IN THE DISTRICT COURT
AT DUNEDIN

LVP2/05

IN THE MATTER OF	THE LAND ACT 1948 AND THE PASTORAL LEASE PO274
BETWEEN	THE COMMISSIONER OF CROWN LANDS Applicant
AND	MINARET STATION LTD Respondent

Hearing: 13-31 October 2008
28 January 2009

Appearances: B Brown QC, M Parker and G Gardner for Applicant
N Davidson QC, K Reid, K Mouat for Respondent

Judgment: 31 July 2009

RESERVED JUDGMENT OF OTAGO DISTRICT LAND VALUATION TRIBUNAL

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Introduction

[1] This proceeding is an application by the Commissioner of Crown Lands ("the Commissioner") for an order pursuant to s 133 of the Land Act 1948 determining the value exclusive of improvements of the Land in Pastoral Lease PO274, known as Minaret Station Ltd ("Minaret").

[2] Minaret Station is a high-country pastoral property of spectacular geographical beauty. The property is situated on the western shores of Lake Wanaka between the Minaret Burn in the south and the Albert Burn to the north. The land rises from the lake to the steep alpine area of Mt Aspiring National Park. It is 19752.062 ha (48,810 acres) in area and has some 29 kilometres of frontage to the lake. Eighty-six percent of the property is situated above 700 metres, much of which is under snow between April and November. There is no road access. Its isolation and natural beauty form amenity values that are at the heart of this proceeding.

[3] The property is held under a pastoral lease. Pastoral leases were established under s 66 (now repealed) of the Land Act 1948. They remain in force by virtue of Part 1 of the Crown Pastoral Land Act 1998. The essential characteristics of a pastoral lease are that it gives the holder the exclusive right of pasturage over the land, a perpetual right of renewal for terms of 33 years, no right to the soil, and no right to acquire the fee simple of any of the land in the lease.[1] The Crown has defined rights of inspection and management control of the land. It has recently been determined that a lessee under a pastoral lease issued pursuant to the Land Act 1948 acquires exclusive possession.[2]

Key Legislative Provisions

[4] Section 8 of the Crown Pastoral Land Act 1998 provides for the calculation of rent payable under a pastoral lease after the first 11 years. Section 8 provides:

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[1] Section 4 of the Crown Pastoral Land Act 1998

[2] *The New Zealand Fish & Game Council* v *Attorney-General & others* High Court, Wellington, CIV 2008-485-2020, 12 May 2009, Simon France J at [84]

Calculation of rent payable under pastoral leases after first 11 years

Subject to section 6, to the extent only that the land held under it is pastoral land, the yearly rent payable under a pastoral lease for every period of 11 years after the expiration of 11 years from 1 January or 1 July (whichever is the sooner) next following its commencement must continue to be calculated as for the renewal of a renewable lease; but—

(a) As if the references in Part 8 of the Land Act 1948 to 4 1/2 percent were references to 2.25%; and

(b) With the rental value of the land ascertained under section 131 of that Act not including any potential value that the land may have—

(i) For subdivision for building purposes; or

(ii) For commercial or industrial use.

[5] Section 2 of the Crown Pastoral Land Act 1998 defines "renewable lease" to mean "a renewable lease as defined in s 63 of the Land Act". "Rental value" is defined to mean "the value of Crown land on which yearly rent payable under a renewable lease is calculated in accordance with the Land Act 1948."

[6] Section 131 of the Land Act 1948 makes provision for valuation for calculation of renewal rent. Interpretation of this section is the key issue in this proceeding. The section provides:

131 Valuation for calculation of renewal rent

(1) Not earlier than 2 years and not later than one year before the expiry of a renewable lease the Board shall cause the following values to be ascertained:

(a) The value of the improvements which are then in existence and unexhausted on the land included in the lease:

(b) The value at the commencement of the lease of all improvements included in the rental value at the commencement of the lease:

(c) The value of the land included in the lease exclusive of the improvements referred to in paragraph (a) of this subsection:

Provided that, subject to the provisions of this Act,—

(i) In ascertaining the values under paragraphs (a) and (c) of this subsection, equal emphasis shall be placed on the value to be ascertained under each paragraph:

(ii) The values shall be ascertained on an equitable basis, having regard to the relationship between lessor and lessee:

(iii) The sum of the values under paragraphs (a) and (c) of this subsection shall be equal to the capital value of the land.

(2) For the purposes of the last preceding subsection, the expression capital value means the sum which the land and improvements thereon might be expected to realise at the time of valuation if offered for sale, unencumbered by any mortgage or other charge thereon, on such reasonable terms and conditions as a bona fide seller might be expected to require.

(3) In respect of the improvements referred to in paragraph (b) of subsection (1) of this section the lessee shall, [as the Board may determine], either—

(a) Purchase the improvements at the value determined either for cash or by instalments, together with interest at such rate as may be fixed by the Minister of Finance, over such period not exceeding 30 years as may be determined by the Board; or

(b) Pay interest at the rate of 4½ percent per annum on the value so determined, in the same manner as rent.]

(4) The rental value of the land for the [first period of 11 years of the term of the new lease] shall be the value of the land as determined under paragraph (c) of subsection (1) of this section, and where the lessee [is required] pursuant to the last preceding subsection to pay interest on the improvements referred to in paragraph (b) of subsection (1) of this section, shall include the value of those improvements as determined under that paragraph.

(5) The yearly rent for the first period of 11 years of the term of the new lease shall be 4½ percent of the rental value as defined in subsection (4) of this section.]

(6) As soon as possible after the values have been ascertained under subsection (1) of this section, and not later than [9 months] before the expiry of a renewable lease, the Commissioner shall deliver to the lessee a notice in writing informing him of those values, and requiring him to elect whether he will accept a renewal lease at the rent based on those values [for the first period of 11 years of the term of the lease] …

(7) If the Board omits to cause the said values to be ascertained, or the Commissioner omits to deliver the said notice to the lessee within the prescribed times, the lessee may require the values to be ascertained and notice to be given at any time thereafter so long as he remains in possession of the land, whether the term of his lease has or has not expired, and his right to a renewal of the lease shall not be affected by any such omission or delay.

The Process

[7] Section 131(1) requires the Commissioner to obtain from a valuer assessments of the values, described in s 131(1)(a), (b) and (c). The Commissioner has no input into those figures. The rental in respect of a renewable lease is to be determined on the value of the land exclusive of improvements as ascertained by a third party. In the case of a pastoral lease a further adjustment may be required to be made by virtue of s 8(b) of the Crown Pastoral Land Act.

[8] On 23 September 2004 the Commissioner gave notice to Minaret that the lease was due for rent review on 1 July 2005. The yearly rent notified as payable for 11 years from 1 July 2005 was $62,370 plus GST, being 2.25 percent of what was stated to be the rental value. The rental value was assessed on the basis of the following values:

a)	All improvements on the land	$4,470,000
b)	Crown improvements at commencement	$nil
c)	Land exclusive of improvements ("LEI")	$6,160,000
d)	Rental value	$2,772,000

[9] On 14 December 2004, Minaret gave notice pursuant to s 132(a)(2) of its election to have the values fixed by the Land Valuation Tribunal.

[10] On 2 May 2007 the Commissioner advised Minaret that he had requested a review of the existing Crown's valuation because he considered that some valuations had not been done strictly in accordance with the Land Act provisions. At the same time the Commissioner further advised Minaret that the above valuation included a capital value assessed at $10,630,000.

[11] Following on from the issuing of a protocol[3] by Land Information New Zealand (LINZ) the Commissioner reviewed a further valuation which shows the final figures as follows:

a)	Value of all improvements	$4,840,000
b)	Crown improvements	$nil
c)	LEI	$5,980,000
d)	Capital value	$10,820,000
e)	Rental value	$5,280,000

[12] This is a test case. The fundamental issue is whether amenity values are included within the value of the land exclusive of improvements. There are two types of amenity values in the context of this case. The first type is extrinsic to the property. This type of amenity value refers to roads and infrastructure of community services. There is no issue that this type of amenity value forms part of the LEI value.

[13] The second type of amenity value, which is intrinsic to the property includes views, proximity to features such as lakes, rivers and mountains, privacy and other intangible benefits that appeal to many people in a variety of ways. It is this type of amenity value that looms large in this case. This is because some people, particularly wealthy purchasers and the Crown, have paid very high prices for pastoral properties over the relevant valuation period. The prices far exceeded previous prices for pastoral properties. The perception is that the purchasers were willing to pay those prices in order to obtain the benefits of those amenities. Stated baldly, the Commissioner contends that that amenity value affects the value of the LEI for the purposes of s 131.

[3] We will deal with the issue of the Protocol later in this decision.

[14] There is much at stake for both parties and others whose valuations await the outcome of this issue. In financial terms, Minaret's annual rent would increase from $4900 to $105,600 if amenity values are included within the value of the land exclusive of improvements. Interpretation of the statutory provisions is difficult.

[15] Minaret says that the implications for the holders of pastoral leases go beyond the financial. In some cases, the very existence of pastoral leases would be in jeopardy if the Commissioner succeeds. Those are not matters for this Tribunal.

The Key Issues

[16] There are essentially two main issues:

a) How should the Tribunal assess the value of the LEI;

b) Whether intrinsic amenity values should be included in the LEI.

[17] Resolution of these issues involves analysis of the relevant statutory provisions and application of appropriate valuation methodology.

The Competing Contentions – Summary

The Commissioner's Position

[18] It is trite that some purchasers will pay what appears to be in excess of market value to obtain the benefit of isolation and views of lakes, rivers and mountains. The Commissioner contends that as a matter of logic and on a literal reading of the plain words of s 131 of the Act, the value of such amenities lies in the land. The Commissioner submits that the right of exclusive possession to pasturage granted to the lessee means that it is the lessee who enjoys those amenity values, subject only to limited rights of the Crown.

[19] The Commissioner contends that s 131 requires a market valuation of land irrespective of land classification. In this case the land is classified as pastoral. The Commissioner contends that amenity values are part and parcel of the land to be

taken into account in the valuation as they are part and parcel of that which is being leased. The Commissioner argues that s 131 does not permit the valuer to "strip out" value that can be attributed to non-pastoral use. The Commissioner contends that once the values are ascertained under s 131 of the Act, only values referred to in s 8(b)(i) and (ii) of the Crown Pastoral Land Act are subtracted.

[20] The Commissioner submits that the valuer is required to apply the following matters when undertaking a valuation:

a) Section 131 requires a separate valuation of the improvements then in existence and unexhausted on the land (VI), other (Crown) improvements (VOI), the land exclusive of those improvements referred to in paragraph s 131(1)(a) (VLEI), and the capital value (CV).

b) The section is silent on how the values are to be ascertained. Whatever method is used, and especially if it involves a residual approach, the valuer is required to place equal emphasis on VI and VLEI and so to cross-check the value of the components. This prohibits using mere subtraction.

c) The valuer must derive the three values (the VI, VOI and the VLEI) on equitable basis recognising the lessor/lessee relationship. The reasons for this requirement is that the components are not owned by the same person. Here certain improvements and the land exclusive of improvements are in separate ownership and the nature of the relationship on which the separate ownership is based has to be recognised. This is nothing to do with income. It is to ensure that each party's contribution to the capital value is recognised.

d) The values to be ascertained are a market value, which should be based on the best available evidence.

e) Where the land involved is classified as pastoral land, any adjustment to reflect the s 8(b) exclusions of the Crown Pastoral Land Act 1998 is undertaken as a separate and subsequent step once the s 131 rental value has been ascertained.

f) The valuer is not required to reach a valuation which in his or her assessment produces an "affordable" rental. The provisions are directed to ensuring that the specified values are fair to each party and recognise their contributions to the capital value. It is not to ensure that one of the specified values, after subtraction of the s 8 exclusions and when then multiplied by the prescribed percentage, produces an outcome which, in the valuer's perception, equates to an "affordable" rent.

Minaret's Contentions

[21] In summary, Minaret contends:

a) The central premise of the valuation is to fix a rent for the contractual right to occupancy of the leasehold property for pastoral farming purposes. The rent derived is not a "market rent" of Minaret Station but for the LEI state based on the value of the LEI for pastoral farming purposes.

b) The Crown seeks incorporation of values, which are "non-pastoral" and thus antithetical to the relationship under the contract of lease. Market evidence of "highest and best use" sales includes factors patently non-pastoral. Pastoral intent is the last of Mr Murray's (Crown witness) classification of purchaser motivation and transactions where pastoralism is an incident of occupation rather than the primary purpose and in Crown conservation transactions has no relevance whatsoever.

c) The LEI condition for a pastoral farming platform must be accurately assessed. Clearance by burning is an improvement. Improvements are deducted by the Crown on a depreciated cost basis to produce the LEI. They are not in law a "residual", nor does the Crown assess them for the value they bring to the land, again antithetical to the legislation.

d) The Crown derives the LEI from a false market by reference to land class including non-pastoral values. The LEI simply "falls out" to include all of the "amenity" value. By analysing the LEI carrying capacity, the lessee addresses the central premise of the valuation.

e) The "amenity" value must be differentiated between what attaches to a pastoral property as such and the iconic or x-factor value, which is attributable to other motivations.

f) No economic or any other crosscheck is made on any LEI value derived by an artificial valuation of non existent LEI, or by a residual process thus treating the reality (affordability) of the rental in the business of the lessee as irrelevant. This ignores the equitable direction under the statute and the clear directions of the Courts and Tribunals that the business opportunity of the LEI for pastoral farming is to be assessed. To do otherwise would produce an irrational result.

