

may 2003

new zealand
property
JOURNAL

FINANCIAL BENCHMARKING

How real estate firms perform

HUMANS AND PROPERTY

The rise of customary property rights

MODAL HOUSE

What's its future?

COMPULSORY ACQUISITION

Is land entitled to special value elements?

PROPERTY AND WORKPLACES

Optimising returns

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NZ Property Institute benefits

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Any photographs, diagrams and illustrations intended to be published with an article, must be submitted with the hardcopy. A table of values used to generate graphs must be included to ensure accurate representation. Illustrations should be identified as Figure 1, 2 etc.

A brief (maximum 60 words) profile of the author; a synopsis of the article and a glossy recent photograph of the author should accompany each article.

Manuscripts are to be no longer than 5000 words, or equivalent, including photographs, diagrams, tables, graphs and similar material.

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EDITORIAL

Property has returned to vogue in the past 12-18 months, but will this wave of good fortune continue?

Many New Zealanders have increased their exposure to property as an asset class. If we look at some of the key drivers in the property market over the past 12 months, it may help provide some sort of framework within which we can come to some conclusions on the future.

Relatively low and steady interest rates have given many people confidence to invest in property. With China trying to become the manufacturing base of the world, global inflationary pressures have been reduced. Internationally, interest rates have topped dramatically. Since September 11 Alan Greenspan, chairman of the US Federal Reserve, has reduced interest rates to 1.75%. In New Zealand the Reserve Bank has brought the OCR down to 5.75% which, compared to recent years, is quite low

and inflationary pressures of the 70s/80s appear to be well and truly beaten. With such a real interest rate differential, New Zealand has seen an influx of capital seeking higher returns. As a result, the exchange rate has appreciated significantly. It remains to be seen if the Reserve Bank Governor, concerned about increasing current account deficits, international uncertainty and decreasing domestic activity, will actually ease interest rates.

Demand in an important driver in any appreciating market and immigration is driving a big slice of New Zealand's property demand. From two years ago when there was a net outflow of 10,000 migrants a year, the country now has a net influx of 40,000 permanent and long term arrivals. Interestingly, there continues to be a net loss to Australia, perhaps because the corporate sector continues to migrate there. With changes in immigration rules, it is likely migration may level off. However, the Iraq war may increase the numbers of people wanting to live in relatively safe New Zealand.

Household structure and size has also influenced demand. Lifestyle changes and the trend toward single parent homes has seen the number of people per household decline. This simply means that more dwellings are needed to house the same number of people. Along with other demographic changes, we are seeing some quite significant changes in the type of accommodation sought. These demographic changes will continue to drive new types of demand and create new opportunities for investment.

In the past three years there has been a rural boom with farmers' incomes in the 12 months to December 2000 up by almost \$

This cash injection of \$6 billion, or approximately 5% of our GDP, was on top of the previous year, which was \$2 billion. On top of this farmers increased their overall borrowings 20%, up \$4 billion. This has allowed the rural communities to reinvest in plant, equipment and property. It has been reflected in appreciating asset values of rural farmland and has had a flow on effect into towns and cities as farmers have sought diversified investment with excess cash. This year income forecasts for farmers level off. There has been significant decline in dairy farming income as international commodity prices and an appreciating dollar have cut returns. The attitude and confidence of banks will be the key driver of any continued rise in rural land prices.

Confidence, of course, plays a key role in any market. It could be said that the last election was the one to win. The economic cycle picked up and New Zealand has not had to face droughts, Asian economic crises or other international shocks. However, with poor performances by the Japanese, US and European economies and the uncertainties of war, New Zealand may be more likely to catch the international cold. Domestically, we have historically low levels of unemployment and real wages have been increasing. This has driven household confidence, which has seen household debt levels increase significantly over the past few years. Some suggest the Reserve Bank's ability to influence demand through monetary policy has been enhanced as the ability of households to borrow more money has declined, thus providing a more stable and lower structural interest rate regime. The NZPI Confidence Index has dipped over the past couple of months, but is still significantly higher than the lows of mid-2000.

Externally, September 11 has had a major impact on the New Zealand property market as many ex-pats and others have seen New Zealand as a haven and have invested in a future lifestyle. This has been particularly evident in some rural and coastal sales. The value of the dollar relative to the US dollar, British pound and the Euro makes New Zealand a very cheap place to invest in.

The Internet has played a huge part as it has allowed people from overseas to purchase property "over the phone" without having to travel here, thus increasing the opportunity for foreigners to participate in our property market.

Property has benefited from the weakness of alternative forms of investment. Lower bank deposit rates are at a post-tax 1%-2%, which barely keeps pace with inflation. International equity markets, which were attracting huge amounts of New Zealand capital, have performed very poorly for the past two-three years. This has been exacerbated by a loss of confidence particularly in the US market where corporate scandals, such as Enron, and poor governance have dampened confidence. This has benefited property and there has been a worldwide surge in values. For example, while the British stockmarket has fallen by more than 30% in the past 12 months, the residential property sector has appreciated by more than 20%. Investors around the world have rolled their funds into hard assets such as property and more recently gold. The question is when will the equity markets stabilise and start attracting capital back?

So are the prospects for property positive? You decide, but use a member of the New Zealand Property Institute if you need a property professional!

Conor English, Editor New Zealand Property journal

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Financial benchmarking: New Zealand real estate agencies compare their performance

Abstract

The research is based on a recent (2001) pilot study of agencies conducted for the Real Estate Institute of New Zealand by Robert Bevan and Associates, and Massey University. The study adopted an Australian survey model developed by Robert Bevan and Associates for the Real Estate Institute of Australia. This model has been applied in regular surveys over the past 10 years in Australia, the findings have been publicly available, and the results have been widely used as a benchmarking tool by Australian real estate agencies.

In the New Zealand study, agencies were provided with a blank template and asked to submit details of their income, expenditure, retained earnings, number of staff and number of principals for the financial period April 1, 2000 - March 31, 2001. Applying financial benchmarking as a management tool is a relatively new development for most New Zealand agencies. It was first implemented by franchise groups and umbrella organisations and has gradually increased in popularity over the past few years.

Until now the data on much of the results have been regarded as commercially sensitive and not released into the public arena.

The results of this pilot study provide all agencies with an opportunity to compare their individual performance against key financial performance indicators of a number of respondent sub-samples. The sub-samples are based on revenue categories and levels of operating surplus. In addition, the adoption of the Australian model in the New Zealand survey allows for comparison of the results with Australian findings.

Introduction

What is benchmarking and why has it become an important business tool for real estate agencies in recent years? Benchmarking is defined in the Oxford Dictionary as "to evaluate or check by comparison with a benchmark" - a reference point. It is a term which has been commonly associated with measuring performance or achievement in business, sport and/or by individuals.

Its use in business evolved through the introduction of quality management techniques designed by J Edwards Deming after the Second World War. In the first instance it involves comparison with competitors and/or an established industry standard or norm. Benchmarking has also been described as the process by which a business measures itself against a better performing business, and then adopts and adapts any functions or procedures shown to be more effective.

For many years benchmarking by real estate agencies was limited to production comparisons, e.g. comparing market share or number of listings with those of competitors. The performance of individual salespeople was also (and still is) compared with others within the organisation, eg, number of exclusive agencies and sales per month, and number of appraisals converted to listings. Norms or standards, now called key performance indicators, were established. Meeting and, where appropriate, exceeding the norms became an objective for individual salespeople.

Financial benchmarking, the comparison or measuring of an agency's financial performance against a better business or an industry norm was seldom practiced in the industry until the past two decades.

With the arrival in the 1980s of corporates, franchises and umbrella organisations the group collection of sales and financial data from real estate agencies gradually became established as common practice. The formation of these organisations helped to overcome one of the most important and difficult areas of benchmarking, ie, obtaining relevant financial statistics to allow the comparison of key areas of a business with market competitors. The development of larger agencies and more complex business structures focussed attention on the need for more sophisticated management tools such as regular monitoring of market and financial performance.

In the new, fiercely competitive environment, robust and sustainable market share and financial performance became important key performances

indicators for many leading agencies, including independent agencies, which had moved quickly to compete effectively with the groups.

The practice of financial benchmarking amongst New Zealand agencies was introduced by Waikato University which had been offering businesses a benchmarking service since the early 70s. However, it was the franchise groups and the marketing co-operatives which took the first tentative steps in the early 90s to formalise and regularise the process amongst the organisations' membership.

A common approach was to bracket the agencies into groups according to turnover ranges and to develop a set of key financial performance indicators, first as a group norm and then for the top 10% of each group. Individual agencies within the groups were encouraged to analyse their business, compare it with competitors (the group norm and the top 10% of the group) and to develop and implement strategies to improve performance. Whilst several sets of key performance indicators were developed from the available data, both the data and the findings were considered commercially sensitive and therefore not available to those outside the participating groups.

Independent agencies in Australia and New Zealand wishing to adopt financial benchmarking tools were unable to access publicly available data for the purposes of making valid comparisons with competitors.

Robert Bevan and Associates, working with the accounting firm Deloitte Touche Tomatsu, initiated the first moves to establish a publicly available data set for Australian agencies in the early 90s. Data continued to be collected nationally, and from various Australian states, over the decade and Robert Bevan and Associates regularly released the findings into the public arena. In 1999, under the auspices of the Real Estate Institute of Australia these two organisations conducted an Australian wide real estate agency profitability survey and the findings were publicly released in 2000 (Bevan, 2000).

It remained to duplicate the research in New Zealand. Following discussions between Robert Bevan and Associates and the Real Estate Institute of New Zealand an identical survey for New Zealand was commissioned in 2000. Under the auspices of the institute, Robert Bevan and Associates and Massey University undertook the *survey* in New Zealand in 2001. The survey and the findings were publicly released in the same year, and are the prime focus of attention for this paper.

Methodology

Acting under the auspices of the Real Estate Institute of New Zealand, Robert Bevan and Massey University accepted the brief to conduct a profitability survey of New Zealand residential real estate agencies. The objective of the research was to establish the first

publicly available New Zealand inter-firm comparison of real estate agencies' financial performance. The findings would provide an opportunity for financial benchmarking by all residential agencies whether independent or members of a group.

Sample

The sample for the survey consisted of all licensed residential real estate agencies in New Zealand in August 2001, a total of 1263 businesses. As both licensing and membership of the Real Estate Institute are compulsory under statute in New Zealand the sample represented all residential agencies that were currently trading, and on the Institute's records.

Questionnaire

The questionnaire was a one page survey form based on the form developed by Bevan (2000), and used previously in the 1998/99 Australian survey conducted by Robert Bevan and Associates and Deloitte Touche Tomatsu for The Real Estate Institute of Australia. One question only was modified to more accurately reflect the different employee/independent contractor relationships applying in New Zealand agencies.

The survey consultants limited any changes to the form to ensure validity of Australian/New Zealand survey comparisons. The survey forms were mailed to all members (the sample) in June 2001 by the Real Estate Institute of New Zealand via the Real Estate Journal. An explanatory memo, inviting members to participate and to return the form by fax or mail to Massey University, accompanied each survey form. Respondents were asked to complete the form using data from their financial records for the year April 1, 2000 to March 31, 2001

Data Collection

Of the 1263 questionnaires mailed out to the survey sample a total of 140 responses had been received by August 25, 2001. Five responses were either blank, or unusable. Valid responses totalled 135 (10.69% of sample size). Four further responses, received after the close-off date, were unable to be included in the analysis.

Results and Discussion

The following are highlighted extracts from the survey findings (Bevan and Crews, 2000).

From the statistical data collected 12 model businesses were derived, consisting of four main models based on revenue categories and eight models, which were sub-groups of those categories. Each model is a representation of the average level of personnel, revenue, expenses, operating surpluses and surplus per principal in each category. The eight sub-group models were based on the top and bottom 10% responses by operating surplus for each main model.

Bevan (2000): Bevan & Crews (2001)

REVENUE CATEGORY (\$p.a.) pERCENTAGE OF RESPONSES

Under \$250,000.00 (Model 1)	21.48% (20.8% A)
\$250,001.00 - \$500,000.00 (Model 2)	22.96% (26.5% A)
\$500,001.00 - \$800,000.00 (Model3)	14.08% (20.6% A)
Above \$800,000.00 (Model 4)	41.48% (32.1% A)

Table 1: Model Businesses by Revenue Category

The four main model businesses by revenue category were:

- Model 1 - Revenue under 250,000
- Model 2 - Revenue \$250,001 to \$500,000
- Model 3 - Revenue \$500,001 to \$800,000
- Model 4 - Revenue above \$ 800,000

Figure 1 represents the percentage of respondents by the four main model business revenue categories. Businesses trading over \$800,000 represented 41.48%, the largest group in the survey sample. Figure 1 reports the Australian response percentages (Bevan, 2000) in parenthesis. The average real estate agency business in New Zealand is larger than that in Australia.

Figure 2 (previous page) reports the findings of two of the main business models - revenue categories \$500,001 to \$800,000 (Model 3) and above \$800,000 (Model 4), each represented as average revenue by category.

Respondents in the two categories represent 55.56% of total responses. With the operating surplus percentage of the larger business model slipping from 16.6% to 15% there is little evidence of achieved economies of scale on the basis of revenue/expenses. The improvement in operating surplus (\$282,534 [Model 4] against \$106,811 [Model 3]) is largely driven by turnover (\$1,882,482 [Model 4] against \$637,642 [Model 3]), based on the number of sales consultants (15.29 [Model 4] against 6.70 Model 3]) and property managers (1.30 (Model 4) against 0.40 [Model 3]).

Economies of scale are evident in the revenue performance of sales consultants in the larger business model (\$106,984 [Model 4] per consultant against \$87,490 [Model 3]). Similar findings to the above are also reflected in the Australian report (Bevan, 2000) where the equivalent ratio was \$173,408 [Model 4]

per consultant against \$129,182 [Model 3]. Refer further discussion following figures 1-7.

The two highest expense items in both business models are advertising/promotion and salaries/commission. Advertising/Promotion expenses for the two models are 12.7% [Model 3] and 12.4% [Model 4] of revenue. However, the revenue item recoverables/advertising is reported as 2.9% [Model 3] and 5.5% [Model 4], leaving net advertising/promotion expenditure of 9.8% [Model 3] and 6.9% [Model 4]. Indications are that larger businesses are more successful at collecting vendor paid advertising, or sharing advertising costs with their salespeople. Whilst net expenditure of 6.9% [Model 4] on promotion and advertising is a key performance indicator for New Zealand agencies the equivalent figure in the above \$800,000 Australian model is reported as 4% [Model 4]. Refer further discussion following figure 4.

Salaries/commission expenses for each of the two business models are reported as 49.5% [Model 3] and 53.9% [Model 4] respectively. Indications are that commission payout percentages are higher in larger businesses, presumably a staff recruitment and retention incentive and/or a reflection of greater administration support for the sales-force. A similar trend is reported for the same business models in the Australian report, where salaries/commission expense percentages are reported as 31.4% [Model 3] and 35.9% [Model 4] respectively Refer further discussion following figure 3.

In this survey, salaries/commissions/total revenue and advertising/promotion (less recoveries)/total revenue are the two key financial performance indicators for expense monitoring. No other expense items exceed 5% of revenue. Revenue/sales consultant is another key performance indicator. This ratio

AGENCIES PERFORMANCE

Bevan & Crews (2000)

AVERAGE REVENUE \$500,001.00 TO \$800,000
(Average By Total Revenue) Model 3

AVERAGE REVENUE ABOVE \$800,000
(Average By Total Revenue) Model 4

PERSONNEL				PERSONNEL			
	Principals	1.20			Principals	1.49	
	Sales Consultants	6.70			Sales Consultants	15.29	
	Property Managers	0.40			Property Managers	1.30	
	Admin/Clerical	1.40			Admin/Clerical	3.54	
	Total				Total		
REVENUE	\$		X	REVENUE	\$		X
	1.00 Sales	586,187	91.9%		1.00 Sales	1,635,786	86.9%
	2.00 Property Management	28,544	4.5%		2.00 Property Management	107,207	5.7%
	3.00 Recoverables/ Advertising	18,575	2.9%		3.00 Recoverables/Advertising	103,174	5.5%
	4.00 Other	4,336	0.7%		4.00 Other	36,315	1.9%
	5.00 TOTAL REVENUE	637,642	100.0%		5.00 TOTAL REVENUE	1,882,482	100.0%
EXPENSES	\$		X	EXPENSES	\$		X
	6.00 Advertising, promotion	80,965	12.7%		6.00 Advertising, promotion	233,108	12.4%
	7.00 Bank charges	1,092	0.2%		7.00 Bank charges	2,862	0.2%
	8.00 Equipment, plant, I.T.	7,029	1.1%		8.00 Equipment, plant, I.T.	21,285	1.1%
	9.00 Group fees	20,955	3.3%		9.00 Group fees	49,149	2.6%
	10.00 Insurance	3,096	0.5%		10.00 Insurance	7,780	0.4%
	11.00 Interest	4,079	0.6%		11.00 Interest	7,042	0.4%
	12.00 Motor vehicles	5,426	0.9%		12.00 Motor vehicles	11,648	0.6%
	13.00 Personnel/training	16,542	2.6%		13.00 Personnel/training	13,610	0.7%
	14.00 Postage,couriers	2,302	0.4%		14.00 Postage,couriers	6,861	0.4%
	15.00 Premises	30,325	4.8%		15.00 Premises	77,427	4.1%
	16.00 Printing	10,116	1.6%		16.00 Printing	29,149	1.6%
	17.00 Professional fees	5,062	0.8%		17.00 Professional fees	11,208	0.6%
	18.00 Recoverables	546	0.1%		18.00 Recoverables	9,229	0.5%
	19.00 Referrals, conjunctions	6,267	1.0%		19.00 Referrals, conjunctions	53,460	2.8%
	20.00 to 23.00 Salaries/Comm-Employees/ Contr's	315,798	49.5%		20.00 to 23.00 Salaries/Comm-Employees/ Contr's	1,014,589	53.9%
	24.00 Salaries- principals	(Na)	(n/a)		24.00 Salaries- principals	(n/a)	(n/a)
	25.00 Subs, licenses, donations	3,735	0.6%		25.00 Subs, licenses, donations	7,992	0.4%
	26.00 Telephone, fax	16,127	2.5%		26.00 Telephone, fax	38,263	2.0%
	27.00 Travel, parking	1,369	0.2%		27.00 Travel, parking	5,286	0.3%
	28.00 TOTAL EXPENSES	530,831	83.4%		28.00 TOTAL EXPENSES	1,599,948	85.0%
	29.00 OPERATING SURPLUS Includes 24.00 salaries principals	106,811	16.6%		29.00 OPERATING SURPLUS Includes 24.00 salaries principals	282,534	15.0%
	30.00 SURPLUS PER PRINCIPAL	89,009			30.00 SURPLUS PER PRINCIPAL	189,620	

Table 2: Two Main Business Models Revenue Categories \$500,001 to \$800,000 (Model 3) and above \$800,000 (Model 4)

increases markedly with the size of the business as reported above. Refer further discussion following figures 3 and 4.

Further highlights and NZ/Australia comparisons

Figures 1-7 explore a number of key revenue streams, expense items and returns achieved by the businesses, expressed as operating surpluses and operating surpluses per principal. Comparisons between the New Zealand and Australian surveys are also explored. Currencies are expressed in real dollars, ie, no allowance is made for exchange rate differences. Figure 8 explores the extent to which revenue is earned from property management activities.

Figures 1-3 explore the relationship between the

sales-force, sales-force earnings and levels of compensation. The number of salespeople is a clear determinant of levels of turnover in real estate agency practice and the effectiveness of their production is a key performance indicator for the industry.

Figure 1 reflects the number of salespeople reported in each of the four business models for both New Zealand and Australia. The sales-force in the average New Zealand real estate business is larger than its Australian equivalent.

Most real estate agencies began as small businesses but many have grown to much larger enterprises over the past two decades. As indicated earlier, under discussion attached to table 2, figure 2 reflects the extent to which economies of scale are evident in

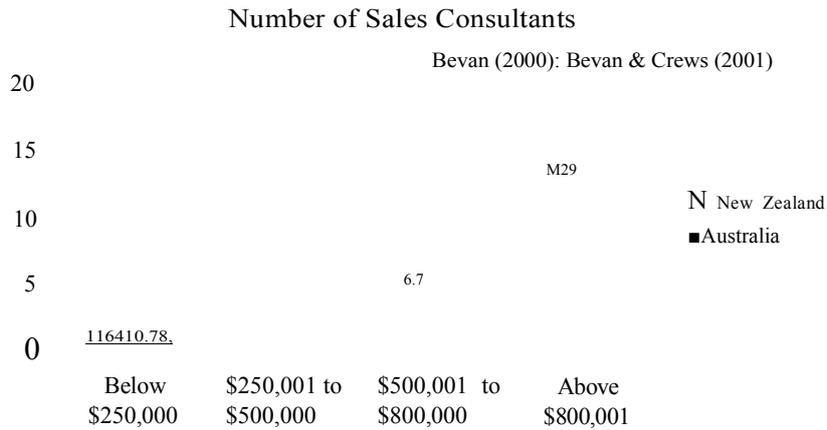


Figure 1: Number of Sales Consultants

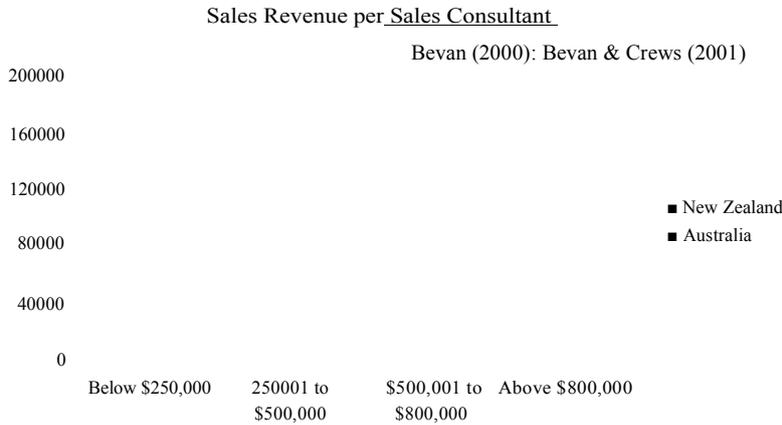


Figure 2: Sales Revenue per Sales Consultant

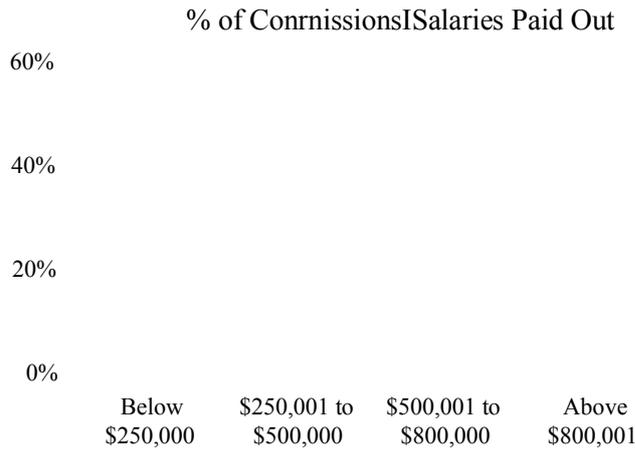


Figure 3: % of Commissions/Salaries Paid Out

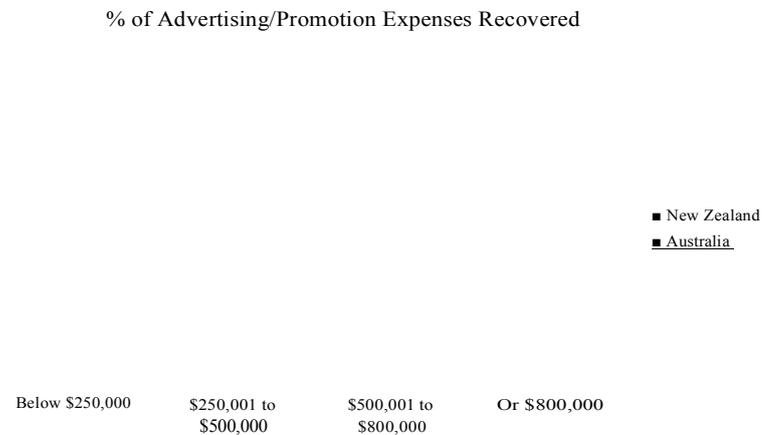


Figure 4: % of Advertising/Promotion Expenses Recovered

individual sales consultant revenue in the larger business models.

