IN THE SUPREME COURT OF NEW ZEALAND SC 4/2011

[2011] NZSC Trans 18

BETWEEN **LISA MARIE COLLEEN MANDIC**

First Appellant

AND **STEPHEN NEIL DOHNT**

Second Appellant

AND **CORNWALL PARK TRUST BOARD (INC)**

Respondent

Hearing:	23 June 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	E St John and K M Quinn for the Appellants M E Casey QC, J K MacRae and A F Buchanan for the Respondent

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CIVIL APPEAL

ELIAS CJ:

Yes.

MR ST JOHN:

May it please the Court, St John and Quinn for the applicants.

ELIAS CJ:

Thank you Mr St John, Mr Quinn.

MR CASEY QC:

May it please the Court, Casey, and with me Mr MacRae and Ms Buchanan.

ELIAS CJ:

Yes, Mr Casey and Mr MacRae and Ms Buchanan. Yes, Mr St John.

MR ST JOHN:

Thank you, your Honour. I do have copies of my speech notes available, if that would assist; they're about seven pages long. I'll leave them for the moment, I don't want to cause any controversy. I can hand them up if they will assist?

ELIAS CJ:

Well, we do take in succinct summaries, preferably of one page or two pages.

MR ST JOHN:

Yes.

ELIAS CJ:

Seven pages seems rather more excessive. But if it would help you, in speaking to them, for us to have it in front of us, the Registrar will collect it.

MR ST JOHN:

Thank you. I also have a extract from all three of the evidence of the valuers for the respondents, which at some stage I'd like to take you to.

ELIAS CJ:

Why was that not included in the materials we had?

MR ST JOHN:

The extracts –

TIPPING J:

I think that's what we're actually being handed out. I've got a document just handed to me called, "Extracts from respondent's evidence."

MR ST JOHN:

Yes, that's right.

TIPPING J:

I thought these were your speech notes.

MR ST JOHN:

Oh, no, I'm handing those up now, Sir.

ELIAS CJ:

All right. Madam Registrar, can you obtain those? Oh, this is just a schedule of material that's before the Court, is it?

MR ST JOHN:

That's quite right.

ELIAS CJ:

Yes, thank you.

MR ST JOHN:

What I wanted to do was just – and it's extracts from the respondent's evidence that I want to take you to at some stage, because it's part of our case that much of what was found in the Court of Appeal and now which is being argued by the respondents is directly contradicted by their own evidence, and I've given you the extracts that I think are appropriate in that regard.

Obviously, we have four central points that we want to make today, they all dovetail into each other. The first is the Court of Appeal's decision that the rent be struck by reference to the highest and best use of the land, and that's the point on which appeal has been granted. The next point is whether, as a matter of law, you take the restrictions in the lease into account, and that breaks down into separate considerations. The third is how improvements are to be valued in accordance with the lease terms, and then the last point is we want to come back to the declarations that were actually sought in the High Court and refined in the Court of Appeal. But the starting point, of course, is the –

ELIAS CJ:

Are these really separate points or are they all aspects of the same point?

MR ST JOHN:

I believe they're all aspects of the same point, they all dovetail into each other. Just to give you an example, in the last part about the declaration you'll see, for instance, that the Court of Appeal actually approved one of the declarations but declined to make the others, and when we go through them closely, having regard to some of the evidence, our case is that none of the three declarations that were sought in the Court of Appeal shouldn't have been made, and that can largely be identified on the respondent's case, not even ours.

If we start with the Court of Appeal's interpretation of clause 13 of the lease, and to which leave was granted, the Court of Appeal held the valuation was to be by reference to highest and best use of the land as if it were vacant. The Cornwall Park lease, as you know, grants a perpetual lease, but restricts construction to a single dwelling for residential use, subdivision is not permitted. The Court of Appeal –

ELIAS CJ:

That's subject to waiver, isn't it, by the lessor?

MR ST JOHN:

That's right, and that –

ELIAS CJ:

Yes.

MR ST JOHN:

– forms part of their argument now. And our response to that is, is that that's not a consideration that can be taken into account.

ELIAS CJ:

Why?

MR ST JOHN:

Because it must be taken as the terms as they stand. In fact there's a passing reference to that in the Canadian Supreme Court case that's part of the respondent's case, where it was noted there that the tribe could actually give up the land to the Crown and thus create freehold title, and the Court held there, well, that's not the point, you have to take the land as it stands.

ELIAS CJ:

That would be a change in the status of the land. Perhaps you'll come on to that, yes.

MR ST JOHN:

Yes, that's right.

ELIAS CJ:

Thank you.

MR ST JOHN:

Well, if I just stay with your Honour's point, though, but the Property Law Act wouldn't allow subdivision. That's not something that you could make application for. That Property Law Act doesn't apply to that particular aspect of it.

BLANCHARD J:

Well, the Property Law Act doesn't to apply to any of it, actually, because section 224, I think I'm right in saying, only applies to leases taking effect after the, or on or after the 1st of January 2008. So it would apply next time round –

MR ST JOHN:

Well, actually –

BLANCHARD J:

– but not now.

MR ST JOHN:

But to that point, actually, it won't, because you'll see that the Board is now trying to use a new form of lease, it's in the materials. They have a new form of lease which they put out with the tender documents for the sale of a property, and you can –

BLANCHARD J:

But they can't use the new form of lease on renewals.

MR ST JOHN:

No, no, no, I'm not suggesting that.

BLANCHARD J:

That's what I'm talking about.

MR ST JOHN:

Yes, we're talking about the same thing, your Honour. The point that I make in the latter is that the new form of lease that they're seeking to establish creates a complete prohibition on those restrictions, and because there's a complete prohibition the Property Law Act wouldn't be able to be brought in aid.

The point that we start with is the Court of Appeal's analysis, which is found at paragraph 49 of its judgment; it was an approach that was rejected in the Lusk Report. It was directly contrary to the evidence of the respondent's three experts, and that's the point of that extract that I've given you.

ELIAS CJ:

Sorry, which extract?

MR ST JOHN:

It's the extract which is called, "Comparison of the respondent's evidence."

ELIAS CJ:

Oh, I see, thank you.

TIPPING J:

What para – 49 of the Court of Appeal's judgment?

MR ST JOHN:

That's right.

TIPPING J:

What passage in 49 are you referring Mr St John?

MR ST JOHN:

It's the last three sentences of 49, Your Honour.

TIPPING J:

Is this the paragraph starting, “Mr Keene sought to distinguish…”

MR ST JOHN:

That's correct, and then comes on to say, “Accordingly, the valuations may be conducted by reference solely to the respective interests of each party at the date of termination, and in the Board’s case by reference to the highest and best use of the land as if it were vacant.”

TIPPING J:

Yes, that's the key sentence, is it?

MR ST JOHN:

That’s the key sentence, yes.

ELIAS CJ:

But that's why they don’t make declaration 3(b), in which you seek to have the land as encumbered by the, as physically encumbered by the existing dwelling, is that right?

MR ST JOHN:

No, that's not – in fact, that's not actually what they said. They said that you could make that declaration, they just didn’t feel any need to do it.

ELIAS CJ:

I’m just reading 49 and 50, following on from each other.

MR ST JOHN:

Yes, I understand, you're right. I’ll come back to the passage. What I was just reminded about is that, by the time of the Court of Appeal, the declarations had been modified to three, so they’re not –

TIPPING J:

But they’re in 44, paragraph?

MR ST JOHN:

Yes, they are.

TIPPING J:

And to make the declaration in 3(b) would be totally contrary to the finding in 49.

ELIAS CJ:

Which is why they don't make it.

MR ST JOHN:

Yes. But if you look at 43, what I'm talking about is the declaration in which the residual may not equal the land value –

ELIAS CJ:

Sorry, looking at what?

MR ST JOHN:

Paragraph 43 of the Court of Appeal's judgment.

ELIAS CJ:

But just – you can take us to that in a minute, I'm just trying to understand this. In terms of the declaration 3(b) that was sought, and as set out in 44, that is declined because the Court of Appeal accepted the Board's case that the valuation was to be by reference to the highest and best use of the land as if it were vacant?

MR ST JOHN:

That's correct.

TIPPING J:

Not subject to the lease, in other words.

ELIAS CJ:

No, not physically encumbered by the existing dwelling.

MR ST JOHN:

That's correct.

ELIAS CJ:

And so the key issue, am I right, in this case, is really the declaration 3(b) issue, whether you are right in saying that the state of the land, effectively the unimproved land, was to be as occupied by the improvements?

MR ST JOHN:
Well, 3(b) and 3(c).

ELIAS CJ:
Yes, I understand that, yes.

MR ST JOHN:
Yes.

TIPPING J:
But do not the Court of Appeal say, “One, the land must be treated as vacant and, B, the existence of the lease must be ignored”?

MR ST JOHN:
That's right.

ELIAS CJ:
Yes.

MR ST JOHN:
That's right.

TIPPING J:
And that's what you're attacking.

MR ST JOHN:
That’s exactly what we’re –

TIPPING J:
Both of them.

MR ST JOHN:
Exactly.

TIPPING J:

Yes.

MR ST JOHN:

When I mistook myself before, what I was saying was is, at 43, one of the declarations that was sought was that land value may not equal residual value, and the Court of Appeal at 43 said, "Well, that's actually right," but you'll see in the last sentence they didn't feel that they needed to make, it wasn't necessary to make any formal declaration in that regard.

BLANCHARD J:

Well, what value would a formal declaration add, if they are otherwise correct?

MR ST JOHN:

Well, if we don't get home on the ones that are set out in 3(a), (b) and (c), or rather 3(b) and (c), you're quite right. Perhaps it might just make things a little bit easier if, at paragraph 27 of my written submissions that were submitted, you'll see there those are the three declarations that were refined for the Court of Appeal. 1(a) had already been granted by Her Honour Justice Courtney, and it's at 2 that the Court of Appeal said, "Well, Courtney J was wrong to decline that," but they didn't feel it necessary to make any order, and then of course 1(b) and (c) and 3 were not made.

TIPPING J:

There was never really any dispute about 1(a), was there?

MR ST JOHN:

No, there wasn't.

TIPPING J:

It's a red herring.

MR ST JOHN:

It doesn't take the issue anywhere, no. What I want to analyse is that the reference to "highest and best use" is contrary to what all three of the respondent's experts, and it's their experts which I have put before you. All their evidence said that their

valuations were not going to be made on that basis, and they all said that they couldn't be made on that basis. It's not what the Board has been writing to lessees in previous years and telling them that that's going to be the basis of the valuation, that's in volume 2 at 198.

ELIAS CJ:

What do you – I'm not trying to hold you up in this – but I'm just trying to work out what are you deriving from this background circumstance, because in the end this is a question of law, isn't it, it's a matter of interpretation, so, so what if the values – I mean, you may have an argument that it's impractical to do what the Board is suggesting here, and you may make that out by reference to what the valuers have said but, otherwise, why is it important, what the valuers thought or, indeed, what the Board might have said?

MR ST JOHN:

Well, the respondents, in their case, have approached this on saying, "Well, it must be a question of objective interpretation of what the parties had in their mind at the time," and their submissions go so far as to suggest that there must have been an element of fairness approaching the issue at that time. We do think that it's relevant that you look at what the Board has done in the past, what their own valuers are saying how it should be done and, indeed, how they approach their own case, because the point that we're making is what they got out of the Court of Appeal is not even what they asked for.

TIPPING J:

You mean, they did better than they were asking for?

MR ST JOHN:

Exactly.

WILLIAM YOUNG J:

You've gone from bad to worse.

MR ST JOHN:

We've gone from bad to worse, yes. And it's that situation that, obviously, we need to correct. And we can make that point –

ELIAS CJ:

Well, you do have to convince us, though, that the Court of Appeal is wrong in that, because we have to be concerned not only with the dispute as between the parties, but with the implications of the Court of Appeal's rulings for other cases.

MR ST JOHN:

Yes, and we intend to confront that. But the starting point is that, as your Honour says, they ended up with far more than what they actually started with, and now, of course, the respondent seeks to defend the position, and you'll see references in their own evidence that, to do so, they actually have to discredit one of their own witnesses and say that that can't be what he meant, which tells you that something went astray at some stage.

TIPPING J:

Well, I find it very odd that we're being asked to consider the views of the witnesses on points of law.

MR ST JOHN:

Yes. The object is, as I said before, is to demonstrate that what they ended up –

TIPPING J:

If you show that it, as the Chief Justice said, it just won't work this way, that's fine, but I'm not interested in what a witness might say about the law.

MR ST JOHN:

No. Well, the point that I've made in my speech notes is that it was implicitly noted by Justice Courtney as not being the appropriate method of valuation, and it's not supported by *Cox v Public Trustee* [1918] NZLR 95, upon which of course the respondent places such heavy reliance, and we obviously have to confront *Cox* at some point.

ELIAS CJ:

Well, wouldn't it be best to start with your legal submission, developed by reference to the authorities and then, if you're making as a supporting argument one based on the practicality, go to the evidence and the history of the matter?

MR ST JOHN:

I'm happy to do that and, indeed, that's where I start, because what I want to do is, really, start from first principles because, as I say, that will bring us at some stage to *Cox*, and then come back to the Court of Appeal's judgment. And the point, obviously, is that the term "highest and best use" will be applicable to what we call a typical Glasgow lease, where what've being offered by the owner and paid for by the leaseholder is the right to use the land as the leaseholder sees fit, and that right is subject only to external restrictions such as zoning, town planning rules, which, as your Honour said, doesn't feature in this case. And the rationale for recourse to consideration of the highest and best use is explained in the *S & M Property Holdings Ltd v Waterloo Investments Ltd* [1999] 3 NZLR 189, and that's tab 3 of our supplementary bundle, and I want to spend a little bit of time focusing on this decision.

This, of course, is a five-member Court of the Court of Appeal, and one of the starting points is paragraph 23 of the judgment delivered by Justice Henry and the second line is, "Common ground at highest and best use valuation method," and in the next sentence, "That method is based on an assumption that the notional prudent lessee will put the land to the best use to which the site is suited." And the point that we make and what's happened here, we say, is that one has attempted to lump all Glasgow leases together and end up with a result that suggests that "highest and best use" applies to all Glasgow leases, and the point is that, the thrust of our submission, is that clearly they don't and you have to look at the facts of each case and, of course, the terms of each Glasgow lease. And –

McGRATH J:

How was the rent determined in *S & M* once you'd found out the highest and best use valuation?

MR ST JOHN:

It was a fair market rental in that case.

McGRATH J:

A fair market rental on that valuation?

MR ST JOHN:

That's right.

McGRATH J:

Yes, well, at some stage you'll come to deal with the fact that that's not our formula, that we have a 5% formula.

MR ST JOHN:

Absolutely, and we're not ignoring that point. But if I can take you now to paragraph 66, and it's the joint judgment of Justice Blanchard and Justice Thomas, and we place heavy reliance on this because what is being said here, at paragraph 67, and it's starting at the second sentence, is, "Valuation practice must certainly have regard to the practicalities of the situation under review, must also be anchored in sound valuation or economic theory if it's to survive as a discipline serving the ends of the commercial community." And then their Honours talk about the underlying rationale of the Glasgow lease. And then starting down again at –

BLANCHARD J:

It does say, "A rent fixed for the bare land without regard to the buildings or improvements."

MR ST JOHN:

That's quite right.

BLANCHARD J:

Which suggests that you're looking at a vacant site.

MR ST JOHN:

Yes, that's right. And you'll recall, in that case, that the terms of that lease actually specifically said that you excluded buildings from the valuation.

TIPPING J:

And also made specific reference to ground rent too, didn't it?

MR ST JOHN:

That's absolutely right. Where I'm taking you to is the passage starting at 71, continuing on, where we say the Court is making a statement of general application which aren't solely specific to the facts of that case. And if you start at 73, "Having obtained the leasehold interest, the lessee is able to develop the land as he or she

sees fit, as the entrepreneur, the lessee, obtains the benefit of the development or suffers the loss if the loss accrues."

TIPPING J:

I wondered if you were going to rely also on 71?

MR ST JOHN:

Yes, we are.

TIPPING J:

Isn't that almost the high-water mark, if, depending on how one …

MR ST JOHN:

It is the high-water mark, and you'll see that that phrase is repeated throughout many of the judgments both here and overseas.

TIPPING J:

Well, it wasn't the view I expressed in my judgment in *S & M*.

MR ST JOHN:

Well, I'll park that for the moment, if I may.

TIPPING J:

Yes, I think you should.

MR ST JOHN:

But if you look at 73, and the Court is talking about the underlying rationale of a Glasgow lease, where the point is, is that what is really being given is everything short of the fee simple, and it 's for the lessee to make the best use of the land. And if the lessee suffers a loss, well, that's down to the lessee. And at 74, the judgment records that perhaps too little attention was paid in argument to the fact that the lease in question is a lease in perpetuity, and we place reliance on the next sentence, "The owner of the land has parted with possession of the land for what is, in reality, an indefinite period." And it goes on there to –

TIPPING J:

Shouldn't, Mr St John – this is all very interesting, and one is reasonably familiar with this and I'm not trying to ride you off it for that reason, but shouldn't we be looking at the terms of this particular lease that we're concerned with in this case, because isn't that what's really going to determine this case? This is a long way away from what we've got in the present case, isn't it?

MR ST JOHN:

No. What we, with great respect, the point that we're advancing is that the dicta that's pointed out here is that the purpose of a typical Glasgow lease is to give everything, short of the fee simple, so that the lessee can take that entrepreneurial activity for their own benefit. The terms of this lease actually restrict the ability to which the lessee can use the land.

TIPPING J:

Yes, I understand that, and that's the real issue, whether or not you ignore or take into account the terms of the lease. Isn't that the crunch point?

MR ST JOHN:

That's the absolute crunch point, and that is our crunch point –

TIPPING J:

Yes.

MR ST JOHN:

– and if I say, as an overview, we say, that once the landlord imposes or once the owner imposes restrictions in the lease, then those are to be taken into account for valuation purposes, unless the lease specifically says otherwise. And that ultimately brings us back to what the Court of Appeal did, we have to confront *Cox* on that basis. But if you take it as a starting point, the lease actually says that it is the gross fee simple which is to be valued, and the gross fee simple in this case obviously includes the lease, it's registered against the title and the registration is in the record.

BLANCHARD J:

A fee simple doesn't include a lease.

TIPPING J:

No, that's the crunch.

MR ST JOHN:

But –

TIPPING J:

It's the proper meaning of "fee simple" here.

MR ST JOHN:

Well, that's – the fee simple has the lease registered against it, it's on the title.

TIPPING J:

But, with respect, that's a naïve observation. I mean, the fee simple is, here, is being used as an abstract concept, isn't it?

MR ST JOHN:

Well, that's the point, whether you describe the fee simple as a hypothetical fee simple or a pure fee simple or that which actually exists. And the ruling in *Cox* and what has come up subsequently is to say, "Well, you treat the fee simple as if it's unencumbered."

TIPPING J:

Yes.

MR ST JOHN:

Mmm.

TIPPING J:

Well, isn't that the key issue?

MR ST JOHN:

That is the key issue.

TIPPING J:

Well, why should we not, because of the context – you're valuing here the two different interests, aren't you? You're valuing the landlord's capital on the one side, but giving credit for the tenants' or lessees' improvements?

MR ST JOHN:

That's right.

TIPPING J:

In essence, that's the exercise, isn't it?

MR ST JOHN:

Well, that's –

TIPPING J:

The question is whether the landlord's capital is to be diminished for this purpose by the restrictions in the lease.

MR ST JOHN:

Yes, that is the question, that's exactly the question.

TIPPING J:

But isn't *Cox* a more directly authoritative case than *Waterloo Hotel* for this purpose?

MR ST JOHN:

Well, the point that we make when we come to talk about *Cox,* which, I'm happy to do that now –

McGRATH J:

Well, for my part, I haven't yet got the point that you're making in the *Waterloo Hotel* case, and if you want to say more about that, because I'm not as familiar with this field as my colleague, not having had the fortune to be in the *S & M Property* case, I don't mind you going on. At the moment, I haven't yet ascertained why, and I'm bearing in mind there's a 5% factor in our case, why it is that the *Waterloo Hotel* case helps us.

MR ST JOHN:

Yes. The thrust of the *Waterloo* case, Your Honour, is found firstly at paragraph 71, where it says you must look at the terms of the lease in each –

BLANCHARD J:

But that's because they were having to fix a ground rent, a fair ground rent, which necessarily had to take into account what it was being fixed in relation to, namely, the term and the terms of the lease.

MR ST JOHN:

That's right, but –

BLANCHARD J:

But that's not the exercise here.

MR ST JOHN:

No.

BLANCHARD J:

The exercise here is one of carrying out a couple of valuations and then taking one away from the other.

