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The NEW ZEALAND VALUERS' JOURNAL is the official publication of the New Zealand Institute of Valuers. The JOURNAL is published four monthly and the Publications Board welcomes researched articles from qualified individuals concerned with valuation, business management of a valuation practice and property related matters.

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A brief (max 60 word) profile of the author, a synopsis of the article and a glossy *recent photograph of the author should accompany each article.*

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EDITORIAL

Special relationships

This issue features a paper on mortgage valuations specially written for members by Michael Burrowes of Kensington Swan. It is supplemented by two short papers giving a lending banker's and a mutual funds manager's perspective to the special, relationship which has to exist between valuer and prospective lender. Having, in business, sat on both sides of the table I can endorse the views put forward by all three contributors.

We also publish a prize winning paper entitled "Ethics and valuation practice". Most valuation work is accomplished by valuers in an objective, unbiased and ethical manner, but for some, self interest and selfish business choices seem to have become a part of the 1990s way of doing things. There can be no professional justification for any valuer, whether motivated by the desire to advocate for a client for monetary or any other reasons of personal gain to knowingly produce a dishonest valuation.

The Valuers Registration Board is the guardian of standards and is also the disciplinarian. The NZIV is the educator, the advocate and the protector of the interest of members. A very special relationship exists between the two bodies.

Until recent years the VRB's main function was, as its name suggests, to assess the suitability of graduates for registration to practice in the public field. But it seems that an increasing amount of the Board's time is being taken up with disciplinary matters and so time has had to be foregone for the more positive things such as ensuring only top quality people get into the profession. The numbers of applicants is increasing and this places even greater strain on Board activities and resources.

In the January 1997 *NZIV Property Digest* The Registrar of the Board drew members attention to the policy review for oral examinations. It was made clear to all aspiring applicants that following their statutory three year practical period they would have to accept the choice of either May or November for oral examinations and comply with the application deadlines.

This is fair enough for members who have entered the three year practical period since December 1995 when the change of policy was first announced. However there appear to be a few NZIV members who had already embarked on the registration process between 1st February 1994 and 30th December 1995. Some of them have been told that they will have to wait up to nine months from practical qualification until oral examination. They are naturally concerned and claim that their employment negotiability has been severely disadvantaged. The system has, perhaps unwittingly, failed to recognise that these people entered the process with a commitment from the VRB that was later changed on them.

What should be really disturbing to NZIV members is that fellow members who fell into this category have been refused consideration for earlier orals even under the "exceptional or extenuating circumstances" provision. We would hope that the VRB could find some way to accommodate these applicants, who after all have followed the rules to date.

Kensington Swan;

Mortgage recommendations

MINIMISING RISK TO VALUERS

by Michael Burrowes

The following article is the text of a publication shortly to be released to all NZIV members as "Information Series No.5"

Introduction

In 1996 the NZIV conducted a series of risk management seminars around New Zealand for its members. One of the topics which raised considerable interest was mortgage recommendations. Several situations were discussed:

- When a mortgage recommendation is requested;
- When the valuer is asked not to provide a mortgage recommendation;
- When no mention is made as to whether or not a mortgage recommendation is required;
- When the valuer is asked to extend his or her valuation report for the use of a mortgage indemnity insurance underwriter, such as CUAMIC or MGICA, for high risk insured lending;
- Whether or not a valuer should disclaim responsibility for evaluating the ability of the borrower to meet loan repayments.

The discussions covered residential, commercial and rural property, and income generating and non-income generating situations.

Our advice to valuers on the course of action recommended for each situation is as follows.

Mortgage recommendation requested

The legal duties of a valuer when a mortgage recommendation is requested are comprehensively set out in *McVeagh's Land Valuation Law* (8th ed, 1994) at pages 198-202. In summary, when valuing for mortgage purposes a valuer should keep in mind:

1. The owner's wishes are entirely secondary to the interests of the mortgagee whom the valuer either represents or at least to whom the valuer owes a duty of care.
2. The mortgagee's interests must be adequately protected at all times as far as it is in the valuer's power to do so.
3. The valuer's whole report must be aimed at conveying to the mortgagee in as few words as possible a complete picture of the property, its surroundings, probable progress or deterioration and its probable chances of maintaining its value during the term of the mortgage, excepting of course such things as major economic changes which cannot reasonably be foreseen.
4. Any other information about the property which will enable the mortgagee to reach a decision on the amount and

term of the loan must be presented.

5. If less than the maximum amount or term is recommended, the report must make the reasons for this clear to the mortgagee.

Prudent lenders will be concerned with the "security value" or "loan worth" of a property from the aspect of resale. Overestimation of returns and/or overcommitment by the borrower are the major causes of unsatisfactory loan experience.

Many Court decisions highlight the obligations of valuers in making valuations for mortgage purposes.

For example, in *Corisand Investments Ltd v Druce and Co* (1978) 284 Estates Gazette 315, the general principles to be applied by a valuer when making mortgage recommendations were considered. The valuer should bear in mind that, following the making of the mortgage, the mortgagor may default, forcing the mortgagee to sell the property, and that if the proceeds of the sale are insufficient to cover the arrears of the mortgage debt and the costs of the sale, the mortgagee will incur monetary loss. Thus it was held that the valuer must exclude from his valuation any element or factor which is present at the date of valuation, but which may not be present at the date of the future forced sale. According to Gibson J:

> "I accept the view ... that a mortgage valuation must look for a certain period into the future. The valuer cannot be expected to peer very far ahead, or to anticipate trends or future changes of which no indication has been or could be given to an ordinary competent valuer. The valuer however, can reasonably be required to be aware of the fact that the market is `high' or unusually buoyant, when such are the circumstances and to guard against over confidence in such market conditions. He can reasonably be required to consider what the position of the property may well be in circumstances of forced sale within 6 to 12 months of his valuation."

This statement focuses attention on the need to weigh whether factors currently operating in the market will continue so to operate and the likely consequences of their continuance or change.

Where market values are susceptible to rapid change, it is advisable to include a statement in the valuation report regarding its use along the following lines:

> "The value provided in this valuation is our opinion of the current market value on a willing buyer/willing seller basis. That value may change in the future due to market conditions and changes to the state of the property the subject of this report. Any decision to lend should take these factors into account and allow a reasonable and prudent margin between the amount advanced and the current market value given in this valuation. Additionally, the margin should also recognise the consequences and costs of a forced sale."

Request for no mortgage recommendation

In the course of preparation of the NZIV Practice Standards Nos 1 & 2, legal opinion was sought on an issue raised by some members - should valuers provide a mortgage recommendation in their valuation reports when specifically asked not to do so and when it is known that the report will be used for mortgage advance purposes?

In summary, in certain situations it is mandatory for valuers to include a loan recommendation in their valuations even though they may have been requested not to provide one. These are:

- Valuations for trustees who may lend money in reliance on the valuation report;
- Valuations for the purposes of the Solicitors Nominee Company Rules 1996 (as adopted on 9 April 1996);
- Valuations for the purposes of the Securities Act (Contributory Mortgage) Regulations 1988 (as amended in 1994).

In other situations, where the valuer has been instructed by the lender not to include a mortgage recommendation, the valuer could be in breach of his or her duty to exercise due care, skill and diligence if the valuer does not point out in the valuation any circumstances which might cause the lending client to limit the amount of the advance it would otherwise make available. It is

"... are valuers under a duty to include a two-thirds loan recommendation?

also essential that the valuation report should specifically record the basis on which it is prepared, ie, that the lender has requested that no security recommendation be given.

THE ISSUE

The issue is whether valuers instructed to carry out valuations for mortgage lending purposes are required, or are under a duty, to include in their valuations a loan recommendation (usually two-thirds of the market valuation).

We shall consider the issue under four headings:

(i) Valuations for Trustees

(ii) Valuations for the purposes of the Solicitors Nominee Company Rules 1996

Valuations for the purposes of the Securities Act (Contributory Mortgage) Regulations 1988

Valuations for other Lenders

Valuations for trustees

Where a valuer is aware that the person for whom he is carrying out a valuation is a trustee who may lend money in reliance on the valuation report, the valuer has a duty to consider not only the value of the property but also the amount of the loan which the trustee would be justified in advancing - *In re Solomon Nore v Meyer* (1912) 1 Ch 261 at 282.

In re Solomon was decided against the background of the English Trustee Act 1893 which provided that trustees lending money on the security of property on which they could lawfully lend were relieved from the burden, formerly cast on them by the Courts, of investigating for themselves the nature and circumstances of the security where a valuer was employed by them under the Act. A similar statutory provision previously appeared as section 10 of the New Zealand Trustee Act 1956.

Section 10 of the Trustee Act 1956 has now been repealed and replaced with a new section 1 3N, as follows:

"13N. Certain loans and investments by trustees not chargeable as breaches of trust (1) A trustee lending money on the security of any property on which the trustee can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the Court

(a) That in making the loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be competent to value the property by reason of his or her profession or occupation and his or her personal expertise and experience, being a person instructed and employed independently of any owner of the property; and

(b) That the amount of the loan does not exceed the proportion of the value of the property stated in the report as the maximum proportion that the valuer considers that it would be prudent to lend on that property; and

(c) That the loan was made on the advice of the valuer as expressed in the report."

In our opinion, notwithstanding the recent amendments to the Trustee Act 1956, the principle enunciated in *In re Solomon* still applies and the requirement is for the valuer to provide both his opinion as to the value of the property and advice as to the amount which the trustee would be justified in advancing. This amount might or might not be limited to two-thirds of the market valuation and is a matter for decision by the valuer exercising such skill, care and diligence as is reasonably required of a valuer in such circumstances.

Valuations for the purposes of the Solicitors Nominee Company Rules 1996

Solicitors nominee companies, operated by legal firms, act as trustees for investors' funds. The procedures for operating and making advances through solicitors nominee companies are strictly regulated and solicitors must comply with rigid procedural steps when advancing money through such companies. These steps are set out in the Solicitors Nominee Company Rules 1996.

The information required to be contained in a valuation report submitted for the purpose of lending through a solicitors nominee company includes (inter alia):

"The registered valuer's recommendation as to the amount for which the land provides adequate security for a loan on first mortgage free of encumbrances."

Thus where valuations are prepared by valuers for the purpose of lending through a solicitors nominee company, it is incumbent on the valuer to include a security recommendation.

Valuations for the purposes of the Securities Act (Contributory Mortgage) Regulations 1988

These regulations apply to contributory mortgage brokers as defined in the regulations but not to solicitors' nominee compavies.

A contributory mortgage broker is a person (not being a mortgagor under a mortgage or any other person to whom or for whose benefit any money is lent in consideration for the mortgage given by the mortgagor) who:

(a) Offers an interest in a contributory mortgage to the public for subscription; or

(b) Manages interests in a contributory mortgage, being interests that have been offered to the public for subscription whether or not that person holds beneficially any interest in that mortgage.

Where a valuer is aware that a valuation report is to be provided pursuant to regulation 5 of the Regulations, he or she is required to provide the information contained in the Third Schedule to the Regulations. This information includes (inter alia):

"The registered valuer's recommendation as to the amount for which the land provides adequate security for a loan as first mortgage free of encumbrances."

Thus where valuations are prepared by valuers for the purposes of the Securities Act (Contributory Mortgage) Regulations it is incumbent on the valuer to include a security recommendation.

Valuations for other lenders

Not all prospective lenders are trustees or subject to statutory requirements as to the information to be contained in valuations obtained by them. There is no requirement for persons lending their own money to comply with the provisions of the Trustee Act. In general, banks do not act as trustees or as contributory mortgage brokers but lend money on their own account. In such circumstances, the engagement or instruction of a valuer will normally be a matter of contract. In the absence of any legislative requirements (as in the case of the Solicitors Nominee Company Rules) the content of the valuation will be a matter for agreement between the parties.

In other words, it is open for a bank to instruct a valuer not to include a security recommendation. In such circumstances, as

" The valuer could be in breach of duly of care if he/ she did not point out special circumstances. "

long as the market valuation of the property is arrived at using the skill, care and diligence reasonably required of a valuer, the valuer will, subject only to the comments hereunder have discharged his or her obligation to the bank.

Notwithstanding that the valuer and the client may agree that the valuer will not make a security recommendation, a person who holds himself or herself out as a valuer represents himself or herself as having the skill and knowledge which a reasonably competent member of the valuation profession would have, and it is his or her duty to exercise such skill, care and diligence as is reasonably required in the work which he or she has undertaken. Thus where a valuer is aware that a valuation is required for mortgage purposes, and notwithstanding that it has been agreed between the parties that the valuer will not make a specific lending recommendation, the valuer could be in breach of his or her duty to exercise due care, skill and diligence if he or she did not point out in the valuation any circumstances which might cause the lending client to limit the amount of the advance it would otherwise make available. Circumstances may arise where, notwithstanding the market valuation of the property at the time the valuation was carried out, it would be imprudent for a lender to advance more than a particular proportion of the market value.

If, for example, the property was liable to deteriorate or was exceptionally liable to diminish in value, or depended for its value on circumstances the continual existence of which were doubtful, a prudent lender would require a larger margin for its protection than it would in the case of a property attended by no such disadvantages, and an expert who does his or her duty will take this into consideration.

Thus a house situated in an above-average area but in need of say repiling might have a current market valuation of $150,000. However, it may be evident that, if the repiling work is not carried out within say 18 months, the house could subside with resulting damage. In such circumstances, a prospective lender aware of the full position might only be prepared to advance up to say 40% of the present market value until such time as the work is carried out. In our opinion, where the valuer is aware that the valuation is for lending purposes, the fact that a prudent lender would only be justified in advancing 40% of the present value would need to be made known to the lender notwithstanding that no mortgage recommendation was sought. In such a circumstance, the valuer would not have discharged his or her duty merely by providing the lender with the market valuation.

We also believe it is essential that, where no security recommendation is required by the lender, the valuation report should specifically record the basis on which it is prepared so that there can be no misunderstanding between the valuer and the employer, or the valuer and third parties to whom the valuer may owe a duty of care, as to the nature and extent of the instructions. For this reason, great care should be taken in using an abbreviated valuation format which fails adequately to identify the basis of the valuer's instructions or allow for comment on adverse features.

Valuers should also be aware that a valuer who makes a report knowing that a third person will be shown his or her report and may rely on it owes a duty of care to that person. This is well established since the case of *Hedley Byrne & Co Limited v Heller & Partners Limited.* The principle was re-affirmed in *Yianni v Edwin Evans & Sons* (1982) QB 438 which involved a case where a Building Society contracted with a valuer for a report on a property which the valuer knew the Building Society intended to be security for a loan to a prospective purchaser. The valuer also knew that his report would be shown to the prospective purchaser and could thus reasonably foresee that the purchaser would rely on it. In those circumstances a duty of care was owed to the purchaser. It may be possible, however, for this type of liability to be avoided by the use of an appropriate disclaimer.

NO MENTION OF NEED FOR MORTGAGE RECOMMENDATION

The NZIV Practice Standard 2 (Valuation of Residential Properties for Mortgage Purposes) and the NZIV Guidance Note 2 (Risk Assessment and the Valuer) both state that a mortgage recommendation should be provided except when the valuer is specifically instructed to the contrary by the client.

In our view this is a sensible policy to adopt in relation to all valuations. Moreover, in certain situations discussed in the previous section it will be mandatory to make a mortgage recommendation. Finally, the advice given in the section "Mortgage Recommendation Requested" is equally applicable.

High risk lending

It is now common practice for several major lending institutions to arrange for mortgage indemnity insurance cover on loans which exceed 75% of current market valuation. The underwriters of this insurance normally require that the valuation report be addressed both to the lender and to the underwriter. Apparently some underwriters also require a specific statement in the report that they are entitled to rely upon the report. These requests obviously raise issues of liability, especially in cases where lenders are keen to advance funds approaching the market value of the property.

In this situation, when a valuer is preparing a valuation report we recommend that the valuer adopts the following course of action:

- State in the valuation report that the valuation has been undertaken for the purpose of ascertaining the current market value of the property on a willing buyer/willing seller basis.
- Include a mortgage recommendation in accordance with the Institute of Valuers Practice Standard 2 and Guidance Note 2. The recommendation is the valuer's recommendation as the percentage of value that may be safely advanced on mortgage.
- Include a disclaimer along the following lines within the body of the valuation report regarding its use:

"The value provided in this valuation is our opinion of the current market value on a willing buyer/ willing seller basis. That value may change in the future due to market conditions and changes to the state of the property the subject of this report. Any decision to lend should take these factors into account and allow a reasonable and prudent margin between the amount advanced and the current market value given in this valuation. Additionally the margin should also recognise the consequences and costs of a forced sale."

Evaluation of ability of borrower to meet repayments

In certain cases, especially in the cases of commercial property, rural property and residential investment properties, the valuer will receive, or may have reasonably available to him or her, certain information relevant to the ability of the borrower to meet loan repayments. Although we are not aware of a reported case where a valuer has been held liable to a lender on the basis that the valuer had a responsibility to evaluate the ability of the borrower to meet loan repayments and was negligent in so doing, nevertheless there is the possibility of such claims being made. We believe it would be prudent for valuers to disclaim responsibility for evaluating the ability of the borrower to meet loan repayments, particularly where the valuer does receive certain information regarding the ability of the borrower. We would suggest a disclaimer along the following lines regarding use of the valuation report:

"In making this recommendation we have assumed that the mortgagee is satisfied as to the personal covenant of the proposed mortgagor and his/her/its ability to service any loan. We express no opinion as to, and accept no liability for, the ability and willingness of the proposed mortgagor to meet his/her/its commitments under the proposed loan."

ABOUT THE AUTHOR

Michael Burrowes is a partner in the Wellington office of Kensington Swan. He has practised law at Kensington Swan since 1980 and has been in the Commercial Department since 1983. He has recently assisted in the writing of two New Zealand texts on the law of mortgages.

