Inc from its inception in 1978 to 1985 and was appointed its first honorary member in 1986. In addition to his professional interests, Bob has also contributed generously to the community through Jaycees and Rotary and has served as past chairman of the Ashburton College Board of Governors.

In addition to his professional interests Bob has always maintained a very able interest in practical agriculture and, with his wife Dianne and a daughter, live on and farm a 12-hectare fully irrigated property near Ashburton. Until recently Bob was also a partner in a 130-hectare intensive horticultural, cropping and sheep farm property. Bob also has a particular interest in the survival of rural communities which have been under restructuring pressures over recent years and he is held in very high regard by those who know him.

Bob has served on the Committee of the South Canterbury Branch of the Institute for a number of years, including a term as its chairman.

The South Canterbury Branch of the Institute unanimously recommend the elevation of Bob Engelbrecht to the status of Fellow of the NZ Institute of Valuers in recognition of the high esteem in which he is held within the profession, and the very significant contribution he has made to the standing of rural valuation. A

Report on the April 1990 Council Meeting

The April 1990 meeting of the Council of the New Zealand Institute of Valuers was held at Taranaki Country Lodge, New Plymouth on Saturday and Sunday 21- 22 April 1990.

The President, R L Jefferies, welcomed the full representation of Councillors and invited guests including members of executive and overseas delegates, G Martin, President of the Australian institute of Valuers and Land Administrators and R Mason, President of the Appraisal Institute of Canada.

John M Harcourt Memorial Award

E T (Ted) Fitzgerald of South Canterbury Branch was awarded the John M Harcourt Memorial Award for his outstanding service in the development of NZIV Services and computer sales data.

Advancement to Fellow

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

H J Blincoe	Auckland
C N Chamberlain	Auckland
S D Morice	Hawkes Bay
R F Fowler	Wellington
A McSkimming	Canterbury/Westland
R L Engelbrecht	South Canterbury

Nomination for Life Membership

Council nominated S L Speedy for Life Membership of the Institute.

Nomination of NZIV Representative on VRB

Council confirmed the nomination of Peter Tierney as a NZIV representative on the Valuers Registration Board.

Honorary Memberships

Professor S Locke, Professor J Baen and Associate Professor K Christiansen were awarded Honorary Membership of the New Zealand Institute of Valuers and each was present to receive the award and address Council.

Applications for Advancement to Associate Status

Council agreed that the procedures for interviews of members applying for advancement to Associate status are to require that written notice of the interview to be held should be given to applicants. Council agreed that a unanimous decision of a Branch Committee may resolve that an interview is not required for any particular applicant for advancement to Associate status.

Committee Reports Received and Discussed

Executive Committee

J N B Wall, Chairman, reported that a new one-year contract is being negotiated with the Valuer General for the supply of sales data. He advised that submissions have been made by members of Executive Committee on the Disaster Insurance Bill and the "Flathold" concept of property ownership.

Professional Practices Committee

J N B Wall, Chairman, advised that all complaints against Institute members received by the Committee during the year had been referred to the Valuers Registration Board and many other instances of criticism of valuers which are not official complaints had been dealt with by correspondence through the committee.

Education Board

W A Cleghorn, Chairman, reported that good sales of Volume 2 of Urban Valuation in New Zealand have been achieved. A training video titled *Digging A Little Deeper* has been commissionedby the Board and was shown at the meeting. The total cost of the production has been approximately $24,000 including 2,000 copies of an explanation booklet. He reported that publications and posters for careers in valuation have also been commissioned to the design stage and estimates are being received for publication of the material. Mr Cleghorn advised that a very disappointing response to the Education Board-sponsored seminars on computer use in valuation practice has been received with some early seminars in the South Island having to be cancelled. The Board has met with the academic heads of Real Estate and Property Management together with a representative of the Valuers Registration Board and it is intended that further meetings will be held.

Council agreed that a paper on the Continuing Professional Development programme being promoted by the Education Board should be prepared and presented to the October 1990 Council Meeting.

Editorial Board

W A Burgess, Chairman, reported on the successful 50th Jubilee issue of *The New Zealand Valuers' Journal* published in march 1989. The Board had also been responsible for the publication of the continuing index to the Journal from 1942 to 1988 and for the organisation of the NZIV Robertson Young Telfer sponsored lecture tour by Dr T Whipple from Australia.

T J Croot, Editor of *The New Zealand Valuers' Journal* reported that publication of the Journal is continuing satisfactorily with good co-operation and a high standard of production editing being received from Vicki Jayne of Wordsmith Partnership and good printing production from Devon Colour Printers in Auckland. Costs have generally been within budget. A reasonable flow of articles and suitable material is being received but concern was expressed by the editor that most of the contributions are being received from a very narrow representation of the institute membership.

Services Committee

A P Laing, Chairman, advised that future development of the services provided by the committee is likely to be best achieved on the basis of contracts and that an emphasis will be placed on research and development of further services.

Standards Committee

G J Horsley, Chairman, reported that the committee has been expanded to include Professor S Locke and B Hilson. Mr Horsley reported briefly on the recent TIAVSC meeting held in London.

Mr Laing reported on amendments proposed to Guidance Note 4 in the NZIV Code of Ethics relating to reporting standards for incorporation in company accounts and for valuations of fixed assets for investment and security purposes. Council agreed that legal advice should be taken in respect of the renumbering of clauses in the Code of Ethics.

Publicity and Public Relations Committee

Mr K M Allan, Chairman, advised that a number of the activities of the committee in public relations have recently been undertaken by other Council Committees, notably Education with promotion of careers and a directory of public valuers. He questioned the need for Publicity and Public Relations in its present form.

Westbrook Commercial Property

Mr J G Gibson, General Secretary, reported that the Westbrook house office premises have now been converted to Unit Title ownership from March 1989 and that some proposals are being considered for refurbishment of the offices on the floor owned by the New Zealand Institute of Valuers.

Council of Land Related Professions (CLRP)

Mr R E Hallinan, NZIV representative on CLRP reported that there are proposals for changes to the structure of CLRP and a change of name to Federation of Property Institutes (FPI). Structural changes would include the formation of a General Council comprising two representatives of the present five institutes including the President (or his nominee) of each institute. Council agreed to support in principle the formation of a Federation of Property Institutes.

NZIV Services

Mr A W Gowans, Director of NZIV Services Ltd, advised that all activities of the company had ceased since the formation of NZIV Services Committee. Council agreed that the assets of the company be transferred at book value to the New Zealand Institute of Valuers and that the company be held by NZIV.

Land Professionals Mutual Society Inc (LPMS)

Mr A L McAlister, NSIV representative on LPMS reported that there are currently 260 registered valuer principals and 111 valueremployees covered by theprofessional indemnity scheme. He advised that since 31 May 1989 there have been 15 claims or alerts made to the Society and there are currently 39 open files being held. One single claim resulted in a settlement by LPMS of $455,000. Mr McAlister advised that "run-off" cover is being developed for retiring practising valuers.

NZIV Annual Report

President, R L Jefferies, presented the 1990 Annual Report of the New Zealand Institute of Valuers which was adopted by the Council. Mr Jefferies commented on the very high quality of presentation for the report.

Plant and Machinery Committee

Mr J P Larmer, Chairman, reported that here are now 27 Plant and Machinery affiliate members of the institute. He advised that formalities for the setting up of the Institute of Plant and Machinery Valuers Incorporated have been completed and that members may now become affiliate members of NZIV. The rules of the Institute of Plant and Machinery Valuers Incorporated, the incorporation of the new institute and the appointment of a management committee were adopted by the Council.

Massey University Property Foundation

Mr W A Cleghorn, NZIV nominee to the Foundation, reported that the Foundation has only a small funding base but that the organisation is operating satisfactorily.

Real Estate Valuation and Property Management Education Foundation

President, R L Jefferies reported that a full-time senior lecturer in valuation has been appointed at Auckland University. He reported that a professional fund raiser has been appointed to advise on a fund rasing programme for the Foundation. Mr Jefferies advised that the Foundation is nevertheless in a sound financial position with a reasonably substantial cash reserve.

Legislation

Mr J G Gibson, General Secretary, advised the Council that

since October 1989 the Institute has made submissions to the following Bills and Committees.

- Disaster Insurance Bill
- Reform of local and regional government • Local government reform draft bill on rating base • Resource management Bill

Groups of Institute members are presently pursuing discussion papers on "Flathold" ownership and he Government consultative document on the taxation of income from capital.

Reciprocity with Appraisal Institute of Canada

Mr R Mason, President of Appraisal Institute of Canada (AIC) reported on the completion of the reciprocity agreement to be signed with New Zealand Institute of Valuers. President, R L Jefferies replied on behalf of NZIV expressing the pleasure of the Institute that reciprocity had finally been achieved and that formalities would be concluded with the signing of the document at the Annual General Meeting on Monday 23 April

Reciprocity with Australian Institute of Valuers and Land Administrators (AIVLA)

Mr G Martin, President of AIVLA advised that a reciprocity agreement is still being frustrated by the academic qualification requirement of the NZ Valuers Registration Board but an agreement is still being pursued.

Pan Pacific Congress

The Council agreed that the fares and direct expenses for the Chief Delegate to Pan Pacific Congress shall continue to be met out of general funds of the Institute and agreed that interest and as necessary capital of the Pan Pacific Congress Fund will be used to promote the Congress or to assist with fares and registration costs of other officials and delegates who prepare and present papers at Congresses.

Branch Accounts

Reports on 1989 Branch Accounts were presented and Councillors commented on activities in their branches.

NZIV Financial Report

President, R L Jefferies, presented the financial report for 1989 which was adopted by Council.

Membership Statistic Trends

Mr J G Gibson, General Secretary, presented a report on membership trends which showed a growth in membership of 16.3 per cent or 290 members.

Membership Referendum

President, R L Jefferies, presented the results of the Membership Referendum conducted in 1989. A response from only 27 per cent of members of the Institute was received. The results showed a majority support for the "status quo" position which maintains the registration system together with compulsory membership of the Institute. Very few respondents supported the Government proposals but if the proposals in the Bill were to be adopted unchanged then a majority of respondents would favour self-regulation. The Council agreed that the results of the referendum are to be published in Valuers Newsline and the Minister is to be advised of the results.

Proposed Valuers Bill

The NZIV's policy on the proposed Valuers Bill as set out in the report by President R Jefferies was adopted by the Council.

Future of NZIV

Mr A P Laing, Vice President, presented a report on the future of NZIV if membership of the Institute becomes voluntary. The report proposes dialogue with the property Management Institute and the NZ Society of Farm Management to investigate a merger of the three institutes. President, R L Jefferies reported on a meeting he had had with PMI executive and there was an indication that PMI executive would welcome formal discussions on a merger proposals. Mr J P Larmer, Vice President, reported on discussions he had had at NZSFM council meeting and later meetings with the President, and there was an indication that NZSFM would be prepared to enter into further discussions on a merger proposal.

The Council endorsed the steps taken by NZIV presidential triumvirate in the merger proposal to date and agreed in principle to formal talks being undertaken with the presidential members of PMI and NZSFM.

Corporate Plan

The Council reviewed the Corporate Plan and confirmed the Mission Statement and Statement of Objectives. It resolved that the Committee should prepare objectives which should belisted in reports to each October Council meeting together with budgets for each forthcoming year.

Visits to Council

The Council meeting was visited by Professor S Locke, J Baen and Associate Professor K Christiansen and each addressed the Council on the current courses being conducted in property at their respective universities. Other visitors included Messrs H McDonald, Valuer General, D Armstrong and P Young representing the Valuers Registration Board. Mr McDonald advised the Council that the position of the Valuers Registration Board on reciprocity is unchanged from that set out in the report produced in November 1989. The VRB has reciprocity agreements with all Registration Boards in Australia except for South Australia and New South Wales. Mr McDonald advised that the basis of the VRB position is that applicants for registration in New Zealand must have a graduate qualification of not less than three years full time study in valuation and that applications for registration from overseas applicants living in New Zealand would each be considered on merit. Mr McDonald advised the Council that the Valuers Bill is currently being drafted.

Election of Office Bearers

The following office bearers were re-elected for 1990/91

President:	Rod Jefferies, Auckland
Senior Vice President:	Alex Laing, Otago.
Junior Vice President:	John Larmer, Taranaki.

Appointment of Committees

Council appointed the following committees:

Executive committee: Messrs Wall, Cooper, Gordon, Kirkaldie and Sellars. Mr Sellars is a new appointee who replaces Mr Allan whose resignation had been accepted by the committee.

Education Board: Messrs Cleghom, Briscoe and Miss L Freeman and two nominees of the Valuer General who are Mr Western and Miss Jansen. The Board will also comprise one nominee from the Valuers Registration Board.

Services Committee: Messrs Laing, Wall, Gowans, O'Brien, Hargreaves and Stone. Mr R Stone is a new appointee.

Publicity and Public Relations: Messrs Jefferies, Kirkaldie, Brady and Stewart. Mr A Stewart is a new appointee.

Standards Committee: Messrs Horsley, Laing, Cooper, Hilson and Locke

Councillor Representative for Overseas Members: MrLarmer

Council of Land Related Professions: Messrs Larmer and Henshaw. Mr D Henshaw is a new appointee.

General Business

Mr G Martin, President of the Australian Institute of Valuers and Land Administrators addressed the Council thanking them for the invitation to attend the meeting and for the hospitality he had received. Mr R Mason, President of the Appraisal Institute of Canada also thanked the Council for their hospitality.

The Editor

Report on 1990 Annual General Meeting

The 1990 Annual General Meeting of the New Zealand Institute of Valuers was held on Monday 23 April at 4.00pm at the Taranaki Country Lodge, New Plymouth.

The meeting was attended by President R L Jefferies, Vice Presidents A P Laing and J P Larmer, Executive member G Kirkaldie, General Secretary J G Gibson, two overseas guests, G Martin and R Mason and 160 members.

A precis of the 50th AGM meeting minutes were read by R A Hallinan, immediate past President and were approved by the meeting. The Annual Report and Accounts were adopted by the meeting and President R L Jefferies commented on the annual report and the sound financial position of the Institute. The appointment of Ernst & Young as Institute auditor was approved.

President RL Jefferies read a citation for S L Speedy for Life Membership of the Institute and the meeting approved the conferring of Life Membership by acclamation.

A citation for E T Fitzgerald for the John M Harcourt Memorial Award was also read by President R L Jefferies and the award presented to Mr Fitzgerald.

Honorary Membership of the Institute was conferred on Associate Professor K Christiansen and Professors S Locke and J Baen. The Reciprocity Agreement between the NZIV and the Appraisal Institute of Canada was formally signed by President R L Jefferies and President R Mason.

Motions for amendments to the rules were presented by G Kirkaldie and approved by the meeting.

The President advised that a separate institute for plant and machinery valuers (called Plant and Machinery Valuers Institute) has been established by the NZIV and members of the new institute will be affiliate members of NZIV. He then introduced recently elected Branch Councillors: T D Henshaw (Waikato), R M Stone (Hawkes Bay), G H Kelso (Gisbome) and A Stewart (Canterbury/Westland) to the meeting.

Finally Mr Jefferies thanked J P Larmer, Vice President and the Taranaki Branch Committee for their organisation of the AGM and the Council Meeting and expressed the view that the organisation had been of a particularly high standard resulting in very successful meetings. A

The Editor.

New Zealand and Canadian Valuers' Reciprocity Agreement

A significant occasion in the history of the New Zealand Institute of Valuers and the Appraisal Institute of Canada was marked on 23 April 1990 at the Annual General Meeting of the NZIV with the signing of an agreement of reciprocal recognition of membership by the Presidents of the respective Institutes.

President Bob Mason of the Appraisal Institute of Canada commented: "We welcome this occasion which marks the culmination of over two years of negotiation between our Institutes to mutually recognise the qualifications of our members."

Noting that the two Institutes already had strong ties between them, Mr Mason added that: "The reciprocity agreement would allow valuers from Canada and New Zealand to practice in each other's countries with the certainty that their respective qualification would be recognised and respected."

NZIV President Rodney Jefferies added that "many New Zealand qualified valuers were already resident and practising in overseas countries and that there were strong elements of commonality between the two Institutes. A former President of the Appraisal Institute of Canada, Lincoln North, had visited New Zealand on three occasions and had participated in a nation-wide Education lecture tour of New Zealand in 1985. Mr North had been conferred with Honorary membership of the New Zealand Institute of Valuers in May 1988 in recognition of his service to the NZIV.

"The two Institutes were further linked through their common membership of the Pan Pacific Congress of Real Estate Appraisers, Councillors and Valuers which meets each two years, the last meeting being in Christchurch, New Zealand in 1988 and with Canada due to host the congress in 1992," concluded Mr Jefferies.

The membership of the NZIV is approximately 2100 while the Appraisal Institute of Canada has approximately 6000 members. A

OBITUARY: James Nixon Hodgson, FNZIV (1914-1990)

Jim Hodgson, a foundation member of the Institute and along-serving Massey University staff member, died on I February 1990.

run was from a farming family in Hawxes Bay and, after attending Napier Boys' High School and Canterbury University College, :,commenced sruaies at ivmassey in*Cyst.*

Alter graduating B.Agr.sc and gaming futher practical experience, he was employed as a Farm Appraiser by the State Advances Corporation, assisting farmers during the depression. During World War 11, he served in the Middle East with the first echelon in divisional intelligence from 1.93943.

With this background Jim was ideally prepared for the task of developing rehabilitation courses at Massey Agricultural College for returned servicemen intending to enter farming. He continued:* Massey as a lecturer in Dairy Husbandry and later as a foundation member of the Agricultural Economics and Farm Management Department. At his retirement in 1974, he held the position of Reader in Farm Management. Jim was elected a Fellow of the NZ Institute of Valuers on 15 April 1950.

Jim's fellow students, his own students, his colleagues and friends will remember him for his wise counsel, pragmatism and sense of humour. In particular, he will be remembered for the signficant contribution he has made to the discipline of Farm Management and to the development of Massey as a multi-faculty university, serving New Zealand's land-based industries.

Arbitrators Institute Conference Focuses on Fast Track Dispute Resolution

Recently retired Chief Justice of New South Wales, the Honourable Sir Laurence Street, Arbitrator, heads an impressive list of key-note speakers who will be taking part in the Annual Conference of the Arbitrators' Institute of New Zealand.

The special 1990 Conference, to be held at Wairakei from June 22-24, has as its theme *Fast-Track Dispute Resolution.*

During recent years there has been a number of interesting developments in the area of rapid alternative dispute settlement of commercial disputes. The legal aspects of these recent developments as well as the practical techniques of fast-track settlements will be discussed.

The conference is to be opened by the Hon W P Jeffries, Minister of Justice, and for two days delegates will take part in workshop seminars and listen to distinguished key-note speakers presenting papers which will cover arbitration, conciliation, mediation and other means of dispute settlement.

The objective is to allow all those taking part, to become more aware of cases and decisions which could affect the arbitral process and offers the opportunity for those present to gain practical experience in dispute settlement, with top arbitrators adjudicating on results. With all parties acutely aware of the cost and time involved in prolonged disputes, there is an increasing demand for fast-track procedures to become more widely available.

Other speakers include: Dr Jacob Bercovitch, senior lecturer in Political Science at Canterbury University and mediation specialist; Bernard Knowles, past managing director of the NZ Wool Board and previous general manager of the NZ Dairy Board, and the principal guest speaker for the formal dinner is to be the Rt Hon David Lange, Attorney General.

Colin White, convenor of this 1990 Conference, stated in Wellington recently: "while this year's conference is most relevant for our own membership, we want to emphasise the importance of this year's theme for all of those who are in decision-making roles. We shall be strongly encouraging a wide cross section of non-member decision-makers to attend." A

[uers Registration Board Prizes

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•ear have been awarded to:

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Valuations: A Problem Solving Imperative

by R TM Whipple

The second paper presented by Dr R TM Whipple at the sponsored seminars held in Auckland (1 September) and Wellington (5 September)

Thus shall you go to the stars. Virgil: *The Aeneid,* IX. 641

Prologue

Fields of study which are fundamentally healthy exhibit a process of intellectual growth and development. In this, valuation is no exception. Over the last 20 years, a significant rethinking of the received orthodoxy has taken place, a rethinking which yields a richer perspective on practice. This has been one of the major two influences operating on the profession over that period.

The other major influence is less healthy, however. I propose to deal with it at some length and then put it aside. The profession has been at the centre of some quite trenchant criticism.This has

Iy.R T tl ;(ram) Whipple isthe Growth Equities Mutual Professor in Valuation and Land Economy at Curtin University of Technology in Perth; Australia. He has wide perience in the: property development' in- ustry throughoutA ustraluz and eauerseas having been Austra- *I arrManigerofa united*Stotes *based firm* of economic eon. *sultant, :specialisinz n: real easihility studiesand 'DrWhipple* is active *in the affa 'irs of the Australian Institute of Valuers and lane!' Admit istrators and is the Foundation President of the Sydney Universi Land Economy Society. As well as being a valuer he is also. qualtfiedsecurities analyst and a member of the Securities* Insttti *of Australia Educational Task Force being its principal lecturer finan tai mathematics and statistics. Dr Whipple has lectured ; rrincewn untversuy oral: e-University of Wisconsin in United Staterand atthe(1ltu. versttes ofCambridge and Aberde x the United Kingdom.lieu rol tcauthor and hasedited... of significant books on prat aluation. Dr Whipple* is a m *of the Educational Advisoryt'anet of the Commonwealth Assocu Lion of Surveying and Ln zti Economy. He has served on a* larf *number of Government Committees and has been a consultant many organisations in the publicandprivatesectors*

Winston Churchill Memorial Trust

Fellowships

Since 1965, the Winston Churchill Memorial Trust Board has granted up to 25 fellowships annually to enable New Zealanders to undertake a variety of projects overseas. The awards are financed from the income derived from the invested trust fund which was raised in memory to the late Sir Winston Churchill, PC, CH, OM.

What are the aims of the awards?

The purpose of the awards is to finance some study, investigation or activity by New Zealand citizens who, by reason of the award, can contribute to the advancement of their trade, calling, or profession, or to the benefit in general of New Zealand, or to the maintenance of the Commonwealth as a beneficial influence in world affairs.

Who can apply?

Any New Zealand citizen may apply to the Board for financial help to enable him or her to undertake a project overseas or perhaps complete one in New Zealand. Because it has only limited funds available the Board generally prefers to make awards to persons who would not be eligible for a grant from some other source. The Board therefore welcomes applications from persons in such categories as tradesmen and technicians. But the field is wide open and anybody may apply.

What are the conditions?

There are only three conditions under which the awards are made. Firstly the recipients must be New Zealand citizens either by birth or by naturalisation. Secondly recipients must return to New Zealand on completion of their projects. Thirdly, the recipients must also submit on their return to New Zealand a full report to the Board on the benefit their findings have for New Zealand, their trade, calling or profession

Who gets a fellowship?

Awardees in the past have been selected in a very wide range of occupational fields and professions. They have included:

* A Dunedin man employed by the National Safety Association who studied industrial accident prevention in Canada.
* An Upper Hutt woman kindergarten director who studied preschool education n the United States.
* A Rotorua man employed by the Maori Arts and Crafts Institute, who studied the arts and crafts industry of Polynesia.
* A Feilding religious sister, who studied the teaching of the deaf in England, Sweden and the Netherlands.
* An Otahuhu boilermaker who studied boiler making and welding techniques in England.

If you are interested in applying for one of these awards write now to:
Joanne Oliver
Trust Administrator
Winston Churchill Memorial Trust
P 0 Box 10-345. Wellington North

NOTE: The closing date for applications is July 31, and awards are usually announced in November each year.

arisen partly as a product of dissatisfaction with the ability of traditional methods to meet the demands on the profession's services in times of inflation, rapidly changing values and the competition between real property and paper securities for institutional funds. Some of the expressions of dissatisfaction have come from within the profession but the majority seem to have come from without. Another factor leading to criticism has been the demonstrably poor standard of work produced by many in our calling as a result of either incompetence or (more rarely, thankfully) malfeasance. There are individual exceptions, of course.

"... the valuation profession around the world is in serious trouble..."

These criticisms have not been confined to one country. In the United States,the Barnard Report (1986) of the US congress following its extensive public hearings, observed that "Appraiser ineptitude, negligence, and misconduct are widespread". The Committee proceeded:

> Of greatest concern is "client advocacy appraising," wherein large numbers of appraisers willingly agree, or otherwise succumb, to pressure brought to bear by lenders, borrowers, and others involved in the loan origination and underwriting process. Essentially, in exchange for an implicit or explicit promise of future business, so called " advocacy appraisers" provide the numbers needed "to make the deal work", instead of the independent value estimate they are supposed to furnish. (p 59)

A consequence is expressed in the following terms:

> Faulty and fraudulent real estate appraisals have become an increasingly serious national problem. Their harmful effects are widespread, pervasive, and costly. They have seriously damaged and contributed driectly to the insolvency of hundreds of the Nation's financial institutions and have helped cause billions of dollars in losses.l...(p57)

Apart from some leading professional negligence cases, criticisms of valuer performance in the UK have tended to be more technically based. Typical of these was a broadside launched by Greenwell and Co. (1976). This, with other comment and a feeling of unease that traditional methods were not serving client needs, caused the Royal Institution of Chartered Surveyors to commission a study of property valuation methods by the Polytechnic of the South Bank (Trott, 1980). This was a comprehensive review of traditional methods as well as the more recent advances in financial mathematics made by UK scholars in recent years (some of which are of considerable importance in their own right). The final report has since been issued but, unfortunately, both documents seem to have had little impact. This is probably because of their methodological orientation whereas what was required was an intellectual approach pitched at a more abstract level. Nevertheless, the 1980 report especially is a very useful compendium of the technical state of the art in Great Britain and deserves far wider distribution than it has received.

Howard (1988) in a wide ranging review of problems induced, at least in part, by faulty valuations, shows by way of a case study involving valuations of shopping centres and industrial land that Canada, too, is not stranger to the poor practices referred to. He notes:

> Because in all appraisal assignments care must be taken not to mislead a reader, there must be the application of the basic traditional valuation theories. If proper consideration had ben given to the marketability of subject properties and the feasibility of completing them at the rates of return used within the appraisals, the reports would have alerted this (case study) company's management to the fact that they were paying too much for the properties. The suspicion abounds, however, that theri purpose was to build up their equity base and therefore instructed their appraisers accordingly.

The author, who is the Chief Appraiser Public Works, Canada, went on:

> When our value estimates were presented to the company, they objected vehemently but were unable to raise additional equity and were placed in liquidation. The Canada Deposit Insurance Company Corporation thereuponpaid $275m to the company's depositors and is currently seeking to recover its funds through the liquidation process.

Nor has the profession in Australia escaped opprobrium. The strictures levelled by Rothwell (1984), a senior executive in the merchant banking sector and himself an experienced valuer, are typical of comment the writer all too often hears from senior partners in law firms, executives in manufacturing and commerce, barristers and others. The basic matters over which Rothwell took issue were incompetence, failure to address the client's problem and lack of credibility. He concluded by observing:

> ...the profession is being discredited, work which is naturally the province of the valuer is flowing to other property professionals; and financiers at least are increasingly internalising a measure of theri valuation advice. (op cit., P24).

Evidence of this latter point is that the accounting profession

"... the accounting profession is increasingly invading the traditional area of the property professional..."

is increasingly invading the traditional area of the property professional especially for the high cost assignments. Valuers are losing fees as a result.

Australia's largest insurance organisation, the AMP Society, has refused to renew existing professional indemnity insurance policies for valuers and will not underwrite any new business in that area. This is an appalling indictment.

I have presented this material, not because I delight in reciting a litany of disaster but to underscore my contention that the valuation profession around the world is in serious trouble. The difficulty is compounded by the fact that the various professional bodies seem incapable of taking much remedial action. This is probably a structural problem.

What, then, is the concerned valuer to do? The solution lies, it seems to me, at the grass roots level where each of us has to lift his game and review critically a great deal of our conventional wisdom.

It is in this respect that the new thinking I referred to at the outset has much to promise. With its emphasis on problem definition and solution within a logically coherent frame of reference, the faithful implementation of professional assignments will go a long way toward meeting the criticisms referred to. Furthermore, the approach which has been developed enables the valuer to enlarge the scope of his services and to retain

control of his client. This affords a good measure of protection against the forays of other professions. The result should be more repeat business, more referrals, augmented income and a strengthened professional base for which no apology will be needed.

