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new zealand property JOURNAL

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MR

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INSTITUTE

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NZ Property Institute benefits

The New Zealand Property Institute was launched in 2000 to take the profession into the 21st century. This followed overwhelming support for a new organisation by members of the New Zealand Institute of Valuers (NZIV), the Institute of Plant & Machinery Valuers (IPMV), and the Property & Land Economy Institute of New Zealand (PLEINZ).

The Institute has a membership of 3000 key property professionals, who provide services in a number of property related areas involving people, places and spaces. These include; property management, property consultancy, property development, property valuation (rural, residential, commercial and industrial), facilities management, plant and machinery valuation, financial analysis, real estate sales and leasing, project management, and others.

The Institute has 17 branches across provincial and metropolitan New Zealand, a number of overseas members, and is affiliated to a number of other international property organisations.

The Institute's business plan has 3 key goals:

- To become the first choice pre-emenent organisation for property professionals to belong in New Zealand;
- To lead and influence the New Zealand property sector and its environment;
- To provide professional support of members to enhance public confidence in the profession.

The Institute promotes a code of ethical conduct and provides a range of membership services and benefits.

The Institute provides a range of products, services and benefits including:

- The Property Business - published bimonthly in partnership with AGM Publishing, this is the Institute's lfagship publication, which has established itself as the leading property publication in New Zealand.
- JOBMail a weekly email service to all members advertising jobs available in the sector, these job vacancies (and positions sought) are also put on the Institute's website: www.property.org.nz.
- Property Registration an added status conferred by the NZ Property Institute Registration Board in the streams of Plant and Machinery Valuation, Property Consultancy, Property Management, and Facilities Management. The Valuers Registration Board registers property Valuers.
- Property Standards - sets standards of practice in New Zealand, and is developing Australasian-wide standards. In addition, the Institute has had considerable input into the development of International Valuation Standards.
- Code of Ethics and discipline- has a code and Rules of Conduct, which are enforced by a professional practice committee to ensure that the public are served ethically and have some measure of protection.
- Education- enhancing the quality and skills of the profession through initiatives such as the provision of textbooks, accreditation of university courses, provision of professional certificates, education seminars, audio conference and events.
- Membership Benefits package- all institute members are automatically entitled to a number of discounts off the Institute's affiliates products and services. For example 30% subscription discount to the award winning Unlimited Magazine, office supplies, accommodation average savings have been estimated at over $15,000 across a range of products. For further information, please visit: wwwpropertyorg.nz.
- NZ Property Institute Awards - the Institute promotes professionalism and recognises excellence by providing national, internal and tertiary studies awards to key individuals who contribute to the industry, profession and Institute.
- Property Network - the network of 17 branches across the country, and one in London. This provides a local focus point for Institute networking, educational activities and social functions such as the Property Ball, golf days, BBQ's and Christmas functions.
- International relationships- the Institute has a number of reciprocity arrangements with other countries that have regulated professional marketplaces, allowing some NZ members to practice overseas more easily In addition, the Institute has an MOU with the Australian Property Institute, an agreement with IFMA (International Facility Management Association), is represented on other international bodies such as IVSC (International Valuation Standards Committee), WAVO (World Association of Valuation Organisations), PanPac (Pan Pacific Congress of Real Estate, Appraisers, Valuers and Counsellors) PRRES (Pacific Rim Real Estate Society), and has a number of other international relationships.
- NZ Property Institute Confidence Index measures confidence and other key indicators in the property sector.
- Career Foundations - a key package, which provides additional support, targeted at university students and graduates needs.
- Schools project - established in 2003 to promote the Institute, profession and universities offering the Property Degree, to youth (specifically school leavers) throughout New Zealand. Initiatives include visitations by local members to secondary schools, distribution of promotional material to schools, and other communications.
- Property Publishing includes discounted textbooks for student members, the `Property Journal', NZ Property Institute's Statscom, and other publications.
- Library Services the Institute has an extensive range of publications on all aspects of the property profession available to members, who are welcome to request information.
- Property Card- given to all Institute members, and gives entry to Institute events at discounted prices. It can also be used as a form of identification/verification of membership with the NZ Property Institute, when accessing the institute's affiliates products and services at discounted rates.
- www. property.org.nz the Institute's website provides information on the Institute and its members, such as `branch events', `find a registered member' and on line publications. Information about the products and services identified above, as well as additional products launched by the Institute, can be also found on the site. The site continues to be developed further.
- Other NZ Property Institute products and services: the Institute is also looking at partnering with other organisations to bring more benefits to members and these will be announced as they are progressively launched.

To become a New Zealand Property Institute member: There are eight levels of membership that recognise professionalism and achievement - Student, Graduate, Affiliate, Associate, Full Member, Senior Member, Fellow and Life Member. Not everyone is able to become a New Zealand Property Institute member. To check out how you can become a member either contact us, go to our website for more information, or contact Mike Clark, chairman of the PI membership committee at mac@seagars.co.nz

Submitting articles to the New Zealand Property Institute Property Journal

Notes for Submitted Works

Each article considered for publication will be judged upon its worth to the membership and profession. The Editor reserves the right to accept, modify or decline any article. Any manuscript may be assigned anonymously for review by one or more referees. Views expressed by the editor and contributors are not necessarily endorsed by PI.

Deadline for contributions is not later than January 10, May 10 and September 10 of each year.

Format for Contributions

All manuscripts for publishing are to be submitted in hard copy - typed double-spaced on one side only of A4 sized paper and also in Microsoft Word document format on IBM compatible 3.5" disk or alternatively emailed to head office.

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.

Articles and correspondence for the PI Property Journal may be submitted to the editor at the following address: The Editor, PI Property Journal, PO Box 27-340, Wellington.

NEW ZEALAND
property
INSTITUTE

Why become a member of the New Zealand Property Institute?

NZ Property Institute'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 wwwproperty.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

For more information on our services to members contact the P1 National Office:

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New Zealand • Telephone 64-4-384 7094 • Fax 64-4-384 8473
www.propertyorg.nz • Email: conor@propertyorg.nz

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EDITORIAL

While the economy, driven by property, continues to perform well through 2004, we can not overlook the longer term challenges that need to be addressed professionally and physically.

Our population as of June 2004 was estimated to be 4.061 million living in 1.44million households

We use a total of 653 litres of water a day per capita. We have a total of 91800 km of roads (year 2000) and an ever-increasing demand for energy. As of March 2003 we had a generating capacity of 8413MW and the Ministry of Energy predicts that we will have to increase this by 150MW a year to keep up with projected growth levels. These figure present challenges which must be faced.

Security in property is good whether you own it, rent it, want it, or trade in it. This security in property is often taken for granted. It requires strong infrastructure to supply property with its needs. There has been a lack of direction in the implementation of our infrastructure needs, which has resulted in uncertainty and dysfunction. Infrastructure is an economic and a social good that is essential to not only the smooth running of our economy but the smooth running of our lives as well. Failure to keep up our infrastructure will impact directly on property and property professionals.

As property professionals we need to keep an eye on the bigger picture.

To this end we had 560 registered for our Queenstown conference. 670 enjoyed the southern musters dinner and awards. 37 speakers covered a range of topics that both stretch minds and gave specific tools to solve problems.

I hope you enjoy this edition and please do not hesitate to give your feedback, or indeed your contributions.

Kind regards

Conor English

Life Citation Stephen Allan Ford, FNZPI, FNZIV

Like many of his contemporaries Allan attended Lincoln College, gaining a Diploma in Agriculture, followed by a Diploma in Valuation and Farm Management.

Allan has been a member of NZIV since 1974. He was advanced to Associate status in 1977 and to Fellowship in 1996. A number of property graduates have benefited from the experience of working with and being trained by Allan.

Throughout this time Allan played an active role within the NZIV. He served on the Rotorua/Bay of Plenty and Waikato Branch Committees between 1982 and 1992, then was elected as Waikato Branch Councillor to the NZIV Council in 1992. Over the next 6 years he served on Council rising to become Senior Vice President of NZIV in 1998.

Following his successful vote to establish a new Property Institute comprising members of NZIV and PLEINZ in 1999 Allan formed part of the four person working party to negotiate, facilitate and manage the establishment of the New Zealand Property Institute (PI). He then served as the inaugural President of the Establishment Board of the New Zealand Property Institue for the first 18 months. During this period Allan invested a significant amount of his time and energy in setting in place a structure under which the new Institute would operate.

Allan was subsequently appointed Chief New Zealand delegate, host delegate and Chairman of the Board at the Pan Pacific Conference of Real Estate Valuers and Councillors in Auckland in April 2000.

Since departing the role of PI President in 2001, Allan has chaired the PI International Committee, attended many meetings overseas and was a member of the Inaugural Board of WAVO (World Association of Valuation Organisations). He is highly respected for his views on international relationships and has served New Zealand interests with energy and integrity in this area. Allan has presented papers at several conferences.

Outside of his property career Allan has been fully involved with his community. He has been a member of Waikato Sunrise Rotary since 1984, past Chair of the Board of Trustees for Hamilton West Primary School and has taken a keen interest in sports such as sailing, rugby, fishing and cycling. Allan once confided in me that he enjoyed arbitrations because it was the closest he got these days to playing rugby

Allan is married to Debbie and they have four daughters, all of whom I have had the pleasure of meeting.

Allan has been actively involved in the governance of the profession over a 15 year period which continues up to this day. He has had a strong effect on the valuation profession and the momentum for change to the PI. The Board of the New Zealand Property Institute are unanimous in their support of Allan's Award of Life Membership.

Life Citation Anthony John Robertson FNZPI

Anthony's property career commenced following a stint at Lincoln College and his career in Corporate Real Estate, a field in which he is still involved in, began in 1988.

During the late eighties Anthony's institute involvement also began and in 1991 he became branch chairman of the Canterbury Branch holding the post until relocation to Auckland.

In 1994 Anthony was elected onto the National Council of PLEINZ and his direct 'action orientated' style was very influential in the delivery of benefits and services to PLEINZ members.

Under PLEINZ Presidency of Greg Wright and now based in Wellington, Anthony was a fundamental player in the merger discussions of 1999 between PLEINZ, NZIV and the Institute of Plant & Machinery Valuers.

Following a successful merger vote, Anthony's name was top of the list within PLEINZ circles to take PLEINZ forward into the newly formed New Zealand Property Institute (PI).

It is for his work at that time in 1999/2000 that this Institute owes Anthony Robertson an enduring debt of gratitude.

Despite a sweeping majority vote in favour of the merger, Anthony and Board Members of the time found the environment far from convivial and tremendous leadership, drive and focus was required - all qualities Anthony thankfully possessed in spades.

His determination and unerring desire to deliver on the mandate of the members at the time remains fundamental to the award of Life Membership to Anthony.

Anthony was elected as President of the New Zealand Property Institute for the 02 and 03 years a term that will always remain critical, as we look back from our position of success in the future.

Few members can boast of having achieved the quality and quantum of effort Anthony has provided for the institute over such a prolonged period.

Anthony's role within Telco Asset Management Limited sees him now based permanently from their Sydney Office but equally we see no better candidate for the fostering and promotion of trans Tasman relations with API.

The board of the New Zealand Property Institute are unanimous in their support of Anthony's Life Membership.

Update to Members on decisions made at the AGMs in Queenstown

(Please refer to the AGM documentation that was posted to all members prior to the AGMs for more background information to these resolutions if you require it).

NZ Property Institute AGM

Four Resolutions were put to the meeting from the PI Board following work and input from the National Membership and Education committees and PI Registration Board.

Resolutions 1, 2 & 3

- Amended definition of "Voting Members"
- Change to existing Rule 11 - Change to Membership Structure
- Amend rule 13.10 with reference to `Members' to be `voting members'

These proposed constitutional rule changes were to implement an amended "membership pipeline" with Affiliate, Graduate and Associate memberships being removed and replaced with a new category of "Intermediate" which had no post nominal or voting rights. Existing Associate (ANZPI) members were to be become Members and retain voting rights. No changes at all were proposed for Registered Valuers and ANZIV was to be retained. Entry criteria for membership were not affected by this resolution.

Resolutions 1, 2 & 3 were related and were therefore voted on at the same time.

The resolution did not achieve the 70% majority support required of those who voted. Therefore the resolution was lost.

The Board is now looking at how it will progress this issue forward.

Resolution 4

- New Code of Ethics

The new Code of Ethics & Rules of Conduct is to align both PI and IV Codes of Ethics and to bring the new Code further in line with the Australian Property Institute Code of Ethics. A similar resolution was put to the IV AGM (see below). By having one document for all members, it clarifies for the members and the public the Code of Ethics that our members operate under. This removes confusion and enables the disciplinary process to operate more smoothly.

The resolution was passed

NZ Institute of Valuers AGM

Two resolutions were put to the AGM from the IV Council following additional input from the PI National Standards Board.

Resolution 1

- New Code of Ethics

A Memorandum of Understanding (MOU) was signed with the Australian Property Institute (API) at the May 2001 AGM. The outcomes sought from this MOU were to align the Codes of Ethics, and other structures of the two Tran Tasman Institutes, so that there was commonality across both Australia and New Zealand.

Further, PI now delivers services for valuer members of the property profession through the Service Level Agreement with IV While the Valuers Act remains, valuer members find themselves in a position of being bound by a Code of Ethics under the IV and Code of Ethics and Rules of Conduct under PI, effectively two different `Codes of Ethics'. This creates confusion for members.

This resolution is designed to remove the confusion that exists by creating one Code of Ethics that applies to all members of both New Zealand Institutes. Essentially it sees IV adopting the current PI Code of Ethics and Rules of Conduct under the one heading of Code of Ethics (comprising a Public Statement and Rules of Conduct) with some variations to takeaccount of the-existence Gf- he-Valuers Act and cornerstone provisions in the current IV Code of Ethics.

This resolution assists in achieving the above.

Another outcome of these changes is to make the Practice Standards of the IV mandatory, thus aligning the status of the IV standards with that of the PI and API.

The resolution was passed

For IV members, the new Code of Ethics is currently with the Minister awaiting his legal sign off that this be adopted. A copy will be emailed soon.

Resolution 2

- Mandatory Practice Standards

Practice Standards in PP 2004 have mandatory status for PI and API members. These three Practice Standards currently have `recommended good practice' status for IV members. The resolution is to implement mandatory Practice Standards for IV members and thus aligns the status of Practice Standards for IV and PI members.

The PI Valuation and Property Standards Board which is tasked with the `Development and Maintenance of Professional Standards' on behalf of IV, has recommended that Practice Standards become mandatory for IV members. This recommendation has been endorsed by IV Council and the PI Board.

The resolution was passed

The impact of the resolution will see little practical change for valuers who use current standards especially as over ninety percent of IV valuer members also belong to the PI.

NZ Institute of Valuers EGM

An EGM was held and a Special Resolution put following a motion for this to happen from a member of the Institute, supported by over 20 other members, as is required by the IV rules. Following legal advice the IV Council conducted an EGM and the resolution was put. This was not a Property Institute Board resolution, but one put forward by a member of the NZIV membership.

Resolution 1

- Proposal from Life Member Rodney Jefferies to `forthwith wind up the NZIV'

The resolution was lost

Once issues pertaining to this `no-vote' are resolved and in accordance with the objectives of the NZIV Council and the rules a resolution to initiate winding up will still need to be put to members so that the NZIV can be dissolved in due course.

NEW ZEALAND PROPERTY AWARDS 2004

TONY SEWELL AWARDED PREMIER PROPERTY INSTITUTE PROPERTY AWARD

Property Institute Industry award

The New Zealand Property Institute Property Industry Award recognises the individual who in a public or private capacity has demonstrated the qualities of leadership and vision an/or positively impacted on the property sector; economy and/or community.

Mr Sewell has been recognised for his achievements in his position as General Manager of the Ngai Tahu Property Group Limited. Mr Sewell has been responsible for the establishment and growth of the company as well as playing a significant role in the negotiation of the Ngai Tahu Claim Settlement. The Company now has total assets of $200m and is involved in Property Investment and Development throughout New Zealand. Tony Sewell has worked in both Property Development and Consultancy and was Landcorps National Operations manager before taking up his current position at Ngai Tahu Property Group Limited.

NZ Property Institute Academic Award

Other awards on the night included The New Zealand Property Institute Academic Award that is awarded to an academic who has made a major contribution to the property sector by demonstrating exceptional research or teaching performance in the field of property This year's recipient was Professor Robert Hargreaves who received the award for his ongoing work as Professor of Finance Banking and Property at Massey University

NZ Property Institute Journalism Award

The New Zealand Property Institute Journalism Award is awarded to recognise excellence based on the relevance to the advancement of the property industry; and/or research into the property industry; and/or analysis and reporting of the property industry. This year's recipient was Ann-Marie Johnson of The Dominion Post.

NZ Young Property Professional Award

The New Zealand Young Property Professional Award is awarded to recognise excellence displayed by a young professional in the property industry This year the recipient was Campbell Stewart from CB Richard Ellis in Auckland.

Property Institute CEO, Conor English said today "We need some tall poppyies. We need to recognize those who have distinguished themselves from their peers and who are providing leadership and inspiration to our sector. These winners do that." Mr English concluded.

NEW ZEALAND PROPERTY INSTITUTE FELLOWSHIPS

The New Zealand Property Institute also awarded fellowships to the following members:

Leone Freeman, Rob McNabb, John Cameron, Patrick Fontein (Auckland Branch), Hamish McKegg, Doug Saunders, Keith Williams, (Waikato Branch), Peter Jenks (Rotorua/Taupo Branch), Gerard Logan (Hawker Bay Branch), Frank Hutchins (Taranaki Branch), Chris Leahy (Manawatu Branch), Richard Chung, Milton Bevin, Mike Horsley, (Wellington Branch), John Trueman, Blue Hancock (Nelson/Marlborough Branch), John Church, Chris Stanley (Canterbury Branch), John Aldis, David Paterson, Ah-lek Tay (Otago Branch)

Trends and Challenges in Corporate Real Estate

ARTICLE PUBLISHED IN THE PACIFIC RIM PROPERTY RESEARCH JOURNAL

ABSTRACT

We provide an insight into the current and future role of CRE managers. Typical roles and responsibilities of CRE managers are described with a focus on the key-defining characteristic of CRE: It is the link point between the organisation and the property industry.

The challenges of managing conflicting demands between different parts of the organisation are explored in some detail. We give our views on the current challenges for CRE managers. These focus on getting senior managers to listen and communicate goals and strategies.

The development of sound business strategies, effective teams and project delivery performance are key to successful CRE.

We reveal our finding that competence in the property arena is no more than a pre-requisite for the CRE role. We develop the premise that an exceptional CRE manager must also understand their organisation and possess excellent leadership, management and communication skills.

We conclude that the focus of advisers and academics should be on helping CRE managers extend their reach and capabilities in organisational management. The most effective way that academics can assist CRE managers may be the transfer of leading business and strategic thought into the CRE environment.

Keywords: Corporate real estate, property strategy, CRE training

INTRODUCTION

Since 1990, Dow CRE has acted for in excess of 50 major public and private sector organisations. In this period, we reconfigured some of the largest portfolios in New Zealand and led a number of property industry initiatives. We are the only property consultant in New Zealand, and possibly Australia, that is exclusively focused on the end user of the property resource.

In addition to property advice, we coach and guide many corporate real estate managers and their teams. This gives as a unique point of view in the industry as we work alongside the CRE managers and can see the challenges they face on both a day-to-day and long-term basis.

Our coaching and training used to be primarily focused on property issues but, in the last five years, we have changed the focus to the broader corporate issues and the interface with the organisation.

Figure 1.

CRE is the link between the organisation and the property market. The linkage aspect is the key defining characteristic of the CRE function. The challenges being faced by CRE managers are in two broad areas:

- Understanding and guiding the organisation;
- Improving performance within the CRE function

A third area is that of working with the property industry This is of less universal interest in the CRE field as many CRE managers have specialist property skills and experience.

The implications of these challenges extend to the support industries of consultants, educators and researchers.

WHAT IS CRE?

At the simplest level, CRE is about providing optimal working environments at the most economic cost.

To further develop this, the key words are discussed below:

- "Optimal" is measured against the goals and needs of the organisation. We will cover in some detail later, the ways and means to identify the corporate goals and to optimise the various characteristics that working environments have.

- For many organisations the "working environment" is the office. Technology is, of course, liberating work and workers from the traditional office workplace but the office is still the locality where most business activity takes place.

  The same principles apply for specialist working environment such as health, education, correctional facilities, industrial and retail.
- The "most economic cost" is a generally assumed target for all organisations. Defining economic cost will be an interesting challenge as the implications of obsolescence become more significant.