A lending banker's perspective

by Jon Morton-Smith

This paper is an edited version of a talk given at the ISVA Annual Conference in Bristol UK in March 1996.

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> *" If I am to lend for five years, I need confidence in the asset and its net income, as well as its ability to sustain "value" over the term. "*

The needs of a lending banker are not always understood by valuers and often bankers don't appreciate the needs of a valuer.

One of the most difficult aspects in the relationship between a valuer and a banker is that valuation is not the be all and end all to the banker clearly it is important, but it is only a part of the jigsaw. Very few bankers know much about property risks, most are generalists who from time to time undertake either direct property finance or lending secured by property assets.

With these points in mind, I will focus much more on the appraisal of property risk rather than on value issues.

In selecting the right valuer, a lender relies heavily on the professionalism of the valuer. We rely on our personal contacts, but it is a clear responsibility of the valuer to establish whether or not he/she really can undertake the requirements of the lender. Is the valuer fully involved in the relevant markets? Does the valuer really know who is buying and who is selling? Does the valuer fully appreciate the needs of a purchaser?

A valuer who admits to not being able to do some form of specialised work will earn many more "Brownie points" by admitting so up front, rather than making a poor job of it.

So before anything happens, I need to meet the valuer (probably chosen from our internal "panel") and discuss what is involved. For instance:

- The type of transaction, eg, purchase, sale or refinance;
- The type of assets, their age, quality and location;
- Specialised trading assets such as hotels and care homes, are they leisure related or pure investment properties?
- Is the property owner-occupied or tenanted, and what management is required to maintain and collect the rents?
- The term of the loan and the need to consider obsolescence and amortisation am I lending for three years or 30? This makes a very real difference as to the usefulness of the advice I receive!

I would also expect that there were no conflicts of interest with the valuer.

So what do I need and why? If I am to lend for five years, I need confidence in the asset and its net income, as well as its ability to sustain "value" over the term. Clearly, this is where appraisal comes in. Given that the lender is a banker and not a property professional, we must "sub-contract" for the professional advice. The issues, initially, must focus on income, for instance:

- The quality of the tenant covenant is it a listed company or an unknown or something in between? And, for that matter, how do you tell? What are the current buyers looking for?
- The quality of each lease and its terms privity (or lack of

it) might be important. What are the specific terms and conditions?

- Tenant option breaks and downward reviews how do we gauge the quality of income over time?
- Potential to re-let if necessary and on what terms, since void and rent free periods have a double cost. We require the valuer's best professional opinion of what is seen today, and whether or not conclusions should be regularly updated.

" It is important to me that I have two sources of repayment income and value. "

Each element of income must be carefully assessed and from this every direct cost attributable to the property must then be deducted. A projection or cash flow forecast with clearly established assumptions provides a good picture of the expected income streams.

I lend against the ability of the net rent to pay interest and make debt reductions as well. It is important to me that I have two sources of repayment income and value. If income fails, what am I left with? I might require interest rate hedging to manage that element of unknown cost for the period of the loan but that still leaves me exposed at the end of the loan term.

This must then lead on to the "art" of valuation. Valuation is today's view of what a valuer thinks could be achieved in time. I do not enter a new loan with a view to sell! Nonetheless, I do need to have a clear understanding of the sensitivities of that value so that I can monitor it during the course of the loan. I might even need the valuer's help to update and monitor progress, and may still need to redetermine value if I cannot obtain repayment when I want it.

Finally, what should I pay a valuer? I am much more interested in the quality of the appraisal and report than the level of fee being charged. If the quote is too low I worry that the valuer will not properly resource the job, and if it is too high I may feel that advantage is being taken of the bank's involvement!

ABOUT THE AUTHOR

Jon Morton-Smith is a London Corporate Banking Manager. Previously with Midland Corporate Banking Group he is now with the Hong Kong and Shanghai Banking Corp Ltd in London.

A Loan Manager's view

by Christopher Barnao, National Mutual Fund

White list or black list?

The last two years have seen a proliferation of short form valuation reports.

Short form reports can be considered to be reports of four or less pages giving only a brief description of the site and improvements, little or no commentary on locality and market conditions and limited evidence and/or explanation of methodology (including listing comparable sales).

This is being driven in part by the discount and in part by the banks. Firstly, discount valuers are targeting two segments of the market with no requirement for comprehensive reports: cash buyers who wish to have an indication of value but because they are not borrowing against the property are not concerned about meeting a lender's requirements; and customers of those banks mentioned below that accept such limited reports.

Secondly, some banks are inadvertently encouraging valuers to pare reports. With their extensive branch networks (a branch in every town and city suburb), bankers are very familiar with the areas they are lending in and can also carry out drive-by inspections on the way home at night. A short form valuation report is therefore adequate in most instances.

The trend in mortgage lending however, is away from banks to insurance companies, trustee companies and niche lenders.

These organisations operate without large networks of offices throughout the country. They may have only one centralised loan processing office in Wellington or Auckland utilising mortgage brokers or advertising supported by an 0800 number as their distribution channel.

Given their physical remoteness from the majority of clients and therefore the security properties, these lenders rely on detailed valuation reports to assist their assessment of the security offered for a mortgage loan.

Whilst bankers will often know the pros and cons of lending in their locality and a drive by inspection will tell them a lot about a particular house or street, remote lenders do not enjoy such comforts. Faced with this dilemma these lenders have two options.

The first is to use a `white list' or panel of valuers and accept only reports from these valuers.

This method is favoured by some lenders, however, it excludes a large number of good valuers who simply have never had (and never will have) the opportunity to deal with these lenders and thus prove their mettle.

The second option is to use a `black list' of valuers lenders are dissatisfied with, thus creating more opportunities for most valuers.

Both options have draw backs for clients. If they obtain a valuation prior to approaching a lender they might find, to their cost, that the valuer they have used is not acceptable to the lender and another report will be required.

At least with a `black list', the potential for this to happen is slight.

Lenders should be encouraged to use `black lists' rather than `white lists' for the benefit of the valuation industry and prospective borrowers.

Valuers can play their part in this by standardising the format of reports and applying a high specification of detail in reports.

They can also enquire as to the purpose of the reports they produce and insist on producing full reports where the report is to be used to assist the client in obtaining mortgage finance.

By so doing, lenders can feel confident in accepting reports from all valuers (except those on a `black list').

This would create opportunities for valuers currently excluded from `white lists' and minimise double expenditure for borrowers.

ABOUT THE AUTHOR

Christopher Barnao is the Mortgage Manager for National Mutual Funds Management NZ Ltd. He has been with National Mutual since October 1994 having previously spent nine years with the National Bank in a variety of lending and management roles.

Christopher is responsible for the development and management of National Mutual's New Zealand mortgage lending business.

Ethics and valuation practice

by Neal Hurley, SRA

This paper is the first place winner of the Robert L Foreman, MAI, Essay Contest sponsored by the Real Estate Counselling Group of America (RECGA) and the Appraisal Institute.

Treatises on professional ethics date as far back as 2,500 years ago and the nature of our ethical dilemmas continues to change. Technological advancements and changes in the regulatory environment present appraisers with tough challenges to provide clients and the public the service they demand and still uphold the highest ethical standards.

DEFINING ETHICS

When contemplating this essay, I realised that my first challenge was to define ethics, or ethical behaviour. Like most of us, I have some intuitive notion of what constitutes ethics, but formal definitions are helpful, as in the following:

Ethic:

1. the discipline dealing with what is good and bad and with moral duty and obligation;
2. a. a set of moral principles or values,
   b. a theory or system of moral values,
   c. the principles of conduct governing an individual or a group (professional).'

Ethical:

1. of or relating to ethics;
2. involving or expressing moral approval or disapproval;
3. conforming to accepted professional standards of conduct;
4. of a drug: restricted to sale only on a doctor's prescription.2

Obviously each of these definitions has a component that relates to one's "professional" comportment. This brings focus to the often debated questions, "Is there a difference between personal ethics and professional ethics? Is it possible for one to engage in activity or make decisions that are professionally acceptable, while being out of alignment with your personal morality?" There are individuals who feel that a business environment is unique, with its own set of circumstances. The ability to apply these rules, even when not in alignment with your personal ethics, is held as an essential element of success. This idea is articulated by Albert Carr in his 1968 *Harvard Business Review* article, "Is Business Bluffing Ethical?"" While it is important to recognise the relationship between individual and professional ethics, any conclusion as to when they are in equilibrium is highly personal, and as such, outside the scope of an essay published in a professional journal. Therefore, the balance of this essay will focus on the "professional" side of the equation.

"... not knowingly to do harm"

Professional ethics is not new. Peter Drucker points out the concept of *primum non nocere* ("above all, not knowingly to do harm") which was included in the Hippocratic oath of the Greek physician over 2,500 years ago.' Drucker isolates the essence of professional ethics so well that I could not improve on his words. As such, I offer the following quote:

" The professional has to have autonomy. He cannot be controlled, supervised, or directed by the client. "

"No professional, be he doctor, lawyer, or manager, can promise that he will indeed do good for his client. All he can do is try. But he can promise that he will not knowingly do harm. And the client, in turn, must be able to trust the professional not knowingly to do him harm. Otherwise he cannot trust him at all. Theprofessional has to have autonomy. He cannot be controlled, supervised, or directed by the client. He has to be private in that his knowledge and his judgment have to be entrusted with the decision. But it is the foundation of this autonomy, and indeed its rationale, that he see himself as affected with the public interest. A professional, in other words, is private in the sense that he is autonomous and not subject to political or ideological control. But he is public in the sense that the welfare of his client sets the limits to his deeds and words. And primum non nocere, "not knowingly to do harm, " is the basic rule of professional ethics, the basic rule of an ethics of public responsibility. "[5]

When first reading this passage, I was struck by the strong correlation to the obligations of the professional appraiser. Independence, professional responsibility, duty to the client, and duty to the public are all strong components of the *Code of Professional Ethics of the Appraisal Institute.* [6] Further, clearly the compensation we can expect as a result of ethical behaviour is no less than trust, arguably the most valuable form of payment available.

The concept of not "knowingly" doing harm is found throughout the *Code of Professional Ethics.* This is important, as it clearly removes that human phenomenon, known as mistakes, from the heading of ethics. Mistakes, or standards violations, may be viewed in a more favourable light than ethical digressions. After all, it is easier to educate an individual than it is to change a person's inherently flawed character.

WHY BE UNETHICAL?

This brings us to the question why would an individual choose to act in an unethical way? In their book *In Pursuit of Ethics, Tough Choices in the World of Work,* OC Ferrell and Gareth Gardener' discuss three factors that may lead to unethical behaviours in the workplace. These factors include personal moral standards, organisational relationships and values, and opportunity, which is loosely defined by the authors as conditions that limit barriers to unethical behaviour, or actually provide rewards for such.

Psychologist Lawrence Kohlberg identifies three stages of moral development: preconventional morality, conventional morality, and post conventional morality. A person's degree of moral development may explain why individuals make different choices when faced with the same ethical dilemma." Individuals in the first level, typically children, make decisions based on the avoidance of punishment. In the second level, decision making is strongly tied to the approval of others and is concerned with society's standards. The third level is characterised by a high degree of personal conviction and rationality, with little regard for self-interest, or the views of others or of authority. When faced with the same ethical problem, obviously people at different stages of moral development could make different choices, with each feeling that his or her choice is correct.

The attitudes and actions of our co-workers or fellow professionals can also influence our ethical behaviour especially if we are at Kohlberg's first two levels of moral development. People just beginning a career may be viewed as a "clean slate" in terms of how they understand acceptable professional behaviour. While we have very little control on an individual's level of moral development, we can influence co-workers and fellow professionals through our professional behaviour. Leadership by example is powerful, and experienced appraisers should recognise and accept this professional responsibility.

The third factor identified is "opportunity." This factor has significant implications for the professional appraiser. The June 1994 revisions to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)9 reflect a more relaxed approach to federally regulated financial institutions' oversight of the use of real estate appraisals. Some may view this as removing barriers, or presenting an opportunity. The structure of the residential mortgage industry may inherently offer significant opportunity. With so many people involved in this process being paid on commission, there is significant incentive to close a loan. The response to an appraiser who impedes a closing tends to be rather negative. In some cases the reaction is so severe that an appraiser may logically conclude that there is some financial incentive, that is, a reward for unethical behaviour, to avoid impeding the process.

If you are a good business person who is attentive to customer service, you have probably attempted to understand your client's perception of good service. If your client's criterion is "fast, cheap, and high enough to do the deal", then you may be faced with an opportunity to behave accordingly. I want to emphasize that I am talking in generalities and have no intention of judging individuals who are paid on commission. In fact, when I invest a significant amount of time and effort into a work project, I expect to get paid, and if I don't get paid, I get upset, Therefore, I am not criticising the individuals, but the current system does have some structural flaws that are often conducive to unethical behaviour.

A recent twist on the opportunity factor is the "distance," not in terms of miles but in terms of relationships, between appraisers and their clients. With technological advances we may interact on a less personal basis with our clients. The upshot of this could be that we depersonalise or institutionalise clients. An analogy would be the individual who would never consider stealing a dollar off a co-worker's desk but may not hesitate to install and use a pirated software package. People tend to be sensitive to the wrongfulness in taking that dollar but not in software piracy. As the appraiser client relationship becomes less personal, the challenge is to recognise that our actions can harm an institution just as they can an individual.

ARE YOUR DECISIONS ETHICAL?

As professional appraisers, we need to realise that we need to make decisions that have ethical implications. When we are faced with these dilemmas, some type of process at our disposal that would allow us to make thoughtful decisions would be helpful to have. As stated earlier, many of us intuitively make these choices without any real formal thought process. Laura L Nash provides some discussion on this issue in her article, *Ethics Without a Sermon*. Nash presents a list of twelve questions that can be asked when we are faced with an ethical decision. The benefit of these questions is that they provide some systematic or procedural method for problem solving and are especially helpful to those of us who prefer not to rely on our intuition. I have chosen three questions pertinent to the nature of the appraisal profession's ethical dilemmas.

" See how long our profession exists without trust. "

Question 1: *"To whom and to what do I give my loyalty as a person and as an appraiser? "* This brings into focus the importance of the appraiser-client relationship, the importance of which is often unrecognised. One simple example is seen in how many appraisers respond when they are asked to change a report so that a particular lender appears to be the client when, in fact, the report was originally prepared for another party, such as a different lender or individual. Often this request is fulfilled, with no release from the original client and no disclosure of the original appraiser-client relationship. In addition, asking and answering this question would refresh our memory that we have an obligation not only to our client, but also to the public and other third parties.

Question 2: *"Could I disclose without qualm my decision to my boss, my family, or an ethics board of the Appraisal Institute?"* The benefit of the question is fairly obvious. You might further ask, "Am I making a decision that would stand the bright light of disclosure?" If known, would this decision result in my losing my job, losing the respect of people important to me, or jeopardising my professional standing?"

Question 3: *"Am I confident that my position will be as valid over a long period of time as it seems now. "* This question highlights the impact of placing short-term profits ahead of long-term success. In an environment that seems to be indicating a decrease in demand for appraisal services, it is a challenge to keep our long-term perspective. When there is generally a downward pressure on fees and the expedient solution is to "give 'em what they pay for," would not the ethical solution be to find a way to provide a product that is reliable, accurate, and meaningful, and allows us to be profitable? Admittedly, this is not an easy proposition, but one that is necessary for our long-term survival.

CONCLUSION

The appraisal profession, like most others, is dynamic. Technological advances, as well as the ebb and flow of regulation, will change the way we do business. With these changes will come new ethical dilemmas. Our individual and collective ability to respond to these new challenges with the highest of ethical standards will allow us to continue to be considered providers of a value-added service. Earlier in the essay I alluded to the value of trust. To those cynics who say, "Yeah, try to eat trust or pay your mortgage with it," I would respond, "See how long our profession exists without trust." This is one of those things that may not seem important to the short-term thinker, but its value in the long term is clear. I challenge my fellow appraisers to adopt the creed, *primmum non nocere* ("above all, not knowingly to do harm") and conduct their practices accordingly.

NOTES

1. Merriam-Webster, Inc; Webster's Ninth New Collegiate Dictionary; Springfield, Massachusetts: Merriam-Webster, Inc, 1991; p.426.

2. Ibid; p.427.

3. Albert Z Carr; Is Business Bluffing Ethical?; Harvard Business Review (January February 1968); p.143-153.

4. Peter Drucker; The Ethical Responsibility. Management: Tasks, Responsibilities, Practices; (New York City, Harper & Row, 1973); Reprint, Essentials of Business Ethics, edited by Peter Madsen and Jay M Shafritz; New York City: Harper and Row Publisher's, Inc, 1990; p.26-38.

5 Ibid; p.30

6 Appraisal Institute; Code of Professional Ethics of the Appraisal Institute; Chicago: Appraisal Institute, 1996.

7. OC Farrell and Gareth Gardiner; Tough Choices in the World of Work; Springfield, Illinois, The Penguin Group [Meridian], 1991; p.27-33.

8. Ibid; p.28-29.

9. Regulation 12 CFR Part 34, Federal Register, v. 59, no. 108, June 7,1994; 29482-29502.

10. Laura L Nash; Ethics Without a Sermon; Harvard Business Review, v. 59, November-December 1981; p.78-90,

Young Professional Valuer of the Year 1997

Members are reminded that the New Zealand Institute of Valuers seek nominations of suitable candidates for the Young Professional Valuer of the Year by the 30th of November each year. Members are encouraged to identify potential nominees and where appropriate to advise their employers of the award. Information kits are available from the General Secretary.

Eligibility criteria:

Nominations are limited to Members or Affiliates aged 30 years or less who have achieved outstanding significance within any one or more the following criteria:

- professional participation within the NZIV
- original research
- original authorship

and

- outstanding technical and/or professional excellence

or

- significant contribution to the community that brings credit to the profession. Initial selection will be at Branch level with final selection made by the National Award panel.

There will be one national award each year and this will only be conferred if the candidate is worthy of it.

