Ngāti Whakaue Education Endowment Trust Board v Rotorua District Council

Land Valuation Tribunal Rotorua LVP 12/15; 18-90/15;
20, 21 May; 18 July 2019 [2019] NZLVT 077
Judge J A Smith, Chairman, K Stevenson and D A Culav, Members

Land valuation — Effect of statutory constraint on value — Assessing extent of effect on value of inability to resell — Reserves and Other Lands Disposal Act 1995, s 7; Reserves and Other Lands Disposal Act 1926, s 12; School Trustees Act 1989; Te Ture Whenua Maori Act 1993.

The Ngāti Whakaue Education Endowment Trust Board (the Board) objected to the rating land valuation put in place for certain blocks of land by the Rotorua District Council (the Council). That objection was on the basis the Council did not appropriately take into account the constraints on the ownership of the land under s 7(1) of the Reserves and Other Lands Disposal Act 1995 (the Act). Those constraints included that the Board was unable to sell or otherwise dispose of the land, and that it had to apply the net revenue from the land for the general purpose of education. The High Court *Ngāti Whakaue Education Endowment Trust Board v Rotorua District Council* [2017] NZHC 60, [2017] NZAR 376 and the Court of Appeal *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board* [2018] NZCA 143, [2018] NZAR 951 confirmed that the impact upon the value of a constraint under s 7(1) could be taken into account, but remitted the question of the effect in the particular case to the Land Valuation Tribunal for consideration, following expert evidence. The parties were agreed on the value of the land before any effect was taken into account, and that there was an effect. The dispute was over the extent of that effect.

Held (Ordering that the value on the property was to be adjusted downward by 15 per cent)

1 The chance of a change to the Act was, in the short to medium term, highly unlikely. The Tribunal had previously dealt with a number of cases where changing zoning, and the likelihood of its occurrence, had significantly influenced the value of land. On the evidence, the market would not value a prospect of change much beyond a period of 25 years and even then would devalue that prospect rapidly beyond 10 years. In

this case, a purchaser would value the land for its current purpose and would put little extra value on the long-term prospect of change.

Auckland Council v Green & McCahill Holdings Ltd [2015] NZCA 20, [2015] NZAR 849 considered.

B & J Tong Family Trust v Auckland Council [2018] NZLVT 6 considered.

2 The inability to resell was a long-term constraint upon the use of the property which would affect its value to a prospective purchaser. While there would be an ongoing income stream, the purchaser would calculate value on the basis they would lose access to capital by resale or subdivision for some decades. However, the general powers of the owner to use the property for highest and best use, rental terms, and the ability to re-enter upon surrender of Glasgow leases, to some extent ameliorated the affect of the inability to sell. The evidence was that commercial returns that could be achieved from the site would not be affected by the inability to sell, the practical effect of which was that any reduction in the sale price increased the return to the owner. That amounted to the return of the owner's capital over time.

Ongare Trust Māori Land Block v Western Bay of Plenty District Council [2009] NZAR 175 (LVT) considered.

3 The land values of the properties were to be adjusted by a discount of 15 per cent. That was lower than the level of discount that might apply in an identical situation where the land was not already at its highest and best use.

Valuer-General v Trustees of the Christchurch Racecourse HC Christchurch AP243/92, 13 September 1994 applied.

4 The Valuer-General's *Mangatu* Guidelines are discredited and are of no value or utility.

Cases referred to in judgment

Auckland Council v Green & McCahill Holdings Ltd [2015] NZCA 20, [2015] NZAR 849.

B & J Tong Family Trust v Auckland Council [2018] NZLVT 6.

Li v Auckland Council [2018] NZEnvC 87.

Mangatu Inc v Valuer-General LVP 22-33/95 (29 December 1998) (LVT).

Ongare Trust Māori Land Block v Western Bay of Plenty District Council [2009] NZAR 175 (LVT).

Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board [2018] NZCA 143, [2018] NZAR 951.

Valuer-General v Mangatu Inc [1997] 3 NZLR 641 (CA).

Valuer-General v Trustees of the Christchurch Racecourse HC Christchurch AP243/92, 13 September 1994.