Principles of Interpretation

[22] The fundamental difference between Commissioner and respondent in this case is this: the Commissioner contends that on a literal interpretation of s 131 capital value means market value for calculation of renewal rent. Minaret contends that s 131 must be interpreted in light of its purpose, in this case to set rent under a pastoral lease. Resolution of these competing contentions requires a careful interpretation of the Acts and s 131 in particular. This involves an exercise in statutory interpretation.

[23] Section 5 of the Interpretation Act 1999 directs that "the meaning of an enactment must be ascertained from its text and in the light of its purpose". Minaret submits the purpose is to set a valuation for a calculation of rent for an 11-year period in the context of a pastoral lease contract.

[24] Burrows J.F. in *Statute Law in New Zealand* 3rd Edition at p 135 states:

> The purposive construction of statutes can properly be said to be the modern method of approach.

The learned author cites Sir Robin Cooke (as he then was), that s 5(j) of the Acts Interpretation Act 1924 was so well established that frequent reference is taken to be superfluous. Professor Burrows comments that s 5(1) of the Interpretation Act 1999 does not differ in any meaningful way from s 5(j) of the 1924 Act.

[25] Professor Burrows refers to the "object" or "purpose" of legislation as "making an Act work as Parliament intended".[4] Sir Ivor Richardson is cited: "the twin pillars on which an approach to statutes rests are the scheme of the legislation and the purpose of the legislation".[5]

[26] "The working of the purposive approach" is straightforward when the grammatical meaning and purpose are in harmony but where a grammatical construction does not give effect to the evident purpose of the provision, the Court will look for a construction that does give effect to that purpose. In short, the grammatical meaning "must give way to the construction which will promote the purpose or object of the Act".[6] Professor Burrows[7] refers to the passage from Lord Diplock "The Courts as Legislators" from the Lawyer and Justice (1978) at p 274:

> If…the Courts can identify the target of Parliamentary legislation, their proper function is to see that it is hit not merely to record that it has been missed.

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[4] *Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 530 at 537 and 538 per Cooke P
[5] (1985) 2 Australian Tax Forum 3
[6] *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423 and 424
[7] Statute Law in New Zealand page 137 footnote

[27] In similar passage, Sir Robin Cooke spoke of "the general principle of statutory interpretation that the strict grammatical meaning must yield to sufficiently obvious purpose".[8]

[28] Professor Burrows says that the Courts will sometimes ensure the attainment of the clear purpose of legislation by being prepared notionally to insert words or even conversely to treat some of the words in the provision as surplusage.[9]

[29] In *Northland Milk Vendors Association Inc* v *Northern Milk Ltd*, Cooke P. emphasised that the Court must make the Act work as Parliament intended and while a purpose of interpretation may not fill gaps, it may "bridge a hiatus". A caution was noted that the Court must not usurp Parliament's policy-making function.

[30] The case for Minaret is that there is no difficulty in determining the purpose of the legislation nor is it difficult to value the land for fixing a rent which reflects the business opportunity provided by the provision of land in a LEI state.

[31] While the Courts will not usually read words, which are not there, it may be clear from an Act as a whole that the express words contain certain implications, par-excellence, a construction in light of context and purpose.[10]

[32] Professor Burrows discusses "new developments", that is developments which "could often not have been foreseen by those who passed it" (the legislation). Here the Courts apply an "ambulatory" or "updating" approach and will take this line if developments are within the purpose of the Act and the words of the Act and secondly, that the words of the Act, albeit by liberal interpretation, are capable of extending to them.[11] Professor Burrows says that the engagement of the Court in ambulatory interpretation must proceed on the basis that:

(a) The words of the Act will support the interpretation which is being placed on them; and

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[8] *McKenzie v Attorney General* [1992] 2 NZLR 14 at 17
[9] Statute Law in New Zealand at page 150 and *Inco Europe Ltd v First Choice Distribution Ltd* [2000] 2 All ER 109
[10] Statute Law in New Zealand at page 211
[11] Statute Law in New Zealand at 265

(b) The interpretation is within the purposes of that Act. As to (a) a liberal interpretation is often necessary.[12]

[33] The new development to which the Act is sought to be applied must be within the concept of the Act. In *Birmingham City Council* v *Oakley*[13] Lord Hoffman said:

> One cannot construe the language of an old statute to mean something conceptually different from what was intended. When a statute is interpreted to work in the modern world it raises a question of theory.

[34] Professor Burrows says:

> The Courts must harmonise the "intention" and purpose of the original enacting Parliament with the values, needs and legal climate of today. The original Parliamentary intention may have gone by.

[35] Minaret submits that another proper consideration is that it is not rational to presume the legislature intends the legislation to produce an absurd result. In *Frucor Beverages Ltd* v *Rio Beverages Ltd*[14] Thomas J in the majority judgment said:

> The Courts have come to give the concept of "absurdity" a wide meaning, using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter mischief.[15]

[36] Another formulation of this principle is given by Lord Shaw in *Shannon Realties* v *Ville de St Michel* :[16]

> Where the words of a statute are clear, they must, of course, be followed, but in their Lordships' opinion where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which will introduce uncertainty, friction, or confusion into the working of the system.

[37] In *West Coast Settlement Reserves* v *Valuation Appeal Committee*[17] the Court responded to an argument to that effect to say "it must be questionable whether

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[12] Ibid at page 274
[13] [2001] **1 AC 617** at page 275
[14] [2001] 2 NZLR 604
[15] Ibid at paragraph 28
[16] [1924] AC 185 (PC Canada)at 192
[17] [1997] 1 NZLR 413 at 427

Parliament can ever have intended to create a state of affairs of such patent unfairness, not to say absurdity".

[38] An example of the Court departing from a literal reading of the text of a statute to avoid an absurdity or unworkable situation is provided in *Advanced Securities Ltd* v *Lee*[18] where the Associate Judge reviewed s 139(1)(c) of the Property Law Act 2007, that a mortgagee takes possession on the earlier date of possession, receipt of income, or "the date of an application to the Court for an order for possession…" It was thus impossible to comply with the direction that a mortgagee taking possession should advise interested parties "immediately". The Court adopted an alternative interpretation which better accorded with the intention of the statute, citing *Frucor* and *Brambles New Zealand Ltd* v *Commerce Commission* (2003) 10 TCTL 868.

[39] In *R* v *Tepere*[19] Baragwanath J held that the provisions of the Children, Young Persons and Their Families Act 1989 were to be interpreted in accordance with policy of this statute expressed by the Minister in *Hansard* notwithstanding this was not consistent with the literal language of the Act. The obligation of a person nominated as providing "adequate protection" for the purpose of interview of a young person could not constitute a simple formality. This applied whether the person was nominated by the young person or by an enforcement officer. The Crown argued that the statute provided that it only required the right of private consultation where a nomination was by the interviewing detective. His Honour treated the drafting to be a casus omissus following the approach in *Northland Milk Vendors Association* and the policy expressed by the Minister in *Hansard*.

[40] In *Victor Chandler International Ltd* v *Customs and Excise Commissioners* [20] Chadwick L J referred to Benion:

> In construing an ongoing act, the interpreter is to assume that Parliament intended the Act to be applied in any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Acts

[18] (2008) 6 NZ ConvC 194,658 High Court, Auckland CIV-2008-404-708
[19] [1997] 1 NZLR 341
[20] [2000] 1 WLR 1296 at 1306 paragraphs A2E

passing, in law, social obligations, technology, and the meaning of words and other matters.

The Current Legislative Provisions

Background and History

[41] The background to enactment of the Land Act 1948 is helpfully set out by Mr John Page and Dr Ann Brower in an article titled *Property Law in the South Island*.[21] The 1946 Sheep Industry Royal Commission and parliamentary debates surrounding the passage of the Act emphasised the importance of fixity of tenure and security for improvements in creating a sustainable pastoral industry. The Land Act was a response to the concerns of high country run-holders that included safeguarding the value of pastoral improvements.

[42] The Land Act 1948 created a new form of tenure applicable to high country pastoral lands. This "new form of tenure [was]…for land classified as suitable or adaptable only for pastoral purposes. In using the term "pastoral purposes" there was convincing evidence that the framers of the Act understood "pastoral purposes" [to mean] the extensive pastoralism for which such land was used in a largely undeveloped state."[22]

[43] The Act "established the 33-year renewable lease as the standard tenure…because of the land's susceptibility to erosion, the Act provided for Crown land in the South Island high country to be leased on special pastoral tenures with perpetual right of renewal but no right to freehold."[23]

[44] The removal of the right to freehold went against the general tenure of the 1948 Act. The then Minister of Lands (Hon C F Skinner) attributed this to doubts as to the suitability of pastoral leases for permanent alienation, arising from public concern for soil conservation. The new tenure retained the requirement to obtain the consent of the Commissioner of Crown Lands for burning and cultivation and gave a

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[21] *Property Law in the South Island* Page & Brower, 2008 Waikato Law Review Vol.16 p 73
[22] Ibid at p 85 referring to *The Commission of Inquiry into Crown Pastoral Leases and Leases in Perpetuity Final Report (1962)*
[23] Ibid at p 86 referring to R J MacLachlan "*Land Administration in New Zealand*"

right to the pasturage only.[24] It was also believed that a national failure to take care of the high country would result in a danger to the more fertile lowlands. It also recognised that the hill country is of concern to the riparian landholders dependent on river flow.

[45] Debates in the House prior to enactment of the 1948 Act stressed the interest of the Crown in these lands and the creation of a secure tenure that encouraged investment in farm improvements, facilitated financial security, and as a consequence avoided scenarios of overstocking and land degradation.[25] "The changes in tenure introduced in 1948, particularly the perpetual right of renewal, created a climate of confidence which encouraged run holders to undertake development programmes."[26]

[46] The Land Act 1948 was by way of consolidation and amendment. The Act consolidated over 11,000 sections in fifty-six different statutes. It established the Department of Lands and Survey and provided for the appointment of the Land Settlement Board. The duties of the Board included the carrying out of:

> The provisions of [the Land Act] for the administration, management, development, alienation, settlement, protection and care of Crown land.

[47] The then Minister of Lands (the Hon C F Skinner) summed up the salient features of the Bill as follows:

> All distinctions between the various types of Crown lands are abolished, including education reserves. The many types of leases and licences are consolidated under four main headings – purchase for cash, purchase on deferred payments, renewable lease with right of purchase, and pastoral lease for 33 years with a perpetual right of renewal, or a pastoral licence of 21 years without the right of renewal, present licences and leases to continue until they expire. Any renewal is a lease or a licence under the Bill – that is, when those leases expire or are renewed, they will be renewed on one of the tenures available under this Bill. The lessees, including those with leases of education reserves and small farms, will have a right to purchase, cash or deferred payments, at Land Valuation Court value. Land boards are replaced by land settlement committees whose powers are not statutory but delegated by the Land Settlement Board from time-to-time.[27]

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[24] Ibid
[25] Ibid
[26] Lincoln Papers in Resource Management *Pastoral High Country Proposed Tenure Changes* No.11 (1983) 45 in Page & Brower at p 86
[27] *Hansard* Vol 284, p 4000

[48] The Minister outlined to the House the reasons why pastoral land may be acquired on a pastoral lease or on a pastoral occupation licence:

> Pastoral land may be acquired on a pastoral lease or on a pastoral occupation licence as the board determines. Small grazing tenures and various other types of tenure have been dropped. The reason behind the establishment of a lease of this kind is that it may be necessary for some control to be exercised over the type of land contained in these leases for soil conservation purposes, to prevent erosion, and regenerate some of the hill country contained in the leases. If there is any doubt as to the suitability of the land for permanent alienation, obviously the Crown must retain some control over it. That is why there is no right to purchase in these hill country leases called pastoral licences…[28]

[49] On 15 March 1949 the Minister wrote to Crown tenants to provide a general explanation of "some of the more important provisions [of the Land Act 1948] which are likely to be of interest…" The Minister stated:

> I referred previously to pastoral land being held on pastoral lease or pastoral occupation licence. Neither of these tenures gives the lessee the right to acquire the freehold, for the reason that there are special circumstances relating to pastoral lands (soil erosion, control of rabbits, prevention of overstocking, prevention of indiscriminate burning, and so on) which can best be provided for if the land is held under lease or licence rather than on freehold tenure. However, to give as many holders of pastoral land as possible absolute security of tenure, provision is made for pastoral lands to be let on lease for 33 years, perpetually renewable as of right. This will be a considerable advance on the present pastoral run licence, under which on expiry the Governor General determines whether or not the land is to be again let on licence and, if it is to be let again, whether the run should be subdivided. Where the land is not suitable for a pastoral lease, it will be let on pastoral occupation licence for any term up to twenty one years.[29]

[50] Prior to 1970, s 131(1) of the Land Act 1948 stated:

> **131 Valuation for calculation of renewal rent**
>
> (1) Not earlier than 3 years and not later than 2 years before the expiry of a renewable lease the Board shall cause the following values to be ascertained:
>
> (a) The value of the improvements which are then in existence and unexhausted on the land included in the lease, and which have either been put on the land by the lessee or his predecessors in title during the continuance of the lease or have been purchased by the lessee or his predecessors in title as existing at the commencement of the lease:

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[28] Ibid p 3999
[29] Exhibit M1 *Letter dated 15 March 1949 Office of the Minister of Lands to Aviemore Limited*

(b) The value of all other improvements which are then in existence and unexhausted on the land included in the lease:

(c) The value of the land included in the lease exclusive of the said improvements:

Provided that the sum of the values under paragraphs (a), (b); and (c) each of this subsection shall not exceed the capital value of the land:

[Provided also that where all the improvements on the land included in the lease have either been put on the land by the lessee or his predecessors in title during the continuance of the lease or have been purchased by the lessee or his predecessors in title as existing at the commencement of the lease, the Board may cause only the value of the land exclusive of the said improvements to be ascertained.]

