THE RENT APPEAL BOARDS: SELECTED ASPECTS OF THEIR FUNCTION AND PRACTICE

J. R. Laidlaw*

The Rent Appeal Act 1973, which came into force on 1 February 1974, is stated in the Preamble to be "[a]n Act for the determination of equitable rents for dwellinghouses". The Rent Appeal Boards, whose main function is to give practical effect to this object, were established under that Act. It is now possible to obtain some insight into the manner in which the Boards assess the equitable rent of a dwellinghouse, and as to some of the practices which have developed in relation to the Boards' performance of this function. The aim of this article is first, to outline some of the results of a brief review of the assessments made by the Boards in the twelve month period following their establishment. Secondly, an attempt will be made to describe the approach to the assessment of the equitable rent adopted in practice by the Boards. Thirdly, the nature and extent of the Boards' obligations to provide a written statement of reasons for each assessment, and to comply with certain requirements of natural justice or "fairness", are examined in the light of current practice.

I. THE RENT APPEAL BOARDS

Rent Appeal Boards have been established in Auckland, Wellington, Christchurch and Dunedin. Each Board in practice exercises exclusive jurisdiction within its district, and sits at such places within that district as is required.[1] Board members are appointed by the Minister of Labour for an initial term of three years.[2] It is noteworthy, first, that both the power of appointment and the power to remove a member from office[3] are vested in the Minister, despite the widely held view that such powers should be exercised only with the approval of,[4] or after consultation with,[5] the Attorney-General. Secondly, although the Act does not require Board members to possess special qualifications, it was said at the time of the Rent Appeal Bill's introduction into the House that the persons to be appointed would have qualifications in law and valuation and experience in social work.[6] At present, one member of each Board is a registered public

* LL.B.(Otago). Assistant Lecturer in Law, University of Otago.

1 The Auckland Board, for example, normally sits in Auckland, but it has also sat in Whangarei, Hamilton, Rotorua and Tauranga.

2 Rent Appeal Act 1973, s. 4 (3), (4). The Act also provides for the appointment of deputy members: First Sch., Cl. 4 (1). To date only two deputy members have been appointed (see Appendix A), and the present policy appears to be to make such appointments only upon request by a Board.

3 First Sch., Cl. 2 (1).

4 G. S. Orr, *Report on Administrative Justice in New Zealand* (1964), 67.

5 Survey by the Department of Justice, *The Citizen and Power: Administrative Tribunals* (1965), 26.

6 (1973) 382 N.Z.P.D. 910; cf. (1973) 386 N.Z.P.D. 3751. The English practice is to draw the members of rent assessment committees from panels representative of lawyers, surveyors and laymen: R. E. Wraith and P. G. Hutchesson, *Administrative Tribunals* (1973), 96.

valuer and another a layman.[7] But although it is generally considered that chairmen of tribunals exercising adjudicatory functions should be legally qualified,[8] or at least that their appointment should be subject to the approval of the Attorney-General,[9] only the chairmen of the Christchurch and Dunedin Boards are so qualified.

During their first year of operation, 971 applications were made to the Boards.[10] Of the 504 applications which were heard and determined in this period, 81 percent were made by the tenant, 18 percent were made by the landlord, and one percent were joint applications. In the same period, 382 applications were withdrawn prior to the hearing.[11] Although the Boards have power to hear and determine an application in the absence of the parties,[12] this has seldom occurred in practice. Both parties appeared or were represented at 86 percent of the hearings conducted by the Christchurch and Dunedin Boards.[13] The landlord alone appeared or was represented at 10 percent of those hearings, the tenant alone at three percent, and neither party appeared or was represented at one percent of the hearings conducted. As often occurs with regard to proceedings before informal tribunals, parties have seldom availed themselves of the right to be represented[14] at the Boards' hearings. In the period previously mentioned, the tenant was unrepresented at 96 percent of the hearings of the Christchurch and Dunedin Boards;[15] the landlord was represented by counsel or a solicitor at 27 percent of those hearings, by a person other than counsel or solicitor at five percent, and was unrepresented at the remaining 68 percent of the hearings conducted. As a consequence, few applications for legal aid have been made in respect of applications under the Rent Appeal Act 1973.[16] During the first year of the Boards' operation, only four

7 See Appendix A.

8 Survey by the Department of Justice, op. cit., 27; Franks Committee—*Report of the Committee on Administrative Tribunals and Inquiries* (1957; Cmnd. 218), 11-14; cf. R. E. Wraith and P. G. Hutchesson, op. cit., 102.

9 G. S. Orr, op. cit., 67-68. The chairmen of the English rent tribunals must be selected from a panel appointed by the Lord Chancellor: Tribunals and Inquiries Act 1971 (U.K.), s. 7 (1). Today those chairmen are almost without exception legally qualified: D. C. M. Yardley, "Rent Tribunals and Rent Assessment Committees" [1968] Pub. Law 135, 139-140.

10. See Appendix B.

11. Although there is no provision in the Act dealing with the withdrawal of applications, the Boards appear to permit the applicant to withdraw his application at any time prior to the hearing.

12 Second Sch., Cl. 5 (3).

13 See Appendix B. Statistics relating to appearances and representation before the Auckland and Wellington Boards were not available to the writer.

14 Clause 5 (2) of the Second Schedule provides that "the landlord and the tenant . . . shall . . . be heard either in person or by a person authorised by him in that behalf, whether or not that person is of counsel or a solicitor".

15 Supra, n. 13.

16 See Legal Aid Act 1969, s. 15 (1), as amended by the Rent Appeal Act 1973, s. 33. Legal aid is not available in respect of proceedings before the English rent tribunals. As to the desirability of making legal aid available in proceedings before such tribunals, see Alec Samuels, "Legal Aid and Rent Control Tribunals" (1970) 114 Sol. Jo. 4; D. C. M. Yardley, "Legal Aid and Rent Control Tribunals—A Reply" (1970) 114 Sol. Jo. 24.

applications—all by the tenant—were made for legal aid.[17] In the same period, fourteen applications were subsequently reheard by a Board, in each case on the ground that "new and material evidence"[18] had become available since the original hearing. No proceedings by way of case stated or appeal on a question of law[19] were commenced during this time.[20]

Clearly the success or failure of the Boards to date cannot be measured by the results of their determinations. Given that the Boards' main function is to assess an equitable rent with regard to each dwellinghouse, "landlords or tenants only fail in the sense that one may be more or less dissatisfied than the other"[21] with a Board's determination. Furthermore, the period reviewed is too short, and the information available not sufficiently complete, to permit firm conclusions to be drawn. The assessments made by the Christchurch and Dunedin Boards in their first year of operation may serve as an illustration. Predictably perhaps, of the 46 applications made by the landlord, all except one resulted in the assessment of equitable rents which exceeded the existing rents. However, of the 78 applications made by the tenant, 25 resulted in a reduction of the existing rent, while 45 resulted in an increase. Again, despite earlier predictions that the Boards' assessments would in the main result in the reduction of existing rents,[22] in fact in 80 percent of the assessments made the equitable rent was assessed at an amount equal to or in excess of the existing rent. But it cannot therefore be assumed that the Boards' assessments in these cases have resulted in rental increases which might not otherwise have occurred, for this ignores the fact that many applications are made to the Boards as a result of the landlord expressing an intention to increase the rent payable in future. In the 34 cases in which the application included a statement of the rent proposed to be charged in future by the landlord, the equitable rent assessed by the Board exceeded the proposed rent on only four occasions. Finally, no clear patterns emerge from a comparison of the assessments made by the individual Boards. For example, 78 percent of the assessments made by the Christchurch Board resulted in an increase of the existing rent; the average increase was 25 percent. Only 55 percent of the Dunedin Board's assessments resulted in such increases, but there the average increase was 54 percent. On the other hand, while 14 percent of the Christchurch Board's assessments resulted in a reduction of the existing rent, that rent was reduced in 41 percent of the assessments made by the Dunedin Board.

17 See Appendix B.

18 Rent Appeal Act 1973, s. 9 (1) (c).

19 See Rent Appeal Act 1973, ss. 12-19.

20 Review proceedings pursuant to Part I of the Judicature Amendment Act 1972 were commenced on one occasion: see *Clark* v. *Rent Appeal Board* [1975] 2 N.Z.L.R. 24, discussed infra, pp. 335-336, 340-341.