Determination

This matter was remitted to the Tribunal to determine the extent of the effect on value of a constraint.

L McEntegart and *GJ Dennett* for the objector.

P V Cornegé and *LF Muldowney* for the respondent.

JUDGE SMITH, CHAIRMAN, MEMBER STEVENSON AND MEMBER CULAV.

Introduction

[1] The Trust Board objected to the rating land valuation put in place by the Rotorua District Council on the basis that it did not appropriately take into effect the constraints on the ownership of the land. This was appealed subsequently to the High Court and then to the Court of Appeal which confirmed that the impact upon the value of a constraint under s 7(1) of the Reserves and Other Lands Disposal Act 1995 (s 7(1)) could be taken into account but hesitated to reach a conclusion on its impact given the lack of expert evidence on the point.

Does s 7(1) constrain the interest of the owner?

[2] Whether s 7(1) imposed a constraint in this case was clearly a proposition that the Court of Appeal referred back to the Tribunal to determine on the facts. It was conceded at the outset of this case that there was no dispute between the relevant experts that there was an effect on the value. There was a wide disparity between the witnesses as to the extent of that effect. For current purposes we consider that the evidence is unequivocal and that the owners interest in this case is restricted by the provisions of s 7(1).

Background

[3] The site is a 1.1586 hectare site close to the water's edge to the southern side of Lake Rotorua. This land has been general land since 1880. The Court of Appeal itself cited the history of the matter in the following terms:[1]

> Factual background
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> [7] We gratefully adopt the Judge's summary of the history of Maori ownership of leasehold land in downtown Rotorua and the Fenton Agreement of 25 November 1880 between Ngati Whakaue (and selected representatives of other inland Te Arawa iwi) and the Crown by which the township of Rotorua would be established and European settlement promoted:
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> > [4] The Fenton Agreement involved land passing through the Native Land Court and becoming general land. Some land was to be owned by Ngati Whakaue and leased out and some was to be used as reserves and other public purposes. One aspect was the use of rental proceeds from some of the land for secondary education in Rotorua. This evolved in a series of legal steps:
> >
> > (a) A 1905 Order in Council provided that the rents from the land were reserved for secondary schools under the control of the Auckland Education Board.
> > (b) Section 12 of the Reserves and Other Lands Disposal Act 1926 permanently reserved the land as an endowment for a High

1 *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board* [2018] NZCA 143, [2018] NZAR 951 at [2].

School at Rotorua and allowed for the vesting of the lands in the Board of the school.

(c) Section 8 of the Reserves and Other Lands Dais Act 1928 provided the net revenue would be applied 55 per cent to the payment of teacher salaries at Rotorua High School and the balance as agreed with the Minister of Education.

(d) Section 12 of the Reserves and Other Lands Disposal Act 1960 vested the land in the Board in trust, as agreed with the Ministry of Education, making the revenue also available of a second High School in Rotorua.

(e) The Rotorua High School Board Empowering Act 1979 extended the Board's powers to purchase further lands and accept gifts and named the endowment lands the Ngati Whakaue Endowment.

(f) Section 6 of the Reserves and Other Lands Disposal Act 1982 extended the benefit of the revenue to additional schools.

(g) Section 19 of the School Trustees Act 1989 vested the land in the Public Trustee.

[5] In a claim to the Waitangi tribunal, WAI 94 in 1989, Ngati Whakaue claimed the Crown had breached the Treaty of Waitangi through several of its actions in relation to the Fenton Agreement and 1881 Act. This included that: Ngati Whakaue have been prejudicially affected by section 12 of the Reserves and Other Lands Disposal Act 1926, section 12 of the Reserves and Other Lands Disposal Act 1960, and the Crown's acquisition of the Rotorua High School endowment lands and their subsequent transfer to the Public Trustee pursuant to the School Trustees Act 1989 ...