In what follows I acknowledge a very substantial intellectual debt to several giants. The writers who have profoundly shaped contemporary thinking are now, unhappily, no longer with us: the late Professors Richard U Ratcliff and James A Graaskamp. Both occupied with great distinction the Chair in Real Estate and Urban Land Economics at the University of Wisconsin at Madison. No study of contemporary thinking in valuation would be complete without reference to their works some of which will be cited below and which thereader is urged to follow up.

INTRODUCTION

Let us commence by forming a very clear idea of what it is our clients want of us. In the vast majority of cases, the valuer's client requires an assessment of the price that the subject property will probably sell for if exposed to the market for a reasonable time and on financial terms current in the particular market.This is the definition of "value" we employ hereafter. It is a positive definition which places no subjective demands upon the valuer.

For example, note that this requirement frees the valuer from considering any notion of the "fairness" of the price to be imputed. As Ratcliff (1972a) notes: *"Market value has no ethical content".* The valuer is concerned to interpret the facts of the market and not colour those facts with his own predilections. Valuers have no special training in the philosophical science of ethics and their notion of fairness is no more expert than that of the educated person in the street. Ratcliff continues: *"As an expert witness, the appraiser provides the court with his judgement of the market value of the property... He does not invade the province of judge and jury by injecting his personal opinion of justice."* The valuer also is freed from making unrealistic assumption about buyers and sellers being willing but not anxious, having complete knowledge and a wide range of alternatives to resort to should agreement as to price elude them.

It specifically recognises that a property or a buyer may be in a monopoly position which maybe exploited to the advantage of one of the parties. This requirement and the definition which flows from it therefore gets us off to a realistic start.

THE VALUATION PROCESS

There are five steps associated with the estimation of the value of real property.

1. Define the Issue

The first step is to ascertain the issue confronting the client which occasions the need for a valuation. Almost without exception, a valuation is required so that a problem may be solved, or, at least, solved in part. Therefore this step requires the identification of the fundamental valuation problems which reside in the issue the resolution of which will become an input to the client's overall decision process.

The definition of the valuation problem leads in turn to the definition of value which is most appropriate (Graaskamp 1986). If, for example, the valuation is sought in a resumption case, the definition of value will be specified in the enabling legislation as interpreted by relevant case law. This may stipulate, inter alia, that the dispossessed owner is to be compensated not just for the real estate taken, but also for disturbance, the effect of the resumption on other lands of the owner and so forth. Here the definition enlarges the scope of the rights to be valued.

If the valuation is to serve the purposes of a rating appeal, the definition of value will be that set forth in the rating legislation. Usually this provides that it is the fee simple in possession which is to be valued ie restrictions on title such as covenants and easements are to be ignored. Here the definition curtails the scope of the rights to be valued.

The questions:

- what should I pay for this site if I can obtain planning approval for a change in use?
- what will I get for the site if I don't wait for planning permission to issue?
- what is the value of the property for mortgage purposes?
- what take-out loan should I make on this proposed tourist development when it is fully operational in five years' time?

entail the definition of different property rights, assumption and sets of data and may all lead to different value estimates even though they may be directed at the same parcel of land.

As an example of how problem definition can dictate the range of data required, consider a valuation prepared for mortgage security purposes. The intending mortgagee would certainly be interested in the current market value of the property. In addition, however, information is needed on whether the proposed use is likely to fail and, if so, when on the repayment time line this is most likely to occur. If it does come to pass, the mortgagee also needs to know what is the next best use, who would be the most likely buyer and the price likely to be paid.

Note that the assumptions may be intrinsic to the definition of the problem or they may be imposed externally to it. For example, the rating valuations task mentioned above contains the assumption of a fee simple estate whereas the property may carry the most burdensome restrictions on title. If the contingency of planning permission is relevant, this represents an externally imposed consideration which is material to the assignment.

2. Determine the most probable use

The second step is to determine the property's most probable use. This cannot proceed in the absence of first making an inventory of the property's productive features. As with most endeavours of this kind, mere description of the obvious is insufficient and it is necessary for the valuer to structure his approach and ensuing analyses so that purposeful conclusions are reached.

The following outline of recommended procedures assumes the case of a revenue earning property but many of the points made are of general application.

Studying a property's features entails not merely viewing it from the kerb side but also collecting information from many sources, some of which are difficult to access and verify. The following four broad headings may be used as guideposts to this important stage.

Physical Characteristics

a. The land itself: dimensions, slope, exposure, soil conditions (even if the site is fully built over), drainage and such like. Study and report upon the implications these have for site usage and the extent to which the structure complements and enhances them. If the building does not fully complement the characteristics of the site, it may not represent optimum development and this alone may suggest the desirability of alternative uses.

b. Accessibility to the surrounding circulation systems:

pedestrian access, truck entry for deliveries, motor cars, refuse collection distance to transport termini. Identify any conflicts between modes; if any, assess the extent to which pedestrian and vehicular flows can be separated. This helps to screen out alternative uses which require accessibility characteristics not possessed by the site.

c. Improvements: start at the boundaries and work inward -landscaping, fountains, structures apart from the main building, services provision, drainage. With the main building, start with the foundations and work systematically upward: the structure, floors ceilings, roof, cladding, partitions, vertical and horizontal circulation systems an their capacity, safety, heating/air conditioning/ ventilation, durability of materials, age of mechanical plant and other replaceable items, services capacity.

Legal Characteristics

The valuer must define with precision the rights which are to be valued (as outlined above). Ascertain information on easements, rights-of-way, transferable development rights, heritage impacts, approval conditions under which the building was developed , use restrictions under town planning legislation or by restrictions on title, code compliance; plant and building depreciation under income tax law; allowable floor area ratio on redevelopment; legal searches; monopoly aspects. How do these constrain use? What available rights have not yet been exploited? Are the rights likely to be diminished or can they be added to? If so, how will this affect productivity?

Locational Characteristics

These extend the accessibility characteristics reviewed above. Every site has a unique set of space-relationships with other sites and activity centres. It is important to understand the nature of the linkages which tie uses to site and underpin the spatial structure of the city. How well do the building's uses tap into these linkages? Will the linkages persist over time?If not, does this signify a change in tenant mix and the need to penetrate a different rental market in the future? Is re-use indicated in the foreseeable future? Marketing features: proximity to prime urban uses and services eg stock exchange, courts, transport, other use precincts (viz legal, financial); implications for the continuing demand for space. Evaluate the strengths and weaknesses of competing buildings.

Aesthetic Characteristics

Here the valuer needs to consider the image the building has and its place in the urban landscape. Lobby and sense of presence; reputation and image, architectural features, views, vistas; elements dangerous to the individual, noise, wind.

The task of productivity analysis is to ascertain precisely what it is that is being valued, the property's competitive position on the supply side, costs likely to be incurred forrepairs and replacement and the likelihood that the property may be put to other uses prepatory to assessing its most probable use.

Sometimes this will be obvious and may entail a continuation of the present use. Yet, even in seemingly obvious cases, this step needs careful review. A suburban cottage, for example, may be subjected to certain market forces which indicate that the addition of more rooms may result in a price increase exceeding the cost. If so, does this indicate that the most likely buyer is one who will effect the extensions and sell at a profit? Or, if the improvements are not particularly substantial, it may be purchased for demolition and redevelopment.

This step is particularly important for it points to the most probably buyer or type of buyer which, as will be seen below, is the next step in the process.

It may well be, in many cases, that there is an array of different uses or combinations of use that may be regarded as possibilities. Each of these needs to be carefully reviewed and evaluated in terms of the most significant determinants of land use relevant to the instant case. These may include factors such as:

market demand,
legal sanction,
political acceptability,
technically feasible,
economically supportable and
having an acceptable government revenue impact.

Such considerations lead to a selection of the property's most probable use. Note that this is not necessarily the same as its highest and best use. The later concept, implying profit maximisation as the sole criterion for the use of land, is now a discredited one (Vandell,1982; Grissom, 1983). In recognition of this, the term "most probable use" is preferred to "highest and best use".

An example of an alternative use matrix prepared as part of a mostprobable use study fora redevelopment site may be found in Exhibit 1 (below). Each entry in the display requires sufficient explanation in the valuation report.

The procedure follows that treated by Hayes (1981) an optimising method he refers to as "dominance".

....To use it in making decisions, we must first find the domi-

EXHIBIT 1

FEASIBILITY OF ALTERNATIVE

USE DETERMINANT	USED CAR LOT	DRIVE-IN LIQUOR	SELL TO ADJOINING OWNER	CAR RENTAL	GROUP OF SHOPS
Market demand:	Weak: high interest rate outlook	Strong: nearest 3 miles away	High motive to buy	Good: interest from 2 groups	Good in long term
Legal sanction	Sinage restriction	Sinage problem not so critical	Requires rezoning	Nil	Need permit
Political Acceptability	3 of 4 Aldermen in favour	Strong anti-liquor lobby	Safe	Safe	Poor
Technically Feasible	Yes	Yes	Yes	Yes	Poor car park area
Economically supportable ($'000)	$180	$220	$170	$200	$160

Selection of most probable use: develop site for use by car rental organisation.

nance relations among the alternatives. One alternative dominates another if both of the following conditions are satisfied.

1. It is at least as good as the other on all properties and
2. It is better on at least one property.

Any alternative that is dominated by another is dropped from consideration. Any alternative that dominates all the others is chosen as best. (op.cit., p. 148. Original emphases.)

Clearly, if there is no market demand for a proposed use, it would be dropped from further consideration. Given a demand, however, the other heads of consideration come into effect. Should the demanded use be impossible to house at law and if the law cannot be changed, there is no point in considering it further. Legal sanction embraces considerations of the quality of title and other tenurial considerations as well as town planning, health, building, heritage and the remaining plethora of legislatively based restrictions on use.

Each of these compels careful inquiry. Even if legally permissible, an envisaged use may transpire to be politically unacceptable - a resident action group, for example may succeed in having a scheme thwarted. Should a use necessitate a kind of building structure which, having regard to the physical qualities of the site (such as bearing capacity) is not technically possible. Then it fails on this score.

Potential uses which meet all these tests are then candidates and will be screened out on the basis of how each best meets the client's objectives. Often, these will be economic, but not necessarily will this always be so. Finally, the implications the new use may have for protecting or adding to the local area's revenue should be examined. This consideration could be a material factor in assessing the political feasibility of a proposed use.

The estimates relating to the economic support of the various uses are not valuations. They are simply rough approximations which are used as indicators of the relative economic strength of the alternatives and may be derived by adopting a normative model. An example of such a model is set forth in Exhibit 2 and refers to the alternative of developing the site reviewed in Exhibit 1 for rental by a car rental organisation. In this particular case, impact on government revenue raising was not an issue.

3. Identify the most probable buyer

The third step is to identify the most probable buyer or buyer-type. This process is essentially one of matching the attributes of the property with the requirements and motivations of types of buyer and their position in the market. This, too, is a critical step because it defines the client's market; it begins to reveal relative bargaining positions and it indicates to the valuer the process whereby the most likely kind of buyer makes pricing decisions. Armed with this information, the valuation can proceed in a more focused fashion.

4 Select the valuation method

The fourth step is the selection of valuation method. Since this has as its objective the prediction of behaviour in the market place, it will be helpful to review briefly the process of real estate price formation.

Price Formation

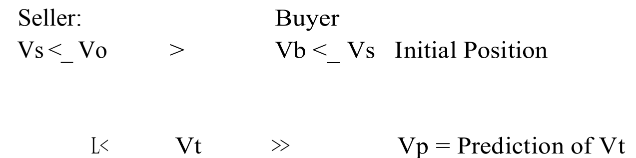
The psychology is complex. In ways which are far from clear, the vendor and the prospective purchaser derive their estimate of what the property is worth. We assign this the symbols Vs (value to self). These and the following symbols were originally proposed by Ratcliff (1972b). It is not necessary that Vs for each be similar in magnitude, or that all market participants would have a similar Vs for the same property. The estimate of Vs is a highly subjective one- even the parties concerned may be hard pressed to place a dollar figure on it.

The vendor typically will offer the property to the market at Vo such that Vo >_ Vs. It would be most unusual for Vo to be less than Vs unless pressure to sell is extreme.

Likewise the prospective buyer, having formulated his Vs for the property, will bid Vb such that Vb <_ Vs and Vb< Vo.

In the ensuing higgling, a transaction price, Vt, will be agreed. It is the task of the valuer to forecast Vt. This forecast is symbolised as Vp the most probable price.

Diagrammatically:



The diagram is a gross over-simplification of a verycomplex phenomenon as to initial conditions and subsequent reactions. It implies, for example, that the buyer's Vs is less than the vendor's Vs. This is not necessarily true. The relative positions of the various quantities on this imaginary "price line" will vary (inter alia) with the motivations of the parties one may be highly motivated to act, the other may be much less so. The assumption that buyers and sellers are "willing but not anxious" is unreal. The main purpose of the diagram, however, is to show that Vp is always accompanied by uncertainty and should therefore be expressed in probabilistic terms. The other aim of the diagram is to illustrate how Vt is the outcome of a behavioural process - a process that may produce a somewhat different outcome if different parties are involved even with the same property.

There are three intellectual (as opposed to methodological) approaches to the estimation of value (Vp):

- inference from past transactions
- market simulation
- normative modelling

We now consider each of these in turn.

Inference From Past Transactions

This entails the identification of transactions of similar properties between parties having motivations relevant to the instant case. The emphasis is on comparability in every sense of the word a quality which is not always easy to attain.

The sold and subject properties must be physically comparable and must enjoy a similar set of locational characteristics. There is a truism in the real estate world which asserts that no two properties are exactly alike and this makes valid comparison a difficult matter even in the case of suburban cottages or vacant home sites where there may be a number of recent transactions which are available as a yardstick.

Motivations also must be comparable. A vendor receives two kinds of benefit on sale: the dollars received and realisation of the motive which precipitated the decision to sell. Viewed this way, value may be regarded as comprising two components: the dollar component and the motive component. Absent the motive component and the real estate market vanishes. Similar comments apply to the purchaser: value refers to the stream of net utility expected from ownership of the subject property plus the realisation of the motive which prompted the decision to move. Where the motive component is the overriding consideration, a vendor may offset the benefit of its attainment against thereceipt of fewer dollars; conversely for a highly motivated buyer.

Thus, if the client must sell, then the estimate of the most probable price is best arrived at by investigating sales where vendor motivation was known to be high. The relationship between probable price and position of the vendor disclosed by market data should be communicated in the valuation report, of course, so the client has full information on which to base the ensuing marketing strategy.

There are variations on the motive component which need to be considered as well. Take the case of a suburban cottage (adverted to above) which may be ripe for replacement. A redeveloper's motivation would be rather different from that of a young couple, say, who may be interested in such a property as their first home and who may wish to acquire it with a view to refurbishing it over a period as a labour of love. This underscores the importance of carefully reviewing and identifying the most probable kind of buyer. These two types of buyer could be expected to pay rather different prices for the same property because their motives and their buying power are different.

In the cases of income earning properties and development projects, the quest for comparability is often elusive. Even if structures are tolerably similar, the price fetched for a particular property may reflect access to financing sources which are very favourable so that a rather higher price results. yet, if the terms of the transaction cannot be ascertained (the usual condition), adjustment of the sales price to reflect this is impossible. The task of valuing a development project which is incomplete rarely will rely upon the comparable sales approach for there probably won't be any.

When suitable sales have been identified, the unit of comparison must be selected with care and that unit adopted which yields the most consistent results upon analysis.

The rationale for using this approach is that buyers and sellers will behave today as they did in the recent past if market conditions and all other relevant factors are the same. The approach is best used when there is a useful number of suitably qualified transactions to infer from, where the circumstances surrounding each can be ascertained, where they relate to the recent past, where market conditions are stable and when the forecast of most probable price is not required too far into the future. When these conditions hold, the comparable sales approach is the most reliable method of predicting the behaviour of market participants.

Market Simulation

Where there are no, or too few, past transactions available from which to infer the most probable price, the valuer resorts to market simulation. Here the valuer selects and uses the appropriate model to simulate the outcome of the market process. Having identified the most probable buyer (or buyer type) the valuer ascertains by direct enquiry, supplemented by his experience, the logic used in fixing price. This logic is then applied to the case in hand. Some examples will illustrate the approach.

A rental valuation is required for abarbers' shop. There have been no recent rental transactions from which to infer value. Enquiry among the proprietor of barbers' shops indicates that the rent affordable by this kind of enterprise is commonly estimated as $X per chair per week. The subject premises can accommodate six chairs but market studies show a demand for only four. A preliminary estimate of the most probable rental value of the premises used for this purpose is $4X per week. That estimate may be adjusted later in the estimation process for special circumstances (if any) as discussed below.

A home unit is to be valued and it is determined that the most probable type of buyer is an investor who will let out the unit. In the absence of recent transactions, a number of investors is interviewed who disclose that they are prepared to pay (say) a figure equivalent to ten times the gross weekly rental. Knowing the level of recent rents for comparable premises, the valuer is then able to derive a preliminary estimate of value for the subject property.

Consider an income property. Potential buyers may compute the price they are prepared to pay by first calculating the amount of mortgage they believe can be secured, deducting from net revenue the ensuing debt service and then adding to the mortgage the equity figure on which the remaining net income yields a satisfactory return (Exhibit 2 over page).

If this is the way the market behaves with the kinds of assignment described, then the pricing mechanisms revealed by such enquiries are valid means of predicting the most probable price (or rental value).

Market simulation will usually be adopted when the property is a special one or when the most probable buyer is a rather rare type (they generally amount to one and the same thing). In this case the client needs to be advised as to the probable depth of demand for the property. This could be a consideration of the utmost importance to a potential mortgagee, for example.

Normative Modelling

This approach to predicting most probable price is adopted only when the inferential and simulation methods fail through lack of information. The inferential method claims "this is the way the market has in fact behaved under similar conditions" while the simulation method maintains "this is how the market will behave". Normative models, on the other had, assert "this is how the market should behave".

This is the least satisfactory method of valuation for it manifests the valuer's own preference scale, it results in a value estimate which is free of the discipline of the market place as a competitive environment and entails the danger of elitism "I'm smarter than the market". Yet there are times when this is the only approach available cases where there is no market, no indication as to most probable use nor most probable buyer. In such cases the valuer is obliged to make a series of critical assumptions, justify them in so far as possible and employ a logic which is internally consistent.

He must impute motivations to the posited buyer and seller, determine what he imagines to be their price fixing regime, make assumptions as to the range of alternatives open to the parties and the scope of the information available to them to illumine their decision process. In short, he must construct his own simulation model out of a total lack of evidence.

Normative Definitions of Value

The statement by Isaacs J in the case of *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441 is a classic description of the normative approach:

> To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, by by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognisant of all circumstances which might affect its value, whether advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.

That particular case was concerned with assessing compensation for land compulsorily acquired for which there was no

EXHIBIT 2

ILLUSTRATION OF A SIMPLE NORMATIVE MODEL TO THE RENTAL CAR USE ALTERNATIVE

INTRODUCTION

The models illustrated in this exhibit were elaborated by the late Professor James A Graaskamp. They are simple pre-tax screening devices which ignore the time value of money and capital appreciation potential except insofar as the adopted return on equity reflects these factors. In the 'back door' approach, one starts with market rent, derives net operating income and then partitions this into debt and equity service components which, when capitalised at the appropriate rates, results in the level of investment justified.

'Front door' analysis starts with an estimate of development costs (including land), apportions this to debt and equity positions, calculates the revenue required to service both and compares this with market rental value. Essentially both approaches are a form of residual analysis. It is possible to pre-specify the values of certain ratios, the levels of which it is desired to maintain. These are the loan to value ratio, the debt coverage ratio and the default ratio. The loan to value ratio is the amount of the mortgage divided by project cost. The example uses 75%. The debt cover ratio is net operating income divided by the amount of debt service. It shows the extent to which the project can service borrowings. This ratio was set at 1.2 in the example.The default ratio is (operating costs + taxes + debt service) +(gross rent). The lowerthe ratio, the greaterthe cushion against financial risk. It measures the capacity of gross revenue to meet the claims upon it. A level of 85% was selected; the remaining 15% is available to cover vacancies and service the equity position (before income tax).

The mortgage constant is the reciprocal of the present value of 1 per period.

In the application discussed in the main paper determining the relative economic potential of alternative use scenarios the valuer would probably use only one of the 'back door' approaches but, for the interest of readers, the results of employing all variants are set forth below. The computer programme employed was written by one of Professor Graaskamp's associates, Robert Gibson, with slight amendments bythe present writer. Applications may be found in Graaskamp (1981) and Canestaro (1982).

Front door analysis using loan to value ratio for car rental

Land cost	200,000
Construction cost	320,000
Soft costs	57,600
Other	18,000
Total cost	595,600

148,900	446,700
8.0000% equity cash on cash rate	mortgage constant 13.5340%
11,912	60,456

Net Operating income	72,368	
R.E. Taxes	3,000	
Operating expenses	10,000	
EFF Gross income	85,368	
Vacancy loss	1,742	
Gross income	87,111	
Rentable area (sq ft)	8,000	
Required rent per square foot	10.89	=98.9894% of market rents
Loan to value ratio	75,0000%	
Debt cover ratio	1.20	
Default ratio	84.3254%	

Front door analysis using LTV and Debt Cover ratio for car rental

Land cost	200,000
Construction cost	320,000
Soft costs	57,600
Other	18,000
Total cost	595,600

148,900	446,700
8.1204% equity cash on cash rate	mortgage constant 13,5340%
12,091	60,456

Net operating income	72,548	
R.E. Taxes	3,000	
Operating expenses	10,000	
EFF Gross income	85,548	
Vacancy loss	1,746	
Gross income	87,294	
Rentable area (sq ft)	8,000	
Required rent per square foot	10.91	=99.1973%of market rents
Loan to value ratio	75.0000%	
Debt cover ratio	1.20	
Default ratio	84.1487%	

Front door analysis using LTV and default ratio for car rental

Land cost	200,000
Construction cost	320,000
Soft costs	57,600
Other	18000
Total cost	595,600

1 48,900	-446-700-,
7,5450% Equity Cash On Cash Rate	Mortgage Constant 13.5340%
11, 235	,60456

Net Operating income	71,691	
R.E. Taxes	3000,	
Operating Expenses	10000,	
EFF Gross income	84,691	
Vacancy Loss	1,728	
Gross income	86,419	
Rentable Area (sq ft)	8,000	
Required rent per square foot	10.80	= 98.2038% of market rents
Loan to Value Ratio	75.0000%	
Debt Cover Ratio	1.19	
Default Ratio	85.0000%	

Back Door Analysis Using Debt Cover Ratio for Car Rental

Gross rents	88,000
Vacancy Loss	1,760
EFF Gross Income	86,240
Expenses	10,000
R.E. Taxes	3,000
Net Operating Income	73240,

12,207	.61,033-
8.0000% Equity Cash On Cash Rate	Mortgage Constant 13.5340%
11 235	450962,

Justified Investment 603,546

If you hold constant	Construction Costs	Land Cost	
Land Cost	207,946 `	200,000	
Other	18,000	18,000	
Construction Cost	320,000	326,734	*
Soft Costs	57,600	58,812	
Construction Cost per square foot	40.00	40.84	*

Exhibit 2 continued

Back Door Analysis Using Default Ratio for Car Rental

	Gross Income	88,000	
13,200			74,800
1,760	Vacancy Loss	Expenses	10,000
		R.E. Taxes	3,000
11,440	Cash to Equity	Debt Service	61,800
8.0000%	Equity Cash On CashRate	Mortgage Constant	13,5340%
143,000	Equity Investment	Mortgage Loan	456,627

JUSTIFIED INVESTMENT 599 ,627

If you hold constant	Construction Costs	Land Cost
Land Cost	204,027 '	200,000
Other	18,000	18,000
Construction Cost	320,000	323,413
Soft Costs	57,600	58,214
Construction Cost per square foot	40.00	40.43

continued from page 19

market. Confronted with a similar case today and given the provisions of the enabling statute, we probably would do no better. Yet the definition has been absorbed into valuation folklore in Australia and variants of it are widely adopted even when the inferential or simulation approaches are available cir-cumstances under which the definition is inapplicable (as we shall discuss below).

Another normative definition which is frequently used is so called open market value (due to the Royal Institution of Chartered Surveyors):

> The best price at which an interest in a property might reasonably be expected to be sold by private treaty at the date of the valuation, assuming a willing seller, a reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market, values remaining stable throughout the above period, the property being freely exposed to the market, and no account taken of any additional bid by a special bidder. *(Chartered Surveyor,* June 1975, p 302).

Being normative, there are quite a few assumptions in definitions such as the two just quoted, assumptions which valuers and their client need to question (Albritton, 1980; Smith, 1986). Let us discuss a few before proceeding.

The use of the words "best price" assumes there could be other prices which the property could fetch. How representative is the "best price"? Is it the top of the range and so skewed that it is abnormal? That inference would seem to be precluded by the words "might reasonably be expected to be sold" which is inconsistent with "best" and would seem to imply a type of statistical expectation. If so, is this expectation a measure of central tendency such as the mean, the median or the mode? (Colwell, 1979). Given the typically skewed nature of price distributions in the real estate market, the distinction is an important one for the difference is far from being semantic.

Restricting the scene to private treaty is intriguing. If the state of the market is such that a sale by auction is likely to yield a higher price, that option (clearly in the vendor's interest) is excluded by definition and the client's interests are not well served. Furthermore, prices resulting from the auction process are defined as irrelevant unless they are no different from private treaty results, in which case there is no point in making this an element of the definition.

Note the assumption of a willing seller. Why not include the accompanying willing buyer? If one, why not both? How is it possible to have a transaction without one of them?

Perhaps the rationale is something along these lines: assume there is no buyer presently registering interest. A willing seller's asking price (Vo) will continue to drop until a level is reached which will make the property attractive to a potential buyer. A further reduction will convert the previously diffident buyer into a willing buyer. At that stage we have "open market value".

What happens, one is tempted to ask, if the process is reversed? Given a willing buyer but no seller in sight, the buyer lets his needs be known to all at large. By continually increasing the price he is prepared to pay (Vb) and by communicating this widely to owners of relevant property, once unwilling vendors are converted to the willing kind at the price now advertised. At that stage do we have "open market value" as well?

In short, do the two different assumptions lead to the same figure ie "open market value"? This cannot be so because, under either assumption, one party is advantaged over the other. (Ratcliffe 1983).

Depending upon the start point, we have either a buyers' market or a sellers' market. With the former, prices are falling whilst, with the latter, prices are rising.

The definition therefore requires the assumption of a market with falling prices an assumption which may be unreal.

It is true, of course, that the valuer must pay regard to recent trends in prices, the relative balance of supply and demand and other factors determining the state of the market at the time of the valuation. To require an assumption that the market is something that it may very well not be is scarcely conducive to attaining a balanced reading of it.

Unless the definition of the problem dictates otherwise or if market data do not exist, valuers are best advised to avoid normative definitions because they inevitably lead to the kinds of coils and absurdities reviewed by Ratcliffe (supra) and in Whipple (1990). In the vast majority of cases the only definition which works is that of the most probable price set forth above.

We move onto the next element of the definition. The quality of willingness is a relative one and, in the limit, it is normative because it is a fiction of the valuer's imagination. Two valuers could have vastly different conceptions of their characteristics and decision outcomes in which case their resulting value estimates would diverge. Is it responsible professional practice to rest one's work on a fiction? The assumption of a willing but not anxious buyer and seller requires the availability of perfectly substitutable alternatives which either party may pursue in the face of failure in their current negotiations caused by either of them becoming unwilling. This is in spite of the fact that no two properties are exactly alike and no parties have equal sets of motives. Because the real estate market is structured into a series of localised sub-markets characterised by thin trading, the range of alternatives is usually seriously limited.

We may next enquire as to what constitutes a "reasonable period"? Can it be shown that the longer a property is on the market, the higher the price it will obtain (Miller, 1978)? Is this period supposed to be before the date of valuation or after it? Clearly, it has to be before the valuation date because that acts as a cut-off point after which events are irrelevant to the task of estimation.

Consider next the words "freely exposed to the market". What are the qualifications essential to such a state? Must there be wide publicity? Is price aproduct of the size of the advertising budget?

If it can be shown that an adjoining owner, for example, is likely to buy the property at a higher price, that differential is to be ignored because special buyers are exluded and, once again, the client's interest are ill-served.

The words "cognisant of all circumstances" make the assumption that the parties to the transaction possess perfect knowledge of the market. Yet we know that information costs in

the real estate market are especially high indeed, the acquisition of perfect knowledge ("all circumstances") is impossible.