[51] The provisos to s 131 as enacted in 1948 are significant in two respects. First, the sum of the values of the lessees' improvements, all other improvements, and the land exclusive of improvements was expressed "not [to] exceed the capital value of the land." Secondly, where all the improvements belonged to the lessee, only the value of the land exclusive of improvements was to be ascertained. The latter proviso in particular lead to a general trend only to value the land exclusive of improvements. This caused concern amongst leaseholders that lead to the establishment of the Committee of Investigation into Rentals and Freeholdings of Crown Leases. The Committee published its report in April 1968. It is known as the Beattie Report.

[52] Cabinet authorised the Committee to consider and examine (with particular reference to farm land):

(1) The existing legislation for fixing of Crown rentals and freeholding charges, and the extent to which the unimproved values under the Valuation of Land Act 1951 were relied upon in the fixation of rentals and charges.

(2) The equity of those provisions as they affect both the lessee and lessor.

[53] At paragraph 2.15 of the Beattie Report the Committee stated:

We draw attention to the various valuations which the Act directs to be made. It presupposes that a capital value be determined because the sum of

> the other three figures described is not to exceed the capital value. The section then goes on to state specifically what shall be valued and the order in which they come in the Act is:
>
> (a) The lessees' improvements;
>
> (b) Other improvements;
>
> (c) The land included in the lease exclusive of improvements (note that it does not say "unimproved value").
>
> We do not infer that because the respective valuations are described in the Act in a particular sequence that that is the sequence in which they must be carried out, but we do believe that the Act intended separate valuations rather than a residual figure representing the value of improvements should be made. As the Act stipulates that the total value of the improvements plus the value of the land should not exceed the capital value, the question arises as to how, in the event that it does so, an adjustment in the individual values is to effected. Under present practice where the unimproved value is deducted from the capital value and the balance allocated as improvements, all abatement falls on the improvements in order that uniformity in unimproved values be retained throughout the local body district for rating purposes. We considered whether the position would be more fairly met if the value of the improvements was deducted from the capital value to arrive at the value of the land but it is conceivable that this method could result in a minus quantity as the value of the land and this is patently absurd. To ensure equity is between lessor and lessee we consider the approach should be to assess separately; -
>
> (i) A fair value for the improvements;
>
> (ii) A fair value for the land;
>
> (iii) A capital value.
>
> Should (i) and (ii) when added together not equate with the capital value then we feel the value of the improvements and value of land should be adjusted proportionately.

[54] The Committee identified the apparent difficulty in defining what is meant by a "fair value for improvements". At paragraph 2.19, the Committee referred to *Cox* v *Public Trustee*[30] where the learned Judge stated:

> There is no method or process laid down by the Acts which the arbitrators or valuers must pursue in determining the value whether of the fee simple or of the improvements and it appears to us that the particular method or process adopted is immaterial as a matter of law provided accurate results are thereby obtainable. It would be unwise to hamper the free operation of arbitrators or valuers in the realms of fact and opinion by laying down anything which is not strictly a law of law.

[30] [1918] NZLR 95 at 100

> The Committee noted that the Land Act made separate provision for the leasing of high country land. At paragraph 3.27 of the Beattie Report the Committee stated:
>
> > Pastoral Land
> >
> > In the Land Act separate provision is made for the leasing of high country land. In view of the vulnerability of this class of land to erosion both natural and manmade, the emphasis in such leases is on conservation by wise farming and stock limitations and restrictions on cultivation are incorporated in the leases. Development by cultivation of suitable areas within pastoral leases is permitted but is subject to prior approval as is any increase in the permitted stock numbers. As an added safeguard, there is no right of freehold. The rent is calculated not on value but on the basis of permitted stock capacity.

[55] The Committee went on to state that because satisfaction with that form of tenure was expressed to them, the Committee did not examine that type of lease. However, the Committee recognised that at least two of their conclusions and recommendations would apply equally well to pastoral land as to farm land. One was more frequent reviews of rental. The other was the need for the Land Settlement Board to refuse to consent to the transfer of a lease where high mortgage and other commitments would be likely to hinder the farming of the land in a proper manner.[31]

[56] The Committee recognised that the potential in rural land for urban development must be reflected in any valuation of it. The Committee acknowledged that in the case of leasehold land, the increase in valuation could result in a very substantial increase in rent. It expressed the view that some protection should be afforded the lessee against that contingency so long as the land is being farmed. The Committee suggested, without recommendation, the rental should be assessed on the full value including potential for urban development but abated as long as it is being farmed to a rental assessed on its value as comparable farm land without urban influence.[32]

[57] The Committee formulated a number of recommendations, two of which are relevant:

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[31] Beattie Report paragraph 3.28
[32] Ibid paragraph 3.25

Conclusion

7 That for the purposes of the Land Act 1948 a fair value should be placed on the improvements and on the land and if the sum of these two does not equate with the capital value the values of the improvements and of the land should be adjusted proportionately.

8 That in assessing the value of rural land under the Land Act 1948 the present and potential capacity of that land should be taken into consideration.

[58] The Land Amendment Act 1970 was Parliament's response to the Beattie Report. Section 9(1) of the Land Amendment Act 1970 replaced the original subs (1). It incorporated the current provisos into ss 122(5) and 131(1). Section 122(5) is concerned with ascertaining values for acquisition of the fee simple. The section is materially identical to s 131(1).

[59] The sections require the valuer to assess the value of improvements and the value of the land exclusive of improvements. The third proviso stipulates that the sum of the two values "shall be equal to the capital value of the land." Section 131(1) does not require a mathematical calculation in which the valuer ascertains the component values, the sum of which is the capital value. This is because the third proviso stipulates that the sum of the component values "shall be equal to the capital value of the land." The High Court in *Assistant Commissioner of Crown Lands* v *Associated Taverns Limited*[33] accepted the submission that in a valuation under s 122 of the Land Act the capital value is the first value to be established. The Court stated:

> If the values of the [land value exclusive of improvements] and the value of improvements (V of I) were established first they must of necessity be equal to the capital value so that proviso (iii) becomes meaningless; and it is to be noted that the proviso requires that the sum of the values "shall be equal to" not "shall be" the capital value, indicated that they are to be equal to some value already established.[34]

[60] Section 131 did not adopt the recommendation of the Beattie Report that if the sum of the two values did not equate with the capital value, the values of the improvements and of the land should be adjusted proportionately. The section is

[33] (1983) LVC 25
[34] Ibid at p 27

silent on what the valuer must do if the two values do not equate with the capital value.

[61] The Commissioner submits that there are two possible approaches to this apparent anomaly. The first is to make mathematically proportionate adjustments to the values of improvements and the land respectively as the Beattie Report recommended.[35] There are two obstacles to such an interpretation. The first is that Parliament did not adopt that particular recommendation. Given that certain of the other recommendations were adopted, the omission would appear to be deliberate. Secondly, the High Court in *Assistant Commissioner of Crown Lands* v *Associated Taverns*[36] rejected apportionment of the values on that basis. The Court (Roper J and Mr Ralph Frizzell) stated:

> We do not accept Mr Wylie's submission that we should adopt Mr Aubreys' 'tailoring' of the two components of [value of improvements] and [value of land exclusive of improvements] based on the skill and judgment of the experienced valuer to arrive at a fair and just apportionment. We are of the opinion that if that was the legislative intention of s 122(5) the term 'value' would not have been used consistently in each subpara, but rather the word 'apportionment' would have been more appropriate.[37]

[62] The Commissioner submits that an alternative approach would be to adjust the component values in such a manner to ensure the relative contribution that the value of improvements and the value of land exclusive of improvements make to the capital value is recognised in a way that is fair to the lessor and the lessee. For instance, if the sum of the values exceeded the capital value because the value of improvements was enhanced by unnecessary improvements, then a greater proportion of the reduction would fall on the value of the improvements. This would call for the exercise of the valuer's judgement.

[63] The Commissioner also submits that a component value could be ascertained utilising a residual approach provided the value was not arrived at by subtraction alone. The figure arrived at would have to be checked against sales evidence so that the equal emphasis requirement was met.

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[35] The Beattie report recommendation 7
[36] (1983) LVC 25
[37] Ibid at pp 29-30

[64] The Commisioner's case is that both ss 122 and 131 of the Act focus on "value" and not the reasons for which the value is assessed. It is submitted that in each case what is required is a market value and the section does not permit an adjustment of those values because of the end purpose of the valuation or to create an affordable rent. The term "capital value" is not defined in s 2, the interpretation section of the Act. It is however defined in identical terms in ss 122(6) and 131(2) of the Act. In each subsection, the definition of capital value is preceded by the words "for the purposes of the last preceding subsection…" One might argue that if Parliament had intended "capital value" to be the same irrespective of the purpose for which it was ascertained, the definition would have appeared in the interpretation section of the Act.

The Associated Taverns Case

[65] The only reported case in which s 131 of the Act has been considered to any extent is *Assistant Commissioner of Crown Lands* v *Associated Taverns Limited*.[38] This is a decision of the High Court (Roper J and Mr Ralph Frizzell). Both parties rely upon the decision authority in support of their competing contentions. Careful analysis of the case is therefore necessary.

[66] *Associated Taverns* concerned a valuation under s 122 of the Land Act for freeholding purposes. The land was situated within a suburban shopping complex. It was held under a special lease issued under s 67 of the Land Act. The special lease was granted for a term of five-and-a-half years and the lessee had the right or option to acquire the fee simple at the date of expiry of that term. The building had been constructed within 18 months of the start of the lease and four years prior to the valuation date. The Court found that, with the exception of the landscaped area of hillocks at the rear, the land was substantially and appropriately developed in terms of bulk and location.

[67] As noted above, the Court held that the capital value is the first to be established. The Court rejected a submission that well established principles for

[38] (1983) LVC 25

ascertaining the three values in s 122 of the Land Act should be ignored. The Court referred to *In re Wright's Objection*[39] in which Archer J said:[40]

> It is well recognised that a valuer must disregard improvements when assessing the unimproved value of land, and in assessing the capital value of land by reference to what it would realise in the open market, it seems neither necessary nor desirable to attempt to value the improvements, either individually or as a whole. Having made an assessment of the capital and unimproved values, the valuer is entitled to assume that the difference between these values is the added value given to the land by improvements or, in other words, that it is the value of the improvements" and further at page 924;
>
> > under cross-examination, indeed most of the valuers were disposed to admit that they had no reliable basis for their assessments of the values of invisible improvements, and we venture to question whether any good purpose was served by their attempt to place separate values thereon. The danger of the practise is that valuers who have made such a valuation of the improvements may be tempted to deduct the amount of that valuation from the capital value, in order to find the unimproved value. Such a method is contrary to the directions of the highest Courts, but we suspect that it may still be practised, and that its followers may seek to justify their procedure by reference to the opinion of Hosking J in *Thomas v Valuer-General*[1918] NZLR 164…when he said that the method was immaterial so long as the correct results were obtained.

[68] The Court continued and stated that the observations of Archer J have been approved by the Court of Appeal in a number of decided cases "the latest being *Atihau-Wanganui* v *Malpas*"[41] in which Cooke J (as he then was) delivering his joint judgment with McMullin J said:

> The next point to note is that it is well settled in New Zealand under the kind of statutory provisions now relevant the value of improvements is a residual figure, being the difference between the capital and unimproved values. The capital value will usually be the easiest feature to arrive at. Subject to the special exclusion in the 1954 Act, a sale of the whole property as it actually stands is to be envisaged, and evidence of more or less comparable sales is more likely to be available. Whether there are improvements and, if so, how the capital value is to be divided between the unimproved value and the value of improvements are inevitably more hypothetical or artificial questions. The value of the improvements is to be arrived at by deducting the unimproved value from the capital value. The starting point is not to value the improvements, either individually or en bloc. At best an attempt to value them separately, in one or other of those ways, might perhaps in some cases be some help as a check on the proportion of the capital value allocated to the unimproved value. To start by attempting to value them

[39] [1959] NZLR 920
[40] Ibid at p 922
[41] [1979] 2 NZLR 545

> separately would be to ignore that improvements normally have little or no real value apart from the whole property of which they form part. For substantially these reasons, the residual method of valuing improvements was laid down in *Wrights* case; and the procedure indicated by Archer J in that case was approved and applied in this Court in the judgment delivered by McCarthy P in *Re 110 Martin Street, Upper Hutt* [1973] 2 NZLR 15, 18. At the earlier stage of the latter case in this Court, *McKee* v *Valuer-General* [1971] NZLR 436, 440 Turner and Richmond J J had been of the same opinion.

