

Summary

[1] The Bushmere Trust (Bushmere) owns a property of 5.859 hectares, northwest of Gisborne, over which it has a licence from Zespri Group Ltd (Zespri) to grow and sell highly valuable kiwifruit known as SunGold, Gold3 or G3 kiwifruit. For rating purposes, the Land Valuation Tribunal (the Tribunal) held that the value of the licence should be deducted from the capital value of the property, valuing it at a level equivalent to a green kiwifruit orchard. In a test case, the Gisborne District Council (the Council), supported by the Valuer-General, appeals. We hold that the capital value of the property, a proxy for fair market value, includes the value of the land as enhanced by the licence, which in practice runs with the land. Accordingly, under the Rating Valuations Act 1998 (the Act), the rateable value of the property includes the value of the SunGold licence. Our interpretation of the text of the Act is consistent with relevant case law and the purpose of the rating regime. We uphold the appeal.

What happened?

Zespri and SunGold licences

[2] Zespri is established under the Kiwifruit Industry Restructuring Act 1999. It owns the SunGold variety of kiwifruit and the associated plant variety rights under the Plant Variety Rights Act 1987. SunGold is a highly valuable commercial crop, resistant to the *pseudomonas syringae* pv. *actinidiae* bacteria (known as Psa-V) and produces a greater amount of fruit than does green kiwifruit. As at 1 September 2020, the market value of SunGold kiwifruit orchards per canopy ha (excluding land) was around \$800,000 to \$900,000, compared to approximately \$300,000 to 450,000 per ha for mature green kiwifruit orchards and \$30,000-\$50,000 per ha for crops such as oranges, avocados and feijoa.

[3] Since November 2010, Psa-V has significantly impacted the kiwifruit industry, so SunGold kiwifruit has replaced Hort 16A as the dominant gold variety. SunGold can only legally be grown under licences issued by Zespri:

- (a) The licence is a contract between Zespri and the grower and relates to a specific area of land, which is GPS mapped. The licence is personal

property.¹ It is common ground between the parties that it is not an estate or interest in land at law.

- (b) The licence confers the non-exclusive right to acquire and grow SunGold kiwifruit from Zespri. It requires payment of a royalty fee and requires the fruit to be sold to Zespri.
- (c) The terms of the licence provide that the licence may be terminated by Zespri in the event of the grower's bankruptcy, going out of business, if Zespri de-commercialises the SunGold variety or for breach of the licence agreement. Under the "use it or lose it" provision, if SunGold plants are not planted or grafted by a specified date, the licence terminates automatically. Sale of the property also terminates the licence unless Zespri has agreed to a transfer of the licence as explained below.

[4] Growers can obtain a SunGold licence by:

- (a) bidding in Zespri's annual private tender process;
- (b) purchasing a SunGold orchard over which the contract granting the licence is novated and the licence transferred; or
- (c) purchasing a SunGold licence from an existing grower separately from the land.

[5] Transfers of licences separate from their land are usually between related legal entities or involve very small areas. Zespri's website provides a platform for advertising and selling licences separately from land.

[6] When the land over which a licence is held is sold, cl 12.1 of the licence (SunGold agreement) requires the vendor to include delivery of a transfer agreement

¹ *Gao v Zespri Group Ltd* [2021] NZCA 442 at [10]; leave to appeal refused in *Gao v Zespri Group Ltd* [2022] NZSC 13.

to Zespri as a condition of sale. Zespri agrees that the vendor's rights and obligations (under the parent licence) transfer to the purchaser for a period of 30 days after the transfer, pending approval by Zespri and completion of a new SunGold agreement (a child licence) between the vendor and Zespri. Zespri's approval of transfer or sale of the licence is required by cl 13.1 of the SunGold licence. So the licence passes to the new owner by a transfer and novation arrangement. The evidence of Ms Tracy McCarthy, Head of Grower Services at Zespri International Ltd, is that Zespri has never declined to approve a transfer.²

Bushmere

[7] Most of Bushmere's property of 5.859 ha, 10 km northwest of Gisborne, is used as a kiwifruit orchard. The orchard canopy is around 3.11 ha of the property and has well-established infrastructure for growing kiwifruit. It primarily grows SunGold kiwifruit.

