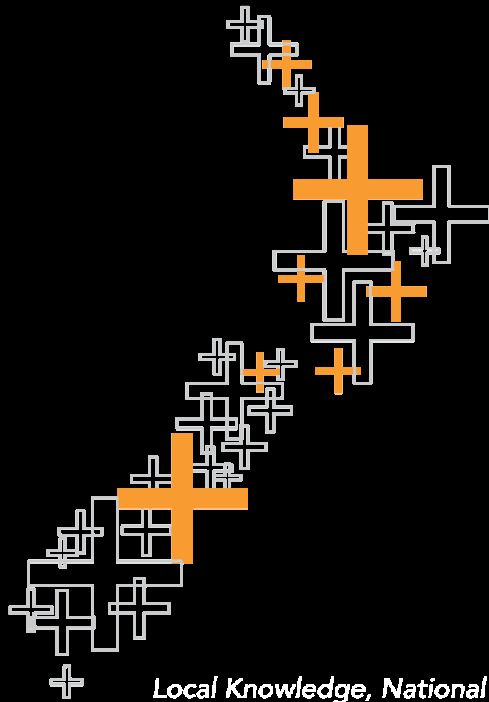


# Telfer Young

Valuers Property Advisors



*Local Knowledge, National Coverage*

# VALUERS in DISPUTE RESOLUTION and as EXPERT WITNESSES

## Presentation by Bob Hawkes

### Introduction

Valuers can find themselves called on to act as experts for a wide variety of disputes involving real estate.

Many aspects of this presentation apply to all, but are centred around the most commonly experienced dispute - rent reviews.



# Source of Disputes

The traditional sources of disputes are:

- Contract - such as a lease or agreement for sale and purchase.
- Statute - such as the Public Works Act 1981 or Rating Valuations Act 1998.



# Range of Potential Disputes

## Some Examples

- Public Works acquisitions and disposals
- Weathertight homes
- Rent reviews
- Rating valuations
- Relationship property
- Deceased estates
- Loss of view
- Boundary
- Insurance



# Range of Potential Disputes

## Some Examples (Cont)

- Resource management
- Defective construction
- Sale and purchase agreements
- Unstable land - landslips
- Access for landlocked land
- Adverse possession
- Professional complaints



# Summary of Potential Disputes

- ❑ To summarise, the range of potential disputes is as varied as the cross-section of property types and occupancy arrangements and as wide as the spectrum of real estate valuation work.
- ❑ It is timely to add a disclaimer. The views expressed in this presentation are my own and not necessarily supported by TelferYoung corporately. Furthermore they are the comments of a valuer, property consultant and arbitrator, not a lawyer.



# Dispute Resolution Spectrum

- Court - imposed decision with no party control on who is allocated decisionmaker
- Arbitration - imposed decision with usually the ability to control who is decisionmaker
- Adjudication - imposed decision with some ability to control who is decisionmaker
- Expert Determination - imposed decision with ability to control who is decisionmaker



## Dispute Resolution Spectrum (Cont)

- Mediation or Facilitation - parties are able to make own decision, with dispute resolution process aided by impartial third person
- Negotiation - parties free to make own decision





# Dispute Resolution Spectrum Summary

- The range is from fully imposed decisions coming out of a Court, down to the mutually agreed results from successful negotiation.
- The Court includes all of its divisions, which for valuers is mostly the Land Valuation Tribunal and the High Court.
- Dispute resolution processes not involving the Courts are commonly known as Alternative Dispute Resolution options, or ADR.



# Dispute Resolution Spectrum Summary (Cont)

- Valuers may encounter any one or all of these dispute resolution options at any time in their career.



# The Valuer as Witness

- ❑ The valuer is engaged for professional advice and that must reflect through to the valuer's behaviour as an expert witness.
- ❑ As expert, the valuer is not an advocate for a client or cause.
- ❑ Valuers are required to abide by:
  - The New Zealand Institute of Valuers Code of Ethics.
  - The Australia and New Zealand Valuation and Property Standards.
  - As experts in Arbitration and Court appearances, the High Court Code of Conduct for Expert Witnesses.