CRE, or the provision of working environments, has been around for as long as people have engaged in commerce. However, it was not until the early 1990s that the term CRE came into general use. The main driver of increased focus on CRE was the fact that technology developed to the point where organisations could choose their location.

This freedom of choice enabled a whole range of real estate options to be used or considered in an attempt to gain competitive advantage. At the same time, organisations started to focus on human capital and search for new ways to recruit, motivate and retain key staff.

The CRE role evolved from a reactive and mechanical process to one of providing working environments in a way that stimulates the organisation to achieve success.

Figure 2 sets out the diversity of responsibilities that a CRE manager must oversee. The increase in sophistication and management input is driven by many concurrent trends. The most noticeable is the impact of technology and the way in which business is being transacted.

The issues, challenges and goals of CRE are similar to that of human resources and IT. What is different is the long-term nature of real estate assets. This requires an even greater emphasis on business and general trends in so far as they could affect the location, size and nature of the physical working environment.

Historically CRE managers did not realise how critical the organisational and corporate aspects were and accordingly focused on property issues, losing sight of the big picture. Similarly, a history of poor performance focus and reporting of property matters meant that many organisations had little visibility on the costs and risks involved in real estate. The IDRC (now CoreNet Global) developed a model of CRE competency as a step diagram to guide the growing competency of CRE managers (Figure 3). CRE is a property/ real estate function as well as a management function.

Figure 2.
CRE Responsibilities

The CRE functions satisfy the organisation's need for a working environment. This requires a range of abilities and skills. Changing technology and increased focus on people has required CRE managers to develop new approaches or competencies. These can be viewed as critical to the new role of CRE managers as the link between the organisation and the property industry.

WHY IS CRE SIGNIFICANT?

The CRE management function is synonymous with the provision and management of the CRE assets. The function shares the role with similar roles or "professions" such as facility managers, strategic asset managers and property managers. CRE is, by definition, a high level view of the corporate need and the provision of real estate to meet that need.

An organisation's property assets typically comprise a third or more of the total assets of the organisation. Real estate costs are generally the second or third highest cost to the organisation behind HR costs and are often at a similar level to IT costs.

The CRE strategy can be a litmus test of the organisation's overall strategy, long-term financial strategy, HR strategy and IT strategy. The absence of timely and practical strategies in these areas is why many organisations make poor property decisions.

CRE is significant to the commercial property industry. Skilled CRE managers can provide developers with specific details on the performance requirements to specify clearly the most useful building. This marketing role is important to develop an industry with more focus on the end user of the real estate in place of the historic emphasis on the investment purchaser.

Figure 3.
CRE Responsibilities

Working Environments, Why Are They Important?

The workplace is a pivotal part of any business. It provides a physical platform for people, technology and process. The nature and "feel" of the workplace helps shape attitudes, culture, brand and self-image.

The greatest impact of premises is on the way that people communicate, collaborate and create. Procuring environments that enhance productivity, retention and recruitment is an increasing element of the CRE function.

Active management of real estate assets is important, as adjustments will always be required to keep the working environment "optimal".

The way we all approach work is changing and accordingly, we need to adapt the working environments we provide in order to suit the new styles of work. Technology has now developed to a point where the location of work can be completely lfexible. Despite the technological advances, the office is still, however, the focal point of activity We conclude that this is driven by the social nature of work. New technology is manifesting itself in subtle changes in the nature of work and the type of worker now occupying a workstation. The knowledge worker is replacing the clerical support staff.

The workplace is more important than ever. A recent study in the UK identified that, of jobseekers actively looking for work, 90% would not confirm an appointment until they had seen the working environment'.

The human resources and IT areas have been subject to close scrutiny in the past. The strategic HRM movement started in the 1980s and the ongoing improvement and penetration of IT systems and tools are impossible to ignore. However, CRE is an area that has yet to be subjected to close scrutiny.

'Survey organised by Regus, Britain at work

Figure 4.

We developed the four cornerstones as a comprehensive framework for CRE performance. All of the cornerstones must be in place in order to effectively manage corporate real estate.

Policy is the "glue" which binds the management cornerstones together.

The principles are applicable to any management function.

Our experience is that the majority of management problems within CRE arise from poor definition in the roles and accountabilities area.

We find that organisations are increasingly focusing on the working environment as a differentiating factor. For example, the critical key success factor for major legal practices is to attract the best talent from universities. One of the most direct ways to improve the appeal is to create an impressive working environment.

The working environment can be configured to encourage teamwork, communication within the organisation and creativity. There appears to be agreement from designers and architects and managers that the working environment has an impact on these factors.

The conclusion is not so clear for productivity Many attempts have been made to prove that premises have a significant impact on productivity. The way in which a working environment impacts on an individual's productivity is difficult to quantify and as a result, there is little conclusive evidence.

A UK funded study produced a guide in 1999 called Improving Office Productivity.2 This identified more than 40 separate studies on aspects of the workplace and productivity These focus on the environmental aspects such as light intensity, temperature and it does appear that the working environment characteristics meet or satisfy lower order needs of, for example, Maslow's hierarchy In this way, it can be seen that if a comfort factor is missing (i.e. an office worker feels uncomfortably cold), performance will be impaired. Once a working environment is problem-free, it is difficult to attribute further performance improvements to the physical environment.

2Improving Office Productivity, Oseland and Bartlett, 1999

3Barbara Prashnig, The Power of Diversity

We know from our involvement with quantitative analysis of working style preferences for clients that individuals have a diversity of preferences in terms of temperature, acoustics and lighting. This diversity contradicts the notion that an optimum exists to increase productivity for all. The Working Style Analysis3 developed by Barbara Prashnig is a breakthrough tool to ascertain each individual's optimum environment. This may drive a new trend toward mass customisation of working environments, in contrast to current best practice which focuses on standardisation.

CHALLENGES FOR CRE MANAGERS

The pressures on CRE managers come from three areas:

1. The Organisation

Within any organisation there is always a conflict between the agendas and specific objectives of the various functions in the organisation. Quality, time and money are often traded. Often the CRE manager must have to resolve these conflicts and encourage individuals to recognise the implications of CRE decision making/ planning in a broader context.

The typical corporate challenges include:

- Increasing rate of change
- Increasing expectations of shareholders and stakeholders
- Increasing focus on performance/measurement/ quality
- Increasing outsourcing of CRE - increasing the need for better definition and clarity on future plans for real estate requirements
- Increasing requirements for probity, clarity, transparency/visibility of property transactions from managers and regulators

A typical trade-off diagram for a property project is:

"Quality" covers many aspects such as future flexibility, image congruency, location and building style/ features.

2. The CRE Function

The CRE manager is focused on timely and cost efficient delivery of effective working/ operating environments. To achieve this requires competent and efficient application of general business skills such as HR management, motivation and presentation. The effectiveness of the CRE manager will increasingly be subjected to more rigorous performance measurement and reporting, often without any recognition of the complexity of many real estate issues.

3. The Property Industry

Property markets tend to be dominated by investment based thinking. The CRE manager is at the end of the property investment process. The organisation wants to maximise the business benefit from occupying space while minimising cost and risk. These goals are generally in total conflict with the property owner's objectives.

The CRE manager is constantly pushing against the flow of the property market.

The property related professions often do not communicate using the same language and terminology as the occupier of the space. Therefore, the CRE manager must constantly act as an interpreter between these groups. Even terms as fundamental as lfoor area are interpreted differently by different parts of the property industry.

These challenges are discussed in more detail on the following pages.

CHALLENGE 1

Understanding the Corporate Strategy

One of the major concerns that we observe is the listening ability of those involved with the CRE function.

Organisations must reshape themselves increasingly rapidly in response to economic conditions and market trends. This contrasts with real-estate assets that are generally less agile.

"Given that a key success in business is to set the best objectives and achieve them efficiently, this should also be the aim of the corporate real estate manager"4

In order to set objectives, CRE managers must have access to the latest and most up-to-date information on the strategies and objectives for the organisation as a whole. Often this information is not readily available as the very latest ideas and possibilities do not find their way into formal documentation for some time.

Corporate goals can conflict with the CRE manager's objectives. One large telecommunications company we are familiar with recently sold their entire property portfolio and leased it back. Rather than this being a strategy to improve the portfolio or change working environments, it was simply to raise cash for a debt-laden corporate.

The most successful CRE managers understand exactly where the organisation is going, when, why and how. With full information on objectives, strategies and timing the CRE manager can then plan and manage the real estate portfolio to best support the organisation.

Many of our clients are public-sector organisations.

The drivers of their business are quite considerably influenced by the politics of the day. Accordingly, many of these organisations are unable to plan with certainty on a long-term basis. This presents special challenges for a CRE manager as no one in the organisation will confirm or project staff numbers even one year ahead.

The need for flexibility in terms of planning processes, layouts and the way that deals are constructed is now as fundamental as reaching agreement on size, quality, rental and terms and conditions of transactions.

4Real Estate in Corporate Strategy, Marion Weatherhead

5A Waste of Space, by Roger Bootle, May 200

6Johnson Controls CRE business survey 2002

CHALLENGE 2

Getting the Organisation to Listen

Real Estate is often ignored at board level. A recent research project in the UK found that 25% of UK blue chip companies had not discussed property at board level for 3 years.5

A real estate strategy and sound information on real estate considerations should form a base for decisions to be made on real estate. However, communication from the CRE professionals to senior management is not often abundant. The recent Johnson Controls survey6 asked respondents to agree that "Real estate information is regularly reported-to corporate executives." The response was 3.2 on a scale from 1 - strongly disagree, through 3 - not sure, to 5 - strongly agree. The implication is that information is passed to corporate executives less than half the time. Clearly this is an area where the corporate real estate industry needs to improve.

If the real estate strategy is not communicated to senior management, the organisation's options can be restricted. One example is a large organisation we are familiar with which allowed too little time prior to a lease end date before making a decision on whether or not to stay The CRE manager tried to tell senior management that a decision was required but the message did not get through. In the end, the organisation renewed its lease at close to the market rental. However, the important aspect that had been missed is that the organisation had to forego an opportunity to change. The CRE manager lost the opportunity to make a positive difference to the organisation.

Despite the difficulty of getting senior management to listen, it is our view that the CRE manager is responsible for developing and implementing a strategy to ensure that they are heard.

In another example, the CRE manager for an educational institution found that the management board was constantly making decisions that impacted on real estate without any reference to him. The consequence of these decisions, in the absence of full knowledge, was that additional costs were incurred.

Further, the ability to develop and implement a cohesive property strategy was thwarted. In order to be heard, the CRE manager had to threaten to leave unless he obtained access to the management board to advise on real estate issues. When access was obtained, the CRE manager did make a clear difference to the organisation, providing timely advice on real estate impacts.

We are not suggesting that every CRE manager needs to threaten to resign but it is an indication of the level of assertiveness that may be required to change the behaviour of senior management.

Performance management, regular reporting, developing a track record and building trust are the ingredients required to communicate with senior management.

CHALLENGE 3

Organisation Fit

There are two related issues. The first is the seniority and reporting level of the CRE manager. The second is the structure of the organisation and the CRE function e.g. centralised, decentralised or functional arrangement.

1. Reporting level

The "right" reporting level reflects two things:

1. The critical nature/ importance to the organisation of property.
2. The ability of the CRE manager to participate at senior level.

Examples of organisations with different levels of `critical' impact of property include:

- Correctional institutions - real estate is fundamental to achieving outputs.
- Healthcare - real estate influences most aspects of organisational activity.
- Software development real estate requirements are non critical.

Many organisations have a low opinion of the importance of property. Real estate managers rarely have a seat on the board or membership of the senior management team.

Typically, the CRE manager reports to the CFO, Corporate Services Manager or occasionally the HR Manager. The most senior property specialist in most organisations is generally the person responsible for management of day-to-day real estate matters. This may mean that strategic development and contribution to the organisation in terms of workstyle trends and broader initiatives is neither expected nor encouraged.

The CRE function can fit into an organisation in many ways. The most impact and influence is gained when the real estate manager is part of the senior management team. However, the CRE manager must have the understanding, experience and knowledge to contribute to the management of the organisation.

2. Configuration

The configuration of the CRE function is a similar issue. The decentralised structure is disappearing in favour of central corporate real estate teams. Technology, the growth in competence of national service providers and the adoption of company-wide policies and standards are making a compelling case for centralising and making best use of the limited availability of experience and expertise in the corporate real estate function.

In decentralised structures, it is difficult to get the region or subsidiary to appreciate the-importance of adopting mature corporate real estate strategies. There are significant risks involved when inexperienced people deal with real estate. Problems arise when real

estate is managed and treated in different ways across a state or country There is not only an increased risk of technical incompetence but also a high probability of ad hoc reactive solutions driven by local managers reinventing the wheel.

Whilst there is no right answer and every organisation has a slightly different structure, it appears that a centralised CRE management structure is preferred. The challenge for most CRE managers is to:

- Centralise to build critical mass and expertise.
- Report to the highest possible level in the organisation.

CHALLENGE 4

Developing Diverse Skills

Some years ago, we worked with a number of property managers, who were relatively new to the role. We produced the diagram below to give them and their superiors an appreciation of the complexity of their role. In many cases no more than a familiarity is required but, at the very least, the CRE manager must be aware of any potential pitfalls or dangers in every field.

In addition to having a level of competence with the full range, the CRE manager must be aware of macro trends and likely changes

The most practical solution to this need for such diverse knowledge is to create standards and templates. Each area can be considered in detail, with the result that there is no need to reconsider the details every time. It is possible to outsource the creation of the templates and guidelines to experts.

We were recently engaged to advise on property issues by a national operation with leased offices around the country The previous structure was decentralised with varying standards and availability of funding. In addition to simply providing the resources to obtain new property, manage projects and renegotiate existing leases, we are focused on creating standards and guidelines.

Equipped with templates and guidelines, each additional project runs more smoothly due to the better flow of information.

The challenge that many CRE managers have is that of finding time to develop forward thinking processes and standards as well as coping with the day-to-day demands of the role.

CHALLENGE 5

Presentation/ Reporting Skills

In 2001, we ran a series of forums for CRE managers, focused on achieving better performance out of the real estate assets. The most common complaint of the CRE attendees was that "senior management don't care about real estate."

Figure 5.

At one of the forums, an attendee asserted that if senior management do not care, it is the result of poor communication or reporting by the CRE manager. If the CRE manager cannot sell their message to senior management, the method of communication must be improved.

We agree with this view. It is the CRE manager's responsibility to sell the value created by sound management of the real estate resource.

CRE managers are often weak at reporting or selling their "value-add" as the mindset of typical CRE managers is focused on "getting the job done." The typical CRE manager is more familiar with managing at a process and implementation level.

This property management approach encourages:

- High motivation to get "things right" •
  An eye for detail
- Risk aversion
- Technical skills

Often this skill set comes with:

- Low presentation skills
- Limited confidence to present well
- Limited "big picture" appreciation
- Reactive vs. proactive approach
- Meeting regulations vs. driving the organisation forward

In organisations with stable workforces and few strategic changes, the CRE manager may have nothing of interest to report to senior management. If this is the case, a financial statement and occasional or exception reporting would be in order.

The challenge is to present the correct level of detail to the operational managers that are most affected by the real estate provision.

This area has historically been neglected. There is often such a serious communication gap that the vast majority of managers have no recognition of CRE.

CHALLENGE 6

Building a Robust Planning Process

In order to focus on key success factors, the CRE manager must develop clear, practical plans. These will achieve the delivery of corporate objectives from the real estate assets.

The immediate task that CRE managers face is defining and agreeing:

- What is a property plan?
- What is a strategic property plan? •
  What is a CRE strategy?

The plan must encompass a blueprint for the real estate assets as well as a plan for the management of the CRE function. We have formed the view that it is best to be quite clear about the differences between the two. The asset management plan or strategic property plan should focus completely on the property assets and the way in which the property assets help achieve corporate objectives.

In contrast, a CRE management strategy should be a business plan for the function. This will include elements such as the roles, responsibilities and accountabilities of the various players for workplace/ real estate strategy, property, policies, planning protocols, performance management, reporting guidelines and service level agreements between the CRE function and other parts of the organisation.

Without going into detail on the requirements of a property plan, the key elements that need to be addressed are as follows:

1. Understanding the overriding corporate strategy or corporate plan.
2. The linkages between the property characteristics and the corporate outputs. Considerable thought must be applied to determine exactly how the real estate assets enable or inhibit the organisation achieving its objectives.
   This requires thinking laterally and practically about a particular asset type that is used to service a particular need. An example could be a public swimming pool where the ideal characteristics for a pool need to be determined to ensure that the pool is built in the way that best meets the operator's objectives. This may involve a complete rethink of the reasons why the asset exists at all. Does a swimming pool exist to train athletes, does it exist to entertain children, or does it exist as a social focal point for a community? These questions need to be answered impartially in order to build the ideal profile for the asset to be provided.
3. Commitment and involvement from the business units. They understand their business drivers better than an external adviser.
4. Developing a demand profile for real estate that is independent of the actual location and size of assets. It is always tempting to use the existing portfolio as a base rather than starting from first principles to assess demand.

If the planning process is rigorous and it involves the users thinking through the reasons why they use the asset and the benefits that the asset provides to help meet corporate needs, this process will potentially result in a much clearer understanding of the location, size, quality and timing of the requirement.

The CRE manager needs to be assertive but sensitive in working with the business units to ensure that they feel a part of the process. If the process is f-oist upon thme zey wilt invariably fight a rear guard action later, sometimes irrespective of the cost implications.

The plan must be created in partnership with the business units.

By encouraging the business unit managers to reflect on why they occupy space and what it provides for them, including considering non-property solutions, the CRE manager can add significant value to the organisation.

CHALLENGE 7
Constructing Clear Roles and Responsibilities

Figure 6.

As mentioned earlier, the key to success is to set objectives and achieve them efficiently. The challenge is to create a coherent set of responsibilities that fit clearly with the organisations goals. Clarity on roles and responsibilities is essential if performance is to be managed with certainty.

CHALLENGE 8
Developing a Robust Performance Management System

Figure 7.

It is self evident that the roles, responsibilities and accountabilities for the CRE function should be focused on the needs of the organisation. The general intent is not normally a problem.

A mission and vision for the CRE function should be developed to provide a parallel perspective to the organisation's mission and vision.

In management reviews we look for three aspects in connection with roles and responsibilities. These are:

1. The clarity of both the written and generally understood roles and responsibilities within the organisation for the range of corporate real estate tasks. If a number of people/ business units are undertaking the same or similar function it is invariably a sign of confused thinking in terms of role definition.
2. The most important role or responsibility in connection with providing real estate assets is that of monitoring performance and in particular, ensuring "value for money" from the whole-of-organisation perspective rather than the property/ real estate perspective.
3. To focus on the above, we spend time tracking down the conceptual "owner" of the real estate within an organisation. The "owner" is the one who pays for the real estate. Ideally, the "owner" should also be the user or beneficiary of the real estate. In CRE, the "user pays" principle works well and encourages sensible decision-making.

The Dow Cornerstones

Frederick Taylor said, "If you cannot measure it, you cannot improve it."

This fits well with our approach to performance management as we feel that a strong performance management structure will focus on finding ways and means to improve performance and improve achievement of the organisation's goals.

Performance management systems can be internally inconsistent. For example, the individual or team is charged with meeting performance targets but they have incomplete control over the resources to achieve those targets. This inconsistency can lead to serious problems in terms of motivation or stress on a CRE manager.

To ensure that this consistency is achieved we include "authority" as a resource in the Cornerstone Model and have managers check that they have sufficient authority to achieve their performance targets.

Review of the performance management system often uncovers poorly defined roles or responsibilities and weak planning and project evaluation processes.

Because the data exists, many performance management regimes focus on the input of the real estate resource such as total costs, rental levels, space per employee. A major shift is required to focus on the outputs.

The chief executive is likely to be more focused on how the CRE function is helping to achieve the corporate objectives. Is the accommodation:

- Supporting image and branding?
- Functional?

- Enabling creativity?
- Encouraging better work practices? • Flexible?
- A low risk element?

The optimum performance management system will review and encourage better results for the organisation. If presented well, this output-focused reporting will be a key communication tool. The challenge is for the CRE manager to develop the measures and demonstrate performance.

CHALLENGE 9

Dealing with a Disparate Property Industry

There is no dispute that the skills, knowledge and motivations of different professionals operating in the property industry vary considerably The differences tend to arise from the skills required for success in each particular field.

The impact of the need for specialist skills is an increase in the number of advisers and contractors involved in any property project. For example, a relocation project could require a tenant to employ a number of advisers, many of which will be involved only briefly The CRE manager must build effective teams from this group and achieve continuity throughout the project.