Previous awardees

1993 Marcus Jackson B.C., B.P.A. - Otago
1994 Leonie Freeman M.Com.(V.P.M.). Hons. - Auckland
1995 Robert John Cameron B.B.S. - Wellington

Landbanks and Treaty land management issues

by Belinda Clark

Office of Treaty Settlement

Introduction

Several major Maori land issues face us today. They include: Maori reserved lands; the rating of Maori land; multiple ownership and ownership structures; and issues associated with the use of land in Treaty settlements. Each of these is a topic in itself and I imagine that most valuers will already be familiar with the rating issues on Maori land and the problems associated with multiple ownership and with the ownership structures for multiply-owned land. This paper focuses on the Treaty claim area which may not be so well known to you, and of which I have more experience.

TREATY SETTLEMENTS

Before discussing the issues arising from Treaty settlements, it is necessary to give some background about the settlement process.

The previous government came into office with the explicit goal of resolving all the major Treaty of Waitangi grievances by the year 2000. It is a goal shared by all the major political parties, although they may differ on the mechanics of delivery. That policy leads to changes: not only specific property related changes, but, also to consequential social and political changes.

Most historical Treaty of Waitangi claims concern the wrongful alienation of land. Land was alienated in a variety of ways including by confiscation, forced sale, court processes or by dishonoured agreements such as to set aside reserves. Since land is the major focus of most historic grievances, it follows that it is also a major focus of the redress or settlement of claims. If it was a simple world, once the Crown had satisfied itself redress was warranted, it would simply transfer back to Maori land wrongfully taken. However, this is not always possible and some significant and difficult issues arise.

Availability of land for settlements

Land is unfortunately not always available to be returned. Since the occurrence of the Treaty breaches, in most cases last century, much of the land under grievance has passed out of Crown hands and into private ownership. Private lands are not taken for Treaty settlements so that leaves potentially available only Crown and Crown entity land. Even there the "supply" of Crown land cannot always meet the "demand" of Treaty settlement requirements. This is obviously so when you consider that it is only surplus Crown land that is potentially usable - the Crown does not offer up sites currently or potentially in use.

To further complicate the situation the government has slowly been divesting itself of large amounts of portfolio over the past few years, pursuant to the economic and state sector reforms. There was some tension between these two imperatives when they originated. On the one hand the divestment by government departments of non-core assets was diminishing the Crown's holdings, and on the other, Treaty settlements required a maintenance if not enhancement, of Crown holdings, since most claimant groups require land as redress for their claims. Over the late 1980s and early 1990s, claimants became progressively more concerned that by the time they came to negotiate a settlement with the government, assets that they might have hoped to receive as part of the deal would no longer be the Crown's to transfer or alienate. To alleviate this concern and to meet the Crown's duty (set out by the courts) to actively protect Maori property, the government created various mechanisms by which surplus Crown land can be protected for use in settlements.

Landbanks

The government has agreed to protect land for claimants pro- tect in the sense that it will be available for transfer to claimants when settlement of their claim is reached through the establishment of a number of landbanks. These are "banks" or supplies of land stored by the government for potential use in settlements.

There are currently three different types of landbank. My department, the Office of Treaty Settlements, is responsible for managing the portfolio of land comprising the various landbanks.

1) The Crown Settlement Portfolio (CSP) holds all surplus properties within confiscation (raupatu) boundaries. Confiscation Boundaries refers to areas of land confiscated under the New Zealand Settlements Act 1863 in Waiuku/Wairoa, Tauranga, Eastern Bay of Plenty, Taranaki and Mohaka.

2) Claim-Specific landbanks hold land which falls within the boundary for a specific claimant group. The claimant group choose which properties they wish to have in the landbank. However, the total value of lands purchased must remain within a certain value (the landbank cap). Those claimants with landbanks are: Muriwhenua, Whakatohea, Whanganui and Ngai Tahu. In the case of Whakatohea and Ngai Tahu land will shortly be transferred out of the landbanks in the course of implementing their settlements. (It will either be transferred to the claimants or released for disposal by the government).

   The relevant criteria for having a claimant specific landbank established require the Crown to:

   - accept that the claims are historically verifiable;
   - agree to a Crown position on the nature and extent of each of the alleged breaches;
   - accept that the correct claimant group has been identified;
   - accept that the claimant negotiators have been properly mandated by the claimant group.

3) Regional landbanks

   Regional landbanks were established to cover areas where a claim-specific landbank has not been established, and the land falls outside a CSP area. They were established in recognition of the fact that some claimants were unfairly disadvantaged in that they were not yet in or near to negotiation and were therefore unable to meet the criteria for a claim specific landbank.

There are 15 regional landbanks based on the Rangahaua Whanui districts used by the Waitangi Tribunal for its regional research project. The key feature of the regional landbanks is therefore that properties may be protected without claimants having to be advanced enough on the path to settlements to obtain a claim specific landbank.

Between the three landbank processes there is coverage of the whole country. It is proposed that properties currently protected in the CSP and regional landbanks will eventually move into claim-specific landbanks. This means that the properties will attach to a specific claim and claimant group. If the Crown is holding more land in that area than the landbank cap, claimants may select the properties they wish to store in their landbank and any surplus will then be disposed of by the Crown.

For all three ways of protecting land, the properties are purchased by the Crown (through OTS) from the vendor agency. The vendor agencies are either a government department, Crown Health

Enterprise, or Crown Research Institute. OTS does not normally purchase SOE land. (However, because of the shortage of Crown land in the area the Crown does consider buying surplus SOE properties in the Whakatohea and Muriwhenua landbank areas.) As a matter of government policy we do not generally acquire land from private vendors.

Private land is not at risk from the landbank mechanism ...

The OTS property portfolio

Currently OTS holds around $72 million worth of property comprising more than 520 individual properties. It is a very diverse portfolio with sites scattered throughout the country. It includes farms, commercial buildings, vacant land, residential properties, industrial land and even a hospital. Generally it does not include much in urban or town areas although there is a small amount in Christchurch and Dunedin.

The breakdown of the Portfolio as at 30 September is:

Crown Settlement Portfolio (CSP) $8.473 million (96 properties)

Claim Specific Landbanks $54.8 million (379 properties)

Regional Landbanks $8.195 million (45 properties)

Private land is not at risk from the landbank mechanism and the Government has repeatedly stated that private land will not be taken for settlement. For properties under $350,000 a joint valuer is appointed by vendor and purchaser (OTS) to fix market value. For properties over $350,000 the vendor and OTS as purchaser each obtain market valuations and then negotiate and/or arbitrate if they cannot agree on a price.

The landbank rules of operation are as follows:

- A cap (GST inclusive) is set which the aggregate purchase price of the properties is not to exceed. The cap is reviewed each year to keep it consistent with the likely settlement amount.
- The properties in the landbank at settlement will be the first Crown assets used in any settlement.
- The Crown will pay net operating costs and receive operating profits. However, if a property incurs losses it will be assessed, and if found to be uneconomic it will be disposed of, unless claimants agree to pay the ongoing costs. To date there have been no net holdings costs on any landbank.
- Properties will be banked "as is, where is". This means that the Crown is under no obligation to develop properties held in landbanks. However, OTS does ensure that properties purchased from vendor agencies for landbanking meet all relevant regulatory and legislative requirements; are managed on a commercial basis; and maintained, as a

minimum, in the condition that they were in when purchased.

- Claimants can exchange properties in their landbank for newly surplus properties, but must pay the actual costs associated with the rollover, to be charged as an advance on settlement, and the Crown can dispose of released properties.

The average length of time held for all properties in landbanks is 1.39 years (as at 15 July 1996). In terms of average net holding costs of properties in the landbanks on a global basis the landbanks run at a cash surplus. This surplus excludes depreciation, interest and OTS overheads. It should be noted that of the properties held for 3 years or longer the average increase in value (as established by individual revaluations) is 12.27% which would be adequate to cover any capital charge if it was applied.

In most cases the value of the properties held in the OTS landbank will change between acquisition by us and transfer to claimants. Where there is a change in the value of a property the loss/gain is absorbed by the Crown.

In respect of leases, we are unable to enter into long term leases of properties (as a general rule) as we do not want to commit a possible claimant group who might receive the land to a lease they may not want to enter into.

The Memorial System:

(section 27 of the State-Owned Enterprise Act 1986)

The memorial system arose out of the "Lands" case of 1987 *(New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641) where the Court of Appeal found that the transfer of assets to State-Owned Enterprises would be unlawful unless the Crown established a system to safeguard those assets should they be required for future use in Treaty settlements.

The Treaty of Waitangi (State Enterprises Act) 1988, was passed in response. It amended section 27 of the State-Owned Enterprises Act 1986 to provide that:

> All land transferred to State-Owned Enterprises will have a memorial registered on the title stating that the land is subject to possible resumption for Treaty claims.
>
> The Waitangi Tribunal has power over such land to make a binding recommendation that the land be resumed and returned to Maori ownership (section 27b of the amended Act). Third parties, such as the owner of the land, may not be heard in relation to such a recommendation.
>
> If a binding recommendation is made the Crown will then acquire the land with appropriate compensation to the owner. This is effected by the Public Works Act 1981.

The memorials apply even after the SOE has sold the land into private ownership. Memorials may be lifted by the Tribunal on application from a claimant group, or by special legislation (eg. the implementing legislation for the Waikato-Tainui settlement). To date the Tribunal has not recommended resumptions under a section 27b memorial, notwithstanding that the memorial system has been in existence since 1986.

In addition to section 27b resumptions, there is provision in amended section 27d for the resumption of wahi tapu (defined as "sites of special significance to Maori for spiritual, cultural or historical reasons") on SOE land. This is not a matter for the Waitangi Tribunal, nor does it involve an assessment of the validity of Treaty claims. Instead Maori apply directly to the Crown for the return of the land on the basis of its special spiritual, cultural, or historical tribal significance. If the Crown is satisfied that the land is of special significance, it may choose to resume the land and return it to relevant people. Unlike section 27b, section 27d does not apply once the land is sold by the SOE.

The Crown Forests Act 1989 brought in a similar system for Crown licensed forestry land. Although, the Act does not require a memorial on the title, the same elements apply as for section 27b land, ie, the Tribunal has the power to make binding recommendations for the return of land, and also to declare that licensed land is no longer liable for return, (ie, that it remains with the Crown). A memorial system also applies for land transferred to tertiary educational institutions and there are also similar resumptive provisions in the New Zealand Railways Corporation Restructuring Act 1990.

An example of section 27d in action was Ngati Ruapani's claim over the Tuai hostel site near Lake Waikaremoana. In 1993 Ngati Ruapani asked the Crown to resume the site as it was a former pa site and burial area. At the time of the request the land was owned by Electricity Corporation of New Zealand (ECNZ). Since section 27d enabled the purchase and return to Maori by the Crown of SOE land which is wahi tapu, the government agreed to buy the land and return it to Ngati Ruapani as Maori freehold land.

Wahi tapu protection

As already mentioned, and independently of any policy on land banking, claimants have a right to ask the Waitangi Tribunal to recommend the resumption by the Crown of land that carries memorials under section 27a of the SOE Act. In addition to the memorial protection on SOE land there is a separate protection for wahi tapu on non-SOE land Wahi tapu on non-SOE land can be protected either through the normal landbanking criteria: ie, CSP, regional landbanks or, claim specific landbanks; or, can be protected by the special significance criteria under existing legislative mechanisms such as the Historic Places Act. If wahi tapu are purchased and returned through these existing legislative mechanisms, rather than by the landbanking mechanisms, then there is no impact on the settlement envelope, ie, costs are not charged against claims the applicants may have.

Effects of claims on property values

From time to time landowners allege that the existence of a claim over their own or nearby territory is driving their property values down due to fears about the free alienability of the land. In that regard, remember, government policy is that private land is not available for redress.

To underline this policy, the Government passed section 3 of the Treaty of Waitangi Amendment Act in 1993. That section prohibits the Waitangi Tribunal from recommending the return to Maori ownership of any private land, or recommending the acquisition by the Crown, of any private land. Therefore fears that land claims over land will lead to it being taken for a settlement, or that its value will be reduced because of potential for it to be taken for settlement, are groundless, since private land cannot be transferred to Maori in a settlement without the owner's agreement. There is no danger that freehold land could be forcibly taken and transferred to claimants.

MANAGEMENT AND REGULATORY ISSUES

Conservation estate and settlements

Other changes instituted by Treaty settlements involve not changes of ownership but change of control or management. In other words claimants are not always seeking to own land, to have the fee simple transferred; but instead often seek some regulatory or management powers over Crown land. This mostly will be in relation to the conservation estate where Maori and the Crown may agree to jointly manage specified areas currently managed solely by the Crown (or DOC on behalf of the Crown) or iwi may seek greater or more formal recognition of their right to be consulted in the preparation of management plans for conservation estate, or be entitled to sit on Conservation Boards as of right. In recently concluded settlements, the Crown and claimants have found a variety of ways in which claimants' right to be consulted can be provided for. These range from a simple agreement between DOC and the claimant group, setting out how and when DOC will consult, to a statutory requirement that the claimants be consulted on certain matters. None of these changes are likely to give Maori a veto over any activities occurring in the conservation estate, or to fundamentally change existing regulatory rights and powers enjoyed by the Crown.

Heritage Covenants and Protection Orders

In the case of wahi tapu, it may be that a Heritage Protection Order is made. A Heritage Protection Order is a provision made in a District Plan that restricts how land can be used. Once a heritage order is included in a district plan, no-one can do anything that would adversely affect the heritage characteristics of the site, unless they have written permission from the relevant Heritage Protection Authority. This includes changing the use of and/or subdividing the land.

It is also possible to register a heritage covenant on land titles. These covenants are negotiated between the owner of the land and the Historic Places Trust and provide for the protection, conservation and maintenance of the heritage site. The covenant may include such terms and conditions as the parties think fit in order to provide protection for or access to the site. A heritage covenant on a title binds all subsequent owners. In addition sites that are of archaeological significance are protected under the Historic Places Act 1993.

EXAMPLES: CLAIM SETTLEMENTS

A brief look at three recent settlements will illustrate the effect and operation of these mechanisms and processes.

Waikato-Tainui

The Waikato-Tainui raupatu settlement was for $170 million. The basic principle underlying the Tainui-Waikato Raupatu Settlement is that of "land for land"; in other words as land was taken so should it be returned. Thus the majority of the settlement amount will be made up of land rather than cash. The Deed of Settlement and the Act which enshrines it - the (Waikato Raupatu Claims Settlement) Act (1995) - set out the process of implementing the settlement. The land used is always Crown or SOE land and is always surplus to requirements. Private land is not considered when identifying possible land for transfer.

Properties listed in the Deed of Settlement transfer quarterly over a five year period ending at the end of November 2000. The first transfer of properties took place earlier this year, and there have been subsequent transfers. Currently properties valued at $27.307 million have been transferred to Waikato. These properties include commercial buildings previously owned by Government Property Services, an AgResearch dairy farm, and land surplus to the requirements of Waikato Health.

The transfer of these portfolios, complex as it is; is only part of the story. As will be the case in most settlements there is not enough surplus Crown land in the claim area to make up the quantum of the settlement. The shortage of surplus land available to the Crown for use in the settlement, meant that other options had to be employed to allow Waikato-Tainui to purchase land outside the settlement package. Thus the

As part of the Deed of Settlement Waikato-Tainui agreed to the lifting of resumptive memorials from certificates of title for land in the area.

right of first refusal is an important tool in enabling the realisation of the land-for-land principle. It means that any surplus land that a Crown entity declares surplus and wishes to sell, must in the first instance be offered to Waikato-Tainui for purchase. Any lands bought this way are not included in the $170 million as they are in effect bought with Tainui's own money. To date however, no land has been purchased by Tainui under the RFR provisions.

1100 properties have to be considered for possible transfer. Some require surveying and no titles exist. Others are held by SOEs or government departments who want to negotiate the terms of their leases with Tainui. Where it has been difficult to reach agreement expert determination procedures have been followed. (We have expert determination to resolve lease issues and arbitration for valuation issues.) All sorts of policy issues arise both at a micro level eg, valuation issues in respect of specific properties; and at a macro level, eg, the conflicting roles of government as both implementer of the settlement (OTS) and lessee of particular properties (a department). With the right of first refusal, a process has to be established that will make this work effectively; decisions have to be made about indemnities for the risk of subsiding houses and for other risks; and about compensation to Crown entities who, through the settlement, find themselves party to deals they consider are not strictly commercial; and third party interests, for instances where prior owners of land taken under PWA are claiming compensation (not for market value which they received) but for lost opportunities.

As part of the Deed of Settlement Waikato-Tainui agreed to the lifting of resumptive memorials from certificates of title for land in the area. It must be remembered that the claim to the Waikato river has not been resolved and therefore those properties adjoining the river will not have memorials lifted.

Ngai Tahu

In a Heads of Agreement signed on 5 October 1996 the Crown and Ngai Tahu agreed in principle to a proposed full and final settlement of all of Ngai Tahu's historical claims relating to land, water, minerals and other natural resources. It will also have a value of $170 million. The settlement will involve the return to Ngai Tahu of both commercial assets and non-commercial lands of spiritual, cultural and historical importance.

The settlement will establish a Deferred Selection Process which will allow Ngai Tahu to select from an agreed schedule of Crown properties, farms and forests, including the Ngai Tahu landbank operated by OTS. The Crown will transfer the properties to Ngai Tabu at market value. Ngai Tahu can select properties which have a total market value of $200 million, using $30 million of its own money in addition to the $170 million the Crown will provide under the settlement.

The market value of each property will be established by the owner of the property or the Crown providing its assessment of market value and Ngai Tahu indicating its agreement to that value, or requiring determination by an independent valuer. All properties will be valued as at the date the Deed of Settlement is signed. Where the property is to be transferred subject to a lease-back to its current owner, the Deed will contain a process which ensures all the terms of the lease can be agreed or determined. Ngai Tabu will be required to make its final selection no later than 12 months after the settlement legislation comes into force and final transfers will take place no more than 3 months later.