MR ST JOHN:

And so – and that is the exercise and, as part of that exercise, the issue arises about whether you take the restrictions in the lease into account, and I won't spend – the point that I'm trying to make from *S & M* is, this dicta which points out that the traditional nature of a Glasgow lease is where the full use of the land is granted to the lessee, and that's not what's happened here. And so we come back to the point –

McGRATH J:

Got that, yes.

MR ST JOHN:

The –

McGRATH J:

What, I suppose, is in my mind, is that in the end that factor can be accounted for in different ways, but I think I may be repeating the point that's been made, that if you actually end up, after you've applied the machinery in clause 13, with a figure, being the residual value, if we can put it that way, to which you apply a set percent, doesn't that make it a totally different situation from one which is ascertaining a fair rental –

MR ST JOHN:

Yes.

McGRATH J:

– or a market rental on a value?

MR ST JOHN:

Yes. We accept that the cases where fair market rental is applied you have to look at the restrictions in the lease.

McGRATH J:

Yes.

MR ST JOHN:

We're not trying to confuse those two issues. What we were pointing out in *S & M* was a statement where the traditional view of a Glasgow lease is unrestricted use of the land, subject to zonings and suchlike, and of course, in that case, the lessee had ended up with a property which could no longer be used for, or that they couldn't use the land for any purpose because of heritage restrictions, and that was said to be a risk that fell on the lessee at the end of the day. But in this case our clients don't have the right to take any risks. All they are entitled to build is a single dwelling for residential use. But what they are being asked to pay rent on is a valuation of the land at its highest and best use, which obviously is quite a different matter and, ultimately, will penalise them.

McGRATH J:

But mightn't the, it mightn't originally when these matters were set up, mightn't that account for the 5% factor, which otherwise might have been larger?

MR ST JOHN:

No, we don't – that's, it's said that that takes, that's part of the respondent's argument, but the answer to that is, we think it more probable – well, one, you look at the Lusk report. All the rents at that time were set around 5%, there seems to be a common figure, I think there's one at six. *Cox*, of course, was at 5%, so it seems to have been a number of general use. But when these leases were being put in place, we don't see it as thought out by the parties that the pressure on urban land would

become such that these properties actually got to the point where they are more valuable if they are actually vacant and no dwellings are actually on them.

McGRATH J:

Thank you.

ELIAS CJ:

Well, what's wrong with that?

MR ST JOHN:

What's wrong with…?

ELIAS CJ:

Yes, that position.

MR ST JOHN:

That they're valued as on their highest and best use, as if it's vacant?

ELIAS CJ:

Yes.

MR ST JOHN:

Because –

ELIAS CJ:

If that's what the lease requires, because that's really the issue.

MR ST JOHN:

Yes.

ELIAS CJ:

But, in any event, what is – I'm just struggling to see why it's an argument in favour of the interpretation that your contending for, that the land may be more valuable without the improvements.

MR ST JOHN:

Yes, well, it comes to the very simple proposition that – which is what I was trying to draw out from *S & M* and which is talked about in other cases – where there are no restrictions as the owner is taking a capital return in exchange for the unrestricted use of the land, and in this case the owner is trying to take a capital return on land to which the lessee has restricted use, can't put it to its highest and best use, so why should the landlord be able to value it on that basis?

TIPPING J:

But it tends to beg the question as to why the thing was fixed at 5%, there's a danger of circularity here.

MR ST JOHN:

Well, not if you adopt our position that highest and best use is not a valuation that's allowed for in the lease.

TIPPING J:

Oh, yes, but …

ELIAS CJ:

Well, we really need to get into the lease, don't we?

MR ST JOHN:

Yes.

ELIAS CJ:

But did you want to take us to *Cox* first, was that –

MR ST JOHN:

No.

ELIAS CJ:

– where you were going?

MR ST JOHN:

I think I'll – well, I can go to *Cox* now, that's at 21 of my speech notes. The respondent, of course, says that *Cox* is a complete answer to the issues before

the Court, and the wording of the valuation clause was nearly identical – I think my notes say was identical, but it's nearly identical, it doesn't have the word "then" in it.

TIPPING J:

That can't make any difference, can it?

ELIAS CJ:

No. In substance identical.

MR ST JOHN:

In substance identical.

ELIAS CJ:

Yes.

MR ST JOHN:

That's right. But that's where the similarity ends, of course. The phrase, "Highest and best use, as if the land were vacant," doesn't appear in *Cox*.

ELIAS CJ:

It doesn't appear here either. Oh, sorry, you're not talking about the lease, you're talking about the judgment.

MR ST JOHN:

That's right.

ELIAS CJ:

Yes.

TIPPING J:

But it's implicit in the ruling in *Cox* that the land must be treated as if it was not encumbered by the lease.

MR ST JOHN:

It's indeed implicit.

TIPPING J:

Yes.

WILLIAM YOUNG J:

Doesn't it actually say that? I thought –

TIPPING J:

I thought – yes.

BLANCHARD J:

Yes, it does.

WILLIAM YOUNG J:

I thought that that actually is said.

MR ST JOHN:

It is. It's not implicit, it's the –

TIPPING J:

No, what I meant is a highest and best use is implicit in ownership of the fee simple without the lease. Because then you're not restrained by the lease, you can do what you like with the land.

MR ST JOHN:

Yes, that's right.

TIPPING J:

Knock over the house, if you like, and start again.

BLANCHARD J:

Cox actually says, "The existence of the lease –

ELIAS CJ:

Sorry, where is *Cox*?

MR ST JOHN:

It's at tab 5 of the appellant's authorities.

BLANCHARD J:

It says, "The existence of the lease must be put out of account," and once you put it out of account – page 101 – once you've put it out of account, surely, you're into a highest and best use situation in accordance with ordinary valuation principles?

MR ST JOHN:

That's right. The starting point, though, is that there were no restrictions in *Cox* as to the use of the land. The only thing that was reserved to the owner were minerals rights, other than those that could be used on the farm. And, of course, the very purpose of the lease in *Cox* was to actually encourage development.

WILLIAM YOUNG J:

Weren't there – I mean, were there not requirements in the lease for the properties to be found?

MR ST JOHN:

Yes, that's right.

WILLIAM YOUNG J:

So the land was subject to restriction?

MR ST JOHN:

No, the – well, we don't see that as a restriction, it was actually to encourage farming.

WILLIAM YOUNG J:

I know, sorry, I mean, it wouldn't have been open to Mr Cox to have said, "Okay, I'm going to have a big subdivision," because that would have been a breach of the, "and I'll develop it for residential purposes."

MR ST JOHN:

No, there wasn't – and if you go to, the actual lease in *Cox* is at tab 29 of the exhibits, volume 3, and paragraph 1 deals with rental, 3 says, well, "Every fourth year paint outside woodwork and ironwork."

ELIAS CJ:

Sorry, what page do we find that?

MR ST JOHN:

316.

ELIAS CJ:

Sorry, yes.

MR ST JOHN:

Five, Your Honour, is, "Keep the demised premises in clean and husbandlike manner," and then 7, that they'll fence, but other than that there are no restrictions at all.

WILLIAM YOUNG J:

Were there not restrictions in the back, in the schedule to the West Coast Settlement Reserves, Leases, Act? So, looking at page 317, "As hereby agreed and declared as follows, all the provision to the West Coast Settlement Reserves Act which are applicable –" oh, no, that's to renewal. Oh, no, but then this lease is subject to, stipulating it under section 42 of the West Coast Settlement Reserves Act. I mean, there may be – whatever the lease said, in any event, these were farming leases designed to encourage the bringing into production of what had been bush country.

TIPPING J:

But clause 4 says –

ELIAS CJ:

Hence what?

TIPPING J:

– that the lessee will cultivate…

WILLIAM YOUNG J:

Clause 4, sorry, yes.

TIPPING J:

Which suggests that you're going to cultivate something, which is farming.

WILLIAM YOUNG J:

All right. Well, perhaps you might say here, say this was close to New Plymouth and the lessor said, "The highest and best use of this land isn't really farming, it's for residential subdivision," how would that have been dealt with?

MR ST JOHN:

Well, the point here is that that's exactly the point. We say that –

WILLIAM YOUNG J:

I know it's the point. So that's an exaggerated version of your point here.

ELIAS CJ:

Well, presumably you're saying that, in that event, the argument that you're contending for on the present –

WILLIAM YOUNG J:

Would prevail.

ELIAS CJ:

Yes, would prevail.

MR ST JOHN:

Yes. And –

WILLIAM YOUNG J:

And in an extreme, taking – because that's quite an extreme example, but an equally extreme example of that in application is the *Phantom Trees* case, where the Court wouldn't value the land on the basis that it had a viable native forest on it.

MR ST JOHN:

And, again, we place much reliance on that case, because we say it's an example where the Courts will not allow injustice to work against a lessee, and that's exactly what happened in that case. A strict wording of the lease would have meant that the trees would have had to have been valued and the Court said they weren't prepared to approach it on that basis. And we make that point in our submissions.

BLANCHARD J:

You were going to go to that case later when you've dealt with *Cox*?

MR ST JOHN:

Yes.

TIPPING J:

How do you deal with, in *Cox*, the statement in the passage I think my brother Blanchard drew attention to on page 101, where Their Honours said, last sentence on that first paragraph on that page, "The very object of the provisions for valuation requires this qualification."

MR ST JOHN:

Yes.

TIPPING J:

It's nothing to do with the particular type of the lease, it was the object, as their Honours saw it, of the provisions for valuation.

MR ST JOHN:

Yes. We start with it this way. The starting point, of course, is that none of these issues appear to have actually been argued in *Cox*. We acknowledge that it's been –

ELIAS CJ:

But it's not really very helpful, is it? Don't you – well, again, don't you have to take us to the terms of the lease here?

MR ST JOHN:

Yes, I do, but if I can just stay with *Cox* for a moment? The way that, the only way of explaining this passage, Your Honour, is that it's an implied term, because that's what the Court has done, it's implied in the term to say that, "In the circumstances of this lease, you take it out of account." Because if you look at the actual clause in *Cox* –

ELIAS CJ:

Oh, yes, you were taking us to that –

MR ST JOHN:

Yes.

ELIAS CJ:

– valuation clause, were you?

TIPPING J:

That's at tab 29, is it?

MR ST JOHN:

It's actually recorded at the beginning of the judgment.

TIPPING J:

Oh, is it? Right.

MR ST JOHN:

It's right at the beginning, and it was – because this was actually under a legislative –

ELIAS CJ:

Where do we find it?

MR ST JOHN:

At page 95 of *Cox*, in the headnote.

ELIAS CJ:

Oh, in the headnote.

MR ST JOHN:

It's in quotation marks, where it's "gross value of the lands after deducting therefrom ..."

ELIAS CJ:

Which paragraph of the headnote? Oh, at the very top.

MR ST JOHN:

At the very top, you'll see it goes into quotations, your Honour.

ELIAS CJ:

Yes, I see. Well, as you say, it's identical in substance.

MR ST JOHN:

Well, as I say, if you read that, the gross value of the lands must, on any reading, have meant, "To include the lease against it."

ELIAS CJ:

Well, that's the question.

MR ST JOHN:

Well, and what the Court in *Cox* said is, "Well, you don't, you take it out of your mind," and what we say is, well, the only way the Court could have done that was to imply a term, that is to be taken out of account.

WILLIAM YOUNG J:

Just a matter of construing the lease, isn't it?

MR ST JOHN:

Well, if you call it a matter of – I don't mind if you call it a matter of construction, but the phrase –

ELIAS CJ:

Well, I …

MR ST JOHN:

– "Valuing the gross," must mean, we say, and we have support in other jurisdictions to the effect, that the value of the gross must include the lease, and –

WILLIAM YOUNG J:

But what – I'm sorry.

ELIAS CJ:

Well, except that the formula is not about, doesn't mention the lease, it mentions deducting the improvements.

MR ST JOHN:

Yes, that's right, but the starting formula is the gross value of the land.

WILLIAM YOUNG J:

But what do you mean by "include the lease", anyway? I mean, if you say, "Include in the lease, factor into the value of the land the fact that it's subject to a perpetual lease and the rent is pegged at 5% of a chosen value," do you, as it were, get into a sort of a tail-chasing exercise, where those terms of the lease become relevant?

MR ST JOHN:

No, it's not a tail-chasing exercise. Because this case is the only one that we can find amongst the authorities where there are actually restrictions as to what can be done –

WILLIAM YOUNG J:

But what do you mean, in *Cox*? What does it mean, "To take into account the terms of the lease," for the purposes of the valuation?

MR ST JOHN:

Well, that's done in all the cases where fair market rental is established. So there's nothing new in taking the terms of the lease into account in various Glasgow leases. In all the fair market rental cases that's exactly what's done.

WILLIAM YOUNG J:

Sorry, I don't know what you mean by it though. Do you mean, for instance, that you take into account the 5% rental value?

MR ST JOHN:

No, what we're saying is that if there is a term in the lease saying that you can only use the premises for a hotel or you could only use them for commercial purposes or you must build within 10 years or some such thing.

ELIAS CJ:

Well, why did you stop that? Why wouldn't you bring in the 5% as part of the calculation?

MR ST JOHN:

Because it's not being valued on that basis. It's not being valued on the basis of its return on capital.

ELIAS CJ:

No, and it's arguably not being valued on the, on a valuation of the lease.

MR ST JOHN:

No, and we're not suggesting it is based on the valuation of the lease itself. What we keep saying is that, in *Cox*, it was declared that you put the existence of the lease out of account, and that's –

WILLIAM YOUNG J:

What was the argument, what was the countervailing argument that was involved in *Cox*, to what extent had it been suggested that the lease should be brought to account?

MR ST JOHN:

Well, you won't find it there, because it wasn't argued. That's the point that we're making.

WILLIAM YOUNG J:

All right.

ELIAS CJ:

The method of valuation that you're arguing against has been applied to these leases always?

MR ST JOHN:

That's correct.

ELIAS CJ:

Yes.

MR ST JOHN:

And *Cox* has been followed subsequently and, in *Hawkes Bay Regional Council v Plested* [1994] 2 NZLR 1 (CA) the –

ELIAS CJ:

Well, it was assumed in *Cox.* So you're saying it wasn't even argued, this point?

MR ST JOHN:

That's right, and so what we're coming back to is saying, well, everyone has said that it's axiomatic that you take the terms of the lease out of account, or the existence of the lease out of account. And the starting point is, as we say, well, no one really explained in *Cox* why this would be so. They simply made what we say was a bit of a throwaway line.

ELIAS CJ:

Well, because they went to the formula for valuation and it is sufficient.

MR ST JOHN:

Well, the starting point for us is that when you, as I've said, if you start with gross value of the land, we say, well, that would, if it's registered against the title, include the lease. They've said –

ELIAS CJ:

Well, that's the issue really, it seems.

MR ST JOHN:

I beg your pardon?

ELIAS CJ:

That is the issue, it seems.

MR ST JOHN:

Yes.

ELIAS CJ:

You have to convince us of that.

TIPPING J:

And they've rendered lands here as fee simple, which I think is actually against you.

ELIAS CJ:

Mmm.

MR ST JOHN:

Well …

ELIAS CJ:

Are you arguing that gross value doesn't include the value of the unimproved land, it includes the value of the unimproved land, subject to the lease?

MR ST JOHN:

No, we're saying that "gross" includes everything, it's land, the buildings and any restrictions that are contained in the lease. And that's what our valuers put the matter as, they said, "Well, you would take a gross value and then you would make a notional deduction for the restrictions that are contained in the lease, such as a single dwelling site or it can't be used for redevelopment." Ironically, of course, the respondent's experts actually say the same thing. That was the point of me giving you that extract before.

TIPPING J:

Doesn't the "gross" simply signal that includes the buildings, for the very reason that you're going to take them off? It would make no sense to exclude them and then take them off.

MR ST JOHN:

But that's exactly right.

TIPPING J:

But it doesn't eliminate the meaning of "fee simple".

MR ST JOHN:

Well –

WILLIAM YOUNG J:

Can I ask, where is the lease?

TIPPING J:

A fee simple is an unencumbered title.

MR ST JOHN:

Yes.

TIPPING J:

That's what's sticking in my mind, Mr St John, that's what you're going to have to persuade me, is that it doesn't mean that in this context.

MR ST JOHN:

Yes. The actual lease, Your Honour, is at tab 3 in volume 1.

TIPPING J:

If I have a fee simple, in ordinary parlance I would regard myself as having an unencumbered title, I own the fee simple, in this context anyway. And "gross" simply, as we've agreed, means you've got to add the building onto that.

ELIAS CJ:

Or any other improvements, like the draining and …

TIPPING J:

Or any other – yes, yes.

McGRATH J:

This is really what Justice Hosking is saying, isn't it, in the previous page?

ELIAS CJ:

Yes.

TIPPING J:

Yes. Even though he didn't actually have the words "fee simple," in front of him, he just had, "greatest value of the lands."

ELIAS CJ:

Yes.

McGRATH J:

Yes.

TIPPING J:

But what I'm suggesting, I think, is "fee simple" is a fortiori.

BLANCHARD J:

Well, he knew he was valuing the fee simple, because he says so, in the middle of page 100.

McGRATH J:

Yes.

TIPPING J:

Does he?

BLANCHARD J:

Yes. He seems to have been a bit of an expert in valuation cases.

ELIAS CJ:

Good Court, too.

WILLIAM YOUNG J:

Is this form of lease laid down in the Trust deed of the Cornwall Park Trust?

MR ST JOHN:

We just had to make that assumption, the trust deed was never in the record.

WILLIAM YOUNG J:

Because the property that's for sale has been offered on – sorry, which the Board acquired – was put up for sale as a leasehold interest, wasn't it?

MR ST JOHN:

No. These leases –

WILLIAM YOUNG J:

Maungakiekie Road.

MR ST JOHN:

– were all created around the same time –

WILLIAM YOUNG J:

Yes, but there's a more recent, that's referred to in the evidence.

MR ST JOHN:

Oh, yes, there is, and that's one that they put out for tender. They acquired it back and then put it out for tender, and they've got a new form of lease.

ELIAS CJ:

I think we're all at the lease now.

MR ST JOHN:

Right.

ELIAS CJ:

Were you going to develop an argument on it?

MR ST JOHN:

Yes. The argument is, as you say, *Cox* is directly against us, and we have to confront that, and we acknowledge that in subsequent cases *Cox* has been adopted and hasn't been distinguished, and we acknowledge in *Plested* for instance, that what was said in *Cox* was described as axiomatic; we acknowledge all of that. The very difference to our argument is that, in all those cases, there were no restrictions in the use of the land and, in all those cases, they have all been described on the basis that what the landlord is getting is a return of their capital for giving away everything short of the fee simple. And our argument is, is that when you start imposing restrictions on what the lessee can do with the land, it follows as a matter of course that that has to be taken into account in the valuation of the gross, and we developed that argument later by reference to overseas authority. We – I mean, this doesn't exist in a vacuum, and the point that we make is that *Cox* and all the other cases have proceeded on the basis that it's axiomatic and we don't have a problem with it when there are no restrictions, we see that it makes perfect sense. But when you do start to improve restrictions, then it doesn't, going back to the words in *S & M*, accord with rational, economic or even valuation theory. Why should the landlord get a return on his capital for using of lands which the tenant doesn't enjoy?

TIPPING J:

The difficulty I have with that is that there were in fact restrictions in *Cox.*

MR ST JOHN:

Well, which restrictions do you mean, Sir?

TIPPING J:

Restricted to farming or "cultivation", whatever that term meant in the context. It must have been a defined term, defined somewhere.

WILLIAM YOUNG J:

I'm pretty sure that the combination of that and the terms of the statute meant that these were farming leases.

MR ST JOHN:

There is no doubt that they're farming leases, but our understanding of the statute is that that went to renewal terms. And in *Cox*, of course, they decided subsequently that the methodology used, described in the lease, actually got so difficult that they introduced legislation to change it, and they changed it to be valued on the unimproved land, and that came in …

WILLIAM YOUNG J:

Where's the restriction in the lease to one residential unit?

MR ST JOHN:

In?

WILLIAM YOUNG J:

In the lease here?

MR ST JOHN:

Yes.

WILLIAM YOUNG J:

It can, under clause 9, it can only be used for residential purposes –

MR ST JOHN:

Yes.

WILLIAM YOUNG J:

– subject to the consent for this. Well, where's the – is there a single residence restriction?

MR ST JOHN:

Paragraph 4 – clause 4, I should say, on page 5. It's at the end.

WILLIAM YOUNG J:

"Create more than one dwelling house." Are these valuations being conducted on the basis that multi-unit residential buildings would be the highest and best use of the land?

MR ST JOHN:

No, and that's why – I mean, the Board's valuation evidence actually says that that's not how they approach it. Moreover, they say that's not how they could approach it, because of the restrictions in the lease.

WILLIAM YOUNG J:

Well, where is the real issue then between the parties, in terms of what particular consideration is there a problem?

MR ST JOHN:

Well, there's a major problem now, that the Court of Appeal have said that they can value it on the highest and best use as if the land were vacant, that's a major problem for us.