[8] Mr Timothy Tietjen, the beneficial owner of the Bushmere property, accepts that if he were to sell his orchard he would be required to include as a condition of the sale that the transfer form would be executed and provided to the new owner.³ So does Bushmere's valuer, Mr Boyd Gross.⁴

Gisborne District Council rates

[9] In 2020, the Gisborne District Council assessed the capital value of Bushmere's property for rating purposes to include the value of the licence, with a total capital value of \$4.1 million. Bushmere objected, estimating the property's capital value, without the licence, to be \$2,852,000.⁵ The Council reviewed the objection and decided not to alter its revision value of \$4.1 million. Bushmere objected to the Tribunal.

² Notes of Evidence for *Bushmere Trust v Gisborne District Council* [2022] NZLVT 002 [NOE] at 36/31–37/3.

³ NOE 6/26–7/13.

⁴ NOE 68/32–69/1.

⁵ Mr Inder's assessment subsequently included an additional 0.4 canopy ha of newly planted licensed red kiwifruit that was not planted at the time of the initial valuation date. The Council does not seek to have that value included on appeal.

[10] There was expert valuation evidence before the Tribunal:

- (a) For the Gisborne District Council, Mr Benjamin Inder, assessed the value of Bushmere’s land at \$4.1 million on the basis of comparable sales using a discounted cash flow analysis as a check.
- (b) A second expert valuer for the Council, Mr Chris Boyd, gave evidence about the commercial value of SunGold orchards. His evidence was that the value of the SunGold licence is reflected in the market price of the land, in the same way as water consents or other resource consents that attribute a benefit to the property.⁶ He said “[w]here a licence exists, it is viewed as intrinsically part of the land asset, deriving the ability to grow and sell the specific variety of fruit”.⁷
- (c) Bushmere’s valuer, Mr Boyd Gross, gave his opinion about the correct valuation approach and methodology for calculating the rateable value. He assessed the market value at \$4.05 million, on a similar basis to Mr Inder. There was no material difference between Mr Inder and Mr Gross regarding the value of the property. But Mr Gross attributed a value of \$1,275,000 to the SunGold licence and, because it is not an improvement, deducted this from the market value to arrive at a “capital value (rating)” of \$2,775,000 for the property. Mr Gross’s view was that the market value of the orchard production system is not the same as the capital value of the orchard land.⁸

[11] This is a test case. The Council is the first to take this new approach to valuing SunGold licences for rating purposes, supported by the Valuer-General. Some 49 growers may be affected. Separate judicial review proceedings, brought by New Zealand Kiwifruit Growers Inc, are stayed pending an application by either party for the stay to be lifted.⁹

⁶ Affidavit of Christopher Boyd, 12 October 2021, at [9]–[10].

⁷ At [24].

⁸ NOE 87/23–29.

⁹ *New Zealand Kiwifruit Growers Inc v Gisborne District Council* [2021] NZHC 2198 at [30].

Relevant rating law

[12] The Local Government (Rating) Act 2002 governs the setting of rates based on the rateable value of land. Under s 13, the local authority may set a general rate based on either the annual value, capital value or land value as the rateable value. Counsel advise that no district now uses annual value as the basis for rating.