There will also be a package of redress for claims relating to mahinga kai or food sources and wahi tapu. This redress will include fisheries rights, place name changes, membership of statutory boards and management roles over a number of native lfora and fauna. The Crown will also provide Ngai Tahu with interests in land for a number of specific sites. These interests will include a Deed of Recognition which recognises Ngai Tahu's association with a site; management input or control but not title; Ngai Tabu receiving title but with management retained by the Crown; and in some cases Ngai Tahu will get freehold title. These options will be applied to a range of sites including rivers, lakebeds, mountains and existing Crown reserves. The redress being provided for mahinga kai will not be valued.

Whakatohea

The Settlement is for all Whakatohea's historical claims of actions or omissions by the Crown up to September 1992.

As part of the settlement the Crown will provide redress to a value of $40 million which includes the following surplus properties:

- a former Road Services depot,
- a surplus Post Shop (memorialised SOE property),
- a surplus former Ministry of Works Depot (memorialised SOE property),
- a Telecom site (memorialised) - inclusion of this property is explicitly conditional on the Crown purchasing the property at market value and on acceptable terms and conditions,
- a Children and Young Persons' Service (CYPS) home.

Several in use properties are also to be transferred subject to lease back. These include:

- the Opotiki courthouse and police station,
- four residential police properties, and
- a quarry.

Whakatohea also have a right of first refusal over the Opotiki hospital property if it becomes surplus.

Again, no private land is included in the settlement.

Secondary implications

Looking ahead 10 years, as a result of the Waikato-Tainui raupatu settlement for example, it is probable that Waikato will:

- be the largest land owner in the Waikato area (approximately 1100 properties with an estimated value today of $155 million);
- own nearly all the land that circles the fringes of Hamilton city;
- probably have purchased land on the open market outside the settlement area;
- own many significant sites in the Waikato area including amongst others:

  Waikato University, Waikato Polytechnic, Ruakura and other lands managed by AgResearch, Coalcorp land, Police stations, Courts, Post shops, Ex Rail Corporation land and Crown Forest land (current licences will not be transferred) at Onewhero and Maramarua forests (subject to cross claim).

A similar effect will flow from the other settlements. Obviously this will create a redistribution of wealth in this country. Not because private non-Maori landowners will be replaced by Maori owners, but because the transfer of a large amount of previously Crown estate to Maori will change the proportion of land holdings by Maori and non-Maori. This process has many consequences.

Most obviously the group of economic "players" in the country developers, entrepreneurs, investors - will include Maori in increasing and considerable strength. Settlements will confer considerable powers of purchase and investment on claimants. Business has already begun to court Maori. Equally of course the process will create many business opportunities for the rest of the population - for agents and advisors to claimants, especially valuers, property investors and developers and financial and tax advisors and for those who benefit from increased Maori purchase power. This in turn alters the balance of power both in the local and national community.

Conclusion

You can see there are many issues arising from the processes for protecting and returning land in settlement of Treaty claims. Some are technical accounting or valuation issues; others are questions of policy or a mixture of the two. For example claimants in areas where land is highly valued will not receive as much land as those where land is less highly valued. That is not a problem where the value of the land is what is important to claimants, but it is where they seek a specific area or site - corresponding to the area alleged to be wrongfully taken - but find because of the high property values in that area (eg, central Auckland, central Wellington) that their settlement quantum will not accommodate that site or the totality of sites they seek. However, all and all, the major issue - that of retaining sufficient land for use in settlements has been addressed. On a wider outlook, the implications of land settlements are quite far reaching. And we are only in the early stages of seeing these effects. They are generally positive and I believe will prove to be beneficial not just for Maori but for all New Zealanders.

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The technology tidal wave

by Rhonda Muir

This paper was prepared for the 1995 New Zealand Institute of Valuers Post Graduate Award in Property.

Figure 1

"Do you envisage that technology will cause major changes in your accomodation requirements over the next five years?"

14% YES
increase

Research conducted by BOMA and Knight Frank Hooker' in Australia indicates that the majority of commercial property tenants believe technology will not have any major effect on their space requirements over the next five years.

Technology will be the number one determinant of demand for commercial property in the next millennium. This paper explains why and examines the impact this will have on the commercial property market.

Valuers who accept the significance of emerging technologies now, still have time to prepare for the changes facing our profession.

TECHNOLOGY AND DEMAND

Technology has always influenced demand. The industrial revolution created demand for commercial property and the value of land increased in response. Other technology caused demand to shift from one form of property to another. For example Containerisation caused demand to shift away from multi-storey industrial buildings in central locations, to low rise high-tech warehouses near ports and major transport routes.'

Because the effects of technology have been absorbed by the property market for decades, valuers could be forgiven for thinking that future demand will remain cyclical. *(Figure 1)* However, there are two compelling reasons why this is not so.

Firstly, even if all other factors remain constant, demand for commercial property will continue to decline, simply because the physical volume of technology is now halving every five years.' For instance, 15 years ago commercial buildings had rooms full of main frames with less computing power than one personal computer has today. And a computer disc the size of two cigarette packets can now hold as much information as compactor storage files which take up valuable office space.

Secondly, we are entering a new era in which commercial property is no longer the only place in which to do business. In the Information Age, more tenants have the choice of working from home, in the Commercial Business District (CBD), suburban office locations, or even from their cars. Eight million Americans now work from home and this is expected to increase to 13 million by 2000.[3]

Technology is no longer just shifting demand for commercial property. It is now permanently reducing that demand.

THE INFORMATION AGE

With technology such as modems, video conferencing, laptop computers and the Internet, many large tenants are already finding new ways to do business.

The Banking Industry is a good example. Traditional branches (generally 200-300m2) are becoming obsolete as they are replaced by alternative distribution systems. Many branches are being sold off and will eventually be replaced by Automatic Teller Machines (ATMs 6m2), banking Kiosks in shopping centres (10-12m2), or even supermarket branches (approximately 25m2). With banks now encouraging the use of Electronic Funds Transfer Point Of Sale (EFTPOS), phone banking and home Internet banking, there may eventually be no need for physical branches at all! Retail shopping is another area where commercial property is being replaced by technology. `Cyber Malls' (retail shopping sites on the Internet) are already a reality. Worldwide Internet purchases equalled $US200 million by early 1996 and are expected to increase to $US600 billion by 2000.°

Technology is also being used to reduce store size. IBM and Blockbuster are currently designing futuristic music and video stores where music and video images can be transmitted down telephone lines from distant databases and put onto a blank cassette in store,5 ensuring their products are cheaper and stock is always available.

Of course, the speed at which retail and commercial property will become obsolete depends on consumer acceptance of the new technology. Many valuers probably do not believe they will see the effects of these changes during their career. After all, it took 60 years after the invention of hydraulic lifts by Otis in 1852 before the first skyscraper was built. 6

However, there are seven good reasons why technology will continue to replace commercial property in the future:

Technology faster, cheaper, easier

Technology is being used by more companies and individuals because it's getting cheaper, easier to use, faster at processing information and more readily available.

Competition

While Information Technology has made `Cyber Commerce' (conducting business on the Internet) possible, competition will make it imperative. And as people learn about the cost savings and increased productivity from modem work practices using new technology, more companies will adopt programmes such as 'Telecommuting" and `Hoteling'8.

Increased computer literacy

As more computer literate individuals replace today's less computer literate senior managers, there will be less resistance to using new technology in the workplace.

Vulnerability of major industries

Government, Banking and the Insurance industries are amongst the largest office space users in New Zealand and Australia. They are also amongst the industries most susceptible to emerging technologies because many of their back office functions are being automated and relocated from the CBD to cheaper locations.

Marketing

Alternative distribution systems, such as retail sales on the Internet, have to date existed without marketing. The first televisions with Internet capability arrived in Australia last year and, according to industry experts9 , "once the technology is marketed, demand for alternative distribution systems will really heat up" at the expense of in-store retail sales.

Environment and infrastructure

Communities throughout the developed world are burdened by the high cost of maintaining infrastructure and are concerned about the environmental effects of pollution from exhaust fumes, etc. Therefore policies such as telecommuting are likely to be supported by local authorities and environmental groups.

Familiarity

People who were used to banking at their local branch but now enjoy the convenience of telebanking, or home banking, will probably find it easy to shop without visiting a store.

IMPLICATIONS FOR THE PROPERTY MARKET

Commercial property is now competing against technology for business. The considerable savings that tenants are beginning to realise on commercial property rent, represent equally significant losses of income and property value to the owners. All valuers now need to reassess their assumptions with regard to:

Rental growth projections

Further research is required to determine the likely timing and extent of significant falls in demand for commercial property. Although worldwide use of the Internet continues to increase

BANKS OF THE PAST

BANKS OF THE FUTURE

- ATM (6m2)
- Kiosks (10-12m2)
- Supermarket branches (25m2)
- Banking
- EFTPOS
- Home & phone banking

LARGE CORPORATES CASH IN

Many companies have already discovered the savings to be made by reducing their property requirements:

- AT&T have estimated savings of $US80 million by large scale reorganisation to increase the use of virtual offices (the concept of using fax, modem, computers and mobile phones to work any where any time).'
- IBM has halved its workspace over the past 10 years, saving $USI billion a year.'! This has been achieved by allocating one workstation for every 12 employees. In the UK over 2 million pounds a year is being saved through consolidating into one central office in London, and replacing a 3,200m2 office in Glasgow with a 325m2 drop in facility."
- Ernst and Young has reduced office space needs by about 186,000m2 since 1992, saving close to $US200 million per year.',

there are still problems with its speed and reliability. A programme called `Reservation Protocol' has been devised to overcome these problems, however, this is not expected to be sufficiently widespread to help users for several years.10

Property life cycles

With the speed at which new technology is developing, commercial properties are becoming obsolete faster. This means property life cycles will be shorter, with less opportunity for capital growth. Shorter cycles mean greater volatility and risk in the market. Ultimately some commercial properties may even fail to provide a hedge against inflation.

Property returns

More capital needs to be spent on existing properties to keep up with a market demanding increasingly intelligent and adaptable buildings. Those buildings which cannot be `re-cycled' also require large capital input to convert them into alternative uses. This capital expenditure is resulting in lower returns on commercial property.

Tenant risk profiles

Blue chip tenants such as Banks, the Government and major Accounting firms may lose favour to less technologically vulnerable tenants such as restaurants, leisure/entertainment operators, doctors' surgeries and mortuaries."

The value of location

With the ability to work anywhere anytime, Central Business Districts are losing their premiums over cheaper alternative locations.

Length of lease terms

Tenants are now demanding shorter lease terms to enable them to respond to new technological developments.

Portfolio strategies

Valuers in asset management roles for institutional investors should give more weight to outer locations, lower risk tenants and alternative types of property investment. For example, changing work habits are likely to create greater demand for bigger and better residential properties, particularly in the prestige market which may be suitable to some investors.

CONCLUSIONS

- Valuers need to recognise that emerging technologies will significantly affect tenant demand for commercial property in future. We need to change our assumptions to reflect shifting investor demand, shorter property cycles, and the redistribution of property values.
- Information technology has evolved from creating property value, to shifting demand, to permanently reducing demand, and will eventually replace some types of commercial property as the principal place to do business. Although demand is falling

only slowly at present, this trend will gain momentum over time and become increasingly widespread due to competition, increased computer literacy, etc.

- In the information age physical property will no longer be the only medium from which to conduct business. Therefore demand for many traditional forms of property may fundamentally change forever. Companies that understand new technology and the benefits it brings are now realising considerable savings on previous property costs.
- There will still be demand for physical property, especially from less technologically vulnerable industries which may gain in popularity over some traditional blue chip properties.

And for valuers who are still not convinced, I offer you this closing thought: "The Internet is like a 20-foot tidal wave coming thousand of miles across the Pacific, and we are all in Kayaks." (Andy Grove, CEO of Intel (the worlds largest manufacturer of semiconductors), Fortune Magazine July 1996).

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The valuation of landfill sites

by Robin Hocking

This paper is the second in an Australian series on Quarries and Landfill sites. It is reproduced by kind permission of the author and The Valuer and Land Economist.

Overview

Waste is usually discharged to a landfill which in most instances is a disused quarry or sandpit. However, landfills can be above ground, formed in a valley, or by a trench and fill operation.

Victorian landfills are controlled by the Environment Protection Act, the Planning & Environment Act and the Local Government Act. The EPA provides for the implementation of policies, and the most current and relevant policy is the State Environment Protection Policy (Siting and Management of Landfills Receiving Municipal Waste) - SEPP.

The permits and licences for a landfill involve both a Planning Permit and an EPA Works Approval. A Discharge Licence will be issued after the works and the conditions in the Works Approval have been completed.

The time frame for an EPA Works Approval is up to three years. A Works Approval cannot be issued unless a Planning Permit is in place.

Waste description

Most waste is classified under the following headings:

- Municipal waste
- Solid inert waste
- Clean fill
- Industrial waste
- Liquid waste
- Prescribed waste, eg, asbestos and contaminated soils
- Biological or infectious waste

Prior to the above classifications, waste had been generally described as either putrescible or non-putrescible.

An EPA Works Approval is not required for clean fill. However, clean fill is described as being naturally occurring material which has not been altered by man. Consequently, bricks and mortar do not fall into that category.

Works Approvals, Planning Permits & Discharge Licences

A Planning Permit must be issued prior to a Works Approval.

A Works Approval can take up to three years to obtain and considerable time and expense may be required.

The application for a Works Approval must meet the requirements of the SEPP, and the Working Plans and method of operation will address the on-site and off-site environment concerns. This involves buffer distances from residential land, leachate and landfill gas controls, the design and staging of the operation, the expected waste stream and its source, and the type of machinery to be used on site.

An EPA Waste Discharge Licence is issued after the works have been completed as required by the Works Approval.

The proposal has the primary intention of protecting all ground water, particularly potable water ...

AAT Appeals and Objections

It must be expected there will be objections from rate payers and possibly from local municipalities and the EPA. As an example, the Works Approval for the South Eastern Regional Landfill site in Clayton Road occupied thirty-four days at the AAT and the appeal is reputed to have cost in excess of $1,000,000.

The above appeal developed out of an argument for the reduction of the number of operating landfills in the locality, which further developed into arguments in relation to the ability of the site and the operators to comply with stringent EPA requirements - particularly for the clay lining of the hole and the security for ground water. The ground water requirements were met with a relatively new and untried method of creating a slimes curtain and the site received approval.

Despite this lengthy AAT appeal, an almost identical application over an adjoining site was also objected to by the EPA and the local municipality, and again the matter was decided through the AAT with an approval. Although there have been very few sites in Victoria refused approval for landfill, the conditions are becoming more and more stringent and onerous on the operator and there is an expectation of further delays and some refusals in the future.

It must be noted the Works approval is issued to the operator making the application. However, contrary to my comments in relation to an Extractive Industry Licence, the EPA has no hesitation in cancelling a Discharge Licence and receiving a new application from another party.

Ground water protection

The ground water is protected under current regulations, however, a new SEPP Protection of Ground Water has been drafted and this policy is now receiving comment. The proposal has the primary intention of protecting all ground water, particularly potable water (total dissolved solids less than 1,500 milligrams/litre) and other uses such as irrigation, stock water and eco systems protection.

The draft policy is proposing that almost all landfills will install a synthetic liner over a compacted clay liner and this requirement is causing considerable concern in the industry.

Airspace

The airspace subject to valuation is usually classified as that being the airspace to natural surface level and contained within the owners title. This could also be classified as being the gross airspace available over a future period, however, present purchase and infrastructure costs are indicating that purchasers of airspace will need to be more concerned with the space licensed for the receival of waste. This requires allowances for clay linings and final capping.

The final contours will be part of the application for Works Approval and may have the effect of increasing the airspace volume. Settlement may also add to the final volume of waste to be received, however, I do not believe this has been a consideration in establishing values.

Care should be used when comparing sales data which has been reduced to a unit value per cubic metre of airspace and, obviously, the comparisons must be "like with like". There have been several sales over the past few years which have been based on a unit value of airspace per cubic metre for both gross and net airspace, and a valuer is required to make the necessary allowances.

As in the quarrying industry, there is the need for an economic volume. In other words, a small hole may not be economically viable if it is required to be clay lined and, on the other hand, an excessive volume of airspace may have little affect on value if the annual use is small.

Buffer zones

Buffer zones are becoming more important and the following examples are current:

- solid inert waste 50 metres from residential,
- municipal waste - 200 metres from residential,
- rural municipal 500 metres from residential,
- municipal waste - 1,500 metres from an aerodrome for piston aircraft,
- municipal waste - 3,000 metres from an aerodrome for jet aircraft,
- surface water 100 metres.

Wastes are prohibited from being deposited in the following areas:

- wetlands,
- lfora and fauna guarantee listings,
- marine and coastal districts,
- crown land - without permission from the Minister,
- flood prone land,
- water catchment areas.

Attenuation zones can be approved around the perimeters of landfill sites. As an example, leachate may be allowed to migrate to an attenuation zone where the ground water is already polluted or where the useful recovery of that water is not viable.

Engineering costs

The costs of lining the hole and the creation of cells is capital intensive over and above the purchase of the site.

Leachate controls and site drainage need to be installed at the commencement of the operation. Access roads, haul roads, fencing, right hand turning lanes and deceleration lanes will all be secondary costs.

Gas controls will need to be installed. This can be in early stages or delayed until the completion of the first few cells.

A valuer will need to acknowledge that each site is different with variations to the operating conditions and the requirements of the permits and licences. The cost of infrastructure and setting-up could range between $400,000 and up to $3,000,000. As an example, the Castlemaine landfill serving a population of approximately 12,000 persons has been budgeted at a cost of $700,000.