[69] Although Archer J in *Wright's* case and the Court of Appeal in *Malpas* were dealing with valuations under the Mäori Vested Lands Administration Act 1954, the Court in *Associated Taverns* considered that despite the differences in approach to valuation under the Land Act no departure from well-established principles was justified.[42]

[70] The Court examined the "obscure terms" of provisos (i) and (ii). The Court held that in their opinion proviso (i) is concerned with the "method" of valuation and proviso (ii) with "that" which is to be valued. In relation to the first proviso, the Court expressed the view that it required "the valuer to be sure that his division of values when they are made where there is little or no direct sales evidence shall be very carefully weighed to provide a fair balancing of values between the lessor and lessee."[43] The Court stated:

> We are aware that the method of valuation approved in *Malpas* cannot in all circumstances be entirely complied with, and that some subjective evaluation of the worth of improvements in the analysis of sales where there is a minimum amount of development may be necessary on the valuation process.[44]

[71] The Court also stated:

> We recognise that the problems of obtaining comparable sales of land in the undeveloped state will usually create greater problems with farm land than urban land and that where an analysis of sales containing improvements is embarked upon a considerable onus is placed upon the valuer to acknowledge adequately a fair proportion between the value he places upon the undeveloped land and the value of improvements. In our opinion this onus weighs more heavily upon him in compensatory legislation than it may necessarily do in taxing legislation.

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[42] *Associated Taverns fn 14* at p 28
[43] *Associated Taverns fn 14* at p29
[44] *Associated Taverns fn 14 at p 29*

[72] The Court referred to proviso (ii) as an "elusive" provision and said:

> We consider that a lease under the Land Act is essentially an agreement between two parties to carry on a business, of which the Crown, in this case, provides the land (for which it receives a rent) and the company provides the capital (for which it receives the income less the rent.)
>
> Inequality would result where the value of either party's resources produced an unduly large or small share of the total income available, now and in the foreseeable future.
>
> To this extent the land resource should be utilized freely by the investment of appropriate improvements to achieve this. The lessee should not be expected to pay a rental based on unexploitable short term potential use of the land, and conversely the lessor should not be expected to forego his fair share of the income from the land and provide a return on inappropriate development to the lessee. The lessor further should not be expected to forego income because of the inferior management skills of a lessee.[45]

[73] The Court summarised the correct approach to the valuation should have been:

> First, the determination of the capital value based on the best available market evidence; and second, the determination of the VLEI [value of land exclusive of improvements] by envisaging the land as being without the benefit of the improvements as defined, but its future use being governed by the knowledge that this use may be influenced in the future by the improvements which exist. The determination of value will then be based upon the future land use assessed on the best available market evidence for this use; and third, the deduction of the VLEI from the capital value to determine the V of I [value of the improvements].[46]

[74] The Court also held that the effect which the existing improvements would have on the VLEI would vary depending upon the quality and quantity of those improvements and would be extinguished "only when a prudent and well-informed lessee would decide that redevelopment was economically appropriate and that the necessary land use planning permissions were obtainable."[47]

[75] The Court assessed each value on the following basis:

a) There was no sales evidence from which the capital value could be determined. The Court therefore used an income capitalisation

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[45] Ibid
[46] *Associated Taverns fn 14* at p 30
[47] Ibid

approach while accepting that this method had its shortcomings. From the capitalised value the Court deducted chattels and plant to assess a capital value of $560,000.

b) The next step was to ascertain the VLEI. There was an issue about zoning as the land was zoned Hotel-Tavern but there were no ordinances for that zoning. There was no sales evidence for properties with that zoning, so the Court proceeded on the basis of a notional purchase of the site under the method followed in most tavern site purchases. The Court considered that the alternative zoning would likely be Residential B but with an increase in value which would follow if the zone was changed to hotel zoning. The Residential B value was $162,000 to which the Court added $38,000 being rezoning costs. It therefore assessed the VLEI at $200,000.

c) The VI was then assessed purely as a residual. The Court stated that having placed equal emphasis or fairness in the establishment of the capital value and land value it followed that equal emphasis would exist between the VLEI and VI.

[76] By a process of pure subtraction, the Court assessed the VI at $360,000 being CV ($560,000) – VLEI ($200,000) = VI ($360,000).

[77] The Commissioner submits that the Court erred in following decided cases when it determined that the differences between the prescribed method of valuation under s 122(5) and that prescribed under the Valuation of Land Act were not such as to justify departure from well established basic principles. The Commissioner made this submission on the basis that the cases to which the Court referred were decided prior to the 1970 amendment to the Act and which involved a method of valuation different from that in the present s 131(1). The Commissioner argues that this is especially so given that an earlier proviso to ss 122(5) and 131(1) of the Act provided that the Board may cause only the VLEI to be ascertained where the lessee owned “all the improvements on the land included in the lease”.

[78] Counsel for the Commissioner submitted that the Court did not approach the capital value and the value of the LEI on different bases. Both were assessed on the basis of use as a tavern with hotel zoning. The VLEI was assessed on a Residential B basis with a premium added for likely hotel zoning. The Commissioner submits that for the improved property, the Court considered that the highest and best use was the tavern.

[79] The Court assessed the VLEI based on residential sales evidence but did not check that against the VI. Hence the Court did not rebalance the values to increase the value of the tavern building on the basis of existing use and reduce the VLEI from the highest and best use value as the Commissioner contends Mr Larmer has done in this case.

[80] The Commissioner argues that although the Court mentioned the income enjoyed by each party from the land and improvements, the sales evidence referred only to the VLEI and did not apply any sales evidence in calculating the VI. Hence affordability was never a factor on the Court's valuation.

[81] It is a fundamental submission for the Commissioner that where market trends indicate that prudent and well-informed purchasers would purchase the property for uses other than, or in addition to, the use for which existing improvements were placed on the property, those alternative uses may be considered when determining the VLEI.

[82] The case for Minaret is that recognition of the business agreement between lessor and lessee is critical to a proper interpretation of s 131. It is submitted for Minaret that the value of the business that the lessee is permitted to carry out on the land is "at the heart of the valuation, with the LEI as a platform for that business." Hence on this analysis the emphasis is on what the business will produce by way of income. Whilst accepting that the s 131 process is general, Minaret submits that it involves a particular assessment of the property subject to the lease. The pastoral lease requires the lessee to undertake certain pastoral activities. It is this interest that the lessee has the ability to market. Contrary to the Commissioner's case, Minaret

contends that pastoral activity is the highest and best use to which the property can be put under the terms of the lease.

[83] Minaret argues that the Commissioner is wrong to interpret s 131 without regard for the lease and the purpose of the valuation. The Commissioner's approach is illustrated in the evidence of Mr Dunckley in which he said:

> The exchange of pastoral leases in the market at prices which reflect an amenity value premium proves that the lessee can obtain a capital gain from their interest in the property. It is inconsistent with the requirement of an equitable relationship between the lessee and the lessor to allow only the lessee to profit from capital gains in the value of the land while the lessor is excluded from realisation of that gain in the value of its asset.[48]

[84] The case for Minaret is that the capital value under s 131(2) of the Act is the value of what is being sold – a working high country property subject to a pastoral lease not a model farm, nor a highly desirable setting in which to live and find seclusion, nor a prized conservation estate.

[85] The process by which the LEI is ascertained is settled. The value of the LEI has to be ascertained separately. It cannot be arrived at by the residual method of deducting the value of improvements from the capital value. The Land Valuation Tribunal in *Commissioner of Crown Lands* v *Emmerson & Ors*[49] adopted the *Associated Taverns* analysis. The Tribunal determined that the first value to be ascertained is the capital value and then the value of the land exclusive of improvements, by envisaging the land without the physical presence of the improvements as defined, the difference between those values being the value of the improvements.

[86] Mr Crighton for Minaret outlined a process in which the capital value is ascertained first and then the "first cut" of VLEI, and thus improvements value with exclusions under s 8 of the Crown Pastoral Land Act 1998, then application of the provisos to adjust the "first cut LEI and improvement values to ensure that the values are equitable as between lessor and lessee…"[50]

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[48] Dunckley brief of evidence para 42
[49] Unreported. Land Valuation Tribunal, Dunedin, 10/8/99
[50] Crighton brief of evidence para. 36

Section 131(1) Proviso (ii) – "Equitable Considerations"

[87] The definition of capital value in s 131(2) is unchanged since enactment of the Land Act 1948. The first proviso to s 131(1) of the 1948 Act stipulated that the sum of the VI and the LEI "shall not exceed the capital value of the land." The 1970 amendment to the Act saw two changes. Minaret submits they are significant. The first is that instead of the sum of the component values "not exceeding" the capital value, the Act provided that the sum of those values was to "be equal to the capital value of the land." Secondly, the 1970 amendment directed the valuer to ascertain the values of the VI and the LEI "on an equitable basis, having regard to the relationship between the lessor and the lessee."

[88] The provisos to s 131(1) of the Act are expressed to be "subject to the provisions of this Act." Minaret submits that proviso (ii) was intended to limit the effect of s 131(2). It was also submitted that Parliament cannot have intended that proviso (ii) be rendered nugatory by the unchanged definition of the capital value.

[89] Minaret's case is that the expression in proviso (ii), "having regard to the relationship between lessor and lessee", directs the Tribunal to the nature of the contract between the parties. Minaret contends that it would give no effect to the equity provision if the valuer simply ascertains the value of the capital value and then adjusts the component values to fit.

[90] The case for Minaret is that the capital value must be a conventional pastoral farming business based capital value of the property so as to avoid a wholly unrealistic value for improvements. Separate assessments of capital value and the value of land exclusive of improvements are required, not by a subtractive process.

Derogation

[91] Minaret submits that a consequence of the Commissioner's approach is the diminution of property rights. In some instances the rent calculated on the basis that amenity values are included in capital value will consume most, if not all, the net farm surplus and will therefore be unaffordable. In such cases, Minaret submits the

leaseholder will be driven to the Crown's bargaining table and his or her property rights will be alienated.

[92] It is trite that the Crown cannot take away private property rights, except pursuant to lawful authority.

> "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. [Any] justification is [to be] submitted to the Judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment" – *Entick* v *Carrington* 19 Howell's State Trials 1029 [1765] per Camden LCJ.

[93] In *Central Control Board (Liquor Traffic)* v *Cannon Brewery Company Limited* 1990 HC 744-752, Lord Atkinson said:

> "That canon is this; that an intention to take away the property of a subject without giving to him the legal right to compensation for the loss of it is not to be imputed to the legislature, unless that intention is expressed in unequivocal terms".

[94] When the Land Act 1948 was enacted, soil conservation was seen as sufficiently important to justify removal of the right to freehold the land. A perpetual right of renewal was seen as the trade-off for loss of that right. It was also seen as the way to encourage investment in farm improvements, facilitate financial security and avoid overstocking and land degradation.

[95] In that context, the pastoral lease provides:

a) The right of exclusive pasturage;

b) The right to renew in perpetuity;

c) The right for relevant values to be ascertained on an equitable basis, having regard to the relationship between lessor and lessee;

d) The right to economic benefits of pastoral farming and the correlative risks;

e) The right to the economic benefits of all improvements to and on the land; created by the lessee and predecessors in title.

[96] Those rights approximate those of the owner of the full bundle of property rights associated with ownership of the fee simple estate except for a requirement to pay rent and the imposition of restrictions on activities that may be undertaken on the land.

[97] Both parties accepted that there are amenity values in the land. The issue is whether the amenity values form part of the value of the land exclusive of improvements or is apportioned between the LEI and the VI. The Commissioner submits that as a matter of logic, amenity value lies in the land which the Crown owns subject to the rights of the holder of the pastoral lease. Minaret takes a contrary view. Minaret contends that the lessee has a property right in the amenity values in perpetuity. Minaret argues that the leaseholder can trade that right by selling the lease. Correspondingly, the Crown has no tradable right in the amenity value. Mr Wallis said in evidence:

> For the Crown to assume ownership of the increased capital value of the asset beyond its pastoral value is to me inequitable. To assess rent on the capital gain unrelated to the pastoral value is to distort the nature of the relationship. The LEI platform is to be valued for its pastoral use. This has nothing to do with seeking a fair market return on Crown assets.[51]

[98] Minaret contends that inclusion of amenity values within the LEI derogates from the rights of the leaseholder to have exclusive possession of the amenity in perpetuity. Hence Minaret argues that if that was the intention of Parliament it would have been necessary for the legislature to have expressed that intention in unequivocal terms.

[51] Wallis brief of evidence paragraph 315-316

The Elements of the Valuation

Capital Value

[99] Proviso (iii) to s 131(1) provides that the sum of the value of the improvements (s 131(1)(a)) and the LEI (s 131(1)(c)) "shall be equal to the capital value of the land". Subsection (2) provides that:

> For the purposes of the last preceding subsection, the expression "capital value" means the sum which the land and the improvements thereon might be expected to realise at the time of valuation if offered for sale, unencumbered by any mortgage or other charge thereon, on such reasonable terms and conditions as a bond fide seller might be expected to realise.

[100] It is common ground between the parties that the first step in the valuation process is that the valuer is required to assess the capital value. We agree. The parties disagree as to how that assessment should be made.

[101] The Commissioner contends that the process requires the valuer, by reference to available comparable sales, to assess the price the land would sell for if offered for sale on the open market. In other words, the market value. Minaret accepts that s 131(2) requires the valuer to assess the market value. The case for Minaret however is that the valuer should identify comparable market evidence excluding non-pastoral elements and s 8(b) Crown Pastoral Land Act factors.

[102] Hence insofar as assessment of the capital value is concerned, the question is whether a proper interpretation of s 131 requires a valuer to consider as comparable any property, the price of which included amenity values.