Sales revenue per sales consultant lifts from \$64,106 (\$136,492 Australia) in the smallest business model - Model 1 to \$106,984 (\$173,409 Australia) in the largest business model - Model 4. Australian sales consultants also clearly achieve higher sales revenues than their New Zealand counterparts.

Figure 3 demonstrates the extent to which salaries/commission paid out as a percentage of total revenue increases as the business model gets larger. The continuum ranges from 29.2% (18.9% Australia) for the smallest model - Model 1 to 53.9% (35.9%) for the largest model - Model 4.

No split between payments to salespeople and to other staff is available. However, as indicated earlier,

under discussion attaching to table 2, it is presumed that the larger payouts are part of staff recruitment and retention incentives and/or a reflection of greater administration support for the sales-force.

Figure 4 records the percentage of advertising expense recovered in each of the four business models. The continuum ranges from 18.5% (38.6% Australia) in the smallest business model - Model 1 to 44.3% (66.6% Australia) in the largest business model Model 4.

As discussed earlier, under table 2, indications are that larger businesses are more successful at collecting vendor paid advertising, or sharing advertising costs with their salespeople. As the second highest expense item reported in the survey, advertising/promotion is a key performance indicator for the industry.

Operating Surplus

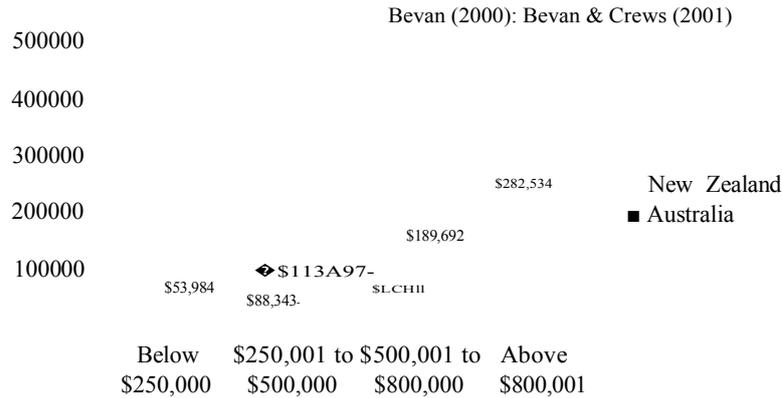


Figure 5 Operating Surplus

An increasing number of real estate agencies in both countries are targeting zero budgeting for advertising. The extent to which businesses recover advertising costs through vendor paid advertising is critically dependent on the role played by sales consultants in achieving agreement from vendors to contribute.

Figures 5-7 explore both the reported operating surpluses and the reported operating surpluses per principal for the four business models. The operating surplus is calculated by deducting the expenses from the revenue of the business.

Regarded as a key financial performance indicator, the operating surplus, or EBITDA, is a benchmark commonly used a basis for valuing the business as a going concern asset, ie, the higher the operating surplus the greater the value of the business. Figure 5 reflects the operating surplus reported for the four business models. The continuum ranges from \$38,398 (\$53,984 Australia) in the smallest business model - Model 1 to \$282,534 (\$419,504 Australia) in the largest business model - Model 4.

As could be expected (but by no means guaranteed for any individual business), the reported operating surpluses increase with rising revenue in both the New Zealand and Australian models. Operating surpluses for all four Australian models are higher than their New Zealand counterparts. The economies of scale evident in individual sales consultants' revenue in the larger business models (as indicated earlier (refer discussion under figures 1-3) is now reflected in the reported operating surpluses.

The financial performance effectiveness of larger businesses, as reflected in the findings, is interesting in light of attitudes currently prevailing in some sectors of the industry. Described in the hard vernacular of the industry as "putting more bums on seats", the practice

of forming larger sales teams has been more recently criticised as threatening the quality of service delivery to consumers. The prolific American real estate author Tucillo (2002), also refers to employing greater numbers of salespeople as putting more "feet on the street" (p 25). He suggests that income derived solely from that practice is now insufficient to sustain a business.

The success of larger businesses at collecting vendor paid advertising, or sharing advertising costs with their salespeople (Refer discussion under figure 4) is also reflected in the operating surpluses. A further factor enhancing the higher surpluses reported for the Australian models is the extent to which Australian agencies are engaged in property management compared to their New Zealand equivalents. Property management is discussed further under figure 8.

Considering the established link between revenue and operating surplus it is also interesting to compare average total revenues for the four business models. Model 1 - \$124,748 (\$154,167 Australia), Model 2 - \$363,305 (\$369,429 Australia), Model 3 - \$637,642 (\$621,524 Australia), Model 4 - \$1,882,482 (\$1,606,646 Australia). New Zealand revenues are lower in the two smaller models and higher in the two larger models.

Figure 6 represents the operating surplus expressed as a percentage of the total revenue. This is one of the most widely used key financial performance indicators for benchmarking against an industry or industry group standard/norm. The industry group norm is often adopted by a business as a target to be achieved or exceeded. For example, the top 10% by operating surplus of the respondent sample for the four business models reported the following Operating Surplus percentages. Model 1 - 74.6% (66.4% Australia), Model 2 - 69.9% (56.9% Australia), Model

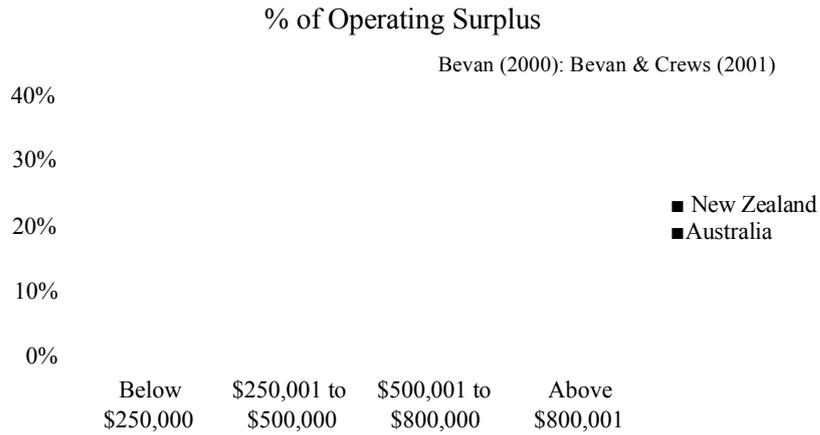


Figure 6: Operating Surplus as a Percentage of Total Revenue

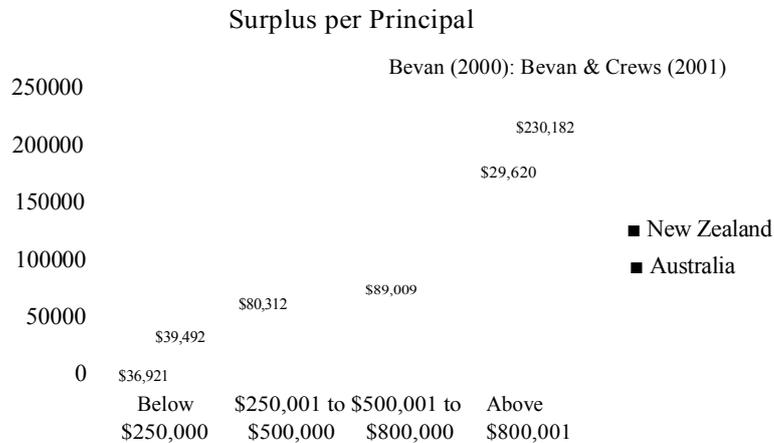


Figure 7: Surplus per Principal

3 - 40% (Australia 58.8%), Model 4 34.5% (27% Australia).

Averages for all respondents were as follows. Model 1 - 30.8% (35% Australia), Model 2 - 24.4% (30.6% Australia), Model 3 - 16.6% (30.5% Australia), Model 4 - 15% (26.1% Australia). The results reflect evidence of "slippage" in operating surplus percentages reported as businesses grow larger, much of which can be linked to the higher percentage of commissions/salaries paid out by the larger businesses.

Figure 7 reports on the operating surplus available per principal for the four business models. It is an assumption that there are no other shareholders in the business, that any management fee has already been included under expenses and that the operating

surplus is divided equally between the principals. The operating surplus per principal represents an important element when calculating the individual shareholder's annual return on risk.

The principal's operating surplus is also the basis for valuing the individual's share of the goodwill of business as a going concern asset, ie, the higher the operating surplus per principal the greater the individual's share of the value of the goodwill.

As would be expected the number of principals rose with the size of the business. The average number of principals reported for the four business models was as follows. Model 1 - 1.04 (1.37 Australia), Model 2 - 1.1 (1.5 Australia), Model 3 - 1.2 (Australia 1.5), Model 4 1.49 (1.82 Australia). Note

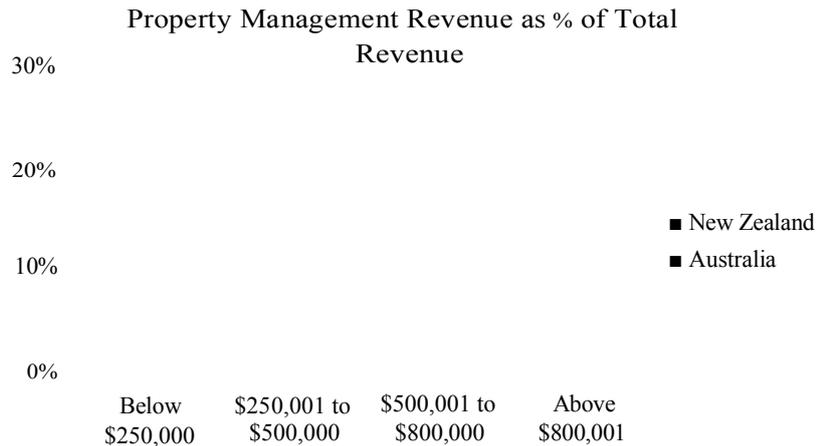


Figure 8: Property Management Revenue as a % of Total Revenue

that Australian businesses reported a higher number of principals for all four business models than their New Zealand counterparts.

Whereas Figure 5 reports Australian businesses as achieving higher operating surpluses than their New Zealand counterparts, Figures 7 reflects the effect of sharing those Australian surpluses with a greater number of principals. A further examination of the operating surplus data per principal in New Zealand finds that 7% are in deficit or breaking even, 46% earn less than \$100,000 from their surplus, 28% earn \$100,000 - \$200,000 and 19% earn more than \$200,000. No equivalent data are available for Australian principals.

Figure 8 reports the percentage contribution of property management towards the total revenues of the four business models. The results reflect the extent to which property management is a significant contributor to the revenue streams of Australian agencies compared to their New Zealand counterparts.

In theory, once revenue from a property management portfolio has achieved "critical mass", ie, property management income reaches break-even against property management expenses, additional revenue adds to the surplus already achieved by the sales division.

Average property management revenues for the four models are as follows. Model 1 - \$16,223 (\$39,002 Australia), Model 2 - \$53,342 (\$94,381 Australia), Model 3 - \$28,544 (\$151,385 Australia), Model 4 - \$107,207 (\$334,900 Australia).

Property management is seen by many agencies as an additional or diversified revenue stream, often regarded as more consistent than sales revenue, ie, less affected by real estate cycle downturns. There is also strong market evidence that a sizable property

management portfolio significantly enhances the value of a real estate business as a going concern asset.

Summary and conclusions

Although regarded as a pilot study, the survey undertaken by Bevan and Crews (2001), and the subsequent findings, provide the first publicly available research into the financial performance of real estate agencies in New Zealand.

Adopting the same data collection instrument as had been utilised in Australia by Bevan (2000) also allowed for some useful comparisons to be made between agencies in both countries. For the first time, individual agencies that have no access to shared key financial performance indicators can measure and benchmark their own performance, first against the relevant revenue based business model, and second, against the top 10% of agencies reported as sub-groups of each model.

Studying the findings also assists agencies, industry leaders and academics to gain further insights into agency profitability, and the financial characteristics that drive profitability in residential real estate agency practice. Highlights in the findings include the identification of key financial performance indicators in both revenue and expense streams, and also in operating surpluses.

The number of salespeople is a clear determinant of levels of turnover in real estate practice and the effectiveness of their production is a key performance indicator for the industry. Larger businesses in New Zealand are achieving economies of scale in the revenue performance of individual salespeople, through higher earnings per sales consultant. Sales revenue per consultant clearly lifts as the business model (and the size of the sales team) gets larger. There is some indication of a similar trend in Australia

(except for Model 3) but Australian agencies report significantly higher revenue per sales consultant than their New Zealand counterparts.

The two major expense items, both key performance indicators, are reported as commissions/salaries and advertising/promotion, the only two items to exceed 5% of total revenue. Commissions/salaries paid out, clearly the highest expense item, increases as a percentage of total revenue as the business model gets larger, a finding that is reflected in both the New Zealand and Australian surveys. The percentage paid out is lower for Australian agencies than for their New Zealand counterparts. Larger New Zealand businesses are also more successful at collecting vendor paid advertising, or sharing advertising costs with their salespeople. Apart from Model 3 this is also reflected in the Australian findings.

As could be expected, reported operating surpluses increase with rising revenue in both the New Zealand and Australian business models. Reported operating surpluses are higher for all four Australian models than their New Zealand counterparts. The higher earnings per sales consultant and the success of larger businesses in advertising cost recovery is also reflected in the reported operating surpluses. The higher surpluses reported by Australian agencies is further enhanced by more extensive property management activities than their New Zealand counterparts.

When operating surpluses are expressed as a percentage of total revenue there is evidence in the findings of "slippage" as business grow larger, much of which can be linked to the higher percentage of commissions/salaries paid out by the larger businesses. Reported operating surpluses per principal in the four business models reflected the effect of sharing those surpluses with a higher number of principals in Australian businesses than their New Zealand counterparts.

It is to be hoped that both the survey findings and the discussion will further stimulate interest amongst real estate agencies in identifying key financial performance indicators in their businesses, and in benchmarking their performance against similar sized businesses.

Alternative sources of benchmarking data, where available, should also be considered as enhancing the robustness of any comparisons. Principals considering growing their businesses should also examine the findings. Whilst larger businesses can benefit from higher productivity and profitability, careful monitoring of the ratio of staff related costs (the highest expense item) is needed as that ratio also rises with increased size.

Improving the financial performance of individual real estate businesses should remain a key objective for all principals and their financial advisers. Whilst this first New Zealand survey is only a pilot study the

findings should prove an important aid in identifying opportunities, and in designing techniques and strategies to meet that objective.

Limitations

A number of limitations relating to this study are readily acknowledged

(i) Whilst a response rate of 10.69% of New Zealand real estate businesses to the survey (Australian rate 7.1%) was considered acceptable as representative, a higher response rate would have lowered non-response bias and enhanced the robustness of the findings. In the event of the survey being repeated further strategies need to be considered to help lift the response rate.

(ii) The survey was conducted in June/July 2001. Data requested from respondents were related to the financial year ended March 31, 2001. A three-month gap for end of year financial data collection may be regarded as insufficient to ensure responses from many in the survey sample who did not have access to in-house accounting systems, or were simply not yet in a position to supply the data. Response bias here is readily acknowledged. In retrospect, a six-month gap after the end of the financial year (adopted in the Australian survey) may have assured a more representative sample.

(iii) Dollar values referred to in the findings are reported in the face value of country of origin. Where financial data between New and Australia are compared, no adjustment or allowance is made for exchange differences.

(iv) Sales commissions/salaries paid out were listed in the survey instrument as a combined expense item (as in the Australian survey). In collecting the data, separating out sales related staff costs from other staff costs may have provided further opportunities to explore the actual cost of sales, ie, commissions/salaries paid to sales staff.

(v) No data were collected on owners' equity or the value of assets despite the importance of return on capital employed as a key financial performance indicator for businesses.

(vi) Statistical analysis in the study was confined to descriptive statistics. The use of additional statistical techniques would have further tested the robustness of the results.

Future Research

In recent years there has been a growing interest in research on the real estate industry in New Zealand. The building body of knowledge on real estate practice is now beginning to offer much more reliable data. The Bevan and Crews (2001) pilot study on financial performance and profitability of real estate businesses is a direct result of the interest shown by Robert Bevan of Robert Bevan and Associates in extending the already adopted Australian model into New Zealand.

The initial findings provide the first publicly available financial benchmarking data for New Zealand agencies. As has been established in Australia, in conjunction with the Real Estate Institute, it is now planned to regularly repeat the New Zealand interfirm comparison survey, thus building comparative financial data on the real estate industry over time. It is hoped that this will not only stimulate further research into the financial performance of agencies but also encourage the release of existing closely held data into the public arena.

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The dimensions of human action and property

Abstract

This paper examines the dynamics of human action using a sociological/anthropological approach to review the appropriate treatment of property within society.

It begins by reviewing the accepted politico/economic categories of Left and Right in the light of historical performance in order to examine their appropriateness and efficacy for human flourishing. While both approaches to the material condition of humanity have been heralded with great promise, it is argued that neither has freed human society from misery.

The shortcoming of the Left/Right approach is located within its dependence on the methodology of modernity that necessarily discourages examination of other dimensions of human action. These are explored using an anthropological approach. It is suggested that concepts of kinship and solidarity, often given potency by cultural and spiritual beliefs, offer more promise in developing a robust theory of action for property.

Introduction

Customary people view property in a way that integrates it into their overall culture and spirituality (Small 1997), whereas Western people tend to use it as the basis for the construction of their culture in terms that are primarily economic (Cuff, Sharrock et al. 1990).

In the West, property is perceived as a bundle of positive legal rights that are politically based and valued in commercial terms (Macpherson 1978). Customary people understand property as essentially proceeding from their spirituality and valued in relational, almost familial, terms (Ezigbalike 1994). When Western people are confronted with customary understandings of property they are forced to grapple with elements of culture that they usually keep quite distinct from property.

Property, to the Western mind, is the basis of commerce, and commerce is the material support for all the other institutions that comprise culture. Smith established the Western understanding of property as an arbitrary institution visible only as those conventions regarding ownership that are upheld by

the power of the state (Smith 1778/1910). On this basis, property has no necessary connection with other cultural forces, beyond the chance historical events that may have contributed to its current form.

The purpose of this paper is to locate property more completely within the realm of human social action. To do this the dominant dimensions of human action will be unpacked and these will be used to develop a framework for understanding property within Western and customary cultures. It is argued that while Western people stress institutional issues regarding property, these only comprise one limited dimension of human action and the position rests on unstated assumptions regarding other critical issues. The paper attempts to demonstrate the importance of these other dimensions of human action that impact on property to provide a better-balanced analytical perspective suitable for exploring property outside of Western modernity.

The foundations of property economics

Property economics can be considered to be the study of how to use property most profitably. Implicit in its parameters is the concept of property. To the Western mind this is a statement of the obvious, but the concept of property becomes problematic when it is exported to other cultures.

The positive concept of property is grounded on the set of private rights that the state will uphold regarding property using the force of law. Property therefore has as its foundation the system of law and government that prevails in a particular society. Property, law and government may be considered to comprise the public institutions of a society. While property rests on the legal/governmental framework, the latter is not the ultimate origin of human action.

The primary sources of English law are statute and common law precedent; both have a single origin. Common law is the crystallisation into law of the ethical position of the common person (Devlin 1965). Statute law is the determination of the government enshrined in positive acts that acquire the force of law through the authority of the government.

In a democracy, the government takes its authority from the free choice of the people who elect

Figure 1

Foundations of Property Economics

Property Economics	Wealth maximisation using
Property Title	Licit ownership rights
Law & government	Socially sanctioned relationships
Culture ethics	Principles for relationships
Anthropology	Understanding of human
Metaphysics /genesis theory /spirituality	Understanding of origins

representatives who will legislate in accordance with their opinions regarding management of the society. This means that the people vote for representatives who will act according to their cultural and ethical values. In both common law and democratic government enacting statute, the ultimate sources of action are the cultural and ethical values of the people.

Cultural and ethical values vary substantially between various societies. Their origins may be traced to many sources, but the dominant immediate foundation is the theory of human nature that dominates in that society. Every person carries an implicit theory of what other people are like, and how they should be related to, this theory is sometimes called an anthropology. A person's theory of what others are like determines whether others should be trusted or not, whether they should be respected or not, even whether they should be exploited or not.

An individual's anthropology may include differing categories of others to whom differing approaches are appropriate. In many cultures, the treatment of blood relatives is different to outsiders, in some outsiders are treated in a different way on the basis of religion, physical appearance, or race. Often, outsiders are treated worse than insiders, but in many cases the individual takes licence with insiders while showing greater respect to outsiders. For example in some customary cultures, personal property is only loosely upheld within the tribe or clan, while great respect is shown to Westerners.

The point is that culture and ethics, even when they appear to be linked to tradition or other sources, are proximately grounded on the individual's anthropology, especially as this is corporately shared across a society.

An anthropology may be adapted from a society's traditions by the individual, but it is still ultimately

grounded on more fundamental issues. Most customary cultures are very conscious that their ways of life are ultimately grounded on their origins.

Discussion of property invariably includes discussion of spirituality. Spirituality includes a story of creation, of the origin of the land and the people and a relationship between the creator and the people. The beliefs of a people regarding their origins forms both the basis of their anthropology and the basis of their understanding of property. In philosophy, the study of the origins of existence is metaphysics. In the Western tradition metaphysics does not necessarily include theology, although it often intersects with it (Johnson 1995).

The beliefs of a people, or an individual regarding the origin of things does not have a basis in any other aspect of human understanding. Aristotle held that metaphysics was the first science, the beginnings of understanding upon which all other understanding, all the other sciences, were built. The case of customary people and their relationship to land is no more than a specific illustration of Aristotle's position.

This means that property economics may be considered to stand on an ordered set of foundations that reach back to the very basis of human reason and belief. This may be illustrated as shown in Figure 1. This set of foundations can be seen to influence human action at various levels. It is highly culturally specific. Using it the various dimensions of human action can be examined and the interrelationship between Western and non-Western cultures can be explored.

Property and culture

Marx focused on the fundamental nature of economic relations in the construction of a culture and

described society as consisting of an economic base upon which all other cultural institutions were built. The economic base/superstructure model of society is probably a fair construction of human society, if existence is assumed to be no more than material. It is consistent with the Enlightenment view of the world and humanity.

The Enlightenment viewed all social institutions as arbitrary and lauded human freedom their only licit origin (Hume 1777/ 1975; Smith 1778/1910). The pre-eminence of freedom in Enlightenment thought meant that no appeal could be made to normative ethical values or religious directives in framing social institutions unless they were generally accepted.

Community opinion and practice is the ultimate reference point. While this approach has the capacity to deliver ethically sound and even religiously inspired outcomes, they remain subject to the veto of human opinion. That is, human preference is the highest authority. This position has become a foundation piece of modern democratic thought, though in practice, it means the human preference of those with effective political power.

Following Smith's notion that property is the outcome of a purely positive statutory situation, it is easy to recognise that property in Western thought is closely connected with other manifestations of government, all of which are ultimately the result of arbitrary expressions of human preference.

The advantage of this position is that it has the power to accommodate a range of diverse values within a single society on the assumption that public dialogue, common sense and democratic government will combine to bring to the fore the best available choice for government at a particular time.

Implicitly, the Western theory of government also relies on commonly held views regarding a number of other important issues. These include:

- i. The assumption that political power finds its zenith in the democratically elected body of representatives that comprises government.
- ii. The assumption that those who control effective political power will use it for what is best for society when making political decisions.
- iii. The assumption that society is an association of independent free individuals who recognise the benefits of co-operative social organisation.
- iv. The assumption that there does not exist an objective knowable set of principles that could be used as a basis for any society's ethical scheme, or public policy.
- v. The assumption that spiritual/religious beliefs should be relegated to the private forum as a personal subjective influence over the individual of dubious merit for the formation of public policy.
- vi. The assumption that people are primarily responsible for themselves alone and that there are minimal necessary obligations to the *other* in

relationship, beyond what is sanctioned by public policy (statute).