Liners

Clay liners are the usual requirement for the containment of leachate and the protection of ground water. The thickness of a clay liner will range from 0.6 metre to over 1.0 metre and the compacted clay may be required on both the floor and walls of the hole.

The current EPA requirement is for a clean impervious clay liner to be compacted to a specification of 1 x 10-9 metres per second. This is the rate of absorption of the clay liner with a 1.0 metre head of pressure which could result in the leachate migrating to a distance of 1.58 metres in a period of 50 years.

The philosophy behind these requirements is the total containment of the leachate within the landfill site and the ability of the clay liner to act as a filter for heavy metals and some chemicals. These requirements are expensive and restrictive and in some rural circumstances may be impossible to meet.

Synthetic liners such as high density polyethylene (HDPE) have been installed in some instances and will become a general requirement under the proposed SEPP ground water policy. This liner is installed over compacted

The methane component of the landfill gas is a major contributor to global warming ...

clay and although the cost of the material may be small, the placement, welding of joins and additional drainage will become a significant capital item.

Approximate estimates for the cost of a clay liner are:

- Using on-site clay $1.50 to $3 per cubic metre for placement and compaction.
- Off-site clay to be imported - up to $13.50 per cubic metre for placement and compaction.

Leachate control

The controls for leachate are primarily for the protection of ground water.

Leachate is the result of moisture infiltrating and passing through the waste body to reside or be captured on the floor of the tipping area. However, any water, even surface water, migrating off the landfill site can be classified as leachate.

Leachate is controlled by retention in the landfill, collection and treatment on site, aeration and on-site irrigation or disposal off-site.

Monitoring bores are required for control and it is usual for leachate to be collected from a sump in the lfoor of the landfill and pumped to a collection pond.

A hydrogeological report is required to provide information in relation to local ground water aquifers. This report will be important in establishing the suitability of the site and it will set the standards and the type of work required for ground water protection.

The volume of leachate generated is influenced by the amount of rain water entering and filtering through the site. An impervious clay cap will be required over finished areas to prohibit infiltration which, if it became excessive, could result in leachate overflowing and escaping at the sides of the landfill "leachate burst phenomenon".

Landfill gas

Landfill gas is produced within the first two years of the receival of putrescible waste and controls are planned from commencement date.

The methane component of the landfill gas is a major contributor to global warming and is required to be controlled. The gas is usually collected from wells sunk into the waste and coupled by horizontal pipes. The gas can be drawn off to a central area and lfared or alternatively used as a source of power and heat.

Gas will continue to be generated in most municipal landfills for a period of 25 years, when it would be expected that commercial quantities are no longer available. At least until this time, the EPA will require continuing control. The moisture content of the landfill will have some bearing on the generation of landfill gas. Gas will be considerably reduced in a dry climate and will increase in areas such as Melbourne with a humid climate or in a site which has been inundated with water.

The clay capping assists in the control of gas and is usually a minimum of 500 millimetres.

EPA levy

All landfills pay a levy to the EPA based on tonnage. The current levy is:

- municipal landfills $2 per tonne, and
- private landfills - $3 per tonne.

In the event that a landfill does not work over a weighbridge, the EPA has carried out aerial surveys and, until recently, used a conversion factor of 550kg/m3 of airspace with various allowances for cover material. The EPA has completed further compaction tests and as from July 1995, the conversion rate was increased to 1,000kg/m3. This will result in some landfills paying a levy almost double their previous commitment.

Valuers will need to be aware that gate prices submitted by an operator may not include the levy.

Compaction rates

Compaction rates have varied over past years but there is now general agreement amongst operators that compactions for most types of waste will range from 750kg/m3 to in excess of 1,000kg/m3. These figures allow for a daily cover material up to 15% and variation will be dependent on the type of waste being received and the compacting machinery.

Landfill compacters are specialised rollers with weights in the range of 25 tonnes up to 45 tonnes and they perform better than the standard track dozer. The success of compaction will be dependent upon the number of passes, the direction of work, the type of waste and the ability of the operator.

Estimated use

The historical use of a landfill is the best evidence for estimating future annual use and the accuracy of any estimates will also depend on an intimate knowledge of the market and the potential waste stream.

There are many instances, particularly in rural areas, where data and historical figures have not been kept or maintained accurately, and in these instances a valuer should be able to rely on the population being served by the particular landfill.

I carried out a recent survey of various data provided by consultants and the EPA, and believe the annual use ranges between 1.1 m3 and 1.5m3 per head of population. If these figures are reasonably accurate, the establishment of an annual airspace requirement becomes simple.

Rates of fill

The rate of fill varies dramatically between landfill sites and locality. The following four sites provide some indication of the annual requirements:

- Kerang - I0,000m3 per annum,
- Bendigo - 110,000m3 per annum,
- Sunshine - 230,000 m3 per annum,
- South Regional Landfill - 280,000 m3 per annum.

Cover material

Dry cover material is required to be spread over exposed faces on a daily basis up to 150 millimetres deep.

The availability of cover material can have a serious affect on the landfill operation and consequently, values. For many and varied reasons, there is a general shortage of cover material in the Melbourne metropolitan area. This has been partially brought about because of extensive road works requiring fill, the tendency to recycle concrete and bricks, and the need for some landfill sites to receive large volumes of solid fill to establish a floor or working platform above ground water levels.

Daily cover can be obtained by reducing or removing the costs at the gate but this practice has a tendency to only redistribute the available material and put further pressure on competing sites.

Operating costs

Legitimate operating costs are often difficult to obtain and there is a difference in accounting procedures between municipalities and private operators. The enclosed worksheet is an attempt to set out relevant data to establish the cost of disposal and management and although the worksheet needs refinement, it has proven to be a very useful tool.

I suggest the operating costs in the Melbourne metropolitan area range between $9.50 per tonne and $16 per tonne.

Rehabilitation is a major expense which becomes extremely important when the landfill is coming to the end of its life and this is particularly sensitive in a valuation for mortgage purposes. The rehabilitation of a combined municipal waste and solid inert waste site could easily exceed $1,500,000.

It *Rehabilitation is a major expense which becomes extremely important when the landfill is coming to the end of its life ...*

Leachate continues to be controlled and consequently, is an ongoing cost.

Gas is also a matter requiring ongoing monitoring and expense. Sampling and monitoring may continue for thirty years after the landfill has been completed.

Birds and vermin are required to be controlled on a daily basis. Birds can become a serious problem. Seagulls are protected and no culling has taken place to date. Dust is a continuing problem, particularly in the metropolitan area. The majority of complaints received from neighbouring residences are in relation to dust and odour.

Plant and machinery is an expensive capital item and a proper allowance must be made for depreciation and maintenance.

Income

Gate receipts in the Melbourne metropolitan area will fall into the following categories:

- Municipal waste - $19 to $27 per tonne,
- Solid inert waste - $12 to $18 per tonne,
- Prescribed industrial waste- $40 to $70 per tonne.

There will be varying charges for other types of waste such as security waste, requiring immediate cover, quarantine waste; eg, Melbourne Airport, asbestos and concrete.

Profits

Recurring profits before interest and tax will vary considerably depending on the operation, the type of waste and accounting procedures. The volume or throughput will also have an affect on profits which will range between $4.50 per tonne and $12 per tonne in the metropolitan area.

Amortisation

The financials used to assist in the valuation of a landfill must include proper amortisation of the airspace as a depreciating asset plus the future costs of reclamation. It is noticeable that some operators elect to defer amortising the airspace and some future costs, which quickly produces unattainable budgets.

Rehabilitation

Rehabilitation of a landfill is usually commenced with the capping of the waste with a minimum of 500 millimetres of clay. Thereafter, there may be requirements for a layer of sand and gravel to act as a trap for landfill gas and a further layer of clay rich soil and finally a top soil.

The final contour will have been set at the time of the issue of the Works Approvals and current standards require a slope of approximately 20% to prevent the ponding of rainwater and to provide a runoff to perimeter drains. Gas controls will be put in place for a putrescible tip. These require wells which are connected to allow the gas to be drawn to a central point for either flaring or the production of energy.

Leachate management controls will be finalised. This will generally mean the ongoing monitoring of bores, the testing of both leachate and ground water and the treatment of leachate in open ponds or closed circuit treatment plants.

Monitoring for landfill gas, ground water and leachate will be an ongoing liability to the operator and/or landowner and it is interesting to note that both the Southern Regional Landfill site in Clayton Road and the recently permited Pioneer site in Fraser Road are committed to a thirty year post closure monitoring programme.

Post closure liability is a major problem for financial institutions, particularly where the client is not a substantial public company.

A large number of operating landfills were permited prior to the current SEPP standards and it is only recently that clay linings have been required. Consequently, older operating sites and closed landfills may require a higher risk factor built into their values than a new site operating under stricter specifications. This does not appear to be reflected in the market place but that may be because of the lack of sales of older sites.

Valuation

Landfills receiving municipal waste have a "rule of thumb" value ranging between $2 and $2.50 per cubic metre for a "greenfield" site. Operating sites with permits and licences in place appear to have a value in the vicinity of $3.50 to $4.50 per cubic metre.

There is virtually no available sales data of operating sites but the recent tender by Melbourne Water for the site in Jones Road, Brooklyn and leased to the City of Brimbank (Sunshine) will be a valuable sale if and when it becomes public knowledge.

The method of valuation is the same as for quarries, ie, the capitalisation of a recurring profit before interest and tax.

Cap rates are also similar to quarries except, I believe, the risks are higher and rates between 25% and 30% are acceptable and less than 20% would be doubtful.

Sinking fund rates should be risk free with an allowance for income tax.

Royalties

Royalties have been paid in the past but there are now few leasing agreements over freehold land. The leasing of property for a landfill provides a problem for the landowner who could become responsible for future liabilities. The freehold owner will have little control over the standard of operation and the problems of future liability will become apparent if the property is offered for sale or mortgaged.

Royalty rates in the metropolitan area can be economic to an operator up to 11 % of the gate price but in rural areas where the throughput is considerably smaller and the gate price doubtful, it may only be possible to equate a royalty to say, 4% of a gate price.

The disposal charges in rural landfills vary, however, the actual costs of disposal will not be different from metropolitan costings. For valuation purposes, I suggest the costings should be treated as being similar and a lower gate price will indicate subsidisation by the rate payers.

One of the best examples of a current royalty is the City of Shepparton lease at the rate of 65c per cubic metre plus cover material at 90c per cubic metre as required.

PROPOSED LANDFILL IN MELBOURNE METROPOLITAN AREA GREENFIELD SITE OCTOBER 1995

Date	October 1995
Location	Melb. metro
Type of fill	putrescible
Air space m3	3,200,000
Purchase price	$7,800,000
Purchase price m3	$2.44
Usage m3 p.a	275,000
Life-years	11.64
Selling price m3 loose	$9.13
Compaction X m3/m3	2.3
Sell.price air space m3	$21.00
Kg per m3 compacted	$950
Conversion m3 per tonne	1.05
Usage tonnes p.a.	261,250
Selling price per tonne	$21.75
Sales income	$5,682,188

Expenses			$ per m3	$ per tonne
Cover material	35,063	1.10%	0.13	0.13
Plant & machinery	594,000	18.64%	2.16	2.27
Deprec. p & mach	99,000	3.11%	0.36	0.38
Wages	316,800	9.94%	1.15	1.21
Salaries	211,200	6.63%	0.77	0.81
Fixed outgoings	240,000	7.53%	0.87	0.92
Guarantee fee	75,000	2.35%	0.27	0.29
Amortise guarantee	232,246	7.29%	0.84	0.89
Amortise air space	362,304	11.37%	1.32	1.39
EPA licence	75,000	0.24%	0.03	0.03
Re-cycle levy	587,813	18.44%	2.14	2.25
Testing/monitoring	15,000	0.47%	0.05	0.06
Pumping	3,500	0.11%	0.01	0.01
Road maintenance	25,000	0.78%	0.09	0.10
R&M	40,000	1.26%	0.15	0.15
Subtotal	2,844,426	89.25%	10.34	10.89
Contingencies	142,221	4.46	0.52	0.54
Amortise capital works	200,312	6.29%	0.73	0.77
Total	$3,186,959	100.00%	11.59	12.20
=M2/p.a	$1.00			

		per m3 air	per tonne
Sales =	$5,682,188	$20.66	$21.75
Expenses =	$3,186,959	$11.59	$12.20
Profit BIT =	$2,495,228	$9.07	$9.55
Ret. on capital =	20.60%		

Operating expenses		
Cover material percent p.a	15.00%	$0.85
Plant & machinery		
No. vehicles	6	
Hours each p.a	1650	
Av. rate p/hr	$60.00	
Deprec. rate p/hr.	$10.00	
Wages		
No. employees	6	
Hours each p.a	2,200	
Av. rate p/hr	$24.00	
Salaries		
No. employees	$3.00	
Av. rate p/hr	$32.00	
Re-cycle levy per tonne	$2.25	
Fixed outgoings	$240,000	
EPA guarantee	$10,000,000	
Guarantee fee	0.75%	
Amor.guar.*50% @	11.00%	
Amortise air space @	1.00%	
Contingencies	5.00%	

Capital Works		%
Buildings	30,000	0.25%
Amenities	35,000	0.29%
Office	65,000	0.54%
Workshop	104,000	0.86%
Weighbridge	8,000	0.07%
Truck wash	1,500	0,01%
Services - water	9,000	0.07%
power	0	0.00%
Tyre shredder	130,000	1.07%
Roads & drainage	2,300,000	18.99%
Linings & preparation	55,000	0.45%
Gas collection	1,150,000	9.49%
Restoration/Final cover	135,000	1.11%
Landscaping	225,000	1.86%
Planning Permits & WA	65,000	0.54%
Fencing	$4,312,500	35.60%
Subtotal	$7,800,000	64.40%
Purchase price	$12,112,500	100.00%
Total outlay	$3.79	
= m2	$3.79	

Summary

The valuation method is basically the same for a quarry or a landfill. The capitalisation of a profit before interest and tax allows for all market place considerations.

Comparisons can be made on a unit value per tonne or per cubic metre but extreme care must be exercised.

A sale by a mortgagee is a serious event for extractive and landfill sites. The forced sale creates doubts for buyers and lending institutions plus legal considerations for the assignment of licences and permits and future liabilities, plus responsibilities for site management and reclamation.

ABOUT THE AUTHOR

Robin Hocking is a director of CJ Ham & Murray Pty. Ltd. Melbourne, which commenced business in 1853. He has considerable experience in the valuation of quarries and landfills and has valued in excess of 160 quarries throughout Australia over the past eight years. He is an associate of the Institute of Quarrying.

The role of fluorescent light flicker in energy efficiency and health

Sick building syndrome

Marie E Fleming, Robyn A Phipps and Cliff J Studman Building Technology Research Group, Massey University

Recent research and industry attention has centred on energy savings in commercial office spaces. Fluorescent lighting has received much of this focus. Lighting is a major consumer of electricity in the workplace, and is an area where significant energy savings are feasible. Improvements in energy efficiency however, should not be made at the expense of the comfort and well being of office personnel. Well designed office lighting which utilises new technologies can improve the working environment as well as increase energy efficiency.

This paper discusses a proposed research programme which looks at the known effects of lfuorescent lighting on the health and productivity of office personnel. It further presents the energy savings which are available with this lighting.

Figure 1: Modulation depth of two fluorescent tubes, Thorn T20W/29 and Philips TLD/18W/82 (Andersson et al, 1994)

modulation 18/39%

20 --------------------------------

O'

0 10 20 30 40 50

t(ms)

Introduction

In a typical contemporary commercial building, artificial lighting is one of the larger energy consumers. It accounts for approximately 30 - 40% of the energy consumption (Massey University, 1992). Artificial lighting has considerable scope for significant reductions of energy. The operation of artificial light largely coincides with peak electricity tariffs, and new technology for energy efficient office lighting has shown that energy savings of up to 40% are achievable (Centre for Advanced Engineering, 1996).

Research suggests that energy efficient lighting technology can also have significant positive returns in terms of the health and productivity of office personnel. Fluorescent lighting has been highlighted as a significant factor in eyestrain, headache, lethargy and other asthenopic (eye related) complaints by office personnel (Wilkins, Nimmo-Smith, Slater and Bedocs, 1989; Lindner and Kropf, 1993). These three symptoms are among the most frequently reported complaints attributed to the office environment, and are experienced by up to two thirds of office personnel (Wilson and Hedge, 1987).

While many aspects of fluorescent lighting are perceived negatively, perhaps the most commonly expressed complaint arises from flickering of the light source.

Recent research on fluorescent lighting suggests that this flicker may be a causal factor in health symptoms experienced by office workers (Wilkins et al, 1989; Veitch and McColl, 1995).

Energy efficient lighting technologies

Technology for artificial lighting in commercial office buildings has grown significantly in recent years. New technologies include energy efficient fluorescent tubes, control gear and fixtures. Energy efficient triphosphor lfuorescent tubes supersede the conventional halophosphate tubes, and feature an increased light output, minimal depreciation, and a greater lifespan. These differing performance characteristics are due to the phosphors which give the fluorescent tube its characteristic colours. Triphosphor tubes combine monochromatic red, green and blue phosphors which the eye blends to produce a white light with good colour rendition and high efficiency, while halophosphate tubes utilise a group of wide band emission phosphors which are less energy efficient (Cayness and Marsden, 1983).

Electronic ballasts offer significant energy savings over choke ballasts, reducing energy consumption by up to 30% and increasing the life of fluorescent tubes. Energy efficient luminaires, reflectors and diffusers maximise the effective light. Inefficient luminaires may utilise less than 50% of the available light due to poor reflection characteristics. Acrylic diffusers yellow with age and may absorb up to 15% of the light that is produced.

A less apparent cost of inefficient artificial lighting is the generated waste heat and subsequent demand for chilling in an air conditioned building (Phipps, 1996). Energy efficient lighting which utilises appropriate tubes, control gear and fixtures requires fewer tubes. Hence less heat is produced. This can conceivably reap a further 10% savings in air conditioning operation, cost and capacity.