[6] In 1993, as part of the Settlement Agreement of WAI 94 the Crown agreed:

> 8. The Crown will address two further concerns of Ngati Whakaue, at administrative cost only to the Crown, as an expression of good faith of the Crown and as part of the Crown's Article I Treaty of Waitangi objective by:
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> ...
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> (b) initiating legislation to amend the terms of the Trust that administers the Rotorua High School endowment land under the terms of section 12 of the Reserves and Other Lands Disposal Act 1960 so that six members of the governing body (including the Chairperson) shall be representatives of Ngati Whakaue, as nominated by the Pukeroa-Oruawhata Trust and Ngati Whakaue Tribunal Lands Inc, and five members shall be representatives of the Rotorua High Schools, and the name of the endowment shall be changed to the Ngati Whakaue Education Endowment; further, the Crown will seek to amend the terms of the endowment so that the purpose of the endowment shall be the general purpose of education ...

[7] This Treaty commitment was implemented by ss 6 to 12 of the Reserves and Other Lands Disposal Act 1995. This Act:

(a) establishes the Ngati Whakaue Education Endowment Trust Board (the Trust Board), with members appointed by the

Trustees of Pukeroa-Oruawhata and the boards of five Rotorua secondary schools;

(b) vests some 16 acres of specified valuable commercial properties in downtown Rotorua in the Trust Board in trust;

(c) provides "the Board has power to lease the land to which this section relates, but shall not sell or otherwise dispose of any part of the land" except for subdividing it to make it more suitable for leasing and ancillary purposes (s 7(1)(b)); and

(d) requires the net revenue to be applied by the Trust Board "for the general purpose of education" (s 7(1)(c)).

(Footnotes omitted.)

[4] In short from this we understand that Ngāti Whakaue dedicated this land as general land for the purpose of providing an income for education of the district. Over a period of time the government utilised this land in various ways and under s 12 of the Reserves and Other Lands Disposal Act 1926 as reserved land as an endowment for Rotorua High School. The land was then vested in a statutory board. By various other modifications to the Rotorua High School's Board Empowering Act, this led to a Treaty claim by Ngāti Whakaue asserting prejudice with the transfer of that endowment to the Public Trustee pursuant to the School Trustees Act 1989.

[5] It is clear in our view that this land has not belonged to Ngāti Whakaue since 1880. It was specifically given by them as endowment land for a particular purpose. The complaint of Ngāti Whakaue is that the land has been incorporated by the Government and High School Board as part of the divestment which occurred in the 1980's.

[6] The solution which was adopted is one which appointed Ngāti Whakaue representatives to that Board. The trustees appointed for Ngāti Whakaue Education Trust Board have retained ongoing concerns about the necessity of them accounting to the Ministry of Education on an annual basis and the lack of their ability to operate in a proper way. Mr Patchell went to some extent to explain the attempts they had made to have the legislation modified to more properly reflect the purpose of the Fenton Agreement and the endowment in 1880.

Chance of change to statute

[7] Mr Cornegé argued extensively through the hearing that there was a high likelihood of a change to s 7(1). In support of this he called Mr Chris Finlayson QC, a former minister of the previous government. Mr Finlayson said that he would not have settled a Treaty of Waitangi claim in this way restricting the rights of the trustee to sell the land.

[8] We conclude that this statement ignores the significant history of this case and the fact that this was always endowment land as general land not a revestment of the land taken from Ngāti Whakaue.

[9] Mr Patchell for the trustees indicated that the trustees had shown no interest in seeking to have the land vested in Ngāti Whakaue again and that the endowment land forms part of the significant history of Te Arawa Fenton Agreement under the land and other reserves land were intended to be reserved for specific purposes.

[10] We have concluded that to the contrary of the evidence given by Mr Finlayson QC and Mr Cornegé's argument, the intent was always that this land remain reserved and used for endowment purposes for education within the district.

[11] On this basis we conclude that any change to allow freehold sale of this land to a third party (particularly outside Ngāti Whakaue) might be seen as a direct breach of that agreement with the Crown. We do not need to go this far however, and we have concluded that as a matter of fact the prospect of change of this constraint within the short to medium term is highly unlikely.

