IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2016-463-000057
[2017] NZHC 60

UNDER	The Land Valuation Proceedings Act 1948
IN THE MATTER OF	an appeal from the Land Valuation Tribunal
BETWEEN	NGĀTI WHAKAUE EDUCATION ENDOWMENT TRUST BOARD Appellant
AND	ROTORUA DISTRICT LAKES COUNCIL Respondent

Hearing: 20 October 2016

Appearances: L McEntegart and G J Dennett for Appellant
P V Cornegé for Respondent

Judgment: 2 February 2017

JUDGMENT OF PALMER J

This judgment is delivered by me on 2 February 2017 at 2 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Counsel/Solicitors:
L McEntegart, Barrister, Auckland
G J Dennett, Solicitor, Rotorua
P V Cornegé, Barrister, Hamilton
Rotorua District Council, Rotorua

Summary

[1] The Ngāti Whakaue Education Endowment Trust Board owns extensive property in downtown Rotorua. It is governed by the Reserves and Other Lands Disposal Act 1995 which derives from a commitment of the Crown to Ngāti Whakaue under the Treaty of Waitangi. Under that Act the Trust Board owns the land for educational purposes and is statutorily prohibited from selling it. Before 2014 the Rotorua District Council erroneously thought the land was Māori freehold land. It applied a 10 percent discount to the valuation of the land to take account of the constraints on sale of Māori land. In its 2014 rating assessment the Council applied s 21 of the Rating Valuation Act 1998 which provides that where land is subject to lease, "circumstances particular to the property concerned that do not reflect the prevailing market conditions are to be disregarded". It applied no discount to its valuation of a test property. The Trust Board objected to the Land Valuation Tribunal which declined the objection.

[2] On appeal, I consider s 21 of the Act is a red herring because the reason why it might be subject to discount does not derive from the existence or terms or other circumstances of the lease, but from its inalienability. I hold the valuation should be based on the price that would be set at a notional sale between a willing but not anxious buyer and seller of the Trust Board's estate which is burdened by the permanent prohibition on alienability. Accordingly the valuation must take into account the effect of the statutory prohibition on alienability. I uphold the appeal.

Rotorua and the Ngāti Whakaue Education Endowment

[3] The establishment of the township of Rotorua has a fascinating history of settlement pressure, partnership, bad faith and missed opportunities between the Crown and Māori.[1] One of the elements of that history was Māori ownership of leasehold land in downtown Rotorua and public reserves set aside for public purposes. This was part of the vision of the Fenton Agreement of 25 November

---

1 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims Stage One* (WAI 1200, 2008) vol 1 at 284-303 and Richard Boast, *Buying the Land, Selling the Land – Governments and Māori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008) at 169-173.

1880 Ngāti Whakaue signed with the Crown which was reflected (though significantly modified) in the Thermal-Springs Districts Act 1881.

[4] The Fenton Agreement involved land passing through the Native Land Court and becoming general land. Some land was to be owned by Ngāti 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 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 Disposal 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 for a second High School in Rotorua.

(e) The Rotorua High Schools Board Empowering Act 1979 extended the Board's powers to purchase further lands and accept gifts and named the endowment lands the Ngāti 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, Ngāti 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:[2]

> Ngāti 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, 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:[3]

> 8. The Crown will address two further concerns of Ngāti 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 objectives by:
>
> …
>
> 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 Ngāti Whakaue, as nominated by the Pukeroa-Oruawhata Trust and Ngāti 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 Ngāti 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. The Act:

(a) establishes the Ngāti Whakaue Education Endowment Trust Board (the Trust Board), with members appointed by the Trustees of

---

2 Agreement between the Minister of Justice on behalf of the Crown and Pukeora-Oruawhata Trustees and the Proprietors of Ngāti Whakaue Tribal Lands Inc for and on behalf of the People of Ngāti Whakaue in relation to Claim WAI 94 (23 September 1993) at Clause 4(a) [Settlement Agreement].

3 Settlement Agreement, above n 2.

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)).

[8] The Trust Board currently owns 94 properties in five blocks in downtown Rotorua. These are leased on perpetually renewable terms.

[9] The Rotorua District Council (the Council) is responsible for assessing rates. From 1999 to 2011 the Council followed Valuer-General guidance for valuing Māori freehold land which included applying a discount to reflect the difficulties of alienating land where it has a large number of owners. In its revaluations in 1999, 2002, 2005, 2008 and 2011 the Council valued the Trust Board's land with a 10 percent discount.