Given his set of assumptions or norms, the valuer will then proceed as he best thinks fit. If an income property, he may adopt a discounted cash flow approach; with a factory, he may capitalise estimated net rent, or failing this, he may derive an estimate of land value, add to this the estimated cost to replace the improvements, deduct estimated depreciation or costs to make good and use this summation as an estimate of most probable price.

For all of his theoretical elegance, the valuer is unable to demonstrate that his estimate using a normative approach is consistent with market behaviour and there is always the danger that he is seduced by the excellence of his own reasoning. Market value is not the outcome of such a process rather, if parties accept it in face of their own uncertainty or as a dispute-settling mechanism, the valuation becomes a self-fulfilling prophecy: of itself, it constitutes no evidence of market value. Rent review disputes settled in this way are a current example.

When a normative definition of value is adopted, there is the risk of inconsistency. If data from past transactions is used from which to infer price, then it is necessary to demonstrate that the transactions cited reflect that definition. This underscores the importance of selecting the definition of value which is relevant to the problem which has to be addressed. The definition dictates the nature of the data required.To mix a normative definition with the first approaches to estimating probable price distinguished above is inconsistent. In the case of the definitions just discussed, comparable sales should be shown to be between parties who are willing but not anxious, fully informed, who at decision time had a range of alternatives available to them and so on. Patently, the definitions are unreal and to combine them with market evidence is an absurd way of proceeding.

Another danger with the normative approach is that it may easily and unwittingly be transported into one of the other two approaches. An example lies in the so-called "adjustments" that are often made to market derived data such as cost to make good. Unless the valuer can show that the market makes such adjustments, a normative element is introduced into a procedure that claims to be more reliable so it may become less so as a result. Therefore the bases for such adjustments need to be supported.

Factors Affecting Choice of Method

The choice of valuation method will be a product of the nature of the problem to be addressed, the data that is available, the cost of assembling it and the skills possessed by the particular valuer.

Take the case where a potential mortgagee is considering the sense of entering into a commitment to refinance a tourist development five years down-stream. A crucial issue is to estimate whether there will be sufficient cash flow after tax to service the envisaged loan. Here is a case where the inferential approach may be of limited applicability. Rather the valuer will probably resort to a form of after tax cash flow analysis in a serious effort to simulate the performance of the venture.

If cash flow data from similar projects is to hand, then the inferential approach will probably be the preferred method. If, however, such data are not available, then it has to be developed and one is then squarely in the normative area. The question of the cost effectiveness of the valuation then comes to the fore: it is self defeating to produce a study which has an unfavourable cost-benefit ratio. If the cost exceeds the benefit, it may be necessary to adopt a normative model, for instance.

Should the valuer be unfamiliar with the techniques of after tax cash flow analysis, he would have to select another method - a selection which may produce a less reliable estimate.

Although an after tax cash flow model may be used in solving the probable, the valuer may not necessarily communicate his main findings in these terms if he believes the reader either cannot understand it or if the client has no faith in it. Be assured that, in this statement, it is not the aim to advocate any form of deception; rather this statement flows from the recognition that a valuation report is also a communications device. If the client has no faith in an after tax cash flow model, for instance, the valuer may communicate his results in terms of a model in which the client has faith or in terms that the client can understand. This is perfectly responsible on the valuer's part if he genuinely believes that the adopted model is the most appropriate one. Of course, the report will contain full details of the approach that has been used (possibly in an appendix) but the main results may be communicated in terms of another model which yields consistent results.

It should be stressed that the adoption of one of the three approaches to estimating most probable price outlined above is not necessarily an exclusive action. If the inferential approach is relevant in a particular case, then the results should always be checked for consistency by applying another approach this would be the simulation approach if the underlying information is available. By the same token, use of the simulation approach as the main method of estimation should be checked against the output of a normative model. Where neither of the first two approaches is possible, only a normative model is available and the confidence interval is wider.

The reader should note the distinction between the three intellectual approaches to estimating price and the usually recognised three methodological approaches we are all familiar with: comparable sales, capitalisation and summation. Under one set of circumstances, the cost approach (for example) may be adopted under the simulation heading. In another application, it may be selected as the most useful normative method if it can be established that buyers use a different calculus.

Note also that a normative approach could be used at up to three points : first, as the means of ranking the economic strength of alternative uses; second, as the major valuation approach and, third, as a check against that approach. Different normative models may be used at each point: the cost approach, a discounted cash flow method, a residual method as in Exhibit 2 (previous page) and soon. The consequences of their normative nature should always be reported to the client particularly if adopted as the major approach. Why? Because this is an admission that there is no market and that is something of vital interest to a client (especially if a mortgagee).

The outcome of applying the adopted approach with its check is to estimate the most probable price. In doing so the valuer should quote a range of figures over which the hypothetical transaction is likely to occur. This should be supplemented by a statement in the form of a single figure as to the most likely price.

Sources of Uncertainty

It is necessary to express the result in probabilistic terms because price is the outcome of a behavioural process and valuation is an act of prediction under conditions of uncertainty. The major sources of uncertainty are:

a. Real property is a complex amalgam of locational characteristics, physical improvements and legal rights at the focus of innumerable forces external to it. Accuracy in forecasting the stream of net utility to be derived from it cannot be assured.

b. Net utility is measured very largely in terms of human preferences which change from individual to individual.

Such is the diversity of reaction across potential vendors and purchasers that behaviour prediction cannot avoid uncertainty.

c. As discussed above, the mechanics of price establishment from individual to individual far from guarantee the same outcome across market participants even if the previous two sources of uncertainty can be controlled.

Other factors adding to uncertainty are the scarcity of reliable data (notoriously so in the real estate market) unanticipated influences that come to bear in a given instance influences that may well be unforeseeable and changes in market forces which cannot be predicted over the forecast period.

All these matters are unique to each valuation assignment; their individual degrees of certainty will change from task to task and the degree of confidence the valuer will have in his prediction will not be constant from one assignment to the next. To report only a single estimate implies equal certainty from assignment to assignment an unreal situation.

Confidence is augmented when the valuer has a close knowledge of the particular sub-market and a great deal of reliable information is to hand. Conversely, if there has been little market activity from which reliable date can be won upon which to construct a prediction, there may be a deal of divergence between the predicted price and the one which is subsequently realised.

Therefore, if a valuer's product is to be consistent from task to task, he must report the degree of reliability he believes can be placed in his estimate. The less confident he is, the wider the reported transaction zone. It is far better from the client's viewpoint for the valuer to report this with his knowledge of the input rather than for the client to make his own assessment of reliability. The valuer is in a far better position to do so and he owes this as a duty of care to his client. The latter can then make decisions on a more complete basis.

It is not necessary for the transaction zone and the most probable price to be derived by formal application of a statistical distribution. Sometimes this will be possible (for an example see Whipple 1986a). As a general practice, the use of odds will be all that is possible. Clients should beware of the reporting of a single figure as reflecting accuracy a spurious quality.

5. Adjustments for External Factors

The fifth step is to adjust the output of the previous phase for special factors relevant to the case in hand, to test the final result for sensitivity to assumptions made and to audit the whole work for consistency.

Special factors may have been imposed from without. One example would be the definition of value that was adopted as appropriate to the brief. As already noted, this may be imposed by statute in, say, a resumption case. The client's instructions may have required the valuer to build certain assumptions into the exercise. Now requirements such as these may not have been present in the comparable sales which were analysed earlier. If so, allowance is to be made for this in deriving the final estimate of value.

Possibly the most demanding requirement is that of consistency. As this needs to be checked in a number of respects, some representative questions are provided.

Has there been a change in the market conditions prevailing at the time the comparable sale were made? Is the method of valuation adopted consistent with the provisions and assumptions underlying the definition of value? Is the result consistent with the objectives of the mostprobable buyer identified earlier? With the demands of potential lenders? Does the adopted valuation method produce results consistent with the output of another method of prediction? Has the statement of the.issue set forth at the beginning been addressed?

Attention also has to be given to the effect of varying any of the assumptions built into the programme of work. If the assumptions are varied within realistic limits, what consequences does this have for the final result? These should be tested, the results evaluated in terms of affect on the size of the transaction zone and fully reported on.

SELECTING AND BRIEFING A VALUER

It is not intended to attempt to provide a check list suitable to all valuation assignments. Patently, that would be impossible because each assignment is a special purpose one special to the particular problem, prevailing market conditions, the availability of data, the skill of the valuer and a host of other factors.

Those who retain the services of valuers should compile their own check list keyed into their own problems. Sufficient information has been provided above to give a good start to such an endeavour the accompanying flow chart (page 24) is a summary expression of the material set forth above and it will be useful in giving an overall view of the logic of the valuation process.

"...the valuer must possess such skills, or default to the accounting profession.."

Valuer selection and briefing go hand-in-hand and neither should be attempted until the problem concerned has been well defined. This will reveal the kinds of professional skills required. With these acutely portrayed, the task of valuer selection can proceed. There is a common view that one valuer is as good as another - the important consideration is to ensure the candidate is registered to practice as required at law. Nothing could be further from the truth because valuers are not interchangeable.

Prime selection criteria concern experience in the market concerned, a command over the analytical skills called for, the ability to communicate, to produce credible work, to meet the client's time requirements and presence of a requirement to answer to a code of ethics.

Clearly, experience is of paramount importance. The valuer who has the greatest store of experience covering a wide range of market conditions is in a far better position to predict buyer behaviour than is a relative neophyte.

Yet experience calls for a command over analytical skills so that the fruits of one's observations of the passing parade can be integrated into an intellectual framework which is useful. Observation for its own sake is an avocation of doubtful problem solving utility. If a problem calls for after tax cash flow analysis, then the valuer must possess such skills - or default to the accounting profession.

It is one thing to amass experience and to have a good knowledge of skills. It is quite another thing to utilise both in an intelligent fashion so as to ensure results that are credible.There is no point in calculating a number (such as an internal rate of return) unless that enables one to make a statement bearing on the problem, to be able to relate it to other viewpoints of the

central issue and reconcile them in a manner which results in an enriched understanding. Furthermore, a valuation report is a means of communication between the valuer and the client a means whereby information is ordered in a logical fashion and made readily accessible.

The fact that a Government agency has granted a license to someone to practice as a valuer says nothing about the ethical constraints within which that person is expected to operate. Therefore, enquire as to the candidate's professional designations, secure a copy of the relevant code of ethics and write compliance with it into the brief. Make enquiries and secure undertakings that the valuer has no conflict of interest (Whipple 1986b).

Check that the valuer's professional indemnity insurance cover is adequate and current.

Do not hesitate to make wide enquiry, ask for and peruse closely copies of work done for others and compare their qualities with the considerations set forth above. If the report comprises a purposeless description of the subject property and then sets out an unsubstantiated opinion as to value, your interests will be better served elsewhere.

A FINAL COMMENT

The emphasis in the new thinking outlined above - which certainly isn't radical is to provide coherent information for decision making. This is not necessarily the information the valuer thinks the client needs but, rather, the information both valuer and client know is needed for solving the problem as defined. Apart from its patent utility, consistent performance in the terms set forth above will elevate the profession's credibility, boost the status of its members, add to their income and provide the ultimate defence against charges of professional negligence. For those reasons, if not for the cause of professional pride, we owe it to ourselves to strive for the stars.

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CHART 1

VALUATION PROCESS

PURPOSE OF THE VALUATION

DATA PROGRAMME

I

PROPERTY ANALYSIS

Physical Attributes

Legal/Political

Linkages

Aesthetic Attributes

ALTERNATIVE USES

EFFECTIVE DEMAND COMPETITIVE SUPPLY

MOST PROBABLE USE SELECTION

MOST PROBABLE BUYER PROFILE

CHOICE AND APPLICATION OF VALUATION METHOD

ADJUSTMENT OF APPLICABLE EXTERNALITIES

FINAL VALUE ESTIMATE

Source: Adapted from Graaskamp JA 'Appraisal 025 North Pinckney", Landmark Research, Madison, 1977.

Property As An Investment

Some Strategic Considerations

by R TM Whipple

The third paper presented by Dr R T M Whipple at the sponsored seminars held in Auckland (1 September 0 and Wellington (5 *September)*

Our wise God hides in pitch-darke night
Of future time th'event decreed,
And laughs at man, if man (affright)
Feare more than he to feare hath need.
Horace 1. N. Ode xxix. 29

Concern for the future of real estate as an investment sometimes is expressed as a result of recent experience not matching expectation and begs the questions: what kind of real estate? What kind of investors? Let us begin by trying to draw a few distinctions.

Data on capital formation in real estate by type of investor is notoriously patchy in Australia. Nevertheless, we may sense some ideas as to relative sizes of broad sectors by examining data on the cost estimates of building commencements.

Over the five years to 1986/7, average aggregates for broad sectors using constant dollars converted to percentage were:

Dwellings	57 per cent
Offices	18 per cent
Shops	9 per cent
Factories	6 per cent
Hotels	4 per cent
Other non-dwelling	6 per cent

This gives a notion of the preponderance of the residential sector. Vast sums, both equity and non-equity, are invested in providing shelter, investment returns and tax benefits to households. Barring disintegration of the household unit, the returns accrue on retirement and so their position is a long term one. Relatively short term market fluctuations ordinarily are of little moment to this class of investor to whom real estate is almost always a winner.

In Australia, some 60 per cent of dwellings are owner occupied and so there is a fair volume of investment in the residential rental market. This tends to be almost wholly tax driven since mortgage interest is deductible against other income. Negative gearing means that smaller individual investors can participate. They tend to have a relatively high income from other sources indeed, they would need to in order to ensure a viable margin to absorb increased interest rates which have been a feature of recent years. The future of this investment avenue is almost wholly dependent upon the whims of Government fiscal and monetary policy.

When the residential sector is omitted and the percentages re-computed across the remaining classes, the position is as follows:

Offices	42 per cent
Shops	20 per cent
Factories	13 per cent
Hotels	10 per cent
Other non-dwelling	15 per cent

(The source of both these sets of figures is BIS-Shrapnell: *Building in Australia 1988-2002.)*

Most of the expenditure on offices, shops and hotels is probably by investors. Many factories would be owner occupied and "other non-dwelling" is a catch-all category.

Therefore, rough as the estimates are and given deficiencies in the raw data, this is probably as good a conjecture as we can make of the relative sizes of the sectors available for property investment.

INVESTMENT CHARACTERISITCS OF REAL ESTATE

Property, by its nature, is immobile and from this fact a number of consequences important to investors follow.

First, a property serves a restricted area. This means that properties in a market area are thinly traded and the property cannot be moved to another location where the demand for its services may be higher. Thin trading betokens a dearth of evidence upon which to base an appreciation of market trends and preferences.

Secondly, property income is derived from a fixed location and cannot avoid affection by forces external to it-forces over which the owner has little control.

Thirdly, no two properties are exactly alike. This, with thin trading, leads to great difficulties in constructing a property price index. It means, too, that properties are not driectly substitutable and each has a set of locational characteristics which are unique.

Fourthly, land value is a residual. Capital, being mobile, is attracted to the real estate which offers the greatest investment potential (consistent with the individual investor's risk/reward profile).

Following immobility, the next characteristic of significance is that real property investment always entails large economic units. In order to facilitate investor participation, special financing and related mechanism are constantly being created to serve this purpose. This is an area of continuing innovation. Developments in this field demand careful and continuing study.

The third investment characteristic to note is that of durability. Land generally is regarded as being indestructible and the improvements on land endure for long periods of time. Economic and functional depreciation of improvements is generally far more rapid than their physical depreciation. A consequence is that improvements cannot usually be changed without considerable cost.

Next we note that property is relatively scarce. The physical availability of land is prescribed by nature's bounty but here our emphasis is on the restricted geographic range within which the carrying out of certain functions is feasible. The attempt to

house a function beyond the areal extent proper to it generally leads to an insufficient demand to exploit it there although it may be profitably and eagerly utilised elsewhere at the same time.

Finally, land is unproductive by itself. To be useful it needs to be married with the proper proportions of labour, capital and management inputs. Determining the appropriate relationships is a by no means simple task and, once concluded, sets the future course of the property for a long period of time (by virtue of the durability characteristic).

To summarise the major points: investment in real estate entails large economic units, decisions are long term in nature, there are forces affecting value over which it is difficult to exercise effective control, information is sparse and expensive to assemble, each property has to be evaluated as a special case, improvements may become functionally or economically obsolescent. One result is illiquidity.

What characteristic compensates for these seeming disadvantages or, at least, potential risks? It is the characteristic of scarcity coupled with the potential rewards to the management input. In this context I am referring not so much to the continuing process of management which property demands, but the flair with which the assembly of improvements, design elements and choice of location is accomplished. The scarcity factor confers a quasi-monopoly which translates to creating that set of locational characteristics and web of interactions around a property and its selected uses which the competition cannot assail over the investor's holding period.

Given a sustained demand for the services of a property as a product of the matters mentioned in the preceding paragraph, the cash flow characteristics of successful real estate investment may now be discerned. These are a sizable initial outlay followed by smaller regular inflows more or less protected against inflation (a product of rental growth) and terminated by a large inflow on disposition.

Turning to the securities industry for a parallel, property investment marries the characteristics of bonds and equity.

This analogy needs to be taken a little further in terms of yield differentials. The discount rate appropriate to well located income property is lower than that attaching to equity investments as represented by the return on the All Ordinaries Index. Therefore, capital recovery will be slower than in the case of the latter. The average time of receipt of individual cash flows, weighted by the present value of each, will be longer than in the case of an investment which spins off a large cash flow at the expense of high resale proceeds.

This, coupled with the security of property (as with bonds), makes it a serious candidate for inclusion in the portfolios of institutions having to fund long term liabilities.

Like bonds and equities, the value of a real estate investment will depend upon expected rental growth being maintained and a non-negative movement in interest rates over the holding period. If rental growth is not maintained, the proceeds on disposition are eroded and the ability of the investment to match long term liabilities evaporates.

INVESTOR TYPES AND THEIR OBJECTIVES

It is not proposed to investigate types of investor and their requirements in great detail.

Among the liabilities of life offices and superannuation funds, a substantial portion is in the long term category. General insurance companies also have some long term liabilities but not to the same extent. Then there are the vehicles designed to invest almost solely in property: property trusts (listed and unlisted).

Whether the latter emphasise income or capital growth or offer a split between the two, there is a requirement for investment properties and development projects selected so as to match liabilities of different maturity.

If events transpire so as to shorten the average liability term and/or if this causes a run on funds, real estate misses out.

An objective of all these vehicles is to achieve an investment mix in structuring their portfolios so as to minimise non-systematic risk by diversification. There is some evidence that the inclusion of property helps dampen cyclical fluctuations in portfolio performance.

For that reason also, there will always be a place for property in their investment packages.

Thus, on those grounds, the future for real estate as an investment seems assured real estate, that is, which possesses the desirable characteristics noted above. In times of high demand, secondary properties also will register an increase in acquisition rate by virtue of the substitution effect.

Why, then, does it happen that even prime property at times loses its appeal and may suffer an absolute decline in value? That is not always an easy question to answer. Some light may be thrown on it if we view real estate investment in a portfolio context.

PORTFOLIO CONSIDERATIONS

To focus the discusion we introduce the modified internal rate of return (MIRR) which was developed by the late Professor James A Graaskamp.

The negative values in a property's cash flow stream are discounted back to present value at the cost of capital rate or whateverrate is used to plan for the provision of future outflows. Denote this by the symbol P.

Cash inflows are projected forward at the reinvestment rate. This is the rate of return achieved by the asset purchased by the cash as it emerges from the property investment. Denote this by the symbol S.

Different interest rates may be used a different points along the time line diagram if deemed appropriate.

We now have two amounts: $P and $S separated by n periods.

The MIRR is that rate of interest at which $P accumulates to $S over n periods.

A computational example may be found in Exhibit 1. (See opposite page)

Note that the MIRR embraces three investments: the investment in which funds are held to met the negative flows; the real estate and the investment purchased by the flows as they are thrown off by the real estate.

It may be seen that the MIRR is a portfolio measure (indeed, it may be applied so as to give expression to the investor's risk preference curve for various investments and used as a rational allocation model but that is beyond the scope of the present discussion).

At all times it is necessary to study the difference between the MIRR and the reinvestment rate especially as the latter shifts over time.

When the reinvestment rate is low, the best MIRR is achieved by the real estate which defers its payout. Otherwise, the cash thrown off has to be invested at a low rate and the portfolio rate declines.

When the reinvestment rate is high, the property which registers the highest M RR is that which achieves a high payout in the immediate future. Funds are available shortly to invest at a high rate.

The MIRK should be computed frequently throughout the life of an investment especially when a significant change in interest rates occurs.

When is Property Unattractive as an Investment?

Under a high interest rate regime, favoured property is that which spins off a high volume of cash. With most holdings, this usually means disposition if sufficient capital growth and equity buildup is available. We assume high transactions costs can be covered.

With a low interest rate offered on reinvestment, one hopes for capital gain in the real estate. If that is improbable and if the MIRR is less than the reinvestment rate, the real estate will likely be sold.

Under both scenarios, therefore, the key is capital growth. If the fudamentals are not in place to make capital appreciation likely, then property loses to other investments.

Underlying this, of course, is the movement in interest rates - a key variable which we have little success in predicting.

All this says nothing new and real estate people have been living with it for decades. What is comparatively new, however, is that the market for prime investment property is now a global one.

Therefore, the reinvestment rate may well be for another opportunity in another land. If local capital growth prospects seem dim in the estimation of investors, resale is likely and this will be followed by a repatriation of funds to offshore.

It follows that the portfolio has come to represent something of an international opportunity set and will become increasingly so in response to the trend to deregulation of markets which has characterised the western (and now, it seems the Soviet) world.

ADVANTAGES IN OFFSHORE INVESTMENT

One of these has already been referred to: the propsect of effecting sizable capital appreciation.

Another reason, and one which often was the initial motive for foreign investment in property, is for portfolio reasons. Investment in overseas securities, including property, is seen increasingly as bringing added security through the benefits of diversification. Risk spreading through international markets is now a fairly common strategy and brings about a demand for high quality information to which I shall refer below.

Exhibit 1: Modified Internal Rate of Return Illustrative Example

Example:

Initial investment	-100,000
Year 1	5,000
Year 2	-10,000
Year 3	20,000
Year 4	20,000
Year 5 (including resale)	225,000

Conventional IRR = 22.17 per cent Possibility of three solutions to IRR. Why?

Compute Modified Internal Rate of Return (MIRR)

Assume: cost of capital rate 15 per cent

reinvestment rate 17 per cent

STEP 1

Compute the present values:

PV $10,000 over two years at .15	=	-7,561.44
PV all outlays at .15	=	-107,561.44

STEP 2

Compute the future values

		$
$5000	4 years at .17	9,369.44
$20,000	2 years at .17	27,378.00
$20,000	1 year at .17	23,400.00
Add terminal flow		225,000.00
Total future value at .17		285,147.44

STEP 3

Compute MIRR

$$S = P(1+i)^n$$

$$i = \left[\sqrt[n]{S/P}\right] - 1$$

where S is future value

P is present value

n is the number of time periods

i is the interest rate per period

Substitute:

$$i = \left[\sqrt[5]{(285,147.44 / 107,561.44)}\right] - 1$$

= 0.2153

or 21.53 per cent.

This solves for rate at which the present value of the outlays must compound so as to equal the future value of the receipts.

NPV at .17	=	$22,753.79
NPV at .15	=	$33,236.56

A third reason is to take advantage of a favourable differential in interest rates. In Australia, the current high level of interest rates (a product of official monetary policy) coupled with lower (for Australia) inflation, has produced a level of real interest which is high by most standards. This has been a spur (how strong a one is not really known) to borrowing overseas to acquire foreign property at lower real interest rates. As the loans stay off shore, there is little exchange rate exposure if the property is to be held long term. At worse, that source of risk is deferred.

The fourth major reason is to secure an investment in a market which may be deeper than the domestic one. Since the markets are larger, there is also a greater diversity of opportunity there. There is a number of considerations underpinning the decision to go off shore. These will vary with the times and need only brief mention here. Of crucial importance are the twin factors of political and economic stability, a favourable (or at least a competitive) tax regime, a legal and regulatory system which is accessible, equitable and understandable and an exchange rate favourable to the direction in which the currency is to move.

EMERGING TRENDS AND OPPORTUNITIES

It is difficult to review trends and identify the opportunities suggested by such a review. This is because conditions vary from country to country. A country with a maturing economy, for example, may present opportunities in the manufacturing sector but probably not in the finance sector.

Therefore it maybe helpful to limit this partof the discussion to a review of guidelines and prospects for locally based investment - guidelines which should apply in the general case whether off shore or local. Property investors should constantly monitor and evaluate economic and social trends. Sometimes these can throw into relief immediate opportunities but they usually point to elements of a longer term strategy.

In developed countries, there is the obvious demographic trend to an ageing population. This points to a burgeoning demand (rapidly emerging in some countries) for the provision of care and accommodation for the aged. As the former family home becomes aburden or the more recently acquired home unit becomes ill suited to current needs, their sale realises a capital amount which should be sufficient to fund hostel or other arrangements and augment retirement income. This kind of investment is sensitive to Government control and tax treatments and requires a very high standard of management. It is probably not an attractive outlet for the institutional investor.

The manufacturing sector in developed countries will doubtless provide selective investment opportunities. This will depend particularly on the success of Government macroeconomic policy aimed at increasing the competitiveness of home industries in foreign markets. Much will depend upon the local situation. For example, cities experiencing population growth will register a need for increased warehousing space. Some countries report increasing demand for small premises to house newly established enterprises with common facilities a type of mini-industrial park.

If a favourable exchange rate can be maintained, growth in tourism should ensue if other factors come into play at the same time. Tourists expect top accommodation and first class service and facilities all the way from the host's airport to smiling service from retail sales staff. This should lead to a demand for top hotels in inner cities to resorts developed by natural attractions such as snow fields, lagoons and beaches. Tourism is often the precursor to more sustained investment from those who came, liked and returned to exploit the experience.

Increasing leisure time will precipitate a demand for holiday accommodation and sporting developments geared to the intranational traveller as well as the overseas tourist.

Profound changes are overtaking the office construction sector. This is a product of the information explosion, the deregulation of financial markets, new developments in the finance sector and the emergence of a better educated and specialist work force. Space standards are increasing and there is a demand for better quality space decked out with the latest electronic and other facilities. This latter requirement is now a major design consideration. The resulting developments are far more capital intensive and the trend to larger prominent buildings on extensive CBD sites is evident. Such projects, in their complexity of design, construction, financing, marketing and management call for the establishment of a very wide range of skills from many professions. Their success will depend also upon close cooperation with Government and special interest groups such as environmentalists.

It is in this area that the institutions have much to offer and much to gain in the longer term. This is to acquire well located property with a view to site amalgamation to prepare for the mega-developments of the next few decades. Given sensitive and sensible choice of location and site assembly strategies within established financial areas in the capital cities of the world, the trend to landmark developments virtually guarantees significant capital appreciation. They will not be realised overnight, of course, but institutions which do not position themselves to take advantage of emerging trends may find that the choice sites have been already accounted for. Remember the characteristic of scarcity reviewed above.

THE PLACE OF THE PROFESSIONS

Deregulation has had the effect of destroying traditional barriers. Valuers now have a new kind of client- one who is highly educated in the leading finance schools of the world and who regards real estate as another form of cash generating vehicle. He is skilled in the areas of financial analysis, accounting, securities dealing, the structuring of financial instruments to meet specific objectives and much else.

The valuer who wishes to retain control of such a client needs a wider range of skills than his predecessor possessed. Not only must he be able to offer competent property advice, but he must be able to do so in a number of contexts: ethical, financial, taxation and other corporate considerations. In short, the scope of advice needs to be widened considerably. Those who do so will survive, those who refuse will not.

Let me give on example. Sophisticated clients investigating a paper investment now demand a risk analysis. The property advisor who is unable to perform a risk analysis for an income property or a development project will lose custom.

There is a growing trend for consultant organisations to establish ties with overseas practices so as to be able to guide the offshore investment decision. This mean access to high quality information on tax regimes, law affecting property investment and the plethora of matters clients must now consider very carefully before making a commitment - either locally or abroad.

Today's typical consultant in property has a considerable investment to make in augmenting the skills traditionally regarded as being adequate. This re-tooling requirement calls for access to educational programmes sponsored by the relevant professional bodies and the Universites.

While there will continue to be a need for specialisation in property advice, the trend now is to be able to offer this within

a broad intellectual framework which recognises the inter-relationships necessarily involved in modern property decision processes. Inevitably this will lead to the unification of presently disparate professional bodies and the establishment of closer ties with the world of scholarship and of new ideas.