[12] Having said that there is always a prospect of change in circumstances over the next decades and it must be said that within a period of somewhere between 30 to 50 years anything is possible. Nevertheless, we conclude that given the prospects of change at that range of time they very much fall to be disregarded as a market consideration

Value of long term prospects

[13] In this regard the Land Valuation Tribunal has dealt with a number of cases where land purchased as farm land has subsequently been rezoned for various purposes and the value of that land changes over time. A recent example would be *Green & McCahill v Auckland Council*[2] which dealt with compensation under the Public Works Act. What seems to be a common factor in the valuation of all of those cases is the potential for change to another more intensive use is normally not significantly valued if that prospect is not within scope within the next decade to 15 years. The Green & Mccahill site was part of the original Todd farm at Okura which has been the subject of application for rezoning before the Environment Court on a number of occasions including recently in 2017.[3] Although there was zoning in place for some development on the Green & McCahill land, much of the remainder of land was in farming, coastal riparian, native vegetation and the like.

[14] Thus, the Tribunal, from time to time, has to deal with issues where changing zoning (particularly recently through the Auckland Unitary Plan) and its prospect of occurrence have significantly influenced the value of the land. A good example of this is the recent Tribunal decision in *B & J Tong Family Trust v Auckland Council*[4] where, as the prospect of development on the land became more realistic, the value of the property increased rapidly.

[15] Any inferences as to how a purchaser would value long term prospects over 30 years must be speculation on our part. Nevertheless, as shown in *Tong v Auckland Council*,[5] the value can increase rapidly as change to a higher and better use becomes realistic. That appears to be in a period of (0–3 years).

[16] We are satisfied from the evidence we have heard that market would not value a prospect of change much beyond a period of 25 years

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2 *Auckland Council v Green & McCahill Holdings Ltd* [2015] NZCA 20, [2015] NZAR 849.
3 *Okura Holdings Ltd v Auckland Council* [2018] NZEnvC 87 (EnvC).
4 *B & J Tong Family Trust v Auckland Council* [2018] NZLVT 6 (17 April 2018).
5 Cited above.

and even then would devalue that prospect rapidly beyond 10 years. In this regard it is similar to the prospects of a person purchasing rural land which has not got any future zoning in place but the possibility of being able to have it rezoned for more intensive use in the coming decades. We conclude that if that prospect is more than 20 years away, any holder of that land (commonly called land banking) is holding on the long-term chance of change but usually on the basis that the activity derives a relevant income in the meantime, that is as a farm.

[17] We conclude the purchaser in this case would value the land for its current purpose and would put little extra value on a long-term prospect of change. Put another way we do not believe that a purchaser would value the land for a more intensive use and then discount it back to the purchase time. The complication in this case is that the land is at its highest and best use currently and is deriving an appropriate income. The parties agree on the property value in the absence of a discount for the restraint on the title. Thus, we are using current use, highest and best use and valuing prospect of change to the legislation as a discount.

Approach to measuring constraint

[18] Therefore, this Tribunal and the experts are left trying to value the constraint on the title (that is the ability to resell), while recognising that the highest and best land use is otherwise appropriately recognised in the value of the land. On the basis that we can see no prospect of change in the constraint on the owners in the short term we now move to consider the value of that constraint.

[19] Could we add that Mr Cornegé; submitted and Mr Finlayson gave evidence on the basis that such a restraint would be easily removed. It is most curious to this Tribunal that valuation of Maori land is still dealt with on the basis of a hypothetical sale. This is a cultural anathema to many Maori land owners and has been extensively criticised in other valuation tribunal decisions. For current purposes we cite the Land Valuation Tribunal in *Ongare*.[6] We noticed a distinct level of discomfort by Mr Patchell in discussing the prospect of the trustees ever contemplating the sale of this land given the agreement of 1880 (nearly 140 years ago) which is one of the early examples of partnership between the Crown and iwi for their mutual benefit.

[20] While we are constrained to apply the Rating Valuation Act we recognise, as did Judge Ingram in *Ongare*,[7] the cultural difficulty of such a hypothetical approach. It appears to us the legal equivalent of trying to hammer a square peg into a round hole. Given the multiple approaches by Ngāti Whakaue to the government (including during the period of Mr Finlayson's incumbency) it is indeed deeply regrettable that this issue has not been given greater priority.