These assumptions constitute a theory of human nature and social relationship. Such a theory can be referred to as an anthropology. This one is correctly termed the Enlightenment anthropology, or more generally, the modern anthropology. A person's theory of the nature of those others in society determines in large measure the person's personal choices in dealing with others in society. That is to say, it is sufficient as a basis for an ethic. This is quite independent of the coercive influence of government.

Strictly speaking, property is not necessarily directly influenced by the dominant anthropological theory of a society, though it may well be indirectly affected. A person's anthropological beliefs will influence that person's exercise of political power when it comes to determining the nature of property, just as it influences the direction of other aspects of public policy.

Hence, if the person believes that human relations are not governed by spiritual beliefs, that person will not support legislation inspired by the teachings of Christianity, Islam or other religious traditions. On the other hand, if the person believes that humans have an obligation to future generations, who by nature are currently politically powerless, that person may support controls on property, such as environmental limitations.

A particular anthropology does not necessarily translate into a single system of public policy. Rather, it provides underlying principles that particular policy formulations must embody that may lead to very different institutional outcomes. Nowhere is this more apparent than in the case of religious sentiment and governmental organisation. Historically, both Whig and Tory extremes of British politics espoused Christian foundations. Today the US Republican party tends to be overtly Christian; while in Australia at the other ideological pole the Australian Labor Party has long links with Irish Catholics.

Likewise, the Enlightenment anthropology has given rise to two diametrically opposed property institutions, those of liberal capitalism and communist socialism. Both embody Enlightenment liberalism, though that liberalism itself manifests as foundation of the two polar extremes. British liberalism is associated with liberal capitalism while American liberalism is associated with left wing ideology.

As a result, it is common for the Western mind to try to locate others somewhere on a continuum between these commonly accepted extremes. People are usually evaluated as either politically left or right, socialist or free market, big government or small government. The Leftist, socialist, statist person is assumed to be suspicious of private property, while the right wing, liberal capitalist will pursue private property as a vital component of the liberal capitalist

panacea for all economic, and most social, problems.

In this way, there are two identifiable dimensions of human action, the more apparent one is the institutional, or political dimension, while the more fundamental is the anthropological dimension. For each choice of a theory of the human person (anthropology), there is a potential range of choices of public institutions. This overcomes the modern limitation of trying to condense political possibilities to the narrow line between the political left and right. Left and right, as understood by Western minds, are not meaningful for people who accept a different anthropology. Likewise, it is improper to attempt to use these categories to interpret the institutions of non-Western people in terms that operate within an entirely different anthropology.

This means that the ideological categories of Left and Right that are familiar in the West are not applicable to societies that are based on a different understanding of the human person, even though they may display empirical resemblances to comparable Western institutions. It is well known that customary people generally hold property on a communal basis, but this definitely does not mean that they are all socialists.

Likewise, economic historians have long debated whether property in ancient Greece was private or not. On one hand it belonged to individual families for their private benefit with the family head as the recognised private owner, while on the other, individuals within families had very limited personal rights to it. The correct conclusion is that property in ancient Greece lay outside the range of possibilities available to Western modernity.

Given the number of possible distinct anthropologies, including the various customary peoples, several Christian, a number of other major world religions and their variants, as well as the secular Enlightenment modern perspective, a plurality of political/economic systems is possible. Comparisons between these may not be straightforward, despite apparent similarities. Since Western people tend to give preference to measurable apparent issues, it is the institutional dimension that is emphasised in Western thought.

By contrast, indigenous peoples tend to stress the importance of tribal/community values, that is, their anthropological position. The fact that these two groups tend to give prominence to entirely different dimensions in human action may be one of the important factors that serve to block effective intercultural communication. This is especially apparent in the area of the customary title debate.

Enlightenment anthropology assumes a material, self-interested, individualistic notion of humanity, whereas customary peoples tend to understand humanity in terms of connectedness through family and clan bonds, where the person exists to contribute

to the flourishing of the community, be it family, tribe, or nation. Some Western people adopt anthropologies inspired from different sources. The Enlightenment anthropology has spawned a variety of others, such as those of Hegel and Marx, while it was itself largely developed from the Protestant Christian anthropology initiated by Luther and Calvin. (Weber 1974) demonstrated how that position facilitated a particular political/economic outlook that was given a philosophical grounding in the eighteenth century.

A distinct concept of the human person, also linked to Christian tradition is found in Catholic social thought. This anthropology has links to the earliest of Christian thought, though it tends to be most accessible within a series of papal encyclicals spanning the last century known as the social teachings of the Church. Contemporary Western culture therefore consists of a plurality of positions regarding the nature of the person. A number of distinct anthropologies may also be identified within non-Western peoples, providing a great variety of possibilities.

The Western dichotomy of capitalist/socialist begins to look very limited when it is recognised that it only strictly applies within the Enlightenment anthropology. The institution of property is intimately connected within this question of the universality of the private/common capitalist/socialist dichotomy of political/economic systems. Within some anthropologies, institutional systems can develop that display superficial similarity to the institutions of property found in modernity.

Mainland Australian aboriginal land ownership could be interpreted as communal, or if pressed, socialist. Murray Island customary land ownership could be interpreted as private. Eddie Mabo's claim to his land was on the basis that he could identify its boundaries and demonstrate how his family had continuous connection to it within a socially sanctioned land ownership system.

However, Eddie Mabo would be appalled to have his title considered as private property in the capitalist sense and mainland aboriginals would not consider themselves as socialists. Customary property may appear to resemble the private property of capitalism or the collective property of socialism, but to draw those conclusions is to ignore much of the dynamic of customary culture and its institutions. Neither group cited use their property in ways that parallel the respective Western institutions.

European feudalism is another instance of property that does not fit neatly into the modern dichotomy. In one sense it was private property, but only for the king. In another, it was collective property for the king as caretaker. Much depended on the ethical character of the king, but the system itself had qualities of both private and social property, open to the potential benefits and shortcomings of both. European feudalism flourished within a particular version of

Christianity and tended to abate as that cultural perspective was superseded. Much depended on the ethical stamina of those in positions of power.

An individual's theory of humanity and society will influence personal behaviour directly. The majority of human action is not determined by government sanction, but by personal choice. The decision to greet someone or not, and the decision to set a tender price as high as the market will bear or as low as will cover normal costs are only two examples of the multitude of human exchanges that are not determined by public policy.

Thus, the anthropology adopted impacts on our confidence and comfort in dealing with others and underpins our ethical and social profile. The challenge in sales is to convey an aura of trustworthiness while not neglecting the necessity to close clients and an appropriate price. Trust infers that the person expects that the other will act in a way that holds the person's best interests in high regard even if it is not in the other's self-interest to do so. It means that the other is expected to exercise a degree of self-restraint.

Enlightenment anthropology has had a long history of difficulty with trust. Human history bristles with instances of humans acting in antisocial ways. It led to Hobbes concluding that humans were naturally warlike. He posited a rational calculus made within every person to accept the yoke of civilisation, not due to its latent attraction, but as a strategy for participating in the superior level of welfare that it provided.

Rousseau reversed Hobbes's pessimistic appraisal of human nature and laid the blame for human frailty at the feet of society. In his view, people were born virtuous, but quickly learned anti-social traits from social contact. Rousseau's solution was to free people as far as possible from the influence of social traditions and values to let people make their own choices. The result or course was anarchy, but it is a view that is still popularly received.

Three sources appear to be available for trust and related habits. The most obvious is tradition, the most persistent are family bonds, the third is religion and the last is reason. None of these appear to be totally reliable. Zimmerman (1947) demonstrated that the rise and fall of cultures are linked to changes in the nature of the family suggesting that there is a recurrent sociological trajectory that links values pertaining to family and tradition to cultural growth and decline. Some cultures hold traditions, such as cannibalism, that are generally considered faulty.

Family bonds usually work well within the family, but say little for the treatment of outsiders. Some religions, such as the Hindu cult of Kali, recommend treatment of others that is suspect. Every anti-social act done by a sane person demonstrates the folly of relying on the human reason of another to cause that person

to be trustworthy. This is doubly apparent when the antisocial acts are also illegal.

To isolate human reason is difficult since all sane people believe that their actions are the result of reason, even if their premises are dominated by elements of tradition, family, or religion. The only instance of pure reason is philosophy and it is a major first task of philosophy to establish the degree to which it can operate independent of tradition, family and theology.

Even within philosophy there are many schools, most built on well-recognised logical or factual flaws and many are transparently little more than instrumental techniques for achieving what would otherwise be unacceptable ethical outcomes. Despite this, Enlightenment thought was over-sensitive to the shortcomings of the first three but over optimistic about reason. It has no formal place for tradition, family, or religion, only human reason.

Each of these four factors could also be taken as further dimensions of human action in their own right. While they inform a person's anthropology, they also directly govern human action in their own realms.

For the present purpose, only religion, or spirituality, will be considered. Religion, or spirituality, is distinct in that it relates to transcendent realities and is commonly cited by customary peoples when discussing property. On the other hand, tradition could be considered as no more than a conglomeration of historical forces, and family bonds could be dismissed as moderately self-evident. Finally, reason has been discussed as a common factor in all human deliberation, so it ceases to be an active dimension, given that only rational behaviour is being examined.

The spiritual dimension deals with the non-material in a way that affects human action. It also makes an important contribution to the human understanding of property. A person's spirituality impacts on action regarding property in two ways. Firstly, it informs the problem of the root of title to land and secondly, it informs the question of the nature of humanity and its ethical parameters.

The major problem with the notion of property is that it cannot be attributed to an intelligent producer in the way that personal property (eg, intellectual property) is. Most religions include a genesis story that attributes the creation of the world to the personal action of some spiritual being. Philosophically this is a necessary conclusion since all material things are contingent, they are the product of other material things and forces, but the regress of causality cannot be infinite amongst material things.

There must exist a being whose nature is not contingent and who is capable of giving being to things that would otherwise be non-beings. That is, there must exist at least one non-material being that is

capable of creating the material things that comprise our world. In some traditions there are many such spiritual beings, on others there is only one.

The important thing for property is that land property naturally is owned by its creator/s. If the creator/s have some intelligible relationship with human society, then land property will feature as part of that relationship. Most customary peoples adopt spiritualities that explain the origin of their land property and set out principles for its licit administration (Small 1997).

In most spiritualities the relationship between the spiritual beings and humanity is social. The spiritual beings take an interest in human action, usually they offer direction to humanity, hear their supplications, offer support but sometimes also punishment. In terms of direction, the spiritual beings tend to provide both general principles for moral action and in some cases specific guidelines for public policy.

Christianity, Islam, Judaism and customary religions all have direction regarding the institution of property. They also convey notions of humanity that contribute to the distinctive anthropologies of the various spiritualities. Thus, in Christianity, humanity is understood to be a single family under a single loving spiritual Father, whereas under Islam the headship relation is more in terms of submission to the will of Allah which includes a moral code that determines relations between Moslems as well as the treatment of non-Moslems.

Customary spiritualities often place the creator spirit/s as the head of the tribe in a way that distinguishes between moral duties to tribe members and duties to outsiders.

Many possible spiritualities exist, though three deserve attention. Most religions assert that they exist to serve what could be called a positive deity, or deities. By positive is meant that the deities value goodness as commonly understood and shun evil. Conversely, some deities relate to humanity as angry and vengeful beings that demand sacrifice and rule through fear. Conceptually, the anthropologies, ethics and eventually the institutions pertaining to property will differ between these two.

A positive deity could be expected to encourage charitable relations between persons that could be manifest in the responsibilities of property. In Islam, property wealth is expected to be used in part for charitable purposes, such as alms giving (Nomani and Rahnema 1994). Christianity has similar traditions (Ederer 1995). Most customary peoples link their cultural commitment to the material welfare of their people through the use of their land property to their spirituality. In this way, the spiritual dimension provides a direct influence on human action, even regarding property.

It must be recognised that not all spiritualities are equal. Some are more or less worthy of serious faith

and there are a great variety of precepts for action that flow from them. Some spiritualities are conspicuously negative, at least in a general overall assessment. The Indian Thuggies, who served the Hindu god Kali, practiced murder and violence as religious observance.

Other examples include the Ancient people of Carthage and the Aztecs. The point here is that these spiritualities operated on relations between people that are generally repugnant, utilising fear, violence and oppression. The possibility exists that spiritualities such as these, if they included links to property, could be expected to promote the use of property for exploitation and injustice.

The third group within the spirituality dimension is the atheist or materialist spirituality. While this may not be a spirituality strictly speaking, it has the same impact as a spirituality and is what is referred to in sociology as a functional equivalent to religion. The atheist believe that there is a no extra-material cause to the material universe and its existence is simply a given that will eventually be explained using physical laws.

This frees the atheist from any essential ethical obligation regarding property and can be seen as underpinning the theories of property from Smith's Enlightenment perspective onwards. Property has been moving in this direction in the West for half a millennia and it has given rise to the modern possibilities of both communism and capitalism. Both of these have enjoyed both limited success and failure.

Given that historical choices regarding spirituality have had varied results, conclusions regarding the most useful spirituality for effective administration of property may be appropriate. This may require a revisiting of the objects of economics. If economics is about achieving the best material outcome for a society, then this objective is broadly comparable to the asserted goals of many positive spiritualities.

As it is, customary people are being prompted to abandon the material precepts of their spiritualities on the basis that it will return them a superior material outcome. Obviously, these questions require careful consideration of exactly what constitutes optimum material outcomes and what other values should be considered.

Conclusion

The way forward in property is to broaden the perspective of analysis beyond the limited perspective of property institutions as lying somewhere on a continuum between ideological the Left and Right. This paper has argued that in addition to the ideological dimension that governs public institutions familiar in Western thought there are several other dimensions to human action that impact on property. In particular, these include the anthropological dimension and the spiritual dimensions that have been discussed here.

It has been shown that the institutional dimension rests on the choice of anthropology that in turn relies on spiritual beliefs, even when these beliefs are that there is no spirituality. To understand property, especially as it exists and is practiced in various cultures requires due recognition of these other dimensions. In particular, in discussions regarding customary title, more emphasis may be warranted on these other dimensions.

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Footnotes

1. Positive in this context means *arbitrary*.

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Where to for the Modal House?

Introduction

The Modal House is a set of building plans for a basic residential dwelling, which is used by members of the New Zealand Institute of Valuers (NZIV) as a factor to estimate building costs, and a benchmark to measure movements in construction price levels.

When first introduced on a national level in 1967, the term Modal, as it suggests, represented the most common residential dwelling specification being constructed at that time due to significant central government involvement in the new housing market. Several revisions of the original house have subsequently been completed to incorporate changes in building design and construction trends. The most recent national Modal - 1996 version comprises a basic 100m², three bedroom, fibre-cement plank clad dwelling with corrugated metal roof, timber frame, and particle board flooring supported by concrete piles.

A strong negative perception appears to have developed among valuers with regard to the quality of Modal House costing data, a major contributing factor to which is seen as the move from construction contract analysis to quantity survey costings. It is also perceived that recent re-specifications of the Modal dwelling in the last decade have failed to preserve continuity of costings, which has undermined the large body of historical commercial cost data that forms the basis of the Statscom system (Graham 2000). Practising valuers now source building cost data from a range of alternative providers.

The intended purpose of the research reported in this article was to investigate and identify current issues relating to Modal House usage by NZIV members and to provide findings and recommendations to assist NZIV Board members in deciding the future of the National Modal House. A three-fold methodology was employed to investigate issues relating to the primary research objective.

1. Survey of practising NZIV members.
2. Hamilton city 2001 new dwelling construction survey.
3. Cost comparison analysis.

The survey of practising NZIV members was completed first, followed by the Hamilton city construction survey, and finally the cost comparison

analysis. After a brief summation of the Modal history, the next three sections present each stream of the research individually with an outline of the respective research techniques employed together with a discussion of the results. The final section summarises the significant research findings.

Modal history

Early history of the Modal House is well discussed in Jefferies (1991, p. 13-9). A summary of that paper as follows covers initial development of the Modal Specification through to adoption of the first National Modal.

In approximately 1940 the Wellington branch of the NZIV carried out quantity survey costings on a Modal Plan. In 1943 the first building costs indexed to a Modal standard were published in the NZIV Valuers' Bulletin. The work of H W L Bates, comprising an analysis of house construction costs in Auckland from 1920-1948, was published in the New Zealand Valuer in 1948. The figures were adjusted to a standard floor area of 1000 square feet. It was also acknowledged that allowances had been made to reflect various building materials. In 1949 the New Zealand Valuers' Journal published full costings of a schedule of quantities for Modal dwellings in Wellington and Auckland, and construction cost data per square foot in Wellington from 1900.

The NZIV Council moved to establish a national standard in 1965 and in 1967 the first NZIV National Modal was introduced. The 1000 square foot (92.90m²) dwelling was constructed with bevel back weatherboard sheathing and hip corrugated iron roofing supported by timber frame. Accommodation included three bedrooms, one bathroom, with separate dining and lounge areas (NZIV 1970).

Re-pricing of the Modal was completed in 1972 but the construction and layout essentially remained unchanged. Conversion to metric measurement was completed in 1977.

A new Modal Specification was published in 1983. It retained a floor area of 92.90m². Layout was slightly altered with reconfigured laundry and central hallway areas. Changes were made reflecting new trends in construction including factory made roof trusses and removal of all native timbers (NZIV 1983).

Table 1: Comparison of the 1991 Modal House specification and 1994 NZIV members'survey results'.

	1991 Spedficiation	1994 Results
Floor area	92.81 m2	105 110 m2
Base & foundations	Concrete piles	Concrete slab
Wall cladding	Weatherboard	Hardiplank
Internal doors	Clear finish	Paint finish
Entrance hallway	Yes	No
Roof design	Hip	Gable
Rear porch	Yes	No
Separate shower	No	Yes
Pantry	No	Yes

'adapted from Millar, 1994.

The next revision completed in 1991 also retained the same floor area and incorporated several changes to the layout configuration including combined dining/lounge, larger master bedroom, and smaller laundry. External construction remained very similar except that timber joinery was replaced by aluminium, and pre-painted roofing metal was introduced. Internally, a freestanding solid fuel burner replaced the existing fireplace and the bathroom was updated with shower and vanity units. The amount of labour input reduced by 17.5%, reflecting the increased use of prefabricated and pre-finished materials (NZIV 1991).

In 1996 the Modal Specification was increased in size to 100m² and woodgrain fibre-cement planks replaced timber weatherboards. The layout was again changed with a continuing move towards open-plan living areas. Specific front and rear entrance areas were effectively removed. Labour input in the building process was reduced a further 15.5% (NZIV 1996).

Survey of practising NZIV members

The purpose of the valuer survey completed within this research was to investigate sources used by valuers to gather building cost information, explore their perceptions of the quality of costing information available, and their perceptions of the current Modal House specification in terms of its relevancy and accuracy. It also looked at progress payment certificate inspection sheets, the focus of which was to investigate respondents' systems for designing and maintaining an up-to-date and relevant cost matrix.

Method

In a study commissioned by the NZIV as part of the 1996 Modal House re-specification, Millar (1994) carried out a mail survey of NZIV members. In mid 1994, 1700 surveys were sent to members, including 1028 practising members. 120 responses were

received indicating a total response rate of 7%, or 11.6% of practising members. The main objective of the survey was to examine members' perceptions as to the most common form of construction they had encountered with new dwellings built since 1990. Results of the survey indicated that valuers perceived the "Modal" dwelling construction at that time was larger (105-110m²), incorporated attached garaging, and was constructed with fibre-cement plank cladding rather than weatherboard on the existing 1991 Modal Specification. The results summarised in Table 1 also indicated noticeable variations between the perceptions of North Island and South Island respondents.

Due to the geographical distribution of NZIV members a postal survey was also considered the most appropriate method for this survey. In April 2002 the mail survey questionnaire was distributed to practising valuers throughout New Zealand. Recipients were mainly selected from the New Zealand Property Journal November 2001 - Professional Directory. 195 surveys were sent to 77 different organisations including 23 offices of Valuation New Zealand. Up to three questionnaires were sent to larger firms. 88 valid responses were received indicating a response rate of 45%. Geographically, the survey ranged from Kaitia in the north to Invercargill in the south and covered both metropolitan and provincial areas. The sample attempted to canvass the spectrum of members in terms of work diversity including those specialising in urban, rural and rating valuation work.

Results

The results of the survey of practising NZIV members are discussed in four sections.

1. Residential costing and Statscom information
2. The Modal House

3. Progress payment inspection sheets
4. Demographic information

Residential costing and Statscom information

In identifying alternative sources of costing information used by NZIV members it was found that 99% of respondents gather residential building cost information. The most popular source of that information was Modal House costs in the New Zealand Property Journal, accessed by 81%. Other sources commonly used by valuers that were identified included the Building Industry Authority (BIA), New Zealand Building Economist, Rawlinsons, Statistics New Zealand and local building companies. 57% of respondents indicated that in addition to using external sources they also use an in-house system.

Investigating NZIV members' perceptions as to the efficiency of the Statscom system responses revealed 66% "always" (monthly) or "often" (six monthly) read Statscom costings provided in the New Zealand Property Journal. However, 76% "rarely" (every two-three years) or "never" provide costing information to Statscom. 66% of respondents indicated the improved supply of information would encourage them to provide any/more information to Statscom.

Members willingness to pay for additional costing information was examined with respondents indicating reasonably strong support for regional based statistical officers to collect data and for payment of statistical officers, with positive replies of 69% and 65% respectively. However, respondents showed limited willingness to pay for better quality costing information with 76% prepared to contribute \$199 or less per annum. Also, 55% either "agreed" or "strongly agreed" that the NZIV should provide regional based quantity survey data at an annual cost to the Institute of \$4000.

Respondents ranked e-mail first as the preferred way to disseminate costing information. The New Zealand Property Journal was overall ranked second, New Zealand Property Institute website third, followed fourth by a mail-out hardcopy.

The Modal House

This focused on members' perceptions as to the relevancy of the 1996 Modal specification and the accuracy of Modal costing information supplied at present. Results were mixed in terms of the overall relevance but there is strong support for updating the current specification. Respondents were reasonably neutral towards the usefulness of Modal House costing information. However, with regard to the accuracy of Modal House costings, 41% of respondents "disagreed" or "strongly disagreed" that the information provided in the New Zealand Property journal is indicative of the actual building costs in their area.

38% of respondents "disagreed" or "strongly disagreed" that the current Modal House specification

is relevant in valuation practice today. 27% were neutral. 34% "agreed" or "strongly agreed". There is strong support for the NZPI to update the Modal House specification with 67% of respondents "agreeing" or "strongly agreeing" to this statement. Furthermore, 50% of respondents "agreed" or "strongly agreed" that the current Modal House should be in character and concept with previous modal specifications in order to maintain viability of the multiple system.

72% of respondents "agreed" or "strongly agreed" that a breakdown of construction component costings should be provided within the total Modal House cost estimates. Respondents also had good support for quantity survey costing information being provided for two dwelling types rather than one "Modal" - to this, 67% indicated responses of "agree" or "strongly agree".

Progress payment inspection sheets

Methods used by NZIV members to compile and maintain progress payment inspection sheets were investigated. 83% of respondents indicated they provide progress payment certificates on at least a monthly basis, including 47% indicating on at least a weekly basis. The provision of commercial/industrial progress payment certificates is significantly lower with respondents indicating 79% "rarely" (six monthly) or "never". Results indicated many valuers are using dated systems that do not reflect changes in materials or construction quality.

The most commonly used source of information for calculating percentage complete estimates in progress payment inspection sheets was the NZIV Handbook utilised by 59% of valuers, followed by 41% each for quantity survey costing breakdowns and local in-house systems. 41% of respondents indicated that they check at least annually the accuracy of whichever progress payment inspection sheets they use.

Kirkcaldie (1999) remarks it is necessary to alter inspection sheet schedules when assessing above average or superior quality dwellings, and additional facilities such as en-suites. In examining whether valuers' inspection sheets reflected varying construction materials, or differences in design quality of residential dwellings, 63% of respondents indicated they do not use different inspection sheets for low and superior quality dwellings. 55% do not use different inspection sheets for differing cladding types. Almost half of the respondents (46%) do not use different sheets for either quality or construction. 28% use different sheets for both.

In general it appears many valuers are currently using modified versions of previously published NZIV costing breakdowns, although with varying levels of concern as to the accuracy of these in a modern construction context. There also appears to be some demand for a standardised system to improve this

Figure 1: Survey respondents' valuation work experience.