[10] For the general revaluation of 1 July 2014, however, it was realised that the Trust Board's properties are general land, not Māori freehold. Landmass Technology Ltd, the valuation service provider contracted to the Council, did not apply the 10 per cent discount.

[11] The Trust Board objected to the removal of the 10 per cent discount under s 32 of the Rating Valuations Act 1988. The test property for this case is the Sudima Hotel lakefront property at 1000 Eruera St, Rotorua, but I understand the issue affects all of the Trust Board's properties.

[12] The Land Valuation Tribunal declined the objection.[4] The Trust Board now appeals. The parties have agreed the matter in issue is substantially a question of law only and should be heard and determined by a judge alone, under s 13(4)(c) of the Land Valuation Proceedings Act 1948.

Rating law

The legislation

[13] Rates are set by local authorities under the Local Government (Rating) Act 2002 based on the value of rateable land. For example, s 13 provides a local authority may set a general rate at a uniform rate in the dollar of rateable value, for all rateable land. The rateable value of land is its annual value, capital value or land value as identified in the local authority's funding impact statement as the value for setting a general rate. Part 4 governs the rating of Māori freehold land.

[14] The land valuation on which rates are based is provided for in the Rating Valuations Act 1988 (RVA). In s 2, "annual value", "capital value" and "land value" are defined as:

> **annual value**, in relation to any rating unit, means the greater of—
> (a) the rent at which the unit would let from year to year, reduced by—
> (i) 20% in the case of houses, buildings, and other perishable property; and
> (ii) 10% in the case of land and other hereditaments:
>
> (b) 5% of the capital value of the fee simple of the unit
>
> **capital value** of land means, subject to sections 20 and 21, the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require
>
> **land value**, in relation to any land, and subject to sections 20 and 21, means the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if—
>
> (a) offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose; and

---

[4] *Ngāti Whakaue Education Endowment Trust Board v Rotorua District Lakes Council* [2016] NZDC 7487.

(b) no improvements had been made on the land

[15] A "rating unit" is defined in ss 5B and 5C as the land comprised in a certificate of title, where there is one, or as determined by the Valuer-General in accordance with specified principles where there is not.

[16] The RVA also establishes the office of the Valuer-General to set standards and specifications for the maintenance of valuation rolls in the interests of ensuring, among other things, a "nationally consistent, impartial, independent, and equitable rating valuation system" (s 4(1)(b)). And the RVA, along with the Land Valuation Proceedings Act 1948, establishes the institutions and procedures for objecting to the Land Valuation Tribunal about valuations. Under s 26(1) of the latter Act, an appeal is by way of rehearing.

[17] Relevant to the argument in this case, s 21 of the RVA provides:

> **21 Value of land subject to lease**
>
> (1) For the purpose of determining under this Act the capital value or land value or annual value of a rating unit that is subject to a lease,—
>
> (a) regard is to be had to the desirability for rating purposes of preserving uniformity with contemporaneous roll values of comparable parcels of land; and
>
> (b) any lease provisions or circumstances particular to the property concerned that do not reflect the prevailing market conditions at the date of valuation are to be disregarded.
>
> (2) This section applies for the purposes of determining valuations for the purposes of this Act and the Local Government (Rating) Act 2002 only, and is not intended to alter the definitions of the terms capital value and land value in the case of valuations made other than for rating purposes under any other Act or document.

Legislative history

[18] The main purpose of the Rating Valuations Bill as introduced was stated by the General Policy Statement in its Explanatory Note to be "to introduce contestability into the provision of valuations for the purpose of rating". The Valuer-General became a regulator rather than a provider.

[19] As introduced, cl 21(1)(b) of the Bill provided:

> (1) For the purpose of determining under this Act the capital value or land value of land that is subject to a lease,—
>
> …
>
> (b) Any unusual lease provisions or circumstances relating to the lease that are peculiar to the property concerned and do not normally pertain to properties of an otherwise similar nature are to be disregarded.