[13] Rating valuation is undertaken under the Rating Valuations Act 1998 (RVA). The Valuer-General makes rules prescribing standards, specifications and methodologies for the rating valuation process, currently the Rating Valuation Rules 2008 (the Rules). Registered valuers undertake rating valuations on behalf of local authorities. The following definitions in s 2 of the RVA are relevant:

capital value of land means, subject to sections 20 and 21, the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require

land means all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests in the land, and all trees growing or standing on the land

land value, in relation to any land, and subject to sections 20 and 21, means the sum that the owner's estate or interest in the land, if unencumbered by any mortgage or other charge, might be expected to realise at the time of valuation if—

- (a) offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose; and
- (b) no improvements had been made on the land

improvements, in relation to any land, means all work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour, so far as the effect of the work done or material used is to increase the value of the land and its benefit is not exhausted at the time of valuation ...

owner means the person who, whether jointly or separately, is seized or possessed of or entitled to any estate or interest in land constituting a rating unit

value of improvements means the added value which at the date of valuation the improvements give to the land

[14] In *Valuer-General v Mangatu*, the Court of Appeal summarised that:¹⁰

[T]he definition [of capital value] envisages a notional sale by a willing but not anxious seller to the hypothetically willing but not anxious buyer. It explicitly assumes ‘a bona fide seller’.

[15] In *The Proprietors of Atihau-Wanganui v Malpas*, the Court of Appeal stated that the definition of capital value “hinges on the valuer’s assessment of the realisable value of the land at the time of valuation”.¹¹ The Court also stated:¹²

... it is well settled in New Zealand that 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.

[16] Section 20 of the RVA, to which the above definitions of land value and capital value are subject, provides relevantly:

20 Value of trees and minerals

- (1) The value of any trees is not to be included in any valuation under this Act unless the trees are fruit trees, nut trees, vines, berryfruit bushes, or live hedges.
- (2) The value of any fruit trees, nut trees, vines, berryfruit bushes, or live hedges is not to be taken into account in assessing the land value of any rating unit under this Act.

[17] In 1972, the Court of Appeal held in *Re 110 Martin Street, Upper Hutt* that:¹³

It may be that in fact the sale figure is influenced by the circumstance that a consent to conditional use was obtained and the buildings erected under the umbrella of that consent. Whether such an enhancement in fact operates must depend on the varying circumstances of each particular property. It may in some cases; in others it may not. Any such enhancement, however, once the building has been erected, has merged in the value of the building and is thereafter incapable of separate assessment. The Valuation of Land Act must be made to act in a sensible and practical way.

[18] The Court held the relevant value is what the properties would realise on sale on such reasonable terms and conditions as a bona fide seller might be expected to require.¹⁴ The Council relies on a line of similar cases:

¹⁰ *Valuer-General v Mangatu* [1997] 3 NZLR 641 (CA) at 649.

¹¹ *The Proprietors of Atihau-Wanganui v Malpas* [1979] 2 NZLR 545 (CA) at 554.

¹² At 550.

¹³ *Re 110 Martin Street, Upper Hutt* [1973] 2 NZLR 15 (CA) at 17.

¹⁴ At 17-18.

- (a) In 1925, in *Toohey's Ltd v Valuer-General*, the Privy Council recognised in Australia that the value of land may be enhanced by premises being licensed under the Liquor Act 1912 (NSW).¹⁵
- (b) In 1944, in *Re Oriental Hotel, Muir to Niall*, the Land Sales Court accepted that the existence of a liquor licence added to and enhanced the value of the licensed premises.¹⁶
- (c) In 1948, in *Dunedin City Corporation v Hames*, the Court of Appeal accepted that whether the existence of a liquor licence enhances the annual value of land is a separate question from whether the definition of land or improvements could include its value.¹⁷ Finlay J held, based on “unqualified acceptance” by English authorities, that enhancement of value attributable to the existence of a licence should be taken into account in assessing rates on an annual value under the Rating Act 1925.¹⁸ Kennedy J held:¹⁹

These authorities show that the valuer is to take the premises as they actually are, and he may treat them as enhanced in value, if it is so, by reason of the fact that they are licensed; for the annual value of premises as licensed premises may be greater than the value of them as unlicensed premises. ... In so doing the valuer is considering nothing different than when, with regard to the valuation of land, he considers advantages of site and suitability for special purposes. He is not valuing a license or goodwill as such, but is valuing premises as licensed premises, and, therefore, enhanced in value, it may be, by the existence of the license.