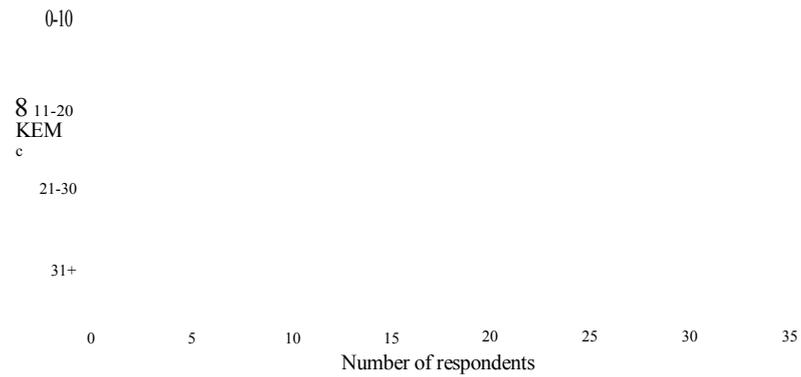
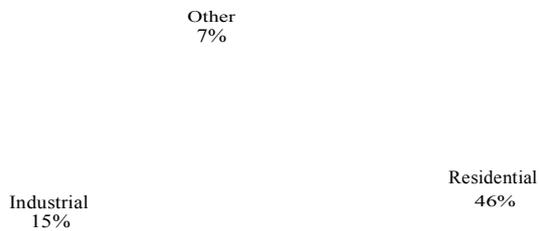


Figure 2: Nature of respondents' work effort by task.



service with 78% of respondents supporting production of a computer spreadsheet model for property specific "inspection sheets" based on construction inputs.

Demographic information

The survey sample aimed to canvas senior members of the profession because several survey themes had significant amounts of associated history eg, staged development of Modal House Specifications. Survey respondents had on average 19 years experience practising as valuers (excluding four questionnaires with no response). Respondents' levels of work experience classified in 10-yearly intervals are displayed in Figure 1. The majority of respondents

had between 11 and 30 years experience, providing 64% of the data set.

Respondents were primarily urban valuers. 84% of all respondents' total time at work was spent practising urban valuation, 55% of all urban valuation was in the residential area, with commercial/industrial work representing the remaining 45%. Responses to the "other" work option included mediation, arbitration, consultancy, and property management. Figure 2 indicates the relative proportions of total time spent working in various areas of valuation practice.

Hamilton City 2001 new dwelling construction survey

Responses to the mail survey defined several

points of concern valuers have regarding the updating of the Modal Specification. One issue is the relativity of the 1996 Specification to current construction trends. Survey findings indicated a perception among valuers that very few new dwellings built today are similar to the Modal Specification, compared to earlier specifications that were developed in consultation with the Housing Corporation when the government had significant involvement in the new housing market. Many responses suggested this was an important factor influencing the quality of current Modal costing information. As a result, further empirical research was initiated as part of this study to investigate the relationship between the 1996 Specification and construction of new residential dwellings built within Hamilton city in 2001.

Method

Statistics New Zealand publishes a range of construction data including the number of new dwelling units that are authorised. This information is gathered from the territorial authorities that administer new construction by issuing building consents for new structures and alterations to existing buildings. Data for the survey was accessed from the Hamilton City Council building unit. Building consent applications must include building plans in compliance with the Building Act 1991 Regulations, and these are held on file following completion of construction.

Key construction attributes to be recorded were defined as follows:

- Floor area (m²): total dwelling area including attached garaging, but excluding decking.
- Walls and roof construction classified utilising Quotable Value New Zealand construction codes.
- Number of bedrooms: separate bedrooms were counted. Studies and utility rooms that appeared large enough to accommodate a single bed were entered as bedrooms.
- Bathrooms: separate bathrooms and en-suites were inputted individually. Separate toilets were excluded.
- Floors: numbers of floors were counted. Basement areas were treated as an additional level.
- Garaging: Garaging under the main roofline was classified using Quotable Value New Zealand construction codes. Detached garaging was not quantified.
- Garage Areas: Attached garage areas were assessed from building plans.
- Building consent costs: An estimation of construction value is required as part of the Building Regulations 1992.

Published data from Statistics New Zealand indicated that consents were issued for 652 new dwellings within Hamilton city between January and December 2001, representing a sample size of 3.15% of the total 20,730 new dwelling consents issued

nationwide during this period Statistics New Zealand (2002a). In every consent issued the number of individual units was identified, and the building data collected and counted separately for each. 618 valid observations were recorded. Consents issued for relocatable buildings were excluded. Some inconsistencies in the published data were also found within the territorial authority information and this data was excluded.

In addition to the complete data set of 618 dwellings, two subsets were identified, namely 491 detached dwellings, and 127 attached units/apartments. The attached units/apartments classification incorporated all dwellings constructed within semi-detached or multiunit developments including townhouses, flat/apartment buildings and retirement units. Two major retirement complexes were being developed and partially completed with ongoing construction during the sample period. One incorporated a main rest home building providing 51 one-bedroom studio apartments together with semi detached 1-3 bedroom flats. The second comprised 61 two-bedroom units. Separate analysis was completed for each subset as it was considered inclusion of the retirement specific development would distort the statistical information for detached housing.

Statistical analysis was completed on each of the three groups labelled "all", "detached" and "aparts" (apartments). Frequencies for cladding types and construction trends were compared between each subset. An attempt was also made to quantify the Modal construction with "detached" dwellings built in Hamilton city in 2001.

Results

Frequencies for building materials and design features were calculated for each series and summarised findings are presented in Table 2.

Brick and roughcast wall claddings have significantly higher usage than any other material. 567 (92%) of all the 618 new dwellings were constructed with these materials. Brick is the most popular wall cladding for all building types within the survey. The relatively higher usage of brick cladding in the apartment category is attributed to the two retirement homes. The roughcast category comprises all dwellings with applied texture finish and includes a range of substrate materials including polystyrene, fibre-cement sheet, concrete block and may also include brick.

Three and four bedroom dwellings account for the majority of total new construction. 212 (34%) of the 618 samples for all dwellings were three bedrooms. 201 (33%) were four bedrooms. 367 (59%) of the 618 total new dwellings had two bathrooms (en-suites are counted as a second bathroom). 354 (72%) of detached dwellings had two bathrooms. 114 (90%) of units/apartments had one bathroom.

Table 2: Comparison of dwelling construction trends (%) for new dwellings built within Hamilton City in 2001.

	Apartments (n=127) %	Detached (n=491) %	All (n = 618) %
Wall construction			
Brick'	60	47	50
Roughcast	37	44	42
Other	3	9	8
Roof construction			
Metal '	17	78	66
Tile'	83	21	34
Other		1	
Number of bedrooms			
1	42	1	9
2	43	2	10
3	13	43	37
4	2	44	35
5+		11	9
Number of bathrooms			
1	90	23	37
2	10	72	59
3+		5	4
Number of floors			
1	83	84	84
2+	17	16	16
Garaging			
G1Aa	46	7	15
G2A'	12	81	67
Other Attached		7	6
Detached	42	4	12

'see Quotable Value New Zealand classifications

Table 3: Comparison of Hamilton City 2001 new dwelling Modal construction, the NZIV 1996 National Modal House specification and Millar (1994) Modal construction.

	HCC 2001 Apartments	HCC 2001 Detached	HCC 2001 Jul	NZIV 1996	Millar 1994
Dwelling area	99.3 m2	165 m2	99.3 m2	100 m2	105 2 110
Garaging	19.8 m2 attached	36 m2 attached	36 m2 attached	detached	20 m2m25 m2 attached
Wall construction	Brick	Brick	Brick	Fibre-cement	Fibre-cement
Roof construction	Tiles	Metal	Metal	Metal	Metal
Number of bedrooms	2	4	3	3	3
Number of bathrooms	1	2	2	1	1

The large majority of all dwellings (82%) had attached garaging. Attached two car garaging is by far (81%) the most common form for "detached" dwellings built. The retirement village influence is again evident with 42% of the apartment series having detached (if any) garaging.

Next, an attempt was made to quantify variations between modern residential dwelling construction trends and the 1996 Modal Specification. To provide comparative data the mode was determined for several key construction parameters within each series of the Hamilton city data. The results of this analysis are presented in Table 3, together with the 1996 NZIV specification, and findings from the previous NZIV member survey in Millar (1994). The apartment influence is again evident in the overall Hamilton city data with the Modal area for "all" data at 99.3m². The results of this construction survey clearly indicate the Modal construction for "detached" dwellings built within Hamilton City in 2001 as significantly different than the 1996 NZIV Modal Specification.

Cost comparison analysis

The purpose of this section of the research was to compare market related construction cost data and alternative sources of residential cost information currently used by NZIV members identified from within the results of the NZIV members survey.

Method

Market related cost data was sourced from Hamilton city 2001 new dwelling data, and two building firms operating in Hamilton. In the Hamilton city data the median price per square metre for the sample of 491 "detached" new dwellings was calculated. Of the two builders surveyed, the first provided a price list, which detailed asking prices and floor areas for 92 building plans. Although the information was general in nature, the size of the sample allowed calculation of a median "cost price" to the consumer. This series was labelled "Builder 1 - List Price". The second builder provided detailed cost information for 16 dwellings constructed within the Waikato in 2001. The data is considered more indicative of price levels than Builder 1, as it represents the actual transaction quantum rather than an offer price. Costs were adjusted to exclude chattels such as floor coverings and extraordinary features such as additional foundation costs or air conditioning systems. This data series was labelled "Builder 2 - Actual Sale Price".

Building cost indicator sources identified from the results of the NZIV members survey included the BIA, New Zealand Building Economist and the Modal House. The following section provides an overview of

each data provider particularly focusing on the basis from which costings are calculated.

Building Industry Authority

The BIA is an independent crown entity established in 1992 for the purpose of managing New Zealand building legislation. The BIA provides cost estimates in six regional areas for a range of building types including residential dwellings, a retirement home, a light industrial building and commercial retail buildings. Costs have been provided by quantity survey firm Maltby and Partners on a bi-annual basis since commencement of the data series in July 1999 (BIA 2002).

Residential costings are provided for two dwelling types summarised as follows.

Small House: 145m² single level dwelling providing three bedrooms, one bathroom plus en-suite accommodation together with attached double garage. Kitchen/living/dining areas are open plan. Construction is of brick veneer exterior supported by timber frame, pre-finished steel roof, and reinforced concrete slab foundation.

Large House: 203m² single level dwelling providing four bedrooms, bathroom plus en-suite accommodation together with attached double garage. Two separate living areas. Construction is of brick veneer exterior supported by timber frame, concrete tile roof, and reinforced concrete slab foundation. Includes security alarm system.

Maltby (2002) describes the information provided as indicative of speculative house costs, being costings for construction of a one-off speculative house not reflecting the discounts achievable by group house builders (18-25%) or the added costs of architecturally designed dwellings (20%).

The New Zealand Building Economist

This is a quarterly publication providing a range of elemental building and construction cost data together with building and construction cost indices. Overall costings per square metre are provided in six regional areas for two dwelling types briefly described as follows.

Standard House Specification: 94m² single level dwelling providing three bedroom accommodation with one bathroom, separate toilet and laundry. Construction is of fibre-cement weatherboard wall cladding supported by timber frame, gable zincalume roofing and particleboard flooring supported by timber piles.

Executive House Specification: 195m² two level dwelling providing three bedrooms, one bathroom plus en-suite accommodation together with attached double garage. Construction is of brick veneer to lower level and Insulclad to upper level supported by timber frame, metal tile roof with

Figure 3: Initial comparison of construction cost data suppliers.

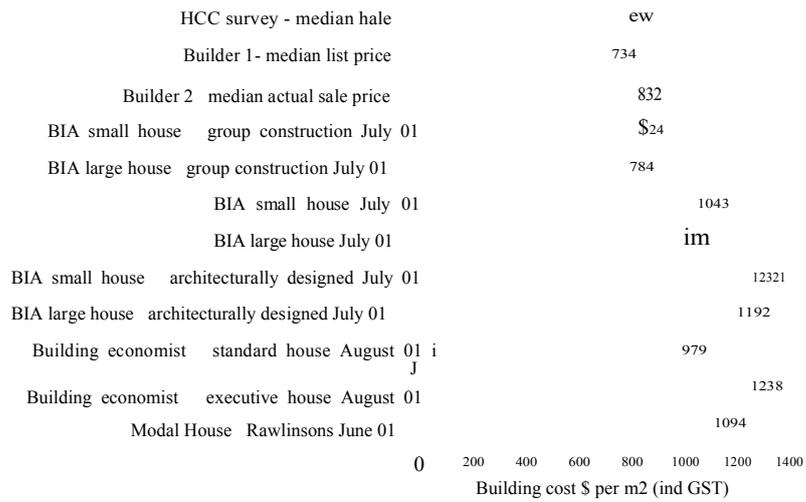
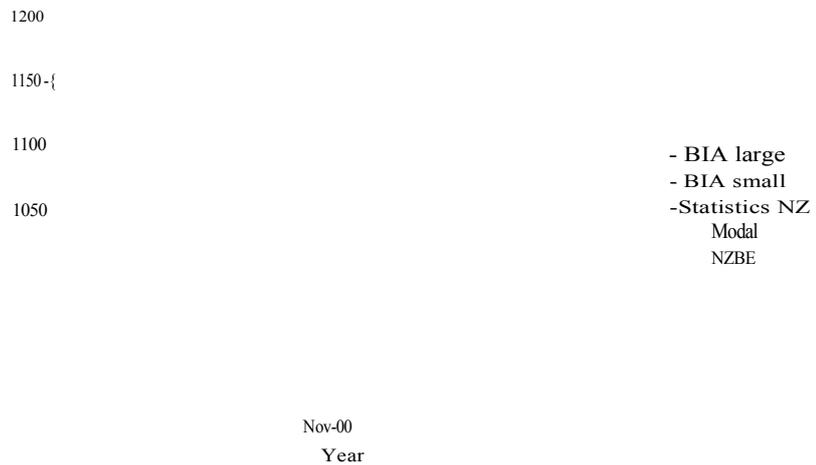


Figure 4: Index comparison.



concrete floor in garage and timber flooring to the living areas (The New Zealand Building Economist 2001).

Statistics New Zealand

Residential building costs are measured quarterly within the Capital Goods Price Index (CGPI). The Residential Buildings Index is broken down into two series, dwellings and outbuildings, and hostels and boarding houses - Statistics New Zealand (2002b). To determine dwelling prices 150

builders are surveyed. Plans are provided by the individual builders, with variations of new plans introduced adjusted within price estimates. Smaller sized and larger sized firms are surveyed. Statistics New Zealand have previously used a "Modal" system, but discontinued its use approximately 10 years ago due to problems related to maintaining relativity between overall market activity and the costing data obtained by pricing one specification (S. Collins, personal communication, 5 August, 5 September, 2002).

Results

Figure 3 compares market related building costs sourced from Hamilton builders and the Hamilton city new dwelling construction survey with alternative sources of costing identified within the results of the NZIV members survey.

Median building costs for the "Hamilton city", "Builder 1" and "Builder 2" data series are towards the top of the graph. Prices for the "Builder 1" and "Builder 2" data sets are somewhat lower than most cost indices, and are closely aligned to the BIA Group building price estimates. Both builders surveyed operate with bulk purchasing power and economies of scale in cost distribution, which is reflected in the overall price structures. In general, the alternative costing sources presented in the lower portion of the graph indicate a large range of indicative building costs from \$784 per square metre for the BIA large group house to \$1252 per square metre for the BIA small house designed architecturally.

This comparison provides limited use, as there is no continuity of floor areas between each standard. Also there are large variations in the quality of construction between the standards, i.e. group and housing and architecturally designed housing.

Indexing

The second analysis presented in Figure 4 aimed at comparing the recent performance in terms of building cost appreciation of the various sources of costing information identified by NZIV members. Each building source was indexed to a base of 1000 in order to measure relative building cost movements. Moving average lines in the graph plot the movement of each cost index since mid 1999. From a base of 1000, upward movement to 1100 represents a 10% increase in building costs.

The results of this graph show that indicated building costs are increasing at a variable rate among the alternative sources of costing information used by NZIV members. New Zealand Building Economist data was combined as price estimates for both standards have not changed since 1996. The Statistics New Zealand Residential Building Index and NZIV Modal Costs appear to be reasonably well correlated in price movements. BIA benchmarks have inflated at around twice Modal rate increases in the last three-year period.

Summary of research findings

Survey of practising NZIV members

Results presented show the most common source of residential costing information used by practising NZIV members is the Modal House costings published in the NZPI Journal. Other sources used are classified broadly into two main areas as externally (outside the firm) - predominantly from quantity surveyors and internally (within the firm) by analysis of building contracts. There is no strong perception among

valuers as to the most useful external costing source.

In investigating perceptions of the Statscom system it has been found the information is well received, but poorly contributed to. Members noted lack of spare time to provide costings to Statscom, and the timeliness of information returned, as two key limitations with the system.

Information collected regarding NZIV members willingness to financially contribute to capturing costing information indicates that many are supportive of paid regionally based costing officers. However, results indicate respondents are quite averse to paying more than \$200 per annum for improved information. Comments received in general suggest members feel this is a service NZPI should already provide, funded by existing annual subscriptions.

Assessment of NZIV members Modal dwelling relevancy and accuracy perceptions indicate current costing information is regarded as inaccurate in some situations. Members generally perceive as the main issue an outdated specification not reflecting current construction techniques. Strong support was expressed for updating the Modal House and, in addition to providing the "Modal rate", distributing costing breakdowns for the Modal specification. More experienced respondents placed stronger emphasis on maintaining the conceptual basis in order to preserve the multiple system. Respondents with less experience showed stronger support for updating the Modal House specification.

Looking at the current use of progress payment certificates, many valuers are using dated calculation sheets for determining the percentage complete of dwellings. Almost half of all survey respondents do not use different inspection sheets to reflect varying quality or construction of dwellings. An opportunity appears to exist to develop a standardised computer spreadsheet model incorporating these differences.

Construction survey

Results of the Hamilton city 2001 new dwelling construction survey supported valuers' perceptions that modern construction trends differ significantly in terms of design, layout and materials from that of the 1996 NZIV Modal Specification. In comparison with the results of Millar (1994), it also appears that residential construction has changed considerably in the last eight years with a higher frequency of larger dwellings providing more facilities i.e. en-suites or second bathrooms, and attached garaging. The results of this survey suggest the term "Modal" is no longer applicable to the NZIV standard.

Cost comparison analysis

Alternative sources of construction cost information indicate a wide range of building cost rates per square metre because of the differences in dwelling specifications used to measure costs. In the

comparison of actual builder data and cost indices, it appears consumers are able to purchase dwellings from building companies at lower prices per square metre than construction costs for "one-off" projects. Analysis of the recent performance of several cost data suppliers indicates differing rates of cost appreciation, which has significant implications for usage in valuation in terms of consistency of practice and professional indemnification. For example, in the context of replacement insurance calculations, inconsistent construction cost increases could seriously undermine the overall quality of this product provided by NZIV members. Provision of a centralised building cost rate with consistent inflation factor would increase the level of professional justification underpinning such work.

Conal Newland has spent the past *four years* employed as a valuer and *property* analyst at Hamilton *firm* Curnow Tizard. During this time he completed extramural study towards a Master of Business Studies in *property* at Massey University where he completed a *degree* in Rural Valuation and an *undergraduate* diploma in Urban Valuation at the Palmerston North campus from 1994-1998.

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NZ Property Institute benefits

The "special value" of land in compulsory acquisition cases

Abstract

KMM Recent valuations cases have only served to broaden the argument over the limits of the 'special value' element in compulsory acquisition cases. From *Eagle v Charing Cross Railway* (1867) to *Pastoral Finance Association Ltd v The Minister* (1914) the underlying principle remained focused on the owner's entitlement to receive as compensation "the value of the land to them whatever that might be." That is, if the dispossessed owner is to receive compensation, the measure of compensation must take account of the peculiar value to the owner of the property compulsorily acquired. In recent times the discussion of 'special value' has embraced the concept of 'special adaptability' under certain circumstances. This paper is a fundamental analysis from first principles supported by case law references and presents the benchmarks to be considered in any exercise involving questions of 'special value'.

Introduction

The final years of the 20th century were exceptional times for stock market investors. They witnessed the meteoric rise and unpredictable demise of internet stocks as new technology companies traded globally the future value of their intellectual properties. For a time investors were mesmerised by the intrinsic value of new technology assets but ultimately the fascination with the new gave way to the proven value of the old economy corporations. In passing, the world was left to wonder, once again, why certain assets are so difficult to value.

Over the centuries the courts have had to grapple with the same question when considering the 'special value' of land to an owner or interested purchaser in compulsory acquisition cases. The science of valuation in this arena is overflowing with case law scenarios that challenge the intellectual rigor and imagination of any valuer or lawyer. The discussion which follows incorporates the leading cases in England, Australia, Canada and New Zealand since 1820, and summarises, to the limited extent possible, the principles which operate in the present day.

The special value principle

Where both seller and buyer are willing to transact a transfer of the land in question for an agreed price the prevailing principle to be applied under Australian

Law is the rule in *Spencer v Commonwealth* (1907) 5CLR 418. However, if the land has a special value to the owner over and above the market value, the Privy Council decided in *Pastoral Finance Association Ltd v Minister* [1914] AC 1083, drawing on the 19th Century resumption cases, that an owner was entitled to be compensated for what the land was worth to them:

"That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them ... the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it."

Therefore, the dispossessed owner is entitled to either market value (*Spencer*) or its special value to the owner (*Pastoral Finance*), whichever is the greater.

The *Pastoral Finance* principle has been incorporated in major land acquisition statutes in Australia, but as noted in Douglas Brown's Australian text: "None of the provisions adopt the precise words used in *Pastoral Finance*. Clearly the statutory provisions have the same broad object as *Pastoral Finance*. The principle recognises that the market value of the land may not necessarily be the real value of the land to the dispossessed owner."

Having stated in broad terms the principles that flow from *Pastoral Finance* it is necessary to qualify the limitations that guide its application. The *Pastoral Finance* principle is controlled by a number of caveats.

- Special value does not justify a ransom value that might be extracted from a hypothetical purchaser with a special need for the land.
- Value to the owner is the value of the land at the time of the expropriation, with all its existing advantages and possibilities, excluding any advantage due to the carrying out of the scheme for which the land has been acquired.
- Special value cannot be used to compensate an owner for the sentimental value of the land. •

The statutory codifications distinguish special value from reinstatement and disturbance damages. There is a need to distinguish between enhanced property

valuation (special value) and compensation for damage (disturbance and re-instatement costs)

Special adaptability of land: Highest and best use

The Land Clauses Consolidation Act 1845 (UK) s.63 allowed for the compensation, in excess of market value, for the special adaptability of land. A wider statement of this concept is the highest and best use principle (the Turner principle). This principle pursues a valuation based upon a property's best and most advantageous use, rather than its current use and market value. The Turner principle was applied to allow the owner to establish the probable existence of a special purchaser with such a use. However, this augmented value does not include any increase arising from the actual implementation of the statutory scheme for which the compulsory acquisition was made.

On Brown's reading of the land acquisition statutes the "highest and best use" is not expressly recognised in the legislation. He notes that:

"the acquisition statutes do not direct that the dispossessed landowner shall receive compensation for the highest and best use of the land. The statutes require compensation to be assessed for the value or for the market value of the land. The highest and best use of the land is a factor governing the ascertainment of the market value of the land. In determining the highest and best use of the land, that is to say, where it is claimed that the land has a greater value if it were used for a different purpose from its existing use, the claimant needs to establish:

- (a) the best use must be legal it must come within the planning and building regulations;
- (b) the best use must be within the realm of probability it must be likely, not speculative or conjectural; and
- (c) the best use must be of a kind to come within the imagination of a particular purchaser.¹¹

'Special value' was the critical issue in *Yates Property Corp v Darling Harbour Authority* (1991) 24 NSWLR 156. The New South Wales Court of Appeal (Kirby P, Handley JA, Mahoney JA) was reviewing the quantum of compensation to be paid to the dispossessed owner whose futuristic plans for a generous parcel of land at Sydney's Darling Harbour included the creation of an extensive market emporium.