[20] The Explanatory Note observed in relation to clause 2:

> The definitions of the terms "capital value" and "land value" are now subject to *clause 21* of the Bill. That clause deals with valuations of land subject to leases, and is intended to nullify the decisions of the High Court in *Valuer-General v Radford & Co* and the Wellington Land Valuation Tribunal in *Diffey and Diffey v Valuer-General.*

And in relation to clause 21:

> *Clause 21* makes special provision for the valuation of land subject to a lease. It is intended to overcome the results of the decision of the High Court in *Valuer-General v Radford and Company Limited* [1993] 3 NZLR 721, and the decision of the Wellington Land Valuation Tribunal in *Diffey and Diffey v Valuer-General* (8 May 1996).
>
> In those cases, the Court and the Tribunal required the valuation of the properties concerned to have regard to, in one case, the need to buy tenants out of their leases, and, in the other, the fact that the land was subject to a long-term lease that guaranteed rents that were well above market values.
>
> The clause now provides that, in determining the capital value or land value of land subject to a lease, regard is to be had to the desirability for rating purposes of preserving uniformity with contemporaneous roll values of comparable parcels of land, and that any unusual lease provisions or circumstances are to be disregarded where they are peculiar to the property concerned and do not normally pertain to properties of an otherwise similar nature.
>
> The clause is specifically stated to apply for the purposes of determining valuations for the purposes of the Bill and the Rating Powers Act 1988 only. It is not intended to alter the definitions of the terms "capital value" and "land value" (which have often been adopted in different statutes) for valuations made other than for rating purposes.

[21] In *Valuer-General v Radford Co Ltd* Greig J in the High Court had held the realisable value of the owner's estate or interest must take into account any effect of

leases which was, there, negative.[5] The Land Valuation Tribunal relied on that in *Diffey and Diffey v Valuer-General* where the effect of leases on the realisable value of a property was positive.[6]

[22] The Government Administration Committee recommended amending cl 21:

> **Special provisions relating to determination of rateable values**
>
> Clause 21 makes special provision for the valuation of land subject to a lease. It provides that, in determining the capital value or land value of land subject to a lease, regard is to be had to the desirability for rating purposes of preserving uniformity with contemporaneous roll values of comparable parcels of land. Auckland City Council, in its submission, suggested that the clause should expressly denote that this applies to annual value. Most of us consider that clause 21 should be amended to apply to annual value as well as to land and capital value and that the bill be amended accordingly.
>
> Most of us consider also that clause 21(1)(b) should be amended to provide that any lease provisions or circumstances particular to the property concerned that do not reflect the prevailing market conditions at the date of valuation are to be disregarded. Most of us recommend that the bill be amended accordingly.

[23] Accordingly, in the current text of s 21, the chapeau of s 21(1) refers to annual value as well, and refers to the more technically accurate "rating unit" rather than "land" and in s 21(1)(b) the amendments:

(a) dropped the "unusual" that qualified "lease provisions";

(b) widened the "circumstances relating to the lease that are peculiar to the property concerned" to "circumstances particular to the property concerned"; and

(c) replaced "do not normally pertain to properties of an otherwise similar nature" with "do not reflect the prevailing market conditions at the date of valuation".

---

5 *Valuer-General v Radford Co Ltd* [1993] 3 NZLR 721 (HC) at 725.

6 *Diffey and Diffey v Valuer-General* Land Valuation Tribunal, Wellington LVP 4/94, 8 May 1996.

Case law

[24] In *Westpark Marina Ltd v Auckland Council* Ellis J, sitting in the High Court with an additional member Mr Mahoney, examined s 21 in another appeal of a Land Valuation Tribunal decision.[7] There, the Waitemata City Council (West Harbour) Empowering Act 1979 vested harbour land in the Auckland Harbour Board which was empowered to transfer it to the Auckland Council to develop a boat harbour. The Council leased it to the Westpark Marina.