# The NZIV Code of Ethics

The relevant section of the code is 1.7, which reads:

“A member must maintain the strictest independence and impartiality in the performance of the member’s professional duties. To this end no member shall

- a) adopt the role of advocate to the exclusion of that independence and impartiality



## The NZIV Code of Ethics (Cont)

- b) allow the performance of that member's professional duties to be improperly influenced by the preferences of clients or others as to the result of their professional work
- c) rely improperly upon information supplied by clients or others in the performance of their professional duties; or
- d) act in any other way inconsistent with the duties of independence and impartiality”



# The NZIV Code of Ethics Summary

- The valuer must be INDEPENDENT and IMPARTIAL.



# The Australia and New Zealand Valuation and Property Standards

- Many sections of this document apply to expectations of the valuer. The valuer is expected to be fully familiar with it.
- The various mixture of mandatory and voluntary International Valuation Standards, Practice Standards and Guidance Notes are so voluminous as to not allow time for a detailed analysis in this presentation.
- Suffice to say the document reflects the same theme as the Code of Ethics and High Court Rules insofar as behaviour as an expert is concerned.



# The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses

## Duty to the Court

1. An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.





# The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

## Evidence of Expert Witness

3. In any evidence given by an expert witness, the expert witness must -
  - (a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:
  - (b) state the expert witness' qualifications as an expert:



## The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

- (c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:
- (d) state the facts and assumptions on which the opinions of the expert witness are based:
- (e) state the reasons for the opinions given by the expert witness:



## The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

- (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
- (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.



## The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

- 4 If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.



## The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

- 5 If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.



# The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

## Duty to Confer

- 6 An expert witness must comply with any direction of the court to -
  - (a) confer with another expert witness:
  - (b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witnesses:



## The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

(c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.



## The High Court Rules - Schedule 4 Code of Conduct for Expert Witnesses (Cont)

- 7 In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.





# Dispute Resolution in Practise

## ❑ FIRSTLY

- ❑ Choose a cost-effective dispute resolution process
  - Why choose arbitration when party/party negotiation or mediation may be less costly?
  - Why choose Court when ADR techniques may be less costly?
  - ADR has the added advantage of confidentiality.



# Dispute Resolution in Practise (Cont)

## SECONDLY

It is the parties' dispute, not that of the valuers.

As pointed out earlier, it is the valuer's role to provide expert evidence, not act as an advocate.



# Dispute Resolution in Practise (Cont)

## □ THIRDLY

- Understand and apply the underlying authorities for the dispute. This means:
  - Read, understand and apply the relevant provisions in the statutes.
  - Read, understand and apply the contract provisions.



# Dispute Resolution in Practise (Cont)

## ❑ FOURTHLY

- ❑ Ensure chosen Dispute Resolution Process is followed.
- If arbitration, then adhere to the rules as agreed in the contract, coupled with the provisions of the Arbitration Act 1996 and related Court precedent.



# Dispute Resolution in Practise (Cont)

- If expert determination then follow that track - don't confuse with arbitration.
  
- ❑ NOTE - FOR DISPUTE RESOLUTION CLAUSE DRAFTERS - the Arbitration Act 1908 has been repealed and replaced by the Arbitration Act 1996. Avoid including the 1908 Act in modern contracts. If 1908 Act is deliberately included then avoid attempts to insist it applies. It is dead.



## Dispute Resolution in Practise (Cont)

- The dispute resolution provisions in contracts and dare I say statutes, do not preclude the disputing parties from agreeing to adopt other resolution methods.
- It is their dispute - they can settle it as they see fit - it is their commercial decision.