WILLIAM YOUNG J:

Okay. Well, before that problem arose, what was the big problem for the lessees?

MR ST JOHN:

Yes. Because the big problem was the methodology that was being adopted by the Board, which gave primacy to the land value, which was squeezing out the value of the improvements.

WILLIAM YOUNG J:

Oh, I see.

MR ST JOHN:

And so what they were doing, we argue in a simplistic way, is taking land away from the gross and saying whatever is left is the improvements.

WILLIAM YOUNG J:

And that's the point addressed by Mr Larmer in his evidence.

MR ST JOHN:

That's right.

BLANCHARD J:

But that wasn't what happened in the Carter arbitration, was it?

MR ST JOHN:

What happened in the Carter arbitration is, we say it amounts to the same thing. In fact, we say it's actually worse. What happened in the Carter arbitration is the Board adopted what's called a net rate methodology, and it's Mr Gardner who puts that forward. And what he does is he takes reference to vacant sites and then he applies a deduction to get a net rate of improvements, a theoretical one, and then he applies that to the subject property. And the problem with that, which our experts said and is endorsed by the High Court of Australia in the *Maurici v Chief Commissioner of State Revenue* [2003] HCA 8; 212 CLR 111; 195 ALR 236; 77 ALJR 727 decision, is that once they start with vacant land sites they're actually giving primacy to land. And the whole point here is that vacant land sites are more valuable than those that are occupied.

ELIAS CJ:

But I don't understand the problem with that, because you are talking about valuation, as opposed to cost of improvements, in any event, and it's valuation of the gross value of the land, which includes the improvements to the land. If the construction on the land is not a substantial improvement, because the land is more valuable than perhaps is, or would warrant a more expensive house or something like that, why is that not properly reflected in the calculation?

MR ST JOHN:

Because that calculation assumes that gross minus land equals your improvements, but what, the exercise here is to arrive at a residual, which is quite different from land value.

ELIAS CJ:

But I don't understand why you wouldn't come out with the same result if you had done it by valuing the improvements on the land. I understand the way it's been done, but I don't see that it should yield a different result if it's valuation of the improvements that has been undertaken, rather than simply ascertaining their replacement cost or something like that.

MR ST JOHN:

Well, all that our clients have asked for is that there is a separate valuation of the improvements.

ELIAS CJ:

But why – have you got anything to indicate or can you explain to me why it would yield a different result?

MR ST JOHN:

Because what you're aiming to get at is residual, and you may get – what is wrong with the approach that's adopted by the Board is to suggest that, if you take land value away from gross, you are automatically left with the improvements value, because that's not how this lease reads, it's actually the other way around.

ELIAS CJ:

But why – I know it reads differently and you could do it a different way, but why won't it yield, if the valuation is done properly, the same result?

MR ST JOHN:

Because, because it doesn't give account of what the, of the, the proper account of the improvements. And if you go back to *Cox*, Your Honour, *Cox* actually says, at the top of, I think it's 99 and 100, that –

TIPPING J:

"There is nothing in those provisions to indicate that the two values are together to be equivalent to the capital value of the land, buildings and improvements as a whole."

MR ST JOHN:

Yes.

TIPPING J:

Yes, well, I think I'm inclined to be with you on this.

MR ST JOHN:

Yes.

TIPPING J:

That there may be a difference in the increments that the improvements give as an undifferentiated part of the whole –

MR ST JOHN:

Yes.

TIPPING J:

– to that which is given when they're valued separately.

MR ST JOHN:

Yes.

TIPPING J:

There may be a difference.

MR ST JOHN:

And, there may be a difference, and the whole point about this lease is, it says, that they're to be done separately.

TIPPING J:

Yes, well, that's undeniable.

ELIAS CJ:

If there's a difference, I accept that the lease requires the separate valuation, but I'm still struggling to see that, if properly done, there should be a difference.

MR ST JOHN:

Well, the respondents acknowledge that there is a difference, they acknowledge that there is a difference between residual and land value, so you may get different

results depending on different properties. And that point is actually acknowledged in West Coast Settlements, it's actually said there that –

ELIAS CJ:

Yes, I know it's said there.

MR ST JOHN:

Yes.

TIPPING J:

Isn't the simple fact that it's got to be done separately? I don't think Mr Casey's going to argue that it – because that's what it expressly says.

MR ST JOHN:

Yes.

TIPPING J:

No, it's a matter of individual site and individual valuations, as to whether there is a difference.

MR ST JOHN:

Yes.

TIPPING J:

But the capacity for that to be a difference has to be recognised in the separate assessments that are made.

MR ST JOHN:

That's absolutely correct.

TIPPING J:

It's as far as you could go really, I would have thought.

MR ST JOHN:

Well –

TIPPING J:

And you're entitled to insist that it be done separately.

MR ST JOHN:

That's right, and what we, the declaration that was sought in the High Court and continued in the Court of Appeal, is that the value of improvements wasn't derived, that they weren't derived from another, so you didn't have a case where improvements was a result of –

TIPPING J:

If that had been intended, the formula would not have been two separate valuations.

MR ST JOHN:

That's what I'm saying.

TIPPING J:

One would have inevitably led to the other.

MR ST JOHN:

Exactly.

WILLIAM YOUNG J:

What, so, are there – there are really two issues you've got in the case. One is, what you say is deriving the value of the improvements by reference to the value of the land without improvements, which is what you've just been talking to Justice Tipping about, and that the second is perhaps – and I think it may be a more theoretical issue – that is the possibility that the unimproved value of the land may be derived on the basis of a highest and best use, which is in fact not permitted by the lease.

MR ST JOHN:

Well, we say that no one should be talking about unimproved land at all, that there is no room for unimproved value in this case.

WILLIAM YOUNG J:

All right. But, okay, well, I think that's the first point. But you have the second concern that if, that somehow or other the rental is going to be fixed by reference to a highest and best use of the land, which is not permissible under the lease.

MR ST JOHN:

That's correct. But that arose, that became issue number two after the Court of Appeal –

WILLIAM YOUNG J:

Court of Appeal, right.

MR ST JOHN:

– because that's not what was expected.

MR WILLIAM YOUNG J:

Yes.

MR ST JOHN:

In the High Court what, and in the Court of Appeal, what the primacy of the argument was to ensure, as Justice Tipping say, that those two separate valuations are carried out to arrive at a residual, and the residual may not well be land value, and the respondents acknowledge that. And then, of course, and that's all that the lessees have been insisting upon, and there's been a tendency, for instance, by the Board in the past to just value land, and they wrote to the lessees from time to time and said, "Can we cut through this cumbersome process and just do it that way," and in the Lusk report the Auckland Area Health Board were criticised for having done that for a number of years. But the point here is "residual" is not the same "unimproved land". Of course, now we've got to a situation where, after the Court of Appeal judgment, we face the consequence that the Board may – this is in response to Justice Blanchard's question, "What's been going wrong in the past?" The only example of what's happened in the past is the Gribble arbitration, but of course that was decided before the Court of Appeal. All the Board's experts – again, in that comparison sheet that I gave you – said that we, "When we do gross valuations, we have to acknowledge the restrictions in the lease, we have to acknowledge that it's a single dwelling site and we can't take development purposes into account." Now we face the consequence that they could completely switch.

TIPPING J:

How do they square that approach with *Cox*?

MR ST JOHN:

Well, actually I found it very hard, but I don't think they can, or they do, because they all three of them, I mean –

TIPPING J:

Do they know of *Cox*?

MR ST JOHN:

Yes, they make legal submissions throughout their evidence.

WILLIAM YOUNG J:

It sort of depends a bit though, doesn't it? Say the highest and best use of the land is for a supermarket.

MR ST JOHN:

Yes.

WILLIAM YOUNG J:

Well, that might not be a sensible basis for valuing it, when that's prohibited by the lease.

MR ST JOHN:

Well, I'm with you there.

WILLIAM YOUNG J:

Yes. So I'm not sure – I thought you would be – so I'm not sure that Mr Casey is going to be saying, "Well, we think it would be great to have a supermarket here and that's really, you know, that would be the highest and best use of this land, so we'll just depart from the whole scheme of the thing." The real departures are likely to be if there are, on just the intensity of the use of the land, isn't it?

MR ST JOHN:

That's right, but we don't need to look at like departures but, again, in response to Justice Blanchard's question, what happened in the Gribble arbitration was the Board's approach to valuation was that net rate method that I described before, and that, our criticism in the High Court and the Court of Appeal was that it gave primacy to land value and squeezed out the improvements, and that was why these proceedings were started from the outset.

BLANCHARD J:

Have we got the Gribble arbitration somewhere?

MR ST JOHN:

Yes, you do. You have it at tab 7 of the respondent's casebook of authorities. And I just want to point out something very quickly in this before –

ELIAS CJ:

So volume –

MR ST JOHN:

Of the respondent's casebook of authorities.

ELIAS CJ:

Thank you.

MR ST JOHN:

Tab 6, sorry. If you have that in front of you, there's a correction that you need to pick up –

BLANCHARD J:

Oh, this is Carter?

MR ST JOHN:

Yes.

BLANCHARD J:

That's John Carter, the lawyer, I see.

MR ST JOHN:

That's correct, and Victoria Carter, the…

TIPPING J:

Is that a point of some…

ELIAS CJ:

Only to Aucklanders.

BLANCHARD J:

It's just that I am acquainted with him.

MR ST JOHN:

Well, no, your Honour, it is a point of some significance, actually.

TIPPING J:

I'm sorry, I didn't intend to be facetious, Mr St John.

MR ST JOHN:

No, no, I didn't take it that way. But if you – it comes down to why this is so important and, again the question was being posed, "Well, what's the big problem here?" These declarations were sought to assist the lessees in forcing the Board to take what we say is the correct approach to valuation. And if you start at the first page of the interim award of umpire, but then you turn over the page, and you'll see the cast of appearances. And so the Board hires leading silk with juniors, there is a cast of thousands of valuers at incumbent cost, Mr Carter saves himself a dollar by appearing for himself.

ELIAS CJ:

What's the point of this?

TIPPING J:

Is this a sort of violin …

WILLIAM YOUNG J:

Well, you're saying that because the Board has, I suppose, more skin in the game than individual lessees, it can, it's going to be advantaged in this sort of situation, but that's just life isn't it?

MR ST JOHN:

No, where it comes in is, Justice Harrison made criticism of the declaratory route in his judgment and said that the proper route was to challenge each arbitration as they came up and I'm merely pointing out that for many lessees that's an impractical

option, that's the point that I'm trying to make. Maybe that is life, but nonetheless. Now, I just –

ELIAS CJ:

I don't think it is relevant to the argument that we are hearing, but for my own part, I have some serious difficulties with the statements made by Justice Harrison as to the scope of the Declaratory Judgments Act. I only mention that in case anyone has a contrary view that they want to raise?

TIPPING J:

I would share that.

MR ST JOHN:

Yes, well, I'm not going to spend any time on that.

WILLIAM YOUNG J:

Well, what I'm interested in is what they actually did in this.

MR ST JOHN:

Can I just point out –

TIPPING J:

Cast of thousands, what happened?

MR ST JOHN:

At paragraph 10.20 there's a typo, it's corrected later, but just in case, it's better to point it out now.

TIPPING J:

He got lessor and lessee round the wrong way.

MR ST JOHN:

He did, he did.

TIPPING J:

We've all done that.

MR ST JOHN:

Well, the way that it reads at the moment, he says he gives more weight to the lessee's value and then on the last page he acknowledges that he had that the wrong way round.

TIPPING J:

What is there in here, I think that's what my brother Blanchard was really asking, but is there anything in here that actually helps your argument?

BLANCHARD J:

Well, no that wasn't what I was asking.

TIPPING J:

Oh, wasn't it, no.

BLANCHARD J:

I was wanting to know how they went about the valuation in this case.

MR ST JOHN:

And you can start by doing that by going to 10.2 and you'll see here that Mr Gardner for the Trust Board calculated the valuation of the improvements on the basis of analysis of sales, deducting his opinion of the market value of the land as vacant.

BLANCHARD J:

That's the market value of the comparator land?

MR ST JOHN:

That's right.

BLANCHARD J:

Yes.

MR ST JOHN:

And so then he arrives at a net rate for improvements, which he then applied to the Carter property, so where we say this goes horribly wrong is his starting point is vacant land sales and the *Maurici* case from the High Court of Australia which was in our supplementary bundle, if I just mention in passing because it stands for a very

simple proposition, which says that you cannot use those as comparable because it just fails to take account of how scarce they are and it also fails to deal with the proper hypothetical, which is, what if all the lands were vacant and so what Mr Gardner's doing here is he starts from the basis of a value of vacant land, which everyone acknowledges is valuable, and can in fact in cases actually be more valuable than land with improvements on it and so, all our experts said well, it's a little bit more refined than just taking land away from gross to arrive at improvements, but in fact it's worse.

ELIAS CJ:

You mean that they factored in a premium for it being available vacant land?

MR ST JOHN:

Well, he doesn't put it that way, but –

ELIAS CJ:

But it would have to be that wouldn't it?

MR ST JOHN:

Well, he starts with his comparable properties being vacant land and that's the likely result.

ELIAS CJ:

But is he really meaning that, or is he just meaning the bare land, is there anything to indicate that he, that he was going further than that?

MR ST JOHN:

No, well, you won't find it in the record, if that's the answer to your question, but –

ELIAS CJ:

Because there is a, there is a point at which a property, even with a dwelling on it, the dwelling may have negative value –

MR ST JOHN:

Quite.

ELIAS CJ:

– so he, mmm, all right.

TIPPING J:

You could have a situation like this couldn't you, that the gross value of the fee simple is a million minus a hundred thousand for demolition, 900?

MR ST JOHN:

Quite.

TIPPING J:

Step one.

MR ST JOHN:

Yes.

TIPPING J:

Value of improvements, however, are not per se negative because they don't need, so that demonstrates that the two will not always march together.

MR ST JOHN:

Exactly.

ELIAS CJ:

Well, I query that because it's the value of the land as improved and if the so-called improvements are of negative value, I don't see that you don't deduct that from the land.

MR ST JOHN:

And that's the point that we confront squarely, because that fails to take account the terms of this lease.

ELIAS CJ:

All right, yes.

TIPPING J:

Well, I think that there maybe a misunderstanding. To get, if to get highest and best use at step one you need to demolish, you have to take those costs into account, surely?

MR ST JOHN:

Well, no, the Court of Appeal said highest and best use as if the land was vacant.

TIPPING J:

Yes, well, there I think there may be a subtle difference and –

ELIAS CJ:

And that's really why I was referring to a premium if the land was treated as if actually vacant, but if you're simply saying that you're trying to get an unimproved land value, I don't see what's wrong with that. I understand if you're not taking into account the removal.

MR ST JOHN:

What's wrong with it is that it starts as the basis of the valuation, the land figure in the first place and there's no basis in the lease to do that.

ELIAS CJ:

All right, well, you'll have to take us again to the lease because I thought it was a valuation of the land.

MR ST JOHN:

No, it's a valuation of the gross value of the fee simple.

ELIAS CJ:

Yes, a gross value of the fee simple.

MR ST JOHN:

Well, that's not unimproved land for instance, or even land value. You see, you will see in some Glasgow leases that the valuation is to be of the unimproved land, that's what found its way into certain statutes and the suchlike, but land value doesn't come into it anywhere here. What you have is a residual and when you take improvements away from gross value, you end up with a residual that may be quite different than land value and that's what the percentage is applied to, the residual.

TIPPING J:

Well, the buildings, for the purposes of step one, might be a minus, but for the purposes of step two, there's almost certainly going to be some form of plus.

MR ST JOHN:

Yes, and what –

TIPPING J:

That's why the two, that demonstrates the point –

MR ST JOHN:

Yes.

TIPPING J:

– that they're not necessarily going to equate.

MR ST JOHN:

That's right and it's a two-stage process.

TIPPING J:

Exactly.

MR ST JOHN:

Because I'm talking about in the declarations, one of the declarations sought was that the valuation is to be treated as if the land is occupied, which might even acknowledge that –

TIPPING J:

It would seem to me to be most unfair if the landlord could get highest and best use, ignoring the cost of putting it to highest and best use.

MR ST JOHN:

Yes and so the valuation that was sought, and that was a single valuation, a single declaration, again it's set out at paragraph 27 of my written submissions and that was 1(b) which said, "The gross valuation is limited from the state of the land as

occupied," and the point there is that the Board acknowledged in all their evidence, well, they do acknowledge that, they have to. So –

TIPPING J:

I think provisionally that its highest and best use, which you must bring to account any cost in achieving highest and best use, ie it's not treated for that purpose as vacant land because if there is a house on it that has to be demolished to put up a better house, you must bring to account the costs of demolition.

MR ST JOHN:

Well, that's right, except it's this phrase, highest and best use for any purpose which –

TIPPING J:

I know that's your first argument, that's your subject to the lease argument, but assuming one was against you on that, I'm provisionally with you on the second set.

McGRATH J:

I'm just, obviously you and Tipping J can reach accord on that basis. I'm not myself quite so sure, it seems to me this is a machinery provision which is worked out on the basis that the, for the lessee to, carries all the benefits and detriments of development, that the lessor can keep on going simply on the machinery basis that the land, he will get a return on the land that's based on the formula that deducts the value of substantial improvements from the gross value. It doesn't say deduct, it doesn't, that seems to me is that you ignore, you don't have to get into questions of how much the cost of removing the improvements will be.

MR ST JOHN:

But your Honour started that comment with talking about the lessee gets all the benefits of the development; there's no development here, there is a single dwelling used for residential purposes and that's clearly what was to happen here, is the grant of the, the deed was to encourage large residential homes surrounding the park, which had been donated to the city.

BLANCHARD J:

But there was no obligation to build.

MR ST JOHN:

No there wasn't.

BLANCHARD J:

In fact, it's made quite clear it's the lessee's option.

MR ST JOHN:

Yes, well, the simple answer to that is we say it's unrealistic to take that into account because if you were paying rental on the land and the only thing you could do with it was to build a single residential dwelling, then that's what they were going to do. We don't think that that takes matters very far.

Your question was about the valuation method Blanchard J used in the Gribble arbitration and you'll see that the net rate method was adopted. Our expert witnesses explained more carefully how that net rate method is used and obviously in the High Court and in the Court of Appeal, our case was critical of that and we noted that even the, one of the respondent's experts talked about it being a method that was problematic, but you can see that the differences in improvement valuations in that arbitration was at least 27 percent, which tells you that there is something very different in the approaches of the lessee and the lessors. Ironically in that case there wasn't much argument about the value of the gross.

ELIAS CJ:

The value of?

MR ST JOHN:

The gross. There wasn't much argument in that case.

ELIAS CJ:

Just tell me, what do you say, just shortly again recapitulate is the gross value of the fee simple, what is that?

MR ST JOHN:

Yes, you'll see that if you go to Mr Seager's evidence, which you'll find at tab 10.

ELIAS CJ:

No, I just meant, tell me what is the gross value of the fee simple, in your submission?

MR ST JOHN:

It's the value of the whole property by usual valuation methods attributed to comparable sites and similar home and the such like. Then there is a deduction, a notional deduction made for the fact that there are restrictions in the lease.

ELIAS CJ:

So it is unimproved value, plus improvements, less a deduction for the restrictions, is that, would that be, encapsulate what you're saying?

MR ST JOHN:

No, because it doesn't get, because we're talking here, there's a difference between capital value and the gross. What we're not talking about here and we're very anxious of course not to get into a situation where A plus B equals C with the result that you only have to do it the other way around to arrive at the improvements value, that's what's gone horribly wrong here.

ELIAS CJ:

Yes, but, so tell me again what it is that you're saying, gross value of the fee simple is, how do you calculate it?

MR ST JOHN:

Well, if you –

ELIAS CJ:

No, can you just tell me?

MR ST JOHN:

Well, as I said, you take, just using normal valuation methods.

ELIAS CJ:

Yes.

MR ST JOHN:

Comparable properties and sites and such like and you get a gross value by attributing it to comparable properties. Then you take off a notional value because of restrictions –

ELIAS CJ:

What is the gross value that you start with, what's it based on?

MR ST JOHN:

It's based on comparable sites and properties as value –

ELIAS CJ:

As based on the land and the improvements?

MR ST JOHN:

Yes.

ELIAS CJ:

Yes, so you have the land, plus improvements, less a deduction for the restrictions?

MR ST JOHN:

Yes, that's right.

ELIAS CJ:

But I thought that's what I put to you a few moments ago and you said you were anxious not to accept that.

MR ST JOHN:

Well, the starting point, we say, is that you cannot start with the land value because that's not what this lease prescribes. It's not a valuation of the unimproved land, it's a valuation of the gross, to which you then deduct improvements and the improvements have to be arrived at by a separate valuation –

ELIAS CJ:

Yes, I understand that.