[25] After traversing the legislative history, the High Court considered s 21 did not require the leases to be ignored in the valuation in that case. That was because "it is reasonable to conclude that the marina land is unique" and could not be compared with adjoining industrial land in order to value it.[8] The Court considered "the policy concerns that underlie s 21(1)(a) do not seem to arise in this case" because the leases were irrelevant to the comparison.[9] It was a quite different case from *Diffey* where there was a readily identifiable market involving other leases over comparable land.[10] Indeed, the Court considered s 21 was something of a red herring because the leases did not make a difference to the valuation of the Marina land.[11]

[26] The Court in *Westpark Marina Ltd* found that only the statutory restrictions on alienability required consideration. The Court reviewed previous case law which identified effects of statutory restrictions on alienability on the value of land through their effects in restricting the use of the land.[12] In particular I note Richardson P for a full Court of Appeal in *Valuer-General v Mangatu Inc* stated in relation to Māori freehold land:[13]

> First, the subject of the valuation is "the owners' estate or interest" in the land. It is not a valuation of the pure fee simple…
>
> Second, the valuation is made on the statutory premise that the owner will sell its estate or interest in the land. The definition envisages a notional sale

---

7 *Westpark Marina Ltd v Auckland Council* [2012] NZHC 623, [2012] NZAR 619.
8 At [43]-[45].
9 At [46].
10 At [47].
11 At [49]-[55].
12 At [52] and [56]-[65] citing: *Thomas v Valuer-General* [1918] NZLR 164 (SC); *Valuer-General v Trustees of the Christchurch Racecourse* HC Christchurch AP 343/92, 13 September 1994; *Carter Holt Harvey Forest Ltd v Valuer-General* HC Christchurch AP7/98, 27 November 1998.
13 *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 at 649.

> by a willing but not anxious seller to the hypothetically willing but not anxious buyer. It explicitly assumes "a bona fide seller". It follows that for valuation purposes practical difficulties in actual sales of obtaining agreement from individual owners and of obtaining the necessary quorum and agreement to sell in the case of Māori incorporations and trusts are not taken into account in the hypothetical valuation process.
>
> Third, in terms of the definition, the land value is the sum which the owner's estate might be expected to realise if offered for sale on such reasonable terms as a bona fide seller might be expected to impose. The value is what a willing but not anxious seller would sell for and what a willing but not anxious buyer would be prepared to pay for the property. As in other valuation matters it must be assumed that the hypothetical purchaser is a person of reasonable prudence, properly informed as to all the relevant facts.

[27] The Court in *Westpark Marina Ltd* found the Empowering Act there did not, as a matter of fact, have a material effect on land value in the absence of any suggestion that it prevented sale of the fee simple title or that it restricted the highest and best use of the land.[14]

The Land Valuation Tribunal's decision

[28] The Trust Board's objection was declined by Judge McGuire and Mr Parker sitting as the Land Valuation Tribunal. The key part of the reasoning appears to be:

> [61] At the risk of over simplification, the ultimate question to be asked may be just how difficult are the obstacles in the way of the owner being able to treat the land as ordinary freehold land? In *Carter Holt; Christchurch Racecourse* and *Mangatu*, they are difficult. In *Thomas*, they are not difficult.
>
> [62] We cannot finally say how that question would be answered in respect of the Ngāti Whakaue Education Trust Board in this case. The historical analysis of the governance legislation of the Trust Board suggests that the legislature has been responsive to the changing needs of the Trust Board – as it appears to have been with other similar charitable entities. And unlike, for example, the situation that pertains in respect of the Christchurch Racecourse where use other than highest and best use is "locked in", as it were, the land the subject of this objection can be put to its highest and best use.
>
> [63] The 94 properties comprise all the appropriate uses for the area of Rotorua that they occupy, as mentioned earlier from residential to retail to business uses and to hotel accommodation. In other words, uses entirely appropriate to the area. The uses also include a branch of a multinational fastfood outlet.

---

[14] At [65] (and [75](d)].

> [64] Mr Dennett reminds us that the situation of his client is unique and we are not being asked to set a precedent. However, a deduction in rating value for a landowner of 94 sections in the CBD of Rotorua, or indeed elsewhere, is likely to have more than a minor effect on how the rating burden is shared in that local community. That being so, there are interests involved that would go well beyond the parties presently before the Tribunal.
>
> [65] We record that we find the situation that has now pertained for five revaluations with discounts being applied to have been wholly regrettable and we readily understand the dismay on the part of the objector when after 15 years the deduction was peremptorily withdrawn.
>
> [66] However, for the foregoing reasons, we must decline the objection.

Should the value of the Trust Board land be discounted for rating purposes?