Energy eff icient lighting and health

Using appropriate energy efficient technologies may have significant spin-offs for the comfort, well-being and productivity of office personnel. New technologies, in particular energy efficient luminaires, reflectors and diffusers are designed to provide lighting which minimises asthenopic complaints in the workplace. These aspects of lighting, for which the effects are well known and documented, have received significant research attention to identify parameters which minimise work related health complaints.

The health effects from fluorescent light flicker are less well defined. The following sections of this paper discuss the alleged effects of fluorescent light flicker on the health and productivity of office personnel with respect to the proposed research programme.

Perception of fluorescent light flicker

The flicker from fluorescent lighting is a product of the frequency and modulation of the lamp. The frequency or rate of lficker of low frequency lighting (choke ballast) is 100 Hz, twice the frequency of the power supply. High frequency (electronic ballast) lighting has a flicker of up to 60,000 Hz.

The differing persistence of the individual phosphors which line the inside of the fluorescent tube smooth out the rapid flicker due to the light discharge. Each phosphor has a finite lifespan or 'afterglow' resulting in a light that modulates between 17 and more than 90% dependent upon the phosphor composition *(Figure* 1).

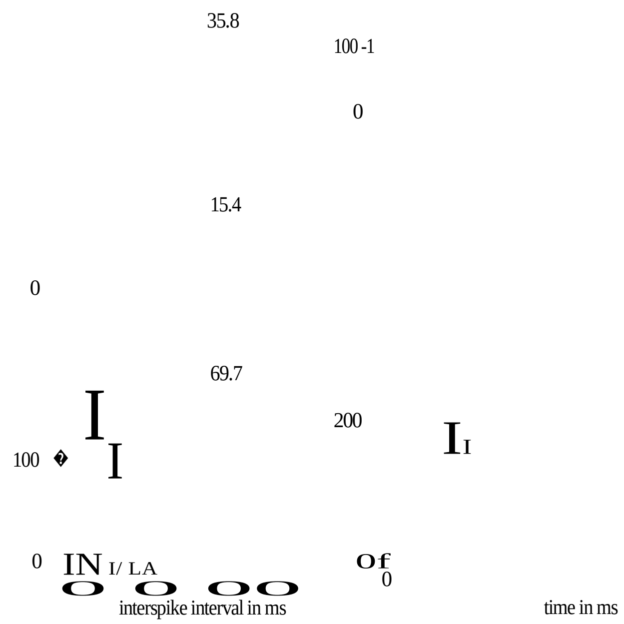
The perceptible flicker from fluorescent tubes has attracted many complaints about fluorescent lighting, due to its distracting and irritating effect on the eyes. It also has been shown to influence subject's satisfaction with fluorescent lighting (Brundrett, 1974). The discharge frequency of a lamp with a choke ballast (low frequency) may be discernible by up to 25% of the population (Brundrett, 1974; Lindner and Kropf, 1993). However in fixtures with electronic (high frequency) ballasts the flicker is `swamped' by the phosphor persistence, and there is no evidence to suggest that this is detected by the optical system.

Visual sensitivity to flicker varies. It is well known that visible lficker can trigger epileptic seizures in individuals who are susceptible (Wilkins, 1993). Physiological factors including gender, age, fatigue, and psychological state (Collins and Hopkinson, 1954; Brundett, 1974; Lindner and Kropf, 1993) as well as aspects of the physical environment such as light intensity and positioning (Collins and Hopkinson, 1954; Berman, Greenhouse, Bailey, Clear and Raasch, 1991) will predispose office personnel to flicker sensitivity.

These aspects are reflected in the office environment. Women perceive flicker more readily than men, and those aged between 20 and 30 years of age are more sensitive to the modulation. Open plan offices increase flicker perception particularly at high illuminance.

Modulation of fluorescent tubes has also been highlighted as a factor in flicker perception (Collins and Hopkinson, 1954). Consequently it has been hypothesised that low frequency triphosphor tubes will incur a greater visibility than that of halophosphate tubes (see *Figure* 1). This may have a physiological effect on the optical system (Wilkins and Clark, 1990). Components of the optical system continue to respond synchronously to flickering light well above flicker rates consciously perceived by the eye. Human electroretinograms (ERGS) have shown that visual neurons will fire in response to flickering light at up to 145 Hz (Berman et al, 1991). Feline visual neurons have been shown to fire almost twice as often under fluorescent light, and show strong phase locking of responses to the flicker (Eysel and Burandt, 1984) *(Figure 2).* Flickering light has also been shown to influence the accuracy of eye movements when scanning text. When reading under modulating light the rapid eye movements or saccades that the eye normally makes are less accurate, and more likely to overshoot the targeted words (Wilkins and Clark, 1990). It has been surmised that this extra work can tire the eyes - leading to eyestrain and headaches (Veitch and McColl, 1995).

Figure 2:The response of feline visual neurons to daylight (top) incandescent light (middle), and fluorescent light (bottom)



Research on fluorescent light flicker and visual complaints

Research into the visual performance and visual comfort of office personnel and research subjects has indicated that changing the frequency and modulation of lfuorescent lighting may reduce the incidence of asthenopic complaints in commercial buildings. The field study conducted by Wilkins et al (1989), showed that changing the fluorescent lighting from low frequency to high frequency operation more than halved the incidence of headaches and eyestrain.

Further research by Veitch and McColl (1995) showed increased visual performance under high frequency as compared to low frequency light. There was no significant difference in reading performance between halophosphate (modulation 20%) and full spectrum lamp types (modulation - 90%), although the full spectrum light had the lowest visual performance score. Visual comfort was reduced under low frequency as compared to high frequency light, but this difference was not significant.

Tinted eyeglasses which reduce modulation from fluorescent lamps, have been shown to improve the visual performance of individuals who are sensitive to the lighting (Wilkins and Wilkinson, 1991).

NEW ZEALAND RESEARCH

Massey University are currently conducting a research project which investigates the effects of lfuorescent light flicker on the health and productivity of office workers. The research will assess the effect of differing frequencies, and differing modulation.on the incidence of headache, eyestrain, and lethargy symptoms in a commercial office environment. It will also determine if the satisfaction, comfort and productivity of personnel is affected by differing light treatments. The field work is to be conducted in three Wellington offices in 1997.

Research hypotheses

- Increased flicker frequency in lfuorescent light fittings will decrease health symptoms and increase productivity and satisfaction with the lighting.
- Differing modulation of fluorescent lighting will influence the health symptoms, satisfaction and productivity of office personnel.

Methodology

An interventional field study with repeated measures, will be conducted in three host offices (n = 51,45,32), investigating the effects of three combinations of lficker frequency (high frequency and low frequency control gear) and modulation (triphosphate and halophosphate lfuorescent tubes). Each of the lighting conditions will operate in the office space for a four week period and will be interchanged outside office hours. The fluorescent tubes will be colour temperature matched to minimise occupant detection of changes. All offices will receive a standardised lighting condition (control), which will run for two weeks at either end of the experimental period and does not represent any of the experimental lighting conditions. The controlled lighting condition will detect baseline personnel responses in each of the office spaces, as well as differential symptomatic trends that develop throughout the experimental period, and may be due to such factors as response fatigue. Environmental factors such as temperature, humidity and daylight levels will be monitored throughout the study period and will be assessed by analysis of covariance.

The experimental offices are in sealed air conditioned commercial buildings which utilise fluorescent lighting as the primary light source. All of the offices have windows, but the daylight contribution is minimal as the participants predominantly work a twilight shift and the study will be conducted over the winter period.

The subject personnel's primary work task is cheque data entry. The employees work between one and five evening shifts with a duration that varies between three and eight hours dependent upon workload.

Participants will fill out a daily symptoms diary recording the occurrence and severity of any headache, eyestrain and lethargy symptoms that they have experienced. Those symptoms which are not due to the workplace will be excluded from the survey data. In addition, lighting quality, satisfaction and perceived effects on productivity will be measured on a weekly basis. Bibliographic data such as age, gender and visual aberrations will be collected at the commencement of the study. The productivity of the participants (rate of cheque data entry) will be monitored throughout the four month study period. The study will be analysed as two separate contrasts. Baseline control conditions at either ends of the study will be treated as covariates in the analysis. ANOVA will be used as the primary tool for analysis of differences between lighting conditions. Factors including bibliographic data, working hours and other variables will be considered as covariates in the analysis. Secondary analysis will consider the relationship between symptom occurrence and subjective variables such as satisfaction with lighting.

Conclusion

Well designed commercial office lighting can provide an environment which is both energy efficient and beneficial for office personnel by utilising appropriate energy efficient technologies. Aspects of lighting such as glare, contrast and illumination levels which may affect the well-being of office personnel are considered in these technologies, and have been incorporated into efficient fixtures.

Electronic ballasts and triphosphor fluorescent tubes are two energy efficient technologies that may influence the health and productivity of office personnel. In particular, the use of electronic (high frequency) ballasts in the control of office lighting has been shown to decrease the incidence of headaches and eyestrain experienced in the workplace by minimising the fluorescent light lficker. Modulation of the light has been pinpointed as a possible factor in these symptoms.

The proposed research will assess the effect of fluorescent light frequency and modulation on the health and productivity of office personnel in the work environment. Preliminary results are expected by the end of 1997.

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ABOUT THE AUTHOR

Robyn Phipps.

Marie Fleming is an assistant lecturer who is studying towards a Doctorate at Massey University. Marie's paper, which was recently presented at the Pacific Rim Real Estate Society Conference, won the New Zealand Institute of Valuers Achievement Award for the best paper presented by an emerging researcher. Marie Fleming, Robyn Phipps and Cliff Studman are part of Building Technology Research Group at Massey University. The group conducts research into factors in the workplace which affect the health and well being of office personnel.

Cliff Studman.

NON-REFEREED PAPERS

The *NZ Valuers 'Journal* and *NZIVProperty Digest* welcomes papers from all authors. Authors submitting papers must observe the following format:

- The paper should be typed double spaced with a minimum of 3cm margins and on one side only of A4 sized paper. Copy must be suitable for scanning.
- Original photographs, diagrams, tables, graphs and similar material intended to illustrate or accompany a paper should be forwarded separately with the text. A table of values used to generate graphs must be included to ensure accuracy. Illustrations should be identified as "Figure 1 (2,3,etc)". The approximate places where illustrations are to be inserted through the text should be clearly shown in the manuscript. Pages should be numbered.
- Primary (a-level) heading should be typed in all capitals and bold; secondary (b-level) headings with initial capitals and bold; and tertiary (c-level) heads should be italicised. Do not number headings.
- Footnotes, Endnotes, References and Acknowledgements are to be listed at the end of the article in the following format:

Footnotes, Endnotes	References and Acknowledgements
1. Comment	Author; Title; Publication
2. Comment	Author; Title; Publication

- Manuscripts for the Journal are to be no longer than 5000 words; or equivalent including photographs, diagrams, tables, graphs and similar material. Digest articles are to be no longer than 2000 words.

Please send one *copy* as well as the original on a 3.5" IBM compatible disk to the Editor.

Please include a brief (maximum 60 word) profile of the author, and a recent glossy photograph of the author.

Note that *NZ Valuers' Journal* deadlines are no later than 15 February, June and October each year. The *NZIV Property Digest* deadlines are no later than 15 April, August and December each year. The Editor reserves the right to accept, modify or decline any paper at any stage.

REFEREED PAPERS

The NZ Valuers Journal welcomes papers from all authors seeking refereed status on issues directly relating to the valuation of land and improvements thereon. Authors submitting papers for refereeing by the NZIV International Panel must observe the following format:

- The paper should be typed double spaced with a minimum of 3cm margins and on one side only of A4 sized paper. Copy must be suitable for scanning.
- Original photographs, diagrams, tables, graphs and similar material intended to illustrate or accompany a paper should be forwarded separately with the text. A table of values used to generate graphs must be included to ensure accuracy. Illustrations should be identified as "Figure 1 (2,3,etc)". The approximate places where illustrations are to be inserted through the text should be clearly shown in the manuscript. Pages should be numbered.
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1. Comment	Author; Title; Publication
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- Manuscripts are to be no longer than 5000 words; or equivalent including photographs, diagrams, tables, graphs and similar material.

Please send five blind (author not identifiable) copies as well as the original on a 3.5" IBM compatible disk to the Editor.

Please include on a separate page a brief (maximum 60 word) profile of the author, a synopsis of the paper and a recent glossy photograph of the author.

Note that *NZ Valuers' Journal* deadlines are no later than 15 February, June and October each year. Because international referees are involved, authors must allow themselves sufficient time for their papers to be distributed, critiqued and returned. Where a paper is not totally accepted for publication it may be returned to the author for revision (together with the blind referees critique). In such a case the author may resubmit one revised paper through the same process.

The Editor reserves the right to accept, modify or decline any paper at any stage.

Superannuation Investments Limited v Woolworths (NZ) Limited (High Court, Auckland, CL 22/96, 25 September 1996) Arbitration Lease Rent review Appeal from umpire's award Whether face of umpire's award discloses an error of law Issue estoppel Whether issue estoppel applies to rent reviews Base rent Turnover rent

IN THE HIGH COURT OF AUCKLAND

CL NO. 22/96

AUCKLAND REGISTRY

BETWEEN: SUPERANNUATION INVESTMENTS LIMITED, A DULY INCORPORATED COMPANY HAVING ITS REGISTERED OFFICE AT AUCKLAND AND CARRYING ON BUSINESS AS AN INVESTMENT MANAGER

Plaintiff

AND: WOOLWORTHS (NZ) LIMITED, A DULY INCORPORATED COMPANY HAVING ITS REGISTERED OFFICE AT AUCKLAND AND CARRYING ON BUSINESS AS A RETAILER

Defendant

Hearing: 13 September 1996

Judgment: 25 September 1996

Counsel: RG Simpson and JA Fletcher for plaintiff
Liam McEntegart for Defendant

RESERVED JUDGMENT OF WILLIAMS J

Solicitors:

Bell Gully Buddle Weir, DX CP20509 Auckland, for plaintiff
Simpson Grierson, DX CX 10092 Auckland, for Defendant

This is a claim against the award of a Mr Gribble acting as an umpire in a rental review application between Superannuation Investments as sublessor and Woolworths as sublessee. Superannuation Investments claims that there was an error of law on the face of Mr Gribble's award. Alternatively, it claims that the parties are bound by issue estoppel because of the contents of an earlier rent review between these parties conducted by a Mr McGough on 20 December 1993. Woolworths contends that the award discloses no error of law. It contends further that issue estoppel cannot apply to rent reviews.

The land at 123-127 Lake Road, Northcote in North Shore City is occupied by the North Shore City Council, and has been leased to (now) Superannuation Investments. On 5 February 1992 the land was subleased to Woolworths for a term of 17 years, 1 April 1989 -31 March 2006. Under the sublease, the Base Rental was initially $332,000pa plus GST payable monthly in advance, the amounts reviewable triennially (and biennially in the last 8 years).

Clause 2.5(a) provided for the rent to be reviewed at those intervals:

> "To a rental that is the total of ... a reviewed Base Rental fixed in the manner set out in clause 7.4 herein; and a Turnover Rental comprising the amount that ... 1.75% of the Lessees gross turnover ... ex-

> ceeds the amounts of the reviewed Base Rent for the same Lease Year."

Interest was payable on overdue rental (clause 2.6). The Lessee is required to pay outgoings (clause 2.8) and GST "payable on the Base Rent and the Turnover Rent and all other amounts payable under this Lease" (clause 2.9). Pursuant to clause 7.1 the Lessee covenanted to pay *"The Base Rent and the Turnover Rent"* monthly in advance in respect of the former and within 60 days of the end of the year in the case of the latter. The Lessee was also required to pay *"all ground rent, rates, taxes ... charges, assessments, duties impositions and fees...* "and costs of water, energy and alike (clause 7.3).

Clause 7.4 (a) relevantly provided:

> "The Base Rent payable under this Lease shall be reviewed at the commencement date of each of the periodic intervals ... to the Market rent for the Premises to be agreed upon ... and failing agreement then such Market Rent as shall be fixed by arbitrators as provided hereunder BUT in no event shall the Base Rent so agreed upon or fixed ever be less than the Base Rental payable for the immediately preceding rental period. "

The procedure for setting the Base Rent was the conventional process of the Lessor giving notice, the Lessee responding and the parties then appointing arbitrators with the arbitrators appointing an umpire.

The Second Schedule to the sublease contained an extensive turnover rental provision to ensure that an accurate account could be kept of the same. Its provisions do not require recital. The parties and their arbitrators were unable to agree on the Base Rent for the three year period commencing on 1 April 1995 and accordingly appointed Mr Gribble as umpire. In his award dated 15 February 1996 he fixed the Base Rent at $354,547pa plus GST, but, given the ratchet provision in clause 7.4(a), then fixed the Base Rent at $360,000pa, that being the Base Rent payable pursuant to Mr McGough's award. The principal question with which this case is concerned is whether Mr Gribble's award demonstrates on its face that he fell into error of law.

The award itself was brief, but an 8 page annex was attached to it and it was common ground that that was to be regarded as part of the award.

The first section of the annex seemed to be a summary. It noted that Superannuation Investments' arbitrator had contended for a rental of $404,635pa plus GST, while the arbitrator for Woolworths had submitted a figure of $264,400 increased to $360,000 plus GST by the ratchet clause, that lower figure including a deduction described as "*Allowance for wrongly based turnover clause against leasehold rental."* The material made available to Mr Gribble included Mr McGough's award. In this section, Mr Gribble noted that the ground rent under the headlease was $59,000, reviewable 7 yearly with its 21 year term expiring on 31 December 1999. Mr Gribble noted Woolworths' obligation to pay the rent, outgoings, rates, internal maintenance, insurance ground rent and keep both the interior and exterior of the building in good condition.