MR ST JOHN:

Yes.

ELIAS CJ:

That's the next step.

MR ST JOHN:

Yes.

ELIAS CJ:

But the gross value must start, or must have as a component of it, the land, plus, plus the improvements.

MR ST JOHN:

Yes, that's right.

BLANCHARD J:

It's a market value of the property as a whole isn't it?

ELIAS CJ:

Yes.

MR ST JOHN:

Yes.

BLANCHARD J:

But you're arguing that there should be a deduction for the restriction.

ELIAS CJ:

Yes.

MR ST JOHN:

Quite, because that's the only time, that's the only place where you can make the deduction for the restriction because you couldn't make it during the second exercise when the improvements are valued –

ELIAS CJ:

Yes.

MR ST JOHN:

– so it can only be made during the first.

ELIAS CJ:

Yes, thank you.

WILLIAM YOUNG J:

How did other, slightly different point, the rent reviews all fall at the same time, or –

MR ST JOHN:

No.

WILLIAM YOUNG J:

– are they completely staggered, or are there clusters of them?

MR ST JOHN:

Well, they are staggered but there are, as I understand it, and I'll stand corrected after the break, but as I understand it, since these proceedings were started in the High Court, all the rent reviews have been put in abeyance, other than those where agreement could be reached quite quickly.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.50 AM

MR ST JOHN:

Thank you, your Honour, I wanted to take you to the passage that I had in my speech notes about why the restrictions on the lease have to be taken into account and I started by saying, well, it can be done three ways.

BLANCHARD J:

Where are you?

MR ST JOHN:

On my speech notes, paragraph 15 Your Honour. You'll see that in this lease the valuation is to be used as the words, "then", which again that word didn't appear in *Cox*. I had the exchange earlier which where you said that it didn't make, you didn't see that that was of critical importance, but in the *Revenue Properties Co v Victoria*

University (1993) 101 DLR (4th) 172 case and in the *Plaza Hotel* case and the New York Court of Appeals case in *Second Avenue* which you will all find in the respondent's supplementary bundle of authorities. This point did become relevant. It can, and the point here which can be found most quickly at *Revenue Properties* which is at tab 5 of that bundle.

TIPPING J:

Which bundle is that?

MR ST JOHN:

It's described, Sir, as the appellants' supplementary bundle of authorities.

TIPPING J:

Thank you.

MR ST JOHN:

And tab 5, which is the *Revenue Properties* case which is cited with approval in *S & M* and the passage can actually be found in headnote number 1, which is, "In the absence of definitions of the lease and having regard to the context and the fact that these were net leases, the phrase "demise lands" was descriptive of the lands themselves, subject to the leases," and you can come through –

ELIAS CJ:

Sorry, can you just take us to where we see this in context?

MR ST JOHN:

Yes, 182, your Honour, where it starts, "There are no clear words stating that the demise lands are to be valued irrespective of any improvements made thereon." It goes on to say, "Nor are there qualifying words such as if free an unencumbered." And then they go on to say, "Or are there words such as, land only without buildings or improvements," and that, without buildings, of course, was the phrase used in *S & M*, that was the point.

ELIAS CJ:

Was this just a valuation of the lease?

MR ST JOHN:

No, this was –

ELIAS CJ:

What was being valued here?

MR ST JOHN:

It was a 100 year ground lease, your Honour.

ELIAS CJ:

Where's the, where do we find the valuation formula, or the rental?

MR ST JOHN:

It was the fair market value of the demise lands.

ELIAS CJ:

The fair market value, isn't it the fair market value of the lease?

MR ST JOHN:

No, of the demise lands.

ELIAS CJ:

Oh, of the demise lands.

TIPPING J:

It means if the land's subject to the lease.

MR ST JOHN:

Yes.

ELIAS CJ:

Yes.

TIPPING J:

But that's not our case.

MR ST JOHN:

Well, the point, we do that parallel Your Honour because when it talks about the demise lands, in this case it's talking about a valuation of the then, we can go to the exact words.

TIPPING J:

"The fee simple of the land then included in the lease."

MR ST JOHN:

That's right. So –

TIPPING J:

Well, that's just descriptive of the land isn't it, at that time?

MR ST JOHN:

Which includes the lease. That's the point that we advance and we take from revenue that they say, well, that follows that you're going to say the demise lands. The demise lands must include the lease and if they've meant to say something else, they would have said so.

WILLIAM YOUNG J:

Well, say the lease has said the gross value of the demise land, is that different from what it says, you say no?

MR ST JOHN:

Well, the demise lands, that phrase in *Revenue Properties* said well, you then include the lease and what those cases say and the two cases that followed, is that if you wanted to get to another result, then you would have to specifically say so and if you, you can see an example –

TIPPING J:

Is this an argument for our not following *Cox*?

MR ST JOHN:

Yes.

TIPPING J:

That Canadian Court said something different?

MR ST JOHN:

That's right, but I can rat ... But when I came, I'll come back to that in a moment, because I still think that *Cox* can be rationalised on the basis that the key difference in that case was that there weren't any restrictions in the lease and –

TIPPING J:

I thought we'd been down that road –

MR ST JOHN:

Yes.

TIPPING J:

– you're coming back to it?

MR ST JOHN:

No, no, I'm not planning to go back over old ground, but you'll see in the subsequent case in *Plaza Hotels* which is at tab 6, which is the Supreme Court of New York and you'll see there in the head note, second head note, "Valuations of land for lease purposes must take into consideration all encumbrances therein, including use restrictions unless there is a clear provision to the contrary," and on the second page is the actual lease formula, it's right down the page, so 942, beginning the words, "Article 2." And there's your valuation formula and if you come through to page 944, down the bottom, square bracket 1, where they say, "That the restrictions to hotel use imposed by the lease must be taken into account." And you'll see the point made again at page 946.

TIPPING J:

This is not consistent with *Waterloo Hotel*.

MR ST JOHN:

No, in that context it's not. If you come through to page 946, the top of the page and come six lines down, where it says, "There's nothing in the language of the option agreement or of the lease to justify an interpretation which would base the rent on the value of the land when devoted to highest and best use while the lessee is restricted by the lease to which," et cetera. Now, then you have at tab 7, a seven member Court of the Court of Appeals of New York and again, the annual rent that's set out in

the overview was to be 7% of the value of the demised premises and if you come over the page to the passage halfway down "Opinion", it's said that because it wasn't specifically included, the lease has to be taken into account when valuing the property.

BLANCHARD J:

So really your argument is that this case is distinguishable from *Cox* because *Cox* simply talked about gross value of the lands whereas this talks about gross value of the fee simple of the land then included in the lease.

MR ST JOHN:

Yes.

BLANCHARD J:

The word 'then' is perhaps a distraction. I think that probably is, in related to time, but if it read a valuation of the gross value of the fee simple of the land included in the lease –

MR ST JOHN:

Yes.

BLANCHARD J:

You say that distinguishes it from *Cox*.

MR ST JOHN:

Well, yes it distinguishes it from *Cox* but we also note that that was never argued in *Cox* either. That was never put to the Court there, and so, of course, again, if you started with that passage at paragraph 71 of *S & M* in your judgment, your Honour, where you said, well, you have to look at each lease to look as to how it's to be valued, and the point that we derived is the thrust of the Court of Appeal's judgment seems to be that you could take now any Glasgow lease and say, "Well it's to be valued as on its highest and best use," but that's not right.

TIPPING J:

The question then is what is the intent objectively derived from the words "included in the lease". Is it intended to be solely descriptive or is it intended to be limiting?

MR ST JOHN:

No, well obviously –

TIPPING J:

You argue it's intended to be limited?

MR ST JOHN:

Of course, yes of course.

TIPPING J:

But that's really the crunch point.

MR ST JOHN:

That's the crunch point and these authorities and, of course, I'm about to move to authorities from the United Kingdom, which we believe are even more helpful but what's being said here, of course, is that there is nothing peculiar in that result. If the owner wanted to come to a different result then you would have expected them to actually say so in the terms of the lease, and in New Zealand that's done all the time. Again, it was done in *S & M,* or the *Waterloo* case, where valuation was to exclude any buildings that had been erected.

TIPPING J:

Do you accept that for the purpose of deriving the intention, one has to bear in mind that these words are part of a composite formula involving two steps?

MR ST JOHN:

Yes.

TIPPING J:

Yes.

MR ST JOHN:

And I said before break that the restriction part must always come in the third step and that's when you assess the gross value.

TIPPING J:

Oh, yes, if it's going to come in at all, it's got to be there.

MR ST JOHN:

It does, yes, but if you look for a moment at the – if I'm just staying with this point about you would have expected them to say something. If you look at the respondent's bundle of authorities, right at the back they had what was described as a Chronology of Statutory Provisions. I don't think anyone's actually arguing that these necessarily become relevant at some point, but you will see that in all the land acts and the such like, there is reference to exclusion of mortgages and charges, but there is no statutory reference to exclusion of the lease, except until you get through to, it's about three pages in, Māori Vested Lands Administration Act 1954, and you'll see in subsection (1) the Valuer General actually is to proceed as if it were not subject to any lease.

WILLIAM YOUNG J:

What normally – well I may be wrong in this – but I suspect that often where this issue has arisen the suggestion is that land that is subject to a lease and is, therefore, not available to the lessor for use may, for that reason alone, be less valuable.

MR ST JOHN:

Yes.

WILLIAM YOUNG J:

And to allow that to come into the assessment process would have an obviously destabilising effect on the investment of the lessor because it's sort of leveraging in on itself.

MR ST JOHN:

Well that's actually – there's a subsequent case from California that the respondent's advanced last week, and that's what's argued in that case. That it will be a self-fulfilling prophecy that the value in rent will continue downwards on that basis.

WILLIAM YOUNG J:

And then, for instance, if these valuations come to be assessed, done in, say, a time of very high inflations, it might be said well it's really unsatisfactory to have a long term lease with a 5% return and, therefore, we'll leverage the value down again. So, those sort of arguments are perhaps features of some of the cases. You say there's one from California where that's been argued.

MR ST JOHN:

Well, it's against us.

WILLIAM YOUNG J:

Yes.

MR ST JOHN:

It was put up by the respondent. They sent it down last week.

WILLIAM YOUNG J:

Right.

MR ST JOHN:

And I don't know how it's arrived. It should be with your papers of course but that's what the Judge in that case says, that –

BLANCHARD J:

Is this *Bullock's Inc v Security-First National Bank of Los Angeles* 325 P.2d 185?

MR ST JOHN:

Yes.

BLANCHARD J:

I've got it but I haven't read it.

MR ST JOHN:

No.

WILLIAM YOUNG J:

Is this argument featured in New Zealand cases?

MR ST JOHN:

No.

TIPPING J:

Well this case which I have glanced at certainly, as you say, is against you, and it does traverse the sort of matter that my brother Young has just been raising.

MR ST JOHN:

Yes.

TIPPING J:

Does it not?

MR ST JOHN:

And the distinctions I think, there's actually a number of points to this. There's – that case was actually cited in *Revenue Properties* so certainly the Court in *Revenue Properties* didn't take it as limiting the ratio that they came to, but when you read that point where, and I think it's at page 4 of 8 from the bottom left-hand corners, and down the bottom is His Honour's point, or suggestion where it would reduce the value of the reversion and so on, in endless succession, and the rule contended for is wholly impractical, but that's not what's occurring here and that's not what would occur here because the valuation of our properties, or the Cornwall Park properties, are not being valued on the basis of the rent they derive and no one, not even the Board, has suggested that ever, and that's the key difference between our case and this Californian one.

If I can move you to *Basingstoke and Deane Borough Council v Host Group Ltd* [1988] 1 All ER 824, which is tab 6 of the appellant's bundle of authorities, which is a different one, obviously, than the supplementary one, which is of the English Court of Appeal. This was a case where the lease said that it was to be valued as F, clear of all buildings, such as in the *S & M* case, but the lease restriction was restricted to use as a public house and if I can ask you to start at page 828, at paragraph G, and all they do is repeat, with respect, what was said in *S & M* that it's axiomatic that you start with the intention of the parties and the construction of the rent review clause, and it all depends on the particular language that's used. And then, a few lines down, under H, they say, "Nonetheless, it's proper and only sensible when construing a rent

review clause to have in mind what normally is a commercial purpose." And then the relevant passages that we rely on, over the page.

ELIAS CJ:

Where, sorry, what passages?

MR ST JOHN:

Oh, sorry, at 831, at the top of the page beginning paragraph A, where they say, "We approach the construction on the footing that unless the paragraph otherwise requires expressly or by necessary implication, or some context indicating otherwise, the parties are taken to have intended that the notional letting assumed for the purposes of the rent review assessment was to be on the same terms and then –

ELIAS CJ:

Sorry, this was a lease of premises was it?

MR ST JOHN:

It was a ground rent.

ELIAS CJ:

It was a ground rent, okay.

MR ST JOHN:

And the ground rent was to be valued as if there was actually no building. There was a public house on the property and the lease actually said that's the only basis on which you could use it and lessee said, "well, I'm, this is unreasonable, I'm getting a valuation on vacant land when you've told me I can only use it for one single purpose", and so what you had there was very clear language in fact as to how it was to be valued and the Court said, well, that can't be right. You have to look at what the parties intended and if the parties had said, you can only use it for one purpose, then that's the basis on which you must value it. And if, at the same page, 831, if you were at paragraph C where it says, "There is no express direction that in thus assessing," et cetera, but it comes down to the passage quite the contrary, "In the case of this lease, with its stringent user covenant, such a direction would be capable of working so unfairly on the tenant, that we find it impossible to suppose that the original parties to the lease could have intended this," and we press that. And when we, the point that we make by reference to that last passage –

TIPPING J:

What was the basis upon which the landlord here was trying to have the place valued, for a use other than a public house –

MR ST JOHN:

Yes.

TIPPING J:

– do you recall what that was?

WILLIAM YOUNG J:

I think it's identified, because it never really, the dispute got to Court before they really got to the –

MR ST JOHN:

Yes, but it was to be –

TIPPING J:

Oh, I see, it was more abstract.

WILLIAM YOUNG J:

It was for general development purposes I think.

MR ST JOHN:

It's in the headnote.

WILLIAM YOUNG J:

I couldn't see it when I looked through it.

MR ST JOHN:

Yes, it's in the headnote, which is at page 824, beginning halfway down between F and G where the landlord sought the determination of the Court whether the valuer should assess the current ground rent on the basis the premises were available for letting on a hypothetical lease, such as a bare site for development.

WILLIAM YOUNG J:

All right.

MR ST JOHN:

Obviously all this dovetails into our submission that the parties cannot have intended a result where the lessee is paying a rent based on a valuation of something which they don't enjoy and can't enjoy and which is expressly excluded and we bring all this back to *West Coast Settlements*.

ELIAS CJ:

Sorry, before you do that, so the submission you make based on *Basingstoke* is that the valuation should have been on the basis of single residential dwelling?

MR ST JOHN:

Exactly.

ELIAS CJ:

Yes.

MR ST JOHN:

And I've heard that you keep, you're reluctant to look at what the respondents' valuers said in that document that I gave up, but in their evidence before the High Court, that's in fact what they acknowledge should be done.

ELIAS CJ:

Yes.

MR ST JOHN:

And in the round, we draw all those threads together by saying, what we contend for is in fact advanced by the respondents themselves in their own evidence.

ELIAS CJ:

Leaving aside the evidence, though, is that the way the Board has approached valuations throughout the history of this lease?

MR ST JOHN:

That's, no, for instance, I can only take you to what's in the record, but you know in the record that for many years they were inviting lessees to adopt a rental based on

the valuation of the land only. It wasn't said then whether it was being valued on development potential, or the such like. Again, the Lusk Report records that the Auckland Area Health Board were doing the same thing because they didn't want to go through what they called the convoluted process. But you find contradictions within the respondents' evidence because there are references to development potential and the fact that the land may be more useful it's vacant and so, in the end, we drew the impression that they seemed to keep their options open and the fact that they're now defending highest and best use, has left the land where vacant, which is an argument that they've never contended for and they never contended for in the Court of Appeal. The fact that they don't disallow that obviously tells us that if they had that opportunity, they would press it. But before this, there was no evidence that that's how they were approaching it. We say they were approaching it on the wrong basis because they were giving primacy to land value and that's the purpose of –

ELIAS CJ:

Yes, that's the first argument, but the secondary argument, second argument, is that highest and best, if highest and best land value is still required, it's nevertheless restricted to single residential dwellings.

MR ST JOHN:

Well, it just wouldn't be highest and best use, yes.

ELIAS CJ:

Well, it might, it might, yes.

TIPPING J:

It would be, subject to that restriction.

MR ST JOHN:

Well, the gross valuation was as Blanchard J described before the break. It is of simply market valuations of comparable properties, it's no more than that.

TIPPING J:

I have some difficulty reconciling the conclusion reached in *Basingstoke* with the rationale as expressed at the bottom of 828 and the top of 829, where in similar terms, both Sir Nicholas Browne-Wilkinson and Lord Justice Dillon talk about changes in rationale, the purpose is to reflect to ... Taking the first citation at the

bottom of page 828, "Changes in the value of money and real increases in the value of the property during a long term." Now, say there's a real increase in the value of the property brought about by a zoning change –

MR ST JOHN:
Yes.

TIPPING J:
– but this property, because it's subject to the lease, can't take advantage of that zoning change.

MR ST JOHN:
Yes.

TIPPING J:
Does that have to be construed as meaning that there isn't then a real increase in the value of the property?

MR ST JOHN:
No, because we've already agreed and the declaration was made by Justice Courtney and there's no cross-appeal against that, that zonings don't come into it.

TIPPING J:
I think we're on slightly divergent paths, Mr St John. I mean, if the rationale for these rent review provisions and this sort of formula is to give the landlord the benefit of increases in value of the property during a long term, that won't be realised if there is a restriction of usage –

MR ST JOHN:
Yes, yes.

TIPPING J:
– or it may not be realised.

MR ST JOHN:
Indeed.

TIPPING J:

There seems to me to be a slight contradiction here. You understand what I mean, in other words –

MR ST JOHN:

I understand the question.

TIPPING J:

Look the rationale is not actually borne out, if you bring to account the restrictions in the lease, or may not be. The landlord is forever tied, if you like, to the user that the lease requires and is likely to be significantly disadvantaged in relation to external real increases in the value of the property.

MR ST JOHN:

But, well, and he may be. We don't see anything wrong with that result.

TIPPING J:

I'm sure you don't.

MR ST JOHN:

But we see it as far more simplistic than that. The landlord has notionally given away everything bar the fee simple and for a, in this case, for a percentage return but why should he have the advantage of that valuation on land for any purpose when it's restrictive? But if the landlord imposes a restriction which he later regrets because the zoning changed would make the land more valuable, then I don't see that as a disadvantage. It's the same for both parties.

BLANCHARD J:

Well I suppose the landlord could always unilaterally release it.

MR ST JOHN:

Well that's right and yes, that's right, because you're talking about, your Honour, restrictions as being of a disadvantage to the landlord but the assumption that you must make, or we invite the Court to make her, is that the landlord assumed that these restrictions were to his advantage because it's the landlord that drafted the

lease and has insisted on the restrictions. So, presumably for it, it considers there to be an advantage –

TIPPING J:

How would you – is *Basingstoke* reconcilable with *Cox* or does one have, inevitably, to depart from *Cox* if one's going to go with *Basingstoke*?

BLANCHARD J:

Or distinguish *Cox*?

TIPPING J:

Or distinguish *Cox*?

MR ST JOHN:

Or distinguish ...

TIPPING J:

On some material basis.

MR ST JOHN:

Yes, and we don't think that – we're perfectly happy if you do, but we don't think that you need to overrule *Cox*. We think it can be distinguished or analysed on –

TIPPING J:

This is because you say *Cox* doesn't involve any restriction.

MR ST JOHN:

That's right and, in fact, we say that *Cox*, in its context, actually can be perfectly explainable, particularly when you put *Cox* to one side with the *West Coast Settlements* case and this is the – of course there's one more case which I needed to – which was *Lynnethorpe Enterprises Ltd v Sidney Smith (Chelsea) Ltd* [1990] 1 EGLR 148 at tab 7, which has that phrase "the presumption of reality".

McGRATH J:

Basingstoke is a reasonable current ground rental for the demised premises isn't it?

MR ST JOHN:

That's right.

TIPPING J:

Used is the word "reasonable".

ELIAS CJ:

Sorry, what does it say?

TIPPING J:

"Reasonable ground rental".

McGRATH J:

It's, I think it's at page 826.

MR ST JOHN:

You can see it in the headnote, your Honour.

TIPPING J:

And that, I think, was similarly the formula in that *Ponsford v HMS Aerosols Ltd* [1979] AC 63 case that's referred to a little later by Lord Justice Nicholls and that there.

MR ST JOHN:

So, but all that tells us is that all these clauses are different and so the facts of each case have to be looked at to what's been taken from them.