- (d) By contrast, in 1991, in *Kyne v Valuer-General*, the Tribunal held that a licence for Mr Kyne’s garage to be erected on the Council’s road reserve adjacent to his property was personal to him and not an improvement, so should not be included in the rating revaluation.²⁰

¹⁵ *Toohey's Ltd v Valuer-General* [1925] AC 439 (PC).

¹⁶ *Re Oriental Hotel, Muir to Niall* [1944] NZLR 512 (HC).

¹⁷ *Dunedin City Corporation v Hames* [1948] NZLR 962 (CA).at 986 and 991.

¹⁸ At 999.

¹⁹ At 986.

²⁰ *Kyne v Valuer-General* [1991] NZLVT Cas 2.

[19] There is another line of case law that emphasises that the capital value of land is made up of its unimproved value and the value of improvements, and that a licence is not part of land value nor the value of improvements.²¹ In 1959, in *Re Wright's Objection*, the Land Valuation Court also made clear that the value of improvements is only the difference between the unimproved value of the land and the capital value and that it is neither necessary nor desirable to value improvements in assessing the capital value of land.²²

[20] In 2018, in *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board*, the Court of Appeal agreed that the correct approach to rating valuation reflects:²³

- (a) the assumption that the land is capable of being sold (regardless of any real restrictions on that land being sold);
- (b) the identification of the estate which would pass to the purchaser, and whether there are any limits to that estate which would continue to burden the land after sale; and
- (c) the factual evaluation of the worth of that estate to a putative purchaser, and specifically whether the restrictions on that estate or other features of the land would affect its value.

[21] The Court held that a statutory restriction was a limitation on the estate or interest in the land there, which is what had to be valued for rating purposes.²⁴

Decision under appeal

[22] The Tribunal, comprised of an Environment Court Judge and two registered valuers, heard Bushmere's objection and issued its decision on 1 February 2022.²⁵ It stated that the issue was:²⁶

... whether the value of the licence, which is personal to the Trust but which enables the grafting of the G3 kiwifruit onto generic rootstock, is part of the

²¹ *Re Jacob Joseph (deceased)* (1905) 25 NZLR 225 (SC); *Re Gilmer, Public Trustee v Commissioner of Stamp Duties* [1929] NZLR 61 (SC); and *Public Trustee for New South Wales v Commissioner of Inland Revenue* [1966] NZLR 257 (SC).

²² *Re Wright's Objection* [1959] NZLR 920 (LVC) at 922 and 927–928.

²³ *Rotorua District Council v Ngāti Whakaue Education Endowment Trust Board* [2018] NZCA 143 at [47] and [22].

²⁴ At [43]–[44].

²⁵ *Bushmere Trust v Gisborne District Council* [2022] NZLVT 002.

²⁶ At [3].

improvements to the land in terms of the Rating Valuations Act 1998 where the rating valuation has been conducted on the basis of capital valuation.

[23] The Tribunal held:

- (a) The definitions in the RVA mean that the kiwifruit vines “must be included in the improvement value, not the land value given s 20(2)”.²⁷
- (b) “[T]he value of the kiwifruit vines or any intellectual property and licences cannot be part of the land value by virtue of s 20(2)”.²⁸
- (c) “[K]iwifruit vines can constitute part of the improvement value and therefore contribute to the overall capital value”.²⁹
- (d) “[T]he rootstock is part of the vine attached to the land and should be included in the valuation of the property”.³⁰
- (e) But “the value of the licence is not part of the improvements TO THE LAND or for the benefit of the land”.³¹
- (f) Cases relating to annualised value are unhelpful because they include “an element of the business aspect which is not utilised for capital value”.³² The *110 Martin Street, Upper Hutt* case does not advance the question “as to whether or not the licence forms part of the business of the orchard or part of the value of the improvements to the land”.³³ The *Toohy’s v Valuer-General* case only obliquely assists because it concerns unimproved land values.³⁴
- (g) Without further reasoning on the issue:

²⁷ At [34].