[103] The Commissioner submits that s 131 applies to any Crown renewable lease regardless of the classification of land. Section 51 of the Act provided for land to be classified as either farm land, urban land (residential), commercial and industrial land, or (as in this proceeding) pastoral land. The Commissioner submits that regardless of the classification of land, the provisions of s 131 apply to the ascertaining of values and draws no distinction between the various classifications. The Commissioner's case is that using market evidence from sales of comparable properties, the valuer ascertains the three values. He is not required to fix the rent.

Section 8 Crown Pastoral Land Act – The Statutory Exclusions

[104] There is a point of difference between the parties as to when the s 8(b) Crown Pastoral Land Act 1998 exclusions are made. It is convenient to consider this issue before considering the meaning of s 131(1) of the Land Act 1948.

[105] Minaret submits that the statutory exclusions should be deducted from the capital value. The Commissioner's position is that the values assessed under s 131 will reflect the potential for subdivision for building purposes and the commercial and industrial uses. Once those values have been ascertained, the Commissioner submits that only then the next step is to consider whether the value of the LEI needs to be adjusted to exclude any of the factors contained in s 8 of the Crown Pastoral Land Act 1998.

[106] It is therefore necessary to determine when the s 8 Crown Pastoral Land Act 1998 factors should be excluded. The statutory exclusions were originally contained in the proviso to s 66(7) of the Land Act (as enacted in 1979) and are now contained in s 8 of the Crown Pastoral Land Act 1998. There was no provision similar to s 66(7) of the Land Act, now s 8 of the Crown Pastoral Land Act 1998, in respect of land classified as other than pastoral. Section 66(6) provided that the yearly rent payable upon the renewal of a pastoral lease "where the land comprised in the lease has been re-classified under s 51(3) of this Act as farm land, urban land, or commercial or industrial land, shall be classified in the same manner as for the renewal of a renewable lease…" The words "to the extent only that the land held under it is pastoral land" in s 8 of the Crown Pastoral Land Act 1998 have the effect of applying the higher rental of four-and-a-half percent to the land comprised in the pastoral lease that has been re-classified as farm land, urban land, commercial or industrial land.

[107] The full text of s 8 is set out in paragraph [3] above. The key provisions of the section are:

> **S 8 Calculation of rent payable under pastoral leases after first 11 years**

> …to the extent only that the land held under it is pastoral land, the yearly rent payable under a pastoral lease…must continue to be calculated as for the renewal of the renewable lease…
>
> (b) With the rental value of the land ascertained under section 131 of [the Land Act] not including any potential value that the land may have –
>
> (i) For subdivision for building purposes; or
>
> (ii) For commercial or industrial use.

[108] The term "rental value" is defined in s 2 of the Land Act and s 2 of the Crown Pastoral Land Act 1998 to mean "the value of Crown land on which the yearly rent payable under a renewable lease is calculated in accordance with the Land Act 1948". Section 131(4) of the Land Act 1948 provides that "the *rental value* (emphasis added) of the land for the first period of 11 years of the term of the lease shall be the value of the land as determined under paragraph (c) of subsection (1)…" Hence the yearly rental is payable on the value of the LEI as calculated in accordance with s 131(1)(c). The "rental value of the land" referred to in s 8(b) of the Crown Pastoral Land Act therefore is the value of the LEI ascertained under s 131(1)(c) of the Land Act 1948.

[109] Accordingly, we consider that the exclusions referred to in s 8(b)(i) and (ii) should be deducted from the value of the LEI, that being the "rental value of the land ascertained under s 131 of [the Land Act].

[110] The next issue is whether s 8(b) means that anything that would not relate directly to the setting of a pastoral rent should be excluded from the value of the LEI as Mr Larmer suggested in evidence.[52] The Commissioner contends that there is no basis for giving s 8(b) an interpretation wider than that which flows naturally from the plain meaning of the words used. It was submitted for the Commissioner that Parliament intended only to exclude the value arising from the lands potential for activities which it was not open to the lessee to undertake at least not without separate consent.

[52] Notes of evidence p 899, lines 10 - 19

[111] If Parliament had intended to exclude the potential value of land for other than pastoral use from the LEI it could have achieved this in a number of ways. Parliament could have included the words "for purposes other than pastoral purposes including…" after the words "…potential value"… in s 8(b) of the Crown Pastoral Land Act or it could have stipulated that the value of the LEI was to be the productive value of the land. Of course, if the intention of the legislature was to exclude unexploitable potential of the land from the s 131 assessment, then s 8 of the Crown Pastoral Land Act requires no amendment.

[112] We consider that s 8(b) does not mean that non-pastoral factors, beyond those specified, are to be excluded from the assessed LEI.

What is the Market

[113] The case for the Commissioner can be somewhat baldly stated as "the market is the market." The Commissioner submits that the assessment of capital value and also the value of the LEI requires the valuer to apply evidence from comparable sales including sales where clearly amenity value formed a significant part. It is central to the Commissioner's position that the valuer should consider sales of pastoral properties with similar location and amenity values or attributes which are not necessary for farming or pastoral purposes. In the view of Mr Mahoney, a valuer should look at the evidence in the market. He should examine whether the property possesses similar characteristics to the property being valued and he should place greatest reliance upon that.[53]

[114] The International Valuation Standards define "market value" by reference to an exchange between a "willing buyer" and a "willing seller" "after proper marketing" when the parties "acted knowledgeably, prudently and without compulsion". It is curious that Parliament did not use those well-understood terms if Parliament intended "capital value" in the third proviso to s 131(1) to mean "market value". The Commissioner contends that those concepts are envisaged by the words "if offered for sale" and "on such reasonable terms and conditions as a bona fide seller might be expected to require".

[53] Notes of evidence page 296, line 3

[115] Mr Seed gave evidence for the Commissioner that the market for investors in pastoral leases is made up of rational investors. If they have a required rate of return target they go into investments with their eyes wide open and they understand that the return will come from two sources. One is the economic farm surplus that they generate in any one year and the other is the increase in wealth that occurs at the end of whatever their time horizon is.

[116] Mr Seed also noted that purchasers may have a consumptive demand. This relates to a way of life associated with farming and with other locational values of the property and possibly for speculative purposes. Hence purchasers may or may not be taking into account expected increases in the values or increases in wealth over time. Clearly, that consumptive demand was influencing the market in 2004. The case for the Commissioner is that the rational purchaser buying for consumptive reasons and the farmer buying for a pastoral business together comprised the market in which pastoral leases were being sold in the years immediately preceding the valuation date of 2004.

[117] The Commissioner called evidence (from Mr Horsley) to the effect that while some wealthy individuals may buy for lifestyle reasons, they also expect to run the pastoral farm in a businesslike manner and expend capital in doing so. Mr Osborne stated in evidence that although these wealthy (mainly) overseas purchasers were concerned about farming economics, they bought for lifestyle and legacy reasons and farming could be described as secondary. Nevertheless they expended a considerable sum on farm improvements.

[118] The rental payable on the value of the LEI as assessed by the valuers on which the Commissioner relies would in many instances consume a disproportionate amount of the annual farm surplus for properties awaiting determination. In some cases the assessed rental would exceed the net farm surplus. Notwithstanding consumptive demand from wealthy overseas purchasers and their relative wealth, we wonder whether many of the "comparable" sales on which the Commissioner relies would not have occurred at all or at anything like the price paid simply because the pastoral farms could not be operated in a sound economic manner.

[119] The difference in approach between valuers for the Commissioner and those called for Minaret is that the former assessed the capital value and the value of the LEI on the "highest and best use" basis whereas the valuers for Minaret assessed those values on the market value for existing use or "in-use" basis.

[120] Counsel for the Commissioner in closing submissions stated that the distinction between highest and best use and in-use is not the issue because the market evidence must be comparable as opposed to non-comparable. The Commissioner's position is that the fact a purchaser may not intend to continue pastoral farming does not exclude a transaction from providing relevant sales evidence.

[121] Minaret's position is that the demand (mainly from overseas purchasers) for iconic real estate and the pastoral farming market are distinct markets. Minaret's case is that it is untenable under the legislation to include non-pastoral values in the capital value. Minaret submits that if that were not so, equivalent pastoral operations would have markedly different LEI values and thus rental differentials on account of non-pastoral values alone. It is submitted that equitable adjustment is not complex once a uniform pastoral approach to the LEI valuation is undertaken beginning with the exclusion of non-pastoral elements in the comparable factors and thus the LEI.

[122] Minaret submits that if the Crown is correct, then the basket of comparable properties will include non-pastoral elements which do not necessarily flow to the LEI.

[123] The New Zealand Institute of Valuers Valuation Standard 3 defines "market value for the existing use" as "based on continuation of its existing use, assuming the asset could be sold in the open market for existing use, and otherwise in keeping with the market value definition regardless of whether or not the existing use represents the highest and best use of an asset."[54] The case for Minaret is, that having regard to the purpose for which the valuation is being carried out, the valuation should be on an in-use basis rather than the highest and best use basis.

[54] Crighton brief of evidence paragraphs 47 - 52

Minaret submits that there are very different markets. Mr Larmer said in evidence,[55] adopting the evidence of Mr Horsley, that "…land values and rentals are being set in one market (i.e international demand for iconic real estate) while the incomes being used to pay the rentals are being derived in a separate and largely unrelated market (pastoral farming)."

[124] Minaret considers that the methodology adopted by the valuers for the Commissioner do not warrant any analysis of s 131 or equity. This is because the case for Minaret is that the Crown merely considers that the open market, ignoring affordability and pastoral use, meets legislative requirements and all the valuer has to do is take away the value of improvements and make any necessary s 8 Crown Pastoral Land Act adjustments.

[125] The case for the Commissioner is that while some wealthy individuals may buy for lifestyle reasons, they also expect to run the pastoral farm in a businesslike manner and expend capital in doing so. Indeed, they contend that their access to outside capital may mean they are better farmers. Hence the Crown submits that while there may be different purchasers in the market, in that some may be motivated more by their desire to farm while others are more motivated by lifestyle, they are all purchasing pastoral properties that are all in the same market and they are competing with one another.

[126] Counsel for the Commissioner considers that the case for Minaret is misconceived to draw a distinction between valuation on an in-use or highest and best use basis. The Commissioner submits that the s 131 provisos require the valuer to place an equal emphasis on the value of improvements and the value of the LEI and ascertain them on an equitable basis. It is submitted that this is something that is driven by proper analysis and application of the sales evidence not by changing the use. The Commissioner submits it is nonsense to suggest that valuing the land for its highest and best use prevents the valuer from assessing the component values on an equitable basis.

[55] Larmer brief of evidence paragraph 132

[127] The Crown considers that the issue is not between highest and best use on the one hand and in-use on the other but that the market evidence must be comparable as opposed to non-comparable sales. The only basis for excluding sales would be if they are not comparable and lacked non-pastoral attributes or if the price was so out of line with market levels that the sale could be considered non-market. It was suggested for the Commissioner that because there are not many pastoral sales, the valuer should be slow to exclude any available sales evidence.

[128] Iconic high country property attracted buyers, particularly between 2003 and 2004, of substantial net worth who reflect a lower marginal value of money than most market participants, and for whom normal economic considerations are generally not applied. Their emphasis lies in optimising their personal satisfaction.[56] They are not subject to the financial constraints that affect other buyers of pastoral property. Mr Dunckley also accepted that transaction prices began to change and were not readily explicable by normal pastoral valuation principles.

[129] The Armstrong report records:

> "The CPLA pastoral lease is an unusual form of tenure. Firstly, it is a ground leasehold (arising out of a requirement to pay a prescriptive rental for only the pasturage), secondly…recognising that the lessee is not required to pay a rental for the added possession rights".

And at s 6.8 of the Armstrong Report:

> "We do not agree with submissions…that these premia values do not belong to the lessees and should be paid back on sale in some manner or form to the Crown. Such a condition would require a legislative change and expose the Crown to a substantial claim for compensation."

[130] In Mr Crighton's view, values which are not driven by pastoral farming uses cannot form any part of the rental review determination "so long as the lessee is restricted under the lease to derive income solely from the exclusive right of pasturage over the land." Mr Crighton gave evidence[57] that the major problem with the Crown's position is that the increasing value accrues to the lessee and for the lessee to realise the value, the property has to be sold. Nonetheless the Crown

[56] Mills brief of evidence at PM3 124
[57] Crighton brief of evidence paragraph 34

requires rent to be paid on the full value of the LEI, including amenity value, although the Crown has no access to the increment in the lessees' interest and the lessee does not have a bankable value. Increased borrowings have to be financed from the farming business cash flow.

[131] The capital value of properties is derived from a comparison of sales. Mr Crighton stated in evidence that the market for x-factor properties is "relatively thin"[58] and there is a high level of subjectivity, both as to statutory exclusions and high amenity values. In Mr Crighton's opinion "market value for existing use" or "value in-use" represents the pastoral use value excluding all non-pastoral values that should be excluded for rent review purposes.[59] Minaret submits that the legislators of the Land Act 1948 did not contemplate the circumstances where some have paid a substantial premium over pastoral values for what are now described as x-factor properties.

[132] Minaret submits that the LEI is an artificial construct. Mr Crighton said in evidence that the statutory exclusions are "an indicator" that the legislature intended that the values other than those associated with exclusive right to pasturage should not form part of the rental values. However, Minaret advances its case on the broader proposition that valuations for rental purposes should not include values anomalous to the purpose of the valuation. This begs the question as to whether the valuer is to make an assessment of the LEI "for rental purposes".