21 R. E. Wraith and P. G. Hutchesson, op. cit., 189.

22 See, for example, (1973) 382 N.Z.P.D. 3752, 3759.

II. ASSESSMENT OF THE EQUITABLE RENT

Earlier New Zealand tenancy statutes[23] had as their main object the promotion of general economic stability. A rent was to be determined which was fair as between the parties, but subject always to the overriding qualification that the figure so determined had no adverse affect upon the economic stability of the community.[24] The present Act neither seeks to promote general economic stability, nor provides for the determination of a fair rent in accordance with a fixed formula which operates in relation to the actual or presumed value of the property at some earlier point in time.[25] Upon receipt of an application by either the landlord or the tenant of a dwellinghouse, the Board is required to "make an assessment fixing the equitable rent of the premises".[26] Section 8 of the Act provides:

> (1) For the purposes of this Act, the equitable rent of a dwellinghouse shall be that rent which (without regard being had to the personal circumstances of either party) a reasonable landlord might expect to receive and a reasonable tenant might expect to pay for that dwellinghouse having regard to—
> (a) The locality in which the dwellinghouse is situated:
> (b) The standard of accommodation which the dwellinghouse provides:
> (c) Its state of repair:
> (d) The prevailing level of rents in the locality:
> (e) The provision of a proper return to the landlord:
> (f) The landlord's outgoings in respect of the dwellinghouse:
> (g) The furniture and chattels (if any) provided by the landlord.
>
> (2) Any amount allowed in respect of furniture and chattels provided by the landlord shall not exceed 15 percent per annum of their value.
>
> (3) An assessment may include a reasonable allowance for management and collection of rent.
>
> (4) In determining a proper return to the landlord for the purposes of paragraph (e) of subsection (1) of this section regard shall be had to the value of the premises as a dwellinghouse and not their value for industrial, commercial, or other purposes.

The object of the Rent Appeal Act 1973 is that in each case the Board, by balancing the competing interests of the hypothetical "reasonable landlord" and "reasonable tenant", is to determine a rent which is equitable in respect of the particular dwellinghouse.

1. *Presumption that the Existing Rent is the "Equitable Rent"*

In some cases decided under earlier New Zealand tenancy statutes there are to be found statements indicating that a presumption existed, at least where the fair rent was to be determined during the term of the tenancy,[27] that the rent agreed between the parties was the fair

23 Particularly the Fair Rents Act 1936 and the Tenancy Acts 1948 and 1955. For an historical outline of this legislation, see H. Jenner Wily, *Tenancy Legislation* (5th ed., 1962), 3.

24 *Griffin* v. *Chance* (1949) 6 M.C.D. 121, 124.

25 Under the earlier statutes the determination of the fair rent largely involved mathematical calculations based upon the value of the property. Under the Tenancy Act 1955, for example, it often consisted only of totalling the appropriate return on capital value and allowances for repairs, depreciation, rates, insurances and chattels. See generally The New Zealand Institute of Valuers, *Principles and Practice of Urban Valuation in New Zealand* (1959), 168-171; E. F. Page, *Tenancy Legislation in New Zealand* (1949), 55-56.

26 Rent Appeal Act 1973, s. 6 (1).

27 *Sievwright* v. *Wellington College and Girls' High School Governors* [1944] N.Z.L.R. 523, 528.

rent.[28] It is not clear from these decisions, however, whether the presumption applied where the tenancy comprised a dwellinghouse,[29] nor do they establish the weight which the court should normally attach to the presumption.[30] Although the existing rent payable by the tenant is not one of the matters to which the Boards are directed to have regard by s. 8 (1), that sub-section does not exhaustively define the matters which may be taken into account in assessing the equitable rent.[31] And it would be unrealistic to assume that the Boards will never attach any weight to the rent agreed by the parties to be payable in respect of the tenancy. But the existing rent can be regarded as no more than a matter which *may* be taken into account. The equitable rent "shall be that rent which . . . a reasonable landlord might expect to receive and a reasonable tenant might expect to pay" for the dwellinghouse. In the light of this mandatory direction, s. 8 (1) cannot be construed as either permitting or requiring the Boards to regard the existing rent as prima facie constituting the equitable rent.

2. *Assessment of the "Equitable Rent"*

In brief, the assessment of the equitable rent involves the determination of the value of the property, the calculation of an annual rental on the basis of that value, and its subsequent adjustment to take account of all other relevant considerations. The Board's first step is to establish the current market value of the property.[32] The invariable practice appears to be that the Board obtains the Valuation Department's assessment of that value.[33] Under earlier New Zealand tenancy legislation, the courts were careful to ensure that no single method of determining property values was adopted by the tribunal as a matter of policy. The courts were prepared to indicate that a particular method of valuation was normally the most appropriate with regard to a particular type of property,[34] and to hold that a particular method was inappropriate in the light of the objects of the legislation.[35] But generally they encouraged the tribunal to refrain from committing itself to any one method of valuation.[36] Similarly, the present English rent tribunals and rent assessment committees are

28 Ibid., 529. Similarly *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix Ltd.* [1944] N.Z.L.R. 24, 32; *Service Buildings Ltd.* v. *Todd Motors Ltd.* [1947] N.Z L.R. 661, 671, 679; *Jewellers Chambers Ltd.* v. *Red Seal Coffee House Ltd.* [1949] G.L.R. 133, 134.

29 *Sievwright* v. *Wellington College and Girls' High School Governors* supra, and *Dingle* v. *Boys* (1949) 6 M.C.D. 179, 182, appear to be the only cases in which the presumption was applied to a tenancy of a dwellinghouse.

30 *Service Buildings Ltd.* v. *Todd Motors Ltd.* [1947] N.Z.L.R. 661, 677.

31 See further infra, pp. 331-332.

32 i.e. the current market value of the unimproved land plus the improvements thereon.

33 The writer understands that the Valuation Department supplies an assessment of the current market value of the property at the time of application; it does not, as was sometimes the case in the past, merely supply a copy of the valuation appearing on the District Roll.

34 *Humphreys Furniture Warehouse Ltd.* v. *Cuthbert* [1949] N.Z.L.R. 913, 923; *Harold Hall & Co.* v. *Selwyn Buildings* Ltd. [1952] N.Z.L.R. 848, 874.

35 *Wedderspoon* v. *Taylor* (1941) 2 M.C.D. 156, 157; *State Advances Corporation of New Zealand* v. *Lucas* (1951) 7 M.C.D. 39, 47.

36 *Reids Furnishings Ltd.* v. *Hamilton Autos Ltd.* [1951] N.Z.L.R. 730, 735.

encouraged to be flexible in their approach to the valuation of properties,[37] and they may choose any method of valuation which will lead to the assessment of a rent which is fair in the particular circumstances.[38] So in one case, where the tribunal had valued the property on the basis of its historical cost, it was said:[39]

> [T]his is a quite novel method of valuation. . . . It is not arrived at on comparables, it is not based on square footage, it is certainly not based on the contractors' theory. But it is based on original cost, taking a percentage thereof as the fair rent. It may be, because there is no fixed yardstick by which a fair rent is to be arrived at, that this is a permissible method and that a just conclusion can thereby be arrived at.

In the light of the provisions of s. 8 of the Rent Appeal Act 1973, the Boards ought not to be regarded as being any more restricted than their English counterparts in their choice of the method of valuation which may be adopted, and should be permitted to use such methods as will result in the assessment of a rent which is equitable for the particular property in each case.

Having determined the current market value, the Board then calculates as a percentage thereof an annual rent for the property. It seems that at this stage in its assessment the Board invariably has regard to the need to provide "a proper return to the landlord".[40] The only directive given to the Board as to what constitutes a "proper return" is that in determining such return, "regard shall be had to the value of the premises as a dwellinghouse, and not their value for industrial, commercial, or other purposes",[41] and none of the Boards has so far disclosed either the percentage of the current market value adopted in a particular case, or that normally adopted in the absence of special circumstances.[42] However, the Chairman of the Dunedin Board has indicated[43] that his Board views the provisions of s. 8 (1), and in particular paragraph (e) of that subsection, as authorising the Boards to arrive at an assessment of the equitable rent based in part on a percentage of the current market value. He has also disclosed that his Board has adopted in each case an annual rent equivalent to 9½ percent of that value, and that this is done on the basis that the resulting annual return constitutes a "proper return" to the landlord. It may be that each Board has adopted as the "proper return" the average return available on solicitors' first mortgages of residential properties in its district. The current average return on such mortgages in the Dunedin Board's district is 9½ percent per annum. Regional variations in the present returns available on solicitors' first mortgages in part reflect, to a greater or lesser extent, the differing economic conditions currently prevailing with regard to residential

37 See Alec Samuels, "Assessing the so-called Fair Rent" (1966) 110 Sol. Jo. 878. See also, by the same writer, "Valuation of 'fair rent'" [1971] J.P.L. 262.

38 *Anglo-Italian Properties* v. *London Rent Assessment Committee* [1969] 1 W.L.R. 730.

39 Ibid., 733 per Lord Parker C. J.

40 Rent Appeal Act 1973, s. 8 (1) (e).

41 Rent Appeal Act 1973, s. 8 (4).

42 See the comments of Mr J. M. Conradson, Chairman of the Dunedin Board, reported in *The Evening Star*, 21 September 1974. It seems that the Boards have deliberately adopted a policy of non-disclosure on this point.

43 Mr J. M. Conradson, speaking at a seminar conducted by the Otago Branch of the New Zealand Legal Association at Dunedin on 7 June 1975.

accommodation in various parts of New Zealand. If this is the case, the Boards may use future variations in this return as the basis for some alteration to the percentage of the current market value which they regard as providing a "proper return" to the landlord.

The final stage in the Board's assessment of the equitable rent involves the adjustment of the annual rent which has been established as a percentage of the current market value to take into account all other relevant considerations. Although they do not constitute an exhaustive catalogue of relevant considerations, the seven matters specified in section 8 (1) have a substantial affect upon the quantum of rent finally assessed in each case.[44] The equitable rents determined by the Dunedin Board over a one year period,[45] for example, provided annual returns to the landlord on the current market values adopted ranging from 6.93 percent to 26 percent. The average return was 11.77 percent.