## Dispute Resolution in Practise (Cont)

- A contract stipulating resolution by arbitration does not prevent the parties from agreeing to mediation.
- A Statute stipulating reference to the Land Valuation Tribunal does not necessarily prevent the parties from agreeing to resolution by other means such as arbitration.



# Dispute Resolution in Practise (Cont)

- ❑ Public Works acquisition disputes are a suitable case study. The Act prescribes the Land Valuation Tribunal as the formal arbiter.
- There has been a move by at least some Territorial Authorities towards agreeing with affected parties that resolution be by arbitration in lieu of the LVT.
- Conversely it appears at least some other acquiring authorities insist on using the LVT.





## Dispute Resolution in Practise (Cont)

- This last group hold to reasons such as there is a legal principle involved that requires full airing.
- Perhaps that might also be a candidate for arbitration. We have some highly qualified legal arbitrators in New Zealand, including well-regarded retired High Court judges.



## Dispute Resolution in Practise (Cont)

- Concerns about precedent-setting might well be addressed by the parties agreeing the award be available to the public - instead of the normal protocol that the arbitration is confidential.
- I suggest use of arbitration in this manner has been envisaged by the legislators - see Section 10 of the Arbitration Act 1996, particularly subsection (2).



# Dispute Resolution in Practise (Cont)

- ❑ Section 10 reads:
  
- ❑ Arbitrability of disputes - (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.



# Dispute Resolution in Practise (Cont)

- (2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.
  
- The Act binds the Crown (see Section 4).
  
- Note the LVT in Auckland comes under the Auckland Tribunals Unit. Elsewhere it falls within the District Court Civil jurisdiction.



# Valuer Involvement with Rent Disputes

## □ Can include:

- As arbitrator sole or as a member of a multi-arbitrator tribunal.
  - As expert giving evidence for a party.
  - As third expert determinator.
  - As expert and advocate for a party.
- ❖ NOTE : Serious consideration needs to be given to whether the fourth option complies with the Code of Ethics - Is definitely alien to the High Court Rules.



# Rent Review Steps

- Consider for example the current ADLS lease
  - Fifth Edition 2008
  
- I. Either party may issue notice of new rent - this may or may not be supported by a registered valuation.
  
- II. Party receiving notice may accept or dispute.



## Rent Review Steps (Cont)

III. The parties shall endeavour to agree. If no agreement within 10 days rent may be determined by either:

a. Arbitration - see Second Schedule Clause 2.2(a.)

b. If the parties so agree, by registered valuers acting as experts - see Second Schedule Clause 2.2(b).



## Rent Review Steps (Cont)

- The 2.2(b) option calls for each party to appoint a valuer, with default provisions in the event of one party not complying.
- The appointed valuers are to appoint a third expert before commencing their determination, who is to determine the rent in the event of the valuers failing to agree.
- The valuers and third expert are to give the parties the opportunity to make written or oral submissions - while the decisionmakers are to consider these submissions they are not to be bound thereby.





## Rent Review Steps (Cont)

- Arbitration is further addressed in Clause 44.1 and 44.2 of the Second Schedule, as follows:
  1. Unless any dispute or difference is resolved by mediation or other agreement, the same shall be submitted to the arbitration of one arbitrator who shall conduct the proceedings in accordance with the Arbitration Act 1996....



## Rent Review Steps (Cont)

2. If the parties are unable to agree on the arbitrator, the arbitrator shall be appointed, upon request by any party, by the President or Vice President for the time being of the District Law Society of the district in which the premises are situated. That appointment shall be binding on all parties... and...subject to no appeal.



## Rent Review Steps (Cont)

- The various ADLS leases over the years since the 1993 original version prescribe slightly different processes than the current.
  
- The basic theme of arbitration or expert determination, with provision for an imposed arbitrator, is more or less constant. However some of the early versions refer to the third expert as umpire.
  
- Avoid confusing umpire with arbitrator.