There is now a considerable literature on the international aspects of property consulting (see, for example, Hines (1988) and the references cited therein).

There is even a professional journal published in this area and a professional body which sets out to train its members and set standards in the international ramifications of rendering property advice.

As part of this ferment, there is a need, if foreign investment in property is to be wooed and local decisions reached on firmer ground, to establish a property "think tank". This would be expected to provide hard data to assist investors: data on the course of property prices and rents, means of structuring financing packages, studies of "where we went wrong and why" cases as well as those cases widely acclaimed for their business success and contribution to the national wealth. Such an organisation, fostered and encouraged by the profession, also could be expected to provide sound independent policy advice to Government on matters affecting property investment.

The challenge awaits us all. A

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Implications of Nominee Company Rules Goods and Services Tax and Land Tax

by B Gould

SOLICITORS' NOMINEES COMPANY RULES 1988

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niinar head at New Plymouth an 24 April 1990

Some 18 months ago I addressed the local Institute of Valuers on several pieces of relevant legislation including the Solicitors' Nominee Company Rules. I indicated at that stage that the legislation would create more work for valuers albeit with the added responsibility. Whilst there may have been some truth in that statement, 15 months of working with the legislation has also made it abundantly clear that it also meant a lot more unrewarding work for solicitors.

While some firms, including my own, have continued to run their Nominee Companies (admittedly to far more professional degree), many others have proceeded to wind their nominee Companies down.

The reasons for winding their Nominee Companies down are varied and include:

a. Not the least are the comments of our professional indemnifiers. They have had no hesitation in alerting us to the large number of claims that arise from Nominee Company activities. Indeed it has been intimated to us in no uncertain terms that cessation of activity in this area will have a beneficial outcome so far as our premium is concerned. The policy terms have also been changed to require compliance with the Solicitors' Nominee Company Rules and requiring all further loan applications to be approved by a minimum of three partners.

b. Increasing competition in the marketplace. Solicitors' Nominee Companies were born out of the need of some clients for interest-only money from a readily available fund (our client investors) without the inherent restrictions then existing in the current New Zealand financial market. Indeed many a Solicitors' Nominee Company advance has facilitated a commercial transaction which may otherwise have foundered. Now in the age of deregulation various Institutions clamber over each other to advance such funds.

c. With the increasing competition many Solicitors have found it more difficult to recover sufficient fees and commission to cover overheads and provide a satisfactory margin in respect of their mortgage lending practices. Indeed in years gone past the cost effectiveness of the Nominee Company and contributing mortgage lending would not have been questioned. It was a creature of circumstance which more than justified its existence. Compliance with the new procedures as set out in the Solicitors' Nominee Company Rules have involved higher overheads. Even firms that had a very regimented and business-like Nominee Company have found the additional cost of compliance significant. Many Solicitors have found it more difficult to recover sufficient fees and commission to cover overheads and provide a satisfactory profit margin in respect of their mortgage lending practices. Indeed within our Lawlink Group, half of the firms no longer run, or are in the process of winding down their Nominee Companies. Several others like our own are keeping a watchful eye on the market place but inevitably see the demise of the Nominee Companies.

In the absence of procuration fees, up front fees and those types of charges which are routine in the commercial sector Solicitors in the past have relied on the professional fees they charged, the opportunity cost afforded to the lending client by the ready availability of funds and the collection commission on interest as ensuring the Nominee Company paid its way. With the demise of the opportunity factor now afforded by the ready

availability of funds and the inflexibility provided by minimum and maximum terms, the viability of a Nominee Company is now questionable. To remain competitive the neccessary increase in the comparatively low margins would only result in the loss of contributors, some of who already see other institutions rates and flexibility as being preferable alternatives.

If nothing else, the advent of the rules have made many firms address the profitability of their Nominee Companies far more than they otherwise might have. This has required a full analysis of the income and expenditure, requiring an estimation of the amount of time involved in operating the same, taking into account a debit for that portion of the audit fees attributable to the time spent in respect of the mortgage lending operations and an estimate of what portion of general and special levies paid to the fidelity fund should be charged against the Nominee Company operation and the professional negligencce insurance premiums.

In Practice

From the operational view point the new rules have produced a lack of flexibility, and a mass of paper and communication requirements which have greatly increased the overheads in managing our mortgage practice. They contain extremely detailed disclosure requirements and the procedures which must be followed on a default under a mortgage are more onerous and more strict. Whilst in the past we were readily able to swap the funds of one contributor with the funds of another in an existing security, the new Rules now require extensive disclosure and an up-to-date valuation on any such swap. The same is true of any renewal of a mortgage. All this is in addition to the fact that the provisions as to valuation are more stringent than previously.

We have had many clients recently who in the normal course of events would have rolled their two-year loan over but who, on being presented with the requirement of an updated valuation and other additional costs, have chosen to refinance at a comparative rate in the market place on what are admittedly more lfexible terms. Similarly we have encountered problems when a client wished to subdivide or sell off a portion of the land subject to our mortgage and in order to get a partial release the borrower is required to obtain a valuation of the remaining land and in some cases meet the additional cost, of the further reports that we must give our contributors.

In fairness to our borrowers whenever we have had a contributor wishing to withdraw funds before the due date we have politely suggested to the investor they should meet the cost of the new valuation. Again this has done little to endear a Nominee Company investment to them. The requirements in respect of defaulting borrowers are also onerous to the extent that we are required to advise our investors within 30 days of the fact of any default, something other lending institutions are not required to do.

One matter of significance that sometimes can be overlooked is that the Solicitors Nominee Company Regulations specifically relate only to an investment made in the name of the Solicitors Nominee Company. Neither those rules nor the Contributory Mortgage Regulations apply to a contributory mortgage in the name of the contributors alone where no offer is made to the public.

It appears to now be accepted that an offer to existing clients may not fall within the realms of an offer to the public. Accordingly, if I as a Solicitor arrange for two specific clients to lend in their own names to a third client then I am not bound by the regulations and nor, if I obtain a valuation from your firm, is your firm. Notwithstanding I would like to think that most firms would seek to have the same requirements fulfilled.

Where Do We Go From Here?

Any firm still running a Nominee Company has several alternatives, they include:

1. Streamlining the Nominee Company to the utmost, managing for profit. The success of this alternative would be almost entirely dependent upon the good will of the contributors who in many cases would presently find the rates offered below those that they would obtain 'on call' elsewhere.
2. To combine with other law firms ensuring professional management.
3. Link with the financial service industry itself, as an example in Southland most solicitors have close links with the Southland Trust Bank and the Southland Building Society and much of their investment funds are channelled into those two organisations. Similarly most borrowers presenting to solicitors are directed to either one or other of the two organisations. Companies like Dominion Mortgage Services Ltd are actively advertising in professional publications seeking investor funds.
4. Trustee Company. The New Zealand Guardian Trust Company has a group investment fund to which investment funds can be channelled. This could provide a basis for reciprocal business and borrowers can be referred as well.
5. Mortgage Unit Trusts. These promise to provide a flexibility that is otherwise lacking but the current economic climate and the fact that there are already 208 unit trusts in New Zealand does not guarantee success or ensure that any such launch would be successful.
6. Use financial planning to offer clients other more diversified forms of investment.

Valuations

As many of you would be aware if a valuation from a registered Valuer is obtained for Nominee Company funding it must be as atadate no later than four (4) months before the date upon which the statement is given to the investor. The Solicitors involved though have the option of relying on a registered or Government valuation not older than one year or in the case of special authorities, such other information as to the value of the security as in the opinion of the practitioner will enable the investor to reach a decision as to the nature and adequacy of the security.

In our experience this discretion has rarely been exercised. In exercising it we only expand the investor's reliance upon our professional judgement into an area where we have no expertise. If the discretion is exercised at all it is only where:

1. It is not anew advance on the subject property but rather a rollover.
2. More than one partner of the firm is fully conversant with the property, the mortgagor and his/her business (if any).

The *Kendal Wilson Securities Ltd v C T Baraclough* (1986)1NZLR 576 decision is a timely reminder to our profession that obtaining a valuation within the four-month period is suffice to remove all responsibility from our doors. Lawyers are generally not bankers trained to assess cash flows or to make advance assessments. Our firm is fortunate to have as our Nominee Company Lending Manager a former Bank Manager who is a qualified Accountant. All applications are first vetted by him and thereafter submitted to a partner sub committee of two. None of us would deny the objectivity and expertise he brings to such an assessment. I might add at this stage that he has not been inundated with applications as in our view most loan applications should currently be able to obtain as good if not a better deal in the marketplace. If they can't, then unless there are

very particular circumstances, we shouldn't want any part of it. I am aware of some firms who still operate as a lender of last resort placing scant regard on factors other than the security margin and the need to process investor's funds. In our view their attitude is short-sighted and dangerous. On several occasions we have gone so far as telling prospective lenders that we could not advise them to use Nominee Company funds despite the accumulation of available funds.

What are the Specific Differences We Have Noted?

Initially I could, tongue in cheek of course, suggest it is reassuring to see stated in your reports the obvious your independence! Having said that I can state that the fuller content of the reports have further assisted us in assessing loan applications,. there is no doubt that the matters contained in such reports enable us to be in a more informed position from which to assess a loan application. Of particular assistance is:

1. Details of the encumbrances and their relevance.
2. A record of the specific assumptions used in completing the valuation.
3. Where relevant, a statement as to the income producing capacity of the property.

The last requirement, can in many cases, be of particular assistance to us and I believe should be included in such valuations. It obviously provides us with an independent and objective view point of the property's earning capacity. Often it will raise matters that were not provided by the borrowing client or were not clearly ascertainable from his accounts. In relation to commercial property and farms it has obvious relevance. It also appears to be a logical extension of the valuer's role and an important part of the valuation process. It conjures up though some interesting possibilities, several of which could be considered to be more in the realms of project analysts or human resource consultants. This extension of the valuer's role can be compared to a recent High Court judgement relating to a rent review for a commercial property where the Judge indicated that the relevant factors to be taken into account on a rent review could include having regard to the profitability of the tenant's business. Obviously this extension to the matters that are relevant will increase the level of responsibility taken by your profession and the need to possess the skills to provide them.

The requirement to detail the assumptions used in completing the valuation is I believe one of your greatest safeguards. It is particularly relevant when giving a statement as to the amount of income that can reasonably be expected under conditions prevailing at the time. It also has some specific relevance if any of the encumbrances are to be released or replaced. If any matter is incapable of verification but has been a factor taken into regard by you then I believe it is imperative that it is included in the list of assumptions on which you proceeded. For the same reason I believe it is important that you receive your instructions in writing and that in some cases you should possibly have a set format on which those instructions are to be completed or that you immediately send a letter confirming the same. This could be particularly relevant where you are required to comment on the productive capacity of the land and there is no relevant financial data on which you can base your assessment. Again note that under the solicitors Nominee Company Rules you are only required to comment on the income producing ability of the property if it is within your knowledge that the property is proposed to be used for producing income. If you have been told it will not be then this should be clearly stated.

The other obvious information to be contained in the report is the opinion of the valuer as to the capital value of the land free of encumbrances and the recommendation as to the amount for which the land provides adequate security for a loan on first mortgage free of encumbrances. From our point of view this has removed the previous two-thirds rule. The same of course is true of trustee investments where trustees now are entitled to rely on a valuation that states the maximum proportion that the value considers it would be prudent to lend on that property. It has been interesting to note that in reviewing the various recommendations we havereceived it appears that all of them have fallen well within the two-thirds ratio. If the rules and regulations were intended to promote caution they appear to have been effective. Speaking as a lender, this can only promote confidence. Speaking on behalf of a profession who do not consider lending to be their prime task, it is reassuring to know that we are receiving such a service.

The Impact of GST & Other Tax Considerations in Property Valuations

Times have changed. When we used to prepare agreements in respect of land and buildings we were only ever required to specify values for chattels, plant and equipment and the purchaser only had to pay the contract price. Now thanks to GST, changes to the stamp duty legislation and other tax changes there seems no end to the values that must be specified.

I am aware that your profession has made lengthy and strenuous submissions to the Government of the day in respect of the problems created by GST on property transactions and its effect on your ability to accurately assess a property's value. When one considers the legislation this is inevitable. If GST were payable (and thank God it's not) on all property transactions on the whole of the purchase price your profession may have been better able to accurately assess its full effect.

GST

As it stands there are many circumstances that must be considered before it can be determined whether GST is in issue and if payable, on what proportion, namely:

Are one or both of the parties registered?
Is the property used for residential purposes?
Is only part of the property used for residential purposes? Is the supply an exempt or zero rated one?

Whilstmostofthese matters can be covered in the agreement for sale and purchase prepared or perused by solicitors, or in negotiations between the parties and their advisors it can be difficult to accurately translate the particular circumstances onto the standard Notice of Change of Ownership which we thereafter are required to forward to Valuation New Zealand for your eventual use. That notice asks four questions:

1. Did the gross consideration include GST?
2. What was the gross consideration including GST?
3. Value of land and buildings including GST?
4. Chattels value.

In respect of any residential dwelling unless it has been sold by a developer who is or should be registered for GST purposes, the answer to the first question will be no, the answers to (2) and (3) will be the same and (4) will be as set out in the agreement.

How though can the relevant particulars be accurately translated where say the price is described as including GST but the vendor is not registered and the purchaser is. Inevitably the purchaser will, if he is able, claim back one ninth of the purchase price. The notice is obviously inadequate to record that sort of information and indeed the vendor's solicitor would be unable to accurately provide such. Consider also the situation where the vendor was not registered but should have been, the price is plus

GST and sometime later after a GST audit the vendor is deemed to be registered and thereafter has its hand out for the GST that is contractually payable.

Tax and Stamp Duty

With the advent of depreciation recovered on buildings falling into the tax net from the29 July 1988, it has been prudent to place values on the respective commercial buildings in addition to the chattels, plant and equipment.

From the vendor's point of view these values will inevitably be as close as possible to his book values. For some time we have been required to place values on dwelling houses and their immediate surrounds (not exceeding 4500m2). You may ask what real benefit or assistance is that to the valuer? In almost all cases the values set will bear more relevance to the appropriate book values or the GST cashflow implications for the purchaser, than reality.

All of these factors mean that in many cases the details of the transaction contained in the Notice of Change of ownership will be of little assistance to you and further enquiries will have to be made. This inevitably is going to be easy in the smaller centres where the property and players are well known and the relevant information can be sourced.

Land Tax

As you will be aware as from 31 March this year, land tax is payable on land having a land value in excess of $10,000 only, (rather than the previous thresh hold of $175,000). Whilst this may not affect many in the larger centres, it has had significant ramifications on the local scene where many property owners and/or their tenants have now been pulled into the net. The sudden imposition of land tax has left many tenants and landlords scampering for their leases and details of their last rent review to determine:

1. Whether any such land tax is payable by the tenant.
2. Whether the fact that the landlord/tenant would or would not become liable for the land tax within the period subsequent to the last rent review was taken into account in assessing the new market rental.

A recent case in the Dunedin High Court has confirmed that a general charging clause in a lease making a tenant liable to pay "all rates and taxes whatsoever which now or which during the said term shall be rated taxed charged assessed or imposed on the said land payable by the tenant..." includes land tax even when it was never envisaged at the outset of the lease that land tax would ever be payable in respect of the subject property.

As a consequence we have noted that, not only are prospective purchasers ensuring that settlement does not take place before midday on 31 March in any year but also their checking that the lease squarely places any such land tax liability on the tenant or that such liability was taken into account on the lastrent review. A

THE 1990S: A BANKER'S VIEW

Riding the Roller Coaster

by K J Connell

In September 1987 our family travelled to Australia for a holiday. While we were there my son talked me into joining him in a ride on a roller coaster. After the initial reaction, which was probably more fear of the unknown than anything else, the experience was one we enjoyed to the extent we repeated it later on the same day. That evening I was asked, "Was that the first time you had been on aroller coaster?" to which I replied, "Yes". With hindsight, my answer was incorrect.

I moved to Taranaki in the latter part of 1985, a year that had seen the completion of some large energy projects in the province. A large company with whom I had a banker/customer relationship had been employing in Taranaki some 700 people in mid 1985; when I arrived they had less than 25 people in the province.

House prices had been, and were, continuing to decline; local businesses, who had spent much of 1984 and 1985 talking about what would happen when the large work force left the province for greener fields or their next project, were starting to experience declines in turnover.

Those businesses spoke about the declining value of their operations, but were slow in doing anything about it. While all this was happening, the wind of change was blowing through the rural sector and, for those of you who are based in provincial and/or rural areas, I don't really need to tell you what happened to land values, stock values and a host of other things from the front door of the farm house to the very centre of retail trade in surrounding areas.

So looking back, as a lender, I actually stepped onto my first roller coaster in 1985. I had no idea of the fluctuations in values one would experience, nor the speed with which some of these changes would occur.

By mid 1988 I sensed the roller coaster was moving to more even ground. My employers then offered me the chance to return to Auckland. I took up that offer which has resulted in my continuing on the roller coaster ride with the only real change being the scenery. I now observe that city properties, both

residential and commercial, and city-based businesses and their related fixed assets, change in value at sometimes frightening speeds. There are market forces in play at the moment that lead me to believe the roller coaster ride has still a period to run in some locations, and that both lenders and valuers have a responsibility to use common sense and good professional judgement in their work.

It is with this background that I express my thoughts in this paper, not only about some of the things that have happened over the past four to five years, but also about some of the things I personally consider we should be examining right now in light of recent experience.

Some people have been good at riding the roller coaster and have emerged not only unscathed but quite successful. Other people have survived, but were not well prepared when the ride began and suffered some bruising as a result of their experience. Fortunately many of those people are, in my opinion, now fitter, healthier and wiser, even though they may not volunteer that fact. There have been, of course, some casualties.

As a lender, the past few years have been ones of widely contrasting fortunes. If you fell into the category of a banker willing to make a loan only if you present sufficient evidence to show you don't need it, then you will have had some uncomfortable moments, and maybe some losses on your books from subsequent events.

You will think about that successful business person who came to you in 1983 or 1984 and pointed out he was generating surplus cash. He suggested he should diversify, probably for tax reasons, although he would never admit to that being the key factor in his decision.

You helped him with a loan and away he went and purchased that kiwifruit block, or a few head of deer or purchased another commercial property for which you loaned him 75 per cent of the purchase price, or purchased another business which he planned to dovetail into his existing operation.

If you were an investor in the provincial or rural areas it did not take long before the wisdom of your investment became apparent. The kiwifruit prices stopped increasing and, even worse, started to decline while, at the same time, your costs were continuing to increase.

The value of the land from which the fruit was growing reacted accordingly and, of course, that was your security. The bottom fell out of deer prices, one of the tenants in your commercial property went into liquidation and debt servicing now exceeded rental income, and that new business well life became so tough in your existing line of business that you had no option but to concentrate on that and the new business went downhill fast.

Being the conservative lender that your are, a decision was probably taken to sell or reduce the investment in some way; a restructuring of the borrower's total debt was made, leaving him in a relatively tight but manageable position for a few years. You have had some nervous moments, even sleepless nights, as some of those borrowers were friends and respected members of the local community, but fortunately your borrower was sound and it was that strength that helped you both through.

If you were a lender at the other end of the spectrum, some would now describe you as a pawnbroker with great imagination. After making those loans, all of which would probably have been more highly geared than the previous lender I was talking about, the roller coaster really took off. It was not just one loop, it was two or three probably mixed in with a fast straight, a sudden dip, a curl or a twist.

You quickly came to realise that asset values could halve in a very short space of time, while the liability recorded against them did not shrink one dollar. Even worse, the ability to service that loan had changed and the liability was now increasing. A number of lenders also came to realise that the balance sheet item known as `goodwill', `key money', or whatever one likes to call it, could actually move from being an asset to becoming a liability.

Our lender, who probably was wearing braces or a belt, had his hands in his pocket and a smile on his face when the original deals were signed, is now, some two to four years later, standing on the breakwater at Port Taranaki.

His belt or braces have gone- they were used to try and save one of his other deals and he is hanging onto a post at the end of the breakwater as he fights a wind that has been changing direction, and is cold and strong. Everything feels as though it is lying around his ankles and,to make it worse, the media have learned of his plight. Their headline that morning read, "XYZ Bank forced to move on ABC Group of Companies". The reporter says, "Why?". The banker replies, "It was those valuers. They gave me a report saying the assets were worth lots of money, but they weren't."

Now, before anyone thinks this is about to turn into an attack on valuers, let me assure you it is not. I am going to say that both your profession and mine have had members, fortunately small in number, who could at best only be described as `bad apples'. I only hope we have both been successful in identifying those `apples', and then getting rid of them.

I could probably give your numerous examples of problems that bankers have had to face as a result of assets changing value but that would serve little purpose. As a quick comment, I have learned, or had reconfirmed, two things out of my roller coaster experience to date, viz

a. Don't panic. When you suddenly realise the market has changed and your position is now weakened or, even worse, you are now exposed to a cold wind, take stock quickly but carefully before you act.

b. D = M2. Once you have quickly and carefully assessed

the position and made a decision on a course of action, then go and do it as quickly as possible. The longer you delay your action the bigger mess you will have on your plate or the more money it will cost you. Hence my D = W. If you doubt that theory, ask some of my colleagues and competitors in the finance sector for their truthful comments.

I would now prefer to switch attention to some of the matters I personally would like to see addressed in the 1990s.

There are probably two things we can be certain about in the 1990s. Firstly, change will continue. Next month will be different from this month and 1991 will bring us different problems and challenges from those we are facing in 1990. We must both learn to cope with that change more efficiently and more effectively.

Secondly, risk will continue to be present in our respective industries. Given the events of the past few years, I am sure there are many valuers and lenders who would like to see a risk-free market place, but that is a dream.

The markets in this country, and many others, were built on risk and we therefore shouldn't knock it too much. I would prefer we both locate a way of assessing that risk more accurately so that it can then be managed more efficiently and effectively.

Consider the effects of change. Whether we like it or not, the deregulation that came into the market places following the change of Government in 1984 forced us all to not only consider what we were doing but how we were doing it.

If we take the rural sector one of the first to feel the wind of change it was music to one's ears to see valuation reports come onto one's desk that related the value of the property back to what that property could produce for the owners. Being a banker and spending a lot of my time dealing with the working capital positions of people and businesses, I am vitally interested in the cash they generate either as individuals or from the assets they own and operate.

Your valuation gives me an indication of the wisdom of the investment someone has made, or is wanting to make, and furthermore that helps me assess the return that is being made, or can be made, from that investment.The more up-to-date and therefore more accurate your valuation is, the better balanced my decision should be.

If I am relying on a valuation that has been prepared from out-of-date information then my risk factor must be increased. I am not looking for a totally risk-free proposition but, because I am lending money customers have deposited to customers who want to borrow, I am very interested in bringing the risk factor to the lowest level while still doing the business so that it is profitable to both borrower and lender.

In the area of residential housing, I consider the time lag between your valuations and the market position is, generally speaking, so small there is not really a problem. This probably stems from the better data base you work from, the data base being bigger than the other sectors you work in, and one with the largest number of transactions.

In the rural and horticultural sector, the time lag or gap between your valuations and the market position is much greater.

This is where my frustration starts creeping in. I don't expect you to be right up with the market, but my training and logic suggests to me that if prices for produce or products increase or, more importantly, decline over a period of time then I would expect to see some alteration in the values coming through rather quicker than they do.

As a lender, we are often experiencing at first hand the property owner's cashflow and, because of this, we are in a position to sense a change in values some months before they come through. I am not saying lenders should become valuers-no, that would be disastrous.

Lenders need an independent body such as yours to help us "see the wood from the trees". But I do wonder if your body cannot gather in some of that information, which we as lenders see and gather in, and include it in the formula you use when you are preparing a valuation.

Perhaps the example I am now seeing most frequently, and the one that causes me to ponder longest, is in the commercial property sector.

To make an extreme statement- if only to make a point-why does it take one or more tenants in a building to close their business down, either voluntarily or forced, before it is accepted that rents have been set on an out-of-date valuation? Let me give two simple examples.

The first was in New Plymouth. A central city location with six tenants. The two-yearly rent review was due. To help him assess his position, the landlord employed a firm of valuers to assess a current market valuation of the property. (I should add here the valuation was not undertaken by a Taranaki-based firm).

The valuation was completed and then used as the basis for setting new rentals (+80%). The first I knew about the proposed rent increases was when two of the tenants, who were customers of the Bank, approached me for advice. Both said, "you know our position. We are trading profitably and earning a modest living for ourselves. This proposed rent increase will put us in a loss position."

We looked at a number of options - increasing selling margins, reducing other costs but the retail market was flat and those options were just not practical. I therefore suggested both parties should take a copy of their latest Profit and Loss Statements to the landlord and attempt to negotiate an unchanged rental.

To cut a long saga short, the landlord said he had a current market valuation and the trading positions of the tenants had no relevance. The net result was that two businesses closed down, two businesses relocated to much less expensive premises without any material loss of trade, and the remaining two stayed on. Three of the four premises remained vacant for many months.

The landlord, in my opinion, was the principal loser, but I am left wondering if the outcome would have been different if the recent trading positions of those businesses had been included or reflected in the formula used when preparing the valuation.

I am very sure in my own mind the two businesses who relocated did so solely because of the landlord and his insistence on the valuation being a current market one. The rental increase was the major factor in the two businesses closing their doors.

There were several losers in that case, and again I wondered if the most recent data had been used in the valuation formula. I had seen the rural downturn affect New Plymouth retailers and businesses for over 12 months prior to the date of that valuation. There were many sources of information in the city that could tell you sales or turnovers were down, gross profits had been squeezed, a lot of businesses had cut costs but net profits had declined and in many cases were hard to come by.

My second case is very similar. An Auckland suburban-based business that had been operating for over 30 years. Profitable,well managed and fortunately soundly based. The

sharemarket crash had quite an effect on the business. Turnover fell by over one-third; gross profit, which had been very consistent at 32%-34% for many years, fell to 21% in the 1988 year.

Late 1988 a rent review came due. The landlord obtained a valuation and my customer received notice of a 100% increase. Some nine months later they agreed on an 80% increase. My customerknow what he was going into when he signed the new lease as by then the sharemarket crash effects were being felt hard and cold. He was a very proud person and was going to give it his best. He recovered his Gross Profit to 25%, contained costs well (excluding rent) but, when we sat down with him last month, we calculated that, even if he had not been borrowing any money whatsoever, the business would still not have been profitable.

Rent was his largest overhead, it even exceeded wages and the proprietor's salary or drawings, which I might add were only $21,000.

The shop is now in the midst of a closing down sale. There may be the usual arguments over the lease as it still has four and a half years to run but again I am left wondering.

There were lots of factors in both cases that one could argue had an effect on the end results. I accept that, but in both cases the changed business conditions had been evident for many months before those valuations were prepared.

Some of you are already including more up-to-date data in your valuation reports, but the majority by far of the valuations crossing my desk are not reflecting those changed conditions quickly enough. I believe a more up-to-date valuation report must allow parties to handle today's environment in a more efficient and more effective way. If that happens, we all benefit.

Service, quality, professionalism we hear those word a lot these days. Like you, we are in the service industry and we certainly know that our client base is demanding quality. I would be dumbfounded if your client base is not demanding the same. I admire and respect your profession right now.

I am suggesting, as a lender but very much a layman when it comes to your field of specialisation, a possible way of improving the quality level of your reports. If anyone takes those extra steps I believe lenders in New Zealand will respect you for your quality, service and your professionalism. That roller coaster will not seem so daunting after all. A

by J G Gibson General Secretary

ARBITRATION LAW "PERIMETERS AND PARAMETERS"

Papers presented at a one day seminary organised by the Legal Research Foundation Inc in Auckland, September 1989, price $25 including GST.

This small publication of some 102 pages (A5) is of interest to valuers and arbitrators for it was presented in conjunction with the Law Commission's review of arbitration law. (The Law Commission's paper No 7 `arbitration' was considered by the NZIV and submissions made thereon by the Institute).

The publication consists of five papers and foreword.

Paper 1 Hon Evan Prichard, "Interface Between Arbitration and the Courts"

Paper 2 Professor A K Paterson, University of British Columbia, "Judicial Intervention in International Commercial Arbitration in British Columbia"

Paper 3 Patrick Brazil, Consultant to Macphillamy Cummins & Gibson, Canberra, "The Australian Perspective"

Paper 4 - Thomas Kennedy-Grant, Barrister, Auckland, "Regulation of Procedure and Enforcement of Pre-Hearing Orders"

Paper 5 - Professor R G Hammond, University of Auckland, "Joinder, Consolidation and Remedies

All papers are of interest to the profession but the contents of papers 1 and 2 were the most relevant and informative.