²⁸ At [70].

²⁹ At [72].

³⁰ At [73].

³¹ At [74].

³² At [78].

³³ At [84].

³⁴ At [85]–[86].

[88] On the fundamental issue we conclude the licence does not form part of an improvement to the land and rather represents another aspect of the value of the business just as other plant, machinery, staff arrangements and the like may perform particular benefits and values to a purchaser.

[24] The Tribunal also considered whether the Rules permitted the Council to create separate subcategories for different subtypes of kiwifruit. It examined the Gisborne Rating Valuation Report 2020 which considered “the licence is inherent and fundamental in the value of the property” and is included under the definition of the value of improvements for rating purposes.³⁵ It considered that approach was not accorded to any of the categories in the current rules and was not the subject of the mandatory regulations which do not provide directly for sub-categories of kiwifruit.³⁶

[25] Accordingly, the Tribunal concluded:

[111] For the reasons we have discussed:

- (a) we have concluded that the capital value of this property for the District revaluation under the [RVA] is \$2,800,000.00. Being land value of \$1,035,000.00 and improvements of \$1,743,000.00 rounded up to \$1,765,000.00; and
- (b) that the kiwifruit licence is not an improvement to or for the benefit of the land. This includes:
 - (i) that it represents a speculative investment by the owner with the prospect of increasing income from the orchard business;
 - (ii) the licence cannot be transferred with the property and requires a new contract with the licence holder, Zespri; and
 - (iii) the licence can and has in certain cases been transferred and the cultivars removed from the rootstock. Rootstock is still available to be utilised by the other non-licenced species or other licenced species of kiwifruit.

[26] The Council appeals. Bushmere opposes the appeal. The Valuer-General exercised their statutory right to join these proceedings as a party under s 37(1)(c) of the RVA. They support the appeal. They were granted leave to adduce further

³⁵ At [102], citing Gisborne District Council and Lewis Wright Valuation and Consultancy Ltd *Rating Valuation Report 2020* (1 September 2020) at 117–118.

³⁶ At [105]–[106].

evidence, an affidavit explaining how the information in Appendices A to H of the Rules is used by the Valuer-General in performing statutory audits and the purpose of the Rules that prescribe the form and content of that information.³⁷

Submissions

[27] Mr Harwood, for the Council, submits:

- (a) The Tribunal erred in valuing the land based on a position that cannot lawfully exist, namely that land with SunGold vines but without the legal permission that authorises the existence of the vines. The vines and the licence are functionally inseparable.
- (b) The Tribunal erred in considering whether the licence is within the definition of “improvement”, which is a residual figure. Capital value is a proxy for fair market value. There is no logical reason to treat the water permit associated with the land differently to the licence. Where land has been improved under a permission or consent and that has been recognised by the market as transferring with the land, as here, the enhanced value must be recognised in the capital value.
- (c) The Tribunal erred in rejecting *Hames*, which considered annual value because the capital value of income generating assets is the net present value of their future anticipated return. *110 Martin Square* is directly analogous here and builds on the earlier cases regarding licensed premises, which the Tribunal incorrectly distinguished.
- (d) The Tribunal erred in its interpretation of the Rules because it is inconsistent with the RVA. The categories in the Codes in Appendix F of the Rules do not constrain how different properties are to be valued. They are used for evaluative purposes, as part of the Valuer-General’s audit function, and do not prescribe valuation methodology.

³⁷ *Gisborne District Council v Bushmere Trust* [2022] NZHC 662.