Kirby P concluded (at 162):

"Special value can only arise where, at the time of compulsory acquisition, the owner is actually putting the property to some use for which it is especially well suited. It is a term of art used to describe a characteristic of the expropriated interest which is of economic value to the owner but which would not enhance the market value of the interest and hence would not be included in the 'market value'

component as the compensation to which the statute entitles the owner following resumption."

Mahoney JA illustrated the process of reasoning through three examples (at 165-166):

"The way in which special value or (as it is in some cases) disturbance is to be taken into account depends of course upon the circumstances of the particular case. However, in a sense what is involved is that the owner is treated as one of the persons "willing but not anxious" to become the purchaser of the subject land. The court then looks, as it has been described, to what the owner, as a potential purchaser, would pay for the land rather than not obtain it. The inquiry as to special value seeks to identify what the owner as such purchaser would pay. The process of reasoning may be illustrated by taking, by way of example, three cases.

In the first case, the owner is not yet using the land for the particular purpose but the use to which the owner would put the land is the same as that to which it would be put by any other hypothetical purchaser, namely, the best and highest use of it. In such a case, there would, without more, be no special value.

In the second case, the special use on which the owner relies is the same as the best and highest use to which any other hypothetical purchaser would put the land but there is the additional factor that the owner is already, at the date of the resumption, putting the land to that use, for example, as part of a business. In such a case, if the owner did not secure the land on the hypothetical sale, he would be "disturbed": he would suffer the loss resulting from the land not being any longer available for use in his existing business. He would lose the profits he would have earned if he had continued to carry on the business and he would bear the cost of having to move the business from the land. In that case, he may have to take account of the special value of the land to him, compensation which includes something for that special value.

The way in which that factor is to be taken into account in such a case has been the subject of consideration in a number of cases. It is referred to in the judgments of the High Court in *Commonwealth v Reeve* (1949) 78 CLR 410, and *Commonwealth v Milledge* (1953) 90 CLR 157 at 164. It is not necessary for present purposes to pursue that matter. It is sufficient that, in cases of this kind, the award of special value or disturbance as part of the special value of the land to the owner is rationalised on the basis that, as a hypothetical bidder for the land, the owner would take into account that, if he did not secure the land, he would suffer the loss represented by, for example, the disturbance of his business and would, the hypothesis is, therefore pay more than an ordinary hypothetical purchaser would.

In the third case, the use to which the owner is putting or desires to put the land is different from that

to which any other hypothetical bidder on the hypothetical sale would put it. In such a case and subject to certain limitations: of eg, *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer Vizapatam* (the Raja case) [1939] AC 302; there may be special value to be taken into account. But, in such a case, it is important to avoid confusion because of the terms used. If the use to which the owner is putting or desires to put the land is different from that to which other hypothetical purchasers would put it, it may be itself the "best and highest use" and so there will be no special value. But where the owner's use or proposed use is different from the use of others, then it is sometimes said that the land has to the owner a special use different from the ordinary market use or "best and highest use": in that sense the owner's use has been described as a special use and so there may be a special use to be taken into account."

Special adaptability and sole purchasers

A problem is said to emerge where there is but one purchaser who, attracted by the special adaptability of land, might be persuaded to pay in excess of market value. There has been some disagreement as to whether such a situation justifies an augmentation of market value. In the UK, s.2, Rule 3 of the Acquisition of Land (Assessment of Compensation) Act 1919 (UK) disallowed the augmentation of market value in such circumstances. However, in the absence of such legislation, augmentation of market value is allowed.

The Privy Council in *Raja* allowed for increased value in circumstances of a compulsory acquisition where the land was worthless unless used for the purpose for which it was being compulsorily acquired. In *Raja* an Indian statutory authority in the process of constructing a harbour compulsorily acquired adjoining malarious swamp land because it was a source of fresh water which was required for industrial users of the harbour as well as to carry out anti-malarial works. To parties other than the statutory authority the land had, on all the evidence available, no value and its future value came from the very scheme for which the acquisition was made. On application of the principles established in *Clay and Glass v IR Commissioners* the Privy Council held that the land was to be valued on the basis of its expected future use which included the uses of a compulsory acquirer who, but for speculators, was the only possible purchaser. The Privy Council's decision in *Raja* was followed in Australia, New Zealand, and Canada.

The 'highest and best use' approach is often adopted where a special purchaser is identified. Marks remarked that "the special value aspect, which is reflected in the best and most advantageous use of a property, has often been applied where the owner has been able to establish the probable existence of a

special purchaser with such a use but has been limited in such a way as not to include any increase arising from the actual implementation or carrying out of the statutory scheme for which the compulsory acquisition was made.

Some concluding remarks

The evidentiary issues in 'special value' cases are more often than not of paramount importance in persuading the court to adopt or reject the valuations put forward. In the majority of cases courts have had to consider whether or not it was reasonable to assume that special purchasers would have actually bid in the market place for the subject land because of its adaptability or usefulness to them or because possession or control would provide further development opportunities. Lord Scott in the Court of Appeal in *Robinson Bros (Brewers) Limited v Durham County Assessment Committee* said "every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant and is, therefore, admissible evidence" and concluded that the proper enquiry was primarily an economic and not a legal one.

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Endnotes

- 1 *Fraser v City of Fraserville* [1917] AC 187 at 194; *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 292-293 (Dixon J). Thus, planned subdivision may justify special value: rejected in *Turner v Minister of Public Instruction* (1955) 95 CLR 245; but allowed in *Kennedy Street Pty Ltd v Minister* (1962) 8 LGRA 221; *Chapman v Minister* [1966] 2 NSW 65.
- 2 *Wilson Bros Pty Ltd v Commonwealth* [1948] SASR 61.
- 3 *Leppington Pastoral Co Pty Ltd v Commonwealth* (1997) 76 FCR 318 at 338 349 (Beaumont J); *Director of Building & Lands v Shun Fung ironworks Ltd* [1995] 2 AC 111 at 125-128; *Richardson v Roads & Traffic Authority of New South Wales* (1996) 90 LGRA 294.
- 4 *In re Countess Ossalinsky and Manchester Corporation* (unreported 1883 Queen's Bench ref. in *Re Lucas and Chesterfield Gas and Water Board* [1908] 1 KB 571 at 579 (BrayJ); *Tynemouth Corporation v Duke of Northumberland* (1903) TLR 630; *Re Gouth and The Aspatria Silloth and District Joint Water Board* [1904] 1 KB 417.
- 5 *Turner v Minister for Public Instruction* (1956) 95 CLR 245.

- 6 *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410; *Hill v R* (1980) 7 QLCR 128; *Brighton City v Road Construction Authority* (1985) 59 LGRA 262.
- 7 *Point Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565; *E A Woollams v The Minister* (1957) 75 WN (NSW) 103, 489.
- 8 *Douglas Brown Land Acquisition* (4th ed) Butterworths, Sydney, 1996 at page 105.
- 9 *Re Lucas and Chesterfield Gas and Waterboard* [1909] 1 KB 16 at 31 (*Fletcher Moulton LJ* rejects) and at 21 (*Vaughan Williams LJ* allows); *IR Commissioners v Clay*, *IR Commissioners v Buchanan* [1914] 3 KB 466 (Court of Appeal allowed it).
- 10 Now, *Land Compensation Act 1961*, s.5, Rule 3.
- 11 *Raja Vyricherla Narayana Gajopatiraya v Revenue Divisional Officer Vizagpatam* [1939] AC 302.
- 12 *Clay and Glass v IR Commissioners* (1915) 52 Scot LR 414.
- 13 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *Turner v Minister for Public Instruction* (1956) 95 CLR 245; *Collins v Livingstone Shire Council* [1972-1973] ALR 651; *Universal Land and Investments Ltd v Commonwealth* (1987) 87 FLR 220; *Goold v Commonwealth* (1993) 114 ALR 135.
- 14 *Tan Raruni Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230; *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324.
- 15 *Fraser v The Queen* [1963] SCR 455.
- 16 *Bernard Marks Valuation Principles in the Income Tax Assessment Act* (1996) 8(2) Bond Law Review 114.
- 17 See for example *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410; *Hill v R* (1980) 7 QLCR 128; *Brighton City v Road Construction Authority* (1985) 59 LGRA 262.
- 18 The application of the Privy Council decision in *Pointe Gourde Quarrying & Transport Co. Ltd v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565. See *Fraser v The Queen* [1963] SCR 455 and *E A Woollams v The Minister* [1957] 75 WN (NSW) 103, 489.
- 19 See *Bernard Marks*, note 23 on "Evidentiary Issues" (page 149).
- 20 [1937] 2 KB 445 at 470-471.
- 21 *ibid.*

Squeezing Assets: Achieving integration in workplace provision

To achieve a well designed and managed working environment, which functions well over time, there must be collaboration between all the players

With facilities management increasingly being as much about management as facilities, this paper concentrates not only on ways to get the best out of assets, but on modes of communication between the different parties in the supply and delivery chains so that effective integration can be achieved.

Integration

Most processes fail at the point of handover between functions and stages. Historically, the gaps between research, development, manufacture, sales and marketing, slowed-down getting a product to market. The composite team, working on all aspects from inception, has changed all this. With construction projects, it is the lack of co-ordination between different functions and trades that effects delivery time, cost and quality. In workplace matters, proper collaboration at the right time and in the right way makes for seamless delivery, and satisfied customers.

Communication

Processes for enhancing interaction and collaboration include regular:

- information from the board about the company • newsletters, intranet pages
- departmental and cross-function workshops

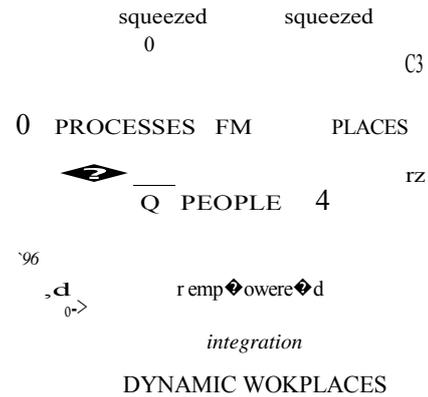
Collaboration

Collaboration comes from trust and clear goals, so bringing all parties together to define roles and responsibilities, and on-going open communication, is essential to effective delivery.

Systems to enhance collaboration include both rigorous methods of control and more relaxed processes for enhancing interaction.

Systems

Systems to assist in cost and quality control include:



- management information systems to capture trends and opportunities
- financial controls and records, especially commitment accounting
- safety, energy and maintenance management systems

Systems that help facilities management performance include:

- quality management systems to ensure consistency and reduce failure
- help-desks and e-fm systems to improve customer service and forecast trends
- independent audits to monitor service and maintenance delivery

Customers

Successful facilities managers know exactly what their organisations aim to achieve, and they base their strategies on finding ways to contribute to this.

However, translating that mission statement into reality is rarely straightforward. Getting board directors to engage in facilities matters even when the financial opportunity is proven can require sophisticated initiatives, such as:

- focusing on branded environments as a catalyst

- for changed behaviors
- proving that advanced systems save money and add value.
- showing that partnering, handled rightly improves delivery quality and value
- illustrating that balancing humanity with efficiency is key to effective operations

As well as the relationship with the board, there is that with all the other users - business managers, staff, clients and visitors, all of whom can be a valuable source of information as well as demanding customers.

Processes to obtain feedback that is both time and output effective can include:

- a help-desk based service
- audits and questionnaires related to key situations
- interviews, observation, workshops and focus groups

User needs

User needs are changing. No longer are a good salary, benefits and interesting work sufficient. Now many users demand a civilised environment and a humane culture. Worklife balance is critical, and home and work environments overlap as they did in early commercial times.

To help attract and retain skilled people, and to enable them to work to the optimum, facilities managers are required to ensure a high level of physical and organisational comfort.

As staff aspirations increase, and more people work from home - at least some of the time - so requirements for the workplace change. It is no longer acceptable for the office to be a dull gray place, now it must be comfortable with a cheerful color scheme and art works on the walls. Wherever possible there should be daylight, natural ventilation and views to the outside world. Ergonomically designed furniture, relaxed meeting spaces, good food, wellness centers and care facilities, all form part of users expectations.

Likewise, services are expected to be comprehensive and delivered to the highest standard, and with considerable charm.

Business processes

Business processes reflect the intense competition of global markets, the opportunities created by advancing technologies, and customer demands.

Communication between individuals and groups is considered essential to business success. However, processing information face-to-face, by telephone or electronically makes up the main body of productive working.

Working open plan is cheap, flexible and helps communication, but many find they are unable to

work productively under these conditions. A major dilemma is to discover the reality of this situation, and ask questions such as:

- Are there people who in order to function well - need enclosed space most of the time?
- Are there processes confidential calls, discussions, and concentrated work which require cellular space?
- How much of all this is to do with status, or what people are used to?
- Can open space (with meeting / quiet space), be designed to fulfill all user needs, or are people too diverse for this?
- What sort of place is appropriate to a specific business process or business sector, and how can it be designed and managed to support corporate culture?
- How can home working best be used to support individual and corporate needs, and what role must facilities management play?

Space

Most occupiers require space that is flexible in the short term, and adaptable in the longer term.

Flexibility, like communication, is central to current considerations, but flexibility is full of dilemmas, such as:

- flexible furniture and layouts allow ease of configuration so that teams can easily refigure, but how about furniture inventory and fire escape routes?
- deep floor plates are more adaptable than narrow floor plates, but cannot provide the same level of daylight and natural ventilation.
- team spaces, with hot-desking or hoteling, encourages team work and optimises space usage, but does a lack of personal territory and a clean desk policy adversely affect output and moral?
- Space, newly designed, can facilitate change and encourage creativity, but how can enthusiasm be retained over time?

Property

Property its rent, rates and servicing usually accounts for 75% of the annual facilities budget. However, many businesses spend large amounts of money unnecessarily. In the UK, for instance, recent research (see report from RICS on www.propertyweek.co.uk) found that £18bn is wasted through inefficient property management each year. This is most prevalent with owner-occupiers.

Property must not just be well managed, it must be fit for purpose. Thus it may well be that accommodation could be:

- in a cheaper location; be serviced officing
- used more densely; partly sublet

- cheaper through challenging rent and rates demands

Ways that management can reduce costs and improve delivery include:

- reducing churn through hoteling initiatives
- improved environmental features to reduce absenteeism

Support services

Integrated service delivery is central to providing effective workspace. It is the most customer facing part of the facilities manager's role, but is made more difficult by the ever-increasing range of services that are expected.

Although often separate contracts, a positive interface between the functions is essential for the smooth running of the operation. Thus, whilst catering, cleaning, maintenance, security, reprographics, wellness centers, landscaping, concierge and so on, must all deliver well in their own right, they must also overlap as needed to ensure that all areas are properly covered. Contracts must be reviewed to ensure that this dovetailing exists, and procedures put in place - plus firm internal management to underwrite this.

Costs and quality can be improved through:

- outsourcing; using managing agents to obtain bigger buying power
- renegotiating rather than retendering; using professional procurement expertise
- reviews of service levels; staff training
- incentives programs; customer / supplier reviews

Performance management

The performance of all aspects of the workplace must be rigorously checked if integrated workplace provision is to be achieved at the right cost. A structured approach can be developed from the earliest stage of an initiative, whether it be acquiring new property or delivering a new in-house or outsourced service.

The development of a small number of key performance indicators (KPIs) for each element of the project provides the methodology needed to measure success throughout the life of the initiative. At the initial stage, and with limited criteria, clear relationships can be established to ensure integration between all elements.

These KPIs must include not just 'hard' aspects such as:

- targets showing clear direction, and parameters for measurement
- business performance
- space standards, costs and quality
- performance specifications for accommodation and services
- service levels agreements (SLAs); reviews of risk transfer

KPIs must also include soft issues:

- user satisfaction, productivity, health and staff retention
- market perception of organisation
- customer attitudes and behaviors
- attitudes of neighborhood

Benchmarking against other properties in a portfolio can provide useful comparisons, as can collaboration with industry peers.

Throughout the life-in-use of the property, KPIs form the basis for on-going post occupancy evaluations (POEs) and other critical feedback mechanisms.

Conclusion

The physical assets of an organisation must be squeezed if it is to remain competitive, but to squeeze the human assets is not only inhumane, it is bad business. The key to successful facilities management is to concentrate on added value, rather than just reducing costs, so that staff are enabled to work productively in environments which function effectively and cost the right amount. Central to this balanced approach is in-depth collaboration of all players which springs from good communication and a proper understanding of corporate goals.

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Reared from New Zealand sheep farming stock, Santa Raymond diagnoses how businesses can achieve effective workspace, which underwrites their processes and culture. She brings together her expertise in architecture and interior design with business and training knowledge to provide an holistic platform for resolving key issues. She co-authored the definitive book on the workplace 'Tomorrow's Office creating effective and humane interiors', and was responsible for the section on offices in the recently published 'The Architects' Handbook'.

Real estate professions, professionals and professionalism

In New Zealand land valuers have practised under an Act of Parliament since 1948. The professional body representing valuers during this period has been the NZ Institute of Valuers. In 1999 the members of the New Zealand Institute of Valuers voted with the Property and Land Economists Institute of New Zealand to form a new institute whose membership would embrace the wider group of property professionals including Real Estate Valuers, Valuers of Plant and Machinery, Property Managers, Consultants and Facilities Managers. This new institute, the New Zealand Property Institute (NZPI), currently represents some 3,000 practising property professionals in New Zealand.

The New Zealand Property Institute has modelled its code of ethics and rules largely along the lines of the code and rules of the NZ Institute of Valuers. However these rules have been refined to provide for the activities of the wider property profession. The New Zealand Property Institute also runs a Professional Ethics Module which is compulsory for its practising members and much of my paper has been drawn from the content of this module.

I would like to commence with a comment on ethics and the profession, and then traverse specific aspects of the property professional's duties and responsibilities in carrying out his or her day to day work.

Professional ethics

Professional ethics: introductory remarks

What is professional ethics?

An ethical or moral concern is a concern with what people 'ought to do', with what goals they 'ought to' pursue.

The idea that in order to act morally we must have proper regard for the interests of others is found in most moral traditions.

Professional ethics is concerned with the ethical or moral evaluation of the professional world and of the particular relationships and practices that comprise the world. It asks what people ought to do in situations which are either peculiar to the professional world, or especially commonly encountered in the professional world.

The aims of a professional ethics module
Professions often set out the central ethical obligations upon their members in codes of ethics.

We will see, however, that Codes cannot work in isolation. Codes, and other regulations such as law, work only where those subject to them take them seriously.

Those subject to codes or laws must be convinced that for the most part they have an ethical obligation to comply with the code or law.

Members of the NZPI are introduced to the ethical values that lie behind their professions through an Ethics module. This module brings these values into light more particularly that:

- The property professions and the practice of their members rest and rely upon a set of ethical values.
 - Members of the Institute should take the ethical demands upon them seriously.
 - That members should come to see their profession as essentially and necessarily engaged in ethical conduct. It is a constitutive part of the professional endeavour.
 - Understanding the values which underpin the profession will allow us to see why members of the Institute are subject, for instance, to an obligation to maintain confidentiality and to practice only in areas in which they are competent.
 - Provisions in the Code are intended to give effect to a set of foundation values, they should be read in light of those values.
- What is a profession?

The Shorter Oxford English Dictionary describes this as a 'wider' sense in which a profession is "any calling or occupation by which a person habitually earns his or her living" and a professional as "*one who follows as a profession, what is generally followed as a pastime*".

A sportsman like rugby player Jonah Lomu, or tennis player Pete Sampras is a professional in this sense, as are followers of the 'oldest profession'.

Historically, at least, this narrower sense applied specifically to the three learned professions of divinity, law and medicine.

Yet is it clear that when we describe groups such as lawyers, physicians, accountants, valuer or property managers as professionals, we mean something closer to the narrower than the wider sense of professional, and it is in a narrower sense that Clause 2 of the NZPI Code of Ethics declares that "It is the duty of *Members to practice their vocation with ...professionalism*".

The difference between the wide and narrow senses of profession and professional is essentially that the latter has 'evaluative' connotations: it links professions and professionals with a set of desirable or honourable traits.

One of the ways in which modern professions - even the three great examples - have moved away from the purest interpretation of the vocational ideal, is that they are all commercial to some extent. We have seen a merging of the business and professional worlds, and the property professions are among the clearest illustrations of the trend. The professions gathered under the NZPI are inextricably linked to commerce. One question for us is whether this increasing commercialisation creates any special problems for the property professions.

The relationship between clients and professionals?

Consideration of the nature of professions and professionals leads naturally to a consideration of the nature of the relationships between clients and professionals.

An imbalance of power and expertise.

Professionals almost always have specialised knowledge and expertise, which their clients lack.

As few clients could perform complex professional tasks for themselves this gives rise to an imbalance of power, generating a de facto monopoly over many professional services. Lending institutions will only accept a valuation from an independent and registered valuer, so a client cannot value their own property even if they do know how to do so.

The importance of the matters about which clients consult professionals.

The matters about which clients consult professionals are typically of considerable importance to the client.

There can also be a considerable cost if the professional does not cater for those matters expertly and diligently.

The opacity of professional diligence and expertise.

The ability of clients to assess the expertise or diligence with which professionals pursue the professional task is often limited. From the client's perspective, a considerable 'opacity' surrounds the professional's work.

Perhaps it will seem that clients can easily remedy this opacity by seeking a 'second opinion'.

The opacity of professional expertise and diligence itself makes it difficult for clients to know when they should seek a second opinion.

The limited nature of the relationship between clients and professionals.

Professionals and clients, typically, enjoy only limited relationships. The client is likely to know very little about the professional as an individual. I know my physician is a physician, but I might know almost nothing about his or her personal life or his or her personal moral views: I might not know what he or she values, or what motivates him.

Despite popular portrayals of professionalism on television, the clients of professionals typically rely on relative strangers for something of significance in circumstances in which they cannot assess the expertise or diligence with which their interests have been pursued.

For now, the analysis allows us to see why professions require their members to avoid conflicts of interest, why they impose requirements of expertise, and why, more generally, trustworthiness is so important in the professions. Remember this is because clients are often in positions of considerable vulnerability in their relationships with professionals. *Caveat Emptor* has little place in the supply of professional advice given the typical inequality of expertise between the parties to professional relationships.

Ethics and the market

Sometimes, critics of professional and business ethics appeal to the market to support a certain kind of ethical scepticism. They say that business and professional ethics, and perhaps more specifically Codes of Ethics, are unnecessary, because the market will itself reward ethical businesses and professions and punish those who are unethical. Provided clients are free to choose between professionals, the idea goes, they will deal with those who are ethical rather than those who are not.

The idea that the free choices of clients will keep businesses and professions honest and ethical assumes that clients are sufficiently informed and knowledgeable to identify and choose ethical practitioners. But the imbalance of expertise which marks professional relationships dramatically reduces their ability to do so. Professionals will be able to work with less than adequate competence and diligence without their clients knowing.

Ethics and the professions

The idea of role-morality

A simple example of role-morality would turn on a distinction between 'personal and professional' ethics. The professional obligation to maintain professional confidences and to 'render service to ... clients ... with fidelity' makes it improper for us to

pass information gained in our professional capacities on to our friends.

We may be morally required to do things at work that we are not morally bound from doing at home.

The value of professional roles:

Lawyers, for instance, are placed under stringent duties of client confidentiality. We can explain that duty by noting that unless clients were secure in the knowledge that their confidences would be respected, they would be much more likely to keep to themselves.

A similar story might be told for the property professions. Without accurate valuation information, securing money over property, for instance, would be a much riskier undertaking than it already is.

Many of the role-differentiated moral obligations of your professions - such as the avoidance of conflict of interest, the obligation to practice only in those areas in which you have appropriate expertise, the observation of stringent independence, confidentiality, and so on - can be understood as duties which are necessary given the more general role or function of our profession in the market and given why it is that we value that role.

The justification of professional obligations which appeal to the social role of professionals may pose a challenge to the property institutes, since the professions that comprise those Institutes seem to have very different roles. The presence of different professional roles is not in itself especially problematic: it may simply mean that the different professional groups within the institute - valuers, property managers, facilities managers, for instance - will be under different professional obligations, just as physicians and lawyers are under different obligations.