ELIAS CJ:

On that point the *Basingstoke* case, as is said at page 831, has a stringent user covenant.

MR ST JOHN:

Indeed.

ELIAS CJ:

Here on one view it may not be quite as stringent because the lessor can give consent to other users. What would you say if the lessor, in these cases, announced to everybody, "We're happy for you to use this property in any way permitted by the

zoning restrictions?" I know you still have your argument that you have to take the state of the land as occupied by the improvements.

MR ST JOHN:

Yes.

ELIAS CJ:

But you wouldn't have this argument based on user according to the lease.

MR ST JOHN:

Well, you would I think because I think the lessees would be entitled to say, given that this is a perpetual lease, that we went in on this basis on the assumption that rental for all time, at every 21 years, would be assessed on this basis and it's not for the landlord to announce, "Hallelujah, we're going to do it a different way but that's to your advantage, take it or don't take it."

TIPPING J:

Well it does say, "Or otherwise with the consent of the landlord." It's not restricted to residential use.

BLANCHARD J:

The landlord can indicate in advance that they'll always consent. I doubt that they'd put it as broadly as that but they could do so.

ELIAS CJ:

I suppose the indication that consent is required presupposes a request might –

MR ST JOHN:

It does and the highest of the evidence was in Mr Larmer's evidence as he said when he was doing one of the valuation exercise. He went to the Board and asked if they would consent to subdivision, and didn't get a response but there's –

WILLIAM YOUNG J:

It was a home occupation wasn't it?

MR ST JOHN:

Mr Seager's evidence?

WILLIAM YOUNG J:

Yes, it was about a home occupation wasn't it?

MR ST JOHN:

That's right, yes, but that wasn't responded to by the Board in its papers. There's nothing in the record to indicate the Board would, and ever had, consented to highest and best use of the land for the tenant's purposes and we don't think that this case, your Honour, should rest or fall on the level of restriction. I don't think that's actually the – that's the factual background to it.

BLANCHARD J:

Well, the Court would have to assert that the restriction would be enforced completely.

MR ST JOHN:

Yes and that was in response to the point again because the respondents now say, "Well we can waive it therefore you can't go on about these restrictions," but we ask the Court to make that assumption.

ELIAS CJ:

Does it amount to saying that in the context of a perpetual lease the landlord can never expect to get highest and best value because the lease has been granted on the basis of residential, single residential dwelling?

MR ST JOHN:

In that case, yes. That's exactly what we say. So highest – the issue here is, is that when the Court of Appeal took highest and best use, they lifted it from *S & M* and in those cases, and that's why I wanted to spend some time on it this morning because what was being discussed in *S & M*, of course, was the owner giving away everything short of a fee simple so the lessee could take with it what they wanted, and the phrase, "The entrepreneurial ability rests on the lessee." So highest and best use is obviously appropriate in that respect because if the lessee doesn't take up the opportunity, that's its problem. It's not the landlords. But if the landlord does restrict highest and best use then they shouldn't be entitled to value on that basis, and that's the very short point and we don't see that as turning precedent on its head. We don't see it as running in conflict with *Cox* or any other authority since. We see it consistent with authorities elsewhere and we see it particularly as consistent with

West Coast Settlement Reserves Lessees Association Inc v Valuation Committee for the West Coast Settlement Reserves [1997] 1 NZLR 413, which we use that to draw all the threads together which we talked about this morning. You said you were familiar.

ELIAS CJ:

No, no, I'm very happy for you to take us to it now.

MR ST JOHN:

Because *West Coast*, of course, was the case where on its strict instruction, the lease had to be valued – that's tab 2 of our supplementary bundle but, again, this was a five member Court of the Court of Appeal and this was a case where on its strict construction, the land had to be valued, taking into account what had subsequently become valuable forestry, which had been cut down. When the land had originally been leased, it was intended that the lessees cleared the land and use it for farming.

BLANCHARD J:

Well it wasn't just intended. It was required by statute.

MR ST JOHN:

Indeed.

BLANCHARD J:

If you look at page 418, the second full paragraph starting at about line 16.

MR ST JOHN:

Section 54?

BLANCHARD J:

Yes, and there were a whole lot of things that the lessee was required to do and you could only do that by cutting down the trees.

MR ST JOHN:

That's right. And the Court was confronted with the problem that many years later the owner said, "Well when we come to assess gross value, you have stripped the land of valuable forestries which we are entitled to either value it on the basis as if they're there, or receive compensation for it." And of course what the Court said in

West Coast, is, "Well, that is the strict construction, but that would lead to an absurdity", and you can find that at page 428, with the second paragraph down indent, it's not to be thought that Parliament intended that it created this positive obligation and then one day would have to find themselves paying rental on doing the very thing which they were prescribed to do.

BLANCHARD J:

But you'll notice at the top of that page, it talks about the need to consider the meaning of the definitions in their statutory context and to arrive at a sensible and fair interpretation which accords with the purpose of the leasing regime established by the 1955 Act and its predecessor of 1892 –

MR ST JOHN:

Yes.

BLANCHARD J:

That was the key to the case.

MR ST JOHN:

Yes.

BLANCHARD J:

And you weren't just looking at a contract between lessor and lessee, it was a contract pursuant to a statutory scheme, we don't have that statutory scheme here.

MR ST JOHN:

Yes. What we say, is the point is still of practical application, because what you have in this case is the Court saying, "On any strict interpretation, the lessor is correct, but we're not going to allow that absurdity to be the result". And we say, "Well there's no difference between that with a statutory created scheme and private lease, because that's what *Basingstoke* said.

ELIAS CJ:

What's the positive obligation that is comparable in the present case? Because it turns on the positive obligation to create farmland out of bush in that case. Are you going so far as to say there was a positive obligation in substance to erect a single dwelling?

MR ST JOHN:

Yes, and I made that submission before the break. I said that it's just unreasonable and impractical to suggest that given that you were paying rental on the gross value, that you would not be erecting a dwelling, because that's the only purpose to which you could do it, and I don't think that one needs to make any stretch to get to that conclusion. And so, if you start with the very basic nub of our case, which is, you cannot value a gross on a different purpose to which you have granted to the lessee. We don't see that that actually conflicts with *Cox*.

WILLIAM YOUNG J:

I'm right, aren't I, in assuming this argument is only really addressed to what was said in the Court of Appeal judgment?

MR ST JOHN:

No, it came up in the High Court.

WILLIAM YOUNG J:

Did it?

MR ST JOHN:

Well, it's discussed in Justice Courtney's judgment.

WILLIAM YOUNG J:

Where does she discuss it?

ELIAS CJ:

What did she decide on though, on this point? She didn't say, "Highest and best use"?

MR ST JOHN:

No, no absolutely not, sorry.

ELIAS CJ:

No. No. So that's really what I think Justice Young's putting to you.

MR ST JOHN:

Oh I'm sorry, your Honour. No, highest and best use came out of nowhere in the Court of Appeal and they, as you say the penultimate paragraph.

ELIAS CJ:

Yes, and it's that windfall to the Board that you're really taking issue with in this case.

TIPPING J:

Did Justice Courtney – what did she say about the relevance of the lease to step one?

MR ST JOHN:

She adopted *Cox*, and said you put it out of consideration.

WILLIAM YOUNG J:

But in what context was she dealing with that argument. Where does she deal with it in her judgment?

MR ST JOHN:

Yes. So you will see that in tab 7 of the first of bundle number 1. It starts at paragraph 16 at page 15 in the right-hand corner.

ELIAS CJ:

Sorry, tab?

MR ST JOHN:

Tab 7, page 15.

ELIAS CJ:

Thank you.

MR ST JOHN:

So she starts by saying, "Well the leaseholder's point of view is understandable, that's the argument, why should they be paying rental based on something to which they don't enjoy". But then says, "Well the lease conflicts with what has long been accepted is the purpose of the renewal provisions under Glasgow lease". Now with great respect her Honour misdirected herself there, that was the point that I made right at the beginning, because there is no rule in Glasgow leases that you don't look

at the lease terms. In fact in *S & M* and the *Fair Market Rental* cases, of course you look at the lease terms to determine the rental value.

TIPPING J:

The next sentence, what do you say about that? It is undisputed.

MR ST JOHN:

Well, it is disputed. Because –

TIPPING J:

Did her Honour not quite have a full understanding of the scope of the argument then, in your submission?

MR ST JOHN:

Well I didn't present the argument.

YOUNG J:

I think it's fair to say that she's actually not dealing with the highest and best use point here, she's dealing with the method of calculation isn't she?

ELIAS CJ:

Yes.

MR ST JOHN:

Oh, that's quite – that's absolutely right. We actually take it from her decision that she actually implicitly, when it came to highest and best use that she had actually rejected that.

ELIAS CJ:

Well where do you get that from? I think that may well be right, but –

MR ST JOHN:

62 and 63 of her judgment.

ELIAS CJ:

Well, so was she envisaging single residential use?

MR ST JOHN:

Well this is where I've taken it from.

ELIAS CJ:

Yes.

MR ST JOHN:

At 62 she describes Mr Larmer's evidence and the criticism of Mr Larmer's criticism that the improvements were getting squeezed out. Then at 63, she's comparing the conflict between Larmer, Seager and Gardner, and then right at the bottom she rejects that conflict and it's the last sentence.

ELIAS CJ:

And that's because she – but is that because she's accepting this as the – being limited by the state of the land as occupied by the improvements?

MR ST JOHN:

Yes, because –

ELIAS CJ:

This is the occupied site basis, but it isn't necessarily restricting it to –

YOUNG J:

Isn't she doing – it's a slightly roundabout way, she's not actually saying highest and best use is or isn't required, what she's saying is the plaintiff said that the Board valuer was using a highest and best use valuation, and she didn't think that that was correct.

MR ST JOHN:

That's a fair interpretation.

YOUNG J:

Yes.

MR ST JOHN:

When I read 62 and 63 together, though, and remembering what the Board's witnesses were very anxious to attempt to say, and again I keep coming to that

extract that I gave you, is they were saying, "Well we do recognise the restrictions in the lease when we come to do our valuations, and what I'm. suggesting is Her Honour was actually adopting her rationalising that evidence and saying, "Well in fact the lessee's complaints are overstated, because no one's actually suggesting highest and best use".

WILLIAM YOUNG J:

Yes.

MR ST JOHN:

But I wasn't there.

ELIAS CJ:

And as you say she didn't have – I'm understanding this from what she's saying, that she didn't have addressed to her, and argument that highest and best use was required?

MR ST JOHN:

That's right.

ELIAS CJ:

Yes.

MR ST JOHN:

And that's one of the points that I tried to make in my –

ELIAS CJ:

So that's why she's not specifically dealing with it.

MR ST JOHN:

That's absolutely right.

ELIAS CJ:

Yes.

MR ST JOHN:

And I mean I've read the submissions in the High Court and you don't have them in the record, but the Board never saw them, what they got out of the Court of Appeal, in fact in the Court of Appeal you'll see that in their submissions they didn't press that at all, it seems to have been quite a windfall. And you know that, because in their submissions before you now, they actually say, "Well, our own witness Mr Gardner, when he talks about valuing on an occupied basis, he must be wrong and so to actually defend what they've now got they're actually having to discredit their own witnesses.

ELIAS CJ:

Well though, there are these two different, I think they are different points. There's the occupied by existing improvements point and there's the user restrictions.

MR ST JOHN:

Yes, they are different points.

ELIAS CJ:

Yes.

MR ST JOHN:

And our argument of course is that you adopt both.

ELIAS CJ:

Yes.

MR ST JOHN:

And the Board now argue that you ignore them completely which is contrary to their evidence that was presented in this case but again, the approach that we put to you, we say, doesn't conflict with authority in *Cox v Public Trustee*, can still be reconciled. We don't require, I mean, we put in our written submissions as saying it was obiter but, on close analysis, we don't think that one has to do any injustice to it, the rule is simply extended to say that you would, in that context, ignore the terms of the lease unless there were some restrictions placed about the lessee.

ELIAS CJ:

It's not necessary to go so far as saying that you import all the terms of the lease –

MR ST JOHN:

No.

ELIAS CJ:

– to say that the purpose of this lease was single dwelling use.

MR ST JOHN:

That's a –

ELIAS CJ:

It's a more –

MR ST JOHN:

Well no, I endorse your Honour's approach because again, all the cases say, like any contract construction, is the starting point is, is you have to look at the parties' intentions at the outset and it was the Board's intention that single dwelling family homes were created to adjoin Cornwall Park. That's what the Board wanted and that's what it's got.

TIPPING J:

What would you say to a highest and best use but limited to single dwelling?

MR ST JOHN:

Well, that was the question that the Chief Justice posed earlier and I said well, it might be –

TIPPING J:

I'm sorry, I mightn't have been fully alive to it but –

MR ST JOHN:

Well, that was the point where I said that my difficulty with that is of course it ignores that these have been perpetual leases which people have purchased on what we say is –

TIPPING J:

Then your only problem is the current occupation, rather than the limits in the lease.

ELIAS CJ:

Yes.

MR ST JOHN:

Yes.

ELIAS CJ:

And I should flag that I have more difficulty with that first argument, that the valuation is limited to the present use, the present improvements, than I think I do with your second argument about the single residential use.

MR ST JOHN:

Well the use as a single residential dwelling was, I mean, we identified that as the thrust of the restriction that we were attacking. So if, I'm not going to – I mean, in the High Court there were other restrictions that were referred to but the thrust of the nub of it is that you get a single family dwelling and you're now being asked to value it on another basis.

The short point is of course is that everyone understands, I think, that in an area like Cornwall, almost very close to the city, there is pressure on urban land and these sites which are actually quite large, between 800 and 1400 square metres, some are available for subdivision and if you're going to value them on highest and best use, then the lessees are in real trouble.

ELIAS CJ:

Where did you want to take us now? Have you – does that virtually conclude your submissions?

MR ST JOHN:

Well it does, I think. Although I wondered – I don't, I haven't taken you through the *Maurici* decision but I told you that it stood for that very simple proposition that taking comparable vacant land sites as your starting point was an error because it failed to recognise that they were inherently more valuable. You see that in the appellants supplementary bundle of authority, it's a decision of the High Court of Australia, it's at tab 4. Obviously we draw this to say that Mr Gardner's approach, he can call it many different ways that he likes but it starts with a primacy on land which defeats the interest of the lessee.

McGRATH J:

So comparable vacant land sites are more valuable than what?

MR ST JOHN:

Well in some cases, improved sites. In fact, that's the whole point here, your Honour. What you have in many of these homes and it's the same point that's actually being made here, is that in urban development, having a vacant site can be far more valuable to you than one that has a house already erected on it and what was happening here, in this case, is the Commissioner was taking comparable vacant land sites and using that as a valuation method, without recognising that they were (a) scarce and (b) not recognising the proper hypothetical which was well, why aren't all the lands then treated as vacant. There was an inherent paradox in what they were saying.

McGRATH J:

Thank you.

MR ST JOHN:

Thank you Your Honour, those conclude my submissions.

ELIAS CJ:

Thank you. Yes, Mr Casey.

MR CASEY QC:

There's a couple of perhaps preliminary points. I did try and get to the Court the *Bullock's Inc v Security-First National Bank of Los Angeles* case last week.

ELIAS CJ:

Yes, we have.

MR CASEY QC:

I've got a better copy of a more official report but if you're happy with the one that you've got then we can just –

BLANCHARD J:

It's pretty hard to read.

ELIAS CJ:

Did you say you've got an official report?

MR CASEY QC:

Well, it's also taken off some website.

ELIAS CJ:

Yes, pass it up please, thank you.

MR CASEY QC:

I also want to be referring to a number of other cases that aren't in the matters before you, that deal with this question about the occupied – sorry, about the user restrictions in the lease. If it's in order, I'll get those passed up now. They include a case called *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* [1986] NSWLR 621 which is an Australian case, and *Aldwych Club Ltd v Copthall Property Co Ltd* (1963) 185 EG 219, an English case and *Bocardo* which is an English Court of Appeal case.

BLANCHARD J:

I've got two cases here, is there a third one?

ELIAS CJ:

Are there three cases?

MR CASEY QC:

Bocardo ... I'm sorry to do this but the development of my learned friend's argument on this issue really only emerged from the cases that he provided in the supplementary bundle.

ELIAS CJ:

This is on which issue?

MR CASEY QC:

On the issue of the user restrictions and the lease.

ELIAS CJ:

I see. What is the position Mr Casey, in terms of how the Board has – since these leases were taken up – approached the valuation as a matter of fact, has it approached it on the basis of the use, the existing use?

MR CASEY QC:

Well it's a question of where you plug that into the equation, and my learned friend is a little bit mischievous to say that the Board's witnesses have said that they take into account the user restrictions in the lease. They say we value the site, and we take the gross value of the fee simple of the land by comparing this developed site with a freehold developed site, and that is how we get the comparison of the fee simple. Now the freehold developed site is a similar, if not quite identical, but a similar level of development to the subject site, to the leased site, and so to that extent they are taking a value of a comparable site, with comparable –

ELIAS CJ:

Use.

MR CASEY QC:

Use. And therefore it's an as occupied site with the development or the improvements on it.

TIPPING J:

But they are hypothesising for the comparison that the subject site is a fee simple site are they?

MR CASEY QC:

Yes, yes and that's what they say the lease requires them to do. They don't make any adjustment for the terms and conditions, or the user restrictions in the lease and that's made clear, even in the extracts that my learned friend has referred to.

ELIAS CJ:

But how do they get to the comparison then?

MR CASEY QC:

Well no, from that point of view, from the gross value –

ELIAS CJ:

Yes.

MR CASEY QC:

– of the fee simple, it's taking a – Mr Carter's house here, and a house across the road that's on freehold.

ELIAS CJ:

But it's a house?

MR CASEY QC:

It's a house, on a section.

ELIAS CJ:

But it's that comparison?

MR CASEY QC:

It's that comparison.

ELIAS CJ:

So it is observing the single dwelling restriction in the lease it is?

MR CASEY QC:

No, no, it's just taking the value of the land in situ as it exists, because that's what the gross value requires one to do. The land and the improvements that are there are valued by reference to the sales of comparable sites where they are freehold.

TIPPING J:

And it's the subject site that is valued, as if it were a freehold?

MR CASEY QC:

As if it were a freehold site.

YOUNG J:

But they never, they never – the valuers weren't saying, as I understand it, the best way to maximise the value of this land is to develop a number of residential units and we'll value the land as if it was going to be used for that purpose?

MR CASEY QC:

I need to address that a little bit more fully your Honour if I may. When they are looking at the comparable land sale, the freehold land sale, that sale may reflect a potential for a higher and better use. So for example, a potential that it might be more valuable if used as a daycare centre. But it's not actually being used as a daycare centre, so it's not valued as if it as. But in the valuation, they do – or they say, Mr Mahoney says the proper approach is if there is the potential within the value that's being reflected in the freehold site, for a different use of that site, and you might say for the subdivisability of the land, then that potential will be reflected in the comparable value of the subject site.

WILLIAM YOUNG J:

Can I perhaps take you to a point that was raised, I think by Mr Seager, he said in the course of one valuation exercise or as part of it, that it became apparent that the less he was going to sell later, he asked the Board if it would approve, if it would relax the residential condition, and didn't get an answer. In that context, would the Board be able to say, "Well the highest best use of this land is for a mixed residential commercial use"?

MR CASEY QC:

Now, you've hit on a very important point and I need to address that with your Honours, because the appealing answer is for me to say, "Well the lessor can by sleight of hand or by one stroke, say to everyone lessee, you can use this land for whatever, the planning permission allows you to, and you can therefore use it for your highest and best use". I don't think I can say that, but I do want to develop what that issue is about, but the point that I get to, and there's a number of answers to my learned friend's point and I'm not wanting to just go to one only and say that's the only answer. But the point that deals with that partly is that the requirement for the – sorry these restrictions are not absolute. User restrictions under a lease usually fall into three categories. One is absolute, where there is no ability to use it for any other purpose. The second is qualified, where it can't be used for any other purpose unless the lessor consents, and the third is where it's fully qualified, which is that it can't be used for any other purpose unless the lessor consents and the lessor's consent cannot unreasonably be withheld.

Now on the face of the leases, they look as if they are qualified, but my submission is that they are in fact fully qualified and that's because of the Property Law Act now importing an implied term, or a term into such leases where there is provision for the lessor to give his consent.

BLANCHARD J:

Well that will apply for the future, but it's not backdated.

MR CASEY QC:

Well, that's why I provided you with the *Bocardo* case, because in *Bocardo*, the Court of Appeal in England says that –

ELIAS CJ:

Sorry, does this mean it has – that the permission cannot be unreasonably withheld?

MR CASEY QC:

Cannot be unreasonably withheld.

ELIAS CJ:

Thank you.

MR CASEY QC:

Now, I just need to check, your Honour, as to, I mean because these leases are being renewed, and the rent is being set on the basis of an about to be renewed lease, the section will apply – the section will apply to these leases.