The CRE manager must see the whole process through from conception to completion. Project management skills are imperative but are often only learned on the job.

The challenge is for CRE managers to build project management skills and capabilities. These are, and will be, a critical success factor.

CHALLENGES FOR ACADEMIC RESEARCH IN CRE

Academic research, or any research, can always assist the CRE management function by refining and developing particular specialist areas.

However, we feel that focus on the development of a number of models or profiles will yield the maximum impact. These models are: -

1. A profile of a typical CRE manager, their background and current skill base.
2. A clear view of best practice CRE management. We have constructed a detailed description of "best practice" and are happy to share this with anyone who would like to take the task further.
3. A summary profile of the key success factors for CRE managers. Some of the key success factors could he as follows: -
   - big picture thinking • strategic understanding • assertiveness
   - negotiation skills
   - motivation
   - doing the right thing not just doing things right • salesmanship
   - education and communication

If items 1 and 3 are reconciled, the gaps between typical skill sets and the ideal skill set could be identified. If this were made widely available, the academic community would have clarity on the areas with the highest demand for training and research.

Most CRE managers come to the function later in their career. The result is a diversity of backgrounds. Part time or distance learning is likely to be more effective than attempting to add CRE to (already full) undergraduate real estate courses.

CONCLUSION

CRE is here to stay as a profession. Standards and expectations of CRE managers will continue to grow If CRE managers have the skills required the CRE role will be recognised and the demand for CRE managers will increase.

Organisations are becoming more focused on the benefits of working environments. Individuals are also becoming more aware of their working environments and the ability that they now have to manipulate how and where they work. At the same time, development of technology is enabling completely different ways of working. CRE managers must keep up with these trends and strengthen their knowledge of the links between the characteristics of working environment and output.

We expect that knowledge of the property industry will become an entry qualification for CRE managers. The keys to outstanding success and the characteristics of exceptional CRE managers relate to a range of additional management skills. We have examined many of these in detail.

The most useful ability that CRE managers could develop is an appetite for learning and continued improvement.

There may be benefits in developing specific courses for CRE managers. This will involve teaching across the range of related disciplines such as CRE, facilities management, strategic asset management, property management and interior design to find common ground.

We hope that this article has given an insight into the way in which the CRE profession is developing and the challenges facing the typical CRE manager.

If you would like to discuss *any of the topics raised in* this article *or would* like the opportunity *to learn more about Dow Corporate* Real Estate *and our products* and services, *please_feel free* to contact us:

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1. INTRODUCTION

The advent of the 1996 Arbitration Act has been notable for many changes resulting, in our opinion, in much more user friendly legislation insofar as lay arbitrators are concerned. There is no doubt that our society has become more litigious and that the court system is straining at the seams with civil disputes resulting in the growth of alternative modes of dispute resolution. The Arbitrators and Mediators Institute is seeing a steady growth of referrals out of the institute offices with disputes that would have normally been dealt with in the conventional court system. Many originating documents now focus disputes away from the conventional tribunals formerly set up by the Crown such as the Maori Reserved Land Act Amendment 1997 which now incorporates private dispute resolution rather than recourse to a Crown appointed tribunal. Other examples are the leaky building appointments to mediators at the Crown's behest. All of these are designed to promote a preference for private dispute resolution.

Our address today covers the following topics relating to the 1996 Arbitration Act and is pitched towards the property profession insofar as the current legislation applies. The ambit covers:

- The fundamentals of the Act as it affects valuers and property professionals.
- The distinction between appointment as an arbitrator and acting as an expert.
- Conduct and expectations of an expert witness.

2. THE FUNDAMENTALS OF THE ACT AS IT AFFECTS VALUERS AND PROPERTY PROFESSIONALS

2.1 Form of Arbitration Agreement

Article 7(Refer Footnote 1) provides that an arbitration agreement may be made orally or in writing. Many arbitration agreements may also be in the form of an arbitration clause in a contract, lease, or by way of a separate agreement- Article 7. The danger of relying on oral agreements to arbitrate lies in the difficulty of proof where such agreement is contested or enforced.

The existence of the agreement and acceptance of appointment must be proved before the arbitrator can receive protection from Section 13 of the Act. Protection from liability is dependent on the arbitrator acting "in the capacity" of an arbitrator. The powers of an arbitrator are only confirmed by appointment under the Arbitration Act 1996 - if there is no reference to the statute the determiner is not an arbitrator but some other person, for instance, an expert (third valuer).

Difficulties can follow for an arbitrator who ostensibly thinks that he or she has been validly appointed, and enters into the dispute making rulings without the power to do so. The proper course to follow, when nominated, is to accept appointment in writing, backed up by the arbitration agreement which provides the arbitrator with the jurisdiction to hear the dispute. Although an exchange of correspondence will be sufficient to constitute an arbitration agreement, in major matters the parties and the arbitrator may desire something more formal.

2.2 Disclosure

It is incumbent upon anyone nominated as an arbitrator to make early disclosure as to any prior contact with the parties. Article 12.1 provides that anyone approached for appointment must disclose any circumstances likely to give justifiable doubts as to that person's impartiality or independence. There is an ongoing duty throughout the arbitral proceedings to disclose any circumstances arising that may lead to a perception of doubt as to impartiality or independence.

2.3 Costs

It is incumbent upon any arbitrator at an early stage, normally at the preliminary meeting, to give the parties a clear indication as to the costs which will be incurred with the preliminary matters pre-hearing, hearing costs and the preparation of the award. Procedure that is silent on the arbitrator's costs can lead to an application for a release of the award on conditions pending payment at the discretion of Court which can review the-costs, i.e. taxing of the fee.

2.4 Place of Hearing and Procedure

In the absence of agreement between the parties, the arbitrator has the power to conduct the arbitration in such manner as considered appropriate. The powers conferred upon the arbitrator include the power to determine the admissibility, relevance, materiality and weight of any evidence. Failing agreement, the arbitrator is free to determine the place of arbitration and meet at any place considered appropriate for consultation, the hearing of witnesses, experts or the parties, or for taking a view of the property

2.5 Confidentiality

Section 14 of the Act prohibits disclosure of information relating to arbitral proceedings and awards unless otherwise agreed by the parties. This has particular significance to property professionals involved with arbitral awards where comparable evidence - either sales or rental information - is involved.

If the parties do not want a witness to know what else is going on during the hearing they should ensure that the witness is only present for the duration of his/her evidence. The witness may owe a duty to retain confidentiality to one of the parties. As a witness is not a party the arbitrator has no power to order the witness to maintain confidentiality.

2.6 Appointment

Appointment as an arbitrator is governed by Articles 10 and 11(First Schedule) and Clause 1(Second Schedule). The following provisions apply:

- Clause 1 provides that - for the purpose of Article 11 - the parties shall be taken as having agreed on the procedure for appointment unless there is advice to the contrary.
- Section 6 (2)(b) provides that if the place of arbitration is in New Zealand, ... a provision of the second schedule applies, ... to every other arbitration referred to in Subsection (1) unless the parties agree otherwise.
- Where the parties are unable to reach agreement, a party can communicate in writing to the other party and specify the details of the perceived default, proposing that if this is not remedied within the specified period (being not less than seven days from the date on which communication is received) then the person named in the communication shall be appointed to the vacant office of arbitrator.
- Parties can opt out of the Second Schedule to the Act in total, or out of specific clauses. If the place of arbitration is to be in New Zealand, the second schedule applies unless the parties agree otherwise. However for most arbitrations in New Zealand it is normal practise for the Second Schedule to remain intact, in which case the appointment procedures apply.
- If the parties have opted out in part or whole of the Second Schedule, then the provisions of Articles 10 and 11 apply
- Article 10 provides that the parties are able to determine the number of arbitrators. Failing agreement the default position is a sole arbitrator (except for international arbitrations).
- Article 11 provides that the parties are free to agree on the appointment procedure. Where the parties are unable to agree on a sole arbitrator that appointment shall be made by the High Court. Where three arbitrators are specified each party shall appoint an arbitrator and those two then appoint the third or presiding arbitrator. In the event one party fails to appoint an arbitrator within 30 days or the two arbitrators fail to agree on the third arbitrator that appointment can also be made by the High Court.

Although Article 11 provides that a party may request the High Court to make the appointment (there is a $1,100 filing fee) Clause 1 provides a simpler and faster alternative. Instead of requesting the High Court to make the appointment, the party wishing to proceed writes to the defaulting party specifying the default, giving a period of time for remedy (not less than seven days) and setting out the consequences of the failure to address the default. Unless the default is remedied the proposal in the communication becomes part of the arbitration agreement. This may be the appointment of a sole arbitrator by the party initiating the communication.

The provisions of Article 10 - other than in rare circumstances - have abolished the role of umpire. However care needs to be taken with agreements prepared pre 1997 as to whether Section 19(3) triggering the transitional provisions for the 1996 Act apply, or whether the old provisions hold fast. Even then remedies provided by the 1996 Act replace the old versions. Future amending legislation is likely to terminate the role of the umpire in favour of a presiding arbitrator.

2.7 Rules of Evidence

Article 28 (1) allows the arbitrator to determine the dispute in accordance with the rules of law chosen by the parties as being applicable to the substance of the dispute. It is unusual for the strict rules of evidence to apply to the category of valuations that would involve land professionals. Clauses 3 and Article 19(2) allow the arbitrator to determine his or her procedures including the standard of evidence that will be applicable. That is, the arbitrator has the power to rule on the admissibility of evidence.

2.8 Correction of Award

Article 33 provides scope for the arbitrator to correct an award for computation, clerical or typographical errors with notice to the other party. This article also provides that, if the parties agree, a party with notice to the other party - may seek an interpretation on a specific point or part of the award. Care must he taken that the correct interpretation is made of what is a computation or clerical error as against a matter of interpretation. The latter requires the consent of both parties.

2.9 Clause 3 - Second Schedule

Clause 3 gives the arbitrator wide powers as indicated above. These must be used with discretion within the boundaries of fairness to both parties and under natural justice. The provisions of the Second Schedule normally stand intact unless specifically opted out of by the agreement of both parties.

2.10 Inquisitorial Powers

The Arbitration Act 1996 allows an arbitrator to adopt inquisitorial processes if necessary and direct the form of enquiry to assist in establishing the evidence to be considered. This can be highly relevant to valuation and rent disputes in particular, but Institute members should be clear that, even when inquisitorial processes are adopted, the rules of natural justice prevail.

The parties must be informed of the nature of the inquisitorial process and the results, so as to have an opportunity to respond or test the evidence brought forward. The inquisitorial powers conferred by the 1996 Act should therefore be used cautiously as failure to observe the rules of natural justice can lead to an arbitral award being overturned (under Article 34) on the grounds that it is against public policy

2.11 Tribunal's Use of Own Knowledge and Expertise

While Clause 3 (1) (b) allows an arbitrator to draw on his or her own knowledge and expertise care must be taken to ensure that the process is fair. The knowledge and expertise which may be drawn on must be directly relevant to the matter in dispute. It should be made plain that the arbitrator is relying on his or her own knowledge and expertise, and in terms of 2.10 above an opportunity to comment and respond must be provided. Under the principles of natural justice, or case law precedent, an award could well be challenged for procedural misconduct if a party was denied the ability to make submissions or bring evidence on a matter where the arbitrator's own knowledge and expertise has been utilised. A breach of natural justice is contrary to the public policy of New Zealand.

2.11 Appeals and Questions of Law

Clause 5 provides parties with the opportunity to opt out of the provisions relating to appeals on questions of law If Clause 5 is retained, an award is final and binding on matters of fact but leave can be sought from the Court to appeal questions of law. The only other provision or recourse to overturn an award is under Article 34. However, the grounds for setting aside are very limited, being in essence procedural misconduct such as a breach of natural justice.

Attention to procedure and ensuring natural justice prevails - with equal treatment to the parties - is a prerequisite to minimising recourse to the provisions of Article 34, which if Clause 5 has been opted out of, is the only recourse a party has to set aside the award. Appeals are becoming harder to bring. Parties should not expect that appeals will be possible if they have agreed to arbitration.

3. THE DISTINCTION BETWEEN APPOINTMENT AS AN ARBITRATOR AND ACTING AS AN EXPERT

3.1

An arbitration takes place where there is a written agreement providing either for resolution of a dispute (present or future), or for the holding of an inquiry to be conducted by a third person appointed by the parties who are bound by the outcome.

3.2

Where the contract or lease provides that in the event of a dispute the parties may go to arbitration there must, of course, be a dispute before the process can be considered to be an arbitration and the award binding. Even where an arbitration clause is silent about the prerequisite of a dispute, the process will not be an arbitration (i.e. within the terms of the Act) unless there is a dispute.

3.3

The distinction as to whether a valuer is acting as an expert or as an arbitrator relates to whether the valuer is to conduct an expert determination or whether he/she has entered into the dispute in a judicial capacity to hear evidence and bring down an award. There is a clear distinction between acting as an expert on the one hand, and as an arbitrator (albeit using his/her own knowledge and expertise) on the other.

3.4

Clearly valuers, if they require the immunity provisions of the 1996 Act, must take care to ensure appointment under the Act is incorporated in the preparation of any arbitration agreement. That is, in relation to modem dispute resolution clauses, if valuers acting as arbitrators want the protection of Section 13 then, where possible, arbitration agreements should be drafted recording that the valuer is actin&as an arbitrator under the Arbitration Act 1996 and not conducting an expert determination as a valuer.

3.5
Whether a dispute resolution clause may be regarded as an arbitration agreement, or an agreement to have the matter determined by expert, comes down to the wording. A clause in a contract that stipulates a dispute is to be resolved by an expert who is not acting as an arbitrator is a powerful indicator that a dispute resolution clause is not an agreement to arbitrate unless the 1996 Act is specifically cited.

3.6
The significance of the distinction lies in whether or not the valuer (or any other land professional in the same position) has immunity from civil suit. Immunity will depend on being appointed as an arbitrator with specific reference to the statute (immunity flows from Section 13 of the 1996 Act). In the absence of such an appointment the arbitrator cannot be acting in an arbitral capacity. In that case the third valuer, for example, appointed to determine the rent when two valuers disagree, is clearly acting as an expert and has no judicial immunity The message is that, if the third valuer requires protection or immunity, then an indemnity clause should be incorporated when appointment is accepted.

3.7
Immunity from suit even with the caution recommended above should not be construed as being axiomatic. There is no immunity for breach of contract and a good lawyer may well be able to reframe inadequate conduct as a breach of contract.

4. CONDUCT AND EXPECTATIONS OF AN EXPERT WITNESS

4.1
Over recent years the Property Institute has developed a more diverse skill base amongst its members. Increasingly the non-valuer property professional will have a recognised expert role as the community becomes aware with the particular expertise and standards underpinning membership of the Institute. The wide skill base extends, in addition to valuation, to property management and consultancy, facilities management, plant and machinery valuation, and the supervision of what may be a diverse property investment portfolio.

4.2
Because of the way many contract documents and leases are structured the most common forums that a property professional is likely to be involved in as an expert witness will be arbitrations or mediations. Property managers, of course, may be involved in opposing roles as parties to a dispute as well as acting as an expert witness although, in the main, this will be the role of the registered valuer. Arbitrations involving rents are probably the most common form of dispute, followed closely by building disputes. There is also an increasing focus on mediation as a forum for dispute resolution and members of the property profession can play a positive role in these meetings.

4.3
To a lesser extent property professionals, especially valuers, may also be called to appear before the Land Valuation Tribunal, the District Court or High Court, or other specialist adjudication bodies such as the Waitangi Tribunal or Resource Management Act commissioners. Disciplinary tribunals such as the Valuers Registration Board can also be a challenge, even to experienced witnesses.

4.4
In arbitral/court/tribunal hearings, independence is expected as well as mere competence. There has been - since July 2002 - a code of conduct under the High Court Rules relating to expert witnesses. Briefs of evidence now require a statement that the expert has read and will comply with the code of conduct. All members of the Institute who are likely to be called as expert witness from time to time should familiarise themselves with High Court Rule 330A.

4.5
The increasing trend towards both mediation and arbitration, away from expensive court litigation, should be seen by property professionals as a positive move. Sound independent property and valuation advice is, in many cases, the catalyst for settlement with mediation proceedings or, alternatively, truncating the length of adjudication. A meeting between experts to identify areas of agreement and discuss differences may result in an agreed position. Where a subsequent joint memorandum is prepared covering the areas of agreement and summarising any remaining differences significant cost savings can result to the parties.

4.6
Experienced judges and arbitrators are awake to professionals who allow themselves to be hi-jacked by plausible or pressuring clients who manoeuvre the expert to an opinion that is not balanced or impartial. Independence is crucial in the experts response to initial instructions. As an example, a valuer should never accept instructions prescribing a particular approach for methodology to the exclusion of all others. Such instructions may dictate a rental/ valuation outcome that has been predetermined by the client. Although such clients maybe in a minority, it is axiomatic however that, when faced with such pressure an expert should decline to accept those instructions. Remember; it takes years to build a reputation and only one hearing to lose it.

4.7
Experts should be open minded and not fixed on a set position without considering the opinions put forward by other expert witnesses. There is a tendency in some cases for expert witnesses faced with opposing viewpoints to sideline reason and refusing to budge when commonsense dictates some reconsideration. Failure to reconsider with an open mind may fatally damage the integrity of the expert. Experienced judges or arbitrators will carefully assess how an expert under cross-examination deals with relevant information or material which may not have been available when carrying out the original assessment. A witness has a duty to consider any relevant evidence and should request additional time if necessary. If the expert is balanced, and does not have a preconceived or fixed position, his or her opinion may be modified or, in the event that the original opinion is confirmed, there should be clear and concise reasons as to why the new material has no impact on the earlier opinion.

4.8
Experts' witnesses are of central importance in Court proceedings and arbitral hearings. But expert evidence on valuation matters is an informed opinion. That can often place the valuer in a difficult position when retained by a party suggesting a duty to that party. The High Court rules referred to are a reminder - one that should not be required by the profession - that it is the duty of the expert to assist the Court or arbitral tribunal by providing a competent and impartial opinion. The adjudicator judge or arbitrator may not have specialist knowledge or expertise although they may be highly qualified in legal matters. Therefore, expert evidence is more likely to be accepted at face value compared to other witnesses. The responsibility is not to be taken lightly and a fully considered response should be given to any matters arising from the expert's brief of evidence or subsequent cross-examination.

4.9
The temptation to stray into the field of advocacy and away from impartiality must be resisted. It is essential that an expert's evidence is prepared in a culture of impartiality and not influenced by the instructing client or lawyer. An unbalanced approach to providing expert evidence will be shown up by careful cross-examination, as already referred to. Experienced judges and arbitrators also develop a "nose" for experts whose expert opinions are blatantly for sale.

4.10
Appearing as an expert can be a daunting experience and is not for the faint hearted especially when under cross-examination by a skilled barrister. The experience can be unpleasant and demanding especially if the witnesses impartiality is called into question, while the person who strays outside the limits of their expertise can also get a hard time. Most instructing lawyers will have respect for an expert who declines to accept the assignment because of expertise limitations or possible conflicts of interest.

4.11
The presentation of expert evidence should be balanced with early acknowledgement of any limitations in the data or sales information relied upon. Reservations extracted reluctantly during cross-examination diminish credibility. Exaggeration is a human characteristic and this is also to be avoided when presenting expert opinion as it will obviously create an unfavourable impression of the witness. There is no doubt that some professionals, when asked for initial assessments that are used to compile a statement of claim, get led into exaggerated positions that cannot be supported by the evidence available. In the valuation field a rental may be requested to commence the rent review process and it is easy to formulate an unconsidered assessment early on when no dispute actually exists. But the expert or valuer should look ahead and, of course, abide by the code of ethics or any related practice standards, as unconsidered or even biased opinions will be thoroughly tested in due course at a hearing by differing expert opinions and searching cross-examination. A lack of objectivity can lead to unacceptably wide differences which do nothing for the reputation of land professionals in general and registered valuers in particular.

4.12
As is the case with all other professional codes of conduct and ethics, conflicts of interest involving valuers and property managers should be disclosed and avoided. Disclosure as a result of cross-examination can be embarrassing and damaging for the professional involved. The short answer is do not act as an expert witness where actual or perceived conflicts of interest could arise.

13.13
Finally, expert opinions put forward by property and valuation professionals should be supported by relevant education, qualifications and experience; and underpinned by independence, integrity, and impartiality Clear reasoning, appropriate methodology, and supporting evidence are fundamental requirements when weighing up the value of an expert witness. Although testimony before a Court or arbitral hearing can be regarded as the pinnacle of an expert's career, ultimate success in the form of a well constructed and delivered brief of evidence can only come from perspiration, preparation, and more preparation. There should be no short cut or easy route to the witness box.