The papers overall provide a useful reminder of the principles involved in arbitrations, and a pointer to `directions' in which the arbitration profession and law are moving.

A HANDBOOK ON THE APPRAISAL OF PERSONAL PROPERTY

Published bytheAmerican Society of Appraisers, 1989, PO Box 17265, Washington DC 20041, USA.

The foreword to this text states:

"This book was produced to serve as: 1) an instructional guide toward the development of appraisal skills for the beginning appraiser; 2) a reference book for the practicing appraiser; 3) the policies and standards statement of the International Personal Property Committee of the American Society of Appraisers, and 4) a useful guide for connoisseurs, attorneys, governmental agencies, insurance companies, museums, et al, who have use for professional appraisals.

It includes new and selected articles reprinted from *Valuation* and from *Appraisal and Valuation Manuals,* published by the American Society of Appraisers."

Divided into five parts as follows:

-principles of valuation
-professional practice
-policies of the International Personal Property Committee of the American Society of Appraisers
-a selection of articles on Aspects of Personal Property appraisal
-about the authors.

The text outlines for the reader the principles, practices and policies underlying the appraisal of personal property.

The selection of articles on `aspects of personal property appraisal' covers such matters as appraisal for insurance purposes, identification of personal property (by marks, modern

techniques such as x-ray imaging etc), appraisal of furniture, photography, manuscripts and other items of artwork, and jewelry.

The chapter headed "Theory and Principles" is worthy of consideration by all appraisers. It covers background information and sets out the "valuation process chart", ie defining the appraisal problem, planning the appraisal, identification of the subject property, data collection, application of appropriate value estimation techniques, Reconciliation and Final Value estimates, value conclusion, the appraisal document.

With the valuation of personal property, as with real property, the identification of the subject property is critical. This section of this chapter makes most informative reading and the principles developed here are clearly seen in the following chapters containing the articles on aspects of personal property appraisal.

The book is clearly for the specialist and is written in the American context as it includes a section on legal guidelines for appraisals. Comments made in this section nevertheless have some international application for all valuers.

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NEW TEXTS ACQUIRED FOR NZIV LIBRARY

Reviewed by General Secretary

With the widening of the base of membership and the increased sphere of practitioner activity, the NZIV has acquired two further textbooks for the NZIV library in the National offices at 181 Willis Street.

Both texts are publications of the American Society of Appraisers, an international non-profit organisation established in 1952, that promotes education and the exchange of ideas, amongst those with an interest in valuation.

The first text *Appraising Machinery and Equipment* is the set text for the Society's educational courses in "Machinery and Equipment Valuation"; the second text A Handbook *on the Appraisal of Personal Property* is also published by the American Society of Appraisers.

Appraising Machinery and Equipment is published by McGraw Hill Publishing Company, sponsored by the American Society of Appraisers. Our review text was published in 1989. Price USD $27.95.

A Handbookon theAppraisal ofPersonalProperty was also published in 1989. Price USD $24.95.

Both publications are available from: The Publications Manager, American Society of Appraisers, International Headquarters, PO Box 17265, Washington DC 20041, USA.

The Society also publishes a range of monographs and journals, chief amongst which is "Valuation" and which is held in the NZIV library.

Appraising Machinery and Equipment is a 200-page text of 14 chapters, each contributed by a contributing author and member of the ASA. Each chapter has a useful "conclusion" and review of the chapter contents.

The chapters are arranged under the following headings:

Chapter One: Valuation Theory and the Machinery and Equipment Appraiser. This chapter discusses value, concepts of value and concepts of property.

Chapter Two: Classification of property, discusses the definition of real estate, personal property, intangible property and effect of state laws.

Chapter Three: Deals with Identification of Machinery and Equipment. Two classifications or levels of identification are discussed "macroidentification" and "microidentification".

Useful "checklists" and explanatory diagrams (based on an "oil rig" and "milling machine") are given to assist the reader. The chapter includes a useful bibliography.

Chapter Four: Purposes of Appraisals deals with the client (and their requirements), types of valuations.

Chapter Five: Considers Replacement Cost New Concepts, and discusses definitions of replacement cost, determination of replacement cost, information required in a valuation exercise, trending cost data and components of replacement cost new.

Chapter Six: Sources of Pricing and reference material, discusses the sources an appraiser may turn to for basic data. A useful bibliography is included with this chapter.

Chapter Seven: Depreciation theory, discusses at length the theories of depreciation as they apply specifically to the appraisal of machinery and equipment. Discussion includes sections on "condition", "obsolescence", "market data approach", accounting methods of determining depreciation.

Chapter Eight: Is concerned with fair market value concepts; and considers the three `traditional' approaches cost, market, and income. The first two are discussed at some length, together with examples showing determination of cost, effective age, physical condition, some examples of appraisals, obsolescence, valuation using market approach. The income approach is not discussed in depth. A useful review/summary concludes the chapter.

Chapter Nine: Considers Liquidation value concepts and discusses definitions, market knowledge required of the appraise, methods of valuation, final correlation of data and conclusions.

Chapter 10: Discusses Insurable value, whilst Chapter 11 deals with Scrap/Salvage value.

Chapter 12: Is concerned with value-in-use versus value-in-exchange. Definitions of each are given, their relation to liquidation, market and replacement cost concepts.

Chapter 13: Discusses Appraisal Report content - the minimum requirements of an appraisal report, and the considerations that go into completing the report. It includes discussion on the identification of property, description of the machinery and equipment, use of detailed inventories of machinery and equipment, use of photographs, etc.

Chapter 14: Is simply entitled "Ethics" and may well have been written with regard to the Code of Ethics of the NZIV.

A useful and comprehensive index concludes the text.

I found this text easy to read and straightforward in its explanation and discussion.

A word of warning: definitions and terms and practices should be read in the New Zealand context and having regard to the NZIV Asset Valuation Standards, particularly but not exclusively, GN10 and BP10.

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Compiled by Leonie Freeman

Computers and Their Implications for Property Management

by L Freeman

omputers. For some people they may have become one of their Company's greatest assets and they would now wonder how they ever managed without it. For some others, however, computers have disrupted their organisation, costa lot of money and set back the progress of their business considerably.

In the reality of today's business world, computers are increasingly becoming a standard and accepted part of an office practice. It is something that business professionals at all levels are having to contend with.

Computers can play an extremely important role in the successful operation of an office practice, and there are a number of key areas in which they can be utilised. In this paper, I propose to discuss the following points:

i) The three essential components of a computer system
ii) Applications of computers in your office practice
iii) Important factors to consider when contemplating the purchase of computer programs, systems or hardware.

1. Components of a Computer System

A computer system comprises three basic and interlinking components:

a) Software - these are the programs or applications which you use. Examples of these include word processing packages, accounting systems, spreadsheets, etc.
b) Operation System - this essentially is the system which runs the individual programs. It is the link between the box and your application such as Lotus.
c) Hardware the hardware is what you can see, ie the box including the monitor and the keyboard. This also includes the peripherals such as printers and terminals attached.

All of these three components are essential, and you cannot run one without the other. All three are also important and key considerations for the successful operation of a computer system.

2. Applications of Computers in Your Office

There are a number of key areas for computer utilisation in your office. Word processing applications are perhaps the most common. There are a large number of "off-the-shelf"packages available which in combination with high quality printers can produce reports and documents of a very high and professional standard.

Accounting is another application which has been computerised in a large number of office practices. This is an area where again the mathematical and more repetitive tasks can be accomplished effectively by a computer, and usually with less error.

Levnte x'teetnan is a Registered Valuer with Darroch ti based in Auckland. She is an Associate of the NZN with a Masters Qf Commerce (First Class Honours) majoring in Valuation and property Management from Lincoln College. Leonie *heads Dar-'rxxhResearch inaddition tobeing responsibtefor arecentupgrade of the computer and information systems within the company. She is involved* with *the Institute on both the National Education and Editorial Boards, and has been* the Research *Consultant to the Real [Estate Institute for the past two years.*

Thispaper was *presented at the Property Management Institute Seminar in Christchurch* inA ugust 1989 *as the introduction fortheirI nar on Computer Applications for Property Management. The ��ninar comprised a number of property management and other associated property systems being displayed and discussed,* as well *as the ability for members to try the programs in a hands on capacity*

Applications which are of most interest to everyone here today are, of course, property management and other related applications. The information associated with the property industry is an area in which computers can play an important role. Whether you are managing, valuing, selling properties or have some otherrole, you are dealing with large amounts of data in conjunction with a changing marketplace. Information for regular reviews, updates or management and analysis are required quickly and efficiently.

WORD PROCESSING

PROPERTY SYSTEMS

-Database
Property Management Systems
Vaipak
Provides
In-house Systems

-Spreadsheet
Customised Models
Budget Analysis
Graphics

ACCOUNTING

a) Data Storage and Retrieval Applications

Therefore the first major area for consideration is data storage and retrieval applications.

i) Property Management programs or systems can be included in this category.
Some of the general requirements include being able to easily search for specific information on individual ten-

ancies or properties. You want to be able to effectively manage the cash inflows or outflows of each property, and be prompted in advance when rent reviews and other events are due. In addition, and something which owners are increasingly expecting from property managers is the ability to illustrate how the investment is performing. An appropriate property management program that suits your particular office requirements can be extremely effective and efficient. I don't propose to detail specific programs further as they can be left to the demonstrators here today.

ii) Other database type applications include sales retrieval. The major one used in New Zealand is sold by the NZIV called Valpak. For those that currently don't have it, a fortnightly disk arrives from the NZIV containing the latest sales. On your computer you have the ability to search specific criteria, such as all the vacant industrial sales in he Birmingham Drive area since January 1986 greater than $100,000. Your selection criteria can be as general or specific as you like.

iii) Valuation New Zealands' "Provides" is an on-line link which enables you to obtain a range of property information including sales data and government valuations. This system is different to the above two in that the relevant information is not stored on your own computer, but instead you "dial-up" Provides and get the information. You therefore pay for the time you are connected.

iv) There are a variety of applications which can be covered by an in-house database. These include such things as a database for storing and retrieving in-house rental information, sales which you have analysed, historical performance of rent and capital growth and the like. In a slightly broader context, uses such as mailing or client lists can be developed.

Databases can be used and adopted for areas where you have information which you want to store, process and then query and retrieve to aid in your current task or job. They can be extremely powerful and are something, I believe, have not yet been used by the property industry to anything like their full potential.

b) Spreadsheets

Most of the database type applications discussed above are generally applications you would buy or get somebody to develop for you. Spreadsheet applications are extremely powerful and useful and after some training are something which can be done within your office. The uses are numerable and limited only by yourself or your imagination.

One basic illustration of this is a budget for a building where a template could be set up and used for a large number of buildings in your management portfolio. Calculations are done automatically so you can easily see what would happen to your cash flow if your figures changed or occurred in different periods. With the basic information available on the spreadsheet, it can easily be amended for use next year. This is very basic and simple to setup, but even with this example you may appreciate some of the spreadsheets' benefits and potential use.

There are a number of spreadsheet programs available in the market. The most common is Lotus 123. Others, however, include Multiplan, Supercalc, Symphony andExcel. Theyrange in their sophistication but can provide a very important management tool.

Database and spreadsheet applications are the two major areas of computer utilisation concerning everyone here today. They can have significant benefits to your office the extent to which the systems are used is up to the individual practice.

3. Factors to consider if purchasing new programs, systems or equipment

The third area for discussion is to outline some key factors which, based on my experience, I consider important when contemplating the purchase of computer programs, systems or hardware.

i) Find out what you want

Before you even speak to a computer salesperson evaluate your current system, whether this is a manual system or a basic computer use. Logically think through the process, and think how these systems will fit into and impact your office practice.

ii) Decide on the types of applications you wish to use

If you are setting up a new system, decide on the software first. That is, the type of word processing program which best suits your operation. If it's a property management system, you are wanting to ensure it will do what you want. Take some of your own examples and try them extensively before you buy any program. It is important to fully evaluate prior to purchase. It is too late afterwards.

If you already have an existing system, ensure that any potentially new programs will word adequately on the computer, in addition to the above. Check you will still have enough space and memory on your computer to run effectively.

iii) Decide on the operating system

This is usually determined based on the software you have chosen. DOS is the most common system but there are others depending on the use that you require.

iv) Select the hardware

The actual computer is the final decision in the above process and the selection is extremely wide. Numbers, size of hard disk and amount of memory is based on the expectation of use. One thing I have seen is that the use of the computers increase exponentially once people are confident in their own ability. Allow for this otherwise in a relatively short period of time you may find your new system inadequate.

v) Support

Ensure you are fully aware of what support will occur if something goes wrong with your software or hardware. Find out the level of support the company will offer. Decide whether you want a maintenance contract and then ensure you have an understanding as to their response time, whether you get a replacement machine if they can't fix it and whether they will come on site or if you have to drop the machines off. You may think the cost of the computer equipment and programs is expensive, but it is nothing in comparison to what it will cost your business if your system is down for a few days while being repaired. This is an area again, which is sometimes forgotten when buying equipment but it is something I can't stress the importance of enough.

vi) Company stability

Company stability ties in with the previous point on support. Don't necessarily buy the cheapest computer from the local comer store. This firm may go out of business. The turnover in both computer people and firms is extremely high and you want to purchase your equipment from someone who can service it and provide backup.

Find out about the financial history and situation of the firms you are buying hardware and software from, and ensure they

will be in business as long as you are planning on being in business.

vii) Training

Training is essential to encourage people to use the new systems. A systematic approach to this is essential. Find out if the people who sell you hardware or software can provide adequate training. Remember the system will only be as good as the people that will end up using it.

viii) Software development

Programs which will cause you the least problems are of course ones purchased "off-the-shelf". These have been tried and tested and any problems have usually been solved.

There are more problems associated with getting something developed. However the type of program you want may not be available, which means you may decide to get it developed by a computer programmer.

Apply the same criteria to potential programmers as when considering company stability and support. Ask the developers to see some of their previous work in place, speak to the end users at the specific firm and listen to their comments regarding factors such as ease of use, time to develop and response time to problems.

Be very clear in your specification at the outset if you want a system developed. Make quite clear who owns the program, what happens if it is a marketable commodity and long-distance support if you have other offices in alternative locations. Be specific in your requirements, performance of the system, when it is to be completed, who does training and how much, cost, progress payments, on-going charges, upgrades and maintenance. It is very easy to tell someone to develop a program and once completed you suddenly realise you really need another ten things included.

Costs then start to increase exponentially. Spend time on the specification initially. It will save considerable expense, hassles and time at a later date.

ix) Understand what you are being sold

If you don't understand what the computer salesperson is trying to sell you tell them to explain in plain English. If you are still unsure, discuss your proposal with an independent consultant. This may cost a small amount, but it is better to ensure that what you are being sold is actually what you want.

x) Keep to the standard hardware brands

Buy standard hardware. Buy brands that are common and that have some track record. If you don't you are likely to have increased problems further down the track.

xi) Spend time on the whole system

Allow time right through all the stages of investigation, purchase, implementation and training. All are essential components and if covered correctly ensure the success of your system.

Just remember, a computer system whether a stand-alone computer for a small office or a large network for bigger firms, is one of the most important investments that your business can make. The right system, properly implemented, can make your business more efficient and improve the service you can give to your clients.

However, a system which does not do things your way can make your internal administration a nightmare. Therefore it is essential to adopt an overall business strategy to your computer systems, be thorough and methodical in your selection of any program or equipment, ensure that it will work with your existing equipment, follow through on key areas such as support and training and regularly re-evaluate the company's position and policy with respect to the computer systems.

You may then become one of those people who wonder how they ever managed without their computer system.

Housekeeping Tips For Computers

ifh. ; folio i '; s pints'.: r.b�t fined frpm::>tI txr liter t� a azirt *In* a The.::> re::> rt of regular column providing lids' ofR iafine ; on wide rat};e of useful issues. Tilt faf►awit article focuses on Housekeeping issues rela[lo ur Cptt�puter.

Housekeeping is a term used in the computer industry to cover a multitude of tasks. In this column it is used to refer to the general care and cleanliness of your PC, its disks and their environment.

This subject is usually not covered during the purchase and supply of a PC and the final details are often left to the imagination or inclination of the operator. A routine cleaning procedure for your PC can be like servicing your car. You will get more mileage, and safer travelling.

The user guide manuals supplied with your PC, not the software manuals, should give you some guidelines as to the care and cleaning of your equipment. Have a look at these in conjunction with this column.

These are the seven basic guidelines that I would recommend:

1. No smoking (in BIG letters) should be pasted up in your computer room, office, cubby hole. Smoke can seriously damage your disks and computer.
2. Murphy's Law seems particularly relevant to computers, especially when food and drink are involved. Ban Food and drink around your computers and disks to prevent Murphy striking.
3. Monitor the temperature where the PCs are located. Like us, they need fresh air, so make sure that air is able to circulate freely around them. Don't place either your PC or disks in driect sunlight. A disk left in direct sunlight, in your car or on top of your PC, for any length of time, will be ruined.
4. Dust can be harmful to your PC. Keep the desk it is sited on wiped clean. Regular vacuum cleaning of the room and around the PC is vital. Be careful when using a vacuum cleaner around your equipment small parts and ribbons have been known to be sucked up on occasion.
5. Get a proper storage container for your disks there are numerous on the market. This will not only keep your disks in a more ordered manner but reduce the amount of exposure to dust or likelihood of some other natural disaster occurring.
6. Use cleaning products the manufacturer or supplier recommends to wipe over your equipment regularly.

It also pays to check your maintenance contract, if you have one, to see if there is any reference in that to any care that must be taken, in order to validate any free maintenance under its terms and conditions.

Finally, why not assemble your own housekeeping checklist now. Take into account operator reluctance, cleaners' timetables and performance, current workloads, and last, but not least, your desire to get the most out of your computer system for the longest possible time. A

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST
C.L. 112/88

BETWEEN BAY MILK PRODUCTS LTD
Plaintiff
AND THE EARTHQUAKE AND WAR DAMAGE COMMISSION
First Defendant
AND FARMERS MUTUAL INSURANCE COMPANYLTD
Second Defendant

Hearing: 24,26,27 April, 1989
Counsel: DAR Williams Q.C., B H Giles and G J Christie for plaintiff
E W Thomas Q.C., T Arnold and D Wilson for first defendant
W M Wilson and MR Sherwood-King for second plaintiff.
Judgment: 14 June 1989

JUDGMENT OF BARKER J

INTRODUCTION:

The judgment is concerned with the plaintiff's first cause of action against both defendants and the first defendant's counter-claim against the plaintiff. These claims were heard as the result of an order under R.418 made on 20 February 1989. The plaintiff's other causes of action may need to be litigated at a later date.

The exact nature of the issues to be determined will emerge later in the judgment; essentially, the Court is asked to interpret relatively confined provisions in both a statute and in an insurance policy.

Despite the narrow scope of the Court's current enquiry, the plaintiff filed voluminous affidavits and affirmations which caused the defendants (the first defendant in particular) to reply in kind. This evidence was wide-ranging in its scope. The Court-book prepared for the hearing numbered in excess of 1100 pages. In addition, theplaintiff's solicitors and counsel provided another large volume containing items relating to legislative history as well as two volumes of authorities. Most of the affidavit and affirmation material I considered largely irrelevant to the interpretation questions which I have to decide. The material certainly went far beyond the provision of 'background' essential for the interpretation exercise. Indeed, much of it was not referred to by any counsel in the course of argument.

I should have thought it possible for the parties to have compiled an agreed bundle of the essential documents relevant to the matters in issue without the necessity of preparing affidavits and affirmations replete with matters of marginal relevance to any interpretation exercise.

Brief cross-examination of one of the deponents of the plaintiff, a Mr Williamson, assisted me little in my quest for the correct interpretation of the statute and the policy.

The relief sought in both claim and counter-claim was a number of declarations. There is no agreement on the property declarations which should be sought, let alone made. There was also an application by the plaintiff for an order under S. 15 of the Arbitration Act 1908 referring the assessment of its claims to a Court-appointed referee.

The facts which it is necessary to record are relatively straightforward and can be summarised as follows.

The plaintiff is a co-operative dairy company, manufacturing dairy products at factories in Te Puke, Opotoki and Edgecumbe. It was formed as the result of dairy company amalgamations in the Bay of Plenty. On 2 March 1987, an earthquake struck Edgecumbe and Whakatane. Measuring 6.25 on the Richter scale, it caused extensive and widespread damage throughout the district. The plaintiff's dairy factory atEdgecumbe sustained severe damage to its processing plant and ancillary buildings. A nearby shopping centre and a motor garage, both owned by the plaintiff or subsidiaries, were also damaged extensively. All of the plaintiff's business enterprises were covered under an insurance policy issued by the second defendant.

As a result of the earthquake damage, the plaintiff claims to have suffered loss of the order of $153 million; this total is reached after including interest, costs and GST but deducting an allowance for betterment. The first and second defendants have thus far paid $32 million and $22 million respectively to the plaintiff. The plaintiff seeks the urgent disposition of this litigation because its business interruption insurance has now expired. It asserts that it has had to borrow money pending trial at a claimed cost of $1 million per month.

The plaintiff claims that it should be compensated for its loss, by the first defendant ('the Commission') to the extent for. which the Earthquake and War Damage Act 1944 and its amendments ('the Act') provides. At the point where that statutory cover expires, the plaintiff claims that the balance of its loss be met by its excess of indemnity insurer, the second defendant ('the insurer') under the "industrial special risks" policy. The second defendant is the `lead insurer' for several other insurers. Determination of the point at which the statutory cover expires is at the heart of the present dispute.

The plaintiff's insurance arrangements were made by a firm of brokers, Sedgwick International Limited ('Sedgwick'). The plaintiff's instructions to its brokers were to ensure full cover for the plaintiff in the event of, inter alia, an earthquake. The plaintiff required cover for three dairy factory sites - ie at Edgecumbe, Opotiki and Te Puke the shopping centre (the Riverslea Shopping Centre at Edgecumbe) and a motor garage and fish shop (McKenzie Conway Motors Limited).

On 27 May 1986, Sedgwick dispatched to the Commission certificates of indemnity value relating to the Edgecumbe factory, the Riverslea Shopping Centre and McKenzie Conway Motors. The certificates were permitted under S. 14(2A) of the Act which will be discussed at length. These certificates were given by a registered architect, an approved certifier in terms of the Act. The certificates referred to `attached schedules' which put values on the main items of plant, buildings and machinery as at the date of certification. The schedules included a figure for expected inflation over the course of the 12 months' cover. The certificates and schedules were returned approved by the

Commission on 29 May 1986. Certificates for the plaintiff's other main properties the Opotiki and Te Puke factories were not sent by Sedgwick to the Commission until 29 august 1986.

Sedgwick negotiated with the insurer for inter alia replacement cover for the plaintiff in the event of earthquake damage. The policy which granted this and a wide range of other cover was dated 8 December 1987. Its relevant details will be considered later. However, at this stage, I note that the policy was not site specific; it covered all the commercial properties of the plaintiff wherever located for a total insured amount of $241,118,123.

The certificates referred to above were furnished to the Commission under S.14(2A)(b)(ii) of the Act which is applicable to properties other than dwellings; the certificates served as the basis for calculating the earthquake and war damage premium paid to the Commission via the insurer. The certificates bore no valuation on their face but referred to a host of schedules attached. The valuations and schedules were prepared by a Mr Treseder of the firm of Sargent, Smith & Partners, Registered Architects. The total indemnity value stated in the aggregate schedules relating to the Edgecumbe properties amounts to $73 million including GST. The premium paid to the Commission for the Edgecumbe properties of the plaintiff was calculated on the total indemnity value in these schedules. If evidence about practice in the industry is to be relevant, then I found it curious that there was much evidence from Mr Agius, a consulting engineer about his practice and that of others in valuing and in giving such certificates, yet not a word from Mr Treseder, the person who actually gave the certificates with which the case is concerned.

The principal matters for the Court's determination are as follows. Some of these items may overlap.

1. What is the extent of the statutory requirement of the Commission to indemnify the plaintiff for earthquake damage? This question involves the following sub-questions:
   (a) What is the interpretation of the words "to make good" in S.16 of the Act?
   (b) Do the indemnity values stated in certificates approved by the Commission under S.14(2A)(b)(i) of the Act constitute the limit of the Commission's liability?
   (c) If so, is the limit of the Commission's liability the combined value of the certificates issued for all the properties covered by the `blanket' policy, ie $138 million; or is it the total of the certificates for the Edgecumbe property, ie $73 million?
   (d) If the answer to both parts of (c) is "No", then do the schedules for individual items of buildings and plant at the Edgecumbe complex create individual limits of liability in respect of each building and each item of plant as identified in each schedule with the effect that, irrespective of the total cost of the damage, the Commission can be required to pay no more than the amount identified in each individual schedule in respect of the plant and buildings covered by that schedule?
   (e) Are the costs to the plaintiff of regulatory updates required to be met to enable the plaintiff to operate its dairy processing plant, to be included in the amount the Commission must pay?
2. At what point does the insurer assume liability to the plaintiff? The insurer argued that its liability commences at the higher of either (i) the approved indemnity value or (ii) the Commission's S. 16 liability in the event of that being greater than the approved indemnity value. Under this argument, if the Commission pays less than the approved indemnity value, then the insurer contends there is a `gap' in the plaintiff's cover between what the Commission has to pay and the point when the insurer's liability commences. As an example, assume a property has a certified indemnity value of $100 million; on an earthquake loss, the total cost of replacement amounts to $120 million; the Commission pays out $90 million as its assessment of actual indemnity value; under this argument, there would be an uninsured gap of $10 million because the insurer's obligation does not commence until the $100 million point had been reached.
3. An application by the plaintiff for an order under S.15 of the Arbitration Act 1908 appointing a referee to determine the quantum of both defendants' liabilities in the light of the Court's ruling on the principal issues.

I now deal with the issues. Although every nuance is not dealt with, I have considered all the very extensive and helpful arguments raised by all counsel in coming to may conclusions.

LEGISLATION:

The Act was first passed in 1944, as a successor to the War Damage Act 1941. It seems that the Act had its original genesis, not in the known vulnerability of New Zealand to earthquakes, but in the perceived need to legislate for compulsory war damage cover during the Second World War when enemy invasion was a possibility.

The 1941 War Damage Act was modelled on an English Act passed in the same year. As New Zealand was emerging from the war unscathed by enemy invasion, an earthquake occurred in Masterton; this event is thought to have prompted the Government of the day to convert the large and unused war damage fund into an earthquake and war damage fund and thereby create a statutory scheme of indemnity cover for earthquake disasters.

Under the scheme, a levy was to be paid by all property owners throughout;t the country at a uniform rate calculated on indemnity value. Only those with fire insurance policies were to be covered. The fire insurance policy was the vehicle for collection from all insured property owners of the levy payable to the Commission. The insurers then passed on to the Commission the levies they had collected from their policyholders. No differentiation was made amongst areas prone to earthquake and those not so prone. The levy was fixed at one shilling (ten cents) per annum per 100 pounds of property value (or 5 cents per $100). The rate of levy has remained unchanged. Naturally, with the ravages of inflation over the years, the total assets insured by the Commission and the total levies received have increased markedly. The Act provides that any shortfall by the Commission be metby the Government in the event of the Commission's inability to pay its liabilities under the Act. Over the years, the Commission's liability has been extended by regulation to cover insured property owners against certain other natural disasters such as landslip.

The cover provided in 1944 reflected the practice of the insurance industry at the time, ie to insure a property for indemnity value only. In 1951, an amendment to the Act allowed replacement cover for earthquake damage in excess of the Commission's statutory liability to be provided by private insurers; under a replacement policy, the levy payable to the Commission was to be calculated on the basis of an indemnity

value certificate given by an approved certifier, belonging to a profession nominated in the legislation.

Such was the state of the legislation at the time when the authority pivotal to this present dispute came to be decided. I refer to the Court of appeal's decision in *AMP Fire & General Insurance Co (NZ) Limited v Earthquake and War Damage Commission* (1983) 2 ANZ Insurance Cases 78.016 ('the ANT case'). Amendments to the 1951 Act were made in 1983, some 5 months after the ANT case had been decided; the details will be discussed later.

It is now necessary to set out the relevant portions of Ss. 14 16, and 18 of the Act, as they were at the time of the Edgecumi� earthquake:

14. Property insured against fire deemed to be insured against earthquake and war damage

(1) Subject to the provisions of this Act and of any regulations made thereunder, where in respect of any period after the commencement of this Act any property is insured to any amount under any contract of fire insurance made in New Zealand with an insurance company after the commencement of this Act, the property shall at all times during that period be deemed to be insured under this Act to the same amount against earthquake damage and war damage.