Role differentiation and the client-professional relationship

Publicity and professionals ethics

It is impractical to expect clients to enquire into the ethics of individual professionals. They must however be able to make some judgement as to that very thing - given the vulnerability of clients and the fact that much of the work of professionals is inevitably out of the control and observation of the client. It is important not only that professionals are ethical, but that clients and potential clients have some way of knowing the ethical stance of practitioners notwithstanding that they do not know them or their personal moral views.

The official ethics of the profession can be public in a way that the personal ethics of its members cannot. Clients get the benefit of these 'public ethics' however, only if they are given priority over personal ethics in member's dealings with the public.

Ethics and the law

Is it enough to obey the law?

A breach of the NZIV Code of Ethics, in the case

of offences of a certain gravity, would leave a valuer liable to deregistration under s.31(1)(a) of the Valuers Act 1948.

It might seem, then, that all this property professional really has to do is act within the law.

A proper sensitivity to ethical issues, however, is likely to require more than mere knowledge of the provisions of the relevant Code and legislation.

Business and professional endeavours rely upon trust and it is not easy to see how it could be otherwise.

In the end, at least one party simply has to trust the other to perform.

The law alone just does not give me enough reason to trust people with whom I must deal if I am to make a living.

The function of professional codes

Roger Kerr, Director of the NZ Business Round Table has written that:

"...Ethical codes may also prove directly anti-competitive in effect ... In general, rules that serve to restrict voluntary exchange, motivated by the pursuit of profit, are incompatible with an ethical approach to business. We must remind ourselves that ethical rules do not make ethical people".

The law for example requires a certain kind of backing or support if it is to be effective, and the same conclusions follow for codes of ethics. We can note the following kinds of support:

- First, as suggested above, the law must be supported by the appropriate ethos or attitude. To be effective a code of ethics must be accepted as appropriate by at least the majority of those it purports to govern. Given this, one of the most important forms of support will be the creation of an organisational ethics that supports the provisions of the code. This is to say that most of an organisation's efforts in securing ethical behaviour must be in training and education rather than in coercion.
- Second, the law must be supported by interpretative institutions or mechanisms.
- Third, if they are to be effective, laws and codes must be backed by institutions that will enforce them where appropriate. A code of ethics that is worth having is worth enforcing.

To be effective codes must be supported by mechanisms, procedures and attitudes.

What can codes do?

What codes can do is to constitute a relatively stable and public guide to the ethics of an organisation. They provide a public statement of the common ethics of the organisation that will serve to indicate both to members and outsiders just what the profession stands for and expects from its members.

Furthermore, a code of ethics can provide an

independent ground of appeal when a practitioner is faced by a colleague with a 'shady deal'.

Professional duty and responsibility

Professional responsibility

Clause 1 of the Code of Ethics of the NZIV declares that in respect of professional responsibility:

"The first duty of each and every member is to render to the member's client or the member's employer with absolute fidelity, and to practise their profession with devotion to high ideals of integrity, honour and courtesy, loyalty to the Institute, and in a spirit of fairness and goodwill to fellow members, employees and subordinates."

The equivalent clause of the NZPI Code of Ethics, clause 2, reads:

Professional duty: It is the duty of Members to render service to their clients with fidelity, to practice their vocation with integrity, honour and professionalism, to act impartially and objectively when providing independent advice, and to respect the public interest.

Fidelity: Both clauses establish a duty of fidelity. What is fidelity? Fidelity, from the Latin *a*, is the quality of being loyal or faithful.

Integrity: Integrity refers to a quality of soundness of moral principle and character.

Loyalty: To display loyalty is to show faithful adherence to a promise or cause or person.

Honour: To honour something is to treat it with respect and esteem.

Fiduciary duty: The NZIV Code of Ethics specifies the fiduciary duties the valuer owes his or her clients. A fiduciary relationship is one that is founded upon trust.

It should be clear, I hope, why it is appropriate to think of the client/professional relationship as fiduciary. By virtue of the structure of such relationships, clients are vulnerable to the conduct of professionals.

Good faith: The NZIV code also speaks of good faith. Nonetheless the term encompasses honest belief and the absence of malice or desire to defraud or seek unconscionable advantage. The person who acts in good faith acts with an honest intention, so that they will have nothing to hide from those who rely upon them. Though acting in good faith will not always secure the client's advantage, where it fails to do so it will not be because of any hidden agenda on the part of the professional.

Fairness and respect for fellow members: The treatment of fellow professionals and employees in a manner which is deemed commercially and professionally appropriate.

The ranking of the duties

The primary duty to client

On its face the NZIV code appears to specify that the valuer's primary duty is owed to the client. The

first duty of every member is to render service to his or her clients or employer with absolute fidelity ..." It is certainly not the case that a duty of fidelity to an employer could legitimately over-ride a duty to a client.

The Code also provides that:

"Every member shall maintain the high standard of his or her profession by referring to the Branch Committee, any act or omission of a fellow member coming under his or her notice which may appear to bring discredit to the Institute or its members".

The valuer may not place his or her own collegial loyalties above those to which he or she is subject in their professional capacity.

Competence and specialisation

The duty of care and skill

The over-arching obligation of the professional to her client is to carry out her professional duties with due care and skill.

The requirement of competence is common to all professions. The passage from Halsbury's Laws of England (3rd ed., p11) though speaking of valuers, could have been speaking of any profession when it states that:

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

Clause 2.4 of the NZIV Code recognises the particular nature of the competence requirement in the valuation profession, providing that as part of the valuer's responsibility to the client:

"A member should not undertake any work for which the member is not qualified or where the member is in any doubt or ought to be in any doubt as to the adequacy of the member's professional competency and/or experience to undertake the work unless such work is completed under the supervision of a person of adequate competence."

The equivalent clause in the NZPI Code reads:

"A member shall not accept instructions in a matter where, based on a reasonable objective standard, the member does not have the competence, skill and/or experience to complete the assignment to the acceptable professional standard in accordance with this Code of Ethics, the Rules of Conduct and the By Laws of the Institute, unless the assignment is completed in conjunction with a qualified and suitably experienced practitioner."

Knowledge of competence

Clause 2.4 was one of the most significant changes made in the revision of the NZIV Code in 1996. Its predecessor, clause 3.3 of the 1961 Code, read:

"A member should not undertake any valuing work for which he is not qualified and where he is in any doubt

as to the adequacy of his or her professional experience to undertake the work."

The clause was amended in 1996 by the introduction of the words 'or ought to have been in any doubt' to introduce an objective standard. Clause 3 of the NZPI also uses an objective standard.

It is important to remember that all the professional has to offer the client is his or her expertise - if he or she in practise lacks that expertise, because of a lack of competence in the right area or insufficient experience, then the professional is taking a fee for nothing.

Clients place their interests in the hands of professionals on the assumption that the profession can competently protect those interests.

Conflict of interest

Approaches to conflicts of interest

Clause 2.2 of the NZIV Code provides that a valuer must not accept instructions where there is or may reasonably be construed to be, a conflict of interest and must withdraw if a conflict develops "unless such conflict of interest is fully disclosed in writing to all relevant parties and all such parties agree that the instructions may be accepted or continued by the member".

Clause 4 of the NZPI Code of Ethics is to similar effect. It states that:

"Members shall consider and identify any actual or potential conflict of interest when carrying out their professional duties, and shall not act in a matter where such conflict or potential conflict has been identified by the Member or other interested party unless all interested parties have been made aware of the situation and have consented to the Member continuing in the task."

It is central to such relationships that the client be secure in the knowledge that the professional is protecting the client's interest. It becomes important that the professional lacks any motive for compromising the performance of his or her duty to the client. Conflict of interest is perhaps the most obvious motive.

The Code of Ethics in effect identifies and acknowledges the risk and grants to the client the right to decide whether to take it or not.

Other conflicts: false statements and contingency fees

Clause 1.4 of the 1996 Code, which reads:

no member shall prepare or certify any statement which is known to be or ought to be known to be false, incorrect, misleading, deceptive or open to misconstruction by reason of a mis-statement, omission or suppression of a material fact any deceptive act or otherwise."

The reasoning here is presumably that the failure to disclose the interest amounts to an omission of a material fact which is relevant to the proper construction or interpretation of the report.

Clause 6 of the 1961 Code of Ethics prohibited the charging of fees on a contingency basis.

The idea is that a professional whose fee depends upon a particular outcome has a personal interest in that outcome.

Confidentiality

Confidentiality in the code

Clause 5 of the NZPI Code of Ethics states briefly "Members must observe the requirements of confidentiality in the dealings with clients and the public". The Rules of Conduct expand this saying:

"Members shall not disclose to any other person or party any confidential information provided directly or indirectly by a client or to a client without the permission of the client except where there is a legal requirement for disclosure, or the information is of public or common knowledge."

Full disclosure is important to valuers, who are under a duty to obtain all relevant information from the client. The valuer cannot normally claim that he or she was unaware of information that affects the value of the property.

When does an obligation to main confidentiality end?

The predecessor to clause 2.1 of the NZIV Code, clause 3 (1) of the 1961 code, read as follows:

"A member shall act towards his or her clients in all professional matters strictly in a fiduciary manner. He shall hold as confidential the results and other findings of his or her valuation and any report, until released from his or her obligation by his or her client or clients or until the transaction or proceedings for which the valuation or report was made have lapsed or been completed."

The 1996 NZIV Code and the NZPI Rules both provide that confidential information shall not be disclosed 'without the permission of the client'.

Independence, impartiality and advocacy

Independence and impartiality

The general idea here is that it is for the valuer to determine, following accepted principles and standards of valuation, the value of the property and the assumptions to be used in the valuation. The valuer cannot shelter behind assumptions or requirements given in instructions from clients or behind information supplied by the client or others. The idea that lies behind the requirement for independence is that the valuer possesses special expertise that is relied upon by clients and third parties. That expertise is to be used to give a genuine indication of the value of the property. Lack of independence compromises the exercise of the valuer's expertise.

It should be noted that the requirement of independence does not prevent the valuer seeking assistance from experts in fields which are outside the

valuer's own expertise and indeed the valuer may have an obligation to do so.

Even where the valuer does avail himself or herself of such expert assistance, the responsibility for the adequacy and accuracy of the final report remains the valuer's.

NZPI Code, Clause 1.7 states:

"A member must maintain the strictest *independence* and impartiality in the *performance of the member's professional duties*. To this end *no member* shall

Adopt the role of advocate to the exclusion of that independence and impartiality.

Allow *the performance of the member's professional duties to be improperly influenced by the preferences of clients or others* as to the result of *their professional work*.

Rely *improperly upon information* supplied by clients or others in the *performance of their professional duties*.

Act in any *other way* inconsistent with the duties of *independence* and impartiality."

Independence and the NZPI

The NZPI Code and Rules also addresses independence. Clause 2 of the Code states that "it is the duty of every member to act impartially when providing independent advice" and Rule 1.3 provides that:

"Members shall not accept an assignment that is contingent upon or influenced by any condition or requirement for a predetermined result where the exercise of objective judgement is required. Members shall maintain the strictest *independence* and impartiality in undertaking *their professional duties*. To this end, no member shall adopt the role of advocate in a case where their duty is to exercise independence and impartiality."

The intent of the italicised phrases is to recognise that not all of the members of the NZPI are at all times involved in professional work requiring independence and impartiality: Those phrases provide an exemption for members whose professional duties quite properly involve them in advocacy.

Summary

In summary, the property professionals role in the New Zealand market today involves not only valuation but also property and facilities management, advisory, arbitration and mediation services to the wider property and commercial markets. In all these activities the professional benefits from adherence to a robust professional code of conduct and standards.

By being a member of a recognised professional body the property professional is expected to follow a code of ethical conduct providing a set of professional and moral standards to which fellow professionals must also adhere. The member knows that his or her recognition as a professional is reliant upon the public and client's awareness of these standards and the credence placed upon them.

If these standards are to be effective, rules and codes must also be backed by institutions that will enforce them where appropriate because a Code of Ethics that is worth having is worth enforcing and in an increasingly commercial world it is these standards which will provide the cornerstones of our profession.

About the author: C N Seagar is a FNZIV FNZPI and a New Zealand Property Institute Board Member.

Retailers lament dealing with mall landlords

Jeremy Reitman, president of Rietmans Canada says landlords have become institutionalised" since being acquired by the giant funds, rather than acting in their previous "entrepreneurial" fashion.

"It's hard to negotiate with an actuary," Reitman told a session at the International Council of Shopping Centres convention. "The mall business has to be remodelled". Shopping centres were originally designed with department stores dubbed "dumbbells" - with anchors at either end, he says. That department store sector has shrunk considerably: "Now, I'm wondering who the dumbbells are. The fees that landlords charge retailers, meanwhile, have spiralled out of control," he says.

Garth Mitchell, president of Mark's Work Warehouse, echoed those views, saying the landlord "typically does not partner strategically well at all. You're at the bottom of the table."

The complaints are probably the tip of the iceberg. Relations between the mall landlord and retailers have become increasingly tense since pension funds took over, industry observers say.

Pension funds have bought out some of the largest mall landlords, such as Cadillac Fairview Corp, and Ivanhoe Cambridge which respectively, are now owned by Ontario Teachers Pension Plan Board and the Caisse de depot et placement du Quebec.

Retailers complain of rising fees to cover taxes, insurance and maintenance of malls' common areas, among other things. They say landlords have become fractured regional bureaucracies, taking their time to make decisions and rarely sympathetic to merchants' needs. Tony Grossi, an executive vice president with Cadillac one of the country's largest mall landlords defended its actions, although he and other major landlords didn't attend the conference.

Grossi says when the pension fund acquired full control of Cadillac in 2000, it went out of its way to keep in place senior management and the existing board of directors, so as not to institutionalise the company. He says regional managers have been empowered to make decisions in a bid to speed the process, rather than prolong it.

Industry officials also argue that the pension funds have provided a level of stability to the mall sector that

wasn't present previously. Rene Tremblay, president of Ivanhoe, says many of the higher costs are beyond landlords' control, although they try to negotiate better rates.

Tremblay, who is also vice president of the ICSC Canadian division, says insurance costs have doubled since the September 11 terrorist attacks, while deregulation of electricity in some provinces has led to higher power rates. "We have a vested interest to control costs as much as we can," Tremblay says. "Our interests are totally aligned" with those of retailers. He also rejected retailers' claims that institutional investors are short-sighted, saying the previous owners probably had an eye on short-term goals more than current owners.

Still, retailers say there is increasing rigidity in dealing with the landlord/pension funds. "We just don't see the loyalty," says Gabe Tsampalieros, president of Cara Operations, which owns Swiss Chalet, Harvey's and Second Cup, among others. "If you're loyal to us, we'll be loyal to you."

Mitchell says landlords' interests have become "tactical" rather than strategic, looking at the short-term rather than long range implications of a decision. For example, he says that Mark's decision to close its eight Dockers stores led to difficult lease negotiations with the landlord to get out of the leases even though Mark's still was interested in opening another 16 stores under its own banner. Of all Mark's suppliers, landlords are "the hardest ones to talk strategically to", he says. Grossi says Mark's appears to be shifting its interest away from enclosed malls.

Why become a member of the New Zealand Property Institute?

NZPI's primary objective is to represent the interests of the property profession in New Zealand.

The New Zealand Property Institute:

- Promotes a Code of Ethical Conduct
- Provides Registration – the formal recognition of experience and certified qualification of excellence
- Provides networking opportunities
- Assists in forming professional partnerships
- Provides a marketing tool in the approach to new and existing clients
- Provides The PROPERTY Business 6 times a year in partnership with AGM Publishing
- Distributes national PI newsletters and email updates
- Delivers a National and Branch CPD programme
- Offers membership with the International Facility Management Association (IFMA)
- Offers other international linkages
- Offers networking opportunities between the profession and the universities through the PI "Buddy Programme".
- Promotes annual PI Industry and Student Awards
- Delivers an annual PI Conference
- Offers links and information through the PI website www.property.org.nz
- Provides regular branch breakfast and lunch seminars
- Promotes the annual Property Ball in partnership with the Property Council.
- Provides PI Confidence index and PI JobMail.

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Summary case law

High Court

- Civil procedure
- Appeals
- Grounds
- Evidence
- Reliability
- Lease
- Terms

Khan v Chutzpah Ltd 20/11/02, Nicholson J, HC Auckland AP58/02

Unsuccessful appeal against findings of District Court Judge - CL leased restaurant to K District Court Judge gave judgment for CL for outstanding rates, insurance, and costs and dismissed K's counterclaims K appealed, submitting judge was wrong in preferring evidence of CL's director, N, to that of K; that judge was wrong in finding that K misrepresented himself; and that she had accepted N's version before she heard K's evidence - held, K has not established there were documents contradicting N's evidence or that the judge was wrong in preferring N's evidence - neither has K shown that judge was wrong in finding K had held himself out to be a tenant along with his cousins - because the deed of lease provided for the tenant to pay the landlord's legal costs, it was entirely appropriate for the judge to clarify what costs CL sought before K gave evidence, and this does not show predetermination on her part - appeal dismissed

High Court

- Civil procedure
- Application
- Property
- Real
- Taxation

London Continental Ltd v CIR 9/12/02, Master Lang, HC Auckland M880-SDO0; CP240-SDO0

Successful application by Hieber ("H") - on 18 April 2000, a charging order was made in favour of CIR over a property order was later extended for a further period of 2 years in April 2002 - property was owned by H H entered a contract for the sale of the property the impediment to the sale proceeding was the existence of the charging order registered against the title to the property H applied for the rescission of the charging order.

Held, the charging order can only operate to charge any equity in property which might be held by H - after taking into account the amount which is legally owed to the mortgagee - order is altered by including the conditions set out in the judgment - draft orders are to be circulated and each party is given leave to ask for this matter to be relisted.

High Court

- Civil procedure
- Application
- Property
- Encumbrances
- Caveats

Land Transfer Act 1952 ss 137, 146

Harris v Anais Holdings Ltd 4/12/02, Fraser J, HC

Invercargill CP29/01

Successful application by AHL and unsuccessful application by Coppus ("C") - H farmed land which was mortgaged to ANZ Bank ("ANZ") - in 2000 ANZ commenced mortgagee sale proceedings - prior to the auction H negotiated a private contract to sell the land to AHL - AHL agreed to lease the property to H for two years - in early 2001 AHL sold the northern blocks of land to the Second Defendants - AHL later decided to sell the rest of the home block H was interested - when the sale and purchase agreement was tendered by H it included a reference to all the titles including the northern block this error in legal description of the land was corrected by AHL H then claimed that the offer initially made was to sell the whole property which H had accepted, and H sought specific performance of the contract AHL then applied to High Court ("HC") for a summary judgement - HC declined the application for summary judgment and ordered that a caveat in respect of the farm land not lapse until further order of the Court H delayed in exercising option to purchase due to financial reasons - AHL applied for the removal of H's caveat on the home block and C applied for a joinder as defendant to the proceeding.

Held, this case can be effectually and completely adjudicated upon without the presence of C accordingly C's application for joinder is dismissed - the foundation of the caveat must be that H has a reasonably arguable case that he has a contract for the purchase of the home block however the offer was made by H for the entire property and this was not accepted and was either impliedly rejected or has lapsed H does not have a reasonably arguable case that he has a contract as pleaded - accordingly the caveat should be removed - application by AHL is upheld.

I

Court of Appeal

- Contract
- Breach
- Remedies
- Specific performance
- Agreement for sale and purchase

Wilmott v Johnson 12/12/02, CA151/02

Unsuccessful appeal by W. W owned a business property which they listed for sale in March 2001 - in November 2001, W secured from J, as trustee of the Beatrice M Trust ("BMT"), execution of an agreement for the sale and purchase of the property. In the agreement, BMT was named the purchaser and J signed on behalf of BMT - the agreement was conditional on J's solicitor approving the title and leases related to the property - W took the agreement to his solicitor first - and the solicitor asked for the names of the trustees to be put into the agreement rather than just BMT - the names of the trustees including J were hand written in the agreement - W signed the agreement on 30 November 2001 - the initialling of the alteration by J was not done till 3 December 2001 - W contended that the agreement was concluded when they signed the agreement on 30 November. J argued that there was no contract until the initialling had occurred on 3 December. The High Court held that the conduct of W on 30 November in returning the document to J with the pencilled endorsement about the names of the trustees was itself a rejection of the offer - and that the alteration was a material variation and no agreement was concluded until 3 December. W appealed against the decision.

Held, the issue is whether an additional initialling on behalf of BMT prevented any contractual commitment from arising until that occurred. As a matter of established practice, it is the time of the final initialling that is determinative of when the contract was complete, and not November 30 which is the date the agreement bears - accordingly, there is no reason to depart from the result reached by the High Court. Appeal is dismissed.

Court of Appeal

- Equity
- Estoppel
- Mortgage
- Priority
- Property Law Act 1952 ss 81-83

McGaveston v New Zealand Permanent Trustees Ltd 11/12/02, CA23/02

Unsuccessful appeal by M. M wished to advance arguments against NZPTL. He contended that he was entitled to a second security over a property of which NZPTL was the first mortgagor and that the debenture in favour of NMF M Mortgages Ltd over the same property created a floating charge only and not a fixed one - the High Court granted summary judgment to NZPTL. It held that the case M wished to advance

was precluded by estoppel arising out of a decision of the Court of Appeal delivered on 30 September 1999 ("1999 decision") - and an earlier judgment of the High Court delivered on 31 August 1999 - M appealed the decision.

Held, the 1999 decision was a final determination of the issue as to priorities - M is, therefore, estopped from arguing that the priorities are other than as determined in 1999 - also it will be unfair to allow these issues raised by M to proceed after the mortgagee sale has occurred. Accordingly, M's case is precluded by estoppel - appeal is dismissed.

High Court

- Civil procedure

- Judgments

- Summary

- Property

- Lease

Radio Tarana (NZ) Ltd v Moir 15/11/02, O'Regan J, HC Auckland CP152/SW02

Unsuccessful application by M for summary judgment - M and RTL entered into lease for theatre for 3-year term. No rent payments were made after 31 March 2000; on 22 April 2002 M re-entered the premises - M sought summary judgment for outstanding rent, interest, insurance, and rates, totalling \$120,037 - RTL claimed M misrepresented that 250 people could be accommodated in the theatre before lease was signed, but Auckland City Council allowed only 60 due to fire hazard - RTL alleged that, due to fire hazard issues, building was closed from August 1998 to February 2000.

Held, onus on M to show that RTL has no arguable case - submission that clause in lease saying that no warranty had been made by the landlord that the premises would remain suitable for tenant's use cannot be sustained in light of s 4 Contractual Remedies Act 1979 - evidence regarding whether theatre was ever closed is unsatisfactory but it is a matter of dispute to be resolved at trial - not satisfied that RTL has no fairly arguable defence of misrepresentation - successful misrepresentation claim would affect M's claim as to amount owing. Application dismissed - RTL's poor state of evidence presented in Court contributed to M's belief that summary judgment was available, and no costs are awarded.

High Court

- Property

- Encumbrances

- Caveats

- Land Transfer Act 1952, s 145

Amos v Green 25/11/02, Morris J, HC Whangarei M42/02

Unsuccessful application by A to sustain a caveat.

Held, the application must fail - A sought to raise

matters which have clearly been litigated and determined against A in the Maori Land Court - allegations of bad faith and like were raised and dismissed in this Court the caveats fail to identify any interest application refused

High Court

- Contract
- Construction and interpretation
- Property
- Encumbrances
- Caveats

Jireh Holdings Ltd v Porehester Ltd 4/12/02, Master Lang, HC Auckland M1466/02

Successful application for an order to remove a caveat - in June 2002 PL entered into an agreement to purchase a property from TTAL which was not the registered proprietor but had entered into an agreement to purchase the property prior to settlement TTAL nominated applicant JHL as purchaser and JHL became registered proprietor clause in agreement that a deposit of 15 percent of the purchase price was to be paid, made up in part of GST input credit from purchase by 16 October 2002 the GST offset had not been received and PL had not paid the deposit JHL wrote requiring payment of balance of deposit within three days of receiving letter as provided for in contract - no payment had been made by 23 October 2002 and JHL purported to cancel agreement - PL argued that the failure to pay the deposit was a result of delay caused by TTAL delay in issuing a tax invoice and lodged a caveat - JHL applied to have caveat removed.