This *paper* was *presented to the Property* Institute *Queenstown Conference.*

ASSIMILATING FAIR VALUE

Valuations for Financial Reporting Purposes august 2004

Introduction

The world is moving to fair value accounting for financial reporting purposes. The accounting professions are devoting considerable resources and energy to refining the concept for wider application. The USA and Canada are involved for the first time, with the US Federal Accounting Standards Board endorsing the concept and moving towards its adoption by 2007.

In late 2003, the International Accounting Standards Board made further amendments to the definition of fair value in International Accounting Standard 16 Property Plant and Equipment, for application on or after January 2005. In Australia the Financial Reporting Council has insisted that International Accounting Standards will be adopted for reporting periods commencing on or after 1 January 2005.

Fair value has major implications for valuers providing valuations for financial reporting purposes and until recently the international Valuation Standards Committee and valuation bodies throughout the world have been grappling with what has been a moving target.

For Australia, 1 January 2005 is D-Day. Valuers will be required to have at least a rudimentary knowledge of IAS 16 and its Australian equivalent, AASB 116. More importantly they will need to understand the relationship between fair value and Market Value, and the concerns in the accounting world with the use of depreciated replacement cost by valuers, when valuing specialised property

This paper will discuss the concept of fair value and it's important underlying assumptions, the different conceptual bases of fair value and market value and comment on the valuation approach now that "Market Value Existing Use" is no longer applicable.

Background

The Australian Accounting Standards Board (AASB) has implemented the Financial Reporting Council's policy of adopting the standards of the International Accounting Standards Board (IASB) for application to reporting periods commencing on or after 1 January 2005.

In early July 2004, the AASB ratified Accounting Standard AASB 116 Property Plant and Equipment. AASB 116 deals with, inter alia, the application of fair value reporting in relation to property, plant and equipment in Australia

Fair value is:
"the amount *for* which an asset could be exchanged between *knowledgeable,* willing *parties in* an arm's length transaction".

Property, plant and equipment is defined as:
"tangible items which are held *for use* in *the production of or* supply *of* goods *or services, for* rental to others *or for* administrative *purposes* and are expected to be used during *more* than *one* accounting period."

Prior to 1 July 1999, IAS 16 noted that the fair value of land and buildings was usually its "Market Value for Existing Use", which "presupposes the continued use of the asset in the same or a similar business". Further, it commented that in determining fair value, an item of property, plant and equipment is valued on the basis of its existing use.

The requirements in the earlier version of IAS 16 were not regarded by the accounting professions as consistent with the concepts of fair value and highest and best use. Accordingly, all references to existing use were removed from IAS 16 and the concept is no longer endorsed by the international Valuation Standards Committee (IVSC).

IAS 16/AASB 116

The objective of IAS 16 is:
"....to prescribe the accounting treatment *for* property, plant and equipment so that users of the financial statements can discern *information* about an entitys investment in *its property,* plant and *equipment* and the changes in such investment. The principal issues in accounting *for property,* plant and equipment *are* the recognition of the assets, the determination *of* their *carrying* amounts and the depreciation *charges* and impairment losses *to be* recognised in relation to them." (IAS *16 para. 1)*

IAS 16 and AASB 116:

(a) apply to property, plant and equipment except when another Standard requires or permits a different accounting treatment (e.g. LAS 17 Leases, IAS 40 Investment Properties);

(b) do not apply to biological assets related to agricultural activity (these are covered by IAS 41 Agriculture) nor to mineral rights and mineral reserves;

(c) require that all property, plant and equipment assets are subjected to the requirements of IAS 36 Impairment of Assets. (The test under this standard is for the directors of the entity);

(d) require that the depreciable amount of an asset shall be allocated over its useful life and that depreciation shall reflect the pattern in which the asset's future economic benefits are consumed by the entity.

Accounting Depreciation

Paragraph 58 of AASB 116 provides that land and buildings are separable assets for accounting purposes. However it goes on further to say that:

"An *increase* in *the* value *of the* land *on which* a building stands does *not affect* the determination *of the depreciable* amount *of the* building."

In other words the entity is still required to apply depreciation to a building asset even if the land value has increased.

This highlights a very important distinction:

- An entity's assessment of depreciation is entity-specific and relates to the useful life of the asset to the entity.
- A valuer's assessment of depreciation is market-based and includes not only physical wear and tear but functional and economic obsolescence.

Fair Value Basis

The revaluation basis of fair value for property, plant and equipment was redefined in International Accounting Standard 16 (IAS 16) in 2003 to read as follows:

"The *fair* value *of* land and buildings is usually *determined from market-based* evidence by appraisal, that is normally undertaken *by professionally* qualified valuers. The *fair* value *of* items *of* plant and equipment is usually *their* market value determined by *appraisal." (Para. 32).*

"If there is no market-based *evidence of fair* value *because of the* specialised nature *of* the item *of property*, plant and equipment *and the* item is *rare-fy-sold cept-as-part of a* continuing business, an entity may need to estimate *fair* value using an *income or depreciated replacement* cost *approach."* (Para. 33).

Then we have the going concern presumption i.e:

"Underlying the definition *of fair* value is a presumption that the entity is a going *concern* without any *intention or need* to liquidate, to curtail *the* scale *of* its *operations or to* undertake a transaction *on adverse* terms." (IAS 39, para. AG 69).

The International Valuation Standards 6th Edition 2003 comments:

"Financial statements *are* normally *prepared* on the assumption that an entity is a going *concern* and will continue in *operation for the foreseeable future.* It is assumed that the entity has neither the intention nor the *need to* liquidate *or* curtail materially the extent *of its* operations; if such an intention *or need* exists, the financial statements may have to be *prepared on a different* basis *and if so,* the basis *used* is disclosed. Certain bases *of* value, such as *forced* sale *or* liquidation, *are* not compatible with *the concept of a* going *concern."* (Accounting background to IVA 1. Para A5.4).

If the presumption does not apply to an entity then an alternative accounting standard will apply

For initial recognition, an entity will usually enter the value of an asset at (purchase) cost. At subsequent reporting dates it may choose to stay with cost or adopt the revaluation model.

In Australia, there is no mandatory requirement to adopt an independent valuation when the revaluation model is adopted and neither IAS 16 nor AASB 116 requires this.

Entity Sets Fair Value

Note that accounting standards are directed at the entity and the onus of compliance is on the entity. Valuers should be aware of the provisions of the standards however they should not consider that they are applying the standards on behalf of the entity. Valuers do not set fair value.

"While a Valuer *provides* an estimate *(f* asset value *for the directors* and/or accountants *of* the enti*ty,* it is *they who decide whether* the value estimate meets the test of *Fair* Value. *Fair* Value takes in *the concept of* Market Value *however the term* Fair Value is a generic *term* used in *accounting."* (IVS 2003. Accounting background to IVA 1. *Para A* 6.4).

The valuer's role is to assess Market Value using the normal comparison, income and/or cost approach, having regard to the highest and best use of the asset. For specialised assets, valued for financial reporting purposes on the presumption that the entity is a going concern, this_willusually be the use by the entity, unless there is a higher and better alternative use.

Other Provisions

AASB 116 introduces a number of other provisions to be addressed by the entity, including:

- Residual value and useful life. The residual value and the useful life of an asset shall be reviewed at least at the end of each annual reporting period and changes accounted for. The residual value of an asset is defined as the estimated amount the entity would currently obtain from disposal of the asset, after deducting the estimated cost of disposal, if the asset were already of the age and the condition expected at the end of its useful life. Useful life is related to either the period over which an asset is expected to be used by an entity or the number of production units.
- Componentisation. Each part of an item of property, plant and equipment with a cost which is significant in relation to the total cost of the item shall be depreciated separately. For example the fitout in a hotel property may be depreciated separately from the building structure; the engines on an aircraft may be treated separately from the mainframe; lifts may be depreciated separately from the building housing them.

Note that these are accounting requirements, not valuation issues. Nonetheless valuers are likely to be requested for advice on those issues which can be addressed after the value of the asset is assessed by normal means. They should not distract the valuer from the primary task of applying accepted valuation methods and market-based evidence to arrive at the value of the item of property plant and equipment.

Operational Assets

The fair value of an operational property or plant and equipment. asset held by an entity is, based on the going concern presumption, its "in use" market value, if certain qualifications and assumptions are met i.e:

- The entity intends to retain the asset for continuous use for the purposes of the enterprise for the foreseeable future.
- The entity has identified any impairment affecting the asset and adjusted its value accordingly.
- The asset meets (if applicable) the test of "adequate potential profitability" in relation to the whole of the enterprise assets. The test is applied by the entity

For an operational asset held for continuing use by the entity for the foreseeable future, typically, the current use will be the highest and best use.

Atypically, the highest and best use of an operational asset may be a use other than the current use an alternative use. In this case the market value will be based on the alternative use, which can be adopted by the entity as the fair value of the asset, provided that any costs to release or free up the asset for the alternative use (relocation, demolition etc.) are taken into account. Valuers would naturally take into account other relevant issues, such as the need for rezoning or remediation.

Valuation Approach

Commonly traded assets are valued for financial reporting purposes using traditional valuation techniques. The unit-based comparison approach (most commonly a rate per square metre) and the income approach will apply to most commonly traded (i.e. non-specialised) property assets.

For specialised properties (see later) the income or cost approach will usually be adopted. If the income approach is the primary basis of valuation, the deduction of allowances usually associated with vacant properties and mortgage valuations (such as lost rent and outgoings for an estimated letting up period) is not necessary because of the going concern presumption.

In the context of financial reporting, the use of the depreciated replacement cost methodology is a special application of the cost approach.

The methodology involves:

1. Establishing the replacement cost of a modern equivalent asset.
2. Allowing for physical wear and tear.
3. Allowing for obsolescence factors.

Reproduction cost - as opposed to replacement cost - is a term commonly used in public sector reporting. This relates to the replacement cost of a replica asset, not a modern equivalent asset.

Land Value

In terms of financial reporting, the concept of highest and best use is applied to the asset as a whole. For properties where the land may have an alternative use with a value higher than the current use, it is generally inappropriate to value the land on the basis of that alternative use and then add the value of the improvements. When assessing the value of land and buildings occupied by an entity, the assessment of the land value can have regard to the highest and best use of the land but the economic constraints imposed on that use by the existence of substantial buildings and other improvements must also be taken into account.

In other words, it is not correct to assess the value of the land without any regard to constraints imposed on the land use by existing buildings. If the buildings are in a dilapidated state, near the end of their econo is life, the valuer wiflhypically take into account demolition costs in relation to those buildings. For buildings which are well short of the end of their

economic life, the land value assessment must take into account the existence of those improvements. For historic structures the valuer will take into account the restrictions they impose on the potential use of the land.

The situation is different if the land has an alternative use value which is higher than (or near to) the total value of the land and buildings as used by the entity, and the valuer must consider this. It is illogical that a potential buyer of an enterprise would completely ignore the potential for an alternative use, particularly if the value on this basis was approaching the value of the total asset.

This approach is different from the former "market value existing use" approach, where the existing use was paramount and any alternative use potential was ignored, even if the value on that basis was higher than the value of the total asset. This led the IASB to drop the existing use concept from its standard.

It would be unlikely that two separate properties (comprising land and buildings) which are similar in all respects other than that one property has an alternative use value which is approaching the "in use" value - would be valued at the same figure. A potential buyer of the enterprise and the two assets would at least consider whether the asset with the alternative use potential has a greater value.

If the alternative use value of the land is higher than the "in use" value then, provided the costs of achieving that alternative use potential are taken into account, the value to be reported is that higher, alternative use value.

Specialised Properties & Adequate Potential Profitability

Specialised property is currently defined in IVS 2003 as:

> 3.3 Specialised *Property*. A property that is rarely if ever sold in the open market, except by way of sale of the business of which it is a part (called the business in occupation) due to its uniqueness arising from the specialised nature and design of the building(s), its configuration, size, location or otherwise.

While there is the possibility of some alteration to this definition in the current review of the IVSC standards, the need for the classification of specialised property remains, as does the use of the cost/depreciated replacement cost methodology, where necessary.

The key to the classification is the lack of direct market evidence. However, when the depreciated replacement cost valuation method is utilised the depreciation rate must, as far as possible, be market-linked.

For specialised property, the valuation will still be subject to the test of adequate potential profitability or, in relation to public sector assets, adequate service potential.

Once the decision is made that the highest and best use of the asset is the current use by the entity, then this, by definition, is the basis of the market value of the asset on the going concern presumption and subject to the "adequate potential profitability" test both of which are issues for the entity, to be accepted or rebutted, when considering the fair value of the asset.

The adequate potential profitability test is a key qualifier of the value of a specialised property The test must be applied by the entity and met before the valuer's assessment can be adopted in the entity's accounts as the fair value of the asset. If the asset fails the profitability test, the entity must write down the value of the asset to its recoverable amount.

The valuer provides an objective measurement of the value of an asset, based on the hypothetical purchaser model. The context is the amount that a hypothetical purchaser would attribute to the asset as part of a purchase of the enterprise (or cash generating unit) on the assumption that the purchaser is informed as to the profitability and prospects of the enterprise.

This does not mean that the valuer is excused from carrying out research and inquiries into the economic health and outlook for the particular industry sector and the enterprise itself.

Whilst acknowledging that the valuer is often only valuing some of the assets of the entity, there is a duty for the valuer to, as always, use best endeavours to elicit information about the industry sector and the enterprise itself.

Cost and Depreciation

Valuers constantly analyse sales of land and buildings as they research and analyse construction costs of buildings. It is therefore not difficult to observe the relationship between the added value of a building analysed from sales evidence and the current new cost of a similar building. In this manner depreciation factors for valuation purposes can be evaluated in relation to market evidence.

The cost approach is regarded as market-based evidence. It is based on the substitution principle, whereby the potential buyer of an existing property will, in many cases consider the option of buying land and constructing a new building as an alternative to purchasing an existing property The potential buyer is therefore evaluating the best cost option i.e. the existing property or, development of a new property. This is market-based evidence.

Optimisation

Optimisation is a concept related to depreciation. It was introduced to ensure that utilities could not charge a rate for the supply of a unit (of gas, electricity etc) that was based on assets which were over-engineered or over-designed in relation to the present and foreseeable future demand. It is defined as follows:

"Optimisation" is the *process* by which a least cost replacement option is *determined for the* remaining *service* potential *oJ' an* asset. It is *a process of* adjustments *reducing the replacement cost to reflect* that an asset may be technically obsolescent *or over-engineered,* or the asset may have *a greater* capacity than that *required. Hence* optimisation minimises, *rather* than maximises, a resulting valuation *where* alternative *lower* cost *replacement options are* available. In determining *the depreciated replacement cost,* optimisation is applied *for obsolescence* and relevant surplus capacity.

Valuers using a depreciated replacement cost approach will usually include the effect of so-called "optimisation" in their assessment of obsolescence (of improvements) and the "modem equivalent asset".

Income Approach

The income approach can also be a valid valuation method for specialised property. In particular, it can be used as a check method against an indicative value based on depreciated replacement cost.

If the value of an owner-occupied property is being assessed for financial reporting purposes based on capitalisation of income, the valuer does not need to assume that the property is vacant and deduct an allowance for letting up costs and loss of rent and outgoings. In applying a capitalisation rate in this circumstance, the valuer should select a rate typical of the market for that type of property and that class of occupier but not a rate reflecting a covenant by the entity itself.

This has been the Australian approach (and, I believe, the New Zealand approach) for many years. Although originally described as the "notional lease" approach, it is now accepted that it is up to the valuer to choose the most appropriate methodology for valuing an asset and to reflect the going concern presumption when the valuation is for financial reporting purposes. This is of course unless an asset is held for sale, disposal or investment purposes.

A test of "adequate potential profitability" where the depreciated replacement cost approach is used can be whether or not the accounts of the entity can absorb an annual rental assessed by the valuer which reflects the use of the building by the activities of the enterprise.

AASB Staff Views

Examples of the application of AASB 116 prepared by staff from the Australian Accounting Standards Board are set out below

Example 1

In 1991, Entity A purchased land zoned industrial on which it constructed an industrial building, from which it continues to operate its business. Entity A applies the revaluation model. At the 2003 year-end, and immediately prior to revaluation, the land's carrying amount is 300, and the building's depreciable amount is 200. Entity A engages a valuer to provide market-based evidence about the fair value of the land and buildings. The valuer's report notes that the highest and best alternative use of the land and building is as residential land without the building (the land can easily be rezoned as "residential"), and the market value of the land as residential land is 550 (after deducting building demolition costs. Rezoning costs and the proceeds from sale of the components of the building are not material).

Australian Accounting Standards Board staff consider that underlying the defined term "fair value" is the concept of market participants' "highest and best use" of the asset, that is, the most probable use of the land and building that is physically possible, legally permissible, financially feasible and which results in the highest value. The concept of "highest and best use" is consistent with the economic rational behaviour that is articulated as fair value (i.e., the land and building will be traded at the best price reasonably obtainable by the seller and most advantageous price reasonably obtainable by the buyer).

Applying this thinking to Example 1 the AASB staff are of the view that:

- the fair value of the composite asset "land and building" is 550;
- on allocation, the asset "land" is attributed an amount of 550, and the asset "building" is attributed an amount of zero.

Example 2

In 1991 Entity B purchased land zoned industrial on which it constructed an industrial building, from which it continues to operate its business. Entity B applies the revaluation model. At the 2003 year-end, and immediately prior to revaluation, the land's carrying amount is 300, and the building's depreciable amount is 200. Entity B engages a valuer to provide market-based evidence about the fair value of the land and buildings. The valuer's report notes that:

- the highest and best use of the land and building is in an industrial activity, and the market value for the land and building is 500; and
- the next highest and best (alternative) use of the land and building is as residential land without the building (the land can easily be rezoned as `residential"), and the market value of the land as residential land is 450 (after deducting building demolition costs. Rezoning costs and the proceeds from sale of the components of the building are not material).

AASB 116 requires that an asset's fair value is measured having regard to the highest and best use for

which market participants would be prepared to pay
The highest and best use of the land and building is as industrial land and industrial building (i.e. the highest and best use of the land and building is its current use). The next highest and best use of the land and building is as residential land ignoring the building (i.e. the alternative use).

- Possibility 1: The highest and best use of the land and building is its industrial use. The fair value of the composite asset 500 is allocated - land 450 (highest and best use as residential land) and building 50 (residual amount). AASB staff have considered whether this is the allocation method required by AASB 116. AASB staff think that allocating the fair value of the composite asset land 450 and building 50 is not consistent with the concept of fair value. AASB staff think that "the market based evidence" is evidence (market buying price) that is consistent with the highest and best use of the land and building, that is, an industrial use. Accordingly, in this example, AASB staff reject the use of the market buying price of the land as residential land as the determinant of the land's fair value.
- Possibility 2: The highest and best use of the land and building is its industrial use. The fair value of the composite asset 500 is allocated in a way that is consistent with fair value of the land and the fair value of the building being measured with regard to the highest and best use of the composite asset (i.e., for industrial use). For example, the fair value of the composite asset 500 is allocated as follows: , the land is measured at the market buying price of industrial land (and that market buying price does not reflect any demand for the land for residential use), and the building is measured at the market buying price of the industrial building's remaining future economic benefits (as an industrial building).

AASB staff think that this latter approach is consistent with fair value being measured with regard to the highest and best use of the land and building (i.e., for industrial use).

Note
The views of the AASB staff, which are not necessarily representative of the AASB itself, were provided by Dr Mark Shying of the AASB and are included to illustrate the accounting view of some of the value applications. Dr Shying is a member of the Australian Valuation and Property Standards Board.

I support the above views subject to the discussion under the heading "Land Value" earlier.

Conclusion

I think the points you should take away with you from this session are:

1. The valuer's role is to assess Market Value.
2. Market value by definition requires the valuer to value assets at their highest and best use.
3. For financial reporting valuations, the highest and best use analysis will usually have regard to the going concern presumption.
4. When the cost/depreciated replacement cost methodology is used as the primary approach to the valuation of an asset, all of the elements in the calculation, particularly the depreciation rate should, as far as possible, be market-linked.
5. It is the entity's responsibility to record the fair value of its assets in the accounts.

Valuers should continue to focus on Market Value principles to provide relevant advice to the accounting professions and their clients and not be distracted by the continuing debate on the application of fair value. While there has been a shift of emphasis on land value assessment and going concern principles, the primary valuation concept for property, plant and equipment still remains, Market Value.