(2) In respect of the insurance of any property under this section the insurance company with which the property is insured against fire shall pay an earthquake and war damage premium in accordance with this Act at such time and in such manner as may be prescribed.

(2A) Where the contract of fire insurance provides for settlement of any claim for damage to or destruction of the property upon a basis more favourable to the insured person than its indemnity value, the following provisions shall apply:

(a) Subject to paragraph (c) of this subsection, the property shall be deemed to be insured under diis section to the amount of its indemnity value only;

(b) The earthquake and war damage premium in respect of each period of the insurance shall be computed

(i) If the property concerned is a dwelling and its indemnity value is specified in the contract of fire insurance, on the specified indemnity value;

(ii) In any other case, on the amount of the indemnity value of the property as approved by the Commission after being certified at the commencement of that period by a person approved by the Commission, being a registered architect or a valuer registered under the Valuers Act 1948 or an engineer registered under the Engineers Registration Act 1924 or a quantity surveyor registered under the Quantity Surveyors Act 1968: Provided that if no such certificate is approved by the Commissioninrespectof any period the premium shall be computed on the amount to which the property is insured under the contract:

(c) Notwithstanding the provisions of S.16 of this Act, if

(i) The earthquake and war damage premium has been computed in accordance with paragraph (b)(i) of this subsection; and

(ii) The contract of fire insurance specifies an indemnity value which is less than 80 percent of the actual indemnity value of the insured property at the time of any loss or damage

The Commission may in its discretion determine that it shall be liable for only a proportion of the loss or damage, being the same proportion that the specified indemnity value bears to 80 percent of the actual indemnity value; but in no case shall the Commission be liable for more than the specified indemnity value. If the insured property consists of more than one item, this paragraph shall apply in respect of each item.

(2B) This section shall not apply with respect to any contract of insurance that is limited to an excess over the indemnity value of the property.

(3) Upon the making of any contract of fire insurance to which this section applies the earthquake and war damage premium at the rate then prescribed, computed in respect of the period of the contract of fire insurance, shall thereupon become a debt due by the insurance company to the Commission.

(4) The amount of the earthquake and war damage pren-dum for which any insurance company at any time becomes liable under this section in respect of any contract of fire insurance shall thereupon become a debt due by the insured person to the insurance company, and may be recovered by the company accordingly. If at any time before the debt is fully discharged any other person becomes an insured person under the contract of fire insurance the amount remaining unpaid shall thereupon become a debt due by him to the insurance company, without prejudice to the liability of any other person. Where two or more persons are liable for any amount under this subsection their liability shall be joint and several.

(7)In this section, 'dwelling' means any building or part of a building that is occupied solely as a private residence; and includes every building, structure, or improvement appurtenant to the dwelling and used for the purposes of the household of the occupier of the dwelling".

16. Commission to make good earthquake or war damage to insured property

(1) Subject to the provisions of this Act and of any regulations made thereunder and of the contract of earthquake or war damage insurance (if any), if, during the period for which any property is insured under this Act against earthquake damage or war damage, the property or any part thereof is destroyed or damaged by earthquake damage or by war damage, as the case may be, the Commission shall be liable to make good (by payment or reinstatement or repair, at the option of the Commission) all such loss or damage to an amountnot exceeding in respect of the property or any part thereof the amount to which the property or that part thereof is respectively so insured, increased by a percentage equal to the percentage specified in S.8(l) of the Goods and Services Tax Act 1985.

(2) Subject to the provisions of any regulations made under this Act, any payments or expenditure for which the Commission may be liable under diis section shall be made at such time or times as the Commission in any case thinks fit, being

(a) In the case of earthquake damage, not later than one year after the amount of the damage has been duly determined (which determination shall be made as soon as reasonably practicable in the circumstances of each case); and

(b) In the case of war damage, not later than one year after the termination of the war during which the damage has occurred."

18. Insurance otherwise than under this Act

(1) Where on the occurrence to any property of any loss or damage against which it is insured under S.14 or S.15 of this Act, the property is also insured against that loss or damage under any contract or contracts made otherwise than under this Act, the insurance of the property under d-ds act (to the amount to which it is so insured) shall be deemed to be in respect of so much of that loss or damage as exceeds the sum of

(a) The total amount payable under that contract or those contracts in respect of that loss or damage; and

(b) The proportion of the loss or damage to be borne by the insured person under the conditions applying to the insurance of the property under this Act.

(1A) Where the insurance under this Act is limited to the indemnity value of the property or any part of the indemnity value, subsection (1) of this section shall not apply with respect to any contract made otherwise than under this Act except to the extent to which the contract relates to the indemnity value or any part thereof.

(IB) Where the insurance under diis Act is limited to an excess over the indemnity value of the property, subsection (1) of this section shall not apply with respect to any contract made otherwise than under this Act except to the extent to which the contract relates to such an excess.

(2) Notwithstanding anything to the contrary in any contract whereby any property is insured against any loss or damage otherwise than under this Act, where the property is or has at any time been also insured against that loss or damage under

S.14 or S.15 of this Act the contract shall have the effect in all respects as if the property were not and had never been insured under this Act.

Since this is the appropriate place in the judgment to cite legislation, I refer also to several provisions of the Earthquake & War Damage Regulations 1984 ('the Regulations'). In general terms, as may be expected, the Regulations expand upon the Act. The following extracts from the Regulations have some relevance to matters before the Court-

5. Conditions of insurance

(1) In addition to all other conditions imposed by the Act or by these regulations but subject to subclause (2) of this regulation

(a) The insurance of any property against earthquake damage under section 14 of the Act shall be subject to the conditions set out in Parts I and II of the Schedule hereto:

(3) Subject to section 14(2A)(c) of the Act, if, at the time of any loss or damage, the insured property or any part of it is of greater value than the amount for which it is insured, the Commission may in its discretion determine that the insured person shall be regarded as being his own insurer for the difference and that he shall accordingly bear arateable proportion of the loss or damage.

SCHEDULE

CONDITIONS OF INSURANCE

PARTI

Conditions Applying to Insurance Against Earthquake Damage, War Damage, Disaster Damage, and Landslip Damage

Reinstatement:

"14. The Commission may at its option reinstate or replace the property destroyed or damaged or any part thereof, instead of paying the amount of the loss or damage, but the Commission shall notbe bound to reinstate or replace exactly or completely, but only as circumstances permit and in a reasonably sufficient manner, and in no case shall the Commission be bound to expend more in reinstatement or replacement than it would have cost to reinstate or replace the property as it was at the time of the occurrence of the loss or damage, nor more than the sum insured by the Commission thereon."

"15. If the Commission so elects to reinstate or replace any property or wishes to consider whether it shall so elect, the insured person shall furnish the Commission with such plans, specifications, measurements, quantities, and other particulars as the Commission may require. No acts done or caused to be done by the Commission with a view to reinstatement or replacement shall be deemed to be an election by the Commission to reinstate or replace."

"16. If in any case the Commission is unable or does not elect to reinstate or replace the insured property, the commission shall not be pecuniarily liable for more than it would have cost to reinstate or replace the property as it was at the time of the occurrence of the loss or damage, nor more than the sum insured by the Commission thereon."

"Arbitration

19. If any difference arises between the Commission and the insured personas to the amount to be paid in respect of any loss or damage, the difference shall be referred, pursuant to the Arbitration Act 1908, to an arbitrator if the parties in difference can agree upon one, and otherwise to two arbitrators, one to be appointed in writing by each party within one month after having been requried in writing to do so by the other party. If the two arbitrators cannot agree they shall appoint an umpire. Where any such difference is so referred to arbitration the making of an award shall be a condition precedent to any right of action against the Commission."

"20. The Commission shall notbe liable to pay in respectof any loss or damage where the amount to be paid is in dispute unless the insured person commences a proceeding by way of arbitration within three months after the date on which was given the decision of the Commission in dispute."

Part II

Conditions applying Only To Insurance Against Earthquake Damage

Proportion of Loss to be Borne by Insured Person

"22.(1) In respect of any loss or damage to any one property occurring during any period of 48 consecutive hours as the driect result of earthquake (not including earthquake fire), the Commission shall not be liable to pay or contribute more than the amount by which that loss or damage exceeds the proportion of the loss or damage to be borne by the insured person (hereinafter referred to as the excess).

(2) For the purposes of this clause

(a) All property in the same ownership and located in one situation shall be deemed to be one property;

(b) All property insured in the joint names of a married couple or in the name of either or them shall be deemed to be in the same ownership."

THE AMP CASE

Fairly detailed consideration of the *AMP* case and extensive quotation from the Court of appeal's judgment is necessary because of the pivotal importance of that authority to the present case.

Several insurers had sought declarations from the High Court on problems perceived by the insurance industry as arising out of the Commission's interpretation of the 1951 amendment to S.14 of the Act relating to the calculation of the earthquake levy on reintstatement insurance policies. The Judge in the High Court had declined to make the declarations sought. The Court of appeal considered his approach incorrect and ruled on the issues raised.

The general thrust of the declarations sought in *theAMP* case was that the indemnity portion of an insurance policy constituted the contract of insurance with the Commission under S.14 and that the excess of indemnity portion of the policy was not within the purview of S.14(2A). Prior to December 1980, the Commission had accepted that there was no reason why both indemnity and excess of indemnity contracts should not be incorporated within one policy of fire insurance, with no earthquake premium being charged on the excess of indemnity portion. In December 1980, the Commission's attitude changed; it required insurers to charge an earthquake and war damage premium on the full amount of the insurance, ie the indemnity cover plus the excess of indemnity or `replacement' cover.

S. 14(2A), at the time of the Court of Appeal hearing, was in the following terms

"Where the contract of fire insurance provides for settlement of any claim for damage to or destruction of the property upon a basis more favourable to the insured person than its indemnity value,

(a) The property shall be deemed to be insured under this section to the amount of the indemnity value only:

(b) The earthquake and war damage premium in respect of each period of the insurance shall be computed on the amount of the indemnity value of the property as approved by the Commission after being certified at the commencement of that period by a valuer approved by the Commission, being a registered architect or by a valuer registered under the Valuers Act 1948 or an engineer registered under the Engineers Registration Act 1924:

Provided that if no such certificate is approved by the commission in respect of any period the premium shall be computed on the amount to which the property is insured under the contract."

The Court's first finding was that the view adopted in 1980 by the Commission was incorrect. That view was categorised as an unneccessarily narrow approach, inconsistent with the obvious intent of the 1951 amendment. The Court's decision on this point was set out in the following words of Cooke J (as he then was)

"As already indicated, the basic purpose of the amendments made in 1951 was clearly to ensure that the automatic statutory cover would be limited to indemnity insurance and that the premiums for it wouldbe calculated accordingly. Provided that this purpose is achieved, it cannot matter in administering the legislation whether a policy holder who has taken out against fire both indemnity insurance and replacement insurance with an insurance company has done so under one contract or two. In most cases where there is a single composite policy there is probably only one contract, the total premium payable to the company being higher on account of the replacement cover. Nevertheless, when an indemnity sum is named and there is provision in certain circumstances for extra replacement insurance above that, there is not likely to be any difficulty in treating the provision for that extra cover as an identifiable and distinct part of the policy, although no doubt usually including many terms common to it and the indemnity part. Nor was any instance of difficulty in the case of such a policy drawn to attention in argument."

The Court then went on to consider a further question, prominent in the submissions of counsel for the Commission, which showed a concern lest an interpretation of S.14 be adopted whereby the Commission might be bound to provide earthquake and war damage insurance up to the amount of indemnity value but would be entitled to premiums only on some lower figure nominated by the policy holder.

The Court of appeal dealt with this submission as follows. Although I quote *in extenso,* I omit the Court's citation from Halsbury

"Not only has the expression 'indemnity value' been left undefined by Parliament, but there is no evidence before the Court of any establishedusagein the insurance industry giving a fixed meaning to the expression or distinguishing between it and the other expression used by counsel, indemnity sum. That being so, the Court is free to and should place. on "indemnity value" in the section the meaning that best gives effect to the apparent intentionof Parliament. Wehave already stated what we understand to be that intention. It is helpful also to bear in mind a leading principle of insurance law, stated in 25 Halsbury's Laws of England, 4th ed. para 3."

"Against that background we think that the appellants are right in a submission which was among those adopted by all their counsel. As previously mentioned we are not attracted by their arguments based on a two-contract approach. But one of their other submissions was to the effect that indemnity value means the indemnity value up to a maximum of the figure, if any, nominated in the fire insurance contract. Putting it in another way, the expression means the value of the loss for which indemnity is provided by the contract. We hold that this interpretation is correct. It produces a workable result in accord with the purposes of the legislation and the general law of insurance. That result is that in the case of a fire insurance policy giving indemnity up to a named sum, that sum will be the upper limit of the indemnity value and will correspondingly be the amount up to which the property will be automatically insured against earthquake and war damage under sec. 14(1). The earthquake and war damage premium will accordingly fall to be computed on that amount at the rate prescribed by regulations made under sec.26(2)(e); the present rate is fixed by the Earthquake and War Damage Regulations 1956 (1956/61) reg. 6 as amended in 1967 (1967/111) and 1970 (1970/143). Any contract or part of a contract limited to an excess over that amount will be altogether outside the scope of sec. 14, by virtue of sec. 14(2B). The concern voiced by counsel on behalf of the Commission will thus be disposed of.

The reasons pointing to this interpretation are further strengthened by the following considerations. If the interpretation suggested and feared by counsel for the Commission were correct, there could be cases where property is under-insured in an indemnity policy-that is to say, in his suggested terminology, the indemnity 'sum' would be less than the indemnity 'value' - but where separate replacement policies cover the difference between the indemnity 'sum' and replacement cost. On the same interpretation the replacement policies would not be limited to an excess over the indemnity value, so they would note excluded from the section by section 14(2B). It seems unlikely that Parliament would have intended this complication. It also seems unlikely that there would at all commonly be issued a separate replacement policy leaving the insured to bear the difference between the limit in his indemnity policy and the actual value of the property destroyed or damaged. The kind of contract which Parliament meant to take altogether out of the scope of the section, by sec. 14(2B), is muchmore likely to have been simply a contract purporting to give cover in excess of the amount of indemnity insurance."

The Court dealt finally with a separate point taken out by two of the insurers relating to an inflationary provision in the certificates provided by the approved certifier under S.14(2A)

"A separate point is raised by the originating summons taken out by the New Zealand Insurance Company Limited and the South British Insurance Company Limited. Those companies ask for an order that section D (inflationary provision) of the valuation for insurance purposes (building) form used by the Commission, insofar as it purports to impose a requirement by the Commission on an insured or insurer, is ultra vires the Commission and therefore invalid and unlawful. The reference is to a provision in the form requiring the valuer, architect or engineer certifying under sec. 14 (2A)(b) to include in the indemnity value an estimated amount of inflation anticipated during the period of insurance. It was submitted that to insist on this, as the commission admittedly does, is contrary to the provision of sec. 14(2A)(b) for a certificate at the commencement of the period.

While the certificate has to be given at that date, we do not see sufficient reason for interpreting the Act so as to preclude a realistic estimate of indemnity value. Some allowance for inlfation can reasonably be stipulated for by the Commission. It is arguable that to require estimated inflation throughout the period, rather than an estimated average, is unfair as a basis for calculating the premium. *On the other hand the value approved by the Commission fixes the upper limit of its liability at any time during the period; the insured can never recover more under the automatic indemnity cover.* We are not prepared to hold that the Act impliedly prohibits the Commission from arriving at that maximum sum in the manner contemplated by the form." (Emphasis added)

Counsel for the plaintiff and the insurer endeavoured to convince me that the passage underlined in the above extract was an obiter statement. They submitted that, the dictum was not part of the ratio of the Court and I should decline to follow it.

It is neither appropriate nor proper for a first instance Judge to disregard such a clear statement from the Court of appeal. Far from the dictum being obiter, I consider it clearly part of the ratio. An effort was made by the insurer which I found quite extraordinary- to support the contention that this was an *obiter* comment by exhibiting the notes of argument of counsel (now deceased) who had appeared for the Commission in the Court of appeal.

I am not prepared to go behind the clear wording of a Court of appeal judgment and hold that that Court did not intend to say what it did or that what was said was an obiter comment, unless

the obiter nature of the comment is obvious. To the contrary, I am in respectful agreement with the whole of the Court of appeal judgment in the *AMP* case and in particular, with the portion objected to by the plaintiff and the insurer which seems to me to be a reasonable interpretation of the subsection. I intend to follow the dictum, subject only to considering first whether the subsequent amendment to S.14(2A) has altered the Court of Appeal's judgment.

THE 1983 AMENDMENT

It can be seen from comparing the two subsections 14(2A) (ie before and after the 1983 amendment) that the principal change wrought by the 1983 amendment was to relieve owners of dwellings who wished replacement insurance from complying with the onerous requirement of supplying the Commission with annual certificates of indemnity value. The dispensation applies only to residential properties. The amendment also introduced a certain averaging regime for under-insured dwellings. As Cooke P stated in an interlocutory appeal in these present proceedings

> "The new S.14(2A)(a) and (b) re-enacted in what appear to be materially identical terms the provisions formerly contained in S.14(2A)(a) and (b) but it added a new paragraph (c) relating to dwellings."

The fact that this legislative amendment was made, clearly indicates that Parliament was well aware of the *AMP* case; the Legislature obviously considered that it would be unjust and unrealistic at a time when reinstatement insurance for dwellings was commonplace to require home owners to provide annual certificates of valuation; such a requirement would be costly for the average home owner and administratively burdensome for the Commission. The provisions governing commercial properties were only changedby the substitution of the word "its" for the word "the" before the words "indemnity value" in paragraph 14(2A)(a).

I cannot accept the submissions of counsel for the plaintiff and for the insurer that Parliament intended to change the effect of the decision of the Court of Appeal by such a minor amendment and in such a subtle way. I cannot detect any significant change effected by this minor amendment, which strikes me as having no more meaningful reason than the stylistic preference of the drafter.

It therefore follows that, in accordance with the *AMP* case, the certificates must form the basis of the upper limit of the Commission's liability.

THE `BLANKET' POLICY

The policy is one described in the insurance industry as a `blanket policy' in the sense that it is not site specific but covers all the insured's property at several locations. However, there is a separate value nominated for each individual building, ie a breakdown according to site; the values, when aggregated, constitute the insured sum. The property insured is categorised as

(a) Buildings, plant and machinery and all other real or personal property anywhere in New Zealand in a total sum of $232,184,495;
(b) Dwellings, outbuildings and contents anywhere in New Zealand in a total sum of $7,929, 844; and
(c) Farm buildings and plant anywhere in New Zealand in a total sum of $103,784,000.

The earthquake section of the policy, does distinguish amongst separate items (see special provision 5 quoted later). That provision requires that, at the date of the commencement of the insurance, the insured must provide the insurer with a written valuation of indemnity value, ie the amount approved by the Commission, and the estimated cost of reinstatement, with each item insured being treated separately.

Counsel for the plaintiff submitted that ordinary principles of insurance law and practice did not necessarily apply to the statutory earthquake scheme because the levy was fixed at a flat rate irrespective of the vulnerability of the location of the risk to earthquake. Moreover, the scheme was said to have overtones of a sociological measure, inappropriate in an insurance situation. The plaintiff submitted that the limit of the Commission's liability was the total indemnity cover under its policy with the insurer- ie the combined indemnity value of the plaintiff's five major sites not just those sites damaged by the earthquake. This submission was based on S. 16 which requires the Commission to `make good' damage etc to an amount not exceeding in respect of the property or any part thereof the amount to which the property or that part thereof is respectively so insured. Because of the gearing of the earthquake cover to an insurance policy, then the several references to `property' in Ss 14 and 16 refer to the property covered by the insurance policy.

I reject this approach. A consideration of the Regulations and the *AMP* case makes it clear that ordinary principles of insurance law and practice apply to the earthquake compensation scheme enshrined in the Act, except insofar as the Act and/ or Regulations clearly indicate otherwise.

Parliament could never have intended that the quantum of the Commission's liability for earthquake damage on a particular site should be dependent on a circumstance over which the Commission had no control, ie the fact that an insured owning many properties spread over widely dispersed localities may for administrative convenience or any other reason insure them all together for fire and other risks under one so-called `blanket' policy.

This approach would mean that if the indemnity value of two properties covered by ablanketpolicy, one situated in Auckland and the other in Wellington was $100,000 each and if the Wellington property were destroyed by earthquake and cost $200,000 to replace the Commission would be liable to pay $200,000 and still continue to insure the Auckland property, even though it had received only a premium for the Wellington property based on a maximum payout for that property of $100,000.

My consideration of the legislation does not convince me that Parliament intended such an unusual consequence. I agree with counsel for the insurer that earthquake risks differ in nature from other risks covered by the policy. Unlike fire, an earthquake could result in damage at more than one site. Unless there is in effect separate cover for each site, an insurer (like the Commission) would not receive the appropriate premium for that site. Indeed the actions of the parties confirmed this approach. Separate valuations for the five major sites were provided to the insurer by the plaintiff's broker; the premia were analysed separately and the insurer made its re-insurance arrangements accordingly.

EXTENT OF COMMISSION'S LIABILITY

Having rejected the `blanket' approach, I consider next what then is the liability of the Commission. Is it the total of the schedules attached to the certificate for the Edgecumbe site (a total of $73 million) or does each schedule represent a separate certificate in terms of the Act?

The numerous schedules attached to the certificate for the `Edgecumbe Dairy Installation' cover every building at the plant and are in common form. I reproduce a sample as p.29A-

A note on the back of each schedule states

"the values given here are block values for complete working units capable of maintaining their present use and output. This applies to both the re-instatement values and the indemnity values".

Of greater interest is the following part of the notation on the back of the certificate itself

"Under a reinstatement, replacement or an extra cost reinstatement policy, the Earthquake & War Damage Amendment Act 1951 provides a means whereby the Earthquake & War Damage premium may be charged on the certified indemnity value *which then becomes the maximum liability of the Commission*..." (Emphasis added)

For what it is worth, it seems from the above statement from the plaintiff's own valuer that he was in no doubt at the time of his valuation as to the Commission's maximum liability. As noted earlier, nothing was heard from him.

I accept the submission of counsel for the Commission that each Schedule must be treated separately and must fix the upper limit of the Commission's liability for the property described in each schedule. The Commission approved not only the certificate but also the schedules which together gave meaning to the certificate.

REPRODUCTION OF P 29/A

VALUATION PACKAGE: Building, Plant, Furniture and Fittings, contained therein plus services and equipment contained in the building and related and adjacent thereto

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Building & Building Services			
A.	Indeminity Value	$	1,606,465
B.	Reinstatement Estimate	$	2,162,623
C.	Demolition	$	24,515
D.	Inflationary Provision		
	(i)Indemnity as Defined	$	213,782
	(ii)Reinstatement as Defined	$	566,833
Plant Furniture, Equipment & Plant Services			
A.	Indeminity Value	$	6,689,494
B.	ReinstatetmentEstmate	$	13,803,431
C.	Demolition	*$*	*66,677*
D_	Inflationary Provision		
	(i) Indeminity as Defined	$	844,757
	(ii) Reinstatement as Defined	$	3,898,066
Comments			

BUILDING NO. Al LOCATION: Edgecumbe
BUILDING TYPE & NAME: Spray Powder Factory
CONSTRUCTION DETAILS: Concrete Masonry, Concrete Floor, Metal Roof

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SARGENT & SMITH & PARTNERS
ARCHITECTS AND DEVELOPMENT CONSULTANTS
AUCKLAND rAURANGA

Logically, the same reasoning which precludes the total sum insured under a blanket policy representing the limit of liability, must apply to defeat the argument that the total schedules for the one site must be looked at globally. Not all components of the site were totally destroyed. Each schedule is discrete. In theory, separate policies could have been issued for each building and its associated plant. Had the certificate referred to the whole Edgecumbe plant, as having an indemnity value of $X million dollars without providing any breakdown and had such a certificate been accepted by the Commission in that form (an unlikely occurrence), then there could be justification for a global site approach to the quantum of the Commission's liability.

The Court of Appeal has held the certificates represent the upper limit of the Commission's liability. It follows that, on the facts of this case, each individual schedule attached to the certificate forms the basis of the Commission's liability for the buildings and plant described in that schedule. This finding is subject to the variation referred to later as to certain regulatory updates as coming within the concept of indemnity.

THE OBLIGATION OF THE COMMISSION TO `MAKE GOOD'

I deal next with the argument that the words "make good" in S.16 mean something different from the words "indemnity value" in S.14. The words `make good' were apparently derived from the English War Damage Act 1941; *prima facie,* authorities under that Act may be of some use although the context of the words in the English Act are different from that in the New Zealand Act. For example in *City of London Real Property Co Limited v War Damage Commission,* (1957) Ch.274, the Court of appeal held that "making good" in relation to war damage involved a notion of restoration; there mustbe preserved in some sense a continuance of the damaged property as a discernible entity.

In the context of the New Zealand Act as interpreted by the Court of Appeal in the *AMP* case there is no difference between an obligation to pay 'indemnity value' and an obligation to 'make good'. The word "indemnity" means usually that the plaintiff should be restored exactly to the position it was in before the earthquake.

The words 'make good' are interchangeable with 'indemnify' in insurance law: See Welford & Otter-Barry, *The Law Relating to Fire Insurance* (4th ed) 293

"A policy of fire insurance always specifies the amount up to which the insurers undertake to make good any loss or damage to the assured. Since, however, the contract is a contract of indemnity, the amount recoverable under the policy in the event of a fire must not exceed the sum necessary to indemnify the assured fully against any loss which he may have actually sustained in consequence of the fire. The assured is not entitled to recover the amount specified in the policy unless it represents his actual loss; its main purpose is to fix the total amount of the premium and to mark the limit beyond which the liability of the insurers is not to extend."

See also: Ivamy, *Fire and Motor Insurance* (4th ed) p. 8 to similar effect.

Accordingly, I find that the Commission's responsibility is to indemnify the plaintiff under normal principles of indemnity insurance but with an upper limit of indemnity value as certified in each schedule for the property covered by that schedule.

REGULATORY UPGRADES

The plaintiff's complex dairy installation is the subject of numerous regulatory requirements of central and local government, the Dairy Board, the Ministry of Agriculture and other bodies. In order to recommence its operation, it claims that any replacement or repaired plant and buildings must comply with a host of regulatory requirements.

The plaintiff submits that the Commission's statutory duty under S.16 to 'make good' the earthquake damage entitles the

plaintiff to be placed in the position it was in immediately prior to the loss; thus, submits the plaintiff, it is entitled to more than a `bricks and mortar' assessment of damage in that the plaintiff is entitled to receive a facility in which it can do what it could lawfully do in the same facility at the time of the earthquake. It says that if that situation can be achieved only by complying with further regulations etc in force at the time of the loss, then the extra cost involved as to be part of the indemnity cover; an insured is not fully indemnified unless it is restored to the position existing at the time of the loss; the amount recoverable is to be measured by the amount of the particular insured's loss.

Market value is the normal basis of assessing indemnity value but the plaintiff's submission, based on compulsory land acquisition cases, is that if the property has no market value, ie a church, then there can be no restoration to the original position unless that property is reinstated. Not surprisingly, the insurer supported the plaintiff in this argument.

Put another way, the plaintiff's argument was that the uniqueness and sophistication of its dairy manufacturing and processing installations and the degree of integration of the complex of processing plant and buildings all mean that proper indemnity of the plaintiff requires that it be restored to the position existing at the time of the earthquake.

Counsel relied on principles established in cases concerned with the compulsory acquisition of land such as *Birmingham Corporation v West Midland Baptist Trust Association* (1970) AC 874. The parallel comes about because the measure of compensation in such cases is market value or 'willing buyer/ willing seller'.

The West Midland Baptist Case was concerned with a claim for compensation for a church compulsorily acquired by a local authority. The building had been unique. The House of Lords held that the cost of reinstatement was to be adopted as a better assessment of the value of the land to the owner and therefore of property compensation. Lord Reid at 893 instanced as proper cases for reinstatement compensation - churches, schools, hospitals, houses of exceptional character and *"business premises in which the business can only be carried on under special conditions or by means of special licenses"*.