3. *Exclusion of "Personal Circumstances"*

The equitable rent is to be assessed by the Board "without regard being had to the personal circumstances of either party".[46] The terms of this prohibition differ from those found in earlier New Zealand tenancy statutes,[47] but the definitions of the phrase "personal circumstances" laid down in decisions under those statutes remain relevant. In *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix Ltd.*[48] the "circumstances of the landlord and of the tenant" to which the prohibition in Regulation 16 (1) of the Economic Stabilization Emergency Regulations 1942 related, were defined as "merely the respective financial positions of the parties".[49] In the same case, Smith J. expressed a wider, though similar, view:[50]

> In my opinion, this provision implies that the wealth or poverty, health or sickness, or other personal circumstance of either the landlord or the tenant or both are not to be regarded as factors in determining the fair rent.

In a later decision it was said with reference to these definitions that[51]

> [t]he feature common to both . . . is that the circumstances referred to in the phrase are those circumstances that are directly and immediately involved in the particular application under consideration.

By excluding the personal circumstances of the parties, and by providing that the equitable rent is to be "that rent . . . which *a reasonable landlord* might except to receive and *a reasonable tenant*

44 See further infra, pp. 332-335.
45 1 February 1974 to 31 January 1975. The Dunedin Board made 29 assessments during this period.
46 Rent Appeal Act 1973, s. 8 (1).
47 Cf. Fair Rents Act 1936, s. 7 (1); Tenancy Act 1948, s. 9 (1). See also the Economic Stabilization Emergency Regulations 1942 (Reprint S.R. 1949/11), Reg. 16 (1). A similarly worded prohibition, which has not as yet been interpreted by the courts, has been included in the English rent restriction legislation since 1965; see now Rent Act 1968 (U.K.), s. 46 (1).
48 [1944] N.Z.L.R. 24.
49 Ibid., 29 per Myers C. J.
50 Ibid., 34.
51 *Harold Hall & Co.* v. *Selwyn Buildings Ltd.* [1952] N.Z.L.R. 848, 861 per Finlay J. There the prohibition related by virtue of s. 9 (1) of the Tenancy Act 1948 to "the relative circumstances of the landlord and of the tenant". See also *Jamieson* v. *Mills* (1956) 9 M.C.D. 180, 181.

might expect to pay" for the dwellinghouse, the Act clearly requires a rent to be assessed which is equitable from the point of view of the hypothetical reasonable landlord and reasonable tenant. The rental value of the premises must be assessed objectively, and no account can be taken of circumstances which are personal or peculiar to either or both of the parties to the proceedings. For this reason, it is suggested that account cannot be taken of the landlord's equity in the property.[52] Similarly, it seems that the Board must ignore, for example, the fact that the landlord has obtained finance at a rate of interest lower than that generally available.[53]

4. *"Having regard to" the Specified Matters*

Section 8 (1) does not provide that a Board "*shall* have regard to" the seven matters there specified; it states that the equitable rent "*shall be* that rent which . . . a reasonable landlord might expect to receive and a reasonable tenant might expect to pay . . . *having regard to*" those matters. First, although the subsection does not contain the words normally used to impose an obligation to have regard to specified matters—and those words are in fact to be found in the corresponding provisions of rent restriction statutes in other jurisdictions[54]—it is submitted that it must be so construed. In *Levin Amusements Ltd.* v. *Girling-Butcher*,[55] the authorising instrument provided that the licensing officer "may refuse to issue [a] licence . . . where in his opinion the issue is not in the public interest, having regard to the conditions existing in the industry". In quashing the decision to refuse to issue a licence, Smith J. held that this provision clearly imposed an obligation on the officer to have regard to conditions existing generally in the film industry.[56] More importantly, the Rent Appeal Act 1973 requires the Board to assess an equitable rent for each particular dwellinghouse. In determining a fair market rent for a dwellinghouse, a valuer would normally take into consideration those matters specified in s. 8 (1).[57] Accordingly, the words "shall be' must be construed as applying to all the succeeding words of the subsection, and the phrase "having regard to" should therefore be construed conjunctively. To do otherwise, and treat the Board as not being under any obligation to have regard to the matters specified, would be to give little if any, effect to the latter part of s. 8 (1).

Secondly, a requirement that a tribunal "have regard" to specified matters tends in itself to show that the tribunal's duty in respect of

52 See further infra, p. 334.

53 In six applications (Reference 47/4/26) one reason given by the Auckland Board for its assessment was that the "rent assessed provide[d] an equitable return to the landlord based on the special interest rates made available on the original loan". If, as it appears, regard was had by the Board to the fact that the Auckland City Council as landlord had obtained loan moneys at a low rate of interest which was available only to local authorities, it is submitted that the Board took into account an unauthorised consideration.

54 Cf. the Landlord and Tenant (Amendment) Act 1948-1954 (N.S.W.), s. 21 (1), which provides that "in determining the fair rent a Fair Rents Board shall have regard to" nine specified matters. Similarly, see the Landlord and Tenant (Control) Act 1957 (Vic.), s. 24 (1).

55 [1940] N.Z.L.R. 854.

56 Ibid., 871.

57 See D. M. Lawrence, W. H. Rees and W. Britton, *Modern Methods of Valuation of Land, Houses and Buildings* (5th ed., 1962), Ch. XIII.

those matters is limited to having regard to them,[58] and that the weight to be given to any one or more of them, if properly taken into account, is a matter for the tribunal to determine at its discretion. In *De Iacovo* v. *Lacanale (No. 3)*,[59] where a Victorian Fair Rents Board was held obliged to have regard to all the matters specified in s. 24 (1) of the Landlord and Tenant (Control) Act 1957, Scholl J. took the view that a Board could not merely "consider the various matters mentioned in" that section, "and then, in fixing a rent, give no weight at all to any of them".[60] However the majority of the Full Court held that the[61]

> . . . legislative command to have regard to certain matters does not mean that in every case the Board must give effect to each or any of the matters referred to. . . . [T]he obligation placed on the Board by the words "shall have regard to" is discharged if it considers these various matters and after such consideration makes a determination.

A Rent Appeal Board's assessment of the equitable rent involves the determination, albeit in a judical spirit, of a question of fact. The rent determined need not have a demonstrable arithmetical relation to any one of the specified matters; it is not a figure which is merely a function, in the mathematical sense, of any one or more, still less of all, of the matters so specified.[62] Where all relevant matters have been considered the courts will be reluctant to interfere with a Board's assessment, insofar as it would require them to attach different weight to matters properly taken into account by a tribunal which possesses specialist knowledge and expertise not shared by the reviewing court.[63]

Thirdly, it is submitted that the matters specified in s. 8 (1) do not constitute an exhaustive catalogue of the considerations to which the Board may have regard in assessing the equitable rent. The decision in *Short* v. *Auckland Transport Board*[64] suggests that if a tribunal in reaching its decision "shall generally have regard to" a number of specified matters, no prohibition in respect of the consideration of other relevant matters should be implied, at least where the tribunal is also required to take into account evidence produced and submissions

58 *Ishak* v. *Thowfeek* [1968] 1 W.L.R. 1718, 1725 (P.C.). See also *R.* v. *The Vestry of St. Pancras* (1890) 24 Q.B.D. 371, 376; *Perry* v. *Wright* [1908] 1 K.B. 441, 458. In the latter case a similar expression of an obligation to have regard to specified matters was said to be "a guide but not a fetter". See also *Jolin Investments Pty. Ltd.* v. *Farrar* [1975] V.R. 716, 719-720.

59 [1958] V.R. 628.

60 Ibid., 636.

61 Ibid., 630 per Lowe and O'Bryan JJ. See also to the same effect, *Rathborne* v. *Abel* (1964) 38 A.L.J.R. 293, 295, 301; *Owen* v. *Woolworths Properties Ltd.* (1956) 96 C.L.R. 154, 160, *Davey* v. *Murfin* (1956) 73 W.N. (N.S.W.) 222, 223; *Beresford* v. *Ward* [1961] V.R. 632, 634; *Jolin Investments Pty. Ltd.* v. *Farrar* [1975] V.R. 716, 721.

62 *De Iacovo* v. *Lacanale (No. 3)* [1958] V.R. 628, 637. But see *Jolin Investments Pty. Ltd.* v. *Farrar*, supra at 722.

63 See *Embassy Liqueurs Ltd.* v. *Licensing Control Commission* [1955] N.Z.L.R. 734, 742; *Central Taxi Depot (Rotorua) Ltd.* v. *New Zealand Retail Motor Trade Association* [1959] N.Z.L.R. 1167, 1168; *Re Boots the Chemists (N.Z.) Ltd.* [1963] N.Z.L.R. 268, 272-273.

64 [1951] N.Z.L.R. 808.

made at a hearing.[65] Similarly, in *De Iacovo* v. *Lacanale (No. 3)*[66] it was said that the Fair Rents Boards[67]

> . . . are directed . . . in determining the fair rent . . . to have regard to certain matters. They are not directed to exclude all other considerations. Indeed, ss. 19 and 21 [which confer on the Boards wide powers of investigation, and authorise them to obtain valuations and reports and otherwise to inform themselves in any manner they think fit] point in the opposite direction.