[133] Mr Larmer perceived the "comparable" sales of high country land and the s 131 assessment of the value of the LEI as being quite distinct. "Comparable" sales are unfettered by valuation restrictions or exclusions which the Land Act or the CPLA impose. On the contrary, he considered that s 131 directs valuers to a "valuation of land, for a pastoral purpose, for a rent to be fixed for such purpose." Minaret cites *Associated Taverns* as an example of the distinction. The CV under both constructs was the same but under the existing use the value of lessee improvements increased and thus the LEI value reduced for freeholding.

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[58] Ibid at paragraph 38
[59] Ibid at paragraph 50

[134] Thus Minaret's position is that the objective of the legislation is to fix a pastoral rent based on pastoral values excluding contributions to market value that have no bearing on the use of the land for livestock farming purposes. Mr Larmer saw the s 8 exclusions as indicating that "potentials" should be excluded from the valuation. If that reasoning is adopted other non-pastoral values and amenity values would be excluded from the LEI. The difficulty in this case is that some purchasers appear to have placed a high value on non-pastoral aspects.

The Competing Valuations

[135] In order to begin to make an assessment of "comparable" properties it is necessary to examine the features of Minaret. Mr Wallis' evidence provides the best description of the characteristics of the property. The key features of the property are as follows:

a) **Access**

Significantly Minaret has no road access. Access is made by boat or by aircraft. The barge and pusher boat owned by Minaret provides the primary link.

b) **Climate**

Minaret has less frequent higher rainfall events than other properties. This is a less desirable feature than more frequent lower rainfall events because Minaret has free draining soils and high summer evapo-transpiration. The summer snow line is 2800 feet (853 metres), marked by the snow tussock line. Evidence was also given of protracted winters of 120 to 130 days.

c) **Topography and Soils**

86 percent of Minaret lies above 700 metres in altitude. It has limited areas of lower altitudinal hill slopes, valley floors and fans. The predominant aspects are south and east. The (warmer) northerly aspects account for less than half the area of the cooler southerly aspects. The warmest north and

north-west aspects comprise only 7.6 percent of the total area. Flat or gently sloping terrain comprises only 4.3 percent of the topography. 77 percent of the soils at Minaret have a low to very low natural fertility.

d) **Vegetation**

On the evidence of Dr Espie, 53 percent of the land area is covered in tussock, 37 percent in bracken and scrub and 4.1 percent in pasture with the balance in native forest, wetlands, plantations, riverbed and bare land.

e) **Land Class Summary**

There is no pasture growth in the winter months of June – August. There is little growth for the months of May and September. As Mr Wallis stated the "physical and climatic data" do not point towards a viable farming proposition at Minaret in an unimproved state but that is not a fair representation once improvements are made. The 1972 Land Use Capability Map indicates that 50 percent of Minaret is suitable for limited grazing, 24 percent for moderate grazing, two percent for limited to moderate cultivation and thus suitable for intensive grazing based on vegetative pastoral improvements.

f) **Weeds, Pests and Diseases**

Hieracium lepidulum is prevalent throughout the property. Broom is under control but the seed bank remains. Broom can grow to high altitudes and is always worse in fern country. Possum numbers are high. Hence TB is a major threat.

g) **Historical Performance**

A Pastoral Lands Report in 1961 recorded:

> A very isolated property steep and costly to run but generally well covered and in good condition. The summer country is particularly good but the winter country could be improved considerably if

> further terrace country was developed and if bracken fern faces were oversewn. A full scale development scheme would not be justified as wool is the only source of revenue. If done gradually some development of the terraces would be economic, would increase production figures and may eventually make it possible (to introduce) a system of culling. Owing to isolation and class of sheep, sales of surplus stock are never likely to help burning capacity.

At valuation date in 2004, the majority of the front country below 1067 metres (3500 feet) was enclosed in a 4200 hectare deer farm carrying 14,638 stock units in conjunction with seasonal run country. By way of contrast it was wintering 2842 stock units at purchase, rising to 14,638 at valuation, now 19,113 at date of hearing with a potential of 25,000.

h) **Soil Fertility**

77 percent of Minaret's soils are low to very low in fertility, 11 percent are low to medium and 12 percent are of medium fertility. The soils at Minaret are moderately to highly acidic and have aluminium toxicity. Soil fertility is only economic to address on the higher producing land classes.

Assessment of the Value of the LEI

[136] The LEI state is as described in the *Kinney* and *Emmerson* decisions. It is not the land in its natural state, but the state the land would have been in at valuation date as if no improvements had been effected to the land. It therefore reflects "the benefit derived from the exercise of good husbandry and maintenance and any other input from the lessee that improves the land but falls short of being improvements as defined under the Act."

[137] Occupiers of the land over time have burnt the vegetation on the land. The issue is whether or not burning is an improvement within the meaning of ss 2 and 131. Mr Murray's assessment of the LEI took into account the effects of burning on the basis that the original occupiers of the land would have burnt the existing vegetation, volunteer grasses would have established themselves and those would be grazeable. In his view, burning was not an improvement so the LEI was affected by

the consequence of burning. If burning is not an improvement then the LEI state at valuation date includes the effect of burning.

[138] The Commissioner contends, by reliance upon Mr Murray's evidence, that the act of burning is clearly not itself substantial as it merely involves the act of lighting a fire which is then left to burn over a specified area of the lease. Furthermore burning on Minaret, the Commissioner argues, was carried out on a relatively small area of the total land nor the Commissioner submits, is it permanent as the burning will cease when the fire goes out. The case for the Commissioner is that burning destroys the vegetation which fuels the fire. The Commissioner contends that the issue is whether the removal by fire of that vegetation can be described as substantial and whether it is permanent.

[139] The issue is what is meant by "substantial improvement of a permanent character". This Tribunal considered the dictionary definition of those terms in *Commissioner of Crown Lands* v *Emmerson* as follows:

> The *Shorter Oxford Dictionary* defines "substantial" as meaning "of ample or considerable amount, quantity, or dimensions". "Permanent" is defined as meaning "lasting or designed to last indefinitely without change". It is the opposite of temporary. Plainly whether something qualifies as an improvement by being substantial and of a permanent character will be a question of fact. The words are relative. It will be a matter of degree in each case.

[140] Mr Murray's evidence was that burning was not an improvement because the effects are not permanent given that burning at Minaret would have taken place at three to 14 year intervals. The Commissioner contends that burning does not last indefinitely without change. Burning does not completely destroy or remove the vegetation. Re-growth starts either by the bracken fern roots re-establishing themselves or by the germination of seeds. Depending upon the type of vegetation which is burnt, the burning has to be repeated at intervals.

[141] Mr Murray referred to the effect on the soil of burning vegetation. His view, supported by other literature, was that burning depleted the soil. The Commissioner contends that if burning depletes the soil of nutrients and thus adversely affects fertility then burning could not be considered to be an improvement. The reasoning

is that anything which does not at least preserve the land is antithetical to the purpose of pastoral leases. Dr Espie opined that Mr Murray and the sources he relied upon overestimated nutrient loss through burning. Dr Espie opined that as Mr Murray used summer fern nutrient data he failed to recognise that fern is a fire adaptive species. Accordingly, nutrients are protected in the rhizomes and the ash remains largely on site.

[142] The Commissioner also relies upon ss 237 and 244 of the Land Act 1908 as support for the argument that burning on its own is not an improvement.

> [171] Section 237 of the Land Act 1908 provided:
>
> > "(1) With the consent of the Minister the Board may permit the holder of any pasturage lease or licence under this Part of this Act … to do any one or more of the following things: -
> >
> > (a) To cultivate any portion of his run for the purpose of growing winter feed for the stock depastured on the run:
> >
> > (b) To plough and sow in grass any portion of the run not exceeding three thousand acres:
> >
> > (c) To clear by felling and burning bush or scrub on any portion of his run, and sow the same in grass:
> >
> > (d) To surface sow in grass any portion of his run.
> >
> > (2) The provisions of Section 244 hereof extend and apply to any improvements made under the authority of paragraphs (b), (c), and (d) of the last preceding subsection, provided that the value payable in respect of such improvements shall be in addition to the value of the improvements provided for by that section.
>
> [172] Section 244 provided that, where a lease or licence had expired and where the purchaser was not the then lessee or licensee, the sale was to be on the express condition that the purchaser paid the value of "any improvements made on a run". Section 244(3) described those improvements as "all improvements, consisting of: necessary buildings, plantations, fences (other than rabbit-proof fences), and ditches for draining, made on the lands the lease or licence of which has been sold at auction at last aforesaid." Any payment made by an incoming purchaser was to also include improvements consented to by the Board under s 237(1), including where the outgoing lessee or licensee had cleared the land by felling and burning bush or scrub *and* sown the same in grass. It was the permanency of the combination of felling, burning and sowing that lifted this activity from one of good husbandry to an improvement for which the outgoing lessee or licensee was entitled to payment.
>
> [173] Similar provisions were included in the Land Act 1924, where:

[173.1] Section 260(1) provided that the Board may permit the holder of any pastoral license "(c) To clear any portion of his run by felling and burning bush or scrub, and to sow in grass any land so cleared". Section 260(2) provided that s 284 was to extend and apply to (b), (c), and (d) of subsection (1) provided that the value payable in respect of such improvements was to be in addition to the value of improvements provided for in s 284.

[173.2] Section 284 provided that where the whole of a run was disposed of to any person other than existing licensee the purchaser was to pay for improvements mad eon run. For the purposes of that section the term "improvements" included "all necessary buildings, plantations, fences (other than rabbit-proof fences), and ditches for draining, made on the lands comprised in the license and all other substantial improvements of a permanent character made thereon with the consent of the Board and the Minister, and the expression "substantial improvements of a permanent character" shall be deemed to include bridges and rabbit-proof fences".

[143] The Commissioner's position is that burning does not qualify as either substantial or permanent because burning (unlike removal of vegetation by mechanical means) needs to be repeated at regular intervals, the land reverts to a vegetative state, and soil fertility is adversely affected.

[144] The third value to be ascertained under s 131(1) is the value of the land "exclusive of improvements referred to in paragraph (a)", namely the improvements that are "in existence and unexhausted on the land included in the lease". The Commissioner submits that the burning which the first pastoralists carried out was not, at the valuation date in 2004, in existence and unexhausted.

[145] Dr Espie analysed pre-pastoral vegetation by reference to the pre-pastoral vegetation description, the ecological succession processes, and the current species distribution. From his analysis he concluded that pre-pastoral vegetation on the lake face would have been mixed scrub/broadleaf woodland, late phase ecological succession, dense, three to five metres in height, and impenetrable to stock.

[146] The frequency of Polynesian burning slowed to the point where at 160 years without fire succession returned to late stage mixed scrub/woodland. Removal of the late succession mixed scrub/broadleaf forest vegetation by the early pastoralists

would give a short term boost in soil fertility allowing the introduction of stock, the establishment of grasses and the reversion to bracken fern in the early succession phase. Cleared areas provide critical winter feed allowing use of summer grazing following snowmelt. After eight to 10 years bracken fern shades out grasses and further burning is required to turn the clock back so as to open the canopy to allow grasses to grow. Minaret submits that this process of clearance allowed permanent establishment of a fine wool pastoral system and subsequent fencing and pastoral activity improved soil fertility.

[147] We are satisfied that burning vegetation on Minaret is an improvement in existence and unexhausted on the land at valuation date. Burning is, in our view, a substantial improvement of a permanent character notwithstanding that the burning may need to be repeated, that there may be some nutrient loss, and that further steps are required to be taken to avoid reversion and to make the land more productive. We do not interpret the definition of "improvements" to mean that the improvement (the burning itself) must be "permanent". The Act refers to "substantial improvements of a permanent character" (emphasis added). Hence we consider that to qualify as an improvement the activity must be substantial (that is, of some substance) and display the essential quality of something long lasting.

[148] The definition of "improvement" as including "clearing of broom, brush, gorse, scrub and sweetbriar…" further supports our view. For one, the definition does not specify the means by which the "clearing" shall take place in order to qualify as an "improvement". Burning is as much a clearing as removal by mechanical means. Indeed there was no evidence that removal of vegetation by mechanical means was any more "permanent" than removal by fire. In order to improve the land permanently, both means of removal would require further steps to be taken to improve the productive capacity of the soil.

[149] Hence our view is that the activity must have a permanent character but need not be permanent.

[150] It is a question of fact and degree as to whether the activity is a "substantial improvement" and displays the characteristics of something long lasting. Removal of vegetation by burning, given Dr Espie's evidence, meets those prerequisites.

[151] Hence we conclude that burning is an improvement in terms of the Land Act and the Crown Pastoral Land Act.

The LEI Stock Carrying Capacity

[152] Dr Espie presented an in-depth report based on extensive research carried out on Minaret and on reference to other related research.

[153] We note that the "Espie report" was prepared sometime after the valuers had prepared their reports and that the results of Dr Espie's research confirms the research and conclusions reached by Mr Mills in regard to the LEI state of Minaret and the associated carrying capacity.

[154] A number of witnesses assessed the LEI carrying capacity of Minaret including:

Dr Espie	1685 stock units
Mr Wallis	1200 stock units
Mr Mills	2000 stock units
Mr Dunckley	3710 stock units (initially 5555 stock units in his 2004 valuation)
Mr Larmer	2000 stock units

[155] Mr Murray arrived at a range of stock units using historical records adjusted in a variety of ways and utilising land use capability classifications.