He then went on to list agreed matters, lettable area, carparking arrangements, locational advantages and the fact that he had been supplied with turnover figures. He then went on to list the points of disagreement saying that (p.3)

> "The major point of disagreement related to the impact of the turnover rental requirement and whether it should impact on the assessment of the market rent. "

The umpire then dealt with the turnover rental, noting that Woolworths' arbitrator had

> " ... made an allowance of $20,000pa for the fact that the turnover clause specified a rental of 1.75% of turnover as detailed in clause 2.5 without in his opinion, reflecting the requirement of the lessee to pay ground rental on top of normal outgoings ...
>
> Mr Lawton was of the opinion, supported by the short legal opinion of Simpson Grierson, ... that the obligation to pay a

percentage rent in terms of the provisions of the lease should be taken into account in the rental assessment under the rent review provisions of Clause 7.4 of the document."

The umpire then summarised the views of the arbitrators respectively and Mr McGough, and then expressed his view in the following passage (p6).

"I believe that in arriving at the Market rental for the premises for the three year review period, the parties would consider all lease terms and conditions including the obligation to pay a turnover rental. If, for example, there was an obligation to pay a turnover rental of 5%, and the evidence suggested that the market norm was 2%, then I would expect this factor to be relfected in the agreed Base Rent, ie the base market rent would reflect all of the terms and conditions agreed to in the lease. Unfortunately as detailed earlier in this Annex, there was no evidence provided of the percentage of turnover for other supermarkets on leasehold land where the Lessee was responsible for the payment of the ground rental. If there had been, there would have been a base provided for a direct comparison. The evidence that was presented suggested a rate for freehold properties of 1.5% to 2% and if 2% were accepted as the norm, then it could be argued that 1.75% may well have reflected the obligation of the Lessee to pay the ground rental. However, with other freehold evidence at 1.5%, the 1.75% requirement could appear to be a premium.

In summary, I believe that the parties would when determining the market rent for the subject premises take into account all of the requirements of the lease in determining the Base Rental including the requirement to pay a percentage of turnover as well as ground rental."

The umpire then moved on to review the rental evidence and then expressed his *"Determination"* in the following passage (p8).

"On the basis of my findings in relation to the matters in dispute, and after allowing for factors as detailed above, I assess the market rental for the three year period at $354,547pa plus GST calculated as follows:

2890.25m2 @ $155.00/m2		$155.00/m2
Less allowance for carparks	$5.00	
Ground rent	$20.41	
Percentage rent	<u>$6.92</u>	<u>$32.33</u>
		$122.67/m2
2890m2 @ $122.67/m2		$354,547

The above rental takes into account the requirement that the Lessee is responsible for the payment of the ground rental."

However, because of the ratchet clause, Mr Gribble fixed the rent at $360,000pa plus GST.

It is to be noted that the allowance of $6.92 per sq m for *"percentage rent"* equals $20,000pa so that it is clear that although Mr Gribble arrived at a different rent per square metre, in essence he accepted the formula for which Woolworths arbitrator had contended.

Because clause 7.4 of the sublease contains the ratchet clause which refers to the Base Rent for *the "immediately preceding rental period"* and because of the claim in issue estoppel, it is next convenient to turn to Mr McGough's award.

On p.2 he made the following points:

"I am satisfied that it is the intention of the parties that I should fix a market rent for the premises. References to other payments by the Lessee in the form of turnover are irrelevant. It so happens that 1.75% of turnover exceeds the market rent for the premises, then the higher alternative will apply. As an opposite, if 1.75% of turnover is less than a market rent for the premises, then the market rent will apply."

On p.4 he noted the contention of Woolworths's arbitrator which again contained deductions for ground rent and turnover rent, and that for the sublessor which first made no deduction for either and then calculated a rent on 2% and 1.75% of turnover.

Mr McGough then dealt with the question of turnover saying that the requirement was to fix a market rent (p.6):

> "The contract then goes on to say that in the event of 1.75% of turnover exceeding the market rent for the premises, then the alternative will apply ...... The contract between the parties in this case protects the lessor against ... turnover fluctuation and against under-performance."

and concluded (p.7) that

> "When the test is a market rent for the premises, actual or projected turnovers cannot be allowed to overrule the stated intention of the parties."

Then, after analysing a number of other factors included comparable supermarkets, he chose $145 per sq in for a number of stated reasons, none of which related to turnover and awarded $360,000 per annum being 2890.25 sq in @ $145 per sq in less the ground rent.

The first question is whether Mr Gribble's determination contains an error of law on its face.

The authorities demonstrate that the error of law must appear on the face of the award as a matter of *"actual exposition not one of inference only". (Sextant Holdings Ltd (in liq) v NZ Railways Corp (1993)* 2 NZ ConvC 191,556, 191,559; *McLaren v Waikato Regional Council* (1993) 1 NZLR 710,715). The interpretation of a contract is normally a question of law, but the courts will not interfere if the parties have submitted that question specifically to arbitration *(Attorney General v Offshore Mining Co Ltd* (1983 NZLR 418, 421). The parties advised that it was accepted that the claimed errors of law in this proceeding were not put to Mr Gribble as specific questions.

Woolworths, however, submitted that there was no error disclosed on the face of Mr Gribble's determination, relying on the decision of the Privy Council in *Champsey Bara & Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480,487 where the following appears:

> "An error in law on the face of the award means ... that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrators stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

Superannuation Investments contended that Mr Gribble's determination contained such an error of law on its face because, by making an allowance in the Base Rent not for the Turnover Rent but for the fact that Woolworths was also obliged to pay a Turnover Rent, his determination gave rise to the possibility that the Base Rent could be less than that *"payable for the immediately preceding rental period".* The point was made that where the turnover for the supermarket was such that no Turnover Rental was payable, Superannuation Investments would have been receiving less than the Base Rental fixed by Mr McGough, had it not been for the ratchet clause, because Mr Gribble's Base Rental contained the deduction for the Turnover Rental obligation.

In terms of money, Mr Gribble assessed the Base Rental at $354,547pa which he increased to $360,000 because of the ratchet clause. Had he made no deduction for Woolworths payment of turnover rental, it seems likely that he would have fixed rent at $374,547pa for the three year term, perhaps rounded off to some slightly lesser figure. It follows that this dispute is about a maximum of some $42,000.

In approaching the question whether Mr Gribble fell into error of law making his award, it is convenient to start with the terms of the sublease. They plainly require Woolworths to pay "A *rental that is the total of... Base Rental and ... Turnover Rental"* plus goods and services tax, ground rent and the other outgoings for which the sublease provides. By stipulating for a turnover rent comprising the amount by which 1.75% of Woolworths annual turnover exceeds the Base Rent, the parties must be taken to have contemplated that in any year when Woolworths turnover did not exceed that figure, no turnover rent would be payable in addition to the Base Rent, the ground rent and the other outgoings. However, the effect of the ratchet in clause 7.4 (a) means that the parties never contemplated that the amount payable by Woolworths could fall below the Base Rent payable in the preceding rental period. The minimum payable by Woolworths under the sublease is the Base Rent plus ground rental, GST and outgoings. The maximum is that sum plus Turnover Rent as defined by clause 2.5 (a)(ii).

However, as appears from the pivotal passage in the award earlier cited, Mr Gribble would have fixed a Base Rent below Mr McGough's Base Rent had the terms of the lease permitted it, by deducting the equivalent of $20,000pa for the fact that Woolworths had to pay the turnover rent. But he then brought his calculated figure up to Mr McGough's Base Rent. That result was arrived at by the application of valuation principles to Mr Gribble's assessment, not as a result of his misconstruing the sublease. On the contrary, he complied with the sublease by finding the parties and himself bound by the ratchet and Mr McGough's Base Rent. Put another way, if the application of valuation principles to the determination of the Base Rent for a sublease containing terms such as this requires a deduction from what would otherwise have been the Base Rent for the fact that the sublease contains a provision requiring the payment of turnover rental in certain circumstances over and above the Base Rent, but with the Base Rent providing a lfoor to the calculation, then it does not appear that an umpire falls into error of law if he makes proper allowance in accordance with those valuation principles for the fact that turnover rental may be payable, provided the result does not offend against the terms of the sublease itself.

Put another way again, this is not a case where Mr Gribble applied the wrong legal principles, but one where he applied principles which are apparently accepted by valuers in relation to the assessment of Base Rent in subleased premises where turnover rent may also be payable and, having done so, then applied the terms of the lease to the result.

This may be contrasted with the case where what was held to be an erroneous approach in law was applied by an arbitrator to the assessment of rent under a ground lease *(Auckland CC v SEG Holdings Ltd* 7/5/96, Williams J, HC Auckland CP435/95) but to be in accordance with the authorities to which counsel drew attention, particularly *Feltex International v JBL Consolidated Ltd* (1988) 1 NZLR 668 and *Sextant Holdings Ltd* (Supra). In Feltex the award was of an *"annual rental"* reviewable every five years and the arbitrator had regard to rent payable under leases of comparable properties held on differing terms, mainly three years. An application to set aside the award for error of law on the face of the record was dismissed. Henry J held that the arbitrator should have regard to all the terms of the lease, to the fact that the lessee had the benefit of a five year term without rent increases and to the fact that (672) *"It is proper valuation practice, and in accordance with legal principle ... to have regard to comparable properties."* He declined to accept a submission that the arbitrator had in effect, varied the terms of the lease. In *Sextant Holdings* the lease required the assessment to be of the *"annual rent"* of the land on a five year term. The Court of Appeal made it clear that that required the application of ordinary principles of valuation.

The Court has already held that it appears that Mr Gribble applied the ordinary principles of valuation. In this sublease the parties did not encumber themselves or their arbitrators or umpire, with an obligation to set *`fair"* or *"reasonable"* rent, but simply to set *"market rent"*. Mr Gribble set *"market rent"* by the application of acknowledged valuation principles and in this Court's view, there is no error of law on the face of the record.

Turning to the second cause of action, although the parties were agreed that issue estoppel, or estoppel *per rem judicatum* may arise in arbitration proceedings *(Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 643), they were at odds as to whether it applies in rent reviews. The elements of that branch of estoppel *per rem judicatam* now generally called issue estoppel are, for New Zealand, as set out in the decision of the Court of Appeal in *Shiels v Blakeley* [1986] 2 NZLR 262 (as recently reviewed in X v Y 1996 2 NZLR 196, 201). The elements of issue estoppel appear in the judgment of the Court (at p.266) [in *Shiels]* in the following terms:

"The first contention advanced ... in support of the application to strike out the new action is that Mr Shiels is estopped by the judgment in the previous action ..... This is a plea of estoppel per rem judicatam. The rule is, so far as material to the present case, that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits. See Spencer Bower and Turner, *Res Judicata* (2nd ed, 1969) para 9. The reasons for the existence of the rule are not in doubt. They were stated by Lord Blackburn in *Lockyer v Ferryman* (1877) 2 App Cas 519, 530:

`The object of the rule of res judicata is always put upon two grounds - the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.'

In one branch of the law of res judicata the cause of action put in suit in the first proceeding passes into judgment so as no longer to have an independent existence. There is both a merger of the cause of action in the judgment and a cause of action estoppel. While in the case of what is commonly called issue estoppel a particular matter of fact or law in issue in the second proceeding is held to have been decided by the prior judgment but may or may not be determinative of the second proceeding.

... Alternatively, ... as defined by Professor Rickett in his article *"The Travails of Issue Estoppel"* (1992) 22 VUWLR 115, 116 (acknowledged by him as drawn from Mathieson, *Cross On Evidence* (4th NZ ed, 1989) (p.315-321, paras 12.8 -12.12):

`It is generally accepted that to found issue estoppel, the following technical requirements must be established:

(i) a final judgment;

(ii) between the same parties and/or their privies;

(iii) litigating in the same capacity;

(iv) on the same issue;

(v) which must be pleaded. "'

It is also instructive to bear in mind the careful distinction drawn by Diplock LJ in *Thoday v Thoday* [1964] p.181, 197-198 (adopted by the House of Lords in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC273, 295-6) where the following appears:

"The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modem law includes two species. The first species, which I will call "cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie, judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa." In this application of the maxim "casa" bears its literal Latin meaning. The second species, which I will call "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

Applying those authorities to this case, it is clear that Mr McGough's award was a final decision between the same parties or their privies, litigating in the same capacity and this issue was pleaded in this proceeding. The sole remaining question is whether Mr McGough's method of determining the Base Rent was directly in issue and was the same issue as Mr Gribble's method.

In considering that question, it is necessary to bear in mind that Mr Gribble's approach was to make an allowance against his determination of the Base Rent, not for the turnover rent which may have been justified by Woolworths turnover, but for the fact that, under the terms of the lease, Woolworths may be required to pay Turnover Rent. That, Mr Gribble held, was a fact which the parties would consider in determining the level of Base Rent.

When that source of possible confusion is understood, the matter becomes relatively straightforward. On p.2 of his award Mr McGough expressly held that he was required to fix Market Rent and that, *"references to otherpayments by the lessee in the form of turnover are irrelevant".* His review of the arbitrators' approach to the matter made it clear that Woolworths' arbitrator was contending for an allowance against Base Rent for what would appeared to have been not the fact that turnover rent may have been payable, but for the turnover rent itself. Mr McGough then turned to the recognition, if any, to be ascribed to turnover but in the passage earlier recounted held that both arbitrators had *"missed the point"* in interpreting the contract and reiterated that the *"requirement is to fix market rent for the premises".* Although the contract was designed to protect the lessor against turnover fluctuations, Mr McGough concluded (p.7) that *"When the test is a market rent ... actual or projected turnovers cannot be allowed to overrule the stated intention of the parties"* and paid little attention to the arbitrators' respective approaches. His conclusion and the rent which he fixed made no allowance in the Base Rent for the fact that a turnover rent may be payable.

The issue before both Messrs McGough and Gribble was the fixing of the Market Rent which was the equivalent of Base Rent. To that extent it was the same issue before both umpires. However, in this court's view, the method by which the umpires achieved the resolution of that issue was a matter for them. In terms of *Thoday*, given the function vested by the parties in the umpire, the condition to be fulfilled in order for Superannuation Investments to establish this cause of action is the determination of the Market Rent, ie Base Rent, but the method by which that determination was achieved is not fundamental to the cause of action and, given the function of the umpire, is not a requirement common to both awards. Further, it needs to be borne in mind that the parties have themselves contemplated regular rent arbitrations. The parties must therefore have expected that each umpire in fulfilling his or her arbitral function would assess the evidence presented, and apply their own competence in reaching their individual decisions. Each was a separate determination under the sublease. The sublease does not require the umpires to follow the same valuation methodology.

It follows that the condition which attached to the umpires' determination in this matter were not the same and the methods used by them were not fundamental to their decision. Accordingly no issue estoppel arises to preclude Woolworths relying on a rental valuation determined by an umpire by methods different from that employed by another umpire on an earlier determination.

At bottom, this is a claim where an earlier umpire accepted a sublessor's submissions as to the proper valuation method to follow in setting the Base Rent for the premises, but the sublessor was unsuccessful in persuading a later umpire that that was the correct valuation method to follow.

In this court's view, neither error of law nor issue estoppel arises out of those circumstances.

The plaintiff's case is accordingly dismissed.

If the parties are unable to agree on costs, counsel may submit memoranda, that for the respondent being filed within 21 days of delivery of this judgment and that for the plaintiff being filed within 35 days of that date, with counsel in each case certifying, if they think it appropriate so to do, that the Court may determine the question of costs without the necessity for a further hearing.

Waiorau Holdings Limited v The Valuer-General (High Court, Dunedin, AP 58/94, 15 October 1996)

Valuation of land Ski-field Freehold land Appeal from Land Valuation Tribunal Assessment of land value Capitalisation of rental valuation method Whether it is appropriate to apply a separate capitalisation rate to land Land development expenditure - Valuation of Land Act 1951, s2, "land value ".

IN THE HIGH COURT OF NEW ZEALAND DUNEDIN REGISTRY

AP 58/94

BETWEEN: WAIORAU HOLDINGS LTD
Appellant

AND THE VALUER-GENERAL
Respondent

Hearing: 19 August 1996

Counsel: WD Alcock for Appellant

MT Parker for Respondent

Judgment: 15 October 1996

Judgment of Chisholm J and IW Lyall (Lay Member of the High Court)

This appeal arises from a Land Valuation Tribunal decision given on 14 June 1994. That decision disallowed the appellant's objection to the respondent's assessment of the Cardrona ski resort land value as at 1 October 1990. The respondent had set a roll value of $910,000 for the land. It was claimed by the appellant, as objector, that the roll value should have been $560,000.

The appellant claims that the respondent fell into error in the application of various valuation principles, and that the Land Valuation Tribunal, by affirming the respondent's valuation, also fell into error. During the hearing of the appeal the capitalisation of rental method of valuation received particular attention. The appropriate rate of capitalisation and the impact of land development on the calculation of land value were also extensively canvassed.

Cardrona Ski Resort

Cardrona is a major New Zealand ski resort. At the time of the revaluation it was the only commercial ski resort known to be held under freehold tenure. It comprises 630.4788 hectares on the southern slopes of Mt Cardrona, Central Otago, approximately 57 kilometres from Queenstown and 33 kilometres from Wanaka. Access is achieved by way of a 12.5 kilometre private access road leading from Crown Range Road. At the time of the revaluation the ski resort was zoned *Recreational S* under the Queenstown Lake District Scheme. This was a separate zone covering existing ski-fields.

The ski-field was originally established by a partnership during the 1970s. In 1985 the land was transferred to a company to pave the way for a public float. In July 1988 terms were agreed for the sale of the ski-field as a going concern. Final settlement of that sale took place on 31 December 1989.

