

VALUERS REGISTRATION BOARD

IN THE MATTER OF an Inquiry under Section 32(2) of
the Valuers Act 1948 (The Act)

AND

IN THE MATTER OF charges under Section 31(1)(c) of
The Act against

Valuer A

BOARD OF INQUIRY:

K R Taylor (Inquiry Chairperson)

P A Curnow

V L Murdoch

COUNSEL:

S C Carter for the New Zealand Institute of Valuers

S M Grieve for Valuer A

DATE OF HEARING:

4 December 2017

DATE OF DECISION:

27 February 2018

The Complaint

1. This matter arose from complainant alleging ethical breaches by Valuer A in that they provided three reports for a property, at the same date and with three different values. This meant that the complainant potentially breached their loan to value ratio (LVR) policy.
2. The complaint was received by the Valuers Registration Board on 6 January 2017.
3. The complaint was investigated by the New Zealand Institute of Valuers [NZIV] and Valuer A was subsequently advised of two charges laid against them.

Charges

4. Section 31(1)(c) of the Valuers Act 1948, you have been charged with such incompetent conduct in the performance of your duties as a Valuer as to render you liable to a penalty provided by the Valuers Act 1948 **in that**, in compiling a valuation report dated 24 November 2016 with respect to a property, you failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of the report and therefore breached Clause 1.5 of the NZ Institute of Valuers' Code of Ethics.

Particulars:

You allowed three valuation reports (concerning the same property with the same date of inspection) to be in existence, with no explanation as to why the valuation was different or that there existed another valuation by you under the same instruction.

5. You have been charged with such unethical conduct in the performance of your duties as a valuer as to render you liable to a penalty provided by the Valuers Act 1948 **in that** in compiling a valuation report dated 24 November 2016 with respect to a property you failed to maintain the strictest independence and impartiality in the performance of your professional duties in breach of Clause 1.7 of the New Zealand Institute of Valuers Code of Ethics in that you were improperly influenced by the preferences of clients and/or acted in a way that was inconsistent with the duties of independence and impartiality
6. Valuer A pleaded guilty to the charges.

Background

7. The complainant advised that in December 2016 they had become aware that the valuations both from Valuer A and their employer prepared for the vendor and the purchaser in relation to the subject property differed.

8. The complainant advised that their lending policy required that they used the purchase price or registered valuation as the basis for lending, whichever is the lesser. The negotiated purchase price was \$450,000. Using the purchasers report they were satisfied with the \$456,000 figure given.
9. The complainant further advised that they lent 90% (the maximum LVR under the lending policy) of the \$450,000, being \$405,000. When they discovered that the vendor's report showed a value of \$440,000, this was an immediate concern as this meant they may have been exposed to an LVR of 92% (\$405K/\$440K).
10. The complainant said they had compared the two reports noting that they were fundamentally identical in commentary. They observed that the vendor's report dated 24/11 showed a market value of \$440,000. They then observed that the purchaser's valuation also dated 24/11 noted a market value of \$456,000. They obtained a further valuation being a 'corrected report' for both recipients showing the market value at \$450,000.
11. In response to communications between the complainant and Valuer A, Valuer A thanked the complainant for pointing out the difference and observed that this should not have happened. In their response they observed that this 'was one of those rush jobs where they have sent out two reports at different times of the day, one to comply with an Real Estate Agents Act [REAA] request, and then followed up later with the finance report'. Valuer A's belief was that when the report was typed a figure that should have been \$450,000 was misread and typed as \$440,000.
12. During the investigation it was noted that the initial valuation was required as the purchaser who was a real estate agent was buying the property. A valuation was therefore required under the Real Estate Agents Act to ensure that a market value was being paid for the property. The valuation provided was the low valuation of \$440,000. It could be implied from this valuation by the real estate agent purchasing the property for \$450,000 that a good deal was being obtained by the purchaser.
13. The second valuation was prepared when the purchaser wished to arrange finance to complete the purchase of the property. This was the higher of the two valuations at \$456,000. This figure could be construed as being of concern as it would indicate that the purchaser had paid less than market value for the property and/or was trying to ramp up the value of the property for finance purposes.
14. When the mistake was pointed out to Valuer A they corrected the report to both parties at \$450,000. While this may have been their intended correct figure in both cases, the existence of this third figure raised concerns as it neatly matched the purchase price. While this may satisfy the vendor in terms of the REAA, it did not satisfy the lender being the the complainant in terms of finance purposes.

15. To compound matters Valuer A had completed and signed all three reports without any change to the operative date or any explanation as to why there were three reports in the marketplace. The existence of these three reports provided the opportunity for confusion and therefore the basis of the complaint.
16. While the quantum of difference was not great, the circumstances under which the differences occurred was not considered good practice for a professional valuer.