On the other hand, it has been held that section 21 (1) of the Landlord and Tenant (Amendment) Act, 1948-1958 (N.S.W.), which states that "in determining the fair rent a Fair Rents Board shall have regard to" nine specified matters, constitutes an exhaustive statement of the matters which may properly be taken into account.[68] In matters of statutory interpretation, the New Zealand courts are directed to accord each statutory provision such a fair, large and liberal interpretation as will best ensure the attainment of the object of the legislation.[69] The object of the Rent Appeal Act 1973 is to provide for the assessment by the Board of a rent which is equitable for the particular dwellinghouse. The better view would therefore seem to be that the legislature intended the Board in each case to take into account all relevant matters, irrespective of whether they are specified in s. 8 (1).[70]

5. *Matters Specified in Section 8 (1)*

Normally the most important factors in assessing the current market value of a dwellinghouse are the nature of the accommodation it provides and its locality.[71] Thus it would seem that a Board will virtually always attach some weight to the "locality in which the dwellinghouse is situated",[72] the "standard of accommodation"[73] which it provides, and its "state of repair".[74] As we have seen, considerable emphasis is invariably placed on the need to provide "a proper return to the landlord".[75] Unlike earlier New Zealand tenancy statutes, the present Act does not require that any greater weight prima facie be attached to the "prevailing level of rents in the locality"[76] in which the particular dwellinghouse is situated than to any other matter

65 Ibid., 811. Cf. *Yukich* v. *Sinclair* [1961] N.Z.L.R. 752 where it was held, without reference to *Short's* case, that where the authorising instrument provided that "no winemaker's licence shall be granted unless the Magistrate is satisfied" on three grounds, it was to be construed as exhaustively defining the matters which could be considered.
66 [1958] V.R. 628.
67 Ibid., 630 per Lowe and O'Bryan JJ.
68 *Brown* v. *Whitehead* (1958) 76 W.N. (N.S.W.) 22.
69 Acts Interpretation Act 1924, s. 5 (j).
70 Cf. the similar construction adopted in *Ishak* v. *Thowfeek* [1968] 1 W.L.R. 1718, 1724 (P.C.).
71 D. M. Lawrence, W. H. Rees and W. Britton, op. cit., 181.
72 Rent Appeal Act 1973, s. 8 (1) (a).
73 Rent Appeal Act 1973, s. 8 (1) (b).
74 Rent Appeal Act 1973, s. 8 (1) (c). This paragraph refers to the existing condition and state of repair of the dwellinghouse. The need for future repairs and maintenance, though affected by the present state of repair of the dwellinghouse, is treated in the Act as forming part of the landlord's "outgoings"; see s. 8 (1) (f), discussed infra, pp. 333-334.
75 Rent Appeal Act 1973, s. 8 (1) (e).
76 Rent Appeal Act 1973, s. 8 (1) (d).

specified in s. 8 (1),[77] nor does it require any "scarcity element" or "scarcity value" to be ignored in evaluating evidence of comparable rents.[78]

The method to be used in the valuation of any "furniture and chattels . . . provided by the landlord"[79] is a matter to be determined by the Board, but "[a]ny amount allowed in the determination of the equitable rent in respect of furniture and chattels shall not exceed 15 percent per annum on their value".[80] While the valuation methods used by the Boards may vary and result in different approaches developing in particular districts,[81] it is suggested that the approach of the English rent tribunals might properly be followed. Those tribunals "endeavour to arrive at a figure related to the value of the furniture in use to the tenant, which [figure] is often lower than a replacement value, but higher than a second-hand or scrap value".[82] Whatever method of valuation is adopted, an allowance for depreciation based on original or estimated cost divided by the number of years comprised in the actual past and estimated future life of the furniture should be made.[83]

The Board must have regard to the "landlord's outgoings in respect of the dwellinghouse",[84] which phrase "means rates, insurance premiums, costs of repairs, and depreciation and other outgoings in respect of the premises and such other expenditure as is met by the landlord for the benefit of the tenant; and includes land tax to the extent that the owner of the premises would be liable for land tax if he owned no other land".[85] In practice little difficulty will be encountered in determining the allowance to be made for fixed items of expenditure such as rates and insurance premiums. If details of the landlord's expenditure on such items are not volunteered to the Board, it has power to compel their disclosure.[86] The basis upon which allowances are to be made for the cost of repairs and maintenance is left to the Board's discretion. Any such allowance need not be calculated as a percentage of the value of improvements; if it is, the Board is not tied to a particular method of valuing the improvements, nor is it required always to adopt a particular percentage

77 Cf. *Griffin* v. *Chance* (1949) 6 M.C.D. 121, 124, where it was held that the objects of the Tenancy Act 1948—the promotion and maintenance of general economic stability—compelled the tribunal to attach considerable weight to evidence of comparable rents.

78 Cf. Rent Act (U.K.), s. 46 (2), where in determining a fair rent it must be assumed that "the number of persons seeking to become tenants of similar dwellinghouses in the locality on the terms (other than those relating to rent) of the regulated tenancy is not substantially greater than the number of such dwellinghouses in the locality which are available for letting on such terms".

79 Rent Appeal Act 1973, s. 8 (1) (g).

80 Rent Appeal Act 1973, s. 8 (2).

81 As was the case under earlier New Zealand tenancy statutes. See New Zealand Institute of Valuers, *Principles and Practice of Urban Valuation in New Zealand*, 171.

82 D. C. M. Yardley, "Rent Tribunals and Rent Assessment Committees" [1968] Pub. Law 135, 145.

83 See *Regis Property Co. Ltd.* v. *Dudley* [1958] 1 Q.B. 346, 361.

84 Rent Appeal Act 1973, s. 8 (1) (f).

85 Rent Appeal Act 1973, s. 2 (1).

86 First Sch., Cl. 15.

of their value.[87] It appears that in practice repairs and maintenance are treated separately.[88] The average sum actually expended on repairs over a previous period of years is accepted as providing the most reliable basis for estimating their future cost. Depreciation should be allowed at a rate based on the estimated life of the dwellinghouse. The value of the property to which this rate is applied may again be assessed in whatever manner the Board determines is appropriate in the particular case; replacement cost would however seem more appropriate than original cost.[89]

It was previously suggested that in assessing the equitable rent, the Board could not take into account the landlord's equity in the property. While sums payable by virtue of a mortgage or other charge secured on the property may appear to constitute an "outgoing" of the landlord, such sums differ from those outgoings—such as rates and insurance premiums—specified in section 2 (1) in that the landlord's obligation (for example to make mortgage repayments) does not arise simply by reason of his ownership of the property. The obligation arises solely because of the "personal circumstances" of the landlord: for reasons personal and peculiar to the landlord, moneys owed by him are secured on the property.[90]

6. *Other Relevant Matters*

It was previously suggested, first, that the matters specified in s. 8 (1) do not constitute an exhaustive catalogue of relevant considerations, and secondly, that one unspecified matter which may be a relevant consideration is the rent payable for the dwellinghouse at the time of the application. Other matters which the Board might properly consider may be present by virtue of the obligations imposed by the lease or tenancy on one party vis-à-vis the other. In *Hamilton Furnishings Ltd.* v. *Hamilton Autos Ltd.*[91] it was held that where proceedings were taken under the Tenancy Act 1948,[92]

> . . . evidence should have been called as to the terms of the various leases referred to [in the proceedings]. The terms of such leases are relevant to, and must affect, the quantum of rent—*e.g.* a covenant by the tenant to repair and keep in repair means that his tenancy will cost him something over and above the rent reserved by the lease.

In particular, the term of the lease or tenancy may be a relevant consideration, for a tenant who has no security of tenure cannot fairly be expected to pay the same rental as a tenant who has a secure

87 The position was the same under earlier New Zealand tenancy statutes: *Macalister* v. *Peel* (1962) 10 M.C.D. 309, 311; but cf. *Rental Homes Ltd.* v. *Smith* (1949) 6 M.C.D. 34.

88 This view is based on comments made by Mr J. M. Conradson, Chairman of the Dunedin Board, at a seminar conducted by the Otago Branch of the New Zealand Legal Association at Dunedin on 7 June 1975.

89 Clearly the value shown on the District Valuation Roll is inappropriate, for it reflects "the unexhausted value of the improvements at the date" of valuation: *Macalister* v. *Peel* (1962) 10 M.C.D. 309, 312.

90 It is also to be noted that under earlier legislation there was an express requirement that in certain circumstances account was to be taken of the interest payable by the landlord under his mortage. See, for example, Tenancy Regulations 1956 (S.R. 1946/187), Reg. 2 (c).

91 (1951) 7 M.C.D. 119.