Although the 1988 agreement for sale and purchase was not produced to the Land Valuation Tribunal by way of evidence, it is plainly a relatively complicated document or series of documents. In broad terms the evidence indicates that 50% of the shares in Waiorau Holdings Limited were purchased initially and that such sale was coupled with an option to purchase the remaining shares by 31 December 1989 at a price reflecting 1988 and 1989 trading results. The option was duly exercised. The final price of the total business including freehold land, as a going concern, was $9,780,000. Within the ski resort industry this was a unique transaction because the sale included freehold land. Final settlement of the sale occurred nine months before the roll revaluation of the Queenstown Lakes District as at 1 October 1990. It was accepted by both the appellant and respondent that this transaction had been at arms length.

Land Valuation Tribunal decision

The Tribunal expressed the view that the difference between the valuers on each side was "largely one of simple arithmetic within the methodology applied by each of the Valuers". It noted the absence of comparable sales, that the sale of the Cardrona skifield was the only sale available to the valuers, and that the valuers had placed considerable emphasis on the capitalisation of rental method of valuation.

As to the capitalisation of rental method, the Tribunal noted that disagreement between the valuers was confined to the capitalisation rate to be applied. The Valuer-General considered 12% to be the proper rate, and the objector 17.57%. The Tribunal attributed the difference between the valuers to their different assessment of the "risk factor".

In the Tribunal's view neither valuer had been able to offer conclusive evidence as to the appropriate risk factor. But it preferred the respondent's approach that:

> "12% is an appropriate return for a land owner who does not have to take all the risks associated with the operation of the ski-field but does not have a risk-free investment, as the rental is based on turnover, and will therefore vary according to the quality of the snow season. The land owner does not have to expend money at the beginning of *each* ski season to prepare the field, for what an operator would normally hope would be a good season and therefore his risks are lower."

It followed that the Tribunal accepted the respondent's rate of 12%.

Having regard to the absence of comparable sales evidence, other than the one sale of the subject property itself, the Tribunal accepted that consideration of alternative valuation methodologies was appropriate. It noted that the respondent's valuer had utilised three different methods when assessing land value and had adopted the most conservative outcome based on the built-up land value method. Such an approach was expressed by the Tribunal to be "acceptable and fair".

The Tribunal commented that it was well aware that a fair and equitable base for rating and other purposes depended on consistency and uniformity. It said that an amendment to the Valuer-General's assessment "without very good cause, could well lead to considerable distortion with long reaching effect within a particular region". Bearing that in mind the Tribunal concluded that the objector had not persuaded it that the respondent's assessment was wrong and confirmed the respondent's assessment of the land value at $910,000.

Issues between the parties

As the appeal progressed it became apparent that the issues between the parties were relatively narrow. To some extent they had crystallised following the Tribunal's decision. But neither party accepted that the differences between the two valuers came down to simply a matter of arithmetic; the differences went considerably deeper and involved issues of valuation principle.

In some respects the parties were on common ground: they agreed that there were no comparable sales; that the only market evidence directly applicable was the evidence arising from the sale of the Cardrona ski resort itself; that in the circumstances utilisation of more than one method in arriving at a valuation was understandable and appropriate; that the appropriate rental rate for the purposes of the capitalisation of rental method of valuation was 2.5% of gross turnover; and that the overall capitalisation rate relfected by the Cardrona resort sale worked out to 17.57% for the total transaction.

There are two primary issues. The first such issue concerns the capitalisation rate to be applied. An inter-related issue about whether a lower risk factor should apply to *the land* only, or whether there should be a common global risk factor for *all components* of the ski-field resort, also arises. The second primary issue concerns the impact of land development on the calculation of "land value", as defined by the Valuation of Land Act 1951 ("the Act"), pursuant to the capitalisation of rental method. The ultimate issue is, of course, whether the appellant has discharged the onus under s20(8) of the Act of showing that the respondent's roll valuation was wrong.

Approach of Valuer-General

Mr Sheppard's evidence before the Tribunal on behalf of the respondent indicates that he used three methods in arriving at a land value of $910,000: a capitalisation of rental method; a built-up land value method; and a comparison method.

Capitalisation of rental method
A facsimile from the respondent to the appellant dated 4 December 1990, which forms part of the evidence, indicates that initially Mr Sheppard used a gross turnover figure of $4 million, a rental factor of 2.5%, and a capitalisation rate of 10%, which pointed to a land value of $1 million. The facsimile expressly stated that the land value arrived at by that method "includes development expenditure of $500,000".

By the time of the hearing before the Land Valuation Tribunal, the gross turnover figure used by the respondent had been reduced to $3,650,000 which equated with actual turnover as then ascertained by the Valuer-General through the appellant's valuer, Mr Laing.

The agreed rental rate of 2.5% produced a notional rent of $91,250. The calculation had, however, been further modified, first, by increasing the capitalisation rate from 10% to 12% and, secondly, by adding development expenditure of $500,000. The calculation was:

Capitalised rental	
$91,250 @ 12 % _	$ 760,000
Add Land Development expenditure	$500,000
Indicated Land Value	$1,260,000

Mr Sheppard considered that a capitalisation rate of 12% for *the land as a separate component* was necessary to reflect a lower risk factor in respect of the land. According to his evidence before the Tribunal this stance was not inconsistent with his concession that 17.57% was appropriate for the *total business* including the land. He considered that the land component should attract a lower risk factor, and that a global approach for the total business, including land, was inappropriate.

The addition of land development expenditure as a separate item was explained by Mr Sheppard on the basis that the capitalised rental figure of $760,000 reflected nothing more than undeveloped land or, expressed differently, land excluding improvements. Accordingly it was necessary to add the value of any development work which fell within "land value" as defined in the Act. He considered that $500,000, being 50% of land development expenditure, fell into this category. Accordingly that amount was added to the capitalised rental figure to arrive at "land value" by the capitalisation of rental method.

Built-up land valuation method

This approach involved the base rural value of the land as the starting point followed by the addition of ski resort resource consent costs plus land development costs. The calculation was:

Base rural land value @ $50.00/ha	*$31,500*
Plus resource consent costs $375,000	
Plus land development costs	*$500,000*
Indicated land value, say,	*$910,000*

Since this was the lowest land value indicated by the three methods, it was chosen by the respondent as the land value for the purposes of the 1990 revaluation.

Comparison method

The comparison method was based on the Mt Hutt ski-field in Canterbury. From a 1990 Mt Hutt figure for land excluding improvements agreed during arbitration, Mr Sheppard arrived at a "skier day" value of $6.20 by utilising Mt Hutt statistics over four years prior to 1990. He then applied that "skier day" value to Cardrona after he had arrived at the Cardrona "skier days" by using statistics for that field over four years prior to 1990. This led to a figure of $600,000 for Cardrona in respect of land excluding improvements. His calculation was:

Land excluding improvements	*$600,000*
Plus land development	*$500,000*
Indicated land value	*$1,100,000*

Again 50% of land development expenditure was added to reflect the added value arising from that expenditure.

Approach of appellant

The capitalisation of rental approach was central to the analysis conveyed by the evidence of Mr Laing, the appellant's valuer. He considered that the Cardrona ski resort sale was unique because the sale included freehold land. His analysis of the sale transaction indicated a profit earnings ratio of 17.57% before tax. He considered this to be the overall capitalisation rate reflected by the sale of the business, and in this respect he and Mr Sheppard are in accord. His calculation was:

Gross operating and other revenues	*$3,650,777*
Notional Rental being 3,650, 000 x 2.5 =	*$91,269*
Capitalised at 17.57% $519,459 = say	*$520,000*

He then rounded the figure up to $560,000 "to allow for variations which could occur in the market's approach to an assessment".

Mr Laing did not accept that there should be a separate, and lower, capitalisation rate for the land. Nor did he accept that it was appropriate to add land development expenditure as a separate component when arriving at a value by the means of the capitalisation of rental method.

He considered that any increase in value by way of land development expenditure had already been reflected in gross turnover and that the capitalisation of rental calculation did not produce the value of land exclusive of improvements but in fact produced "land value" as defined by the Act. He considered that Mr Sheppard's approach had taken into account the added value arising from land development expenditure twice.

Capitalisation rate to be applied

As mentioned earlier, two separate but inter-related issues arise in respect of the capitalisation rate. First, whether in all the circumstances it was appropriate to apply a different capitalisation rate for the land. While the Tribunal did not expressly refer to this aspect, it is probably implicit from the Tribunal's decision that it supported the application of a lower rate for the land. Secondly, the appropriate capitalisation rate to be applied in all the circumstances. The Tribunal accepted that 12% was appropriate. On both of these issues there was a sharp conflict between the evidence of the two valuers.

To arrive at the Cardrona "land value", as defined by s2 of the Valuation of Land Act 1951, it is necessary to notionally separate that land value from the remaining components of the Cardrona ski resort. The capitalisation of rental method of valuation brings into focus whether special features relating to the Cardrona ski resortjustify a departure from the traditional valuation approach of differentiating between various components such as land, structural improvements, plant, machinery and chattels, according to risk. Mr Sheppard considered that there was no justification for departing from the traditional approach in respect of the Cardrona resort, and that in all the circumstances the land component should carry a lower risk factor. On the other hand, Mr Laing considered that the land component was so dependent on, and interwoven with, the ski resort business that it should not be separated out with the result that one global risk factor should cover all assets included in the business.

Our conclusion is that it was not contrary to proper valuation principle or practice to apply a different, and lower, capitalisation rate for the Cardrona land. When the land has been notionally separated for the purpose of arriving at "land value" as defined in the Act, it is difficult to avoid the conclusion that the risk factor associated with the land is lower than the risk factor or factors associated with the remainder of the ski resort business. We consider that in that notional situation the fate of the Cardrona land is not inextricably tied to the fate of the ski resort business. The primary risk would rest with the lessee as operator of the business. Failure of the business would not automatically destroy the potential of the land for use as a ski resort by another lessee or by the owner. The land enjoys characteristics which make it inherently attractive as a ski resort: it has a favourable geographic aspect and location; it is within the snow belt; it has suitable topography and zoning; and, as at 1990, it was able to demonstrate a consistent "skier day" performance over four seasons. These factors support the view that the land is a safer investment than the other ski resort business assets and would accordingly justify a lower yield on account of risk than the remaining assets. We do not believe that a sensible business person would accept that the risk relating to this ski-field operation was evenly spread over the composite items of land, structural improvements, plant, machinery, and chattels. So even if an average return of 17.57% is agreed as fair and reasonable for the overall parcel of assets, it does not follow that a potential purchaser or proprietor would be content, for example, to accept the same return for the plant and machinery as he would accept for the land. Plant and machinery associated with a ski-field operation must be susceptible to considerable operational wear and tear with consequent deterioration in value, whereas the land is clearly more durable.

Having reached the conclusion that it was in accordance with proper valuation principle for a different risk factor to be allocated to the Cardrona land, it becomes necessary to determine whether the rate of 12% utilised by Mr Sheppard was appropriate. In addressing this issue we keep in mind that both Mr Laing and Mr Sheppard were in agreement that the global capitalisation rate at the time the Cardrona business (including freehold land) was purchased worked out at 17.57%. Logically the less risky land component should be significantly below that figure. We consider that the rate of 12% for the land applied by the respondent is plausible and falls within the known framework of the sale nine months before the revaluation.

In our opinion it has not been demonstrated that utilisation of a 12% capitalisation rate involved an error in valuation principle. We agree with the conclusion of the Land Valuation Tribunal on this issue.

Impact of development expenditure

In each of his three calculations Mr Sheppard added a figure of $500,000 to reflect the added value arising from land development expenditure. This was equivalent to 50% of his starting figure for land development expenditure of $1 million. There is insufficient information for us to determine the veracity of the

$500,000 figure. We note, however, that neither the starting figure of $1 million or the $500,000 figure adopted by Mr Sheppard have been challenged by the appellant.

Accordingly we proceed on the basis that $500,000 fairly represents the difference between bare and undeveloped land on the one hand and, on the other hand, "land value" as defined by the Act which includes some land development components. This means that the issue to be determined in relation to the added value arising from development expenditure is relatively narrow. But again the two valuers were in sharp conflict about the correct methodology when using the capitalisation of rental method of arriving at land value. For the respondent Mr Sheppard's stance when he gave evidence before the Tribunal was that multiplication of gross turnover by a 2.5% rental factor produced a rental for bare and undeveloped land. Therefore to arrive at "land value" as defined any land development component which fell within the definition of "land value" had to be added. He considered that grading and levelling of the Cardrona land together with removal of rocks therefrom fell within that definition as a consequence of the second proviso to the definition of "improvements", and added $500,000 to reflect the added value arising from those items.

On the other hand, Mr Laing's evidence was to the effect that multiplication of gross turnover by a 2.5 % rental factor produced, after capitalisation, "land value" as defined in the Act. His reasoning was that as the notional rental from which he assessed land value was turnover based it was a rental for the land in the condition in which it had been notionally leased. This meant that the benefit of any development work must have been included in the land producing the notional rental. It would accordingly have been wrong to take that factor into account again by adding it at the end of the calculation. He considered that Mr Sheppard's approach had taken the added value arising from land development expenditure into account twice.

The situation was further complicated by the respondent's change of position in relation to land development expenditure. Initially, as disclosed by the facsimile of 4 December 1990 referred to earlier, the respondent considered that the capitalisation of rental calculation *included* the $500,000 figure representing added value arising from land development expenditure. But when Mr Sheppard gave evidence before the Land Valuation Tribunal he adopted a different approach. His evidence at that time was that the capitalisation of rental calculation *excluded* land development expenditure with the result that the sum of $500,000 needed to be added to reflect the additional value arising from land development

Mr Sheppard's explanations under cross-examination for these two different approaches were not convincing. One passage of the evidence carries the following explanation:

> "I just want to know why you changed your mind about the formula including a development component in 1990 and now say that development is separate?
>
> One of the reasons was that I have an actual figure for land development and I felt it more appropriate to take it out of the calculation to compare like with like because, as I have said repeatedly, the rental, the $91,250, is a reflection of the undeveloped land or the LEI [land excluding improvements] and this calculation shows the two, the LEI component and the additions, the development improvements."

Another passage provides a further explanation following questioning by the Tribunal:

> "In 1990 you identified the risk at two percent, now you have doubled it to four percent. Why did you do that?
> I just identified that - I included - my discount rate there included the development of improvements so in effect I was taking into account the improvements that

> got done to the property and additional to that I have revisited and I felt that the two percent was inappropriate and I removed the development and improvements from it. I consider the four percent is an applicable risk rate to add to the base underlying leasehold percentages that are for commercial and industrial property.,,

Notwithstanding the explanations provided by Mr Sheppard for the two approaches, it is apparent that the underlying basis of the capitalisation of rental calculation had not changed: gross turnover was multiplied by a rental factor of 2.5% and the resulting figure was then capitalised. We are unable to comprehend how a change in the gross turnover figure from $4 million to $3,650,000 (to equate with actual turnover as advised by the appellant) and/or the change in the capitalisation rate from 10% to 12% justified the different treatment of land development expenditure. It is difficult to avoid the conclusion that this different treatment of land development expenditure was attributable to a change of mind on the part of Mr Sheppard. Whatever the explanation it is necessary for us to determine which approach is correct.

A review of the evidence before the Land Valuation Tribunal leads us to the conclusion that Mr Sheppard's second approach was right. In other words, the capitalisation of rental method utilising a 2.5% rental factor produced a value for bare land excluding improvements. Thus it was necessary to add any additional value arising from land development expenditure which fell within the definition of "land value". "Land value" means:

> "... the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements (as hereinbefore defined) had been made on the said land."

The second proviso to the definition of "improvements" deems certain items including the grading or levelling of land or the removal of rocks or soil therefrom not to be improvements which means that such items are part of "land value". Mr Sheppard's uncontested figure for the added value arising from those items was $500,000. A key factor in resolving this issue is the 2.5% rental ratio used by the parties. Our interpretation is that this relatively modest ratio is in line with the return that might be expected from bare land. It is also in line with the ratio commonly used for calculating rental in respect of Crown land used for ski-field purposes where the Crown, through the Department of Conservation, is providing the mountain slopes in an undeveloped state. In that situation all aspects of the ski-field development are undertaken by the lessee and are accordingly excluded from the rental calculation. We note that under cross-examination Mr Laing accepted that ski-field development work would be undertaken by the lessee. That concession supports the view that the 2.5 % rental factor relates to bare land.

It seems that Mr Laing's reasoning concentrated on the gross turnover part of the capitalisation of rental equation. But the equation involves both a gross turnover factor and a rental ratio factor. As already explained, we are of the view that the rental ratio selected will reflect whether the value to be established is for bare land or land in a semi-developed state or developed state. And if the aim is to arrive at "land value" as defined, a rental ratio which would exclude improvements not within "land value" would need to be selected. We can see the sense in selecting a rental ratio which, following capitalisation, will enable the value of bare land to be determined. Then the added value arising from development expenditure can be added with relative precision.

Comparative figures produced in evidence also tend to support the respondent's value rather than the appellant's significantly lower figure. The evidence before the Land Valuation Tribunal included the following table *(figure 1):*

Mr Laing's proposed land value of $560,000 for Cardrona would produce a land value/skier day figure of $5.80 which would be well out of line with other ski-fields. On the other hand, the figure of $910,000 produces a "skier day" figure which is in line broadly with the other ski fields.

FIGURE 1

SKI-FIELD	4 YR AVE SKIER	LAND VALUE	LV/SKIER DAYS
Cardrona	96,750	$910,000	$9.41
Remarkables	89,000	$1,000,000	$11.24
Treble Cone	34,000	$330,000	$ 9.71
Coronet Peak	34,250	$590,000	$17.23

Conclusion

We therefore come to what we believe is an inevitable conclusion that the land value of $910,000 set by the respondent as at 1st October 1990 for the Cardrona ski-field was a fair and reasonable assessment of land value at that time. We have not been persuaded that there was any error in valuation principle or practice in arriving at that figure.

The appeal is dismissed. Submissions as to costs are invited. If the respondent seeks costs a memorandum from his counsel should be filed and served within 21 days. Counsel for the respondent will have a further 14 days to file a memorandum in response.

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