Submissions

[29] Mr McEntegart, for the Trust Board, submitted the Tribunal erred in not making allowance for the impact of the statutory prohibition on alienation on the land's value. He says the Tribunal conflated the detriment of inalienability with the availability of the highest and best use of the land. Mr McEntegart submitted:

(a) the definition of "capital value" in s 2 of the RVA focuses on the valuation of "the owner's estate or interest in the land";

(b) s 21 does not apply to a value constraint unrelated to the subject lease terms;

(c) the case law establishes that, where sale of land is prohibited by legislation, it should be valued on the basis of a hypothetical sale of the owner's estate or interest in land, subject to the restriction on alienability;[15]

(d) the hypothetical purchaser would pay less for an interest that cannot be sold than if there were no such constraint. Quantification of the discount is a question of fact for valuers but a discount must be made.

---

[15] Citing: *Valuer-General v Ormsby* (1907) 27 NZLR 44 (SC); *Valuer-General v Trustees of the Christchurch Racecourse,* above n 12; *Carter Holt Harvey Forest Ltd v Valuer-General,* above n 12.

[30] Mr Cornegé, for the Council, submitted the restriction on alienability should not result in a discount, for rating valuation purposes, because:

(a) this is consistent with s 21 of the RVA;

(b) this is consistent with *Westpark Marina Ltd;* and

(c) the restriction on alienation is person to the Trust Board and could be lifted.

Analysis

[31] The legislative history of s 21 traversed by Mr Cornegé is useful in identifying Parliament's purpose in enacting s 21(1)(b). In particular, it demonstrates that particular lease provisions should not be taken into account in valuing land subject to lease for rating purposes, reversing *Valuer-General v Radford* and *Diffey and Diffey v Valuer-General.* This extends to other circumstances that do not reflect the prevailing market conditions at the date of valuation. But there is nothing to indicate it was intended to nullify the case law regarding the valuation of statutorily inalienable land.

[32] Section 21 is stated to exist "[f]or the purpose of determining … the … value of a rating unit that is subject to a lease". While the property at issue here is subject to a lease, the reason why it might be subject to discount does not derive from the existence or terms or other circumstances of the lease, but from its inalienability. The value of the land for rating purposes does not depend on whether it is leased. Accordingly I consider, as did the Court in *Westpark Marina Ltd,* that s 21 of the RVA is something of a red herring in this case and that only the statutory restrictions on alienability require consideration.

[33] The statutory restrictions on alienability of the Trust Board's properties are more restrictive than in most of the other statutes considered in the cases cited to me. Section 7(1)(b) of the Reserves and Other Lands Disposal Act 1995 states the Trust Board "shall not sell or otherwise dispose of any part of the land". That derives from

a commitment of the Crown to Ngāti Whakaue under the Treaty of Waitangi. It amounts to a prohibition on alienability.

[34] As made clear by Richardson P for the Court of Appeal in *Mangatu*, the valuation process for rating purposes estimates the price that would be struck by a willing but not anxious buyer and seller of the owner's estate in a notional sale. The statutory prohibition on alienability of the Trust Board's land does not alter that. But it does mean that what is to be valued is the Trust Board's land subject to the prohibition on alienability, as the other case law cited by Mr McEntegart also establishes. The same point disposes of the submission that no deduction should be made because the prohibition on alienability is personal to the owner.

[35] I hold the valuation should be based on the price that would be set of a notional sale between a willing but not anxious buyer and seller of the Trust Board's estate which is burdened by a permanent prohibition on alienability. Accordingly the valuation must take into account the effect on the valuation of the prohibition on alienability.

[36] I expect the prohibition on alienability would diminish the value of the Trust Board land to some extent. Economic theory suggests that there is likely to be value attached to the ability to sell land in addition to the ability to use it. The Trust Board land does not suffer from the sorts of restrictions on use that other statutory restrictions in the case law established. But the prohibition on alienability can be expected to make the land less desirable in some respects than it would be if there was no such prohibition. The value in the land for a notional purchaser would derive from its use, including its leasing, but not from its value in exchange.

Result

[37] Accordingly, I uphold the appeal. I consider the Tribunal was wrong to decline it on the basis there should be no discount. I quash the Land Valuation Tribunal's decision.

[38] However, I do not uphold the original objection, which sought reinstatement of the 10 per cent discount. As Mr McEntegart submitted, the amount of such a

discount is a matter for a valuer to determine, using the statutory process, on the basis of this judgment.

[39] I award costs and disbursements to the Trust Board. If the parties cannot agree on costs they have leave to file memoranda within 20 working days.

Palmer J