Further Material

The current IVSC standards can be downloaded from the IVSC website at:
http://www.ivsc.org

Shortly the IVSC will be issuing updated versions of IVA 1 Valuations for Financial Reporting and GN8 Depreciated Replacement Cost.

The recently issued joint practice manual between the API and the NZPI "Professional Practice 2004" also should be reviewed, particularly Practice Standard 3 and the associated guidance notes.

WIND FARM DEVELOPMENTS AND LAND OWNERSHIP ISSUES

1. Introduction

The construction of wind farms on rural property in locations throughout NZ is attracting the attention of politicians, energy companies, investors, speculators and many land owners who consider *they* might have a potentially worthy site.

A new land use has been established in rural New Zealand. Some areas of developed hill country has a better use and possibly higher value in the market due to its potential as a wind farm site.

The assessment of such land, pre and post development, will have to be addressed by those retained by rating authorities. Many wind farm developers, financiers, landowners and prospective purchasers of properties will require valuations and/or market advice. This will require property professionals, especially rurally qualified practitioners, to understand wind farm development and to be informed about the arrangements entered into between land owners and developers.

Wind-farming is a relatively new land use in New Zealand the first wind turbine generator (WTG) was installed at Brooklyn in Wellington and subsequent to this developments at Hau Nui in the Wairarapa and Tararua Wind Farm near Palmerston North. Since then expansion projects to the existing farms have been undertaken and continue through 2004. A great deal of investigation has been conducted in a number of other locations throughout New Zealand for which development is now at varying stages of completion.

There are consequently some precedents already established in New Zealand. Internationally the wind energy industry is more established with at last count 88 wind farm sites in UK, and many more in Europe, USA and Australia.

Wind farm development in the UK has been welcomed by the farming community with headlines such as the following Press release October 1999:

> "Wind Energy: A New *Lease of Life for* Farmers"... Increasingly *farmers* and land *owners are* turning to alternative sources *of income to keep their* businesses going. *Farmers* are best *placed to harness one of the* greatest natural *resources of the* UK. *Across* Britain a hand full *of* land *owners already* gain valuable *income by* leasing *their* land *for* wind farms. Wind *Energy developers* estimate that land *owners can* expect *between 1000 pounds* and *3000 pounds* in annual payments per turbine, *a payment* which is index linked and could provide *the farming industry* with a total *additional* income *of more* than *100* Million pounds *over the next twenty years"*

Care must be taken in translating international precedents into the New Zealand scene due the subsidies available to renewable energy systems in UK and Europe.

The critical issues of interest to landowners and consequently valuers wishing to become conversant in this area of valuation can be identified as:

- Knowledge that a client's property is suitable as a wind farm site.
- Knowledge that any arrangement entered into by-a-client wit -a wind farm developer is fair to both parties.
- Knowledge of how land owners can ensure

that fairness and equity will prevail
- How will the development of a wind farm on land affect a client's property value
- Will the arrangements entered into restrict or enhance future resale?
- How will ongoing farming operations be affected by the wind farm development?

The NZ precedents are very limited. Search of titles from public domain information reveals that casements and confidential royalty agreements have been established by land owners and wind farm developers - these are discussed below.

For a broader perspective the Country Land Owners Association (CLA) based in London have published a document which provides some background for land owners in terms of land owner agreements and advice on lease structures and royalty payments. The authors have also been communicating with members of the RIGS who have been involved in developments in the UK. Comments are therefore based on two NZ easement agreements and data on UK precedents along with information gleaned from discussions with other valuers and property professionals both in New Zealand and in the UK. The NWEA has as recently as June 2004 published on its web site some useful background data relating to land owner agreements.

Any discussion on the potential agreements between developers and landowners requires some background to the wind as a power generating resource and also some of the aspects of what exactly constitutes a good wind farm site.

Part 1.0 The Nature of Wind Resource

The `wind resource' itself can be described as the spatial and temporal availability of wind for which the embodied energy is able to be extracted. Hence an understanding of the spatial and temporal variability of the resource is key for any strategy to extract useful energy for power generation.

Long term year to year patterns in wind speed variation can be very hard to predict but annual variations can be more accurately described by probability density functions such as the Weibull distribution. The Weibull distribution has been shown to represent a good fit to mean wind speed variation for many typical sites, although is not necessarily applicable to all sites. Shorter time-scale variation (e.g. diurnal) can be important, providing useful data for comparison with the typically bi-modal daily consumer electricity demand pattern in New Zealand.

Methods of evaluating the wind resource are varied but are predominantly based on actual measured data. For this reason the quality of-data-is of very high importance, and to make any form of realistic assessment, high frequency (i.e. 10 minute sampling period) long term (>1 year) data is usually required as a minimum.

1.1 Power in the Wind

Electrical power is usually generated from natural wind flows by the conversion of energy from fluid kinetic energy (wind) to mechanical (rotor-shaft) and then electrical (generator).

Power from wind resource is considered a good energy source as theoretically the power (P) can be described as a function of the wind's velocity (u) cubed for given air density (❑).

$$P. pu3$$

The implications of this are that a very windy site has potential for the extraction of large amounts of energy. In real terms a maximum of just7 2 P or 59% of this can be extracted by any machine (Betzs Law) and any conversion losses further stop the implied energy runaway as shown from the relationship above. This limit is not through any design deficiencies, rather due to theoretical limitations and the practical notion that the fluid (air) has to go somewhere after it has passed through the conversion device. To date no one (to the authors knowledge) has successfully built a machine which is able to exceed the Betz limit.

An industry descriptor for wind farm or turbine performance known as `capacity factor' is often used - representing a utilisation ratio of actual power extracted from the wind compared with the actual rated maximum for a given wind farm. Typical capacity factors internationally are in the order of 25-35% with some wind-saturated European developments having been implemented and economically justified at the lower end of this spectrum. By comparison NZ capacity factors have been shown to be in the order of 35%-50%+. New Zealand has a tremendous wind resource. New Zealand's total potentially cone, tible wind resource has been estimated at 3000MW , when compared to a total world installed generation capacity of approximately 13,000MW it is clear that the local resource is significant.

1.2 The Wind Energy Converter History and Background

The wind energy converter (WEC) has been around for at least 3000 years3 and revolutionised the agricultural industry, allowing the milling of grain, pumping of water and flexibility of having high torque mechanical energy available for a variety of uses. The early windmill was later superseded by the emergence of steam and other fossil fuelled engines, but its relationship with the agricultural industry persists and is strengthening in a modern context. The WEC is thought to have been first used for electricity generation by Charles F Brush in the late 19th Century. Since this, major developments in the design, -durability and capacityof_electrical WECs, including recent advances allowing massive machines to be produced at market competitive rates.

Modern turbine design is based on (but not restricted to) 3 bladed horizontal axis wind turbines (HAWT) with characteristics like low blade area (solidity), relatively high rotational speed and control systems to regulate output.

1.3. Establishing a Wind Farm What is involved?

Data collection and analysis takes a minimum of 12 months and lays the foundation for the entire process. Inadequate emphasis on data analysis could result in potentially millions of dollars of lost revenue to the owner over the life of a project. Similarly a comparatively small capital investment in proper data analysis and site selection could potentially result in a significant increase in potential rental revenue and market value.

The ownership of data regarding a property's potential for wind development is an integral part of any valuation assessment of a wind farm site. It should also be noted that the acquisition of data comes with the risk of `show-stopping' evidence against a site's potential for development. For this reason some of the appropriate precursors are suggested below. Historically utility companies have been the proactive parties seeking and acquiring wind data but there is scope for landowners to pre-empt this and take control of the intellectual property.

1.4. Location, Development Costs & Infrastructure

Unfortunately much of New Zealand's wind resource is unavailable due to practical constraints. It is one thing to have a massive resource but if it is prohibitively expensive to utilise it, then its value is non-existent. Precursors to a successful wind farm generally include (but are not limited to) the following:

- Wind Flow
- Nature of flow, characteristics & turbulence.
- Diurnal/seasonal/annual character of wind resource.
- Wind shear.
- Grid
- Proximity to national grid or local distribution lines - HV transmission lines may cost in the order of $100,000+ per kilometre to install depending on terrain and connection and other factors
- Grid capacity
- Grid connection options (e.g. construction of a new substation may cost $1-$2M or more).
- Proximity to load centre (e.g. city) - results in reduced transmission losses, increasing viability.
- Topography and access (access for heavy vehicles during construction phase transporting heavy and long loads).
- Potentially $40-70,000+ per kilometre to create roads suitable for access-depending on exact requirements.

The above summary suggests relatively tight constraints and the actual cost of installing a wind project will vary depending on the developer's cost modelling and IRR used. Typically end production cost of less than 7c/kWh generated is considered viable4.

1.5. Wind Farm Construction Impact on Farming Operations

The impact on the existing farming enterprise is one of the matters that should be considered in any modelling of the financial implications for wind farm development on a farm site.

The intensity of impact is largest initially during the construction phase. Cooperation is required between the developer's contractor(s) and the landowner (or his/her management team). Effects are typically associated with stock control and movement - as contractors dig cable trenches which cross fences, shelter belts and the like and transport their equipment through gates day in and day out, there is potential for either party to become frustrated with the others impact on their progress. It will be important for any agreement to account for this potential disruption.

From a contractors perspective, the daily commuting across farmland to access a particular construction area may involve the opening (and hopefully closing) of many gates; the man-hours spent on this task alone in the author's experience can easily exceed $1000 per day in lost time cost' to the project.

From a landowner's perspective, the presence of a large number of people on their land along with the change of use to a formal construction site is dramatic, accentuated by the potential for stock losses through increased mortality, escape, crop damage or loss and increased public attention and presence - wind farms constitute a source of local tourism in some areas - e.g. Manawatu.

Under a typical post construction (operational) situation, the intrusive impact on the landowners farming operation is low It must be remembered that the wind farm is essentially a power station, so the full or part time presence of operation and management personnel is inevitable.

Generally the impact on the farming operation as a whole is low, especially when evaluated objectively including all of the economic benefits (and losses).

Part 2.0 Land Owner Agreements

Land owner agreements in New Zealand appear to be established from the perspective of the developer's (Grantee) interests. The basis of comments in this discussion are limited to a perusal of two documents obtained from a Land Online search where two NZp u blic companies have or are in the process of carrying out wind farm development. Details of these

'Based on 60 contractors, each attending 12 gates per day, taking 2 minutes per gate at a fixed time cost of $45/hour

contracts have been found to be confidential and have not been discussed with either the land owners (Grantor) or the Grantees.

The most recent information from the NZWEA is also helpful as it does provide some indication of the Lease Payment Plans operating in New Zealand.

Our interpretation is based on that information and those publicly available documents which legally secure the position between the parties. These would likely he the first source of information available to a hypothetical purchaser of land with such an easement in place. or with a known and marketable wind farming potential.

It is noted that both of these major developments are based on an agreement secured by way of an easement over the land that is to be occupied or affected by the wind farm development. The easement documents are comprehensive and appear to transfer a large bundle of the property rights associated with the land to the Grantee. The following are excerpts from one such easement drawn up in 1995

> NOW THEREFORE in consideration of the premises and the covenants of the Grantee hereunder the Grantor transfers and grants to the Grantee in gross forever (subject as otherwise herein expressly provided):
>
> A Electricity The full, free, uninterrupted and unrestricted right, liberty and privilege for the Grantee from time to time and at all times hereafter (subject as otherwise herein expressly provided):
>
> a. To use the free and unobstructed passage of air and wind over the land for driving wind powered electricity generation equipment for the generation and production of electricity; and
>
> b. To transmit and reticulate electricity onto, over, through and from the land, whether or not such electricity is generated on the land or elsewhere
>
> B. Rights of Way The full, free, uninterrupted and unrestricted right, liberty and privilege for the Grantee, the Grantee's servants, agents, workmen, licensees and invitees (in common with the Grantor, the Grantor's tenants and any other person lawfully entitled so to do) from time to time and at all times hereafter (subject as otherwise herein expressly provided) by day and by night to enter, re-enter, go, pass and re-pass onto and over the land, with or without vehicles, machinery, implements and equipment of any kind.
>
> AND for all or any of the- above_purposes_the__ Grantor authorises and permits the Grantee, the Grantee's servants, agents, workmen, licensees and invitees from time to time and at all times hereafter (subject as otherwise herein expressly provided):
>
> i. To install, erect, construct or place any equipment on the land for the purposes of this easement
>
> ii. To operate and use the wind power equipment on the land for the generation, production, transmission and reticulation of electricity
>
> iii. To maintain, inspect, monitor, repair, replace, add to, relocate or remove all or any of the wind power equipment on the land;
>
> iv. To have the full and unimpaired access to the land and to remain on the land in order to monitor the operation of the wind power equipment and otherwise to carry out and conduct the Grantee's business
>
> v. To construct roads and accessways on the land;
>
> vi. To maintain, repair or reconstruct all such roads and accessways;
>
> vii. To remove all or any of such roads and accessways subject to making good any damage caused by their removal;
>
> viii. To use any roads and accessways located on the land and have access over the land to and from wind power facilities (whether located on the land or on any adjacent or other land);
>
> ix. To erect fences along the boundaries of the land and of any areas of the land on which any wind power facilities or any other of the Grantee's equipment or installations are situated;
>
> x. To increase the size of existing entrances and gateways giving access to the land and to make alternative access and entrances and to remove fences, gates, walls and hedges on the land to allow execution of any of the works permitted hereunder;
>
> xi. To install, operate and maintain on the land anemometers and any anemometry equipment and to carry out tests and surveys in respect of the Grantee's equipment, works and development of the land;
>
> xii. To undertake any other activities, whether accomplished by the Grantee or a third party authorised by the Grantee, which the Grantee reasonably determines are necessary, useful or appropriate to accomplish any of the purposes hereunder;
>
> xiii. To carry out on the land all other works as are required for the exercise of the powers and authorities hereby granted or accomplishing the purposes of this easement.

Lhis_easement then_goes on under... various clauses and Dutlines the Grantors position noting that the Grantor ..e. the land owner...

"shall have the right to use the land *for* such *farming*

activities that do not and will not *interfere* with the Grantee's *operations* hereunder or *enjoyment of the* rights *hereby* granted. *The Grantor* shall not plant *or permit the* planting *of any trees* shrubs *or other vegetation or the erection or* establishment *of any* structure *whatsoever on* the land which:

a. In the reasonable opinion of the Grantee or its appropriate officer may interfere with the Grantee's operations or works on the land or impair the efficient operation of any wind power equipment on the land; or
b. May endanger or cause nuisance to the Grantee's operations, works, employees, agents or contractors in the course of their duties; or
c. May transgress any statutory regulation relating to the Grantee's business or the Grantee's operations, works, installations or equipment installed, erected, constructed or placed on the land

Having considered the provisions as set out in this document along with a number of other clauses, a logical progression is to establish what the Grantee was prepared to pay for the privilege granted to it by way of the easement. The easement document refers to a royalty payment. There is however no reference in the easement as to what the royalty is and the only guidance anybody can obtain from reading the easement, is to find that there is a separate royalty agreement, the clause stating:

The Royalty as *agreed* to and *recorded* between the parties in the Royalty *Agreement* to be *entered* into and *executed prior to the Grantee exercising any* irghts pursuant to this agreement. Any default *by the* Grantee *under* the Royalty *Agreement* shall be deemed to *be a default under* this *agreement.*

The Royalty Agreements are confidential between the parties. So upon reading this easement document it is not possible to can gain any information as to what consideration was paid or will be paid by the development company for all of the rights conferred on it in the easement.

Inspection of a similar document from another company showed that the easement conditions were very similar. In that document it is recorded however that the development company (the Grantee) paid $1 to the land owner as consideration for the grant of the easement. Further inspection of the document revealed the following:

Rent and *other* payments *The transferee covenants* to pay the rent and other payments to the *transferor* at *the rate* stated in the *Agreement.*

The agreement that is referred to in this clause appears to be an agreement in addition to the easement and again from enquiry, that agreement is confidential between the parties.

That second easement agreement also has some other provisions which are of interest in that it appears that the development company is attempting to separate the improvements made to the land by it from those existing and owned by the land owner. The particular clause of interest in this respect states that:

The development will *not become* and will *not for any purpose* be or become *or deemed* to be, fixture *or* part *of the* Land *or* Easement Land.

Development is defined by:

Means the wind *power generation* and electricity transmission business conducted by *the Transferee on the* Easement Land and is *deemed* to include all improvements installed on *the* Easement Land by *the transferee* including all plant and Equipment Machinery and associated apparatus and with out limiting *the foregoing* includes *any anemometer* masts, monitoring equipment, Wind Turbines, transformers, switchyards, *control* buildings, maintenance *workshops, network* cables, Transmission Lines and any *other Structures,* Fixtures, buildings, *devices, apparatus or* appliance *of* whatever nature *or* hind associated with the generation *or* transmission *of '* electricity *(whether in* relation *to the* transmission *of* electricity *generated on* the land *or on any other* land) *together* with all *necessary* cables, supports, foundations and *other appurtenances* associated with the wind *power development and any underground or surface pipes,* ducts or cabling of whatever *nature or* kind installed by the *Transferee,* and any maintenance, *upgrade, repair* improvement *or replacement of* the same.

It is possible that the parties agreed to the clauses relating to development and improvements in an endeavour to define the respective interests of the Grantee and the Grantor. The document then goes on to discuss the responsibility of the parties in relation to rates and taxes and requires the Grantee to pay such rates and taxes as levied against the land to the extent that the same are attributable to the installation or existence of wind power equipment on the land pursuant to this easement. The earlier clauses as noted above specifically excluded those improvements (development) becoming part of the land.

There does not appear to be any provision to record the condition of the land prior to development that leaves us wondering just how the parties propose to apportion their liability in relation to rates and taxes.

The document also has an interesting Termination and Removal Provision:

The *Transferee* shall have the right at any time *to terminate* all or any *part of* this easement and obtain *a surrender* as *to the whore or any part* or this Easement *upon* delivering to *the Transferor notice* in writing *of* such intention *(Transferee's Notice) On the*

Transferee's Notice *being delivered the Transferee* shall *remove from* the Easement land *or from* such *part* (as the case may be) all *of the* Transferee's improvements (except *for any* underground cabling, foundations ,*whether underground or otherwise, pipes* and the like *or any vehicular* rights of way or accessways *constructed by* the Transferee) within a period no later than *eighteen* (18) months *from* the date *of the Transferees Notice being delivered.*

This provision appears to give the Transferee total control over the term of the contract to occupy and when it does leave it can leave behind its cabling and foundations; no mention of compensation to the Grantor for loss of income or for the fact that the land is not fully restored to its previous condition.

These two documents on their own do not assist in assessing the added value which might accrue to the land owners on the land upon which these easements are based. It can therefore only be concluded that those owners have given away a large component of their property rights and in doing so must have been encouraged by a significant up front payment and/or a lucrative annual royalty or rental payment.

Data unavailable to the authors due to confidentiality restrictions include the following:

- The quantum of front end payment (if any)
- The relativity of any such payment to the underlying value of the land.
- Quantum of rental/royalty payments
- How such payments are assessed
- Are they based on the generation potential of the total site rather on just what the particular company has for its own reasons decided at any time to generate?
- Is the royalty payment guaranteed to a minimum level regardless of the output from the site?
- Do the rental/royalty agreements have review provisions to ensure that the land owners income is maintained to market and if so what is the frequency of such reviews.

We have in the preparation of this paper been advised that some of the issues noted above are addressed in some of the confidential agreements between land owners and wind farm developers. However as we have not been able to sight this information from publicly available New Zealand sources we cannot comment on it. We have instead reviewed some data which we have obtained from the UK.

2.1 United Kingdom Precedents

There were as at May 2004, 88 wind farm sites in UK which accommodate 1103 turbines and have a generating capacity of approximately 717MW5 (It is interesting to note by comparison the newly expanded Tararua Wind Farm has 103 turbines with a total rated capacity of 68MW

The preferred land owner agreements in UK are based on leasing arrangements for the land plus in some instances, some form of royalty payment. The leases are set for 20 to 25 year terms with a right of renewal subject to a parallel renewal of planning rights. These leases are reviewed annually to the equivalent of our CPI and have a further review provision to market, which is usually triggered at or about year ten. We are advised that there is an expectation by the land owners and their advisers that such ten year reviews will double the rental /royalty income.

The leases are established on the basis of a rate per annum per turbine reported to be in the range from £1000 to £3000 depending upon the assessed generating capacity of the turbine. It is noted that the rental component is paid regardless of the generation capacity

A leasing arrangement such as this offers more protection to the land owner to ensure that the income stream is maintained both to market and in real terms. The parties also have the ability to define matters relating to compensation and land management issues.