BLANCHARD J:

Every lease or sublease of land that comes into operation on or after 1 January 2008, the leases will be backdated, they'll come into operation before that date.

MR CASEY QC:

Well can I just address Your Honour to section 226, because it applies regardless of the date that the lease came into operation.

BLANCHARD J:

Oh, I see, yes.

MR CASEY QC:

Do your Honours have the section?

BLANCHARD J:

Yes.

MR CASEY QC:

I've got copies here.

ELIAS CJ:

No. Some of us aren't so –

TIPPING J:

No, only our resident expert has got sections.

ELIAS CJ:

Some sleep with it.

BLANCHARD J:

Yes, I see what you mean.

MR CASEY QC:

So, a request for a change of use, or to admit a change of use, applies regardless of when the lease was entered into. So it now becomes a fully qualified restriction, instead of a qualified restriction. I was going to address you on the *Bocardo* case when the Court of Appeal's –

BLANCHARD J:

If it's just a change of use that is required.

MR CASEY QC:

Well it's a use restriction that we're told is the issue here.

ELIAS CJ:

Well it's one of the issues, one of the two issues really, because the state of the land as occupied by the improvements is the other one.

MR CASEY QC:

Oh yes, yes, but in terms of what – of this restriction in the lease –

ELIAS CJ:

Yes.

MR CASEY QC:

It's said to constrain the value.

ELIAS CJ:

Yes, yes. Is that – do you want to –

MR CASEY QC:

I was just going to finish what I was going to say about the *Bocardo* –

ELIAS CJ:

Yes.

MR CASEY QC:

Because it's probably now been superseded by this section. The English Court of Appeal in *Bocardo*, Lord Justice McGaw, said and it's at page 741, "That such a provision would be implied in any event" if you've got a –

TIPPING J:

Unless expressly excluded.

MR CASEY QC:

Unless expressly excluded.

ELIAS CJ:

Yes.

MR CASEY QC:

Now I've got to say that there's some doubt about the correctness of His Lordship's observation there, but fortunately –

ELIAS CJ:

But happily we don't need to worry about that because of the provisions of the Act.

MR CASEY QC:

That's right.

BLANCHARD J:

It went into the Act because of the doubt.

MR CASEY QC:

Presumably. With that I'll take a lunch break.

ELIAS CJ:

All right we'll take the lunch adjournment now, thank you Mr Casey.

COURT ADJOURNS: 12.58 PM
COURT RESUMES: 2.17 PM

ELIAS CJ:

Yes Mr Casey.

MR CASEY QC:

Before I come back to the question of the restrictive uses and the terms of the lease being taken into account, I wanted to come – I guess start from the proposition about the land being vacant, or the assumed state of the land being vacant and unimproved. Now this issue arises, or arose originally as the case developed, because when this case first came before the High Court, the big argument, or the big issue then was, "How to value the improvements?", and it's morphed from that into, "How do you take into account the restrictions in the lease?"

The argument that was before Justice Courtney was that the improvements could not be valued on a market basis because there was no market for the separate sale of improvements, not attached to land, and therefore the proper method of valuation was a depreciated cost, replacement cost method, and that was the major part of the argument. Now I think I correctly interpret that my learned friend isn't still arguing that. But that's the context within which it came before the – certainly before the High Court, and might explain some of the wording of other provisions or other parts of her Honour's judgment.

It also to a degree, explains what the focus was of the value of evidence, which was, how do you value the improvements, and again the issue has become, "Well what are you valuing them against?" I suspect with respect that there's no difference, my learned friend has no difference with me that the value of the improvements is to be a market-based value, and in my outline I've explained how that's arrived at and that is that an improvement, to be an improvement, must add some value, sorry, an improvement to have a value, must add some value to the land as it would be without that improvement. Now that comes from *Cox* particularly, and *Cox* says at page 100, about halfway down, talking about the capital value and then the value of the improvements. "That value is the capital value into which the value or the improvements enters as an undiscriminated part. We deduce from this that in valuing the improvements for the purposes of these leases, the point of view of the melioration they effect upon the land, as land in an absolutely unimproved state, must be considered." And then goes on to say, "That one element of that, the test may be what a tenant would give if the existing tenant did not renew." The other part was the issue about the cost, and then at page –

ELIAS CJ:

Sorry, I was way behind, whereabouts on page 100?

MR CASEY QC:

It's halfway down page 100 –

ELIAS CJ:

Yes.

MR CASEY QC:

Oh yes, about half way down, the sentence commences, "The value is the capital value into which the value of improvements enters as an undiscriminated part".

ELIAS CJ:

Yes.

MR CASEY QC:

And then over the page – 103 I should say, where they answer the questions, question 2, which again is half way down page 103, "We consider the unimproved

value is to be arrived at by reference to its exchangeable value in money or its market value as explained with regard to the capital value. We speak of unimproved value is the value at the date of valuation of the land in its natural state, that is to say the value in its natural state, as for the time being, affected by intrinsic circumstances but not by what has been done to it or upon it, in the shape of improvements of any kind." Now you'd qualify that and say, "Well instead of in the shape of improvements of any kind, it would be improvements of the kind that are described in our lease as being substantial improvements of a permanent nature."

So the method that the Board's valuers adopt is to again value the comparable freehold properties as developed properties and then to assess what the value of the land of that market evidence, or market sale would be, if there were no improvements, and that gives them the value of the improvements on that land, and it gives them a market base for valuing the improvements on the subject land, and they use the – that rate method, to – as their comparability test. And my learned friend spoke about the significant disparity between the lessor's valuer and the lessee's valuer in the Carter arbitration. There weren't as it turns out, a cast of thousands of valuers; there was just one valuer on each side. And the difference between them was accounted for in the fact that the lessee's valuer applied this depreciative replacement cost method, whereas the lessor's valuer applied a method of valuing improvements on comparable freehold land and transporting that value to the Carter property.

YOUNG J:

How did he do that?

MR CASEY QC:

Well this –

YOUNG J:

Sorry, I mean, how did he value the improvements on comparable free –

MR CASEY QC:

Yes, that's the point. What he took was an assessment, a judge – a value as judgment of what the other freehold land would be worth in its unimproved state. Therefore –

YOUNG J:

Isn't that a sort of pig on pork? Because why couldn't he just do that directly with the subject site?

MR CASEY QC:

Well he's not allowed to. The lease doesn't let him do that. He's got to value the improvements and deduct the value of the improvements from the capital value.

YOUNG J:

Oh I see, all right.

MR CASEY QC:

And that's the difficulty that's - my learned friend calls it circularity, it's not, but if you were to value the improvements on the subject site by valuing the subject land as if it was freehold and unimproved, then you would be introducing the circularity. But what it's doing, is it's getting a comparability, because you can have other land that's got nothing like, the land itself is nothing like the leased land, but the improvements are very similar, and so you could have other – I'm just speculating here, I'm not trying to give valuation evidence at all, but if you've got similar improvements then you may be able to get a broader range of valuation evidence than just going to other leasehold sites, or strictly comparable freehold sites. But that's the way it's done, and that's to arrive at a market value basis for the improvements.

TIPPING J:

The problem is, at the first step there's no severance, at the second step there must be severance in terms of the formula. That's the reality of it. The first step, as the Judge said in *Cox,* the improvements of an undifferentiated part of a whole, whereas at the second step in our situation and in *Cox*, they've got to be given their own independent value.

MR CASEY QC:

They've got to be given a value, and what *Cox* says is that value must be a value in exchange, a market value, and that then becomes an exercise for the valuers, as to how you do that. Because it's correct to say that you won't find those improvements transacting separately from land unless there was a market in the sale of these leases for example, which you might be able to explore, but there's no suggestion at this stage the current market allows you to do that. And –

WILLIAM YOUNG J:

But there will be a market for the sale of the leases isn't there?

MR CASEY QC:

Yes –

WILLIAM YOUNG J:

These properties are bought and sold all the time.

MR CASEY QC:

Oh yes, yes, they are, but at the relevant time when the lease – when the lease itself is of neutral value, because as you know over 21 years, as you progressively –

WILLIAM YOUNG J:

Yep, the lessee's interest, sort of ebbs and flows a bit on this property?

MR CASEY QC:

Yes that's right ...

McGRATH J:

Are you saying there's no market for unimproved leasehold?

MR CASEY QC:

No, no, what I'm saying is there's no ready market for the improvements standing on their own.

McGRATH J:

No, of course.

MR CASEY QC:

And the cases in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, as one of them say, "Well it's not for the Courts to tell the valuers unless the valuers go completely wrong, as to how to go about that exercise. The argument in *Cox* was it's based on cost, and the Court in *Cox* said "No it's not, it's actually based on market value, the cost can be a consideration, or replacement cost." And that's why in her Honour's decision in the High Court here she hasn't purported to say how it should be done,

and the fact she said, you can't say how it must be done because market circumstances can alter. There was a time immediately post-war where in fact the value of improvements, or improvement, were significantly more than the replacement cost, because the difficulty of getting houses built meant that people paid a premium for an existing house, over and above what they paid to replace, or what would the replacement cost have been. So that can also fluctuate over time, and of course these leases are set to take a long time, set in place for a long time.

WILLIAM YOUNG J:

Just going back to how the Board's value are operated, does he, when he looks at the other properties, say, "Well what would this property sell if it was vacant?"

MR CASEY QC:

What would the bare land value be of that property? Yes.

WILLIAM YOUNG J:

All right, so essentially they are doing by proxy, what the lessee say they are doing, they are valuing – well although they're not doing it sort of directly by reference to the subject property, they are in reality, looking at a bare land value.

MR CASEY QC:

They're looking at a bare land value for the land that was sold.

WILLIAM YOUNG J:

Yes.

MR CASEY QC:

To try and – effectively, your Honour, to try and apportion the sale price between the land on its own without the improvements, and the improvements, so that they can arrive at a value for the improvements, given that the only value of the improvements is the value they add to the land without them.

WILLIAM YOUNG J:

Yes.

MR CASEY QC:

It's the only way you can do it. Now, what that then leads to of course, is, "Well what is the assumed state of the land when it's being valued, or a portion of the purchase price is being attributed to it, in its vacant and unimproved state?" Now my learned friend has referred you to the Australian, is it *Maurici*, case where there was some criticism of valuers adopting sales evidence of vacant land in Hunters Hill in Sydney, because of its scarcity value. Well, valuers know how to deal with premiums or discounts that might be applied in a given situation. You can't, and it's readily accepted, that you can't value the land with some scarcity component, because there aren't – there isn't a market, or there aren't many sales of vacant sites, because there aren't the vacant sites. But that's commonplace, I mean valuers are always adjusting for unusual market conditions, up or down. If it's a distress sale, they'll adjust for that, if it's a neighbour wanting to expand, they'll adjust for that and if there's a scarcity component in the sale, actual sales price of vacant sites, from which they might be deriving their vacant sales evidence, then they adjust for that.

TIPPING J:

The problem in *Maurici* was the lack of comparability, as I read the case.

MR CASEY QC:

Yes, that's right, your Honour, but partly because in *Maurici* the land that was – the land that had transacted was vacant land and it was in scarce supply, and so it was sold for a premium.

TIPPING J:

Yes. But it's axiomatic that you – you've got to try and find the closest comparable you can, and sometimes you can't find an exact comparable.

MR CASEY QC:

No, and that's the skill of the valuer then, to make the adjustments that they do, and that's their judgment. But the point that that leads onto then, is that if the land is vacant and unimproved, then it's available to be used for its highest and best use, and will transact on that basis. Now –

TIPPING J:

This highest and best use concept is really another way of simply saying, you must bear in mind the potential, is it not?

MR CASEY QC:

That's right. The potential for the land to be used for some other use that is more valuable or more profitable.

TIPPING J:

Within the current and foreseeable value and other limitations?

MR CASEY QC:

Well that's right. Everyone agrees it's subject to the limitations that may be imposed by valuation – sorry, by zoning, I should say, and extrinsic constraints, but that is the value of the land and if you then go and carry out important – effect an improvement on that land, while your improvement might add to the value it might also limit your ability in future to use that land for another use that might at a future date be its higher and better use.

So my argument is that that is a function of the improvement and to the extent that it might detract from the value of the land without that improvement, it is accounted for in the value of the improvement, not accounted for some how in depressing the value of the land without that improvement.

TIPPING J:

If – can I put this to you? If the highest and best use that is permissible within the extraneous, or extrinsic limitations, could only be achieved by say, demolishing what's there already, would you not value that potential, bearing in mind the cost of achieving it?

MR CASEY QC:

You would when you came to the gross value.

TIPPING J:

Yes, for the gross value.

MR CASEY QC:

For the gross value, that's right.

TIPPING J:

Yes, that's what I'm referring to.

MR CASEY QC:

Yes but when you then split, when you then split out the improvement because, bear in mind, it's because the improvement is there that the land value, or that the land can't be used for its highest invest value, that's a function of the improvement. It doesn't go to the value of the land absent to that improvement, without that improvement.

TIPPING J:

Well it doesn't go to the value of the improvement per se.

MR CASEY QC:

Well, it impacts on the value of the improvement because it might depress the value that that improvement would otherwise have.

ELIAS CJ:

It might remove the value of the improvement, at the second stage.

MR CASEY QC:

Yes, it could actually render the improvement of no value at all.

ELIAS CJ:

Yes.

MR CASEY QC:

I also acknowledge, in my written submission, that it actually might exceed what might otherwise be regarded as the value of the improvement and result in a gross value that is less than the value of the land if it didn't have that improvement on it at all. That's conceivable; it's probably not contemplated, but it's conceivable.

ELIAS CJ:

Sorry, just say that again a little more slowly.

MR CASEY QC:

You might have built something on the land –

ELIAS CJ:

Yes.

MR CASEY QC:

– which one would otherwise expect it to have a value but because it is so limiting on the future use of that land –

ELIAS CJ:

Yes.

MR CASEY QC:

– it actually results in the gross value, that is the capital value, being less than the value of the land without that improvement at all.

BLANCHARD J:

Well that's your demolition cost.

ELIAS CJ:

Yes.

MR CASEY QC:

That may be so.

BLANCHARD J:

Because you'd solved the problem by demolishing the building.

MR CASEY QC:

Yes, yes but some of the cases and I think – I'm not sure whether the *DIC* was one of them, the arguments are that because you can't demolish the building because it's got a Heritage listing, you actually end up with land worth less with the building on it than it would be without it.

TIPPING J:

Yes, if you can't demolish then you've got another problem.

MR CASEY QC:

Yes. So the –

TIPPING J:

But what I'm having slight difficulty with Mr Casey, let's assume you can demolish in order to achieve your potential. Obviously the costs of doing that have to bear – the potential, has to bear in mind the costs, we've agreed on that, but why does that necessarily mean that the improvements, viewed in isolation, cannot have a value?

MR CASEY QC:

Well, I don't want to be seen as agreeing with your Honour about the demolition cost in the context that it might be used differently. I'm agreeing with you that when you come to value the capital gross value and you are factoring in the potential for the use of that land for a higher and better use, then a purchase would factor into the purchase price paid –

TIPPING J:

We're ad idem on that.

MR CASEY QC:

Yes.

TIPPING J:

That's the first step.

MR CASEY QC:

Yes.

TIPPING J:

Now, I'm looking at the second step. Given that it's a minus in the first step, does that mean that it has to be of no value at the second step? That's the part I can't quite see.

MR CASEY QC:

Well, there are two possibilities here. One is that even after the cost of demolition is factored in by the perspective purchaser, the improvements have a net added value to the land. So that let's – I hate to use numbers but let's say that the land, without any improvement at all –

ELIAS CJ:

Well it impacts on the gross value.

MR CASEY QC:

It impacts on the gross value but it's –

ELIAS CJ:

But it still may have value. The improvements still may have value.

MR CASEY QC:

Yes.

TIPPING J:

Yes.

MR CASEY QC:

There may still be a net benefit of having that improvement on the land because the land is worth more, even despite the fact that you'd have to demolish the building to capture its full potential, than the land without that improvement. I've just said hypothetically you could get a situation which is worse than that, where having the development on the site actually makes the land with the development worth less than the land would be without it but I say, that's a very hypothetical position and not contemplated by this lease but I'm not dealing with that, I'm more dealing with the situation where you then notionally remove, for the purpose of the exercise, the improvement from the land to arrive at land in the condition that's contemplated by the lease which is land without the improvement. You do not notionally demolish the building to arrive at that value.

Now that comes through in the *S & M* case and I want to take you there in a minute but just –

TIPPING J:

No but you don't notionally do it but if to achieve the highest and best use it requires demolition, you have to do it, surely?

MR CASEY QC:

That's, that's, no –

TIPPING J:

You can't have your cake and eat it.

ELIAS CJ:

No, it diminishes the gross value.

TIPPING J:

Yes.

MR CASEY QC:

It diminishes the gross value by diminishing the value of the improvement, not the value of the land. It is accounted for in the value of the improvement, not in the value of the land without the improvement because it's a function of the improvement that you would have to demolish it to come back to land without the improvement.

TIPPING J:

Well I don't really mind how we get there but if I'm going to buy something to do something like say, put five units on here and in order to achieve that I have to demolish, I'm going to factor that in in my purchase, aren't I?

MR CASEY QC:

Yes, that's right and so –

TIPPING J:

So we're really ad idem I think.

MR CASEY QC:

Yes but I need to be careful that I don't let you lead me into, or you don't misunderstand me to say that when you're then looking at the bare value, that is the value of the land vacant and without any improvements, that somehow has factored into it a demolition cost to arrive there.

TIPPING J:

Oh no, I wouldn't do that because if it's ex hypothesi bare, there's no demolition required.

MR CASEY QC:

That's right, so the point you end up with and the point that *Cox* and *S & M Properties* both come to, is that the land without the improvements, or the land without the value of the improvements, is the same thing.

Now, I just need to explain why you see in some of the valuers' evidence that they talk about assuming the vacant land to be in fact occupied but without – so what they have said is, we look at comparable land as if it was improved but without the value of the improvements and this is this occupied site thing that some of the – that Mr Gardner's evidence refers to and I've pointed out, in fact the evidence he gave in *Carter* which is recorded in Mr Gribble's award, says he, actually talked it as being unoccupied, not as occupied. So there's some confusion there but what those – what they haven't factored in is the clear statement in *Cox* that I just referred you to and also the *S & M Property* decision and, would have to say, that as this case developed through the next level which is in the Court of Appeal, that became more of the focus, now what are they notionally valuing, when they are getting the sales evidence valued to separate out the value of the improvements.

The argument then was well, if you, by deducting the value of the improvements all you deduct is their value not their existence and if you read the *S & M Properties* case and also read *Cox* again, you will see that that argument was advanced and rejected in *S & M Properties*. By deducting the value of the improvements, you also notionally remove them from existence. That's where the valuers were wrong, if they didn't go that far.

Now my learned friend said that this question of highest and best use wasn't raised in argument in the Court of Appeal. I just need to correct that. It was and kindly he's lent me a copy of my written submission which I didn't bring with me and I did refer to it, both in written submission and my recollection is it took a bit of time in the Court of Appeal, I mean, the Court didn't come out with that phrase without it having been a matter of some discussion in Court, where as a result of this movement away from the question of how do you value the improvements, whether you value them by cost or not, to what are you then valuing as the notional residual. It was that you're not – you simply, the disregard you have is not just for the value but also for the existence of the improvements, and if you disregard the existence of the improvements, then you're left with land in a state where it can be used, or sold, for its highest and best use and therefore its value is based on its highest and best use.

TIPPING J:

It would be an error, wouldn't it, to try and value the residual? The residual is the product of two earlier valuations?

MR CASEY QC:

Yes, that's right. But why it becomes an issue is, I think the point that his Honour Justice Young touched on, which is that what you are valuing, or what it applies to is the land that makes up the sales evidence, so that you arrive at a notional splitting of the purchase price, the sale price of that evidence, what is the assumed state of the land of the sales evidence from which you then value the improvements that will apply to the subject site. And probably you have the same assumed state of the land, being the land on the sales evidence and the land in the leased site, that is the residual ends up at being either the same as or close to, a value of the land in its vacant and unimproved state.

Now the issue then was obviously the Court of Appeal said, "Well it won't necessarily always produce that result, it won't always produce the result that the leased land, the residual". I say the residual figure the residual land value, under the lease, will not always equate to the land in its vacant and unimproved state. But it's likely to.

WILLIAM YOUNG J:

It almost always will, won't it?

MR CASEY QC:

Almost always will. And I've given three examples and circumstances at which it might not, but it almost always will. The way that the declarations were originally sought before her Honour in the High Court was a declaration that it would not result and she of course rejected that. The Court of Appeal said, "Well it may or it may not, and it won't necessarily result, but it doesn't need to the subject of any declaration," which in my respectful submission is right. There's no controversy about that. It wasn't the matter that was in controversy in the proceeding.