92 Ibid., 123-124 per Paterson S.M. This point was affirmed on appeal sub nom. *Reids Furnishings Ltd.* v. *Hamilton Autos Ltd.* [1951] N.Z.L.R. 730, 735.

tenancy.[93] So in *Humphreys Furniture Warehouse Ltd.* v. *Cuthbert*[94] where the lease in question was for a term of seven years, with an option for a further seven years, the value of the property upon which the rent was to be based was increased by ten percent to take account of the security of tenure which the term of the lease conferred on the lessee.[95] For these reasons it is suggested that the Boards should, as a matter of practice, require production at the hearing of any subsisting lease or tenancy agreement.[96]

III. THE DECISION

Clause 8 of the Second Schedule to the Rent Appeal Act 1973, which applies by virtue of section 6 (8) to every application made under that section, provides that "[e]very assessment shall be in writing and shall show the Board's reasons for the assessment". The only reported decision which has considered the amount of detail required in a written statement of reasons given by a Board is *Clark* v. *Rent Appeal Board.*[97] The Board had recorded that in determining the equitable rent it "took into consideration in particular" three of the matters specified in section 8 (1). O'Regan J. said:[98]

> The words recorded . . ., are ipsissima verba the words of paras (a), (b) and (c) of s. 8 (1). [The Board] has merely repeated three of the matters to which it was required by the statute to have regard. Such are not reasons for the assessment. They are a bald statement of the statutory requirements upon which 'in particular' it founded its decision.

Prior to the decision in *Clark's* case there was some authority suggesting that a rent tribunal could not simply record that in assessing the rent it had taken into consideration all relevant matters.[99] It is now clear that if a Rent Appeal Board merely records that it took certain matters 'into consideration in particular" but goes no further than to identify those matters by reference to their statutory descriptions, this will not constitute an adequate statement of reasons.

In the few English decisions in which the adequacy of stated reasons has been challenged,[1] some of which were expressly relied

93 See *Hamilton Furnishings Ltd.* v. *Hamilton Autos Ltd.* (1951) 7 M.C.D. 119, 125.

94 [1949] N.Z.L.R. 913.

95 Ibid., 925. See Christchurch Board Reference 47/4/98 which suggests that the Board there took into account the respective obligations imposed on each party by the lease.

96 In practice the request for production could always be made in the notice of date of hearing served on the parties pursuant to Clause 5 (1) of the Second Schedule.

97 [1975] 2 N.Z.L.R. 24.

98 Ibid., 26.

99 "[F]or a Magistrate sitting as a Fair Rents Board to content himself with saying 'I have reached my decision after having considered all of the matters which the statute requires me to consider' is not a proper fulfilment of the obligation which rests upon him as a judicial officer to see that his reasons are 'explicitly stated' . . .": *De Iacovo* v. *Lacanale* [1957] V.R. 553, 559 per Monahan J.

1 *Givaudan & Co. Ltd.* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 250, 258; *Iveagh* v. *Minister of Housing and Local Government* [1964] 1 Q.B. 395, 410. See also *Re Allen & Matthews' Arbitration* [1971] 2 Q.B. 518; *Ex parte Woodhouse, The Times,* 18 June 1960, [1960] C.L.Y. 140.

upon by O'Regan J. in *Clark's* case,[2] the courts have almost invariably limited their consideration of what constitutes adequate reasons to the particular case before them.[3] They have never proceeded to give any guidance in positive terms as to the matters which should normally be included in order to satisfy a statutory requirement that a statement of reasons be given by a tribunal. It is estimated that of the 504 assessments made by the four Boards during their first year of operation, approximately thirty percent record only that the Board took into account all matters specified in section 8 of the Rent Appeal Act 1973, and a further forty percent record the "reasons" for the assessment in terms virtually identical to those reviewed in *Clark's* case. In view of the fact that such a large number of the Boards' assessments appear to contain inadequate statements of reasons, the writer has argued elsewhere[4] that in the case of decisions by the Boards, the courts should, in directing a Board under section 4 of the Judicature Amendment Act 1973 to reconsider and determine the reasons for its decision, give positive directions as to what constitutes adequate reasons. It is suggested that the Board's treatment of each matter required to be considered by section 8 of the Rent Appeal Act 1973 and any other matter taken into account in assessing the equitable rent should be disclosed in the statement of reasons. The relative weight attached by the Board to each relevant matter taken into account should also be disclosed. The writer would in fact go further, despite the lack of supporting authority, and contend that if, as it appears, the Boards have adopted a consistent approach to the determination of an equitable rent, matters such as the current market value assessed and the return thereon considered "proper"[5] by the Board should always be stated.[6]

IV. PROCEDURAL FAIRNESS: APPLICATION OF THE RULES OF NATURAL JUSTICE

The Rent Appeal Boards are not bound by the rules of evidence and are virtually unrestricted as to the source and nature of the "evidence" to which they may properly have regard. Each Board is deemed, subject to the provisions of the Rent Appeal Act 1973, to be a Commmission of Inquiry under the Commissions of Inquiry Act

2 *Re Poyser & Mills' Arbitration* [1964] 2 Q.B. 467, 477; *Mountview Court Properties Ltd.* v. *Devlin* (1970) 21 P. & C.R. 689, 692-693.

3 But see *Metropolitan Property Holdings Ltd.* v. *Laufer* (1975) 29 P. & C.R. 172, 177.

4 Note (1975) 6 N.Z.U.L.R. 383. Space precludes any discussion of the related question there raised; i.e. whether a failure to provide adequate reasons amounts to a jurisdictional error justifying the issue of mandamus or certiorari.

5 Cf. *Metropolitan Property Holdings Ltd.* v. *Laufer* (1975) 29 P. & C.R. 172, 177-178, where it was considered that an English rent assessment committee was under no obligation to quantify any element which it allowed for scarcity, nor to disclose its approach to the question of "scarcity value" in its statement of reasons.

6 Cf. the form of the decisions made under the earlier New Zealand Tenancy Acts; also the approach of the English rent tribunals as revealed, for example, in *Anglo-Italian Properties Ltd.* v. *London Rent Assessment Panel* [1969] 1 W.L.R. 730, 732. Since the decision in *Clark's* case the Boards have endeavoured to amplify their statements of reasons. However, in the writer's opinion, they still do not provide adequate reasons.

1908.[7] Clause 12 of the First Schedule to the Rent Appeal Act 1973 provides:

> (1) For the purposes of any application under section 6 . . . a Rent Appeal Board may make such inquiries and obtain such valuations and reports (if any) as it considers necessary and shall not be bound by any rules of evidence but may inform itself in such manner as it thinks fit.
> (2) Subject to the provisions of subclause (1) of this clause, the Evidence Act 1908 shall apply to each Board in the same manner as if each Board were a Court within the meaning of that Act.

In particular, a Board "may cause any dwellinghouse . . . to be inspected and may cause a valuation of or report upon the premises to be made and may take such valuation or report into consideration".[8] A Board may also "[a]t any reasonable time enter into upon any dwellinghouse . . . for the purpose of examining the premises" and may require the landlord or tenant "to answer any question relating to the letting" or "to produce any rent book, receipt or other document . . . for the purpose of ascertaining the rent paid under any tenancy".[9]

Despite the conferment on the Boards of wide powers to obtain and admit "evidence", the Boards are still bound to comply with the requirements of natural justice and "fairness".[10] Thus a failure to disclose to a party the contents of any communication made to the Board in his absence and to provide the absent party with an adequate opportunity for explanation or rebuttal, will invalidate the proceedings. An ex parte communication may be made by one of the parties to the proceedings and may, for example, take the form of written submissions made pursuant to Clause 3 of the Second Schedule, an oral or written statement resulting from a request made by the Board pursuant to Clause 4 of the Second Schedule, or oral statements made during the course of the Board's inspection of the premises. Alternatively, such a communication may be made by a third party.

1. *Ex parte Communications by a Party or Third Party*

Where a tribunal has based its decision, wholly or in part, upon written[11] or oral[12] information received from one party in the absence of the other, the courts have held on numerous occasions that a failure to disclose the contents of the communciation and to provide an adequate opportunity for rebuttal constitutes a breach of the audi alteram partem rule. The same view is taken even where the undisclosed communication consists only of a general traversing of evidence

7 First Sch., Cl. 8.
8 First Sch., Cl. 13.
9 First Sch., Cl. 15.
10 See *Clark* v. *Rent Appeal Board* [1975] 2 N.Z.L.R. 24; *R.* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bell, London and Provincial Properties Ltd.* [1949] 1 K.B. 666; *R.* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Hodge* (1964) 108 Sol. Jo. 379; *Crofton Investment Trust Ltd.* v. *Greater London Rent Assessment Committee* [1967] 2 Q.B. 955. See also *Re an Application by Marvic Investments Ltd.* (1973) 13 M.C.D. 467, 469.
11 *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, 374; *Low* v. *Earthquake and War Damage Commission* [1959] N.Z.L.R. 1198; *Lamond* v. *Barnett* [1964] N.Z.L.R. 195, 203; *South Otago Hospital Board* v. *Nurses and Midwives Board* [1972] N.Z.L.R. 828. For the general rule, see *Board of Education* v. *Rice* [1911] A.C. 179, 182.
12 *Errington* v. *Minister of Health* [1935] 1 K.B. 249; *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532.

which has previously been disclosed and with regard to which an adequate opportunity for rebuttal has already been given.[13]

Relevant information may also be communicated to a Board by third parties: e.g. expert advisers such as the District Valuer who in practice supplies the Board with a current market valuation of each property, or members of its own staff such as officers of the Department of Labour who sometimes carry out inspections of premises on behalf of the Board.[14] Here again, a Board's failure to disclose the contents of a communication by a third party and provide an adequate oportunity for rebuttal will invalidate the proceedings.[15] For the purposes of the audi alteram partem rule, a distinction must be drawn between reliance by a tribunal on information communicated to it by an expert adviser, and a tribunal's reliance on information within its own knowledge.[16] But in the former case at least,[17] the disclosure rule applies, and the nature of the contents of the communciation is irrelevant for these purposes.[18] Finally, this rule applies in the case of a communciation made by a staff member of the tribunal, even where the communciation contains no new information or material and consists only of a summary of the evidence or a statement of expert views and recommended findings.[19] It is submitted that the only modification or variation of the normal requirements of the audi alteram partem rule effected by the Rent Appeal Act 1973 relates to the requirement as to disclosure in the case of valuations or reports obtained by a Board pursuant to clauses 12 or 13 of the First Schedule.[20]

2. *Adequacy of Disclosure*

In what manner and to what extent must a Board disclose the contents of ex parte communications? Although in the case of ex parte written statements some authorities hold that disclosure is re-

13 *Connolly* v. *Palmerston North City Corporation* [1953] N.Z.L.R. 115, 121; *Denton* v. *Auckland City* [1969] N.Z.L.R. 256, 260.