The extent of the constraint

[21] Dr Boyle, an economist called by Ngāti Whakaue, gave detailed evidence as to modern attempts to value constraint on the title

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6 *Ongare Trust Māori Land Block v Western Bay of Plenty District Council* [2009] NZAR 175 (12 December 2008) (LVT).

7 Cited above.

such as the current one independent of the value of the property for its income generating purpose. He recognised that the value of the property is comprised of two significant elements:

(a) It's ability to derive a commercial return;
(b) The mutability of the asset. This includes not only its liquidity but ability to be changed in form and type at the will of the owners. This necessarily includes the constraints on resale that might be imposed by statute on an owner.

[22] We recognise immediately the preference of valuers to use comparative evidence. The difficulty in this case is by definition there is no evidence because of the inability to sell.

[23] Dr Boyle has therefore extrapolated from various international sources and theoretical papers to try and derive a value for that constraint only. Using various economic formula, he suggests a figure between 30 to 40 per cent and settles on a figure for current purposes of 30 per cent devaluation in the value of these properties. This is a devaluation of the entire property due to that factor and recognises the full economic return of the property.

[24] We note that there are examples in relation to other forms of reserves (where the land use is restricted to recreation or other purposes) of 30 per cent or more. The leading case in this area, *Valuer-General v Christchurch Racecourse*.[8] Here the Court not only valued the land as non-developable (that is rural) but then allowed another discount for approximately 35 per cent even though the land had an underlying zoning for development.

[25] Given that the parties have agreed on the value of this land but for the constraint on ownership, they have already acknowledged that fully developed value should be used rather than some lower and less efficient use of the property. This would tend to strengthen Dr Boyle's arguments that a discount of around 30 per cent is justified looking at theoretical economics.

[26] Dr Fairgray disagreed with some of the calculations used and alters some of the factors to demonstrate that the model is susceptible to changes in input. For example, he notes if the delay or chance of change of ownership is only in the order of five years the formula would suggest that there is no discount. In our view, this is a restatement of the proposition we made earlier, that the period of chance of change would be a factor taken into account clearly by the market. However, by way of comparison, we would have considered that the chance of change in comparison with say the Te Ture Whenua Act constraints would be significantly higher for this property where change of ownership is prevented by a statutory provision.

[27] We also acknowledge that the formula is susceptible to a numerical constraint which is included to correct numbers. This means that the longer the period the greater the discount to the total value which

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8 *Valuer-General v Trustees of the Christchurch Racecourse* HC Christchurch AP243/92, 13 September 1994

approaches 100 per cent. Dr Boyle suggests 84 per cent. For our purpose we consider that the model is only useful for periods between 10 to 50 years and even then can be no more than a guide. What it does tend to demonstrate is that the factors recognised in cases such as *Christchurch Racecourse*[9] and others do fit broadly within an economic model albeit susceptible to changes in input numbers to the formula.

[28] Several valuers gave evidence including Mr Gillespie and Mr Smithies for the objector and Mr Grinlinton for the Council. Based primarily on identifying adjustments typically made by valuers when comparing sales evidence with the property being assessed, Mr Gillespie proposed a 30 per cent discount. Mr Smithies confirmed it was impossible to be precise about the impact on value of the prohibition on sale but considered a deduction of 33 per cent from the freehold value as appropriate. Mr Grinlinton's position turned largely on his view that there was a high prospect of change for the purchaser which would mean that there was a little discount to the value between 3 to 5 per cent. In the absence of that prospect of change his assessment of the deduction in value was 10 per cent. Mr Grinlinton's approach was clearly based upon his application of what he called the Valuer-General's *Mangatu* Guidelines (*Mangatu* Guidelines).

The Mangatu Guidelines

[29] The Tribunal became confused during this and other hearings with the constant reference to these factors which on the face of it appeared to be a reference to the *Mangatu* decision.[10] However, it transpired that this was not the case but was rather a reference to the Valuer-General's *Mangatu* Guidelines issued subsequent to that case.