So the issue that that then leaves, is coming back to my learned friend's point, which is to get away from or to get around the problem that the residual value of the land will be something either at or akin to, its value as vacant and unimproved and therefore available for its highest and best use, is to import into the exercise the user

restrictions that are in the lease. So that is his way of getting away from the result that the residual value will be effectively a highest and best use value.

Now his argument of course is to say, "Well *Cox* doesn't exclude that", or "I can get around *Cox*". In my respectful submission, *Cox* is on all fours. What you don't have in the report is the actual terms of the lease in *Cox,* and I've struggled to try and find it. My learned friend says that the terms of the lease are actually in the bundle, and he's referred you to a lease that's in the bundle; that was not actually the *Cox* lease – it was a form of lease that was submitted by the plaintiff's, the appellant's, counsel in opening, as being a lease under the West Coast Settlements Reserves Act.

WILLIAM YOUNG J:

So that's a lease under the successor for the *Cox* type lease?

MR CASEY QC:

Yes. The West Coast Settlement Reserves Act has got provisions in a schedule that require certain things to be done with the land and therefore there are user covenants and user, I would say, user restrictions, they're quite – they're quite, I use the word stringent if I may. Things that had to be done with the land. At least under our lease you didn't have to do anything at all if you didn't want to.

BLANCHARD J:

Have we got the *Cox* lease somewhere?

MR CASEY QC:

No, no we don't, but I do have a copy of the Act, which –

BLANCHARD J:

That might be helpful.

YOUNG J:

Well wouldn't it have been prescribed by – weren't a lot of these leases prescribed – in a form of a –

BLANCHARD J:

A schedule to the Act probably.

MR CASEY QC:

Yes.

WILLIAM YOUNG J:

Either a schedule to the Act, or prescribed by the Public Trustee.

BLANCHARD J:

Yes, regulations.

MR CASEY QC:

It's on page 79 of the copy that you have, "Occupation and Improvements", and at paragraph 54 of the schedule, clause 54 of the schedule. So there's an obligation to reside on the land, which presumably would've required the construction of a dwelling, and at 55 an obligation to bring it into cultivation progressively and to spend a pound for every acre of the land within six years. So there were user obligations ...

WILLIAM YOUNG J:

It's a funny statute, because the schedule just follows on in the same numerical sequence as the sections.

MR CASEY QC:

Yes.

WILLIAM YOUNG J:

What's the status of the schedule, is it a – are they deemed lease conditions? Or they're not – it does seem more like a statute doesn't it? These seem to be enactment provisions rather than –

MR CASEY QC:

Look, I have to be honest and say, I haven't been able to find a clear link through –

WILLIAM YOUNG J:

Yes.

MR CASEY QC:

From this, to a particular lease that isn't similar to the one that you see in the documents, which doesn't specifically import all of these. But of course the lease that we have in the documents was actually entered into I think after the *Cox* case itself, so I'm assuming that the *Cox* case refers to the lease entered into under this Act or its 1913 successor. Now the other point of –

TIPPING J:

I see if two lessees marry, then they're given the benefit of being able to decide which one they're going to live on. That was very perspicacious.

WILLIAM YOUNG J:

It's if they lawfully intermarry.

TIPPING J:

Lawfully intermarry, yes.

MR CASEY QC:

Yes, I wonder what the statutory policy was there.

TIPPING J:

I'm sorry Mr Casey, that's quite irrelevant.

MR CASEY QC:

Yes, my learned friend referred you to the head-note from *Cox* and said that the provisions of the renewal, or the valuation, didn't refer to fee simple. I note that at clause 56, when it talks about the valuations that are to be made, it does talk about the value of the fee simple of the lands then included in the lease.

TIPPING J:

It seemed to me, looking at this renewal section, that for all practical purposes, it's the same as what we've got in the lease before the Court.

MR CASEY QC:

Well I think even more than for all practical purposes, I think almost verbatim.

TIPPING J:

Yes.

MR CASEY QC:

And *Cox* itself refers to there being a direction that it be the fee simple, and that could only be, I think, by reference to that direction there. Because the actual part of clause 56 that is referred to in the head note, is the last part over the page, which talks about "Five pounds percent per annum on the gross value of the lands after deducting there from the value of the substantial improvements as fixed respectively by the arbitration", but it's the earlier part of the clause that makes it clear, that's the fee simple.

TIPPING J:

The drafter of 56 has got the same "then-itis" –

MR CASEY QC:

Yes.

TIPPING J:

– as the drafter of the lease before the Court.

MR CASEY QC:

That's right. That's why I thought I'd point that out.

TIPPING J:

Yes.

MR CASEY QC:

Now my learned friend sought to make some point of the distinction that occurs, or the difference that occurs in some of the statutory directions in other statutes as well, and the chronology or the table at tab 7 of the appellant's bundle, of the respondent's bundle I should say, what you see there are there are two quite distinct types of provision. One is where it is very similar to *Cox* and to our lease, which talks about a valuation of the fee simple of the lands then included in the lease, and the other is where it's talking under the valuation of Land Act, or its equivalent, where it talks about the value of the owner's estate or interest in the land.

So for example, the Valuation of Land Act 1951, "The capital value of land means the sum which the owner's estate or interest therein would fetch," and it's in that context

that it talks about as if encumbered, sorry, if unencumbered by any mortgage or charge thereon. So where the estate or interest of the owner is being valued, then it goes on to say, "If unencumbered, where the valuation is for the purposes of a lease," as is ours. It talks about the fee simple of the land, not the estate or interest of the owner.

Now, that distinction between the owner's estate or interest and the land is drawn out in a number of cases. Now, *Valuer-General v Radford and Co Ltd* [1993] 3 NZLR 721 was one where it was just the estate or interest because it was a valuation case. The *Valuer-General v Lalich* (1981) Land Valuation Cases 901 which is tab 1 of the respondent's casebook and that was Justice Bisson and Mr Frizzell, the valuer. If you go to the second page, page 904 of the report, the last paragraph, "When land is valued for the purpose of fixing a rental based on capital value for the purposes of a new lease to be entered into, the valuation is quite clearly that of the capital value of the fee simple estate of the intending lessor because at that stage the land is not subject to a lease at all." And over the page, "Put simply, the owner's estate or interest therein are exception to the valuation at when the capital value is required to be for a new lease or the revision of rent under a lease or a renewal of lease, must clearly be interpreted as relating to the fee simple estate of the owner because it's his interest in the fee simple," the 'and' I think is probably a mistake, "Which is being leased and which must be valued for fixing a rental under that lease. The lessor is not leasing his revisionary interest –

TIPPING J:

Reversionary that should be.

MR CASEY QC:

I think that must be reversionary. Faulknor to the same effect. *Re an Arbitration between Napier Harbour Board and Faulknor* [1930] NZLR 184 is the next case at tab 2 at page 188 to 189, the decision of Chief Justice Myers. At the bottom of page 188, quoting from the *Brechin* case, "The valuers are required to determine not the value of the lessor's interest in the land (exclusive of buildings), but the value of the land exclusive of buildings."

TIPPING J:

Where are you reading from, I'm sorry?

MR CASEY QC:

Bottom of page 188 of *Faulknor*.

TIPPING J:

Bottom.

MR CASEY QC:

And then further down on the opposite page, 189, "The existence of the lease is not such a matter as the Court in *Cox v Public Trustee* had in mind as being included in the expression 'extrinsic circumstances'." And at the next paragraph, "The umpire's view that the unimproved value of the land, he reduced his valuation because of his view that the unimproved value for the purpose of clause 9 must be reduced by reason of the restrictions of what he calls a continuous lease. In my opinion, his award is based on a role in view of the construction of the lease."

And similarly in *Plested*, which is the next case, which distinguishes and this is at page 6, the bottom of page 6, line 45, 46, the judgment of the Court of Appeal, "Reference was made in argument to the judgment of Greig J and the Valuer-General in *Valuer-General v Radford* [1993] 3 NZLR 721. The main issue before the Judge in that case was whether the burden of existing leases should be taken into account in valuing the fee simple interest for the purpose of Valuation of Land Act 1951. That again is not an issue relevant to the present case so far as Justice Greig held the redevelopment potential was properly taken into account. His judgment is in accord with the present judgment." So, redevelopment potential being presumably highest and best use.

Now, *Juken Nissho Ltd v Attorney-General* (CA 93/99, 22 March 2000) is interesting. That's the decision of the five-Judge bench of the Court of Appeal because the argument there was that the valuation provision should be interpreted as the estate or interest of the lessor, rather than the land itself and the Court said at paragraph 13 on page 6, about eight lines up from the bottom, "It would be nonsense to suggest that where the methodology adopted was the acceptable one of applying a percentage the value of the land, the value to be assessed is the lessor's interest in the land, or the land encumbered by the lease." Now the other thing that's of interest in *Juken Nissho Ltd v Attorney-General* is that the Crown forest licence provision is included, and if you go back to page 3 of the judgment, bottom of page 3, where the definition of land value is relevant. "The sum of the land, if unencumbered by any

mortgage or other charge, might be expected to realise at that review date," and it was that part that the Court was there referring to because you go onto the next part of the definition, and there is express provision for adjustment of the land value to take into account the terms and conditions of the licence.

So we have an example there of somebody actually turning their mind to the very issue that's been raised here and saying, "well, you take into account the terms and conditions of the licence where it's expressly said that you do so" and we'll issue for licence release. And the issue there was - I see that two of your Honours sat on the Court and one of your Honours was involved as counsel, so you're probably much more familiar with it than I am - but the issue there was that first part, how do you value the land? And the argument was, well you value the land in some way as if it's encumbered by the licence, and the answer was no.

TIPPING J:

Is the point perhaps more subtly put, but equally put, by the land as not subject to the lease? It's the landlord's interest that's subject to the lease.

MR CASEY QC:

Now my learned friend has referred you to a number of cases where the land has been interpreted as being the land subject to the lease, and I want to get onto that position and that line of cases now.

My first point, of course, is if the valuation was to be of the land subject to the lease, then it would raise a number of other issues, not just this question of the user restrictions in the lease. For example, is what you are valuing the lessor's reversionary interest? Because if you're saying that it's the fee simple estate but encumbered by the lease then, effectively, that's what you would be valuing, the lessor's reversionary interest. What adjustments would you make to the value of the land to reflect the fact that the 5% rental rate might be well below or well above a market rate of return? Would you increase the value of the land so that the – if the 5% was low, so that the return was a fair market return on the lease? Would you reduce the value of the land if the 5% was higher than the market? Because that's another term of the lease, just as are the user restrictions. So you get into a whole complicated argument about what particular provisions of the lease do you take into account and my submission is, you can't cherry pick and just take the one that suits the lessee, which is the use restriction.

What about the fact that under a lease like ours the lessee is protected from the effects of inflationary changes for the next 21 years? Should that result in the land value being increased? I think because that's clearly to the lessee's advantage more than to the lessors.

The approach taken by my learned friend is based on the two New York cases in the *Revenue* case in Ontario, and the *Plaza* case, which seems to be the one that at least started, is, it says that, in New York at least, "Valuations of land must take into consideration all encumbrances, including restrictions as to use, unless there's a clear provision to the contrary." And that case is followed in the *936 Second Avenue* which is, I think, the last table in my learned friend's bundle, supplementary bundle, although in its analysis in that case the Court qualifies that statement by, "When the language of the lease so dictates," and that's what the Court said in the 936 Second Avenue case. But what those cases all describe and, effectively, as the default provision, is a value in use. That is, what is the value of this land in use, and the use under the lease? In New Zealand, on the other hand, the Courts have almost without exception held that the valuation is to be its value in exchange, and there's a difference between the value in use and the value in exchange. Now, other jurisdictions have also chosen value in exchange over value in use, and that also of course includes the *Bullock* case –

BLANCHARD J:

What is a value in use?

MR CASEY QC:

Well, that's – I imagine that's what my learned friend is describing. A value subject to the use that you can make of the land.

McGRATH J:

So it's the value of a right to use the land.

MR CASEY QC:

Yes, or the value of the land being used for that use. Now, when –

WILLIAM YOUNG J:

It might correspond to a rental value, a market rental value.

MR CASEY QC:

It could be the same as a market rental value, when you're taking into account the terms and conditions of the lease as part of your market rental. So that would be an example of valuation or value in use.

Now, in the *Bullock's* case, if you've got the Westlaw report that was handed up this morning, which is a little easier to read, I hope, and if I can ask you to turn to page 4 …

ELIAS CJ:

Sorry, you'll just have to give us a moment, or me a moment anyway.

MR CASEY QC:

Either copy. I'm referring to the right-hand column –

ELIAS CJ:

Yes, I have it, thank you.

MR CASEY QC:

– after footnote 2, where it starts, "Appellants properly point out that, 'value' means 'value in use', i.e. the utility of an object as well as value in exchange, i.e. an object's worth in terms of marketable price. But it's clear that the parties did not intend 'use value' in the rental provisions. The lease calls for a determination of the value of the land, not the value of the use of the land for any particular purpose." And then, two pages further on, page 6, the first main paragraph on the left, "The cases relied upon by appellants are not in point, they deal with rental value, the value of the use of the land any purpose for which it is adapted." So there's a clear distinction being drawn in that case between what I've just referred to as "value in use" and "value in exchange". Now, the *Musqueam Indian Band v Glass* [2000] 2 SCR 633 case, which is in the respondent's bundle at tab 5, also picks upon this distinction. Now, *Musqueam* takes a bit of reading. There are three judgments, but I'm really just referring to the first two. The Chief Justice wrote for what was the minority in the outcome, and Justice Gonthier wrote for the majority in the outcome, or the plurality; it gets very complicated, and the issue of the difference between them was whether you value the land as being in an Indian reserve or as its equivalent value if it wasn't in the Indian reserve, and that's what the difference was between them. But on this

particular point that I want to make, they were ad idem, which is that the value was to be the value in exchange.

And if I can take you first to paragraph 35, which is on page 658, and that's part of the plurality or the majority judgment of Gonthier, and much of this is actually referred to, reproduced in my written submission. At 37 it talks about what value is, and then 38 talks about market value generally being the exchange value of land rather than its use value to the lessee, and refers directly to *Bullock's*. It goes on further down that passage, "Land is valued without regard to the tenant's interest in it, for it does not reduce the land's exchange value if the tenant chooses not to use the land for its highest use." And then if you go back a few pages to page 646, on the left-hand column, what is paragraph 13, but the one I think has been obliterated in the copying, and this is the Chief Justice's judgment, speaking on behalf of the minority in the outcome, but in common with the plurality or majority judgment, halfway down, or the last sentence on the left-hand side of 646, "As he states, calculating the fair market value," and she's talking there about Justice Gonthier, "As he states, calculating fair market value requires determining the highest and best use for the land that is legally permissible, disregarding any restrictions imposed by the lease itself."

Now, in my submission, those judgments, and also the New Zealand judgments, with respect, provide a proper rationale for the approach they take. The American, or the North American judgments provided by my learned friend, don't seem to provide the same economic analysis and, with respect, the rationale that is adopted in New Zealand and in *Musqueam* and in *Bullock's* cases are probably the better ones to guide the law in New Zealand, particularly as they have guided the law for so long. So, the New Zealand cases are the ones I've already referred Your Honours to, which is *Cox*, *Juken Nissho* and the others that are in that first part of the respondent's bundle.

TIPPING J:

Does the use value, in effect, require capitalising the rental stream? Is that what they're effectively talking about? I think so, yes.

MR CASEY QC:

Or the use to the lessee.

TIPPING J:

Yes. You've got to reach a figure, a sum, which represents what the lessee would pay to acquire use under the particular lease. So you have to capitalise.

MR CASEY QC:

Yes. It's not entirely clear what it would amount to.

TIPPING J:

Well, perhaps we don't need to divert ourselves too much by that, Mr Casey, unless you've got an immediate and simple …

MR CASEY QC:

Well, no, I don't. What I have is evidence from the lessees, where one of their witnesses talked about valuing the in use or lease restrictions and said that would have to be a matter of assessment, because there's no market evidence of it, and that was Mr Seager at page 114. And then Mr Darroch was a bit more direct, he said that, "The next step is to adjust that value, taking into account the terms of the lease. That involves a reduction in value in those areas of accepting the property in an as occupied condition and with lease restrictions. Valuers are more likely to disagree about the level of those adjustments which are needed to be applied to the market derived gross value of the fee simple." So there's a high level of – and he says, "In these circumstances, a level of subjectivity will almost certainly apply." So there's no strong valuation support for an in use value approach.

TIPPING J:

But there's no question that we have an exchange value here.

MR CASEY QC:

We've got an exchange value.

TIPPING J:

Yes.

MR CASEY QC:

Now, the second point about those North American cases that my learned friend relies on – oh, sorry, I just want to make – the *Commissioner of Crown Lands v Minaret Station Ltd* LVP 2/05, 21 July 2009 case was an example of a valuation in use. Now, the *Minaret* was the Land Valuation Tribunal case in New Zealand where

the Tribunal decided that the statutory purpose of the lease meant that it should be valued as on an in use basis. And you could similarly perhaps argue that the *Trees* case, the *West Coast Settlement* case, because of its statutory framework, although it didn't go to an in use valuation, but it took a different approach because of the statutory regime that I think your Honour Justice Blanchard referred to earlier.

BLANCHARD J:
I'm now wondering whether the statutory regime was actually different from *Cox.*

MR CASEY QC:
Well, yes, but the question, the question at issue was a different issue.

BLANCHARD J:
Mmm.

MR CASEY QC:
The question at issue was how do you, how do you value the improvements by reference to the cost of removing versus the value of the trees in situ. So, I was going to say secondly, the North American cases say that their approach, the approach they take, is subject to any contrary direction in the lease and in my submission, the Board's leases do contain a contrary direction. Their direction is that the value is to be of the fee simple, not of the land, or not just of the land and not of the demised land. Now, in my respectful submission, fee simple is not susceptible of any meaning other than the highest estate not subject to any encumbrance or constraint, or to any lease and as my learned friend argues that fee simple, in this case, is encumbered by a lease registered on the title, yes, the lessor's estate or interest in the land is encumbered by a lease on the title, but the fee simple isn't and that's the difference between valuing the estate of the lessor and valuing the fee simple and it would have to say that that meets that qualification that the North American cases mention.

The third point I've already covered is that the rationale is not fully explained in those North American cases, whereas it is in New Zealand and should be followed and the last point, not quite the last point, but the next point I want to develop is that the appellants overstate, in my submission, the use restrictions. Now, I touched on that before the lunch break and I provided you with a number of cases, which I now want to go through.

The, should I say, I don't accept that there is any force in the argument that the, that somehow or other the word fee simple is, or the term fee simple is to be, is to be diluted and that there is some scope for importing the use restrictions into the valuation exercise, but if one was to go down that path you would then get to the point that I want to get to now, which is, and I refer first to the *Burns Philp* decision. Now, that was a case –

ELIAS CJ:

Sorry, is this a fallback argument?

MR CASEY QC:

Yes, well, responding to my learned friend's point in a number of ways. In *Burns Philp, Burns Philp* the lessor purported to, or entered into I should say, a deed –

BLANCHARD J:

Do we assume that the appeal to the Court of Appeal that was allowed is irrelevant?

MR CASEY QC:

Yes, I've actually just, I've got that judgment as well.

ELIAS CJ:

If it's irrelevant, we don't need it.

MR CASEY QC:

No, I think it's only fair that you have it. The section that I was wanting to refer to is at page 636 and the decision of Justice Young in the Supreme Court was overturned in relation to the efficacy of the deed poll. He said that the deed poll was effective and this is why I said I wouldn't argue that the lessor in this case could simply announce to the world at large that it's prepared to let anything go, because that's effectively what the lessor did in the *Burns Philp* case and the Court of Appeal said they couldn't d that. That's actually been taken on board by the Court of Appeal in our country in the *Forestry Corporation* case which, if you want, I can refer your Honours to, but I think we're getting a little too far away from the point to do that. So lessor can't unilaterally purport to change restrictive –

ELIAS CJ:

Perhaps you had better give us a reference to the case anyway.

MR CASEY QC:

Yes, it's *Forestry Corporation of New Zealand v Attorney General*. Oh, actually no, it's the *Attorney General v Forestry Corporation of New Zealand* and it's at [2003] 1 NZLR 721.

ELIAS CJ:

Thank you.

MR CASEY QC:

And at paragraph 71 and 72 it refers to the *Burns Philp* case. Now, sorry, the point I wanted to come to which is entirely unrelated to any of that, is the observation by Justice Young, at page 363, where he starts off with the efficacy of the deeds poll and says this: "In one sense this question is of little moment because any valuer, when valuing land, takes as a factor in his valuation the potential use of the premises, as well as their actual current use. It may be that a valuer who values (a) a lease where there is no restriction on users or assignments/subletting and (b) a lease where there is such a restriction, but requires the landlord to act reasonably, will not come up with a materially different value for (a) and (b)." So, the high – effectively he's saying the highest and best use is likely to be the highest and best use that a landlord could not unreasonably withhold his consent for.