Counsel for the plaintiff also referred to *Lucas v New Zealand Insurance Co Ltd* (1983) 1 V.R. 698, 701 where Crockett J neatly summarised relevant principles in the context of insurance law as follows

> "In determining the value of the property lost it must be borne in mind that it is not the value in an abstract sense that is to be assessed, but the value of the property to the insured. That is to say it is the insured's actual loss that is recoverable: see Canadian *National Fire Insurance Co v Colonsay Hotel Co* (1923) 3 D.L.R. 1001. So, if the insured should have a house property on the market for sale at a stipulated price at the time of its destruction by fire then the 'real value' to the insured of the property, and so the measure of his loss, is that price (less the site value) and notthe costof its replacement: *Leppard v Excess Insurance Co Ltd,* (1979) 1 W.L.R. 512; (1979) 2 All E.R. 668. Or, should the insured of a house property be intending at the time of its being destroyed by fire in the near future to demolish the house in preparation for the development of the site, then the value of the house to the insured maybe little more than the value of salvages materials upon its demolition: *Falcon Investments Corporation (N.Z.) v State Insurance General Manager (1975)* 1 NZLR 520. On the other hand, the property in question may have a value to the insured beyond the market value because it was held by him for the purpose of using and enjoying it as a house see Bowen LJ in *Castellain vPreston* at400-or in carrying onhis business: *GrantvAetna Insurance Co* (1862),15 Moo. 516, at pp. 518-9; 15 E.R. 589, where there is set out the direction given to the jury the correctness of which in this connection was not challenged on appeal to the Privy Council. In such cases, the insured can be granted the full indemnity to which he is entitled only if there is such restoration as to permit his continueduse and enjoyment of the property or its use in the carrying on of his business. *The cost of reinstatement is the measure of indemnity in such circumstances even though that cost may be in excess of the market value.*
>
> It is often more likely that where the loss is partial only, then, indemnification will require payment of the cost of repairs. Theoretically this cost should be the same as market value, but experience shows that this is rarely so even if some allowance is made on the 'new for old' principle (which it is not suggested should be applied in this case). For the purpose of assessing the correct indemnity to be made the determination of whether a loss is total or partial is a question of fact: see Ivamy, *Fire and Motor Insurance 3rd ed,* pp. 164-9; Sutton, *Insurance Law in Australia and New Zealand,* (1980) para 15.64; and *Elcock v. Thomson,* (1949) 2 K.B. 755, at 764.
>
> How then should the question that now calls for an answer be resolved in the light of the foregoing propositions? The defendant contends that the actual loss suffered is no more than the difference between the value of the property before and after the loss. Although the extent of that difference is in contest it is common ground that it is less than the cost of reinstatement. It was argued that the property not only had a market value before and after the fire but in fact must in the circumstances be taken to be readily marketable. If the plaintiffs were now to sell their property the proceeds from sale together with a sum representing the differential in value would enable purchase of similar investmentpremises with avalue the same as thatwhich the damaged premises possessed before the frie. Even assuming the ready marketability of premises of this nature I am of opinion that this suggested method of assessing the plaintiffs' measure of loss is inappropriate."

See, Ivamy (op cit) p. 170-1 which also contains useful comment on partial loss situation. Also 25 Halsbury (4th ed) para 653 which discusses the circumstances where market value does not provide a true measure of indemnity value.

Counsel also referred to the damages assessment in a case of negligence, ie the decision of the English Court of Appeal in *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* (1970) 1QB 447,468 where Lord Denning MR said

> "The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case. I think the Judge was right on this point."

This approach may not be wholly appropriate here because the duty on the plaintiff in a negligence case is to mitigate loss; also no loss of profits can be claimed against the Commission by a property owner. However, the judicial thinking is akin to that in the compulsory acquisition cases such as *West Midland Baptist.*

Counsel for the Commission submitted that the insured cannot profit from a disaster: see *British Traders Insurance Co Ltd v Monson (1*964), 111 CLR 86, 93. If immediately before an

earthquake, a building had 10 years of operating life, then the Commission is liable to meet the cost of a building of that value but is not liable to replace the building with one having a greater life. In general, this submission is correct, but the case law above extends the notion of indemnity under insurance law in cases where the insured is required to meet additional cost on top of `bricks and mortar' cost in order to carry on exactly the same business as before the occurrence of the fire, earthquake or whatever.

This enlarged concept of indemnity in an insurance context is established by the extract which I have cited from the judgment of Crockett J. Acceptance of the principles there stated, however, cannot increase the statutory duty of the Commission merely to indemnify. The upper limit of the Commission's liability must always be the indemnity value shown in a particular schedule. However, within that limit, the duty to indemnify can mean, in a particular instance, that the Commission may have to pay more than the bricks and mortar depreciated value of a given building should further cost be needed to allow the plaintiff to carry on in that building the self-same operations as those conducted prior to the earthquake.

Whether this principle of indemnity applies and the extent to which it applies will need to be determined in any given instance in respect of any,,giyen schedule will be one of the tasks of the arbitrator whom I propose to appoint.

For example, assume one of the schedules for theEdgecumbe plant in respect of one particular building and associated plant, gave an indemnity value (including the appropriate inflation add-on) of $1 million. To enable the plaintiff lawfully to perform on that particular site the operations which it was doing at the time of the earthquake requires a payment of $1.5 million; the Commission's limit of liability is still $1 million, even though the 'bricks and mortar' valuation of the property may be only $0.5 million. Because of what I shall hold on the 'gap' argument, the further $0.5 million under the example must be carried by the insurer (within the limits of its policy).

One imagines, however, given the Commission's upper limit of liability being fixed by the particular indemnity value in the schedule, that the Commission may infrequently be called upon to consider an indemnity value on this basis. One imagines that Mr Treseder's indemnity valuations were reasonably accurate; the task of proving they were not would be hard in those instances where the relevant plant and building were destroyed. Difficulty will arise in claims over partially damaged buildings and plant. The arbitrator will need to be specially careful to ensure that the insured is not profiting from the disaster whilst at the same time receiving the full benefit of the Commission's duty to indemnify.

The *AMP* case made it clear that normal principles of insurance law apply to the compulsory earthquake cover and to expressions such as `indemnity'. That word must therefore be given its ordinary meaning which in the circumstances I have outlined can include some element of replacement. It will be for the arbitrator to decide whether, in any particular case, the circumstances are such to apply the principles summarised by Crockett J in the extract quoted.

For example, if an office building had been destroyed by the earthquake and its rebuilding required no unusual or regulatory requirements, then normal 'bricks and mortar' value would measure the Commission's responsibility in respect of that building. Different considerations could apply in respect of distinctive buildings with specialised uses where, in the words of Lord Reed, "The business can only be carried on under special conditions or by means of special licences". Because I am about to hold that the insurer assumes liability when the Commission's liability ceases (ie when the amount of the certified indemnity value is reached for each schedule) there can be no question of double insurance a contingency debated before me.

THE GAP ARGUMENT

The relevant sections of the policy between the plaintiff and the insurer need to be considered in this section of the judgment.

The policy is an extremely comprehensive document covering all manner of risks. It commences in the normal way with the insurer agreeing, in consideration of the payment of the premium

> "that if during the period of insurance specified in this schedule... there shall happen physical loss or damage caused by an event that is neither expected nor intended by the insured or subject to an exclusion to the property insured at the territorial limits specified in the schedule the insurers will by payment or at their option reinstate or repair indemnify the insured in manner and to the extent stated herein".

The insured is designated as

> "Bay Milk Products Limited and/or Riverslea Trading Society Limited and subsidiary companies as is now or hereafter constituted and/or companies which they have management control and responsibility to insure".

The insured property is subdivided into buildings, plant, machinery and other real or personal property, stock in trade, merchandise and work in progress, and miscellaneous. The areas of liability are said to be anywhere in New Zealand. The total amount insured was for $232,184,495.

The sections of the policy relating to earthquake damage read as follows

> "It is hereby agreed that in the event of the property insured under the Policy to which this Memorandum is attached suffering Earthquake damage during the currency of this Memorandum and *Insured suffers loss in consequence of the cost of reinstatement exceeding the sum payable by the Commission pursuant to section 16 of The Act, then in respect only of such loss the Insurers will pay the difference between the cost of reinstatement and the said sum payable by the Commission, as defined herein. Subject to the following interpretations and special provisions and subject also the terms and conditions of the attached policy* which are to be taken as incorporated in this Memorandum, except insofar as they may be varied hereby. (Emphasis added)

INTERPRETATIONS

For the purposes of this Memorandum:

(a) "The Act" shall mean the Earthquake and War Damage Act 1944.

(b) "Earthquake damage" has the meaning defined in The Act.

(c) "The Commission" shall mean The Earthquake and War Damage Commission constituted under The Act.

(d) "Indemnity Value" of the property shall be the amount of *the indemnity value of the property as approved by the Commission after being certified at the commencement of each period of insurance by an approved valuer.* (Emphasis added)

(f) "Reinstatement" shall mean:

(i) Buildings

(a) Where destroyed, the rebuilding of the property including the use of currently equivalent building materials and techniques in any manner suitable to the requirements of the Insured including a change in

the nature in the use of the property provided it remains within the same or similar industry/occupation and such additional costs necessary to comply with any Act of Parliament or any Regulations under or framed in pursuance of any such Act or with By-Laws of any Municipal or Local Authority or any Rules, Orders in Council, Ministerial or Government Directives or Conditions of Consent under any of them.

SPECIAL PROVISIONS

4. The liability of the Insurers shall not exceed the difference between the Indemnity Value and the Limit of Liability under the Policy. For the purposes of this Clause *each item insured shall be treated separately.*

5. The Insured shall at the date of commencement of the insurance conferred by this Memorandum and at the date of each renewal provide the Insurers with a written valuation at such date made and certified by an Approved Valuer of the Indemnity Value and of the estimated cost of reinstatement. For the purposes of this Clause each item insured shall be treated separately.

10. The amount recoverable under this Memorandum shall not include any part of the Indemnity Value as approved by the Commission for the period of insurance in which the loss or damage occurs, or any part of the cost of any reinstatement or repair of the property carried out by the Commission in making good earthquake damage."

In the part of the policy in which premium was calculated, the buildings and plant were subdivided according to location and operation: ie Edgecumbe, Te Puke, Kaimai, Opotiki, Riverslea, McKenzie Conway and ancillary covers.

Counsel for the insurer submitted that the plain words of the earthquake memorandum require that the insuring clause be read subject to the interpretation section and the special provisions. In particular, the insuring clause is subject to the interpretation of `indemnity value' where that refers to indemnity value 'as approved by the Commission after being certified etc'. Special provisions (4) and (10) quoted above were also called in aid. Counsel submitted that the memorandum could easily have provided that the liability of the insurer should commence when the sum properly payable by the Commission had been reached; it did not do so. Counsel submitted that the wording on the policy was prepared by a broker acting for the plaintiff (Sedgwick) and not (as is usual) by the insurer; hence the *contra proferentem* rule, if it applied, worked against the insured. A deponent from the insurer stated that, in preparing the premium calculation, he had assumed that the liability of the insurer started at the indemnity certificate figures, notatthepointof the Commission's legal obligation. Consequently, no premium has been charged on any `gap' between the certificate value and the true indemnity value.

Counsel for the insurer further submitted that, if the certified indemnity value of theEdgecumbe site was fixedat$73,000,000, the `gap' issue would become academic, because the liability of the commission would easily reach the certified figure.

In my view, the dominant clause in the policy is that set out in the opening of the earthquake damage memorandum, that is the clause which provides that the insurer will pay (to the limits of the cover) the difference between the cost of reinstatement and *the sum payable by the Commission* pursuant to S.16 of the Act. I agree with counsel for the plaintiff that the insuring clause itself provides for its own supremacy by varying the interpretations and special provisions "except in so far as they may be varied hereby".

Such a construction gives commonsense and obvious force to the insuring provision; it is consistent with the type of insurance which the parties clearly wanted, ie cover for the excess cost of reinstatement, over and above whatever the Commission was legally liable to pay. Counsel for the plaintiff pointed out that, in a partial loss where the cost of reinstatement exceeds indemnity value, (whatever measure is applied) the result of the insurer's argument must mean that the insured would in fact be uninsured for the amount by which the cost of reinstatement exceeds the amount payable by the commission under S. 16 of the Act; a partial loss might result in that approved figure never being reached.

I therefore reject the `gap' argument and hold that the insurer is required to indemnify the plaintiff within the limits of its policy at the points where the Commission ceases to be liable. In accordance with my earlier decision, this means that the insurer will have to adopt a schedule by schedule approach. This should not create difficulty since each schedule shows a replacement value.

ARBITRATION

S. 15 of the Arbitration Act 1908 provides as follows

"Power to refer in certain cases In any cause or matter (other than a criminal proceeding by the Crown),

(a) If all the parties interested who are not under disability consent; or

(b) If the question in dispute consists wholly or in part of matters of account; or

(c) If the case or matter requires any prolonged examination of documents, or any scientific or local investigation, which cannot in the opinion of the court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before an officer of the Court."

The Court has determinedboth theextentoftheCommission's liability and the point where the insurer's liability commences; the determination of the quantum of the plaintiff's claim against both defendants must be a matter of urgency. Its business disruption cover has expired. It has a large manufacturing complex important for New Zealand's export markets. Many persons depend on the plaintiff's continuing ability to operate its factory notably its hundreds of dairy farmer shareholders and its many workers.

This is an eminently suitable case in which to order a reference under S.15(c) of the Arbitration Act; a determination of the quantum of the plaintiff's claim and of the respective liabilities of the defendants as delineated by the Court must involve prolonged examination of documents and a local (and possibly scientific) investigation which cannot conveniently be made by a Judge, a jury or by ordinary officers of the Court. The sheer size of the claim and its numerous component parts all point to the determination of quantum being prolonged. Clearly, too, an on-site inspection at Edgecumbe will be necessary (ie local investigation) and complex issues about machinery may be involved (scientific investigation). It would just not be possible - given the present demands on the Court - to provide a Judge or Master to hear the quantum claim yet it should be disposed of quickly. Indeed S.18 of the Act indicates that earthquake claims should be disposed of by the Commission within 12 months.

A wide view of the legislation is justified: see *Charles Osenton vJohnston* (1942) AC 130,144 where Lord Wright said

"In particular, they say that the case did not, within the

meaning of the section, require any prolonged investigation of documents, nor did it require any scientific or local investigation which could not in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its ordinary officers. This contention involves the interpretation of the words of the section; in particular of the words 'scientific' or 'local' investigation. I think that all the words are used in a somewhat vague and general sense. They are not terms of art nor ar*e they* to be too strictly construed. 'Prolonged' involves practical questions of degree. 'Documents' is a very general word. 'Scientific investigation' is in my opinion wide enough to cover questions of the practical applications of science, though it imports a narrower idea than the words 'technical' or 'expert'. It would not in general include a large proportion of technical or expert evidence, such as that of a handwriting expert or an expert stevedore. But especially in modem days it would cover a wide range of expert evidence, if that is based on scientific knowledge such as that of medical or surgical experts, engineering experts of many types or classes, sanitary or chemical experts. I give these as mere instances of a term which I should construe widely. 'Local' again is a vague term, primarily no doubt applying to investigation of actual local conditions on the spot, but apt to cover any investigation of local conditions. Then the word 'conveniently' is a word which affords a large scope for discretion."

A proper hearing before an arbitrator agreed to by the parties - under the aegis of S. 15 makes such an arbitrator a kind of antipodean official referee: (see *Davidson v Wayman* (1984) 2 NZLR 115). Reference back to the Court if required is easier under a Court appointed arbitration than under a normal arbitration.

The insurer agreed to an order for a Court appointed arbitrator. Although it filed neither notice of opposition nor affidavit on this point, the Commission opposed the order sought on the basis that arbitration was required by condition 20 in the Schedule to the Regulations. The plaintiff had sought only declarations and not claimed judgment for a specified sum in its pleadings.

I consider the Commission's argument on this aspect technical and without objective merit. By submitting to an order under S. 15, the Commission is not deprived of the usual benefits of arbitration such as confidentiality, flexibility and informality; this arbitration would be conducted no differently from a consensual arbitration; the only difference wouldbe the supervisory function of the Court which would be reluctant to interfere if the arbitration was before some suitable person such as a retired Judge or a senior barrister.

To deal with the technicality raised: the case may come within S.5 of the Arbitration Act. The plaintiff has commenced proceedings claiming in respect of any matter agreed to be referred to arbitration. Because the arbitration is imposed on the parties by Regulation the reference to 'agreed' in S.5(1) must include the situation of a claimant against the Commission. The Commission has filed a statement of defence and participated fully in the argument on the difficult issues before the Court. In those circumstances, the Commission may be thought to have waived its right to insist on the statutory arbitration. Even if it has not, the complexity of this case is such that I should have made an order under S.5 allowing the litigation to continue regardless - at least to determine liability.

It would be unrealistic and wasteful to have running at the same time a statutory arbitration between the plaintiff and the Commission and a S.15(c) reference between the plaintiff and the insurer. As I have indicated, it is difficult to see what detriment is suffered by the Commission with a S.15(c) reference.

Counsel for the Commission further urged that there should not be a reference to arbitration until liability had been determined. I reject that submission. What I have done in this judgment is to indicate the points where the liability of the Commission ceases and the liability of the insurer begins. Once that is known, one would hope that engineers, loss adjusters and counsel could at least agree on some things with a right to refer to the arbitrator where necessary.

I have special powers as a Commercial List Judge in dealing with this commercial cause. Under Rule 446N(2)(o) I am empowered to direct such an arbitration; I consider this direction necessary for the speedy and inexpensive determination of the real questions between the parties.

Counsel for the Commission said that the matter was not yet ready for arbitration because further information had not been supplied by the plaintiff. This contention is disputed by the plaintiff. I am in no position to rule on the contentions. However, the referee could rule on whether further information is to be provided.

Accordingly, I grant, in principle, the order sought by the plaintiff under S.15(c) of the Arbitration Act; I await nomination of a suitable referee and the settlement of proper terms of reference. If agreement cannot be reached, then I shall settle the identity of the arbitrator and the terms of reference.

SUMMARY

The decisions I have made can be summarised as follows

1. The liability of the Commission to indemnify the plaintiff is governed by normal principles of insurance law except where the statute otherwise indicates.
2. The upper limits of the Commission's liability to the plaintiff for its claims arising out of the Edgecumbe earthquake are the figures for indemnity value (with an inflation allowance) given in the individual schedules attached to the certificate in respect of the Edgecumbe factory, the shopping centre and the garage business.
3. Each schedule is self-contained as to the building and plant it describes. In other words, the Commission's total liability is set neither by the total value of the property insured by the plaintiff under the 'global' policy with the insurer, nor by the aggregate of the indemnity values for the Edgecumbe sites.
4. If in respect of any particular plant andbuilding described in a particular schedule, the circumstances call for an application of an extended concept of 'indemnity', as discussed in the case law, then the 'bricks and mortar' indemnity value can be exceeded; however, in each schedule the certified indemnity value (plus inflation 'add-on') provides the limit of the Commission's liability.
5. Whether the circumstances give rise to such an extended concept in any given case because of regulatory requirements etc is to be determined in each individual case by the referee.
6. The insurer's liability commences at the point where the Commission's liability ends under any particular schedule and lasts to the limit of the cover provided in its policy.
7. An arbitrator or referee is to be appointed under S. 15(c) of the Arbitration Act 1908 to

(a) Consider whether sufficient information has been supplied by the plaintiff to the Commission;
(b) Assess the quantum of the claims of the plaintiff against both defendants, including when necessary making an assessment referred to in paragraph (4) above.

I specifically note that I was not asked to consider how the inflation `add-on' was to be treated in reaching the upper limit of the Commission's liability under each schedule. Counsel appeared to indicate no particular difficulty. If any arises, liberty to apply is reserved.

GENERAL

After the hearing, I received a submission from counsel for the Commission and for the plaintiff as to the appropriate forms of the declarations. It is neither necessary, instructive nor helpful to go through these in detail. The parties need an urgent decision. I therefore await draft declarations in the light of this judgment. One would hope that, should it become necessary to seal a judgment, all counsel concerned will co-operate in agreeing upon the wording of appropriate declarations. In the event of their not being able to do so, I shall receive memoranda as to the appropriate form of the declarations.

I stress that pleading points assume less merit in a commercial cause such as this than in other forms of litigation. The broad thrust of the Commercial List statute and accompanying rules is to achieve the speedy and inexpensive determination of the real questions between the parties. Indeed, in appropriate cases, pleadings may be dispensed with (see R.446J(3)(a)).

In this present case, I believe that all the present questions between the parties have been argued and decided. I therefore hope that agreeing on the wording of appropriate declarations should not cause difficulty.

COSTS

The first defendant is entitled to costs against the plaintiff and the second defendant. In the event of counsel being unable to agree as to the incidence and quantum of costs, I shall receive memoranda. Any decision on costs will need to reflect the following matters

(a) The first defendant has been successful on the most important issues;
(b) The plaintiff has succeeded
  (i) To some extent on the regulatory update argument;
  (ii) On the arbitration issue;
  (iii) As against the second defendant, on the `gap' argument. (This factor may call for an award of costs against the second defendant in favour of the plaintiff).

Any decision about costs will have to reflect, that there was an overabundance of affidavits filed by the plaintiff on what was essentially an argument of statutory interpretation. The defendants could not be blamed for replying in kind. An agreed bundle of documents (eg the insurance policy, the certificates and schedules etc) would probably have sufficed.

Solicitors: Russell McVeaghMcKenzie Bartleet&Co,Auckland, for plaintiff
Chapman Tripp, Wellington, for first defendant
Bell Gully Buddle Weir, Auckland, for second defendant

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
COMMERCIAL LIST
M. 233/89

IN THE MATTER of the Arbitration Act 1908

BETWEEN GOVERNMENTLIFEINSURANCE CORPORATION a statutory corporation by virtue of the Government Life Insurance Act 1987 carrying on business in Wellington and elsewhere in New Zealand as a life insurer.
Applicant

AND WELLINGTON HOSPITAL BOARD a statutory corporation by virtue of the Hospitals Act 1957 carrying on business as a hospital administrator
Respondent

Hearing: 10 July, 1989
Counsel: Jean E Doull for Applicant
D R Broadmore for Respondent
Judgment: 13 July 1989

JUDGMENT OF JEFFRIES J

This is an application brought by Government Life Insurance Corporation pursuant to s.6(2) of the Arbitration Act 1908. Government Life owns a building situated at 79 Boulcott Street, Wellington. It was agreed by way of heads of agreement in December 1981 that the owner would lease to the respondent Hospital Board (now properly described as Wellington Area Health Board, but hereafter referred to as :"the Board") five lfoors of the building plus 15 permanent carparks.

The term of the lease was 30 years with no right of renewal, but with rental reviews at three-year intervals. Apparently the contractual arrangements have rested on a heads of agreement which in view of the size of the demised premises and the length of the lease is surprising for a more elaborate agreement to lease has not been executed.

The relevant clauses in the heads of agreement are as follows:

> "4. The lease shall provide for rent reviews at Three (3) yearly intervals, the first such date for review falling due Three (3) years as from the date rental first became payable. The rental for the second and subsequent rent review periods to benot less than the rental for the first 3-year period.
> 5. The market rent in respect of every three (3) year period shall be such amount as is mutually agreed upon at the commencement of the period in question or on behalf of the parties hereto. In the event of the two parties failing to so agree then the new rental shall be that as determined by an arbitrator (or 2 arbitrators and their umpire) operating under the provisions of the Arbitration Act 1908 and subsequent amendments."

I turn now to what actually occurred at the time of the most recentrental review. Both parties engaged valuers to act for each respectively. It appears the valuers were under the impression

that they were acting as arbitrators in an arbitration.This matter has been discussed with counsel and they now agree that in terms of clause (5) when disagreement is reached between the parties, or on behalf of the parties, then at that point an arbitration should have been commenced. According to the second sentence of clause (5) there were two options which were either the appointment of a sole arbitrator, or two arbitrators and their umpire.

It seems this had not been addressed by the parties for they never examined the possibility of appointing a sole arbitrator, or two arbitrators and their umpire to undertake an arbitration. It would seem the clause had not been drafted by a legally trained person. The two valuers appointed (one for each side) seemed to think they were in arbitration, but there is no such provision in clause (5) for two arbitrators acting together. It is either for a sole arbitrator or two arbitrators and an umpire, neither of which procedure occurred.

The parties still request a decision from the court on the lessor's application for the appointment of a sole arbitrator or umpire pursuant to s.6 of the Arbitration Act. The background to that request is set out hereafter, but counsel assure the court the parties agree to accept the decision of the court on the problem that arose.

I was informed from the Bar that the valuers communicated with each other after appointment, but no formal hearing of any kind was embarked upon. The result of the communications was that they were unable to agree either on the market rent or on an umpire which was their understanding at the time was the next step.

The point of disagreement on the umpire is about the professional qualification he should possess. In short, should he be another registered valuer (as contended for by the lessor, Government Life), or one possessing a predominantly legal background (as contended for by the lessee Board)? That is the issue for the court to decide at this stage.

Naturally Ms Doull in argument for the lessor relied on a recent judgment *Harbour City Realties Limited v Hoosons Menswear Limited* (M.372/88, Wellington Registry, Heron J., 20 December 1988). In that case the same point as is now before the court was for decision but based on a materially different term in the agreement.

In Harbour City the rental dispute was ".....to be determined by two arbitrators being persons competent in rental valuations, one appointed by each party." There was a further provision that, "if they are unable to agree then an umpire appointed by the two arbitrators is to determine the rent."

The two arbitrators could notagree on the professional qualifications of the umpire in the same way as there is a dispute in this case.

On that occasion the lessor wished to have a lawyer and the lessee a valuer, which is the reverse of the present case. That, to an extent testifies to the openness of the issue of lawyer or valuers. It seems from the judgment of Heron J. he was primarily guided by the stipulation on qualifications of both arbitrators in the agreement. He said at p.3:

> In my view the umpire should be a valuer. I take that from the emphasis placed on the qualifications of the two arbitrators as requested by the lease in reaching that view, and the statement in Russell on Arbitration, 20th Edition 236, to the effect:
> An umpire is aperson appointed to take over the reference from arbitrators who are unable to agree amongst themselves. In general, he is in the same position as a sole arbitrator, must be appointed in the same way and must possess the same qualifications or absence of disqualifications."'

In the instant case there is no specified qualification in the agreement and, therefore, the choice is more open.

An affidavit was filed by the person acting for the lessor as the putative arbitrator in the first round. His independence before the court is questionable, as counsel for the lessee pointed out, and moreover his evidence had perhaps a combative tone in his too plainly stated preference to the court for an umpire qualified in valuation.

The issue is by no means as clear as that deponent thinks it is. The affidavit filed on behalf of the lessee was from its property consultant, but he is not involved in the arbitration. His view was for a lawyer.

The decision of the parties, the court was informed, is now to place the dispute in the hands of an umpire who will take over the reference and make the decision himself as if he were appointed as sole arbitrator.

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 arein adistinctly adversorial 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 by a qualified valuer. In addition it is to be hoped that in the role of sole arbitrator, or umpire, he would call up his education and experience of the necessity for fairness and impartiality when acting in any type of judicial function. So much more is that qualification available when the selection is of a person with conventional judicial experience as is suggested for this case.

Moreover, 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 adversorial requiring a professional man familiar in dealing with such situations.

As the parties have expressed their wish, notwithstanding the precise terms of clause (5) of the agreement, the court now appoints a sole arbitrator and it selects one of legal training or background.

I make no order for costs.

Solicitors for Applicant: Phillips Nicholson, Wellington.
Solicitors for Respondent: Brandon Brookfield, Wellington.

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

C.P. No 84/88

BETWEEN THE OTAGO HARBOUR BOARD
Plaintiff

AND QUEENSTOWN TOURIST HOLDINGS LIMITED
Defendant

Hearing: 17 August, 1989
Counsel: F B Barton for plaintiff
J K Guthrie& D W Parker for defendant
Judgment: 3 November 1989

JUDGMENT OF HARDIE BOYS J

The issue in this proceeding is whether the rental payable by the defendant to the plaintiff in respect of certain land in Dunedin is inclusive or exclusive of Goods and Services Tax. The defendant holds the land pursuant to three leases, each of which was for an initial term of 17 years from 1 April 1970, with perpetual rights of renewal for terms of 21 years. The rent for the first years of the initial term was stated, and it was provided that thereafter and at seven-yearly intervals, as well as on renewal, the rent should be fixed by the valuation of two valuers, one appointed by the lessor and one by the lessee, or, should they disagree, of their umpire. the valuation was to be of "the fair annual ground rent of the said land" without regard to improvements. The provisions for valuation was deemed to be a submission to arbitration under the Arbitration Act 1908.