- (e) The Tribunal's decision creates inequity in the rating valuation of SunGold compared with other horticultural properties, to which there were references in the evidence. It would require the value of all plant variety licences to be deducted from the value of the properties to which they relate, without deducting the value of the vines, which is absurd.

[28] Mr Connolly, for the Valuer-General, submits:

- (a) There is no basis under the RVA to reduce the capital value of the property by the value of the licence, nor to disregard the fact the property is planted in SunGold vines in determining the capital value.
- (b) The root (as it were) of the Tribunal's error was its focus on improvements. The RVA definition of "capital value" and s 20 mean capital value is the amount for which the property, including the SunGold vines, might be expected to sell in a hypothetical market transaction. That transaction would include the purchaser becoming the owner of the vines and the existing licence transferring to the purchaser, which is how such properties ordinarily transact in the market. Bushmere relies on cases from other legislative regimes.
- (c) Ultimately, capital value is very much a market valuation exercise. The key question is whether the relevant attribute (here the licence), would be factored into the purchase price in a sale to a hypothetical purchaser. In the case of SunGold vines, there is a legal framework in place, the practical effect of which is that SunGold licences are transferred with the land. The market assumes that novation of a new licence will occur and this assumption benefits vendors. The uniformity principle requires the more valuable property to be accorded a higher capital value.
- (d) The Tribunal was also wrong in determining that the Rules prevented the Council from taking into account that the property was planted in

SunGold vines. It uses the codes for a reason for which they were not intended. The appeal should be upheld.

[29] Mr Mijatov, for Bushmere, submits the Tribunal correctly articulated the legal position:

- (a) Capital value of land comprises land value and improvements only. Its definition in the Act is limited by the meaning of “estate or interest”, “land” and being subject to s 20. It is the market value of the owner’s “estate or interest in the land” that is relevant, not any value that is attributable to a profit-making mechanism.
- (b) Section 20 does not mean the value of the SunGold licence must be included in capital value. It is common ground that ss 2 and 20 mean that vines can contribute to rateable value of land but not the land value. That is because, while vines are not land, they are an improvement to the land. The definition of “value of improvements” implies that capital value includes the value of improvements. At the least it is a useful cross-check.³⁸ To the extent that the land is improved by the vines, that improvement can be assessed for rating purposes as an improvement to the land.
- (c) The SunGold licence is neither land nor an improvement to the land and therefore does not contribute to the capital value of the land. It is a profit-making mechanism for the benefit of the grower, not an improvement to land.³⁹ SunGold licences do not run with the land and can and do transact separately from the land. The grounds for termination reinforce the absence of connection between the land and the licence. The use it or lose it provision demonstrates that the licence has the potential to increase the value of the grower’s business, if the plant material is planted, but does not indicate the licence affects the

³⁸ *Aitihau-Wanganiu v Malpas*, above n 11, at 555.

³⁹ At 557.

value of the land itself. Neither does the specificity of the licence to a particular area inextricably link the licence with that particular land.

- (d) The expert Tribunal was required to value the land on its highest and best use, a probable use by an average efficient operator, which need not equate to what would occur with an actual sale of the property or business. An average efficient operator would not have access to the super-profits enabled by a SunGold licence. The Council seeks to value SunGold kiwifruit orchards as a profit-making enterprise, on which the grower already pays income tax, despite there being huge variability in profitability. Rates are a land tax, not income tax. The super-profits enabled by a SunGold licence are already taxed on income. There is no evidence as to how other horticultural licences are treated for rating purposes. The principle of uniformity, valuing properties on the same basis, is an organising concept of the law of ratings. The Council's approach would treat green and SunGold kiwifruit orchards as having vastly different rating values. What is required is an assessment of the value of generic kiwifruit vines as an improvement to land.
- (e) The Tribunal did not err in its treatment of the case law. The judgments in *Re Gilmer*, *Re Jacob*, and *Public Trustee for New South Wales* and in *Kyne v Valuer-General* establish that licences are not part of land value or the value of improvements, and therefore capital value.⁴⁰ *Dunedin City Corporation v Hames* was an annual value case.⁴¹ The enhancement effect recognised in *Re 110 Martin Street* depends on the facts of each case. The effect there related to the value of an existing building merging with the consent. It does not relate to licences or other effects such as stock in trade, favourable opening hours, skilled staff, specialised equipment or software or franchise agreements. There is no practical difficulty in separating out the value of the licence.