Held, agreement does not contain any term linking timing of payment of balance of deposit to obtaining GST offset - terms of agreement which relate to how deposit is to be paid are not subject to any ambiguity or confusion JHL was entitled to call for payment of at least balance of deposit on 16 October 2002 and from 19 October 2002 was entitled to cancel agreement - from 23 October 2002 any caveatable interest which PL might have had was extinguished because it was no longer party to a purchase agreement of the property application allowed and order made removing caveat.

High Court

- Maori land
 - Tort
 - Negligence
 - Duty of care
 - Civil procedure
 - Application
 - To strike out
 - Te Ture Whenua Maori Act 1993, s 61(1)(a)
- Helmbright v Potts & Hodgson 20/11/02, Master Lang, HC Rotorua CP7-02*

Unsuccessful application by plaintiffs Hs to state

case for Maori Appellate Court - unsuccessful application by first defendant P&H to strike out proceedings - successful applications by second defendant HNZA, third defendant ODC, and fourth defendant MMA, to strike out proceedings - properties at 67 and 73 Buchanan Street, Opatiki, were owned by Crown for State housing purposes - in 1975 HNZA sold 73 Buchanan Street to Ks but by error memorandum of transfer referred to Certificate of Title relating to 67 Buchanan Street Ks sold property to Hs with solicitors P&H acting for Hs, and original error was repeated Hs fell behind in rates, and when ODC took action Hs tried to take advantage of error by refusing to pay ODC obtained High Court declarations correcting the registration of title for the properties, and Hs were found liable for rates - Hs claimed breach of contract, negligence, and redress from Crown of England for denial of their Tino Rangatiratanga sovereignty defendants submitted that statement of claim disclosed no reasonable cause of action against them.

Held, there is no question of fact arising in this case which relates to the interests or rights of Hs as Maori in any land - no jurisdiction exists to state case for Maori Appellate Court - HNZA, ODC, and MMA have never been a party to any contract with Hs HNZA as mortgagee is not under a duty of care to ensure that its mortgage is registered correctly ODC is not under a duty of care to ratepayers to keep full and accurate records of their properties and is entitled to rely upon the accuracy of notices of sale that are forwarded to it - MMA has never been involved with transaction, and proceeding cannot be used as a vehicle to bring a general constitutional challenge to historical acquisition of land - P&H must have owed a duty to their clients to ensure that they became registered proprietors of property they intended to purchase sustainable allegation of negligence and breach of contract against P&H, but claim as to loss needs to be properly particularised no claim could lie against P&H for loss of Hs' sovereignty applications by HNZA, ODC, and MMA to strike out allowed - application by Hs to state case and by P&H to strike out dismissed.

High Court

- Property
- Lease
- Remedies
- Injunction
- Interim

Kumar v Lucina Investments Ltd 6/12/02, Laurenson J, HC Auckland CP470-02

Unsuccessful application by K for interim interlocutory relief and an order that a caveat not lapse - K was in occupation of a commercial property on 6 March 2002 - his right to occupy was as a sub-tenant of Shell Oil, a tenant of the owner of the property K

was served a notice to quit - on 6 March 2002 LIL settled the purchase of the property and entered an agreement to lease with K resource consent granted to enable the property to be used as a service station LIL applied for building consent to carry out further work in relation to the use as a service station, this was granted then later cancelled K had previously asked if he could relocate his business to the back of the property, LIL agreed subject to a condition of the lease on renegotiation relating to the building consent - the exact effect of that clause is contested LIL concluded it would have to amend its plans if K continued to use the rear area LIL required K to leave the property, K refused, but was eventually removed as was his equipment K was refused ex parte interlocutory interim relief K sought possession of the rear premises, or the front premises until a move to back was possible.

Held, there are serious questions to be tried in this case but that is not determinative - on the balance of convenience, or the reality of the situation, K's chance of remaining in occupation of the property by reason of the lease are not good granting relief would be futile, K would need to reinstate his business but his tenure is very limited so it would only be for a short period a sustainable claim can be met by damages, not occupation interlocutory relief declined, no order that the caveat not lapse granted - LIL will pay K \$100,000 when K withdraws the caveat.

District Court

- Property
- Title
- Settlement

Allan v Barton [2002] DCR 995

Successful claim by A A decided to buy house and approached B for advice on property investment - A agreed to purchase property B was developing sale and purchase agreement signed by parties; deposit was paid to B - A also gave B loan of \$10,000 - B was served with settlement notice by A B was overseas, and A prepared to complete the purchase if required, reserving his rights - B did not settle on the date set out in the agreement, and A cancelled it A then sought recovery of deposit, which B refused A brought claim against B for return of deposit - B argued that A was not entitled to cancel contract.

Held, evidence shows that A was willing and able to settle in full if he had been required to do so - settlement notice was validly served to B, and he did not comply with the settlement date - A was therefore entitled to cancel agreement and claim refund of deposit claim is upheld

High Court

Property
Encumbrances Caveats
Wills, probate and administration Executors and administrators
Proceedings by

French v Public Trust Office 6/12/02, Master Faire, HC Hamilton
M167/02

Unsuccessful application by F for an order that a caveat not lapse - successful application for an order authorising lodging of second caveat against same land - PTO holds legal interest in properties as administrator of F's parents' estates - will annexed to grant of administration appointed three children as executors and trustees to hold residue estate as tenants-in-common in equal shares - F commenced other proceedings seeking recall of grant of administration and has a different will dated 3 May 2000 which he hoped to obtain a grant of probate - later will appointed F as executor and trustee and gives all assets to F - F lodged a caveat on 16 May 2002 claiming to be beneficial owner of fee simple pursuant to a will - one property sold on 30 April 2002 and other has been sold conditional on withdrawal of caveat - PTO lodged a mortgage for purpose of setting in train procedure under s 145 Land Transfer Act 1952 but F did not apply seeking an order that caveat not lapse within statutory time limit.

Held, no point in pressing on with hearing of application under s 145 Land Transfer Act 1952 - problem regarding whether beneficiary of share in residue of estate has any interest in property until residue has been ascertained may not arise here because F is entitled to claim an interest by virtue of being a trustee of will even though there is substantial delay on F's part in taking action regarding the later will, Court is not satisfied that this should operate against grant of leave to file second caveat - F's entitlement is dependent upon his succeeding in application to recall an earlier grant, but it is still a claim to an interest in land wrong to rule on priority between F's claim and purchasers' claim until purchasers make an application to remove second caveat - application granted to lodge a second caveat application for order that caveat not lapse dismissed.

High Court

- Civil procedure
- Injunctions
- Interlocutory
- Trusts
- Trustees
- Appointment

Choi v Son 13/12/02, Nicholson J, HC Auckland M1397-SWO2
Successful application for interim injunction
church formed in Auckland in 1993 called Korean

Peace Presbyterian Church with S as pastor in 1995 a trust was incorporated with six incorporation trustees - in July 2002 members' contributions of over \$300,000 were used to buy Church building discord caused two factions to be formed and S prohibited the faction against him, represented by C, from using the Church - in October 2002 two incorporation trustees were recorded as resigning as trustees and appointed second defendants JYS and HSS as new trustees - in November 2002 JYS and HSS purported to appoint SSH as a third trustee and the three passed a resolution that no-one was able to use the Church until the dispute was settled C filed proceedings asking for possession and control of Church to be taken from S and his supporters - applied for interim injunction to be able to use Church.

Held, whether each of purported trustees has been validly appointed is one of the serious questions to be tried, as is whether they can exclude Church members from Church damages would not be an adequate remedy if interim injunction is not granted nonsensical for property to remain idle and not be used for purpose as a church until substantive issues are resolved as plaintiffs wish to use Church for meetings and worship and have contributed a substantial amount of money to the purchase of the property, the balance of convenience lies in allowing all members of the Church except S and three purported trustees to use Church injunction granted and order that all church assets be frozen

District Court

- Property
- Boundaries
- Disputes
- Tort
- Nuisance

Somers-Edgar v Millennium Futures Ltd [2002] DCR 989

Unsuccessful application by S-E - S-E built a house and left a gap in the wall built on boundary boundary wall was shared by S-E and MFL gap was necessary to accommodate a tree growing close to wall that MFL refused to remove - a condition of local council consent for S-E's house was that tree must remain - S-E sued for an order for removal of tree - S-E contended that tree was an actionable nuisance and that gap in wall compromised their security.

Held, tree does not cause any hardship to S-E it was possible for S-E to build an alternative wall and restriction is minor tree is not an actionable nuisance since it causes no material damage to S-E's property application is dismissed.

High Court

- Contract
- Formalities
- Offer
- Property
- Lease

Becroft Holdings Ltd v Macassey 19/12/02, Salmon J, HC Dunedin CP3/02

Unsuccessful claim for specific performance or damages in respect of property land owned by defendant trustees of Miller family trust ("MFT") was in three titles - land contained in one title was leased to third party J's with a right of renewal for a further term expiring on 1 October 2004 - lease gave J's right of first refusal to purchase land in event of lessors receiving an offer to purchase before lease expired - BHL decided to buy all titles of farm conditional on J's not exercising their right to renew lease or option to purchase but deal did not succeed some months later new agreement was drawn up with new special condition that, provided J's did not exercise the right to purchase or renew their lease, BHL would have the right of first refusal to purchase title J's leased MFT's lawyer gave evidence he believed contract was for other two titles whereas BHL's lawyer believed MFT's lawyer had confirmed J's had not exercised either option and therefore BHL was buying all three - a year later, after J's gave notice to renew lease, MFT's lawyer realised that they had not been offered right of first refusal and, believing that he had to, offered J's option to purchase and J's accepted BHL sought specific performance of sale of land J's leased or damages J's claimed specific performance of sale of leased land to them, or damages.

Held, never a concluded agreement between MFT and BHL for purchase of land leased by J's - meaning of special condition is an option to purchase subject to two prerequisites neither of which were fulfilled as J's did exercise right to renew lease and did not reject right to purchase BHL's lawyer did not read new agreement carefully as he did not realise that, unlike the first one, it was not an agreement for sale of all three properties - special condition did not trigger J's right of first refusal because at best it amounted to an option to purchase and obligation under lease only arises when an offer to purchase was received by MFT - appears that MFT and J's were influenced to enter into contract for purchase of land by a common mistake regarding effect of special condition and arguable that Contractual Mistakes Act 1977 applies - BHL's claim dismissed and J's claim adjourned to await further argument.

High Court

- Insolvency
- Consequences
- Secured creditor
- Taxation
- Goods and services tax
- Special cases
- Agents and auctioneers

Christchurch Readymix *Concrete Ltd v Rob Mitchell Builder Ltd* (in liquidation) 17/12/02, Yenning J, HC Christchurch M37/02

Unsuccessful application for directions under s 284 Companies Act 1993; RMBL sold a property over which National Bank of New Zealand Ltd ("NBNZ") held a mortgage; after sale became unconditional RMBL went into liquidation; sale did not net enough money to repay both mortgage and GST component of sale; liquidators of RMBL believed they had an obligation to account for GST component to Inland Revenue Department ("IRD"); NBNZ considered entire proceeds of property settlement were due to them; liquidators applied for directions from Court regarding sum in dispute.

Held, practical situation is unless NBNZ had provided a discharge of mortgage on terms acceptable to it, sale of property would not have settled and there would be no money payable to IRD for GST; GST liability incurred when deposit was paid on 3 April 2002, rather than at end of GST period, and liquidators are responsible for GST liability incurred after date of commencement of agency, namely 15 April 2002; no factual basis for submission that liquidators acted as agent for mortgagee bank; here was an unconditional sale in place by date of liquidation and liquidators chose to complete settlement meaning that NBNZ was not required to exercise any of options under s 305 Companies Act 1993; *Edgewater Motel Ltd v Commissioner of Inland Revenue* is distinguishable as it was a sale by a bank as mortgagee which is not case here; application dismissed and direction made that net proceeds of sale are payable to NBNZ as secured creditor.

High Court

- Property
- Lease
- Right of renewal

Mac's Cove Tender Centre Ltd v Boyd 5/12/02, Ronald Young J, HC Nelson CP13/02

Successful application by MCTC for order granting relief MCTC leased commercial premises off first defendant B - lease included right of renewal after three years of occupation MCTC failed to exercise renewal rights under the lease in time because of understanding that property was to be purchased at end of lease - meanwhile B sold property unconditionally with vacant possession to second defendant ("G") - MCTC sought an order requiring B

to grant renewal of lease.

Held, there was an agreement to sell the building and B's failure to honour that agreement was the major cause of the failure of MCTC to give notice of renewal - while G was due considerable sympathy it was appropriate to grant relief against refusal to renew and require B to grant a renewal of the lease - application granted.

High Court

- Contract
- Formalities
- Offer
- Property
- Lease

Becroft Holdings Ltd v Macassey 19/12/02, Salmon J, HC Dunedin CP3/02

Unsuccessful claim for specific performance or damages in respect of property land owned by defendant trustees of Miller family trust ("MFT") was in three titles - land contained in one title was leased to third party J's with a right of renewal for a further term expiring on 1 October 2004 - lease gave J's right of first refusal to purchase land in event of lessors receiving an offer to purchase before lease expired BHL decided to buy all titles of farm conditional on J's not exercising their right to renew lease or option to purchase but deal did not succeed - some months later new agreement was drawn up with new special condition that, provided J's did not exercise the right to purchase or renew their lease, BHL would have the right of first refusal to purchase title J's leased MFT's lawyer gave evidence he believed contract was for other two titles whereas BHL's lawyer believed MFT's lawyer had confirmed J's had not exercised either option and therefore BHL was buying all three - a year later, after J's gave notice to renew lease, MFT's lawyer realised that they had not been offered right of first refusal and, believing that he had to, offered J's option to purchase and J's accepted BHL sought specific performance of sale of land J's leased or damages - J's claimed specific performance of sale of leased land to them, or damages.

Held, never a concluded agreement between MFT and BHL for purchase of land leased by J's - meaning of special condition is an option to purchase subject to two prerequisites neither of which were fulfilled as J's did exercise right to renew lease and did not reject right to purchase - BHL's lawyer did not read new agreement carefully as he did not realise that, unlike the first one, it was not an agreement for sale of all three properties special condition did not trigger J's right of first refusal because at best it amounted to an option to purchase and obligation under lease only arises when an offer to purchase was received by MFT - appears that MFT and J's were influenced to enter into contract for purchase of land by a common mistake regarding effect of special condition and

arguable that Contractual Mistakes Act 1977 applies - BHL's claim dismissed and J's claim adjourned to await further argument.

High Court

- Civil procedure
- Injunctions
- Interlocutory
- Contract
- Construction and interpretation
- Property
- Encumbrances
- Caveats

Jireh Holdings Ltd v Porchester Ltd 18/12/02, Paterson J, HC Auckland M1466/02

Unsuccessful application for interim injunction PL entered into an agreement to purchase land upon which 28 buildings were to be completed - interests of vendor were taken over by JHL JHL purported to cancel agreement because PL had not paid part of deposit JHL said was owed by agreement PL lodged caveat against title of land but Master ordered that caveat be removed - PL appealed to Court of Appeal and applied to High Court for interim injunction restraining JHL from selling land whether there is a serious question to be raised on PL's claim that JHL was not entitled to cancel the contract.

Held, PL's rights depend on construction of contract and unlikely background evidence would undermine clear wording no serious question to be tried damages would be adequate remedy for PL as cost to PL if agreement were to proceed is fixed and known and any consequential losses arising from JHL's purported repudiation could be calculated - balance of convenience favours JHL as it may not be able to comply with obligations to bank if injunction is granted - application for injunction dismissed.

High Court

- Property
- Encumbrances
- Restrictive covenants

AFFCO New Zealand Ltd v Property Food and Technology Ltd 18/12/02, HC Auckland O'Regan J, CP493-SWO2

Partly successful application by AFFCO for interim injunction AFFCO sold properties at Waitara and Whangarei to PFT properties were meatworks which AFFCO closed down covenants in memoranda of encumbrance stated properties were not to be used for slaughtering, processing, cooling or freezing of lamb, sheep, bobby calves, cattle or goats for 20 years associate company, second defendant ACL, was carrying out blast freezing of meat products at Waitara and blast freezing and cold storage of meat products at Whangarei - ACL argued that its activity at Waitara had been specifically waived on part of AFFCO by former chief executive and that AFFCO was aware

property at Whangarei was being used for blast freezing and cold storage.

Held, AFFCO has established a serious question to be tried that activities undertaken at both properties are in breach of covenants effect of concession made by former chief executive was an informal concession to ACL which binds AFFCO from enforcing strict terms of covenant in respect of blast freezing at Waitara, but is only temporary situation at Whangarei indicated that AFFCO was prepared to consider a variation of covenant if it would be of benefit to AFFCO, but did not imply AFFCO was prepared to waive in relation to product sourced from other parties - only way AFFCO can derive benefit from covenant is by granting of an injunction to ensure it is complied with injunction granted to AFFCO for Whangarei property but not for Waitara property.

High Court

- Trusts
- Settlements
- Family arrangements

Samujh v Chia 17/12/02, Heath J, HC Hamilton AP66/02

Unsuccessful appeal by RS and NM against District Court ("DC") decision that money advanced to a trust was a gift and not a loan RS unsuccessful in obtaining finance to acquire a home - discussions took place as to how assistance could be given to RS to establish housing security and arrangements were made for provision of funds - \$28,000 advanced to RRP Trust ("the Trust") which was settled for benefit of RS's children and purchase of property, C and PS being the trustees - issue in District Court whether the advance made by RS and NM to the Trust was a loan or a gift - DC held RS and NM were happy to make \$28,000 available to ensure establishment of the Trust and purchase of property however RS rebelled against the rental she agreed to pay and alleged her parents were dishonest which was without foundation - RS placed herself in legal confrontation with the Trust by refusing to pay rental and C and PS left with no alternative than to make necessary proceedings to recover the rent and have her evicted - RS and NM appealed on grounds DC failed to take into account presumption of advancement which placed an illegitimate onus on RS and NM to establish monies advanced were a loan DC also failed to deal with issues of unjust enrichment and resulting and constructive trusteeship arising from situation.

Held, there is no evidence of a particular view of the character of the transaction in the context of discussions which occurred before the transaction entered into - no evidence from NM to suggest a legal relationship of debtor and creditor was intended when moneys were advanced finding of credibility in favour of PS by DC Judge shows the true legal

character of the advance was a gift rather than a loan this is not a case where Court should interfere with findings of fact made by DC appeal dismissed

High Court

- Property
- Lease
- Renewal

Koo v Tuatara House Ltd 19/12/02, Baragwanath J, HC Auckland M1578-IM02

Successful application by K for relief K took assignment of a lessee's interest under a lease which provided for renewal every two years until 2006 - K was not reminded it was time to renew lease after term expired occupation reverted to monthly tenancy under lease - THL purchased lessor's interest and wished to renovate building THL gave K notice his monthly tenancy was being terminated and K applied for relief under s 120 Property Law Act 1952.

Held, salient features here are that THL knew full well of presence of K in building but failed to directly enquire of K whether he would be renewing his lease failure to be alert to need to renew is very failure which Parliament provided should give grounds for application for relief against forfeiture relief granted to K leave reserved to THL to apply if its plans for redevelopment frustrated by unreasonableness on part of K

High Court

- Criminal procedure
- Appeals
- Offences
- Trespass

Whitu v Police 5/12/02, Hammond J, HC Napier AP50/02

Unsuccessful appeal by W against a trespass charge - W and others were shareholders of Kahunugunu Executive - W and others entered premises of the Executive and refused to leave - chief executive ordered them to leave and laid a trespass complaint W and others were charged with trespass - W submitted that District Court Judge gave insufficient consideration as to the ownership of the premises - further that judge gave insufficient consideration to the authority of chief executive to lay a trespass complaint also that judge gave insufficient consideration as to the position of the accused people as shareholders.

Held, an occupier of land may resort to Trespass Act 1980 - it is not necessary that the person giving the notice is fully beneficial owner of the land chief executive officer was entitled to warn trespassers to leave - W and others were entitled to be on premises as shareholders - however their licence to be on premises was not permanent or irrevocable - appeal dismissed.

Court of Appeal

- Equity
- Remedies
- Specific performance
- Property
- Lease

Capital Transport Ltd (1999) Ltd v Hollywood Industries Ltd 18/12/02, CA126/02

Successful appeal by CTL against order for specific performance - CTL leased commercial premises from HIL deed of lease never entered into as required by agreement to lease and HIL sought specific performance to execute deed of lease and payment of outstanding rent High Court Master granted both applications and CTL appealed CTL argued that size of area actually leased was at issue and this would affect any rent review clause in deed of lease.

Held, no apparent authority to answer first question whether cases where compensation or abatement of purchase price have been granted as a condition of specific performance apply to leases - not appropriate for summary judgment for equitable remedy of specific performance to have been ordered without questions of abatement, compensation or equitable set off having been fully argued appeal allowed and order for specific performance set aside.

High Court

- Contract
- Termination
- Repudiation
- Wrongful repudiation
- Property
- Title

Gazelle Properties Ltd v Hulst 18/12/02, Chambers J, HC Auckland AP36-SWO2

Unsuccessful appeal against District Court ("DC") decision in 1997 Ginian Coy Ltd ("GCL") entered into 15 contracts with related vendor companies, including GPL, to purchase 15 apartments - deposits were paid under each contract with date of settlement set at 1 May 2007 - at date of contracts vendor companies did not have title to apartments but contracts to buy them from Heritage Developments Ltd ("HDL") - in 1999 HDL cancelled contracts - in 2000 GCL went into liquidation with H becoming liquidator H wrote to GPL seeking first refund of deposits, which GPL refused, then assurance that GPL would be able to transfer title on settlement date in 2001 GPL wrote to H purporting to cancel contract because GCL was insolvent - DC Judge held that GPL had repudiated contract and GPL appealed.

Held, from time HDL cancelled its contract GCL was entitled to seek reassurance from GPL as to how title was to be provided - H was under no obligation to show how he was going to pay for properties until vendor companies demonstrated capacity to provide

title - GPL's failure to demonstrate this meant that GCL could cancel if it chose - GPL purported to cancel contract when it was not entitled to do so and this amounts to repudiation of contract entitling H to cancel appeal dismissed.

High Court

- Civil procedure
- Application
- Wills, probate and administration
- Family protection
- Property
- Life interest

Lucinsky v Shotter 29/10/02, Master Gendall, HC Palmerston North CP12/02

Successful application by L L applied for leave to bring a claim out of time under Family Protection Act 1955 - L and others are trustees of estate of later Mrs Shotter ("Sh") - Sh's will was made shortly before her death on 5 October 2000 - probate of will was granted 20 October 2000 - S was Sh's widower marriage was a second marriage for both S and Sh and they both had children from previous marriages - S and Sh owned a rural-residential property as tenants in common in equal shares - under Sh's will she made provision for S to have uninterrupted use and occupation of property for one year Sh left an interest in property to her children after expiry of S's one year right of occupation initially S did not challenge will year after Sh's death S was advised that L wished to sell property S sought a life interest in Sh's share of property S required leave of Court to make claim as it was not made until 10 months after probate of will.

Held, Court should exercise its discretion to grant leave to allow S's claim to proceed against Sh's estate - delay in filing application was for a relatively short period - merits of S's claim are significant and require substantive consideration no evidence that L and others would suffer significant prejudice if application is granted - leave granted and costs are reserved orders accordingly

High Court

- Civil procedure
- Judgments
- Summary
- Property
- Lease

Capital and Coast District Health Board v Hunt Group Management Ltd 15/10/02, Master Gendall, HC Wellington CP141/02

Successful application by CCDHB for summary judgment against HGML CCDHB wanted a declaration that HGML had no right to remain as a tenant of Wesley Ewart Hospital "Swart" beyond July 2002 - an order that HGML vacate and deliver up possession of the Ewart in 2000 HGML entered into a contract for purchase of the Wesley Wellington

Mission Inc known as the Ewart - lease was renewable on a monthly basis until 2006 - Ewart applied to renew lease but was refused in July 2002 - CCDHB contended that lease had been terminated CCDHB argued that HGML had no tenancy with them beyond July 2002 and had no right to possession of land.

Held, no unusual features which require Court to invoke exercise of its residual discretion to refuse summary judgment sought by CCDHB - declaration made that HGML has no right to remain as a tenant of the Ewart beyond July 2002 - application for summary judgment granted - however order is stayed for three months to enable HGML to take steps towards relocation application granted with conditions.