[30] Annexed hereto and marked A is a copy of those guidelines and it can be seen that these are absolute and unexplained in their terms. There was no evidence that these guidelines had been endorsed in any superior Court or Land Valuation Tribunal and in fact have been subject to relatively regular criticism by various Tribunals and indeed by inference in superior Court decisions. What is clear from the superior Court decisions including the Court of Appeal decisions in *Mangatu*[11] and *Ngāti Whakaue*[12] is that the assessment of that impact upon the owner's estate needs to be examined on a case by case basis.

[31] We suggest the following factors are ones which are relevant (non-exclusively) to the consideration of such impact:

(a) The nature of the estate particularly whether it is entrenched in legislation or in personal covenants or in contractual covenants;
(b) The level of improvements to the site and whether it has achieved its highest and best use;
(c) Organisation and management of the ownership group;

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9 *Valuer-General v Trustees of the Christchurch Racecourse* HC Christchurch AP243/92, 13 September 1994.
10 *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA).
11 Cited above.
12 Cited at footnote 1.

(d) Any site-specific constraints including cultural sites, major environmental features, planning documents, statutory or other overlays;
(e) Whether there is any market evidence showing equivalent values without the particular constraint in place;
(f) Whether there is any market evidence showing the effect on values with the constraints in place;

[32] Mr Grinlinton referred to the *Mangatu*[13] decision in the Land Valuation Tribunal after remission back from the Court of Appeal. He notes that decision quotes some eight sites where it was asserted that there had been little or no effect on values. Unfortunately, the information given in the Tribunal decision is:

a) Entirely incomplete;
b) Does not show the dates of valuation;
c) Who undertook the valuation;
d) What the comparable elements of the sites together with adjustments made to those values.

[33] While this information may have been given to the Land Valuation Tribunal in that decision it is not available to witnesses before this Tribunal and they are unable to support or explain the various figures given. We must discount entirely that information and note that it would be over some 22 years out of date in any event.
[34] While the *Mangatu* factors under the Te Ture Whenua Act may have been changed by virtue of amendments made to that Act after the *Mangatu* decision, that issue is not relevant for current purposes. As we have noted already, this land is general land subject to a statutory restraint under s 7(1) of the Reserves and Other Lands Disposal Act 1995. In the absence of an alteration to that prohibition on sale the land cannot be resold. We have determined the prospect of that occurring within a period which would affect its value is very low.

Constraint on the owner's estate
[35] Given the clear recognition of the two elements of value being the income to be derived from the asset and the mutability of that asset, we have concluded that adjustment needs to take into account a prospective purchaser will also be looking for a proper return on the asset. In this case that return is unaffected by the constraints on ownership.
[36] Also, liquidity is not the only aspect of the ownership interests and the questions of mutability are also of some importance. The ability to reconfigure and use of the Glasgow lease mechanism to provide an appropriate market return, are both aspects which might affect such value.
[37] We conclude from the various High Court and Court of Appeal decisions on the question of assessing the owner's interest that the Tribunal's duty is to undertake a robust and realistic assessment of the constraint on value where such constraint exists. There can be no precise

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13 *Mangatu Inc v Valuer-General* LVP 22-33/95 (29 December 1998) (LVT).

mathematics around the extent to which a constraint impedes the value of the property given the lack of market evidence.

[38] We also must evaluate a number of different factors in concluding the level of constraint. In this case the owner is not constrained from using it for its highest or best use, for example, compared with a school or racecourse. Nor is the Trust constrained from the form in which it either leases or operates the properties. There is a general discretion held by the trustees for minor reconfiguration such as access and boundary adjustments. Nevertheless, the inability to resell the properties constitutes a major constraint on the normal incidents of ownership of the properties.

Conclusion

[39] We are agreed that this inability to resell is a long-term constraint upon the use of the property which would affect its value to a prospective purchaser. While there would be an ongoing income stream we conclude that the purchaser would calculate value on the basis that they will lose access to capital by resale or subdivision for some decades.

[40] While we acknowledge the evidence of Dr Boyle, which is a proper attempt to examine the impact of such a constraint on its value, we consider that the approach and formula used assumes that this resale constraint is the only or primary constraint. This Tribunal is addressing a number of other forms of constraint upon title in several cases and some degree of subtlety is needed to approach the degree of constraint that would be valued.