[156] Mr Murray's stock unit numbers ranged, depending on which adjustment he used, from 1580 to 4752 with a mid point of 3200 and by an alternative method 3710 and he finally opted for 3200 stock units. Mr Dunckley ultimately adopted this figure.

[157] Mr Murray acknowledged in his evidence the artificiality of the hypothetical state that he adopted and the doubtful value of arriving at a single LEI carrying capacity using his methodology.

[158] We note that the winter carrying capacity without supplementary feeding is the determining factor in assessing a carrying capacity and that in an LEI state there would be no snow fences to contain livestock with corresponding higher losses.

[159] On the basis that burning is an improvement and on the evidence of Dr Espie and Mr Mills we conclude that the carrying capacity of Minerat in an LEI state in July 2005 is 2000 stock units.

Improvements

[160] Section 131(1) requires the valuer to assess the value of improvements "which are then in existence and unexhausted on the land included in the lease..." The Act[60] defines "improvements" as:

> "Improvements" means substantial improvements of a permanent character, and includes reclamation from swamps; clearing of bush, gorse, broom, sweetbrier, or scrub; cultivation; planting with trees or live hedges; the laying out and cultivating of gardens; fencing (including rabbitproof fencing); draining, roading; bridging; sinking well or bores, or constructing water tanks, water supplies, water races, irrigation works, head races, border dykes, or sheep dips; making embankments or protective works of any kind; in any way improving the character or fertility of the soil; the erection of any building; and the installation of any telephone or of any electric lighting or electric power plant:

[161] The Commissioner submits that on a proper construction of s 131, the value of improvements is assessed separately along with the value of the LEI and if necessary those values are adjusted on a fair basis so that they equal the capital value. Minaret submits that improvements are determined as a residual after calculation of the capital value and the LEI and that the legislation directs that improvements are to be assessed for the value they bring to the property.

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[60] s2 Land Act 1948

[162] It is common ground that if the value of improvements is assessed as a residual then that must be on a fair basis with equal emphasis placed on the value of the LEI so that the value of the improvements makes an appropriate contribution to the capital value.

[163] Minaret's case is that if a pastoral use capital value is used to correspond with a pastoral LEI, then the improvements are logically assessed for what they bring to the pastoral valuation. Minaret submits that it is impossible to assess the value which the improvements bring to the property where the capital value is based on transactions with non-pastoral values as the improvements may have no value to the purchaser or may still resonate in the purchase price.

[164] In *Associated Taverns* the Court stated that:

> The determination of the VLEI by envisaging the land as being without the physical presence of the improvements as defined, with its future use being governed by the knowledge that this use may be influenced in the future by the improvements which exist. The determination of value will then be based upon the future land use assessed on the best available market evidence for this use; and third, the deduction of the VLEI from the capital value to determine the VI.

[165] The valuer must assess the value of the improvements as they existed in 2004 and assess the contribution that value makes together with the VLEI to the capital value. The Commissioner submits that it is wrong to assume that the improvements do not exist and to assess the LEI by reference to what a purchaser of the LEI would have to do in order to obtain resource and the Commissioner's consent. Minaret's position is that the valuer must put the consents to one side as if they had not been obtained and assess the value of the land without them but taking into account the chance of obtaining similar consents. As Mr Mills put it, "a purchaser will consider the substantial cost of pursuing these consents and the prospect of a successful outcome".

[166] We consider that it would be wrong in principle to assess the value of the LEI on the basis that the land has been improved. We do not take *Associated Taverns* to be authority for such a proposition. We consider that the value of the LEI should be assessed on the basis that future use of the land <u>may</u> be influenced by the

improvements which exist. That necessarily involves an analysis of the future use of the land and an assessment both of the chance and the cost of obtaining the necessary consents.

[167] Minaret submits that the development potential of the land influences assessment of the value of the property in the envisaged LEI state. Mr Mills expressed the view that it would be difficult, if not impossible, to obtain consents for vegetation clearance to create the current pastoral unit.

[168] Mr Whiting, an experienced planner, in evidence opined that it would be difficult, if not impossible, to obtain consent from the Commissioner in 2005 to convert Minaret from an LEI state to land in pasture.

[169] Mr Wallis was also of that opinion and cited the example of the Commissioner declining a consent application from Mt Albert Station in 2005 to clear and develop 250 hectares adjoining and to the north of Minaret.

[170] A subsequent application in 2006 resulted in consent being granted to clear and develop only 33 hectares.

Marginal Strips

[171] A number of witnesses mentioned in passing the issue of marginal strips and Mr Wallis noted in his evidence that the renewal of the lease of Minaret is a disposition for the purposes of the Conservation Act 1987 and therefore the property is subject to part IVA of that Act.

[172] Evidence produced to the Tribunal showed that as far back as 1960 there was a need to set aside marginal strips, that in 1992 a plan was prepared showing potential marginal strips but when the lease was renewed in 1994 no marginal strips were created.

[173] In 2002 a notation was entered on the Certificate of Title advising that the property was subject to part IVA of the Conservation Act 1987 without any consultation with the lessee.

[174] Mr Wallis produced a copy of a Cabinet paper, which is undated but appears to have been written in 2007, which states in part that marginal strips are automatically created on pastoral leases when they are renewed. Therefore, in 2027 when the Minaret lease is renewed there is a potential for the provisions of part IVA to be invoked and marginal strips will be created.

[175] Whilst many of the valuers mentioned marginal strips, none made any adjustment in their valuations for the possibility that marginal strips could be created.

[176] Accordingly we conclude that the effect of this possibility is negligible and that no adjustment to the VLEI is required.

Discussion

[177] Valuations for calculation of renewal rent under s 131 for pastoral properties have included reference to the stock carrying capacity of a property in its LEI state. Pastoral farmers have exchanged pastoral leases, expended capital and developed pastoral properties on the basis that the rental value had been calculated in that way. This approach fundamentally changed during the course of the rent review with which this proceeding is concerned. The Commissioner considers that the "traditional" approach to valuation for calculation of renewal rent is flawed. This lead to a reassessment of the valuation methodology that has brought about this proceeding.

[178] Section 131 requires the valuer to assess separately the value of the improvements then in existence and unexhausted on the land, other Crown improvements (of which there are none in this instance), the land exclusive of those improvements, and the capital value.

[179] The valuer is required to place equal emphasis on the value of improvements and the value of the land exclusive of improvements. The valuer may not assess the respective values by a process of mere subtraction. The valuer must derive the value of improvements and the value of the land exclusive of improvements on an

equitable basis recognising the relationship between the lessor and lessee. The case for the Commissioner is that the reason for this requirement is to recognise the respective contributions of each party to the capital value. This is because there are different interests in lessees' improvements and the land exclusive of improvements. The relationship is shaped by the contractual rights, statutory rights and obligations and must be seen in the context in which that relationship exists.

[180] Pastoral leases were established to provide security of tenure in respect of leases whose primary purposes were the prevention of soil erosion, conservation, pest eradication and weed control on land deemed not particularly suitable for farming. The pastoral leaseholder is highly constrained in what he or she can do or not do. Consents are required from the Commissioner for activities where no consent would be required for activities in "conventional" farming or other leasehold interests.

[181] Furthermore, s 8 Crown Pastoral Land Act is a recognition of the fact that the rent should not be assessed on factors that the pastoral leaseholder is not able to exploit. We have concluded that s 8 does not incorporate any other non-pastoral factors but the section provides context in which the ascertainment of values on an equitable basis is to be assessed.

[182] The values to be ascertained are a market value but the comparable sales must be adjusted to take account of s 131(1) provisos (i) and (ii). To do otherwise would render those provisos meaningless.

[183] We consider that the valuer for the Commissioner has failed to make appropriate adjustment for the provisos to s 131(1). Furthermore, the valuer has failed to take into account the effect on the purchasers of "comparable" properties of the rental payable under their methodology. We consider that if the purchasers of properties containing significant amenity values took account of rental payable under Mr Dunckley's valuation methodology then the purchases may not have taken place or not for anything like the price paid.

[184] The Commissioner argued that wealthy purchasers of properties containing significant amenity values were motivated not only by consumptive demand but also by the wish to operate the pastoral farm profitably. If those purchasers knew they would have to pay rental as the Commissioner contends, then it is unlikely those properties would have exchanged for the prices they did.

[185] In 2006 LINZ issued a protocol to DTZ New Zealand Ltd, the Crown's contracted valuers.

[186] The LINZ Protocol sets out criteria which DTZ valuers are required to comply with when producing valuations for the setting of pastoral lease rents. In the preamble, LINZ contends that valuers have been excluding certain features or so called amenity values on which the market places a high value. As a consequence LINZ was of the opinion that the values arrived at did not comply with s 131 of the Land Act 1948.

[187] LINZ was also insistent that the consequences of the rental assessment were not to be taken into account when arriving at the rental value.

[188] The protocol required that DTZ valuers carried out a sequence of assessments to arrive at the LEI and CV, the latter to include intrinsic factors as well as amenity values. Also to be assessed was the land value. The LV was to be the residual of the CV less the value of improvements on the land. The LEI was to be the residual of the LV less the value of the improvements to the land.

[189] The Tribunal finds that the LINZ Protocol does not override the requirements and definitions as set out in the Land Act 1948 and amendments and the Crown Pastoral Land Act 1998. It is unfortunate that LINZ has chosen to direct and demand of its valuers a process that is intended to achieve a particular outcome. Those two Acts as well as case law provide valuers and others with the due process to be followed. To produce a protocol at variance with the legislation is not a helpful approach in achieving a change to those Acts and this Tribunal is not the forum to initiate such a process.

[190] It is significant that the protocol, according to Mr Dunckley, had no regard to the provisions prescribed in s 131 of the Land Act 1948, and in particular subs 1(c), (i) and (ii) wherein:

> (i) In ascertaining the values under paragraphs (a) and (c) of this subsection, equal emphasis shall be placed on the value to be ascertained under each paragraph;"
>
> (ii) The values shall be ascertained on an equitable basis, having regard to the relationship between lessor and lessee;

[191] Under the Land Act 1948 and subsequent amendments, the value of the particular property under consideration (Minaret in this case) is to be determined "***for calculation of renewal rent***"- s 131. Further, under s 6(a) of the Crown Pastoral Land Act 1998 "***The rental value of that pastoral land...***" directs and determines in part how the exercise is to be carried out. These phrases are clear and unequivocal as to their meaning and direction.

[192] Part 1 s 4 of the CPLA 1998 states that a pastoral lease gives the holder:

a) The exclusive right of pasturage over the land;

b) A perpetual right of renewal for terms of 33 years;

c) No rights to the soil;

d) No rights to acquire the fee simple of any land.

[193] Sections 15 and 16 of the CPLA 1998 require that a lessee of pastoral land must not:

- Clear or fell any brush or scrub;
- Crop, cultivate, drain or plough any part of the land;
- Topdress any part of the land;
- Sow any part of the land with seed;
- Plant any tree or trees on the land;

- Form any path, road or track on the land;
- Undertake any other activity affecting or involving or causing disturbance to the soil;
- Burn any vegetation.

[194] However, s 16 (2) states that "a lessee or licensee of pastoral land may do anything affecting, involving or causing disturbance to the soil if:

a) The Commissioner has first given the lessee or the licensee written consent to the doing of it; and

b) It is done in accordance with every condition, direction and restriction, subject to which the Commissioner gave the consent.

[195] Pastoral leases are also subject to a stock limitation personal to the lessee as established by the Commissioner.

[196] Further, s 18(1) requires that in relation to discretionary actions that:

> (1) Before taking any action described in subsection (3), the Commissioner must consult the Director-General of Conservation.
>
> (2) In taking any action described in subsection (3), the Commissioner must take into account—
>
> (a) The desirability of protecting the inherent values of the land concerned (other than attributes and characteristics of a recreational value only), and in particular the inherent values of indigenous plants and animals, and natural ecosystems and landscapes; and
>
> (b) The desirability of making it easier to use the land concerned for farming purposes.

[197] These various factors are peculiar to pastoral leases and lessees. The Tribunal views and interprets these matters to be mechanisms designed to protect the interest of the Crown in the land but at the same time providing the lessee with security of tenure and occupation thereby passing to the lessee the risk as well as the opportunity to develop the land for pastoral purposes.

[198] The prescribed levels of rent as well as the lease details are a clear indication as to the intended relationship between the parties as described in the legislation. Owners of freehold properties are not constrained by such requirements or limitations.

[199] Mr Dunckley's approach as demanded by the protocol was described by him to be that:

> "the highest and best use of the property must be determined, be that as an economic farm, or some other use which captures the intrinsic and extrinsic factors influencing value, or a combination of both. Having determined the highest and best use, the importance of the farming operation in terms of added value must then be considered. It is a fact that:
>
> a) The capital value is in excess of "normal" farming values, influenced by the extensive lake frontage and the remote alpine environment;
>
> b) The LEI value contains those non-pastoral influences;
>
> c) The value of the LEI without the substantial deer farm development undertaken over the past 10 years may well be similar and cannot be less than other pastoral land uses.
>
> I am instructed that the issue of rental and its affordability is not a matter that I need to address."

[200] Mr Dunckley in evidence stated that "the highest and best use of Minaret is as a high country station with high amenity values. It would have associated pastoral farm uses, and those uses may vary depending on the motives of the purchaser. Those motives are not necessarily driven by farming returns. Non-farming motivation in the purchase of high country stations is a proven market influence in recent years."