These matters do not appear to be covered in the New Zealand easement agreements. They may however be set out in confidential agreements.

The UK land management issues have been formulated between the Country Landowners Association (Federated Farmers), The British Wind Energy Association and property consultants/valuers involved in advising landowners. Whilst the leasing arrangement is the preferred option, it is understood that some UK sites are covered by easements.

An interesting development occurring in the UK is the establishment of wind farms on the foreshore and in the sea in proximity to the coast. This type of development in NZ would likely increase the level of debate on foreshore issues.

2.2 Other Matters of Relevance

2.2.1 Planning Issues

One of the major issues associated with wind farming is that of addressing Resource Management and Planning issues. Comment from international sources notes that planning restrictions and public opposition is one of the main impediments to wind farm developments. The NZ experience in relation to the development of the two major farms in the Tararua area did not reveal similar public opposition. In fact, anecdotal comment is that the public are fascinated by the wind farm development and some adjoining property owners actually considered there may be some enhancement in their property values due to the potential to capitalise on the tourism aspect of the public interest.

The Territorial Local Authorities are proposing changes to their District Plans to recognise the role of wind farms and the wind resource as a resource of importance. Some of those plans will endeavour to control the location of turbines especially where

ridge lines and hill tops are considered to have some amenity value. Land owners, valuers and developers will need to monitor changes to these plans and be aware of the potential affect that scheme restrictions may have on proposed sites.

2.2.2 Carbon Credits

There has been considerable publicity on carbon credit funding being made available by the NZ Government for wind farm development. This factor is important as it increases the economic viability of projects without being a direct subsidy as seen in other countries.It provides for an internationally tradable emission unit that can be sold to assist in the funding of the development.

Carbon credits or "emission units" are effectively permits to emit greenhouse gasses (1 unit ❑ 1 tonne of CO2 emitted) that can be traded on an international emission unit market. This is a major incentive for wind farm developers in New Zealand where subsidies for this type of development are not available. Companies developing technology that has been recognised to help to reduce greenhouse emissions (like wind energy generation, hydro-electricity, bio-energy landfill gas schemes, and cogeneration) can tender for an allocation of these units which they are then able to trade internationally for cash. The New Zealand Government offered 4,000,000 carbon credits to prospective developers last year (2003) that contributed to the development of 15 emission reducing projects, including the current Te Apiti project and the now complete stage 2 Tararua Wind Farm development.

The first example of this kind of trade was reported to occur last December (2003) by Meridian where the Netherlands Government approached Meridian with a contract to sell their units at a rate of NZ$10.50 per unit. An additional 6,000,000 credits have subsequently been offered for tender['.

2.3 Conclusions and Possible Valuation Approach to a Wind Farm Land Assessment

The task of advising land owners and valuing a wind farm site in New Zealand at this time is fraught with difficulty due to the lack of clear market evidence and confidentiality agreements surrounding the transactions which have taken place to date.

What is certain is that there are many rural (and some urban) sites around New Zealand that are suited to wind farming. Commercial operators are identifying those sites and in some instances securing the land either by way of outright purchase or *by way* of agreement with the land owner.

What is not certain is whether or not those land owners are being adequately compensated for the land and or the property rights going to the developers.

Land owners and their advisers need to become more informed as to the value that their site has to generation companies. As the cost of energy increases in the future and the viability of clean renewable resource improves, the potential for increases in the value of wind farm sites is expected to be very high.

To make informed judgements we need to know the basis of transactions that have taken place in the market both in terms of land sales and access agreements whether they are easements or leases. This may mean that somebody has to apply to court to obtain details of the royalty and rental agreements in place on the existing sites. There is case law that it is believed would support an application for such disclosure. If the information is not available then the next best source are the international precedents.

On a simplistic basis the UK data which has been noted above indicates rental payments in the order of £1000 to £3000 or say approximately NZ$3500 to NZ$10000 per turbine site.

This has to be compared with the recent data released by the NZWEA7 where they note that Long-term compensation is often 1 to 2% of the gross revenue of the wind farm or about $1500 to $3000 per year for each MW installed. This payment also depends on how windy your site is.

In addition, most developers pay an option fee to maintain an exclusive right to develop a wind farm on the land while they are carrying out investigations.

If we took that range and applied it to a hypothetical site in New Zealand of say on a 1000 ha site generating 100MW we could anticipate that the land owners would be receiving a rental /royalty income in the range of $150,000 to $300,000 per annum. This income in some instances on poorer pastoral sites would probably be similar to the gross income from farming the land The UK rates if applied to the NZ scene would provide an extra ordinarily good income and serves to show how production type subsidies or similar arrangements can distort the market.

Using NZWEA data and the approaches noted below, we can calculate the possible value arising from agreements being considered or in place, provided of course we have all of the details of such agreements available to us.

2.3.1 Capitalisation Approach.

Both direct capitalisation (DC) and discounted cash lfow modelling (DCF) are valuation methods which could be applied to assess the added value arising from the income generated from the payment made by the wind farm operator to the landowner.

The maths and the modelling are relatively simple with the difficult part being the judgement call on the appropriate capitalisation rate if direct capitalisation is to be used or the appropriate discount rate if DCF modelling is to be used.

Those rates must reflect the risk of the cash flow That risk will have to be measured both in terms of the cash flow being maintained for a defined period or

in perpetuity. Likewise it will have to reflect the land owner's ability to maintain that cash flow in both real terms and in terms of the market as it moves for this type of lease or royalty payment.

2.3.2 Comparable Sales Approach

The best place to find these rates of course is from an analysis of the market, ie an analysis of sales of wind farm properties that have these cash flows in place. However if we had plenty of these sales we would not necessarily have to use a capitalisation or DCF approach because we would be able to analyse such sales on the basis of the sale price premium over and above the underlying rural land use. In the future we should if we can get good data, be able to analyse sales of such properties on a rate per Megawatt of Generation or Dollars per Turbine.

3: In the Meantime?

We need as a profession to develop a robust methodology to value these sites. To do so we will have to go back to first principles and we will need to:

- Understand the requirements of wind farmers and have knowledge of the value of a good site. It is only with that knowledge that we can (as we do with other rural land uses) differentiate one site against the other.
- Develop a database of land purchased for wind farms. Anecdotal reports exist of certain properties having been purchased by some of the major generation companies and by speculators anticipating a surge in demand. It is only hoped that those speculators had done their homework and had some good engineering advice before they wrote out their cheques!
- Ensure that property owners enter into agreements that protect their rights to maintaining the real value of rental or royalty payments and that the developer cannot walk away from making those payments if a cheaper source of energy generation becomes available.
- Encourage the parties away from confidentiality agreements. When such agreements are encountered, suspicion arises that one or other of the parties thinks it has a good deal and does not want the details to be available to other potential participants. It could be construed that the approach is that if the people remain uninformed they will be easier to "beat down" or "beat up" which ever the case may he.
- Encourage the participants in this emerging land use to develop a set of protocols and guidelines for landowners and wind farm developers. The New Zealand Wind Energy Association (NZWEA) is reported to be taking steps to develop guidelines in this regard. This should be a multidisciplinary process with contributions from the Engineering and Valuation/Property professions as well as Federated Farmers of NZ and the NZWEA..
- Collect data from other countries especially at this early stage as it will possibly save us from `re-inventing the wheel'. The absolute adoption of income data may not be applicable but it does serve to give us some idea of how the issues are treated in other parts of the world

The authors intend to research this subject further and would be pleased to share any findings with land professionals, wind farm developers and any other consultants interested in the industry. Likewise it would be helpful to hear from land owners, advisers or developers who had some experience in wind farm land sales, leasing and royalty arrangements and who would be prepared to share any of their experiences and information.

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1BWEA Press Release 20th October 1999 (www.bwea.com/you/farmingpr.html)
2EECA review of NZ's Wind Energy Potential to 2015
3Burton_T,Sharpe D, Jenkins N, Bossanyi "Wind Energy Handbook"_J.olmAVde.y &Sons_Ltd20D]
4lnfratil Update, Issue 19 "CO. Emissions and the Energy Sector" see www.infratil.com/downloads/pdf/update_sept03.pdf
5BWEA Wind Farms of the UK (www.bwea.com/map/index/.html) June 04
6www.beehive.govt.nz "More carbon credits on offer for climate-friendly projects" Hon Pete Hodgson 16th May 2004
rwww.windenergy.org.nz Wind Energy Introduction to large Wind Systems 22nd June 2004

Case Notes

High Court

Waitemata District Health Board v RRD Ltd *12/3/04,* Heath J, HC Auckland *CIV2004-404-1200*

Civil procedure - Application

Civil procedure - Injunctions

Property - Real

Successful application by WDHB for interim injunction - injunction sought to restrain RRD from taking any steps to prevent WDHB exercising its right to exclusive possession of premises, pending further order of the Court - premises owned by RRD and leased by WDHB - problem arose regarding watertightness of premises roof WDHB took view that inadequate steps were being taken by RRD to deal with issue of repair WDHB decided to withhold rent payments until repairs were done - application dealt with on "Pickwick" basis RRD's counsel suggested that repair and renovation work would start in following week.

Held, WDHB has established a serious question to be tried - provided appropriate terms are included, interim injunctive relief should be granted while orders are not made by consent, orders not strongly opposed orders made include, payment of outstanding rental into trust account and commencement on repair work to roof application granted.

High Court

Reihana v *Director-General of* Conservation *1/3/04,* Panckhurst *J,* HC Christchurch *CIV-2002-409-000755*

Civil procedure - Application - To strike out

Environment and natural resources - Conservation

Maori affairs - Land - Interest

Successful application by DGOC to strike out R's proceeding Titi (Muttonbird) Islands Regulations 1978 secured right of Rakiura Maori to take muttonbirds from Titi Islands relevant regulations were administered by DGOC who wished to update them s 48(1)(d) Conservation Act 1987 (CA) contained the regulation-making power and provided that regulations may be made after consultation with Maori owners - R alleged due consultation had not occurred for proposed new regulations R sought declaration of rights confirming DGOC had not consulted, or not adequately consulted, with Maori owners - DGOC disputed that had failed to consult - DGOC also contended proceedings initiated by R were misconceived and made application to strike out proceeding.

Held, Rs pleading raises no reasoina lue case of-action and should be struck out - proceeding is based on misunderstanding of meaning of s 48(1)(d) CA - obligation under s 48(1)(d) CA to consult owners before new regulations or variations to regulations are made - s 48(1)(d) CA envisages that DGOC may initiate change and only constraint is consultation must occur before change is introduced proceeding is misconceived and premature because new regulations have not been made and consultation is still in process - application granted

High Court

Johal v Star*i*ha *11/3/04, Master* Faire, HC Auckland *CIV2004-404-869*

Civil procedure - Application

Property Real - Encumbrances - Caveats

Property Real Land settlement

Successful application by J for non-lapse of caveat - J and S agreed J could buy freehold of subject property sale and purchase contract, which referred to caveat, was signed - transaction was formalised and agreement completed, which included a possession and settlement date - conflict between J and S regarding content of their discussion about settlement date - settlement statement sent by S's solicitors sought payment of settlement amount including interest for late settlement and contained claim for rent up to settlement date - various correspondence between J and S's solicitors ensued Ss solicitors sent amended settlement statement but only change from earlier statement was increase of rent sum claimed - S then cancelled sale and purchase agreement and entered into contract with another whether Rs settlement notice was valid - whether there was valid cancellation of contract.

Held, settlement notice is only effective if party serving is ready, able and willing to proceed to settle in accordance with notice settlement statement claimed an amount in excess of amount S entitled to on settlement - no evidence that S prepared to settle for less than sum in settlement statement - therefore arguable that S was ready, willing and able to proceed to settlement in accordance with contract - in terms of tests for caveat application, J has reasonably arguable case for interest claimed also arguable case that cancellation notice invalid - summary procedure for removal of caveat against a dealing is wholly unsuitable for determining disputed questions of fact - practice of Court when dealing with applications under s 145 Land Transfer Act 1952 is to attach conditions if appropriate - appropriate to make order on those terms - caveat should not lapse subject to conditions-applica tiort-granted.

High Court

Enoka v Proclaim Holdings *Ltd 8/3/04,* Gendall *J,* HC Auckland *CIV-2003-404-6308*

DA 8 *March 2004*

Civil procedure - Judgments - Summary

Property - Real - Lease

Successful appeal by E against order for summary judgment - E had number of lease agreements with PHL, they were not the original lessor and lessee of agreement - PHL sought reinstatement costs regarding gym fittings left by E and arrears of outgoings - E did not accept PHL had established that installation of bathroom showers and other gym fittings were undertaken by previous lessee, as required in lease agreement for reinstatement costs - District Court Judge entered summary judgment in favour of PHL - E submitted invoices presented by PHL were hearsay and ought not to have been relied on as proof of essential requirements.

Held, E has arguable case therefore summary judgment ought not have been entered - although invoices are hearsay, they are admissible under Evidence Amendment Act (No 2) 1980 as business records - invoices are still insufficient for determining what in fact was installed in leased premises however, therefore not sufficient to enable summary judgment quantum of outgoings also legitimately in dispute appeal allowed.

High Court

Eden Refugee Trust *v Hohepa 28/4/04,* Master Lang, HC Auckland *CIV-2003-404-539*

Civil procedure - Application

Evidence - Discovery Production and inspection Grounds for resisting production

Legal professional privilege

Trusts - Trustees - Duties and liabilities - Breach of trust

Successful application by ERT for order requiring documents to be produced - ERT was former owner of Auckland property ("property") - H was trustee of ERT - ERT contended H effectively defrauded ERT of full value of its property second defendant ("F") was H's solicitor for mortgaging and sale of property - F filed list of documents relating to transactions in issue in proceeding F said required to claim documents privileged because contained communications between F and H - ERT sought order that all documents be produced for inspection whether F entitled, indeed required, to claim privilege on basis of legal professional privilege.

Held, common ground that documents created when litigation not reasonably within contemplation of either party therefore, no basis to withhold documents on grounds of litigation privilege - for solicitor and client communications to be privileged, document or communication must be made confidentially and for purposes of giving legal advice - however, privileged documents may lose privileged status if advice is sought or given to guide client in commission of fraud - not sufficient for ERT to simply allege fraud exists - ERT must adduce evidence to show sufficient case of fraud to justify allowing inspection of documents by ERT - evidence adduced by ERT shows, on prima facie basis, H embarked on fraudulent course of conduct designed to deprive ERT of property fraudulent dealing comes from mortgaging and selling property and failing to account to ERT for sale proceeds - documents relating to implementation or carrying into effect of mortgaging or sale of property, or any other dealing with ERT's assets, need to be produced for inspection documents need to be produced notwithstanding they may be directly referable to seeking or giving of legal advice regarding either setting up or implementation of transactions - application granted.

High Court

Smythe v Singh 31/4/04, Williams J, HC Auckland CIV-2003-404-6239

Civil procedure - Application

Tenancy law Tenancy agreements - Assignment

Tenancy law - Tenancy agreements - Lease

Successful application by SE for declaration that SH liable to SE regarding occupancy of shop and residential flat ("property"); SE were trustees of Pentagon Trust ("Trust"), which owned property; shop of property was first leased to a company for 10 year term, which commenced on 22 August 1990; same company entered written residential tenancy agreement for flat of property on 27 August 1990; both lease and tenancy of property were assigned over years and terms of lease were occasionally varied; in 1996 assignment, lease varied so to renew term for further eight years from expiry; rent review also undertaken, which provided for separate and increased rents for property for ensuing two years; further deed of assignment executed between then lessee and SH and signed by all relevant parties; throughout dealings Trust owned property, therefore, upon acquiring lease and tenancy of property, would appear that SH became liable to Trust for current rent; however, SH submitted, with regard to various correspondence between solicitors involved, this was not the case; whether SH bound by terms of deed of assignment.

Held, SH is bound by deed of assignment; correspondence of previous lessee's solicitor covered all amendments to deed of assignment earlier sent by SHS solicitor and included SH's consent to amendments; only possible conclusion is SH liable for both lease and residential tenancy agreement in terms of deed of assignment; declaration, for purposes of deed of assignment, that SH liable as lessee under both deed of lease of 22 August 1990 regarding shop and as tenant under residential tenancy agreement of 27 August 1990 regarding flat; application granted.

High Court

Kerr Taylor v Attorney-General 3/5/04, Laurenson J, HC Auckland CIV2003-404-3160

Civil procedure - Application

Property - Real - Compulsory acquisition

Property Real - Valuation

Successful application by KT for declaration that value of subject land be assessed at 1 July 1997 - government took land in 1930s under Public Works Act 1992 (PWA) for purpose of Department of Scientific and Industrial Research ("DSIR") - Crown Research Institute of Horticulture and Food Research Institute of New Zealand Ltd ("HortResearch"), which took over agricultural and horticultural functions of DSIR, took over land on 24 October 2001, offer of land made to KT as successor of original landowner from whom land originally taken parties could not agree on price or date at which land's value should be set - KT disputed offer made on 24 October 2001 was "timeous offer" and submitted offer should have been made as early as 1996 whether offer was timeous or whether it should have been made at some earlier point - what point was HortRescarch required to hand over land to Land Information New Zealand.

Held, meaning of word "required", where it appears in both s 40 PWA and s 30 Crown Research Institutes Act 1992, is need or necessity thus providing for return of land by repurchase when public need no longer exists - question of objective fact whether land no longer required for public work - land was consistently referred to as surplus in 1996/1997 Strategic Plan, which, alongside other evidence, points overwhelmingly to conclusion HortResearch had decided to dispose of land by May 1996 - HortResearch's steps in October 1996 towards subdividing land off for purpose of sale also show that before May 1996 when Strategic Plan for 1996/ 1997 was ready, HortRescarch had decided land truly surplus - at that point HortResearch was required by s 40 PWA to hand over land for resale, which it misguidedly delayed doing so in expectation it could go about maximising return from sale of land agree with KT's submission that appropriate date to assess land's value is 1 July 1997 - application granted.

High Court

Governors Ltd v Anderson *21/4/04, France J, HC* Wellington *CIV-2000-485-744 CP211100*

Tenancy law Landlord

Tenancy law Tenancy agreements Lease

Partially successful claim by GL for damages - partially successful counterclaim by counterclaim defendant Chamberlain ("C") for outgoings and damage done to premises by GL and rectified by C - GLwas_1enanLOf.__ property owned by A GL ran a bar on the property with C - C had renovated the premises so the bar could operate - on 5 October 2000, A re-entered property for non-payment of rent - on 19 October 2000, GL obtained injunction and re-entered property - on 18 June 2001, A re-entered property on 7 December 2001, GL regained entry in decision delivered in 2003, GL succeeded in claim against A - Court found As re-entry to tenanted premises in 2000 and 2001 unlawful because rental payments up to date - what measure of damages GL entitled to - whether damages should be awarded to C regarding counterclaim - whether GL mitigated loss - whether GL has shown on balance of probabilities any loss of profit.

Held, GL required to provide assessment of loss - regarding 2000 re-entry, business was, at best, breaking even however, would have been lost revenue for eviction period no loss of stock warranting damages award $2,000 adequate to represent very nominal loss of goodwill because business was kept functioning therefore, for 2000 re-entry, GL entitled to $13,121.90 regarding 2001 re-entry, no significant loss of profits for exclusion from business for one month period therefore nominal damages of $31,109 appropriate regarding mitigation of loss by GL, whether GL acted reasonably is question of fact - reasonable for GL to initially take steps to see if could resolve matter with A and subsequently reasonable to make application to Court once apparent matter not going to be resolved by discussion - A not liable for any damages arising after expiry of one month period from time of second re-entry because one month is reasonable period after which GL should have returned to Court regarding counterclaim by C, outgoings were payable from commencement of lease term even though rental was not payable until later $13,901 appropriate sum to award for outgoings - evidential difficulties with damages aspect of counterclaim therefore nominal sum of $2,000 appropriate - claim accepted in part - counterclaim accepted in part.