14 The power to inspect premises and obtain information is conferred on each Board and on any person authorised in writing by a Board: First Sch., Cl. 15. Section 4 (6) of the Act provides that the Department of Labour shall furnish such secretarial, recording, and other services as may be necessary to enable each Board to exercise its functions and powers. It is submitted that for the purposes of the audi alteram partem rule, any officer of that Department acting on behalf of a Board ought to be regarded as an employee or staff member of that Board.

15 This will be so whether or not the tribunal has actively sought out the third party communicant. See *R.* v. *Architects' Registration Tribunal, Ex parte Jaggar* [1945] 2 All E.R. 131 (unsolicited letters); *R.* v. *Bodmin Justices, Ex parte McEwen* [1947] K.B. 321 (tribunal seeking out and interviewing witness in private).

16 *R.* v. *City of Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane) Ltd.* [1941] 1 K.B. 53, 69; *R.* v. *Architects' Registration Tribunal, Ex parte Jaggar* [1945] 2 All E.R. 131, 138.

17 The application of the disclosure rule where a tribunal has relied upon information within its own knowledge is discussed infra, pp. 343-345.

18 *R.* v. *City of Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane) Ltd.* 1941 1 K.B. 53, 67-68. See also *Low* v. *Earthquake and War Damage Commission* [1959] N.Z.L.R. 1198; *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366.

19 *Denton* v. *Auckland City* [1969] N.Z.L.R. 256, 260. See also *Connolly* v. *Palmerston North City Corporation* [1953] N.Z.L.R. 115.

20 See further infra, p. 340.

quired only of the substance of the statement,[21] the view most frequently adopted by the New Zealand courts is that a copy of the full text must be made available.[22] As there is no practical difficulty today in making full copies of a written document, and because a summary may not always accurately reflect the contents of the full text,[23] it is suggested that the Boards must make available to all affected parties a full copy of the text of any ex parte written statement. The authorities again reveal a divergence of judicial opinion as to the manner in which ex parte oral statements must be disclosed. Although support can be found for the view that the informant must appear at the hearing and repeat his statement,[24] the weight of authority holds that it is sufficient if the tribunal orally discloses the contents of the statement at the hearing.[25]

In view of the uncertain nature of the common law requirements in this area, it is submitted that specific statutory provisions should be enacted which impose a positive requirement on the Boards to disclose all ex parte communications and prescribe the extent to which, and the manner in which, they must effect such disclosure. It has already been found necessary to follow such a course in respect of some types of proceedings under the English rent restriction legislation.[26] But the most compelling reason is that in the absence of clear directions as to disclosure, even where there has been an ex parte communication to a Board the absent party will often be unable to prove that it was in fact made. Indeed the decision in *Clark* v. *Rent Appeal Board*[27] provides an illustration of this difficulty. There the applicant contended that the Board's inspection of the premises was irregular in that the respondents were present at the time of the inspection whereas he was not. Although the Board had notice of this allegation prior to the hearing, neither the Board nor the second respondent[28] affirmed or denied the facts upon which this allegation was based. The applicant himself was unable to prove these facts and O'Regan J. declined to draw any inferences from the silence of the other parties.[29] It is reasonable to suppose that any specific allegation by the applicant that statements were made by the respondents to the Board at this time would have been disposed of in the same manner.

21 *Low* v. *Earthquake and War Damage Commission* [1959] N.Z.L.R. 1198, 1208. See also *Byrne* v. *Kinematograph Renters' Society Ltd.* [1958] 1 W.L.R. 762, 785. *Russell* v. *Duke of Norfolk* (1949) 65 T.L.R. 225, 230-231; [1949] 1 All E.R. 109, 118.

22 *Denton* v. *Auckland City* [1969] N.Z.L.R. 256, 266; *Lamond* v. *Barnett* [1964] N.Z.L.R. 195, 203; *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, 374, 380. Similarly, see *Kanda* v. *Government of Malaya* [1962] A.C. 322, 338.

23 Even where a summary does accurately reflect the full text, a party may still be left after the hearing with a suspicion that it does not.

24 *Connolly* v. *Palmerston North City Corporation* [1953] N.Z.L.R. 115, 120-122.

25 *University of Ceylon* v. *Fernando* [1960] 1 W.L.R. 223, 234 (P.C.); *Fielding Club (Inc.)* v. *Perry* [1929] N.Z.L.R. 529, 543, 546. Again, it is submitted that the full contents of the statement, rather than only its substance, must be disclosed whenever practicable.

26 See, for example, the Rent Regulation (Local Authority Applications) Regulations 1972, S.I. 1972 No. 1037 (U.K.)

27 [1975] 2 N.Z.L.R. 24.

28 The applicant here sought a review of two of the respondent Board's decisions. Only one of the second respondents gave evidence at the hearing of the applications.

29 [1975] 2 N.Z.L.R. 24, 28.

As previously mentioned, Clause 14 of the First Schedule appears to modify the application of the audi alteram rule in the case of valuations or reports obtained by a Board pursuant to clauses 12 or 13 of that Schedule. Clause 14 provides that "[t]he tenant and the landlord shall be *entitled* to inspect any valuation or report obtained by the Board. . . ." Thus it would seem that in the case of such valuations or reports, a Board need not take the initiative in disclosing their contents, and the proceedings will be invalid only if the Board has failed to meet a party's request for disclosure of the contents of such a document. The writer can see no valid reason for a relaxation of the requirements of the audi alteram partem rule in respect of these documents and, if this interpretation of Clause 14 is correct,[30] it should be repealed.

3. *Inspections*

Clause 13 of the First Schedule to the Rent Appeal Act 1973 provides:

> A Rent Appeal Board may cause any dwellinghouse in respect of which an application has been made . . . to be inspected and may cause a valuation of or report upon the premises to be made and may take such report or valuation into consideration.

The Act further provides that a Board "may . . . [a]t any reasonable time enter into and upon any dwellinghouse to which the application relates for the purpose of examining the premises . . ."[31] In *Clark's* case[32] O'Regan J., while declining to infer from the evidence before him that the inspection made by the Board was, as the applicant contended, irregular, proceeded to provide "some guidance to the Board for the future" as to its practice of making inspections.

In so doing, he relied on the decisions of the English Court of Appeal in *Goold* v. *Evans & Co.*[33] and *Salsbury* v. *Woodland.*[34] There, while recognising that in some cases, as where a site such as the scene of an accident is viewed, no harm might be done by one party being absent,[35] it was clearly established that in the case of courts of general jurisdiction "a view of . . . premises in the absence of one party, the other party knowing of it and being there, is [prima facie] an inadmissable view".[36] In *Goold* v. *Evans & Co.,* Denning L. J. was emphatic that:[37]

> It is a fundamental principle of our law that a Judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or at any rate, each party must be given an opportunity of being present.

30 It may be that in enacting Cl. 14 the legislature intended to authorise a party's request for disclosure of these documents at some time prior to the hearing. However, such a view requires a strained construction of the words of the clause.
31 First Sch., Cl. 15.
32 [1975] 2 N.Z.L.R. 24, 28.
33 [1951] 2 T.L.R. 1189.
34 [1970] 1 Q B. 324.
35 *Salsbury* v. *Woodland* [1970] 1 Q.B. 324, 344, 346, 349-350. See also *Hare* v. *British Transport Commission* [1956] 1 W.L.R. 250, 253; *Goold* v. *Evans & Co.* [1951] 2 T.L R. 1189, 1190.
36 *Goold* v. *Evans & Co.* [1951] 2 T.L.R. 1189, 1190 per Somervell L. J.
37 Ibid., 1191.

In *Clark's* case,[38] O'Regan J. considered that an inspection by a Rent Appeal Board would not be likely

> . . . to involve anything in the nature of a demonstration or a reconstruction of events such as was the case in *Goold* v. *Evans*. On the other hand, it would involve a deal more than a Judge, or indeed a tribunal, merely looking at a site such as the scene of an accident which in some cases has been held unobjectionable. . . .