## Rent Review Steps (Cont)

- ❑ There are many other rent dispute resolution options
  
- ❑ While the standard ADLS lease is the most regular encountered, others can include:
  - Corporate hybrids
  
  - BOMA or Property Council versions
  
  - Public Bodies Leases Act



## Rent Review Steps (Cont)

- It is to be hoped rents can be resolved through amicable negotiations, but when all else fails the formal steps thus discussed are the inevitable outcome.
- The valuer becomes involved through being the recognised expert.



## Rent Review Steps (Cont)

- While the ADLS lease option 2.2(b) stipulates the third expert selected by the two appointed valuers need not necessarily be a valuer, it is quite common practise for a valuer to be sought.
- Herein lies a problem, as most if not all valuers normally sought for the role will only accept if the parties grant them immunity from liability similar to that granted arbitrators by the Arbitration Act 1996 (Section 13).



## Rent Review Steps (Cont)

- Section 13 reads - "An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator."
- If a party insists it will not accept the indemnity and no acceptable third expert can be found to undertake the role without indemnity, the parties can find a deadlock - probably leading to arbitration as the only other ADR option.



## Rent Review Steps (Cont)

- Note for contract drafters:
- Consider whether deleting the 2.2(a) option of the ADLS lease is wise in light of the risk of the deadlock scenario when only the 2.2(b) expert determination option is available.





# Arbitration

- Arbitration is basically a private court
- Is empowered by the Arbitration Act 1996
- Is internationally trade law based on the UNCITRAL Model



## Arbitration (Cont)

- In simple terms the steps are:
  - The arbitrator is chosen and appointed by the parties - subject to arbitrator agreement.
  - The arbitrator arranges a preliminary meeting to clarify the way the arbitration will be conducted.
  - Parties present submissions and evidence.
  - Arbitrator considers the submissions and evidence and issues a decision (The Award).



## Arbitration (Cont)

- It is the arbitrator's role to make a decision on the presented submissions and evidence.
- It is the parties' role, supported by their witnesses, to present their case.
- A poorly presented case may result in an unfavourable award.
- It is the valuer witness responsibility to ensure at least that valuers evidence is such as to create a full picture for the arbitrator.



## Arbitration (Cont)

- ❑ It is a quite common practice for valuer experts to not only present evidence for a client at arbitration but also act as that client's advocate.
- ❑ While this modus operandii may be cost-effective, consideration needs to be given to whether it contravenes the NZIV Code of Ethics and the Australia and New Zealand Property Standards all valuers are obliged to comply with.
- ❑ It is clear such practise is contrary to the High Court Rules for expert witness behaviour.



## Arbitration (Cont)

- ❑ Some important points:
  - The arbitrator is not available for private discussions - except in the very rare circumstances of proceeding ex parte.
  - Evidence in arbitration, as in Court, is not the evidence traditionally familiar to valuers. Valuers evidence is in fact market data. Arbitration evidence is the basket of information presented by the parties and on which the arbitrator makes a decision. It can include a valuers report and/or submission.
  - The arbitration is confidential. That includes the award. The confidentiality can only be broken by agreement of both parties or through the award becoming public as a consequence of being presented in Court.



## Arbitration (Cont)

- ❑ Many dispute resolution provisions in contracts and Statute call for arbitration to be undertaken by two arbitrators, one for each party. Those arbitrators are then required to appoint an umpire.
  
- ❑ Issues thus arising are:
  - The umpire is in effect a third arbitrator.
  - Consider whether the cost of arbitration before a three-member tribunal is warranted.



## Arbitration (Cont)

- ❑ Any valuer might be called upon to act as arbitrator.
  
- ❑ Make sure that before accepting the role you are suitably qualified.
  
- What better way to achieve that than to undertake study such as the Massey University Dispute Resolution course or like courses offered by other tertiary training institutions.



# CONCLUSION

- Valuers are and will no doubt continue to be involved in disputes.
- The valuer must act within his or her area of expertise - **INDEPENDENT** and **IMPARTIAL**.