⁴⁰ *Re Jacob Joseph (deceased)*, above n 21; *Re Gilmer*, *Public Trustee v Commissioner of Stamp Duties* above n 21; *Public Trustee for New South Wales v Commissioner of Inland Revenue* above n 21; and *Kyne v Valuer-General*, above n 20.

⁴¹ *Dunedin City Corporation v Hames*, above n 17.

- (f) The Tribunal also correctly interpreted the Rules. The Valuer-General's subjective belief about their meaning and purpose does not assist. The Rules set minimum quality standards and specifications. The Council's approach created a new category of SunGold kiwifruit within the existing horticultural category. That subcategory is not provided for in the Rules. The Council's own valuer, Mr Inder, considered his approach went significantly further than what is required by the Rules.⁴²

How does the licence affect the rateable value of the land?

[30] Section 26 of the Land Valuation Proceedings Act 1948 provides that appeals from the Tribunal are by way of rehearing. This requires the Court to come to its own view on the merits.⁴³ The appellant bears the onus of satisfying the Court it should differ from the decision under appeal because the appealed decision is wrong.⁴⁴ The weight the Court gives to the decision under appeal is a matter of judgment, recognising that the Tribunal has specialist expertise and the advantage of hearing the witnesses. Here, however, the key issue is one of law.

[31] The application of the statutory definitions and s 20 of the RVA is reasonably clear. The Council's rates are set on the capital value. The definition of "capital value" is subject to s 20. Section 20(1) prevents trees from being included in any valuation under the RVA. But that is subject to an exception for "vines", so vines can be included in a valuation under the RVA, including a capital value. In turn, s 20(2) means that vines are not taken into account in assessing land value. That does not apply to capital value.

[32] This interpretation in relation to the logic of ss 2 and 20 is consistent with the legislative history of these provisions. It was confirmed by the positive response by the sponsoring Minister, Hon Tuariki John Delamare, to this question from Hon Michael Cullen at the second reading of the Bill.⁴⁵

⁴² NOE 180/8–20.

⁴³ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008 2 NZLR 141 at [3].

⁴⁴ At [4].

⁴⁵ (17 June 1998) 569 NZPD (Rating Valuations Bill - Second Reading).

As I understand it, subclause (2) means that if one is assessing the land value of the property, then the fact that there are productive trees on the land – fruit trees, vines, berryfruit bushes or whatever – does not affect the land value, for the fairly simple reason that those productive assets could very easily be removed from the land. Potentially, they are a very temporary phenomenon, and therefore are not relevant to the value of the land itself. What is important to the value of the land is its intrinsic, productive capacity, or its value in terms of urban property etc

But when one looks at the valuation for capital value purposes, then the existence of things like fruit trees, or nut trees, or vines or berryfruit bushes are to be taken into consideration. The value of those trees could be included in the capital value of the property for the purposes of rating, but not in the land value of the property. Have I got that distinction correct? Is that what is meant by the difference between subclauses (1) and (2)?

[33] Accordingly, the value of SunGold kiwifruit vines can be included in capital value. And the definition of “capital value” of land means:

... the sum that the owner’s estate or interest in the land ... might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require.

[34] As elucidated by the case law, this definition of capital value is a proxy for fair market value. It is not, of course, an exact proxy. No mass valuation process conducted over thousands of properties on a desktop basis can pretend to reflect the exact market value of an individual property. That is why there is an objections process. But the general rating revaluation exercise based on capital values generally reflects movements in the market values of properties. That is its point.