High Court

- Resource management
- Consents
- Considerations
- Adverse environmental effects
- Visual

Fitzgerald v Auckland City Council 12/12/02, Judge Sheppard, EC Auckland A241/2002

Unsuccessful application for costs after issue reserved at hearing F challenged decision to grant Little Sisters of the Poor ("LSP") consent to redevelop home for aged and poor but abandoned grounds of appeal late in hearing F contended attempts to narrow issues through negotiation should not be penalised by orders to pay costs but instead should be grounds for making no costs award - LSP claimed costs were appropriate as F abandoned grounds of appeal at late stage of proceedings after expenses had been incurred - LSP argued F's position had changed throughout proceedings which caused them added expense.

Held, F raised second position regarding roof gradient and this illustrates continued willingness to resolve issue therefore it is not reason for ordering F to pay costs given what is at stake for F it is not unreasonable for them to apply close measure of cross-examination - no order should be made for payment of costs - application dismissed.

High Court

- Property
- Interests in land
- Access rights
- Easements

Hall v Ewens 18/12/02, Laurenson J High Court Auckland AP102-SW02

Unsuccessful appeal by H against decision returning deposit to purchaser unsuccessful appeal by H against amount of costs - H entered into agreement to sell house to E and E paid deposit E refused to settle after obtaining LIM report and sought to have deposit returned - H rejected E's refusal on grounds it did not constitute proper notice pursuant to

sale agreement E obtained judgment for return of deposit plus interest and was subsequently awarded costs in amount of \$15,000 - H appealed on grounds Judge incorrectly interpreted sale agreement and costs award was excessive.

Held, E gave valid notice as disclosed reason for not continuing with sale - notice implicitly contained proposed remedy as description of problem required H to take action to prevent situation from occurring if H had accepted more reasonable approach to litigation most of E's costs would have been avoided therefore costs award stands - appeal against substantive decision dismissed appeal against costs award dismissed

High Court

- Civil procedure
- Costs
- Legal aid
- Property
- Encumbrances
- Caveats

Gitmans v Alexander 17/1/03, Chambers J, HC Auckland CP218-SD02; M946-IM02

Determination of costs - A was successful in two proceedings, an interim injunction proceeding against her as mortgagee to restrain a mortgagee sale and one by her to remove a caveat - costs were not ordered as it was hoped parties would resolve this - A sought costs of \$11,950 - of that, G and second plaintiff Trust would be jointly and severally liable for \$7,995 and G would be personally liable for \$3,955 - G submitted that he should only be liable personally for \$50 costs as he was in receipt of legal aid.

Held, G is not entitled to protection under s 40(1) Legal Services Act 2000 because he had not been granted legal aid when it was determined he and Trust were liable for costs - if G were legally aided there is not enough information to decide whether or not there are exceptional circumstances justifying an order that G pay more under s 40(2) Legal Services Act 2000 costs ordered on 2B scale as A sought.

District Court

- Civil procedure
- Hearings
- Rehearing
- Tenancy law
- Tenancy tribunal
- Residential Tenancies Act 1986 s 105

Wellington City Council v McMillan [2003] DCR 50
Unsuccessful appeal against dismissal of application for rehearing WCC and M entered into tenancy agreement when WCC gave notice of increase in rental, M went to Tenancy Tribunal Tenancy Tribunal declared that according to tenancy agreement rent increase could not take place until

September after application for rehearing was refused, WCC appealed to District Court.

Held, s 105 Residential Tenancies Act 1986 provides for rehearing if substantial wrong or miscarriage of justice has or may have occurred or is likely to occur - these are strong words which set a high standard and most obviously apply to cases of procedural error or discovery of new evidence however words cannot cover a complaint that Tenancy Tribunal was merely mistaken or wrong in its findings of fact or application of law because here grounds relied on in application for rehearing are complaints about legal correctness of decision they should have been dealt with by way of appeal no distinction can be made between errors of law that are grave enough to constitute a substantial miscarriage of justice and those which are not - appeal dismissed.

High Court

- Civil procedure
- Judgments
- Summary
- Property
- Mortgages

Coffey v Smith 7/2/03, Laurenson J, HC Auckland M569-SWO2

Successful application by S for summary judgment original proceeding was an application to stop third defendant Bridging Finance Group Ltd from exercising mortgagee's power of sale - by agreement a sale took place but C refused to give possession when amount obtained was insufficient to repay existing first and second mortgages - S sought total shortfall from sale - C and SC separated and property put into C's name - SC agreed to pay amounts due under first mortgage in lieu of child support - C took a second mortgage to subdivide property this was used to cover unpaid amounts under first mortgage - property was eventually subdivided but on default subjected to a mortgagee sale.

Held, C is liable for shortfall - S carried out all his obligations in relation to subdivision SC's failure to meet arrears is not relevant - judgement for the amount claimed is entered S is entitled to judgment against SC under second mortgage but quantum is limited to original sum advanced not total shortfall summary judgment granted.

District Court

- Property
- Real
- Boundaries
- Encroachment

Webb v Barr [2003] DCR 127

Unsuccessful application by W for relief related to encroachment of boundaries - an extension to W's house encroached on B's land there was also an encroachment of curtilage into B's property at southern

end of W's property B's driveway encroached on W's property but B accepted and was willing to alter at time of extension W erroneously believed a fence rested on boundary line W claimed that area left for curtilage provided insufficient room for pipes, drains, access and maintenance - W applied for compensated alteration to boundaries to allow encroachment under s 129 Property Law Act 1952.

Held, need of encroachment for curtilage was created previous to W owning house, nor was there intention or gross negligence in encroachment of extension it is not just and equitable to provide relief - land encroached upon is key to future development of B's property despite being subject to a right of way there are alternate solutions to changing vesting of title - it is not unreasonable to reconstruct part of house to stop encroachment - application dismissed.

High Court

- Civil procedure
- Application
- Property
- Real
- Encumbrances
- Caveats
- Land Transfer Act 1952, s 143

Edgewater Apartments Ltd v Starline Investments Ltd 4/12/02, Master Gendall, HC Wellington CP239/02

Partially successful application by EAL EAL applied for an order that a caveat be removed against an apartment in development apartment had been sold and settlement of sale potentially threatened by presence of caveat SIL consented to partial release of apartment in question.

Held, orders made that caveat is to be partially released and removed from certificate of title to apartment - partial release of caveat is entirely without prejudice to SIL over remainder of properties at issue in proceedings orders accordingly.

High Court

- Property
- Easements

McLaughlin v Duke 7/2/03, Priestley J, HC Auckland M1641-IM02

Unsuccessful application by M to extend caveat M bought subdivided property off D who lived on adjoining lot - both properties were protected by common gate and during negotiations it was decided D would erect new gate to solely protect M's property D built gate but common gate still existed and M had to proceed through two gates to get to their property M argued D's agent ("A") represented to them D would re-site common gate to only restrict entry to D's property A swore affidavit stating M was entitled to rely on his undertaking that gate would be re-sited as he was acting for D M commenced proceedings seeking orders to enforce alleged agreement to vary

right of way easement or to create restrictive covenant - M lodged caveat against title of D's land claiming re-siting of gate was registrable interest M applied to extend caveat on basis evidence provided sufficient basis for an arguable case to preserve caveat until such time as ultimate determination D argued there was no evidence before Court which established an alleged or oral agreement stipulated in caveat.

Held, there is no evidence in A's affidavit to show there was intention to create registrable interest - a representation to re-site gate falls well short of agreement to create registrable interest in nature of either restrictive covenant or variation of current right of way easement Court is satisfied parties did not conclude agreement to vary existing right of way easement or to enter into restrictive covenant application declined.

High Court

- Civil procedure
- Application
- Wills, probate and administration
- Executors and administrators
- Intestacy

Re Renata 5/12/02, Hammond J, HC Napier P424/90

Successful application for discharge or removal of administrators under s 21 Administration Act 1969 - R died intestate in October 1980 - letters of administration of estate of deceased were granted to RG and SG R's assets included certain interests in Maori land and other property interests - estate had only been administrated in relation to one of the property interests a solicitors' firm has made attempts to advance administration via communications with administrators directions of service were given by Court in relation to beneficiaries and administrators - transpired that five beneficiaries were not served and one has since died.

Held, failure of present administrators of estate to advance administration of estate renders them unfit to continue - Court orders removal of existing administrators of R's estate - Court orders appointment of two applicants as administrators - direction made that any new property of which R was beneficially entitled shall be vested in new administrators - orders accordingly.

Court of Appeal

- Trusts
- Object or beneficiary
- Charitable

Trustees of the McElroy Trust v Objectors 20/2/03, CA78/02

Unsuccessful appeal by TMT against denial of application - TMT were trustees of charitable trust which owned farm land that incurred losses - TMT sold land and claimed it was impossible to satisfy

purpose of trust and applied for approval of scheme to vary charitable trust under s 32 Charitable Trusts Act 1957 (CTA) - High Court ("HC") declined to approve scheme proffered by TMT and TMT appealed - TMT submitted deposited income produced by sale would far exceed any annual income trust had made over past four decades TMT argued granting Selwyn Foundation ("SF") three quarters of proceeds instead of one half would make purposes of trust inexpedient as social conditions have changed.

Held, variation of trust cannot be proposed unless it has become impossible to fulfil original charitable purpose - whether TMT have shown in terms of CTA that it is appropriate to re-settle trust in accordance with proposed scheme - granting SF three quarters of proceeds from sale would not make purposes of trust inexpedient as SF provides service that trust was set up to achieve - necessary inexpediency has not been shown and there is no basis to approve proffered scheme - appeal dismissed.

High Court

- Civil procedure
 - Judgments
 - Setting aside
 - Property
 - Real
 - Land settlement
 - Land Transfer Act 1952, ss 97(2), 100, 105, 145
- Barge v Freeport Development Ltd* 11/2/03, Master Faire, HC Auckland CP278/02

Successful application to set aside summary judgment - application to discharge caveat adjourned C was director of property development company FDL and gave powers of attorney to two of her children as she lived in Taiwan - C's daughter ("V") signed an agreement for sale with B for property, and B alleged FDL defaulted under that agreement and sought order for specific performance - summary judgment was entered against C, and she applied to have judgment set aside as she did not attend proceeding C claimed service of proceedings was irregular and she submitted she had an arguable defence that needed to be heard she argued she no longer had equitable interest in property as her shares in FDL had been sold and property had subsequently been transferred - she submitted that V did not have authority to sign agreement - B alleged C had implied actual authority, or ostensible authority, to bind FDL.

Held, service was effected, as notice was served at FDL's registered office and no person indicated to process server that any further steps were required there is document from Registrar General indicating transfer has been presented to him and he intends to act on it if caveat is not sustained FDL has no remaining interest which is able to transfer to B, therefore FDL is not in position to comply with any order for specific performance - since FDL cannot

comply with order for specific performance, summary judgment cannot stand - determination of issues relating to C's alleged ostensible authority involve detailed analysis of disputed facts, and it is inappropriate to dispose of matters in summary judgment format summary judgment must be set aside, as an arguable defence has been made out there are two applications to have caveat discharged; therefore it is appropriate to adjourn application and hear applications together application to set aside summary judgment granted application to discharge caveat adjourned.

Court of Appeal

- Civil procedure
 - Appeals
 - Maori affairs
 - Land
 - Freehold
 - Preferred class of alienee
 - Te Ture Whenua Maori/Maori Land Act 1993 s 88
- Bruce v Edwards* 27/2/03, CA19/02

Unsuccessful application for conditional leave to appeal to judicial Committee of Privy Council - E had land status changed from Maori Freehold to General Land by Maori Land Court ("MLC") and preferred class of alienees ("PCA") then lost first right of refusal - E entered into agreement to sell land to B, however before settlement B discovered members of PCA had lodged caveat against land and were applying to MLC to annul status change - MLC found that there should be rehearing but B sought judicial review of that decision in High Court ("HC") - HC decided MLC should be allowed to consider application to rehear and if it thought fit to hear substantive application to annul change of status - B appealed decision to adjourn specific performance application as they claimed they were bona fide purchasers of value who have relied on change of status to their detriment - PCA submitted property remained ancestral land and if transaction proceeded great injustice would have occurred - Court of Appeal ("CA") allowed appeal by B and E was released from undertaking to not register transfer to B - PCA applied for conditional leave to appeal to judicial Committee of Privy Council as they claimed to have interest in land that needed to be protected PCA claimed CA should use discretionary power to grant leave because of degree of indigenous public interest considerations affecting common law of New Zealand.

Held, rights which PCA are trying to protect are procedural rather than substantive and cannot be given cash value therefore for that reason alone application cannot be brought within scope of legislation there is no issue as to jurisdiction of MLC therefore there is no great general or public importance relating to this case - case is not about indefeasibility but about much narrower question and it is not appropriate to use

discretionary power to grant application application declined.

High Court

- Property
- Real
- Encumbrances
- Caveats

T Braithwaite Timbers Ltd v Madsen 14/2/03, Master Lang, HC Auckland M44-IM03

Successful application that caveat not lapse - M undertook subdivision of land and K owned adjoining land also included in subdivision new lots were to be created using K's land however it was not possible for K to separately order new titles so subdivision could never be completed to point where new titles were issued until lots were owned by same person BTL contended M had always been responsible for organising transfer of K's land BTL refused to settle as it claimed M is not in position to provide transfer of K's property M argued responsibility for obtaining transfer rested with BTL in terms of deed or alternatively that variation of agreement required BTL to obtain transfer M purported to cancel agreement on basis of BTL's refusal to settle purchase of subdivision claiming that he is ready and willing to settle.

Held, whether BTL's caveatable interest was extinguished by notice of cancellation BTL established it was at least arguable that M was required to procure registrable transfer of K's land before he could require BTL to settle purchase - variation of agreement was never accepted by BTL and on that basis any responsibilities under deed remained intact - M was never in position to settle in terms of deed therefore he was not entitled to call upon BTL to complete his part of transaction nor was M entitled to issue notice of cancellation - BTL has established it is entitled to sustain its caveat - application granted.

High Court

- Contract
- Termination
- Repudiation
- Wrongful repudiation
- Property
- Real
- Land settlement

Tapp v Blackmore 14/2/03, Laurenson J, HC Auckland CP37/02

Unsuccessful application for damages for wrongful repudiation of contract - successful counterclaim for damages - T and B entered into contract for purchase of land and T lodged caveat over property T failed to meet many proposed settlement dates and B cancelled contract T claimed he had paid B deposit and sought damages for wrongful repudiation B counterclaimed

and submitted he had incurred losses directly attributable to T's failure to settle.

Held, documentation showed purchase price did not include amount paid to B and expressly stated there was no deposit T's original solicitor admitted that there was no deposit payable and any amount paid was to be exclusive of purchase price - pursuant to Contractual Remedies Act 1979 B is entitled to be returned amount paid to T's solicitor and for other losses incurred due to T's actions T is entitled to judgment in his favour in amount of \$46,254 application for damages for wrongful repudiation declined counterclaim for losses incurred granted.

High Court

- Animals
- Domestic animals
- Property
- Entry
- Civil procedure
- Appeals
- Grounds

Summers v A-G 4/2/03, O'Regan J, HC Whangarei M53/02; AP62/02

Successful appeal against District Court ("DC") decision - MAF seized animals from farm of S because they were apparently malnourished criminal proceedings against S had yet to be heard - agreement was nearly reached between parties regarding return of some animals to S - S applied to DC for return of some stock MAF applied to DC that animals be sold and proceeds applied to MAF's costs looking after them DC Judge declined S's application and granted MAF's application S initiated judicial review and later appeal proceedings against decision.

Held, Judge erred in not taking into account correspondence expressing MAF's view of steps necessary to protect welfare of animals in period up to S's trial - if this had been assessed judge may well have come to a different conclusion great weight judge placed on fact that S did not provide adequate explanation for the period animals became malnourished did not balance rights of S in respect of his property and presumption of innocence against welfare of animals scope of s 136 Animal Welfare Act 1999, which imports s 199 Summary Proceedings Act 1957, is a puzzle - s 199 Summary Proceedings Act 1957 should not be interpreted to authorise substantial interference with property rights of an accused person before their guilt or innocence is determined if it had been intended that MAF could obtain an order for sale of animals and retention of proceeds before criminal trial there would have been an express statutory power - appeal allowed - order made that some animals be returned to S after remedial work taken.

Customs Appeal Authority

- Customs and excise
- Licences

XXX v *Chief Executive of NZ Customs Service*
26/2/03, Judge Barber, Customs Appeal Authority
Wellington 001/2003, CAA06/02

Partly unsuccessful appeal by XXX against decision of NZC - XXX was providing NZC staff with premises at new Marsden Point Wharf NZC made a decision varying XXX's control area licence to effect that it be required to provide and maintain without charge suitable accommodation for NZC issue arose as to whether NZC should pay XXX rent for such premises as governed by s 18(3) Customs and Excise Act 1996 ("CEA") - XXX submitted that offices were not an "operating area" and were not used for processing of craft, persons, or articles as required by CEA XXX submitted that offices were properly chargeable under s 18(2) CEA XXX submitted that NZC's condition

requiring XXX to provide premises at no cost was repugnant to s 18 CEA XXX submitted that variations made to licence of XXX were outside powers of chief executive or Customs generally in that they attempt to override provisions of s 18 CEA NZC submitted that it was entitled to vary licence as it had done - NZC submitted that such a variation did not amount to an alteration of the provision of s 18(3) CEA NZC submitted that its action is recognition of fact that use of Customs' premises is covered by s 18(3) CEA.

Held, whether premises of XXX used by NZC can be charged for is to be determined under s 18 CEA if XXX's licence is invalid, it does not follow that XXX may charge for total area in question it is not for NZC to unilaterally decide dispute in its own favour there are insufficient background facts on which to resolve dispute and further evidence is required matter needs to be progressed at a formal hearing in usual way orders accordingly.

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Residential Cdstin

Waitare Beach, Manawatu October 2002

Contributed by *John Timmer-Arends*, TA Valuation

Construction: 2 bedrooms, 2 bathrooms, lounge, kitchen and hallway. Exposed ceilings of internal grade ply. Treated ply walls with zincalume highlights over doors and windows. Treated timber piles and Coloursteel roof. Aluminium windows.

Areas: 140.9m²

Contract Price: \$109,480 (excl. GST)

Analysis:

Total: 140.9m² \$777m² Modal Rate: \$925 Multiple: 0.84

Notes: Price excludes front steps. Golden Home.

Rangiora, Canterbury Westland Hip Bungalow, August 2002

Contributed by *Denis J Milne*, North Canterbury Valuations

Construction: 4 bedroom, 2 bathroom with integral double garage on a flat site. Construction of concrete floor, BV walls, double galvanized joinery and Monier tile roof.

Areas: 147.90 m²

Net Contract Price: \$137,292 (excl. GST)

Analysis:

Total: 147.90m² Net Modal Rate: \$656.40

Notes: Country build factor 1% of contract price per 10km. The factor from the main centre is 30km and is 4,097. House is constructed by Golden Homes.

North Shore, Christchurch Executive Dwelling, August 2002

Contributed by *Denis J Milne*, North Canterbury Valuations

Construction: 2 storey executive dwelling, 4 bedroom and study with integral double garage on a flat site. Construction of concrete floor, Hebel and Linea exterior cladding with Monier tile roof. Include tiling and 3 WC's.

Areas: 221.27m²

Net Contract Price: \$247,191 (excl. GST)

Analysis:

Total: 221.27m² Net Modal Rate: \$793.26 Notes:

Country build factor 1% of contract price per 6km.

The factor from the main centre is 30km and is 1,410.

House is constructed by Golden Homes.

Southbridge, Canterbury House, October 2002

Contributed by *Bill Patterson*, Canterbury/Westland

Construction: Concrete foundation and floor; brick veneer; Coloursteel tile roof; Coloursteel spouting; aluminium joinery; Gibraltar lining.

Areas: 207.057 m²

Net Contract Price: \$149,689 (excl. GST)

Notes: More detail on some costs and list of materials used in construction available from NZPI head office.

Rangiora, Canterbury Westland December 2002

Contributed by *Denis J Milne*, North Canterbury Valuations

Construction: Basic 3 bedroom single bathroom, hip roofed bungalow with attached double garage having internal entry. BV with Coloursteel roof, lacks any fixed heating.

Areas: 113.68 m²

Net Contract Price: \$105,801 (excl. GST)

Analysis:

Total: 113.68m² Net Modal Rate: \$659.91

Notes: Country build factor 1% of contract price per 10km. The factor from the main centre is 30km and is 4,199 including architect/draughting fees. Built by Versatile Buildings.

Waihi, Waikato August 2002

Contributed by Maria Stables-Page, Jim Glenn Valuers
 Construction: Concrete piles, fibrolite exterior cladding, Dutch gable iron roof. Open plan kitchen/living area, 2 bedrooms, 1 bathroom, separate WC, laundry and hall.
 Areas: 82m2
 Contract Price: \$81,334 (excl. GST)
 Analysis:
 Dwelling: 82m2 \$933.34/m2 Modal Rate: \$925
 Multiple: 1.01
 Deck: 3.6m2/180/m2
 Notes: Keith Hay Homes. The Buchan (Classic) design. Contract price excludes carpet and vinyl.

Ngatea, Hauraki Plains May 2002

Contributed by Maria Stables-Page, Jim Glenn Valuers
 Construction: Concrete pad to brick veneer exterior cladding, multi hip Monier tile roof. Open plan kitchen/dining area, family room, formal lounge, 4 bedrooms, bathroom, ensuite, hall and garage.
 Areas: Living 163.2m2
 Garage 43.8m2
 Contract Price: \$155,480 (excl. GST)
 Analysis:
 Total: 207m2/ 845m2 Modal Rate: \$925 Multiple: 0.81
 Notes: A Golden Home Danya. Above average quality kitchen, two ranch sliders, lounge and dining area have bay window style walls. Automatic garage door with 2 remotes.

Kerepehi, Hauraki Plains November 2002

Contributed by Maria Stables-Page, Jim Glenn Valuers
 Construction: Concrete pad to brick Coloursteel weather board pre-painted Superclad 300 exterior cladding and a split gable pre-painted 6 rib galvanized iron roof. Open plan kitchen/living area, laundry/bathroom, 2 bedrooms and additional living area.
 Areas: Dwelling 56.2m2
 Verandah 5.4m2
 Contract Price: \$53,600 (excl. GST)
 Analysis:
 Dwelling: 56.2m2/ 957m2 Modal Rate: \$925 Multiple: 1.03
 Notes: Riverside Versatile Cottage. No interior painting in price.

Ashley, Canterbury Westland Ranch Style Hip Bungalow, December 2002

Contributed by Denis J Milne, North Canterbury Valuations
 Construction: 4 bedroom, 2 bathroom bungalow with integral double garage on a small rural residential block. Well-appointed dwelling of BV walls and C/S roof.
 Areas: 190.38 m2
 Contract Price: \$208,225 (excl. GST)
 Analysis:
 Total: 190.38m2 Net Modal Rate: \$733.74
 Notes: Included in the contract price is the country build factor 1% of contract price per 10km which is 6,597 and the architect/draughting fees are 1,833.

Belfast, Canterbury Westland Hip Roof Bungalow, November 2002

Contributed by Denis J Milne, North Canterbury Valuations
 Construction: 4 bedroom, 2 bathroom with integral double garage on a level site. Concrete floor, brick veneer cladding and concrete tile roof.
 Areas: Total 147.91 m2
 Contract Price: \$148,058 (excl. GST)
 Analysis:
 Total: 147.91m2 Net Modal Rate: \$708.53
 Notes: Included in the contract price is the country build factor 1% of contract price per 10km which is 1,650 and the architect/draughting fees are 2,750. Built by Jennian Homes. Standard plan by Group builder with gas heating, as appliances 5,500 kitchen.

Rangiora, Canterbury Westland December 2002

Contributed by Denis J Milne, North Canterbury Valuations
 Construction: Superior 4 bedroom dual serviced hip bungalow with integral double garage situated on a farmlet. Brick veneer walls with corona shakes roof.
 Areas: 238.9 m2
 Contract Price: \$241,482 (excl. GST)
 Analysis:
 Total: 238.9m2 Net Modal Rate: \$704.98
 Notes: Included in the contract price is the country build factor 1% of contract price per 10km which is 6,855 and the architect/draughting fees are 4,570. Costs include septic tank. Private builder.

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