[201] In noting that Minaret would have associated pastoral farm uses Mr Dunckley highlights the difficulties of working within the LINZ Protocol in that the pastoral use of the property is the only use to which a lessee of Minaret may put the property, constrained or fettered by the conditions of the lease.

[202] In support of this premise Mr Murray provided an analysis of sales of similar properties which he purported contained high amenity values and marginal production values to provide an indication of the type of individual that was likely to purchase Minaret in its LEI state. He concluded that the common factor about the sales was that they sold for well above their value simply as pastoral farming businesses, and secondly that the purchasers were not simply or solely in the business of farming. It lead him to the conclusion:

> That the principal reason for purchasers buying these properties was firstly as a secure investment in what they believe to be a scarce and sought after commodity, that not being the property's productive potential but the rights to exclusive occupation and enjoyment of the amenity values. Secondly, for the personal enjoyment of their amenity values. In all cases mentioned the pastoral productive capacity of the property was a distant third in order of priority of reasons for purchasing the property.

[203] Actual sales of high country properties are open market sales not influenced by either the requirements of s 131 of the Land Act 1948 or the deductions referred to in s 8 of the Crown Pastoral Land Act 1998. For freehold properties the purchase price reflects the combined value of the land and the added value of the improvements. The sum paid will reflect, to a degree, the financial resources available to a purchaser as well as their preferences and aspirations. These matters will have been factored into the purchase price as well as any allowance for potential. A prudent purchaser would also make allowance and provision for the risk involved in realising any such potential.

[204] In relation to Minaret, the Tribunal considers this to be of considerable import particularly in relation to the risk associated with gaining the necessary consents and the costs associated with developing the property to its condition in 2004. A prudent pastoralist would also take into account the lapse in time, which could be significant, between the introduction of machinery, materials and labour required for such a programme and the receipt of a positive cash flow.

[205] Messrs Dunckley and Mills compiled sales evidence to produce schedules showing "unfettered," or non-constrained values for the various freehold sales and also for leasehold sales, making the appropriate adjustments to provide the equivalent freehold values.

[206] The rent fixing framework under s 131 of the Land Act 1948 and the Crown Pastoral Land Act 1998 are clear and unequivocal as to the intent of the legislation, variously described as a valuation for "***calculation of renewal rent***" and further, the "***rental value of that pastoral land***"**.** The reference to pastoral indicates an "in-use" situation which reflects the constraints imposed by the terms and conditions of a pastoral lease as opposed to an unfettered, non-constrained property held in fee simple.

[207] The use of the land being limited to pastoral activities is an artificial construct prescribed by statute. The land can be put to no other use. It follows that in allowing or acknowledging statutory exclusions for potential value, the legislation recognised the presence of such factors. It is axiomatic that intrinsic factors such as amenity values upon which the legislation is silent should receive similar acknowledgement and treatment. When the Land Act 1948 and its amendments were promulgated, factors such as amenity values and significant inherent values were not apparent or considered an issue at the time. Nonetheless views of the property from either Lake Wanaka or the State Highway encompassing the extensive lake frontage, the various valleys and the mountainous backdrop are a matter of personal perception and appreciation. As such they are not "owned" by either the lessee or for that matter the Crown. In essence they are held in public ownership.

[208] Given the terms and conditions of a pastoral lease, these factors are unavailable to and unexploitable by a lessee. To consider significant inherent values and amenity values as part of the LEI when assessing the rental value would be inequitable in the opinion of the Tribunal and the antithesis of the intent and direction of the legislation. In other words, to take that approach would have no regard to the values to be ascertained on an equitable basis having regard to the relationship between the lessor and the lessee as prescribed in s 131 of the Land Act 1948.

[209] The Tribunal determines that the highest and best use approach leads to an inappropriate conclusion and accordingly significant inherent values and amenity values should not be taken into account in determining a rent for pastoral purposes. Therefore an "in-use" assessment meets the intent and requirements as set out in

s 131 of the Land Act 1948 and amendments and the CPLA 1998. Accordingly the Tribunal prefers the approach adopted by Mr Mills.

[210] Both valuers provided analyses of selected properties that had sold and various characteristics influencing the sale price. Those factors included:

- Isolation or privacy, examples being Motutapu and Mt Algidus;

- Attraction or appeal of the location, examples being Castle Hill, one hour from Christchurch, or Waitiri lying above the Kawarau Gorge and 25 minutes from Queenstown;

- Potential in relation to subdivision or other commercial development including skiing, eco-tourism, hunting and fishing and farm stays. Examples are Glen Nevis, Glen Echo and Waitiri;

- Attraction or appeal of properties which have iconic features such as lake or river frontages, limestone outcrops, a mountain backdrop, with elements of bush and tussock cover;

- Lifestyle, including pride of "ownership";

- Pastoral farming;

- Non pastoral purposes.

[211] Inherent in those factors to a major or minor degree is the seemingly powerful influence of buyer motivation. This is highlighted in the purchase of Birchwood or more recently St James by the Crown who are adjoining land owners where the pastoral activities previously carried out on the property were basically irrelevant.

[212] Evidence was given that some individual purchasers, syndicates or other groups from either overseas or within New Zealand held or had access to significant financial resources enabling them to purchase and in some instances, undertake or

plan the subsequent development of a particular property such as residential subdivision at Glen Nevis or a farm park type concept at Glen Echo. Both these properties were held in fee simple.

[213] The Tribunal also noted that significant land development and the construction of extensive walking tracks and associated accommodation buildings had been undertaken at Motutapu. Also there were purchasers whose particular values or requirements outweighed pastoral farming, this serving only as an adjunct to the main reason for purchasing a property. There were other purchasers to whom pastoral farming was overridden totally by other wishes or desires and last but not least, the purely high country pastoralist or run-holder.

Mr Mills' "In-Use"

[214] Mr Mills looked for comparable sale properties where the transaction was essentially based on the returns available from pastoral land use. Table 14 of his valuation analysed 10 such properties. He assessed a range of Net Freehold Sale Prices (NFHSP) of $392 to $664 per stock unit. He concluded that when location, improvements and productive potential are brought to account, Minaret, inclusive of access, sits above the mid-point of the pastoral value range at $600 per stock unit based on an assessment of 14,000 stock units.

[215] Mr Mills identifies a wide range of LEI values between $293 and $970. He considered that in their LEI state the properties he analysed were superior farming propositions on account of better access, the prospects of consents and better development potential. In Mr Mills' opinion, assuming an "in-use" valuation construct, Minaret in the LEI state would trade as a summer run-off to complement a property with good wintering capacity. He considered the basic pastoral grazing value within the LEI to be $750,000 (2000 stock units @ $375/Su) and a total LEI value of $1,000,000.

[216] The Commissioner considers Mr Mills' evidence in method and in calculation to be "deeply flawed" because Mr Mills considered that a valuation for rental review required the property "to be valued as a pastoral proposition". The

Commissioner is critical of Mr Mills for not seeing any place for an amenity value in an LEI. As a consequence of Mr Mills' approach, the Commissioner submits he selected comparable sale properties which have no or only very limited non-pastoral values associated with them.

[217] The Commissioner was also critical that Mr Mills' calculations contained a number of errors and anomalies that he was unable to explain without going back to his source material.

Mr Dunckley's First Valuation "In-Use"

[218] The Commissioner contends that the evidence of Mr Dunckley reflects the correct approach to the task of the valuer under s 131 and the s 8 exclusions. It is submitted for the Commissioner that the correct approach is to assess the value having regard to the highest and best use of the land, recognise that CV is influenced by the amenity values and to consider that those amenity value reside in the LEI. He also rejects an LEI per stock unit value as an appropriate measure.

[219] Mr Dunckley adopts a six step sales analysis methodology as follows:

a) Select comparable sales for the period between July 2003 to June 2004 by reference, broadly, to:

    i) Date of sale;

    ii) Size, location and tenure;

    iii) Comparable price range;

    iv) Land classes.

b) Adjust to freehold for rental payment and terms and conditions of lease and other statutory exclusions;

c) Estimate the Land Sale Price (LSP) by apportioning the value of structural improvements;

d) Apportion LEI (freehold) by apportioning value to development improvements;

e) Apportion LEI to freehold and leasehold components;

f) Estimate fettered LEI by apportioning effect of statutory exclusions.

[220] Mr Dunckley assessed the Market Value of Minaret, adjusted for lack of access, to be $10,820,000, which is lower than Mr Mills' assessment of $12,030,000. The Commissioner also contends that Mr Dunckley's assessment of development improvements of $1,490,000 is a reasonable figure. That figure compares to actual development expenditure less specific items for fencing, roading and tracks of $4,350,000 and Mr Mills' assessed value of $3,270,000.

[221] Mr Dunckley produced two valuations. Minaret is critical of Mr Dunckley's first valuation dated May 2004 where he subtracted a figure of $3,388,000 from a value for the LEI of $6,160,000 to produce a "rental value" of $2,772,000. Mr Dunckley sought to explain what he had done to make such an assessment. He explained that he had produced a "rental value" to arrive at a rental in terms of the pragmatic approach as advocated by Mr Larmer. Mr Dunckley omitted the "pragmatic rental value" in his May 2007 valuation. The Commissioner contends however that Mr Dunckley's assessment of the LEI did not alter markedly from September 2004, May 2007 and his evidence in October 2007 of $6,160,000 and $5,980,000 respectively.

[222] Mr Dunckley saw amenity value as necessarily falling within capital value and LEI. He stated:

> The capital value must include the intrinsic amenity and scenic values. If the capital value must include intrinsic amenity and scenic values where they are recognised by the market for that property, and these values are not improvements, then they must be included in the LEI.

[223] Minaret is critical of Mr Dunckley for "presuming" that amenity values cannot be reflected in the value of improvements.

[224] For clarity, the major elements of the two valuations are set out as follows:

	Dunckley	**Mills**
Capital Value	$12,020,000	$8,820,000
Less Access (as agreed) – Barge/pusher	$1,200,000	$1,200,000
Net Capital Value	$10,820,000	$7,620,000
Structural Improvements (as determined by the Tribunal)	$3,350,000	$3,350,000
Land Value	$7,470,000	$4,270,000
Less Development Improvements	$1,490,000	$3,270,000
Land Exclusive of Improvements (LEI)	$5,980,000	$1,000,000
Less Statutory Exclusions	$700,000	Nil
Net Rental Value (LEI)	$5,280,000	$1,000,000

[225] The figure agreed between the two valuers was the value allocated for the boat and barge access across the lake at $1,200,000.

[226] In regard to the value of structural improvements, Mr Mills assessed a value of $3,322,000 whilst Mr Dunckley initially assessed a value of $3,370,000 and relied in his evidence on a value of $3,350,000. We conclude that the value of structural improvements is $3,350,000.

[227] The fundamental difference in the approaches taken by the two valuers is highlighted in the variation between the $5,280,000 assessed as the LEI rental value by Mr Dunckley as opposed to the figure of $1,000,000 arrived at by Mr Mills. Similarly, there is a significant variation between the value of the development improvements ($1,490,000 and $3,270,000 respectively).

[228] Errors were found in the assessments of both valuers, methodology primarily in the case of Mr Dunckley, and mathematical by Mr Mills. However, the Tribunal is essentially in accord with Mr Mills' approach. In arriving at his valuation, Mr Mills considered rentals for other tussock runs and high country properties, these being reduced to a $/SU based on the LEI. He then compared these figures to his

relative calculations for Minaret. He also prepared a budget to test the affordability of the rent as well as providing a discounted cash flow (DCF) to evaluate the return on the investment as a crosscheck.

[229] Various assumptions are required to be made particularly in relation to the last two approaches and the Tribunal recognises the inherent risks and difficulties associated with such processes. Although neither is a prescribed method relating to the assessments required under the Land Act 1948 or the CPLA 1998, nonetheless such a process allows a rural valuer of pastoral high country to "stand back" and review one's conclusions, rating them against the figures derived or arrived at in the formal valuation process.

[230] The Tribunal does not disagree with such alternative approaches or tests, the experience and skill of the valuer being the determinant as to the balance or weight that is placed on those comparisons relative to the final outcome.

Decision

[231] In this instance, the Tribunal is charged with determining the value of land exclusive of improvements to provide for the review of rent for Minaret as dictated by the Land Act 1948 and amendments and the CPLA 1998.

[232] Having considered the extensive and detailed evidence and the thorough and helpful submissions of counsel, the Tribunal resolves, for reasons earlier discussed, in the following way:

a) The LEI should be assessed by reference to, but excluding from otherwise comparable sales, the intrinsic amenity values;

b) The exclusions contained within s 8(6) Crown Pastoral land Act 1998 should be made from the LEI once ascertained;

c) Burning is an improvement to the land in terms of s 131(1) Land Act 1948 and amendments;

d) The values are determined to be:

Capital value	$8,820,000	
Less access allowance	$1,200,000	
		$7,620,000
Land Exclusive of Improvements		$1,000,000
Value of Improvements		
Structural	$3,350,000	
Development	$3,270,000	
		$6,620,000

Costs

[233] This is a test case. The parties may consider that, because this is a test case, costs ought to lie where they fall. Costs are reserved. If the parties are unable to agree, they shall liase with the Registrar to arrange a telephone conference for the purpose of making directions relating to any application for costs.

Judge P R Kellar Chairman	J W Briscoe Deputy Member	W A Cleghorn QSM Deputy Member Justice of the Peace