Now, in the Court of Appeal judgment, and it might be useful if I hand that up as well, that point is endorsed. Justice Mahoney said at page 646, line (d), the last sentence, "At the least it was envisaged that the rent should be determined upon the basis that the lessor could consent to an appropriate change of use." And at the bottom of that page, line (g), this is page 646, "As I have said in the assessment of the relevant rent, it's proper to take into account that the lessor may consent to a change of the user specified in the lease. The likelihood of his doing so at a particular time cannot be excluded as irrelevant. The weight to be given to it would, of course, depend upon the circumstances."

Now, I make the submission that where a rental is being valued for rent review or renewal purposes, the premises will be valued on the basis of the most profitable use, for which consent could not unreasonably be refused by the landlord and that will usually be the highest and best use. So, while my learned friend has talked

about these user restrictions, he hasn't gone on to the consequence, well so what, when we have this fully qualified, now fully qualified restriction.

I also refer to the *Aldwych Club* case, which I think I've also handed up, it's the LexisNexis report off the website and I apologise, it actually includes a number of typing errors, or transcription errors.

WILLIAM YOUNG J:

I might have some, I have got two copies, is anyone missing one?

MR CASEY QC:

In that case the lease provided for the premises to be used as a club and it was coming up for renewal and the question is whether it should also provide for a use as an office, or as offices and that would impact on the question of rent and if you go to page 4, it said about halfway through the first main paragraph, "The issue of substance is that of the rent, the amount of which must depend upon the nature of the restrictions on user to be inserted in the new tenancy. The tenant has in fact used the premises throughout as a club, but as I've said, the premises are appropriate to be used as offices. Planning permission has already been obtained for that purpose and the landlord accepts that it would not reasonably refuse consent to such an offer. The premises would be likely to command a higher rent for use as offices than as a club. This being the position, it seems to me that having regard to the terms of the current tenancy and the other relevant circumstances, the corresponding provision in the new tenancy should permit use as a club, or as offices without any exception on the part of a landlord." And then follows a matter of course, the premises would be – command a rent at the higher value.

Now the different rationale for other cases that my learned friend has referred to in New Zealand, are where the inquiry has been as to what is a fair market rent, and it's quite clear from those cases that you do take into account a rent of the premises for the term and on the terms of the lease. But this clause of course does not command a fair market rent; it has a specific method of arriving at the rental outcome. But even in those cases where we're talking about fair market rent, it is on the basis of the highest and best use that the premises could command, and the *S & M Property Holdings* case I rely on for that. And my learned friend I think has taken you to those passages where in that case there's reference to the ability of the tenant, the lessee, to develop the land and also to the interests of the lessor.

Now at 75, it's interesting what their Honours said there. They said no significant weight can be attached to the argument that before erecting any building the lessee is required to submit the plans of the building to the lessor for approval and said well the lessor has an interest in maintaining the value of the land, or the value of the reversion should the lessee surrender the lease or default in complying. Then at line 41 they say, "Thirdly, many if not most land owners should grant Glasgow leases, own substantial blocks land and have a direct interest in maintaining the value of their land as a whole." Now that would seem to be seen as a legitimate purpose for the imposition of use restrictions that kept the value of the estate, rather than the value of the particular land, and that's perhaps what can be said here, that the lessor's use restrictions are to protect the value of the estate, which is seen in *S & M Property Holdings* as a legitimate restriction.

The other point that my learned friend made before, what I think was in answer to one of your Honours, Justice Tipping's, question was about, "What if the zoning is changed to allow a highest and best use than the current zoning?" And he said, "Well that's not relevant because zoning's not an issue." Well it's actually a contradiction when it's accepted that any restriction that's imposed by the current zoning, impacts on the land value, if that restriction is lifted, so that there is a more relaxed planning regime, why isn't the lessor allowed the benefit of the lifting of that restriction if he had imposed upon him the limitation that that restriction imposed? So again it comes back to the highest and best use if that changes, as a result of extrinsic changes, whether it becomes more restrictive, in which case the lessor's value is – decreases, or less restrictive, then the lessor gets the benefit of that. And that's again, part of the rationale that's advanced for the highest and best use and for the use restrictions not to apply.

The other question of course, that leads on from that is, "What happens when the lessor is approached for his or her permission, and grants that permission to a highest and best use?" You would think that he or she was entitled to an increase in the rent, if the rent had been depressed because the user restriction meant it couldn't be used for that highest and best use without his consent. The section of the Property Law Act that I've referred you to says that the lessor is not allowed to grant consent on the basis of an increase in the rent. So the lessor is then left in the situation where the lessee being entitled to get consent to a highest and best use gets that consent, having, if my learned friend's argument is accepted, having had

the rental assessed on the basis without that consent, gets that consent, but the lessor can't recover a higher rent in return for it. Again that tells against my learned friend's argument.

Now the final point is that the bargain these parties entered into is what is in that lease, and the bargain was that for better or worse, the lessee would pay and the lessor would receive 5% of a value, or of a value difference, with the initial value being the fee simple and as I say, I think in my written submission, that might be warts and all, less the value of the improvements, and if one applies the correct test to how to value the improvements, you will end up with, or with something approaching, the land in its vacant and unimproved state. Not necessarily so, but likely to be so. And it can't be discounted or depreciated by the imposition of user restrictions.

Now the only other thing I was going to touch on was the demolition costs issue is also dealt with in *S & M v Waterloo*. Now I come back to your Honour Justice Tipping's point, I don't think we've got any different point of view here, I just wanted to draw your attention to what the Court there said at page 206, paragraph, that's part way through paragraph 81 at lines 10 to 15, and also at paragraph 82, about you don't factor in the demolition cost when you are taking the notional value of the land in a vacant and unimproved state, otherwise you get all sorts of differences, I mean like I had the same identical piece of property next door to one another, but someone's put an enormous house on it that cost a heck of lot more to demolish, and someone's put a shed on that costs nothing, well the value can't be different. And various other reasons as to why you don't do that.

Those were my main notes. There may have been other issues that have arisen during my learned friend's submission that you wanted to hear from me on. I know I haven't gone into a great deal of trouble telling you what fee simple means, but I suspect you wouldn't be assisted by me telling you that, but ultimately it comes back to, in my submission, the argument that when it says fee simple it can't be watered down.

The only other point that my learned friend may raise is this question of, "Well can this land be subdivided and if it's highest and best use is its potential for subdivision, does the lease allow subdivision, and does the Property Law Act require or import a fully qualified restriction that the landlord must approve it?" The Property Law Act

provision – sorry, under the lease there is a restriction on assignment in subletting, and that is covered by section 225/226. Section 225 talks about subleasing the types of covenant that the section applies to are transferring and assigning the lease, entering into a sublease, parting with possession of premises, changing use, creating a mortgage and doing any of those things in relation to any part of the leased premise. And a subdivision which would effectively be a partial assignment of the lease, is covered by that, a subletting or assignment of the lease, as to part of the premises, so the, if you like, if there is a prohibition on subdivision, or if the highest and best use was to somehow subdivide, then a cross-lease situation or a subletting of part of the property, would be covered by those sections in the Property Law Act.

I think I've already covered - my learned friend suggested that the Board's value was in their evidence, said that they do recognise the restrictions in the lease, they don't. Their evidence was about the occupied state of the land, not about the restrictions in the lease, I think I covered that earlier on. So unless there's anything that I can assist your Honours with, those are my submissions in addition to what I've already put in my written submission.

ELIAS CJ:

Thank you Mr Casey. Mr St John are there matters you want to reply upon?

MR ST JOHN:

Yes there will be. I want to go back to what my learned friend said about *Cox*. If I can just ask you to go back to that, because my learned friend pressed very heavily that the decision in *Cox* meant that the only way that you could value improvements was on that ameliorative affect on the land, and with great respect, that's not what Cox says at all. What *Cox* says firstly at page 95, is that no valuation –

ELIAS CJ:

So which volume is it again?

MR ST JOHN:

It's in the appellant's bundle.

ELIAS CJ:

Yes, thank you.

MR ST JOHN:

Tab 5. First, that *Cox* holds that no particular valuation method should be prescribed as long as accurate results are obtained. Then at the top of page 100, it says, "That it's not necessary the case that land value, plus improvements value, will be equivalent to the capital of the whole package." And this becomes quite important later. Because my learned friend has it, of course, that, and he put it that improvements in this case as the way the Board approaches it can only be arrived at by first arriving some hypothetical land value, and he says, "That's the only way that you can do it." If you come down, halfway down 100 in *Cox*, it says, "That one element or test of the improvements may be what a new tenant would give for them." At page 103, you'll see in answer to question I(b), it says, "The actual cost is not an exclusive test of the value of the improvements, but may be examined and considered as an element in determining or testing". And then there is the point that is made in *West Coast Settlements*, at page 431, that's in the appellant's supplementary bundle, at line 43.

TIPPING J:

Page?

MR ST JOHN:

Oh, page 431, Your Honour.

TIPPING J:

Thank you.

MR ST JOHN:

The response of the Court was to a plea by the Valuer General to remain – maintain uniformity of valuations, so there's a consistent internal logic. But the Court says, "Well unfortunately we can't", and it's the passage beginning. "Wherever land is subject to leases, and there is a need to value the separate interests of lessor and lessees, there is the potential for the values of those interests to be inconsistent from one property to the other because of the differences in the terms of the lease." And what this does is really underscore the difference between the appellants and the respondents in this case. What my learned friend urged throughout, is that if the property methodology is adopted, you will always end up with land in an unimproved state, which you then value as its best and highest use. But what we are not talking about here is land value, we never have been. We are talking about a residual value

and that's why it's always wrong for them to talk about land value plus improvements will equal capital value. That's a test carried out for the purposes of various statutes. What you have here is a residual after taking the gross and then deducting the improvements. And my learned friend was quite candid when you put to him, "Well how is the Board approaching this?" And he quite candidly acknowledged that what I said to you this morning the way they were approaching it, is what they are doing, they are starting with vacant land sales, and they are using that as the primacy of how they approach the total valuation.

YOUNG J:

That wasn't what I thought he said.

ELIAS CJ:

No.

YOUNG J:

I thought he said they took sales of comparable land and then adjusted the prices to take out what they considered to be the improvements. Now, it's a pretty big adjustment, but I took that to be his explanation of the Board's methodology.

MR ST JOHN:

All right. Well, what I took from the submissions that he made, was him saying that the way that the Board does it, is the only way that it can be done, and he said that he expected that I would acknowledge that the only way that improvements can be valued, is by market value, we don't make that concession that all. What is advanced by our experts, is that discounted cost is a perfectly valid method of valuation, and in this context is the most appropriate method of valuation. We all have to start from the proposition that you go back to with *West Coast*: that you may have two identical pieces of land but because of the particular provisions of the lease, will end up with different values, and we have here what is recognised by everyone to be a reasonably archaic and unfortunately worded lease, but it's the formula that's prescribed and what the Board want to do is start with the land value to arrive at improvements value and our whole point is that's what you can't do, and that was the point of the declarations before the Court. And the other thing my learned friend said, was that in the declarations that we sought, which are reproduced in our written submissions at page 8, sorry, where it is said, he said to you that we were seeking a declaration that the figure from deriving the improvements was never going

to be equivalent to an assessment of freehold value. He overstated it. All that we asked for is that it was not necessarily the equivalent, and one of the points –

ELIAS CJ:

Sorry, what are you referring to? Are you referring to page 8 did you say?

MR ST JOHN:

Of my written submissions.

ELIAS CJ:

Yes.

MR ST JOHN:

Where the three declarations that were refined in the Court of Appeal are reproduced, and my learned friend put to you that what we had asked for, and what we are submitting, is that the figure derived, or the residual figure will never be equivalent to an assessment of the freehold value of the land, but in fact all we're looking for was, an acknowledgement in that declaration that they're not necessarily equivalent. And we understand from what my learned friend says, and from their written submissions, that they actually make that concession, they put it a number of different ways, but they accept that the residual may be different from land value. And that's all we sought from the Court –

TIPPING J:

I don't think Mr Casey said that they rigidly had to be the same. He said that they were likely to be the same, and then a member of the Bench said, "Almost certainly". Mr Casey didn't say that they had to be the same.

MR ST JOHN:

No, no, I'm sorry Sir, I didn't mean to make that submission.

TIPPING J:

Well that's what I thought you were complaining about.

WILLIAM YOUNG J:

I think what you're complaining about is that he having made the concession –

ELIAS CJ:

He's attributed to you.

WILLIAM YOUNG J:

– you didn't get the declaration, is that right?

MR ST JOHN:

That's right. What he attributed to me mis-worded the declaration that we sought, that they were never going to be the equivalent. And the point that we make is that they may or may not be, all we ask for a declaration is that they're not necessarily the same. And we didn't ask to go any further than that.

TIPPING J:

Well Mr Casey doesn't suggest they'll all necessarily be the same, so there shouldn't be any argument about it.

MR ST JOHN:

Well that's the point that I make, that's why one of the questions that we ask is why these – for instance that particular declaration couldn't have been made in the first place.

ELIAS CJ:

Well why do you need it?

MR ST JOHN:

Because what we say, is the way that the Board is approaching this, is that they are trying to arrive at a valuation of land and what they are saying is that they're entitled to a rental based on the unimproved value of the land at its highest and best use, in comparison to what the lease says, which says that the rental is based on a residual of the gross after improvements are deducted. And we say those are two quite different things. And we've never said it any differently. How the valuers may go about doing that, we accept is necessarily a matter for the them, but we have said that our methodology is the most correct one, and the point that I was making at the beginning is that it is not right for my learned friend to say that *Cox* has said that you can't use any other method than what he described; in fact *Cox* says quite the reverse. And if you go back to, my learned friend was talking about the issue of use versus exchange, if you go back to the Canadian case, the *Musqueam* one, which I

agree is quite a difficult case to follow, and with great respect I don't think it's actually, when it's properly analysed, I don't think it's relevant to circumstances of this case, because this was a case not between lease and leaseholders, this was an issue of comparable valuations of this land, which was held by native title and that land which was not. And in this case you can actually see in *Musqueam* at 642, that the method of valuation, you'll see it halfway down the page, that the method of valuation in that case as between holders of the individual plot leases, the method of valuation, was very clear. Where this became an issue later, was actually valuing the land as compared to outside the – within the walls of Vancouver, but outside the native land district, was whether a discount should be apportioned because of recognising that native land in that context was subject to the possibility of different regulatory control, which the native land controlled.

But to take up my learned friend's point about use, if you go back to page 658, and it's the passage that my learned friend referred to, it's at paragraph 38, where it said, "Land is valued without regard to the tenant's interest in it for it does not reduce this land's exchange value, if the tenant chooses not to use the land for its highest use", that's the important passage and of course it cites *Revenue Properties*, which I impressed upon you before lunch, and of course when my learned friend tries to say, "Well these American cases are of no importance", they too cite *Revenue Properties*. And the point here is, is it not an argument about valuing use, it's an argument that we don't have the right to use the property to which they are valuing it. We accept that if we choose not to use the value at its highest and use the land at its highest and best use then we could hardly complain, but that's not the argument here.

My learned friend made reference, or it was, I think a response to Justice Young's question, necessarily about capitalisation of the rental value; you have the *Granadilla Limited v Berben* (1999) 4 NZ ConvC 192, 963 decision amongst your bundle.

ELIAS CJ:

Where?

MR ST JOHN:

That's number 9 of the appellant's bundle of authorities. It's again another decision of Justice Blanchard's and it's at the end of paragraph –

ELIAS CJ:

Sorry, can you just hold on a second because my bundle seems to have fallen apart a bit. What case were we looking at?

MR ST JOHN:

The *Granadilla* one Your Honour.

ELIAS CJ:

In the appellant's bundle?

MR ST JOHN:

In the appellant's bundle, at tab 9.

ELIAS CJ:

Well at tab 9 I have *S & M*.

TIPPING J:

That's probably – is that the supplementary one?

ELIAS CJ:

And I have a detached divider, but – doesn't matter.

BLANCHARD J:

It follows *S & M*.

ELIAS CJ:

Following *S & M* – oh here it is, the divider's come out, that's the problem, thank you.

MR ST JOHN:

And you'll see at the end of paragraph 10 where his Honour makes the point that a fair return on capital may be a little or no relationship to the market rent. And again, this comes into this issue that I've been trying to draw out of West Coast and the such like, is that this isn't a case about talking about what is a fair rental, we acknowledge that, and never said it was, and we say that adjusting the improvements or adjusting the gross, does not distort the bargain between the parties. The only point that we make is under section 13. That exercise has to be arrived at independently, and strictly in accordance with the lease, and then you'll have your residual value to which they can apply the rental figure. And once you

start taking the land at its highest and best use when those restrictions are in place, then it's the lessor that's to sort the bargain, not the lessee.

Now one of things of course that my learned friend said right at the end is, "That I might try and bring up subdivision". It's quite right that in the context of the Property Law Act there is ability of assignment and subletting, but that's obviously a different concept than actual subdivision as what some of the Board's valuers are contemplating, and so what you have is a difference between the Board's asserted ability to value the land as if it was subdivisible, when the lessee obviously can't subdivide the fee simple, and the most that they can come up with is potentially, cross-leases on head-leases of itself, I mean that's the same thing that I think was in the *Plested* decision which arose in that case.

ELIAS CJ:

Sorry, I'm a little lost with that submission.

MR ST JOHN:

Well my learned friend is talking about how I might want to bring up the issue of subdivision.

ELIAS CJ:

Oh, yes.

MR ST JOHN:

And he has to acknowledge that we can't subdivide, but the valuers are talking about the potential of subdivisional material, potential, and that's the point that we extract.

McGRATH J:

He was I think speaking about cross-leases and matters in relation that would involve an assignment of lease, was he not?

MR ST JOHN:

Yes, um –

McGRATH J:

Which is in a sense, a form of subdivision, but your point is it's not a complete option form of subdivision?

MR ST JOHN:

That's right, but what I'm talking about is you're getting two quite different concepts and his valuers are talking about valuing as subdivisible material, where we don't have the same right and it wouldn't be the same thing. Then it is of some note think that my learned friend is now making the point that all of this is a full about nothing, because all of these things can be obtained if asked for under the Property Law Act. But it's of note that the new lease, which I took you to this morning, which was part of –

ELIAS CJ:

I don't think you did take us to it, I think you referred to it, but –

BLANCHARD J:

What's it got to do with this?

MR ST JOHN:

Well it doesn't answer the entire question for lessees or future lessees of the Cornwall Park, but I accept it's a different form of lease than the current one.

BLANCHARD J:

Yes.

MR ST JOHN:

But the point that I'm making is that document has an absolute restriction against all the things to which that –

BLANCHARD J:

It's not the lease that we're looking at. If people choose to sign up with an absolute prohibition, that's their bargain, but that's for the future.

MR ST JOHN:

Yes, I accept that. But it still comes back to, we don't see that, this point changes for us, that the reference to the Property Law Act changes the very submission that we made, which goes to the use and the use that it can be valued upon.

Then I just wanted to deal very briefly with those Australian cases that were referred to today. With respect, we think there is a distinction, I obviously only got them quite quickly, but I think there is a distinction between use of commercial premises and use of residential premises. Obviously in both the English case where you had the club and the, I think the *Burns Philp* one about the hardware store, it makes sense that obviously a change of use is –

ELIAS CJ:

Well it was a change of potential.

MR ST JOHN:

It was a change of potential, that's right. We see that as quite different to a change of potential of residential homes that have already been –

ELIAS CJ:

Right.

MR ST JOHN:

Because these homes have already been constructed.

ELIAS CJ:

So had the club.

MR ST JOHN:

Yes, but the club could be used, they weren't talking about in that case I think, of demolishing the club, I think they were talking about using the club for different purposes, such as I think they were acknowledging that office use for instance, of the existing premises would achieve a better result. And the same in the Sydney case, they were saying, "Well, not using as a hardware store might achieve a better result." Well that makes perfect sense. In this case we have dwellings that have already been constructed, sometimes substantial dwellings, and it is now suggested by the Board that we can value them as highest and best use after the event. If there's nothing else that I can help you with, then I'll leave it there.

ELIAS CJ:

Sorry, what do you mean by after the event?

MR ST JOHN:

Well, all these homes have been constructed wrong your Honour.

ELIAS CJ:

I see, after that event.

MR ST JOHN:

After that event.

ELIAS CJ:

After construction.

MR ST JOHN:

And now what the Board say is, "Well, if 20 years after you've constructed this property, we determine that in fact the better use of the property was to build two dwellings on it, we reserve the right to charge you rental on that basis". Thank you your Honour.

ELIAS CJ:

Thank you counsel for your help in this matter, we will reserve our decision on it.

COURT ADJOURNS: 3.54 PM