[35] A willing but not anxious bona fide seller of Bushmere’s property would expect to sell the land over which there is a SunGold licence consistently with the terms of the licence. That would involve transfer of the licence, novation and the new purchaser taking up a new licence from Zespri. That is what Mr Tietjen and Mr Gross expect would happen here if the property were to be sold. The purchase price paid by the purchaser in such a hypothetical market transaction would reflect the value of the licence and the SunGold vines. While the licence does not necessarily run with the land in a legal sense, in practice it is associated with the property to such an extent that its value is priced into the market value of the property. It is intrinsically part of the land asset which gives the ability to grow and sell this variety of fruit. Accordingly, it is included in its capital value for rating purposes. To the extent that Zespri departs

from its current practice of always approving transfers of licences on the sale and purchase of land, the effect of that would also no doubt be reflected in the market value of the licence and, therefore, the capital value of the property.

[36] The Tribunal erred in identifying that the issue was whether the value of the licence “is part of the improvements to the land”. Improvements and the value of improvements are not mentioned in, and are simply not relevant to, the statutory definition of capital value. There is no legal basis for the suggestion that they are relevant. For valuation purposes too, the value of improvements is a residual value, between unimproved land value and capital value. For that reason, the value of improvements often appears on a rating valuation. But there is no legal reason to value improvements in assessing capital value. The Tribunal’s focus on the value of improvements and the value of land is by the by.

[37] In supporting the Tribunal’s decision, Mr Mijatov relies on the legislative history of the Valuation of Land Amendment Bill (No 2) 1970. That amendment excluded specified invisible improvements from the definition of improvements. It is not clear which way that cuts (because non-specified invisible improvements are apparently not excluded). But it is beside the point for the same reason as the Tribunal’s approach; it misses the central legal role of the definition of “capital value”.

[38] This interpretation is consistent with the case law regarding enhancement effects, such as *Re 110 Martin Street, Upper Hutt*. The licence enhances the value of the property here, just as the building consent enhanced the value of the building there, and liquor licences enhanced the value of land and premises in *Toohey’s Ltd* and *Re Oriental Hotel*, and just as the water consent enhances the value of the property here. To the extent *Kyne v Valuer-General* is inconsistent with that, I consider it is wrongly decided. But perhaps Mr Harwood is correct that the existence of the garage on someone else’s property distinguishes it.

[39] By contrast, the cases relied on by Mr Mijatov relate to a different statutory context. In each case, the Court was primarily concerned with whether an estate was liable for death duties in respect of the value added to that estate by virtue of liquor licences associated with property. The Court was able to uphold the imposition of

death duties on the basis that the licences were personal property of the deceased. The fact that those licences were not real property was accepted on the basis of a line of cases dealing with the imposition of stamp duties for which there was an exemption for certain real property.⁴⁶ In contrast, this Court is concerned with whether a SunGold licence ought to be factored into the definition of capital value for rating purposes.

[40] Finally, we accept the Valuer-General's submissions and evidence about the application of the Rules. The Tribunal erred in considering that the Rules prevented the Council from taking account of the SunGold plantings. The codes specified from Appendix A to Appendix H are required by r 3.2 to be used in audit files. Audit files are used by the Valuer-General to ensure that mandatory information relating to individual rating units and details of rating units that have sold since the previous revaluation have been entered. They do not constrain how different properties are valued and do not prescribe valuation methodology.

Result

[41] We uphold the appeal. Unless there is some contrary reason, of which we are not aware, we would award costs to the appellant on a 2B basis, and reasonable disbursements. If there is dispute as to costs, submissions must be filed within 10 working days of the date of this decision.

Palmer J

W Reid, Lay member

⁴⁶ See *Re Jacob Joseph (deceased)*, above n 21, at 232–233.