High Court

Dudding v WLD Ltd *14/4/05, Rodney* Hansen J, HC Auckland *CIV-2003-404-7254*

Contract - Breach Remedies - Rectification

Contract - Construction and interpretation

Property - Real - Encumbrances - Caveats

Unsuccessful application by D for order that caveat not lapse - D expressed interest in lifestyle block, which was part of subdivision owned by WLDL D intended to purchase lifestyle block with proceeds from sale of another property that D was subdividing and which was yet to sell - WLDL wanted definite date for settlement D's lawyer drafted clause in agreement, which sought to meet requirements of both parties - delays in completion of D's subdivision meant D unable to obtain title to section and to sell property by 1 March 2003 - D had not settled purchase of lifestyle

block when WLDL purported to cancel agreement - D lodged caveat and issued proceedings to preserve it - WLDL sought order for rectification or, alternatively, claimed induced to enter contract by representations, which led WLDL to believe settlement would occur by 1 March 2003 at latest and therefore entitled to cancel under Contractual Remedies Act 1979 - question of what clause meant - whether meaning of clause represents parties' intentions - whether caveat should lapse and, if so, whether rectification appropriate.

Held, meaning of clause is what it would convey to reasonable person having background knowledge of parties at time agreement entered into - no disagreement or ambiguity that relevant clause could only be read as meaning date for possession would be the later of five working days after sale of D's property and 1 March 2003 - common ground that substitution of "or" for "and" made no difference to its meaning - was ineffective to make 1 March 2003 latest possible date for settlement regarding common intention, if parties were in agreement up to moment when executed formal instrument and formal instrument does not conform with common agreement, Court has jurisdiction to rectify irrelevant that may have been no concluded and binding agreement between parties until formal agreement executed - subsequent conduct may be relevant and highly persuasive regarding party's intention at and leading up to execution of agreement - fact that WLDL acted as if agreement stood in form in which sought to be rectified, is strong evidence of existence of intention to contract in those terms - at time parties signed agreement, each had single corresponding intention regarding settlement of agreement - therefore, WLDL entitled to order for rectification to accord with intention and was also entitled to cancel agreement steps WLDL took to cancel agreement were clear and unambiguous - all evidence makes it clear WLDL was in position to settle and prepared to do so - order for rectification appropriate and declaration that agreement validly cancelled - order for caveat to be removed - application declined.

High Court

Selwyn Mews Ltd v Auckland City Council *30/4/04, Randerson J,* HC Auckland CRI-2003-404-159 *TO* 161

Building Regulation - Compliance

Resource management - Offences - Prosecution

Resource management - Remedies - Enforcement order

Unsuccessful appeal by SML against sentence under Building Act 1991 (BA) and Resource Management Act 1991 (RMA) - SML engaged in substantial residential development - work included a cut and batter, which District Court ("DC") found resulted-in ve-ry - substantial interference with geometry of lower part of bank in vicinity of boundary after heavy rain, large subsidence of SMEs land occurred, which extended into neighboring property and minor damage caused to adjoining property SML was charged with intentional failure to comply with Building Code under BA SML was issued notice to rectify and ACC applied for and was granted an enforcement order - consent order was made by Environment Court ("EnvC") against SML, which required it to construct two further timber retaining walls - only one retaining wall was completed when second collapse occurred - SML was charged under RMA with contravening enforcement order or permitting its contravention and with a continuing offence - SML appealed against sentence - whether fines imposed on SML by DC were appropriate.

Held, regarding scale of excavation, extent of damage and lack of proper precautions, fines under BA were not excessive and deterrent sentence required - DC also entitled to conclude deterrent sentence appropriate, despite absence of environmental damage attributable to delay in complying with enforcement order - fact damage did not occur as result of delay is factor to be considered for mitigation but does not excuse non-compliance - scale of maximum fines under RMA reinforces that orders of EnvC are to be taken seriously and fines imposed were small fraction of that potential and were appropriate in all circumstances of case - SML was aware of urgency and that ACC concerned about non-compliance and yet did not apply to Court for variation of order - in circumstances, fines imposed were appropriate - appeal dismissed.

High Court

C Gibbons Holdings Ltd v Wholesale Distributors Ltd 5/5/04, France J, HC Nelson CIV-2003-442-19

Civil procedure - Appeals

Contract - Breach - Liability - Determination

Property Real - Lease

Unsuccessful application by CGHL regarding WDIs obligations under sublease - in 1982, CGHL leased premises from Nelson Harbour Board under head lease - in 1991, CGHL subleased premises to GUS Properties for 12 year term less one day and, on expiry of term, sublease provided for lessor to hold premises in trust for lessee for at least one day there was right of renewal of lease to expire in 2010 - GUS Properties later assigned its interest in sublease to WDL WDL in turn assigned its sublease regarding part of premises to TNL Group Ltd ("TNL") - in 2000, WDL assigned its sublease to Infogate Nominees Ltd, which became Rattrays Wholesale Ltd ("RWL") - in October 2002, RWL went into receivership - CGHL alleged RWL had not paid rental and other outgoings due and looked to VV-DL tomeet remaland outgoings by relying-on contractual arrangements between CGHL and WDL - WDL disputed liability and said effect of parties' contractual arrangements was term of sublease ended

in October 2002 and with it any obligations owed by WDL on default of RWL whether WDIs obligations under sublease continued on after October 2002.

Held, documentation is consistent and clear regarding renewal - strongest argument for CGHL is there was commitment by both parties, on one hand, to let premises and, on other, to take premises on lease for full period however, against that, WDL is correct that alleged 20 year term, which CGHL seeks to enforce against WDL, is same 20 year term, which parties purposefully set up sublease to avoid hence reference to "right of renewal", "expiration" of term and "new lease" - difficulty with CGHis estoppel argument is there was no detrimental reliance - TNL has no rights against CGHL under s 119 Property Law Act 1952 because term of sublease expired in October 2002 and Court has no jurisdiction to grant TNL relief beyond this date - application declined.

High Court

Alexander v Gitmans 17/06/04, CAI 1/04

Contract - Breach - Remedies

- Specific performance

Unsuccessful appeal by A against High Court (HC") judgment ordering A to pay damages to G A and G constructed block of apartments through their joint venture company, Parkbrook Holdings Ltd ("PHL") - during course of development of apartments A and G fell out, but two agreements were later reached regarding apartment block A did not adhere to first agreement which resulted in HC ordering specific performance in favour of G that was later changed to damages in lieu of specific performance following mortgagee sale by As mother A submitted As obligations under first agreement were never triggered because G never called upon PHL to settle transactions associated with sale of units as set out in that agreement - A also submitted G never complied with his obligations under first agreement therefore A was not required to fulfill his side.

Held, As repudiation of contract by allowing mortgagee sale alone is enough to warrant award of damages to G also, As obligations not subject to G giving a settlement notice to PHL on basis once an order for specific performance has been made the contract is then under control of Court, only Court can put an end to it - when G obtained order for specific performance, it was on basis he had been at all material times, ready, willing and able to settle - G was not required to prove that again when damages replaced specific performance - in any event, when A repudiated contract he dispensed with any requirement for tender of performance - appeal dismissed. -

High Court

Rosser v Global *Construction Services* Ltd 27/2/04, *Master* Lang, HC Auckland CIV-2004-404-4899

Property - Real - Encumbrances - Caveats

Trusts - Classification Constructive trusts

Successful application by R for order that caveat be removed - R owner of house, title of which was subject to caveat in favour of GCSL house scheduled for sale and as result required application dealt with on interim basis urgently caveat said to protect interest in cestui que trust from registered proprietor as trust pursuant to a constructive trust as evidenced by an arbitral award which determined R was required to pay GCSL $23,298 - GCSL submited work carried out by GCSL on land created such a trust and accordingly a caveatable interest in property.

Held, if GCSL contention is correct it has far-reaching consequences for building industry - therefore important it be argued in more detailed manner - only reason matter was been brought forward with urgency is immediacy of sale - not appropriate to hold up sale pending resolution of issue - only interest protected by caveat is monetary - GCSL does not seek interest in land and has no real problem with property being sold GCSL in essence seeks to be protected in respect of arbitral award however, caveat should be released on condition that R pays sum of $23,298 into Court - application granted.

High Court

Otago Station Estates Ltd *v Parker 10/6/04, CA158103*

Contract -Formalities - Consideration

- Bills of exchange

Unsuccessful appeal by OSEL against decision of High Court ("HC") Judge - OSEL entered into land purchase agreements with P and others - agreement became unconditional and payment of deposit was to deferred - after a lengthy period of time, notice was given to OSEL that cancellation of contract would result if payment was not made within three days - OSEL deposited a personal cheque into the nominated account - P rejected the personal cheque because it was not in compliance with requirement of the agreement - HC Judge decided OSEL did not remedy default in the required time as the personal cheque was not considered good tender OSEL submitted payment by personal cheque must be accepted unless defendants have stipulated in advance - also submitted HC Judge was incorrect to infer a need for certainty in the circumstance of payment made to remedy default - P had forgone right to reject the personal cheque.

Held, there is no custom in relation to payments to remedy default in payment of deposits - failure of P not to-specify the-mode-of-pa_yment-cannot amount to a waiver of requirement to pay in cash, bank cheque or other cleared funds ("legal tender") - no distinction should have been made between payment for deposit

and payment for default of deposit - P has the right to reject a personal cheque by way of deposit - P did not waive the requirements for legal tender - method of payment adopted by OSEL did not comply with the requirements of the agreement - appeal dismissed.

High Court

Familton v Nebraska Investments Ltd *3/3/04,* Master Thomson, HC Christchurch CIV2003-409-2488

Property Real - Encumbrances - Caveats

Successful application by F that caveat not lapse - F and NIL entered agreement for sale and purchase of a unit real estates agent's name was crossed out on agreement and unit was not registered with a real estate agent - NIL submitted as F was employed by real estate agent and was involved in sale of related units he must be taken as having introduced himself and his wife to unit - therefore sole agency clause applied and extended not only to commission requirement, but agent's fiduciary duties to principal - NIL further submitted contract voided based on fact F failed to supply valuation by independent registered valuer as required under Real Estate Agents Act 1976 (REAA) - F submitted REAA did not apply because sale was private.

Held, F clearly has arguable case for retention of caveat as unit was not listed and agreement for sale and purchase written as private sale - once caveator shows reasonably arguable case for interest claimed an order for removal of caveat cannot be made unless patently clear that caveat cannot be maintained - on basis there was no valid ground for lodging it or if a valid ground which once existed no longer does - while possibility that NIPS argument could ultimately prevail cannot be ruled out, it is problematic and not so compelling as to deny F an arguable case - application granted.

Court of Appeal

Liguori v Tai Shing Industries Ltd 1/7/04, *CA240103*

Property Real - Lease

Unsuccessful appeal by L against decision to allow summary judgment - TSIL entered into a six year lease agreement with Gilmer Properties Ltd ("GPL") with L as guarantor - end of the lease period allegedly an oral agreement was reached where the lease would be renewed but no documents were executed - GPL continued occupy premises and paid at the original rate - TSIL resumed possession of property because of breach of lease agreement - High Court Judge held that lease was not validly renewed as notice was not given in accordance with terms of the lease - GPL had not accepted TSIL proposal and had contmued to pay rent in accordance with original lease L had failed to establish a set-off defence - L submitted Associate Judge erred in holding that L had no defence under s 105 Property Law Act 1952 (PLA) - L further submitted Associate Judge erred in holding L had not established a set-off defence - whether the parties had agreed to a new lease or a renewal of the original lease.

Held, no evidence of renewal of lease - clause in the lease is determinative and not s 105 PLA - L failed to satisfy Associate judge on set-off point and this Court will not go against this factual finding appeal dismissed.

High Court

Duncan and Davies Nurseries New Plymouth Ltd v *Honnor* Block Ltd 10/6/04, Keane J, HC Auckland *CIV2004-404-2343*

Civil procedure -Application

Equity Unconscionable. bargains

Property - Real - Lease

Successful application by DDNPL for interim injunction - until 31 August 2003, DDNPL held horticultural land ("land") on lease - DDNPL alleged it held land after that date under agreement to lease - however, in April 2004, it was evicted when HBL, registered owner, re-entered and secured possession DDNPL wished to resume possession for two purposes - namely to uplift stocks of plants to fulfil export orders and to secure access to land for Moores Valley Nurseries Ltd ("MVNL") to which, during currency of asserted agreement, it sublet part until October 2004 - HBL denied there was any agreement to lease - HBL said after lease expired, negotiations for new lease began but neither lease nor agreement eventuated - HBL said DDNPL became tenant at will and was charged rent, which it chose not to pay and therefore HBL asserted it was entitled to resume possession as it did - whether there was, and remained, an agreement to lease.

Held, four elements must be certain for there to be an agreement to lease - namely parties, premises, precise term of lease and rent payable - appearance of agreement is not sufficient - no tenable basis for inferring from correspondence between parties that negotiations resulted in any agreement to enter into new lease, let alone any specific terms - no accord as to who lessee was to be, land to be leased, term or rent - therefore, once original lease terminated, probabilities favour a tenancy at sufferance, which became a tenancy at will once HBL began to charge rent - on termination of lease, DDNPL did not retain a seriously arguable right to re-enter land to uplift plant stock as emblements - significant that HBL made proposal to DDNPL, including allowing DDNPL to remove stock intended for export, when determining whether DDNPL has any more general claim for interim relief-in-equity-,relying-cm uncenscianabihty - before lease terminated there was no thought by either party that DDNPL should prepare to quit immediately - nor that on termination of lease, DDNPL became

disentitled to uplift its plant stock for sale or export - this shared implicit understanding was sufficiently settled to give DDNPL reason to believe it would either retain possession under new lease - alternatively, as long as it was reinstated, it would be able to quit with its stock intact or at lease honour its export contracts and any contract with MVNL - therefore, DDNPL can claim it would be unconscionable for HBL to enjoy any right to stock and DDNPL is entitled to rely on doctrine of estoppel - thus first condition necessary for granting of interim relief is met - balance of convenience and balance of risk favours granting of interim relief therefore, interim injunction will issue requiring HBL to permit DDNPL to enter land and to uplift any plants necessary to fulfil DDNPL's present export orders - also to enable DDNPL to honour any commitment it has to MVNL - application granted.

High Court

Subtropix Ltd v Cassandra Motels Ltd 4/5/04, *Master* Lang, *HC New* Plymouth *CIV-2004-443-157*

Civil procedure - Judgments - Summary

Contract - Performance

Property Real - Land settlement

Unsuccessful application by SL for summary judgment and an order for specific performance of agreement for sale and purchase of freehold of property in dispute - CML owned property, including motel complex which was subject of registered lease - SL wished to purchase both freehold and leasehold property - SL believed it had entered into agreements of purchase - CML alleged no binding agreement ever entered into - negotiations on behalf of CML conducted by their agent Mr Beaven ("B") - affidavit evidence prepared for CML includes contentions that SUs shareholders and directors, Mr and Mrs McMillan ("Ms"), were appraised of need for signature of both CML trustees - while one trustee had signed agreement Mr Unsworth ("U") had not - Ms deny they were told of need for U's approval and signature - submitted for SL that case one of comparatively rare class where credibility issues could be determined on affidavit evidence alone because of conflicts of evidence and consistency of evidence from CML.

Held, principles relating to application for summary judgment are clearly established significantly, summary judgment can not be granted if CMLLs evidence is sufficiently credible that it cannot be dismissed out of hand while matters of credibility as submitted by SL are of considerable weight they can be explored at trial - it is narrowly concluded that B's evidence can be construed as confirming that advice was given to Ms before contract was signed - if M's were told of need for Us approval on 19-February then that advice would have preceded signing of the counter-offer - this issue is significant and can only be properly determined at trial - should CMLs evidence ultimately be accepted several possible defences may be available - noted that SL is seeking to require CML to specifically perform the contract on basis of dealings with B alone - currently B's evidence is extremely limited in scope, where as at trial both parties will have opportunity to fully test B's evidence - would be unfortunate if CML were required to perform contract without first having had opportunity to satisfy itself and Court as to scope and extent of B's actions as CMis agent - not appropriate to enter summary judgment against CML and to require it to specifically perform agreement - application declined.

High Court

Pillay v Economy Taxi Ltd *11/6/04,* Associate *Judge* Lang, *HC Auckland CIV-2004-404-1934 CIV-2004-404-12 70*

Civil procedure - Application

Property Real - Interests in land

Successful application by P for order that caveat not lapse - P interested in purchasing ETLLs three sections so arranged for real estate agent ("K") to approach ETL's director ("R") to ascertain whether sections were for sale - R said ETL prepared to sell sections for $450,000 - P signed written offer to purchase sections for $400,000 - K told P that ETL wanted flexibility over possession and settlement date - accordingly, possession date in agreement left blank P satisfied condition that he obtain sufficient finance by certain date - P denied K's contention that P adamant settlement date be six months from date of agreement - on P's evidence both parties happy for settlement to occur any time after six weeks from date of agreement - agreement never reached regarding settlement date so date of possession in agreement remained blank whether, applying appropriate principles, it is arguable P had caveatable interest in sections - whether binding agreement concluded between ETL and P.

Held, most important factor to determine is whether parties intended to be bound notwithstanding they had not finally agreed upon possession date - should not remove caveat unless patently clear no caveatable interest exists - P's evidence provides sufficient factual foundation to establish it is at least arguable parties intended to be bound subject only to reaching agreement about possession date - agreement for sale and purchase requires written notice of fulfillment or waiver of any condition to be given to vendor written notice never given in terms of agreement and P's solicitor wrote to ETIs solicitor confirming again agreement was unconditional - no evidence to suggest ETL gave P notice, prior to P's confirmation that agreement unconditional, that it was avoiding agreement on basis finance condition not fulfilled-or-net ther€for at-least arguable written notice of fulfillment of finance condition given prior to agreement being avoided by ETL and thus arguable agreement not void for non-fulfilment of finance

condition P has proved to required standard that he has caveatable interest in ETLs property application granted.

High Court

Johnston v Clark *10/6/04*, Ronald Young J, HC Nelson CIV200344223

Contract - Breach Remedies - Rectification

Equity Unconscionable bargains

Property Real - Interests in land

Unsuccessful claim by C and other for specific performance of contract - J owned, as trustee of mother's ("S") estate, 9.6 hectares - J wanted to subdivide property in terms of clause 5 of S's will so she could retain house and section leaving approximately 9.5ha to sell - C was trusted neighbour of J - common ground C interested in purchasing J's property after S's death purchase price of $300,000 was agreed - J and C had different versions of how contract for sale of land came to be signed - C said contract reflected oral agreement between parties - J said contract did not reflect oral agreement between parties - J said oral agreement between parties was for sale of residue of land and J trusted C to draw up contract to match oral agreement C sought specific performance of written contract - J counterclaimed seeking rectification of contract to reflect parties' intention and oral agreement.

Held, C is not a credible witness and his evidence is not reliable - J is truthful witness, intelligent and mostly reliable but occasionally forgetful of precise details given age - J is clearly a trusting person and trusted C evidence overwhelmingly supports J's proposition that she always wanted to remain in house and that any sale of property would be subject to her retaining house and section view is reinforced by note made by J's solicitor prior to signing contract - reject J's submission that failure to stipulate date for settlement meant contract too uncertain to be enforceable - there was a meeting of minds and both parties intended same thing but contract did not reflect oral agreement Contractual Mistakes Act 1977 does not apply because J's "mistake" was in thinking contract matched (as she was told) oral agreement - this is a mistake in interpretation because a reading of contract would have made it clear it did not reflect oral agreement rectification of contract is available on legal principles and should be ordered - when parties signed contract, their intention was to sell and buy only land and not house and section for $300,000 net to trustees - all elements of unconscionable bargain are present regarding contract - these include J's age, C's knowledge of J's trust in C and that J would not sell house gross inadequacy of price for lanct-ffin contract - also C's deliberate action in taking advantage of J's trust resulting in substantially unequal bargain claim rejected.

High Court

Major Decorating Mt Albert Ltd v Duncan *11/6/04*, Harrison *J*, HC Auckland *CIV-2004-404-002716*

Civil procedure Application

Property - Real - Lease

Successful application by MDMAL for declaration that D, MDMALS landlord, acted unreasonably in withholding consent to assignment of deed MDMAL signed agreement to sell its business to Mr Jun and Mr Ryu ("assignees") - MDMAL requested D's consent to proposed assignment as required in MDMAIS contract with D - D refused to consent to assignment and provided no reasons for refusal - consequently, MDMAL issued proceedings - whether D acted unreasonably in withholding consent.

Held , following legal principles are relevant - s 110 Property Law Act 1952 provides D must not withhold consent "unreasonably" - M has burden of proving D unreasonably withheld consent - D was not bound to give reasons for refusing to consent, however, failure to comply with MDMAIs request for reasons may support inference refusal was unreasonable - MDMAL must prove its assignees are of good credit, position or reputation and evidently trustworthy MDMAL has discharged onus of proving D acted unreasonably in withholding consent to assignment of lease - D's primary inquiry must be directed towards assignees' financial circumstances - D's position on this issue is contradictory and defies commercial sense, lending weight to alternative argument D was acting for ulterior purpose of securing occupation of premises - balance of D's grounds for refusal are directed at establishing assignees do not have financial resources to meet tenant's obligations - significantly, D never challenged advice provided about assignees' financial circumstances - MDMAL and assignees acted promptly in seeking consent and supplied whatever information D requested application granted.