On expiry of the initial 17-year terms, the defendant exercised its right of renewal. By instruments dated 17 May 1987 the parties each appointed a valuer to fix the fair annual ground rents for the first seven years of the new terms. On 31 July 1987, the valuers, who had not found it necessary to call on their umpire, signed their awards, naming the sum of $9,240 as the "fair annual rental" under two of the leases and the sum of $20,800 as such rental under the third. At the foot of each award they set out the costs of the arbitration and the manner in which they were to be borne, stating in respect of each sum mentioned that it included GST.

The Board's solicitors thereupon prepared the necessary documentation for the lessee's signature and provided in it that the rent was in each case the amount fixed by the valuers, plus GST. The lessee, however, maintained that the valuers' figures must be taken to be inclusive of GST, and so it has been paying no more by way of rental increase than the valuers' figures. The matter comes to this Court for resolution on a claim by the Board for a declaration that the defendant is liable to pay the rent on a GST exclusive basis. An alternative prayer for an order granting the Board relief by way of restitution or compensation pursuant to s7 of the Contractual Mistakes Act 1977 was abandoned; and I was not asked to enter judgement on a further claim for interest on the alleged short-fall in the rental payments.

No steps have been taken to have the award remitted to the valuers, but at the hearing in this Court Mr Barton called them both to give evidence as to whether their award was inclusive or exclusive of the tax. Mr Guthrie objected to the admissibility of that evidence but I allowed it de bene esse. Both valuers said that in accordance with the general practice that prevailed amongst valuers, at least at that time, their assessments were exclusive of GST. I mustnow determine whether I am entitled to have regard to that evidence.

The Goods and Services Tax Act 1985 was enacted on 3 December 1985 and imposed the tax as from 1 October 1986. It is a tax on the supply of goods and services and it is payable by the supplier. Although in the normal course the amount of the tax is added to the price otherwise payable, there is no statutory obligation to do so. Nor does the statue require that where the tax is to be passed on it is to be built into the price: it may be expressly added to it. But if it is not, the price stated must be taken to include the tax. In this connection reference may be made to *Love v Norman Wright (Builders) Limited* (1944) 1 All ER 618. And so in the case of a tenancy or a lease, unless it is otherwise provided, the agreed rental will be taken to include GST. Mention should be made of s 78 of the Act which is to the effect that in the case of a contract entered into before 1 January 1987, if the tax has not been taken into account in the contract price, the contract is deemed to be modified so as to allow the supplier to increase the price by the amount of the tax. But Mr Barton disclaimed reliance on this section, which he acknowledged does not apply in the circumstances of this case. And both counsel took the view that there is nothing in the Act material to the resolution of the dispute. Nor, it appears, have there been any judicial decisions in point. It is therefore necessary to look to general principles.

The contracts embodied in the memoranda of lease gave the defendant the right to renew, and stipulated how the rent then payable was to be set. The ageed procedure has been followed and it has resulted in each case in a figure which, in accordance with the contract, is the rent that is payable. On the face of it, GST is included in that figure. If it were not, the rent would be a higher figure. But that higher figure has not been set by the valuers as the rent. Had the parties themselves agreed on the figure set by the valuers it would not be possible for either, short of a plea of mistake, to adduce parol evidence to show that they had really agreed on a higher figure. May that then be done where it is not the parties nor their agents (for the arbitrators here were not the parties' agents) who have arrived at the figure, but arbitrators whose agreement on the figure is not contractual, although it has contractual effect? The answer must in my opinion he in the law as to arbitration and not in the law of contract. The law of contract requires that the rent is the amount named in the award, for the parties have bound themselves to accept that amount. If the amount is wrong, the error can be rectified, if at all, only by the arbitrators. Unless and until that is done the parties are bound by the award as it stands. The Court has not right to alter the contract by replacing the arbitrators' figure with another, even if it can be said that the express reference to GST in that part of the award that deals with costs creates an ambiguity.

It is clear from the arbitrators' evidence that they made a mistake. They did not think it was necessary to say that GST was not included. It maybe too that there is an ambiguity. As at present advised I see no reason why their mistake should be be put right, or the ambiguity resolved. But that cannot be done in these proceedings. It requires an application under s 11 of the Arbitration Act (see generally Mustill and Boyds' *Commercial Arbitration* chapter 33).

The plaintiff therefore cannot succeed in these proceedings and there must be judgment for the defendant. I think it appropriate in all the circumstances that there be no order as to costs.

Solicitors: Caudwells, Dunedin, for plaintiff.
Anderson Lloyd, Dunedin, for defendant.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST
CL 65/89

IN THE MATTER of the Arbitration Act 1908
AND
IN THE MATTER of Section 11 of the Arbi tration AmendmentAct 1939
AND
IN THE MATTER of an Agreement to Lease dated 22 April 1982
BETWEEN PETER JAMES MAHONEY
Applicant (Arbitrator)
AND MODICK R C LIMITED (formerly R C Dimock Ltd)
First Respondent (Lessor)
AND GILTRAP GROUP HOLDINGS LTD
Second Respondent (Lessee)

Hearing: 7 December, 1989
Counsel: R J Craddock QC and R P Deeble for first respon dent
M P Reed & Glenese Adams for second respondent
Judgment: 14 December 1989

JUDGMENT OF EICHELBAUM C J

The first respondent is the lessor and the second respondent the lessee under an agreement to lease for a term of 21 years commencing 28 May 1982, relating to premises at 103 Great North Road, Auckland. As to rental, after providing that for the first three years the rental was to be as stated in the lease, clause 3.13 continued as follows:

> The rental hereunder shall be reviewed on the third anniversary of the commencement of the term and at every subsequent third anniversary thereof. The rental fixed at each review shall be such rental as is agreed upon by the Landlord and the Tenant and if they cannot agree to be determined by Arbitration in the manner herein provided but not in any case to be a rental less than the rental chargeable immediately prior to such review. During the fourth, fifth and sixth years of the term hereof, the rental payable each month shall be reduced by any amount calculated on the formula-x c where
> a. Is the amount to be refunded by the Landlord to the Tenant in accordance with clause 1.17 hereof reduced by the amount actually paid in terms of that clause as at the rent day concerned.
> b. Is the total value of the demised premises fixed by the valuation on which the rental for the three years commencing on 20th April 1985 is established.
> c. Is the rental for the demised premises as established by the foregoing valuation.

The explanation of the latter portion of this provision is that clause 1.17 provided that the tenant was to proceed forthwith with the partial demolition and reconstruction of the building forming part of the demised premises, according to certain plans identified by the parties. The completed structure, including partitioning fencing and electrical fittings, but not carpets and drapes, was to be the property of the landlord. The landlord agreed to refund to the tenant the cost of such work, not exceeding $200,000.

In the event the tenant's expenditure amounted to $479,222. That factor led to proceedings in this Court when on the occasion of the first rent review, the issue arose whether in fixing the rental for the renewed term the arbitrator should take into account the fact that (a) the tenant had spent $279,222 on improvements to the landlord's land on which in effect wouldbe paying rent.

The matter came before this Court on a Case stated, Barker J's judgment being reported as *Jefferies v R C Dimock Ltd* (1987) 1 NZLR 419. Barker J referred to a line of cases where a distinction had been drawn between clauses, on the one hand, which had the effect of requiring an assessment on the footing of a reasonable rent assessed on an objective basis, without reference to a particular tenant or a particular landlord, or to the history of how the premises came to be built or paid for; and on the other hand, provisions requiring the ascertaining of a rent reasonable as between the particular parties.

Cases of the latter type, of which *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* (1981) 1 All ER 1077 and *Lear v Blizzard* (1983) 3 All ER 662 are examples, required the arbitrator to determine, subjectively, what would be a fair rent for the parties to agree in all the circumstances, taking into account all the considerations which would have affected the minds of the parties if they had been negotiating the rent themselves.

Barker J, holding that the clause in the present case was indistinguishable in any material way from the clauses under consideration in the two cases just cited, held that the submissions for the tenant must prevail. It followed that the proper approach was the subjective" one and that therefore the elements set out earlier relating to the improvements were ones the parties would properly have had in mind in negotiating their agreement, and to which regard should have been had by the arbitrator.

Having stated the outcome of the earlier litigation in broad terms, it is now desirable that I record more specifically the reasoning on which it was founded. In *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* Buckley L J said:

> The question arises: by what measure is an arbitrator to fix the rent if the parties do not agree? Counsel for the landlords initially contended that the arbitrator so-called would act not as an arbitrator but as a valuer. He based that argument on the use of the words `shall have agreed' and the word `fixed' in the review clause. On that basis he submitted that the rent should be the market rent for the property , on the authority of a decision of the House of Lords in*Ponsford vHMSAerosolsLtd* (1978) 2 All ER 837`(1979) AC 63. Subsequently he conceded that the clause must be read as an agreement to arbitrate and not not as an agreement to abide by a valuation. On that footing he agreed that, on the true construction of the clause, the rent should be such as it would have been reasonable for this landlord and this tenant to have agreed under the lease. It would consequently be proper for the arbitrator to take into account all considerations which would affect the mind of either party in connection with the negotiation of such a rent, as, for example, past expenditure by the tenant on improvements.
> In my judgment, counsel for the landlords was right to make that concession and to have accepted that the present case falls within the reasoning of the minority of the House of Lords in *Ponsford V HMS Aerosols* (p1087).

Later Buckley L J noted that by the conclusion of the argument, counsel were at one as to the right approach. He continued:

> "I myself am satisfied that the market rent would not provide a proper standard to adopt in the present case. In my judgment, in default of agreement between the parties, the arbitrator would have to assess what rent it would have been reasonable for these landlords and these tenants to have agreed under this lease having regard to all the circumstances relevant to any negotiations between them of a new rent from the review date." (p 1088 emphasis added)

In *Lear v Blizzard* Tudor Evans J followed this authority, saying:

> "... the emphasis in the clause is on what is to be agreed between the parties, and the arbitrator is required to determine what it would be reasonable for these landlords and this tenant to agree in all the circumstances of the case. I think that it was the intention of the parties to the lease that, in default of agreement between them, the arbitrator should determine a rent which it would have been reasonable for these landlords and this tenant to agree and to take into account all the considerations which would affect the minds of the parties. In other words, the test to be applied is subjective and not objective." (p668)

On the occasion of the second rental review, issues arising between the parties have again brought them to this Court, by way of an award stated in the form of a special Case pursuant to S 11 of the Arbitration Amendment Act 1938.

At the hearing of the arbitration evidence was given by valuers on each side. They had agreed on a market rental assessment for the leased premises at $353,700 per annum, and after adjusting the same for tenants' improvements in accordance with the decision of Barker J, reached an agreed rental figure of $308,500 (exclusive of GST) for the rent review period commencing 28 May 1988.

According to the Case the valuers informed the arbitrator that the rental figure just quoted did not have regard to the particular business operations on the premises, but rather to the premises, that is the land and buildings, by comparison with other known lease rentals.

Evidence was also given by Mr Gibb, the group general manager of the second respondent. He deposed that Giltrap Motor Group Ltd had shown a net operating loss for the financial year ending March 1988 of some $800,000 and an unaudited loss for the succeeding 9 months of over $1.5 million.

I should say more about the nature of the tenant's business. By way of an agreed statement from the bar I was informed that the lessee was involved in every aspect of the motor industry except manufacture. Initially it had operated a General Motors franchise in the premises, but at the relevant time it was carrying on its Nissan franchise there. The Nissan franchise was operated through a subsidiary , Giltrap Motor Group Ltd. (The parties did not seem to place any significant on the different entities involved.)

Counsel were unable to agree whether the entire business of Giltrap Motor Group Ltd was carried on at the premises. The evidence was that for purposes of their use as a franchise dealership the premises included facilities for retailing, warehousing and administration.

I infer that the improvements effected, mentioned earlier, were specifically designed to make the premises suitable for a franchise dealership, Possibly they would be suitable for other forms of business as they stand but I think that must be speculative. However, no doubt they could be made usable for such with the expenditure of money.

Whether they could be so used would be subject to the landlord's permission, and might also require planning approval; I do notbelieve the evidence contains any information on the last mentioned topic.

The Case recorded the lessee's contention that the working of the rent review clause required a subjective approach in assessing the rental, and that under such approach the profitability of the only type of business that could be carried on in the premises as of right must be taken into account.

On the basis of the financial evidence, the lessee contended there should be no increase in rental; from the working of the clause, it will have been seen that a ratchet provision prevents any decrease.

On the other hand, as noted in the Case it was the lessor's contention that the valuers had agreed on a market rental which took into account restriction on user, that evidence as to the profitability or otherwise of the business carried on in the leased premises was irrelevant, that the only appropriate adjustment to the rental fixed on a market basis was that required by the judgment of Barker J, namely to recognise the lessee's expenditure on improvements, and that the rental figure agreed by the valuers of $308,500, which reflected this adjustment, should thus be the rental for the review period.

The arbitrator accepted the lessor's contentions and fixed the rental at $308,500 exclusive of GST. He stated that in the event that his award was found to be erroneous as a matter of law and that the financial circumstances of the lessee and/or the proprietor of the business on the leased premises were relevant, on the evidence before him he was unable to make an alternative award on that basis and accordingly requested that the matter be remitted to him for a further hearing.

The questions for the Court posed by the arbitrator in the Case were as follows:

i) In fixing the rental on a rent review under the lease between the First and Second Respondent must any regard be had to the profitability or otherwise of the actual business conducted on the leased premises?
ii) If so, to what extent?
iii) Is the financial situation of the actual lessee relevant?
iv) If so, to what extent?
v) Does the award correctly state the rental to be paid for the leased premises for the period 28 May 1988 to 27 May 1991?

In the concluding stages of the argument before me, it became apparent that Mr Reed, who had not been engaged in the matter until recently, sought to argue that even if questions (i) and (iii) were decided against him under question (v) the award was incorrect in other respects.

I agree however with Mr Craddock's contention that this course is not open. The allegations in question are that the arbitrator failed to take into account the terms of the lease, in particular the restriction on user, and that in relying on the evidence of rentals of so-called comparable premises, he did not have regard to the differences in the review clauses of those premises and (in one particular instance, the John W Andrews premises) the differences as to the nature and success of the business being carried on at them.

In my opinion all these points were submerged in the agreed figure submitted in evidence by the valuers, and the arbitrator must have been satisfied that such figure sufficiently took into account the point in issue. From the formal statement of issues filed in these proceedings it is evident that that was also the view of counsel then acting.

I should record that the first respondent did not seek to re-litigate any of the matters decided by Barker J. Clearly, to some extent at least it would be precluded from doing so. It is not necessary to attempt to define the precise ambit of the decision which is binding on the parties since it was not challenged that the review clause should properly be regarded as requiring a "subjective" approach.

The question is whether the matters which the lessee wishes to have taken into account are properly within the ambit of that approach. In substance, the issue is whether the arbitrator was required to take into account the profitability of the particular aspect of its business which the lessee chose to operate on the demised premises.

I commence by referring to a number of the decisions cited by Mr Reed in his comprehensive submissions. As to the general approach to a rent review I cannot do better than quote from *Basingstoke & Deane Borough Council v The Host Group Ltd* (1987) 284 EG 1587. Delivering the judgment of the Court of Appeal Nicholls L J said:

> The question raised on this appeal is one of construction of a rent review clause in a lease. In answering that question it is axiomatic that what the court is seeking to identify and declare is the intention of the parties to the lease expressed in that clause. Thus, like all points of construction the meaning of this rent review clause depends upon the particular language used interpreted having regard to the context provided by the whole document and the matrix of the material surrounding circumstances.
> While recognising therefor, that the particular language used will always be of paramount importance, it is proper and only sensible, when constructing a rent review clause, to have in mind what normally is the commercial purpose of such a clause.
> That purpose has been referred to in several recent cases, and is not in doubt. Sir Nicolas Brown-Wilkinson V C expressed it in these terms *inBritish Gas Corporationv Universities Superannuation Scheme Ltd* (1986) 1 WLR 398 at 4011:
> There is really no dispute that the general purpose of a provision for rentreview is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates.
> The purpose is to reflect the changes in the value of money and real increases in the value of the property during a long term.'

To the same effect Dillon L J said in *Equity & Law Life Insurance Society plc v Bodfield Ltd* (1987) 1 EGLR 174 at p 125:

> There is no doubt that the general object of a rent review clause, which provides that the rent cannot be reduced on a review, is to provide the landlord with some measure of relief where, by increases in property values or falls in the real value of money in an inflationary period, a fixed rent has become out of date and unduly favourable to the tenant. The exact measure of relief depends on the true construction of the particular rent review clause." (p 1589)

InEmailLtdvRobertBray(Lanowarrin)PtyLtd(1984) VR 16 the Supreme Court of Victoria (Full Court) had before it a review clause providing that in default of agreement, the rental was to be as determined as a reasonable rental by a valuer appointed by the parties. The premises contained a building constructed to the tenant's specifications, including special and unusual features; and it could be inferred that the parties recognised that the premises would be difficult to let on the open market, because the demand for it would be limited, although it had special value to the tenant.

The Court held that the expression "reasonable rental" was of a different character from "market rental", and in the context meant a rental reasonable in the light of all the relevant circumstances.

The Court declined however to circumscribe or deliniate the circumstances to which the valuer might have regard.

The case is of interest in pointing up a rare example, so far as reported decisions go , of a factor (other than tenant's improvments) relevant to a "subjective" assesment which would not bepermissable if the rental had to be fixed on an open market basis, namely where the landlord had constructed a specialised building for the tenant.

In Feltexlnternational Ltd vJBL Consoldiated Ltd (1988) 1 NZLR 668 there was a 30-year lease with rent reviews every fifth year. On review the rental was to be fixed by agreeemnt for failing agreement by arbitration, subject to a ratchet clause. Henry J, approaching the matter on the basis that some implication was necessary to give business efficacy, decided that the "annual rental" to be fixed on review must be regarded as the fair annual rental.

That in turn, in the Judge's view, brought in the test of the "prudent lessee", laid down in *Drapery & General Importing Co of NZ Ltd v Mayor etc of Wellington* (1912) 31 NZLR 598: what the prudent lessee would give for the ground-rent of the land for the terms contained in the lease.

For present purposes the importance of the case is that it reinforces the distinction between a "reasonable rent" (the Judge equated "fair" with "reasonable") on the one hand, and a market rent on the other; the latter, Henry J remarked (p671) being capable of excluding subjective factors which could influence the determination of what is fair between two particular parties.

The DIC case and more recent decisions in which it has been followed and amiplified *(eg WCC v National Bank of NZ Properties Ltd* (1970) NZLR 660, also cited in argument) were of course concerned with perpetually renewable leases with long-term review periods, the rental being assessed on the basis of unimproved land.

The review of the rent was inseparable from the tenant's right of renewal; although (as Mr Craddock correctly pointed out) the decision as to renewal would precede the fixation of the new rent. For myself I should prefer to reserve the question of the extent to which the principles there applied can helpfully be carried over to the present situation.

The "prudent lessee" approach, which specifically exludes any considerations other than those present to the mind of the lessee (see eg the *National Bank* case, per Sir Alfred North Pat p 671) does not seem to sit readily with one requiring consideration of all factors relevant to a fair agreement between the particular parties.

In WJBartonLtd vLongAcre Securities Ltd (1982) 1WLR 398 the Court was concerned with a statutory tenancy in respect of which s.34 of the Landlord and Tenants Act 1954 provided:

> The rent payable under a tenancy granted by order ofthe court under the Part of this Act shall be such...as, in default of...... agreement, may be determined by the court to be that at which,

> having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,
> (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business) ..... "

The issue for decision was whether the tenant should make discovery of its accounts relating to the business it had carried on in the premises for the past three years, and also accounts relating to the business the tenant carried on in other premises about seven miles distant.

It was held that in determining the open market rental under the Act, the best evidence was that of the rental of comparable premises; that the tenant's business accounts might be relevant when evidence of such comparable premises was not available, or the premises were peculiarly adapted for a particularpurpose; and that there was no general proposition of law that the tenant's accounts were always relevant. Oliver U who delivered the judgment of the Court (Lawton, Brightwell and Oliver U) posed the question:

> "...of what relevance to such an inquiry are the tenant's trading results? The Court is not concerned with the tenant's ability to pay rent but with the rent which a willing lessor could command for these premises in the hypothetical open market and there is a perfectly well recognised way of arriving at that by reference to the rents payable for similar premises in the vicinity." (p401).

Later, in dealing with a passage in the judgment at first instance to the effect that the tenant's trading accounts were always relevant, he said:

> "We confess that, for our part, we are entirely unable to follow this in the case of a property such as this where there are, as it is conceded that there are, plenty of comparable premises in the vicinity from which the open market value of premises of this type can be deduced.
> No doubt evidence of the tenant's trading would indicate whether his business had been sucessful or unsuccessful and so might be a pointer to the rent which this particular individual tenant might be prepared to pay in order to spare himself the disruption of moving to other similar premises in the area, but that has nothing to do with the open market rent which the court is directed by the Act to ascertain." (p402)

It is clear then that evidence of the success or otherwise of the tenant's business in the premises will be excluded for purposes of the assessment of an open market rental, at any rate in the ordinary case where evidence of comparable rents is available. Nor does the suggestion that financial evidence could be a pointer to the rent which a particular tenant might be prepared to pay to spare himself the disruption of moving help the tenant here, because in this case the review is unconnected with any question of renewal.

The tenant is saddled with the lease for the next review period. Nevertheless this passage in the judgment contains at least a hint that considerations relating to profitability could be relevant in a case where the subjective approach was appropriate.

In the judgmentin *WJBarton Ltd vLong Acre SecuritesLtd,* there was discussion of another decision of the Court of Appeal, *Harewood Hotels Ltd v Harris (1958)* 1 WLR 108. It concerned what was described as rather unusual hotel premises, and again one issue (indeed the principal issue) was the admissibility of evidence concerning the tenant's trading. At p 115 Romar L J said this:

> "But I cannot find anything in the language of (sections 34(a) and (b) of the 1954 Act) which renders it irrelevant to look at such material as the accounts of this company as part of the material on which the judge must make up his mind as to what rent might reasonably be expected to be obtained for the premises in the open market.
> I should have thought that one of the first things that anybody who was going to set up an hotel business in this type of premises in this locality would want to know would be what prospects he had of making a good thing out of it, and, therefore, what rent he would be prepared to pay for the premises, if, indeed he decided to take a tenancy of thepremises at all. I cannot see any ground, either on common sense or the language of the section, upon which that consideration should be relegated to the realm of the irrelevant.
> I do not think that the judge would be entitled to look at the accounts for the purpose of seeing what the company could afford to pay. Mr King-Hamilton suggested that that really was what " the judge did in the present case that he looked to see what profit they made in one year and what loss they made in another year, and so on, and said that this company, having regard to those figures, ought not to be expected to pay more than a particular rent.
> I should be disposed to agree that that was wrong, if the judge did it; but I do not think that he did it at all. He came to the conclusion that this hotel was being run efficiently; he came to the conclusion, and indeed it was agreed on all hands, that the premises could only be used as an hotel, and then, for the purpose which I have mentioned of seeing what a new person, an outsider, would pay as rent for these premises, he looked into the question of what kinds of prospects, having regard to the law of supply and demand, this hotel would have." (p 115)

So Romer LT was saying that the question of how profitably a business of a particular kind might be conducted in the premises could be relevant even where the issue concerned an open market rental.

If it is legitimate to have regard to evidence of this nature for such purposes in the case of an open market assessment, then it follows that it must equally be relevant in a case where the subjective approach is appropriate.

It is now necessary to clear away matters not in contention, and to endeavour to refine the actual issue. The lessee does not contend that the evidence of the financial situation of the lessee is relevant, other than in respect to the viability of the business of the tenant carried on at the particular site, or what the tenant considers it worth to continue to conduct the business which it is presently conducting from those particular premises. The emphasis is on the particular business, carried on at the premises in question.

Thus the issue does not concern any question of the state of the country's economy as a whole. Nor does it relate to any downturn in the motor industry in general.

These considerations would necessarily be in the mind of any parties negotiating a review of rent, and would properly be taken into account in assessing the rental on an open market or objective basis. The same applies to any suggestion of a localised state of business depression.

Likewise, if the tenant wished to suggest that the particular location had become less attractive, for example by reason of a street closure, or the institution of a one way traffic system. Needless to say evidence pointing to opposite trends in any of

the respects mentioned would equally be relevant. The financial standing of the respective parties, in the broad sense, must however be irrelevant. At this stage, limitations to what is encompassed by the "subjective" approach begin to become apparent.

The fact that either, the landlord or the tenant is a wealthy person may affect his attitude in negotiations, or that of the opposite party, but one would think it self evident that on any basis it should not be permitted to affect the outcome, whatever the appropriate basis of approach.

It is however helpful to examine why, conceptually, that is so. I suggest two reasons (without excluding the possibility of others).

Notwithstanding that the approach is described as subjective the factors which may permissibly be taken into account are limited to those which a reasonable person would regard as bearing on the rental of the subject premises as between the particular parties.

That exlcudes the tenant's ability to pay, or the landlord's need to receive some minimum figure to survive. In my opinion, ability to pay (or survive) is assumed.

In negotiations the tenant might be tempted to say that a wealthy landlord did not need to extract the last cent but (considerations of economic duress apart) the reasonable tenant would recognise the right of such a landlord to drive as hard a bargain as anyone else.

This theme I think derives some support from remarks by the minority in *Ponsford & Ors v HMS Aerosols Ltd* (1979) AC 63 (1978) 2 All ER s37 a decision referred to in the extracts from *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* quoted earlier, I refer to the speech of Lord Wilberforce at p 74; p 840, and particularly to Lord Salmond's at p 80,p843:

> "I agree entirely with Roskill L7 that the reviewed rent must be reasonable as between the parties to the lease, a reasonable rent for the landlords to accept and for the tenants to pay, having regard to all the relevant circumstances of the case existing at the date ofthe rent review."

In that case the review clause explicitly referred to a reasonable rent, but the same concept, in my opinion, is implicit in the subjective approach appropriate here.

It is not subjective in the sense of permitting the infiltration of fanciful considerations, or ones idiosyncratic to the personalities of the respective parties, but only allows regard to be had to those having a basis of fact, and of a nature that would be perceived as relevant by a reasonable landlord or tenant.

In the end, the assessment of the relevance of particular circumstances, and the weight to be given to them in the instant case, is for the arbitrator.

I conclude, however, that on a review where the subjective approach is appropriate, one cannot automatically and in all respects exclude regard to the profitability or otherwise of the business which the tenant proposes to conduct on the premises during the currency of the period for which the rental is being fixed.

It would be difficult to say more without trespassing on the arbitrator's terrritory; see the *Email* case at p 21.

I can now answer questions in the Case as follows:

(i) The arbitrator should have approached the arbitration by determining what would be a reasonable rent for the parties to agree to in all the circumstances, taking into account all considerations existing at the review date pertinent to the demised premises and the relationship of landlord and tenant, that would have effected the minds of reasonable persons in their position had they been negotiating the rent themselves.

(ii) To the extent that the arbitrator considers appropriate, having regard to the answer under (i) and the evidence before him.

(iii) As under (i).

(iv) As under (ii).

Question (v) asked whether the Award correctly stated the rental for the review period. It is evident that the Arbitrator did not approach the fixation of the rent on the basis set out in this judgment.

He first determined the rent on an open market basis, then deducted an allowance for the tenant's improvements. In the circumstances I have to answer question (v) by saying that the Award did not fix the rental on the appropriate principles.

However, that is not to say that the arithmetical answer was wrong. Nor of course am I saying that it was right. The result is entirely a matter for the arbitrator, to whom I now remit the award for reconsideration.

I make two comments in conclusion. It may be surprising to many landlords and tenants to learn that the financial accounts of the business carried on by the tenants in the demised premises are of any relevance.

That it must be said is largely a function of the form of the present rental review clause, one that may well have been chosen deliberately in view of the building clause in the lease. I say "largely" because from the references to case law in this judgment it will be apparent that such financial evidence may be relevant even with an "objective"review.

Secondly, counsel for the lessee accepted that sauce for the goose would have to be for the gander too. If the tenant's use of the premises appeared to be especially profitable, no doubt landlords would be interested in exploring the tenant's accounts.

As to costs, the second respondent having succeeded is entitled to costs against the first respondent which I fix in the sum of $3000 together with disbursements as approved by the Registrar.

The first respondent must also pay the abitrator's solicitor and client costs in relation to the proceedings, together with disbursements as approved by the Registrar, again on a solicitor and client basis.

If the quantum of the arbitrator's costs cannot be agreed,the question can be referred to me by memorandum.

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Solicitors for second respondent:	McElroy Milne, Auckland.

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