[41] In this case we consider that the general powers of the owner in relation to highest and best use of the property, rental terms, ability to re-enter upon surrender of Glasgow leases and the like, to some extent ameliorate the affect of the inability to sell. Valuation evidence was presented for the objectors by Messrs Gillespie and Smithies. Both agreed that the commercial returns that could be achieved from the site, whether by the objector undertaking their own development or leasing to a third party, would not be affected by the inability to sell the land. The practical effect is that any reduction in the sale price due to the impediment on the site, increases the return to the owner. We conclude this be viewed more properly as returning the owner's capital over time.

[42] There is some disagreement in the Tribunal as to the extent of this impediment and there is some justification for the view expressed by Dr Boyle of 30 per cent. Nevertheless, we are all agreed that this goes too far and that the answer fits within the range of 15–20 per cent impediment on the value of the property. In the end we are unanimous in our view that there should be a reduction in the value of Ngāti Whakaue properties for this constraint on use of 15 per cent which is lower than might apply in other identical situations where the return to the owners estate was not already at its highest and best use. We acknowledge th is is conservative and at the bottom of the range. Where the land use is constrained this would affect the overall value and may justify greater discount such as in the *Christchurch Racecourse* case.[14]

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14 Above n 9.

[43] Nevertheless, we also agree that the type of asset in question and the commercial returns are a relevant matter in assessing the value of the property. In this case though, those matters are not in contention because the parties have agreed on the value of the property but for this constraint. Accordingly, we would assess the test property at $3,150,000 less 15 per cent which results in a land value of $2,677,500. Our understanding is that this test property represents a proxy for other properties within the group and no explanation has been given to us as to why there should be a different discount. These properties were argued as a group. Accordingly, as we understand it, all of the values will be readjusted accordingly.

Directions

[44] We therefore direct:

(a) That the value on this property is to be adjusted to a Land Value of $2,677,500, a discount of 15 per cent on the Council Rating Value;
(b) Other properties are to be adjusted accordingly;
(c) If there is some reason why this cannot occur and has been explained to the Tribunal and superior Courts at the time of the hearings, then a memorandum should be filed within 10 working days setting out the reasons for differences.
(d) We do not understand that it is intended that there be a further hearing in respect of the balance of properties and accordingly anticipate that unless exceptional circumstances already identified to the Tribunal or Court are in play all values should be reduced by the same percentage;
(e) Section 38 of the Act gives very limited powers for the Tribunal to award costs and it is unclear whether or not the Tribunal has any general powers as to costs under other Acts including the Land Valuation Act. If any party seeks an order for costs they are to file the application within 20 working days, any reply within 10 working days and the final reply, if any, five working days thereafter. The tentative view of the Tribunal is that costs should lie where they fall.

Costs

[45] Costs are unlikely to be available but any application and supporting submission are to be filed within 15 working days and a reply within 10 working days thereafter. Any final reply, if any, five working days after that.

APPENDIX

"A"

The following guidelines have been established to assist when assessing the value of Maori land that is subject to Te Turewhenua Maori Act 1993 for inclusion on the district valuation roll. Each case must be considered individually and taken on its merits. Any other influences not listed should also be considered.

The land should be initially valued as general land with the following adjustments.

Initial adjustment for multiple ownership

Number of owners	Adjustment
1–9	–3.5%
10–24	-4.0%
25–49	-5.0%
50–99	-6.0%
100–499	-7.0%
500–999	-8.0%
1000–1999	-9.0%
Over 2000	-10.0%

Additional adjustments for sites of special significance

Pa Site	-1.5%
Urupa	-1.5%
Runanga sites	-1.5%
Whaiwhai sites	-1.5%
Indigenous Forest	-1.5%
Kainga	-0.5%
Access trails	-0.5%
Garden sites	-0.5%
Kai Moana sites	-0.5%
Other Wahi Tapu sites	-0.5%
Maximum Adjustment	-5.0%

Reported by: David R Taylor, *Barrister and Solicitor*