High Court

Bevan v Erindi Construction Ltd 10/5/04, Master Lang, HC Auckland *CIV-2004-404-543*

Building Regulation Construction - Compliance certificate

Contract - Construction and interpretation

Contract - Termination

Unsuccessful application by B for order that caveat not lapse - B entered contracts for purchase of two properties - ECL was registered proprietor of land subject of contracts - contracts required code compliance certificates ("certificates") to be provided by 17 April 2003 but date extended by agreement to 30-June 2003- however, construction of dwellings did not proceed according to schedule and ECL was unable to supply certificates by that date - on 19 January 2004, ECL wrote to B advising condition

regarding certificates was not met and contracts were at an end - earlier, on 12 November 2003, B had registered caveat over land in contracts - B sought order that caveat not lapse - whether, applying relevant principles, it was arguable contracts remained in existence.

Held, condition regarding certificates clearly inserted for B's benefit - contracts expressly provided time for fulfilment of any condition was of the essence - condition regarding certificates is to be viewed in same light as finance condition therefore, if condition regarding certificates not satisfied by due date, open to vendor to avoid contracts - thus, after 30 November 2003, open to ECL to avoid contracts at any time before contracts either fulfilled or waived accordingly, ECL entitled to cancel contracts and validly did so - party to contract is not entitled to rely upon failure of condition as bringing contract to end where they are responsible for failure - onus on B to establish caveatable interest and B has not made any attempt to provide any material in reply to ECUs affidavits - no sustainable evidence to suggest ECL deliberately stalled or delayed project's completion B has failed to establish, even to arguable standard, that condition regarding certificates failed by virtue of ECUs default - open to ECL to cancel contracts - B no longer has any interest in land and Bs caveat must be removed - application declined.

High Court

Solicitor-General v de Bruin 28/5/04, Associate Judge Yenning, HC Auckland *CIV-2002-404-003302* - M540/02

Criminal law Proceeds of crime - Confiscation order Forfeiture

Equity Interests

Property Real Interests in land

Successful application by SG for order forfeiting money and residential property to Crown $379,240 in cash was located during police search of property - police seized cash and arrested DB in contemplation of his being charged with money laundering DB was later convicted on numerous counts of importing and selling MDMA (Ecstasy) and nine counts of money laundering the proceeds - jury accepted cash and moneys used in purchase of property were from proceeds of drug operation - Court made restraining order regarding cash and property second respondent Delaney ("D") had prima facie interest in property as joint tenant - D opposed forfeiture order and sought order under s 18 Proceeds of Crime Act 1991 (PCA) recognising her interest in property - whether Court should order forfeiture of property to Crown.

Held, in exercising its discretion, Court may have regard to matters set out in s 15(2) PCA-including-Ks-solieitors-vere-advised-of-this-breach in relation additional factor of D's interest in property despite property's predominant use was home for DB and D, property is affected by funding of its purchase from drug proceeds and fact DB used it in part as base for conduct of drug operations - D will not suffer undue hardship from forfeiture - D's legal interest in property is directly relevant consideration - regarding above factors including seriousness of DB's offending, appropriate to make order for forfeiture of property in Crown's favour however, principal issue is D's position no evidence D was involved in commission of offences or knew or had reason to believe property at time was tainted property issue is whether D's interest can be increased above her equitable interest - DB's entire interest in property was tainted from outset and rights D may have against DB as consequence of their relationship do not translate into right or interest in property entire purchase price of property, excluding $15,000 contributed by DB, was funded from proceeds of crime and therefore D cannot reasonably expect to share in DB's interest or increase her interest in property above initial interest by claim against DB - benefits D received from living in property more than compensate her for monies she expended on property - appropriate to make order for forfeiture of balance of cash to Crown subject to payment of counsel and payment to D of $20,125 being her interest in property - application allowed.

High Court

Kumar v Bahramitash 4/3/04, Williams J, HC Auckland *CIV-2003-404-5876*

Contract - Termination

Property Real - Land settlement

Remedies - Specific performance

Unsuccessful application by K for specific performance of contract to buy land from B - successful counterclaim by B for declaration that he validly cancelled a contract - after inspecting land owned by B, K signed contract to buy land - later, K discovered large quantity of soil on land and alleged soil was dumped after initial inspection K also alleged B had failed to point out boundary pegs - settlement had not occurred and B gave notice to K of cancellation of contract - K issued present proceedings for specific performance - B submitted he had validly cancelled contract issues were when soil was deposited on land, what parties' obligations in relations to pegs were, and whether K should have tendered settlement.

Held, between date of execution of contract and later site inspection, land had been changed by deposit on land of piles of soil - therefore, it was B's obligation to have soil removed before being entitled to settle - although B may have pointed out pegs to K, evidence makes it clear that two were not correctly located - however, land was re-pegged and both B and to pegs was rectified - K should have tendered sum required in settlement statement less sum equal to diminution in value of land due to soil being on land

- K did not do this - B was accordingly entitled to cancel contract - K's claims against B dismissed - B is entitled to judgment against K on his counterclaim by way of declaration that he validly cancelled contract - K's application dismissed - K's counterclaim accepted.

High Court

Commissioner of Inland Revenue v Campbell Investments 19/3/04, Wild J, HC Wellington CIV2003485916

Property - Real - Title - Transfer

Taxation Goods and services tax Assessment - Output tax

Taxation - Goods and services tax Objections

Partially successful appeal by CIR against Taxation Review Authority ("TRA") decision - Mr Montgomery ("M") held three properties as trustee for Cl, unincorporated group of three persons comprising JCM, his wife ("MM") and JCM family trust - M asked that beneficial interests of M and MM be registered in their respective names as legal owners - this was done by memorandum of transfer which transferred shares to MM, trustees of trust and to M beneficially ("transaction") - subsequently MM and JCM asked that their respective shares of property be transferred to family trust - documents detailing these transactions were sent to IRD, who subsequently lost them family trust submitted to CIR the GST return which showed purchases and claimed input credit - CIR decided to unilaterally register M and MM for GST - CIR requested to see documents relating to transactions that had been lost - M submitted new documents - in new documents transfer was described as sale of going concern - CIR assessed Cl for output tax and disallowed trustees' input tax credit - taxpayers objected - TRA allowed trust's input tax credit and disallowed output tax assessed against Cl - TRA held issue of shortfall penalties did not arise - CIR appealed against decision of TRA whether trustees of trust were entitled to input tax credit - whether Cl was liable for output tax whether shortfall penalty should be levied against taxpayers.

Held, transaction did not constitute supply for GST purposes of properties by Cl to its members - Cl's taxable activity is renting commercial property activity did not change after transaction date - all that happened then was transfer of legal title to beneficial owners - transfer of properties to family trust did not involve supply for GST purposes by CI to trust within relevant tax period, because settlement did not occur until later - it follows that there cannot have been failure by CI to return GST output tax in respect of that supply in its GST return - shortfall penalty cannot be imposed on Cl for supply of properties, because supply did not occur in taxable period however; Cl's tax position for taxable period was abusive one in relation to supply for GST purposes of rent from properties, attracting 100 percent shortfall penalty - trustees are not entitled to input credit and Cl is not required to pay output tax appeal allowed in part.

High Court

Westpac Banking *Corporation* v Ikafoli 4/4/04, Master Lang, HC Auckland *CIV-2004-404-972*

Civil procedure - Application

Property - Real - Encumbrances - Caveats

Successful application by WBC to remove caveat - WBC held first mortgage over residential property in Auckland - registered proprietor of that property defaulted in their obligations under the mortgage and Property Law Act 1952 notices since expired - WBC exercised its power under the mortgage to sell property to third party, and settlement of sale was due to be completed - property occupied by I and other - I and other filed a caveat against the title to the property caveat purported to protect their position as purchasers under an option to purchase granted by registered proprietors to them WBC had discussions with the adviser assisting I and other in discussions I and other expressed an interest in purchasing the property ultimately, that was not possible and sale by the mortgagee prevented that as a possible option - WBC entered into contract to sell property - there was shortfall due to payment of enforcement costs and costs of sale.

Held, I and other's caveat has no further utility given the exercise by WBC of its power of sale as mortgagee, despite their original caveatable interest - shortfall as a result of the sale means that neither present registered proprietors nor I and other can have any justification for maintaining hope of any further interest in the property appropriate to make orders sought by WBC, I and other had been notified but did not appear order made removing caveat from property in question - costs are reserved - orders accordingly

High Court

Ngati *Apa* Ki *Te* Waipounamu Trust *v Attorney-General;* Alt cit Ngati Rarua Iwi Trust v Attorney-General *23/3/04,* CA192/02; *CA201102*

Civil procedure - Appeals

Maori affairs - Land Maori Appellate Court

Unsuccessful applications for conditional leave to appeal by NAKTW and another Iwi against Court of Appeal decision - Waitangi Tribunal had overlapping land claims by a number of South Island Iwi - Maori Appellant Court ("MAC") determine tribal ownership boundaries in the Upper South Island in favour of Ngai Tabu - NAKTW and other Iwi sought a judicial review on the MAC decision on the grounds of procedural improprieties and breaches of natural justice - NAKTW and other Iwi submitted they had a right of leave to appeal under the third limb of rr 2(a)

and 2(b) of the New Zealand (Appeals to the Privy Council Order) 1910 (the Rules) - NAKTW and other Iwi contended that requirements of natural justice in a judicial process affecting Maori rights raised a question of great general or public importance.

Held, NAKTW and other Iwi's anticipation of final sucess to an extent beyond $5,000 is in law no more than an expectation and is not a civil right considered under the Rules - fact specific or narrowly defined issues of law are unlikely to meet the threshold under the Rules - whether or not the MAC had breached natural justice is important but is of narrow scope will not be used for any other case - appeal dismissed.

High Court

Property Rights *of New* Zealand Inc v Manawatu-Wanganui Regional Council 12/2/04, Master Gendall, HC Wellington CIV-2003-485-1136

Civil procedure - Pleadings - Striking out

Unsuccessful application by MWRC to strike out PRNZI's appeal against Environment Court ("EnvC") decision MWRC's application was brought on that grounds that relief sought by PRNZI was beyond scope of reference to EnvC and original submissions to MWRC - also submitted appeal disclosed no reasonable or relevant case in relation to alleged errors in law PRNZI had brought an appeal arguing MWRC's charges should be contained in its proposed plan MWRC's application was made on reliance of r 186 High Court Rules and inherent jurisdiction of the Court.

Held, PRNZI should be accorded opportunity to have appeal heard - PRNZI had proceeded with due diligence - this is not a matter in which inherent jurisdiction of the Court to strike out an appeal should be exercised application declined.

LEGISLATION

Overseas Investment Amendment Regulations 2004 (SR2004/146)

These regulations, which come into force on 01/07/04, amend the fees prescribed by the Overseas Investment Regulations 1995 ("the principal regulations").

There are no changes to the fees for applications for non-land matters (under Part II of the principal regulations) or for administrative and information services.

The changes to the fees for applications for land matters (under Part III of the principal regulations) are as follows:

- consent determined by the Overseas Investment Commission (the Commission) under delegation: the per consent fee is increased from $3,500 to $4,400 and the maximum fee is increased from $8,750 to $11,000:
- consent determined by the Minister of Finance and the Minister of Lands: the per consent fee is increased from $3,800 to $4,800 and the maximum fee is increased from $9,500 to $12,000:
- consent for a specified transaction (whether determined by the Commission or the Minister of Finance and the Minister of Lands): increased from $1,200 to $1,500:
- for consent to a series of transactions involving either the same purchaser or the same vendor: the initial consent fee is increased from $3,800 to $4,800 and the subsequent consent fees are increased from $2,500 to $3,200:
- alteration of consent conditions determined by the Commission under delegation: increased from $800 to $1,000:
- alteration of consent conditions determined by the Minister of Finance and the Minister of Lands: increased from $3,500 to $4,400:
- exemption determined by the Commission under delegation: the per transaction fee is increased from $600 to $800 and the maximum fee is increased from $6,000 to $7,500:
- exemption determined by the Minister of Finance and the Minister of Lands: the per transaction fee is increased from $800 to $1,000 and the maximum fee is increased from $6,000 to $7,500.

Other fees under the principal regulations are increased as follows:

- the consent fee for retrospective consents is increased from $500 to $1,000:
- the annual monitoring fee for being listed in Schedule 1 of the Overseas Investment Exemption Notice 2001 as a portfolio investor is increased from $400 to $500: -
- the application fee for being added to Schedule 2 of the Overseas Investment Exemption Notice 2001 as a New Zealand controlled entity is increased from $3,800 to $4,800, and the annual monitoring fee is increased from $2,500 to $3,200:
- the fee for an application for a declaration under section 56 of the Fisheries Act 1996 is increased from $22,500 to $30,000:
- the fee for an application for the grant of a permission under section 57 of the Fisheries Act 1996 is increased from $22,500 to $30,000.

Land Information New Zealand (Fees and Charges) Amendment Regulations 2004 (SR2004/157)

These regulations, which come into force on 05/07/04, amend the fee pale to Land Information New Zealand, as set out in Part 3 of the Schedule of the Land Information New Zealand (Fees and Charges) Regulations 2003, for providing a copy of a survey plan or diagram.

Land Transfer Amendment Regulations 2004 (SR2004/158)

These regulations, which come into force on 5 July 2004, amend the Land Transfer Regulations 2002 by substituting a new schedule of fees payable under the Land Transfer Act 1952. The main features of new Schedule 5 are as follows:

- the Schedule is restructured to provide a more logical sequence:
- some items have been deleted or merged with others:
- most fees are reduced.

Cadastral Survey (Fees) Amendment Regulations 2004 (SR2004/159)

These regulations, which come into force on 5 July 2004, prescribe the fees payable under the Cadastral Survey Act 2002 for determining, under section 9(a) of the Act, whether cadastral survey datasets and cadastral surveys comply with standards set under section 49 of the Act.

Regulation 4 reduces 4 of the fees payable for electronic document lodgement and 13 of the fees payable for manual document lodgement under the principal regulations. These changes reflect the marginal costs associated with the products and services of Land Information New Zealand (LINZ), as listed in the fee schedule, and the equitable share of the residual costs that are recovered from the users of the products and services.

An over-recovery of fees for LINZ's products and services has resulted in a surplus. Regulation 3(1) provides a means to return this surplus to the users of LINZ's products and services by adding 2 circumstances when the chief executive may authorise a refund or waiver of a fee. The 2 new circumstances provide for a refund or waiver of a fee if the refund or waiver is to

- encourage the lodgement of digital cadastral survey datasets; or
- recognise any over-recovery of fees in previous financial years.

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Contributor's Name & Firm

Location of Costing

Date

Type of Costing (please circle)

Residential Rural Commercial Industrial

Type of Construction (i.e. House/Flats/Office/Shed etc)

Construction Details

(If insufficient space please continue on separate sheet)

Areas

Contract Price (Excluding GST)

Analysis

Element Floor Area Cost/M2 Modal Multiple

Notes

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Fernside- Hip Roofed Bungalow, July 2004
Contributed by Denis J Milne, North Canterbury Valuations
Construction: 4 Bedroom, 2 Bathroom, Hip roofed Bungalow with integral double garage situated on a level site at Woodend. Brick veneer with cone. tile roof and double-glazed.
Areas: 146.40m2
Contract price: $148,150 (excl. GST)
Analysis:
Total: 146.40m2 Net Modal Rate: $699.72 Notes: Country build factor 1% of contract price per 10km. The distance from the main centre is 28km. The allowance for architecture/draughting fees is $1,476. Golden Homes Building were the Contractor.

Fernside- Hip Roofed Bungalow, January 2004
Contributed by Denis J Milne, North Canterbury Valuations
Construction: 4 Bedroom, 2 Bathroom, Hip roofed Bungalow with internal access double garage. Situated on a flat site at Fernside. BV and C/Steel roof.
Areas: 146.66m2
Contract price: $172,271 (excl. GST)
Analysis:
Total: 146.66m2 Net Modal Rate: $778.52
Notes: Country build factor 1% of contract price per 10km. The distance from the main centre is 35km, and the allowance for the architecture/draughting fees is $1,718. House constructed by Builder Today Homes.

Waikuku- Hip Roofed Bungalow, January 2004
Contributed by Denis J Milne, North Canterbury Valuations
Construction: 4 Bedroom, dual bathroom Hip Roofed Bugalow with integral double garage. Constructed of concrete floor slab, Rockote walls and Coloursteel roof.
Areas: 163.54m2
Contract price: $173,537 (excl. GST)
Analysis:
Total: 163.54m2 Net Modal Rate: $745.73
Notes: Country build factor 1% of contract price per 10km. The distance from the main centre is 30km, and the allowance for the architecture/draughting fees is $1,852. House constructed by Stonewood Homes.

Woodend- Hip Roofed Bungalow, January 2004
Contributed by Denis J Milne, North Canterbury Valuations
Construction: 3 bedroom, dual bathroom, Hip roofed Bungalow with integral double garage erected on a flat site at Woodend. Conc. Floor 70 series BV and Col. Steel roof.
Areas: 154.98m2
Contract price: $150,771 (excl. GST)
Analysis:
Total: 154.98m2 Net Modal Rate: $709.00
Notes: Country build factor 1% of contract price per 10km. The distance from the main centre is 26km, and the allowance for the architecture/draughting fees is $1,591. House constructed by a private builder.

Ohoka- Superior Dwelling, February 2004
Contributed by Denis J Milne, North Canterbury Valuations
Construction: 11/2 storey superior dwelling with integral double garage, situated on a flat rural residential block at Ohoka. Concrete lfoor, hebel walls, metal tile roof and double-glazed ext. joinery
Areas: 260.27m2
Contract price: $324,030 (excl. GST)
Analysis:
Total: 260.27m2 Net Modal Rate: $916.27
Notes: Country build factor 1% of contract price per 10km. The distance from the main centre is 26km, and the allowance for the architecture/draughting fees is $3,047. House constructed by David Reid Homes Ltd.

Northwood, Christchurch April 2004
Contributed by Property Technology Ltd
Construction: Residential House, currently 27% completed. 4 bedrooms (Con fdn for floor), 2 bathrooms (Est walls Rockcote cladding and Linea boarding), Double Garage (Interior walls plaster board). Roof Long Run Colsteel, Joinery: D/S Alum. 7 year Masterbuild guarantee. Site works: driveway (col concrete) patio same concrete service Board. Landscaping: ready lawn & basic shrubs, boundry line 2 sides ih share. Internal fence 1.5 & 2, clothesline (fence mounted), 1 mailbox (brick plaster)
Areas: House area 191.48m2 (PC Sum $8,500)
Contract Price: House $216,400 (excl GST)
Siteworks: $15,420 (excl GST)

Rangiora, Canterbury Westland May 2004
Contributed by Denis J Milne, North Canterbury Valuations
Construction: Superior hip roofed bungalow with dual bathroom and integral double garage in a new subdivision Hanmer Springs.
Areas: 37.65m2
Contract, Price: $177,464 (excl GST)
Analysis:

Net Modal Rate: $827.43

Glrtint1tt1al C oslings

Birmingham Dr Area, CHCH April 2004
Contributed by Property Technology Ltd
Construction: Commercial Factory Warehouse 5 meter stud, Concrete Fdn and floor (wodden top), Ext walls 120m precast concrete slabs office Hardiflex on TW frame & Rockcote. Roof Trimdele Col steel. Joinery Alum, Lininap Plaster (office) & D/side sisalation on netting (roof). Steel portal frame, Suttering Butynolan 18m CPd plywoods P+ Para/x1 wall. GIFI reception & Office top office & (A Hachect's side of building)
Areas: Ground floor 561m2 + Deck 11.16m2 + Upper Floor-58m3-=b 19m2
Contract Price: $340,5000 (excl GST) + $5,000 plans + $5,500 Council RC.
Analysis: Office GF 63.8, Top 58.0, Ablution 7.0
Notes: Warehouse 503.67, Roller Door 4.8 x 4 hand operated.

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and the Institute of Plant & Machinery Valuers (IPMV)

" ....any Fellow or Associate who *rendered pre-eminent* service to the Institute *over a* long *period....."*

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R V THOMPSON
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J BRUCE BROWN
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S A FORD
M R MANDER QSO
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A L McALISTER
S L SPEEDY
R P YOUNG
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