An inspection by a Board,[39]

> . . . is 'for the purpose of examining the premises'. Such an examination and the impression of this or that factor which it leaves with the individual members cannot but affect their judgment on the matters they are to determine.

Accordingly, before exercising its power of inspection, the Board should have given "fair notice to the parties" and have invited "them or their representatives to be present at an appointed time".[40]

It is now clear that the requirement as to notice applicable in the case of views by courts of general jurisdiction and, in England, in the case of views by tribunals exercising judicial functions,[41] now also applies to inspections by a Rent Appeal Board. However uncertainty still exists as to what constitutes proper notice of an inspection, and as to whether the normal rule requiring disclosure of ex parte communications operates where such notice is given.

First, O'Regan J. imposed the onus on the Board to give "fair notice" of an inspection. Courts of general jurisdiction must give individual notice to each party prior to making an inspection or taking a view.[42] There is some authority to the effect that in the case of inspections by a tribunal, the parties must be made aware of the inspection and of the view taken as a result of it, and must have an opportunity of addressing the tribunal thereon.[43] On the other hand, in *Ryder* v. *Minister of Housing and Local Government*[44] the plaintiff was advised at the commencement of a public hearing that an inspection would be made, but he was not present at its conclusion when the time of inspection was announced. He subsequently argued that he had not been given a proper opportunity to attend the inspection. Upholding the tribunal's decision, Slade J. appears to have taken the view that a tribunal need not give notice of the time of inspection to each party individually.[45] In the writer's opinion, the views expressed by Slade J. ought to apply only where a requirement as to individual notice would impose an unduly onerous burden on the tribunal,[46] and where the parties ought to have anticipated that

38 [1975] 2 N.Z.L.R. 24.

39 Ibid., 29.

40 Ibid., 30. The New Zealand Public and Administrative Law Reform Committee had commented earlier on the absence of any provision in the Rent Appeal Act 1973 as to notice of inspections: *Seventh Report*, 1974, para. 28.

41 *Errington* v. *Minister of Health* [1935] 1 K.B. 249.

42 *Goold* v. *Evans & Co.* [1951] 2 T.L.R. 1189.

43 *Yendall* v. *Smith Mitchell & Co. Ltd.* [1953] V.L.R. 369, 375.

44 [1954] J.P.L. 508; [1954] C.L.Y. 503.

45 The brevity of the reports of this decision prevents any firm conclusion on this point.

46 As, for example, in *Ryder's* case where the number of persons potentially affected by the proposed inspection was large.

an inspection would be made and should themselves have ascertained the time at which it would be made.

In practice the Board will be advised by the applicant of all potential parties to the proceedings. The parties will always be limited in number. Furthermore, the Boards' practice as to whether an inspection is made varies, so that the parties cannot reasonably be expected to anticipate an inspection. The Wellington and Dunedin Boards always cause the premises to be inspected by at least two Board members prior to the hearing whereas the Christchurch Board caused an inspection to be made on only two occasions during the first year of its operation, and of the small number of inspections made by the Auckland Board during this period, the majority were undertaken by an officer of the Department of Labour, often after the hearing.[47] For these reasons it is submitted that the obligation to give "fair notice" of an inspection will normally require a Board to give individual written notice to all parties.[48]

Secondly, the writer has argued elsewhere[49] that the mere fact than an inspection was made in the absence of a party, involving as it does an opportunity for ex parte communications, should not of itself constitute a breach of the audi alteram partem rule.[50] But in order to ensure a fair hearing, in these circumstances the reviewing court should place the onus on the tribunal to satisfy it that in fact no communication prejudicial to the absent party was made. It was also suggested that proper notice of an inspection cannot always be regarded as "curing" a decision which would otherwise be invalid because ex parte communications were made during the inspection. Only if the communications referred to matters which the absent party should reasonably have anticipated would arise out of and relate to the inspection,[51] should that party be deemed to have waived his right to disclosure of the contents of the communications.

Thirdly, a Rent Appeal Board may make an inspection in the absence of both parties and it seems, despite dicta to the contrary,[52] that the normal rule as to disclosure applies.[53] It is a moot point whether this rule also applies where an inspection is made in the presence of all parties. It would seem that it does not, for in *Salsbury* v. *Woodland*[54] the decision was upheld even although the fact that an inspection had been made was first revealed to the parties in the

47 See the comments of Mr R. A. Keir, Chairman of the Auckland Board, reported in *The Evening Star*, 3 February 1975.

48 Such notice could in practice be given in any notice served on a party pursuant to Clauses 4 or 5 of the Second Schedule. An exception to the requirement of individual written notice might exist where the Board decides to make an inspection during the course of a hearing at which all parties or their representatives are present. In this case oral notification of the time of inspection should be sufficient.

49 Note (1975) 6 N.Z.U.L.R. 383.

50 *Ryder* v. *Minister of Housing and Local Government* [1954] J.P.L. 508. *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935) 153 L.T. 219. Cf. *Goold* v. *Evans & Co.* [1951] 2 T.L.R. 1189.

51 E.g., the nature and character of the premises viewed.

52 *R.* v. *Brighton Rent Tribunal, Ex parte Marine Parade Estates Ltd.* [1950] 2 K.B. 410, 420-421.

53 *R.* v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bell, London and Provincial Properties Ltd.* [1949] 1 K.B. 666, 683.

54 [1970] 1 Q.B. 324.

judgment of the court,[55] and it is unlikely that a reviewing court would require more of a tribunal such as a Rent Appeal Board than it would of a Judge.

4. *General Knowledge or Expertise*

In general, administrative tribunals are permitted to rely on their own pre-existing knowledge and expertise to test and supplement the evidence before them, and may substitute their own expert opinion as to the conclusions to be drawn from such evidence for that of expert witnesses. The English rent tribunals have "been encouraged by the courts to attach as much weight to their own knowledge as to evidence, or even to let it override the evidence".[56] Like those tribunals, the qualifications of the members of the Rent Appeal Boards[57] and the nature of the functions they perform indicate that they are intended to possess specialised knowledge. It is also clear that the Boards will gradually acquire further knowledge and expertise through the continuing performance of their functions.

The circumstances in which disclosure must be made when a tribunal relies upon its own pre-existing knowledge and expertise have yet to be precisely determined by the courts.[58] It appears that a distinction should be drawn between the use of knowledge or information acquired from relatively specific sources — which will normally be readily identifiable—to supplement, or as a substitute for, evidence, and the use of an accumulated background of general knowledge or expertise to assess and evaluate the evidence presented. The disclosure rule applies in the former case,[59] but not in the later, for there "the special knowledge of the tribunal cannot be separated from it and is part of the equipment of the tribunal".[60] Thus it would seem, for example, that any knowledge of facts obtained by a Rent Appeal Board as the result of an inspection which gives rise to an issue of fact not previously raised by the proceedings must be disclosed.[61]

While the courts will permit a tribunal to use undisclosed general knowledge or expertise as the basis for deciding between two conflicting views, they will not allow a tribunal to rely on such knowledge for the purpose of rejecting uncontradicted evidence placed be-

55 The question of prior disclosure both as to the fact of the inspection having been made, and as to the impressions gained by the Judge thereby, was raised by counsel (ibid., 333-334) but was not referred to in the judgments.

56 R. E. Wraith and P. G. Hutchesson, op. cit., 273. See, for example, *Metropolitan Property Holdings Ltd.* v. *Laufer* (1975) 29 P. & C.R. 172, 176.

57 See Appendix A.

58 See generally, J. A. Smillie, "The Problem of 'Official Notice': Reliance by Administrative Tribunals on the Personal Knowledge of their Members" [1975] Pub. Law 64. The writer has relied substantially on the views there expressed. See also Alec Samuels, "Personal Knowledge of Rent Assessment Committee Members" (1967) 117 New L.J. 228.

59 *R.* v. *Milk Board, Ex parte Tomkins* [1944] V.L.R. 187.

60 Ibid., 197 per Lowe J. See also *Denton* v. *Auckland City* [1969] N.Z.L.R. 256, 263; *R.* v. *City of Westminster Assessment Committee, Ex parte Grosvenor House (Park Lane) Ltd.* [1941] 1 K.B. 53, 69.

61 And similarly the discovery on an inspection of facts which are material to an issue previously raised. But see *Vale Estates (Acton) Ltd.* v. *Secretary of State for the Environment* (1971) 69 L.G.R. 543. And note the effect of Clause 14 of the First Schedule, discussed supra, pp. 338, 340.

fore it by a party.[62] On a number of occasions already, a Board has had before it the uncontradicted evidence of a professional valuer called by one of the parties. Where, in giving his evidence, the valuer expresses his opinion as to the rent which should be assessed based upon a method of assessment coming within the provisions of section 8, but which differs from that proposed to be adopted by the Board, the Board must, if the adoption of the Board's method could not reasonably have been anticipated, inform the parties of its basis and, if requested, allow them to present further evidence or submissions on this point.[63] Accordingly, the South African courts have held that where a party to proceedings before a rent tribunal has tendered a valuation of the premises which has gone uncontradicted at the hearing, and in valuing the premises itself the tribunal has applied a principle or presumption derived from its pre-existing knowledge and experience without disclosing it to the parties, the tribunal's decision will be quashed on the ground that it has deprived the parties of their right to make submissions on a crucial issue.[64] The same rule should apply where a Board's understanding of the law leads it to a conclusion on a point of law which was neither argued by the parties nor was capable of being reasonably anticipated by them.[65]

As we have seen, the Board's appear to have adopted as a matter of policy a fixed approach to the assessment of the equitable rent. Even if this approach is not based on considerations extraneous to those contemplated by the Rent Appeal Act 1973, still its adoption must not disable the Board from exercising its discretion in individual cases.[66] It may therefore be necessary for the Board to disclose this policy to the parties. In one case where a port authority had refused to grant a licence to carry out certain works, it was said that no objection could be taken[67]

> . . . where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, *intimates to him what its policy is*, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case.

Where the parties ought reasonably to have anticipated that the Board would rely on its pre-existing knowledge or expertise, and ought

62 *Hughes* v. *Lancashire Steam Coal Collieries Ltd.* [1947] 2 All E.R. 556, 558; *R.* v. *Deputy Industrial Injuries Commissioner, Ex parte Howorth* (1968) 112 Sol. Jo. 542. Cf. *R.* v. *Medical Appeal Tribunal (North Midland Region), Ex parte Hubble* [1958] 2 Q.B. 228.

63 *R.* v. *Flintshire County Council Licensing (Stage Plays) Committee, Ex parte Barrett* [1957] 1 Q.B. 350, 361. It seems that fairness may in some cases require not only disclosure of the method of assessment, but also the reasons for its proposed adoption. See further infra, p. 345.

64 *Chaitowitz* v. *Johannesburg Rent Board* 1943 T.P.D. 333; *Zidel* v. *West Rand Rent Board* 1946 T.P.D. 60. The former decision also suggests that disclosure must be made even where the accuracy of the evidence rejected by the tribunal is disputed by the parties at the hearing.

65 See *Société Franco-Tunisienne d'Armement-Tunis* v. *Government of Ceylon* [1959] 1 W.L.R. 787; *Re Chien Sing-Shou* [1967] 1 W.L.R. 1155 (P.C.).

66 *R.* v. *Torquay Licensing Justices, Ex parte Brockman* [1951] 2 K.B. 784, 792; *British Oxygen Co. Ltd.* v. *Minister of Technology* [1971] A.C. 610, 625. See generally, S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), 274-277.

67 *R.* v. *Port of London Authority, Ex parte Kynoch Ltd.* [1919] 1 K.B. 176, 184 per Bankes L. J. Similarly *R.* v. *Torquay Licensing Justices, Ex parte Brockman* [1951] 2 K.B. 784, 788.

reasonably to have known the substance of the principle or policy derived therefrom, disclosure need not be made.[68] In determining the equitable rent, the Board is required to have regard to the matters specified in section 8 (1), and normally parties ought to anticipate that reference will be made to those matters.[69] But in other cases fairness may require that the substance of a previously established principle or policy be disclosed, even if it is enunciated in previous decisions where, as is normally the case in proceedings under the Rent Appeal Act, the parties are inexperienced and appear without the benefit of legal advice or representation.[70]

V. CONCLUSION

The problems which arise where demand for rental accommodation exceeds supply have essentially social and political causes, and it is outside the scope of this article to express any conclusion as to whether the establishment of rent tribunals provides the best practical solution to those problems. Nor has it been sought to exhaustively examine all aspects of the function and practice of the Boards established under the Rent Appeal Act 1973. Nevertheless, at least one criticism may be levelled at the Boards' present practice, and that relates to the lack of information they have provided as to the manner in which an assessment of the equitable rent is made. It is hoped that this article has provided some indication of the manner in which the Boards perform this function. However it seems to the writer that the Boards themselves must do more to inform parties and their professional advisers of the approach taken in practice. This could be accomplished by the provision of more detailed and explicit statements of reasons in the assessments handed down and thereafter open to public inspection.[71] That the Boards, like many other tribunals, are bound to comply with the requirements of the audi alteram partem rule seems clear. But in this instance, where parties are often unsophisticated and usually appear without benefit of legal advice or representation, it is essential that the Boards themselves are cognisant of these requirements. Not only will non-compliance seldom be challenged in practice, but also, in view of the present form of the Boards' statements of reasons, a failure to disclose the method of assessment proposed to be adopted will effectively deny parties their only practical opportunity of ascertaining and challenging that method.

Already one Board's practice as to the making of inspections has been successfully challenged in review proceedings. It is suggested that all Boards should adopt the practice of the Wellington and Dunedin Boards and ensure that each dwellinghouse is inspected by at least some Board members prior to the hearing. There are obvious advantages in making an inspection prior to the hearing; the practice

68 *Crofton Investment Trust Ltd.* v. *Greater London Rent Assessment Committee* [1967] 2 Q.B. 955, 969.

69 See *Pretoria Rent Board* v. *Levitt* 1953 (3) S.A. 36, where the statute required the Board to have regard to rents charged for comparable premises and it was held that the parties ought to have anticipated that regard would be had to this matter.

70 See *Re North Coast Air Services Ltd. and Air Transport Commission* (1973) 32 D.L.R. (3d) 695, 711, 719.

71 Rent Appeal Act 1973, s. 7.

of conducting an inspection after the hearing has been completed cannot be conducive to the prompt determination of applications, and much of the time presently spent at the hearing describing the character and state of the premises will be saved if some Board members have already inspected them. Furthermore, in any assessment of the equitable rent much is bound to depend upon personal impression, and the writer would prefer that the Boards be required to inspect all premises unless the parties waive the requirement in a particular case.

Finally, "landlord and tenant problems give rise, unfortunately, to many ill feelings, and the people involved are often so unsophisticated that rules have to be bent in order to achieve that fairness which is the essential core of natural justice".[72] It is therefore essential that Board members possess the knowledge, ability and integrity necessary to deal properly and fairly with these problems.[73] Bearing in mind the nature of many of the problems which have so far arisen in relation to the Board's practices, it would also seem desirable that Board chairmen possess legal qualifications and experience.

APPENDIX A

Auckland Board	
Chairman:	Mr R. A. Keir, previously principal of the Auckland Technical Institute.
Members:	Reverend Kingi M. Ihaka,[1] a prominent member of the Auckland Maori community.
	Mr B. B. Gardner, a registered public valuer.
Wellington Board	
Chairman:	Hon. W. A. Fox, one time Minister of Housing.
Members:	Mr M. R. Love, J.P., a prominent member of the Wellington Maori community.
	Mr G. W. Rowse, a registered public valuer.
Christchurch Board	
Chairman:	Mr A. T. Bell, a retired solicitor.
Members:	Mr A. F. Ross, a trade union official.
	Mr A. Gray, a registered public valuer.
Dunedin Board	
Chairman:	Mr J. M. Conradson,[2] a practising solicitor.
Members:	Mrs M. J. Plunket, a member of the Otago Hospital Board.
	Mr R. G. Sutherland, a registered public valuer.

1 Mr H. Pihema was appointed as deputy on 19 July 1974.

2 Mr M. R. D. Guest, a practising solicitor, was appointed as deputy on 10 February 1975.

72 D. C. M. Yardley, "Rent Tribunals and Rent Assessment Committees" [1968] Pub. Law 135, 151.

73 It may be observed that the need for the appointment of persons experienced in social welfare work, suggested at the time of the enactment of the Rent Appeal Act 1973, is questionable in view of the fact that the Boards are required by s. 8 (1) to exclude from consideration the "personal circumstances" of the parties.

APPENDIX B

	Auck.	Wgtn.	Chch.	Dun.	Total
1. *Applications*:					
(a) Number of applications made in the period — 1/2/74 to 31/1/75	419	352	144	56	971
(b) Number of applications withdrawn prior to hearing	187	132	36	27	382
(c) Number of applications awaiting a hearing at 31/1/75	25	47	13	—	85
(d) Number of applications determined as at 31/1/75	207	173	95	29	504
2. *Party Making the Application*:[1]					
(a) Landlord's application	31	15	45	1	92
(b) Tenant's application	174	158	50	28	410
(c) Joint application by landlord and tenant	2	—	—	—	2
3. *Appearance at Hearing by Parties*:					
(a) Appearance by both parties or their representatives	Not Available		82	23	105
(b) Appearance only by Landlord or his representative	„	„	11	2	13
(c) Appearance only by Tenant or his representative	„	„	2	2	4
(d) No appearance by parties or their representatives	„	„	—	2	2
4. *Representation of Parties:*					
(a) Tenant represented by—					
(i) Solicitor	„	„	4	1	5
(ii) Agent	„	„	—	—	—
(b) Landlord represented by—					
(i) Solicitor	„	„	20	9	29
(ii) Agent	„	„	3	2	5
5. *Legal Aid*:[2]					
(a) Applications by Landlord	—	—	—	—	—
(b) Applications by Tenant					
(i) Granted	3	1	—	—	4
(ii) Declined	—	—	—	—	—

1 These figures relate only to those applications determined by the Boards in the period 1/2/74 to 31/1/75.

2 No applications for legal aid were made in respect of Supreme Court proceedings.