Submissions on behalf of the New Zealand Institute of Valuers

17. Ms Carter on behalf of the NZIV provided submissions on penalty and costs. Ms Carter restated the facts in relation to the charges which the Board understood were not in dispute.
18. The NZIV submitted that as a consequence of the above contact, Valuer A was in breach of clause 1.5 of the New Zealand Institute of Valuers Code of Ethics that they failed to ensure the maintenance of the highest standards of preparation of a report and that they allowed three valuation reports concerning the same property with the same date of inspection to be in existence with no explanation as to why the valuation was different or that there existed another valuation under the same instruction. Furthermore, they have breached clause 1.7 of the New Zealand Institute of Valuers Code of Ethics which states as follows:
 - 1.7 A member must maintain the strictest independence and impartiality in the performance of member's professional duties. To this end no member shall:*
 - a) adopt the role of advocate to the exclusion of that independence and impartiality*
 - 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 on 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.*
19. The NZIV referred to two aggravating factors in relation to this conduct:
 - a. *Apparent bias:* Valuer A provided two differing valuations, one for the vendor and one for the purchaser. As the complainant noted the perception is that Valuer A has given two values to show the property in a positive light for each party. Further, there is apparent conflict in preparing reports for both the purchaser and vendor.
 - b. *Potential loss:* As a consequence of the valuation provided by Valuer A, the complainant has potentially exposed themselves to greater risk than they

otherwise would have on a valuation of \$440,000. The complainant at lending 90% would have only exposed themselves to \$396,000 rather than \$405,000.

20. The NZIV observed that there would appear to be no mitigating factors relating to the conduct in question. Valuer A in their response to the complaint stated that their typist had released the report without their knowledge. Valuer A appears to be putting the errors down to 'sloppy' practice. It is submitted it is not a mitigating factor but instead raises further alarm bells in relation to their ability to operate as a competent registered valuer.
21. The NZIV also noted that a further aggravating factor was that this was Valuer A's second appearance before the Valuers Registration Board. The NZIV can find no mitigating personal factors in this case.
22. The NZIV reminded the Board of Inquiry of its powers in terms of Sections 31 and 33 of the Valuers Act in relation to penalty. These ranged in severity from a reprimand to removal from the Register.
23. The NZIV referred the Board to the recent decision of the Valuers Board of Appeal in *Valuer B (appeal) [2017] NZVRBA 1*. In that case Valuer B facilitated four reports being in circulation for the same property with different reinstatement valuations for insurance purposes. The reports came about as draft discussion reports but were each signed as complete reports. The first report was grossly undervalued and successive reports increased the value. The Board of Appeal reduced the fine of \$6,000 to one of \$4,800.
24. The NZIV submitted that Valuer A's conduct in relation to their reports of November 2016 amounted to a serious breach of the Code of Ethics and considered this conduct to be more serious than that of Valuer B in that there was the additional charge under Clause 1.7 of the NZIV Code of Ethics. Accordingly the NZIV submitted that an appropriate penalty was a fine in the region of \$7,000 coupled with a reprimand.
25. As to costs, the NZIV reminded the Board of its power to award costs where a guilty verdict was found and also noted that if the Board decided not to impose a costs order on Valuer A, then others registered under the Act would carry the full burden of funding the investigation and the disciplinary functions of the Board.
26. In support of the award of costs NZIV cited the three relevant cases being that of *the Canterbury District Law Society Complaints Committee No. 2 v Iosefa* before the Lawyers and Conveyancers Disciplinary Tribunal, that of *Gurusinghe v Medical Council of New Zealand* in the High Court, and that of *Cooray v Preliminary Proceedings Committee* in the High Court which was a Medical Council case. The NZIV submitted that the basis of these cases costs should be assessed with a starting point of 50%, increasing the amount if there were aggregating factors to justify an increase or, decreasing it where mitigating factors exist that would justify that course of action.

27. With these factors in mind, the NZIV submitted that costs should be assessed at 50% of the total cost to shift the burden in part from the shoulders of others in the profession. Accordingly the NZIV sought costs in the sum of \$5,378.51.

Submissions on behalf of Valuer A

28. Ms Grieve on behalf of Valuer A acknowledged that Valuer A faced two charges in relation to Section 31(1)(c) of the Valuers Act 1948 and that they had entered guilty pleas in relation to both charges. It was observed that Valuer A had pleaded guilty to the charges at the earliest opportunity.
29. Valuer A acknowledged that they accepted that their processes had not been robust and that they had not maintained the required degree of competency and independence on this occasion. They advised that they have committed to make changes to their practice to ensure this incident is not repeated.
30. Valuer A then outlined the circumstances surrounding the preparation of the valuations. It was observed that they had inspected the property on 22 November 2016 and that they had dictated the details of the property as they walked around with the vendor. It was noted that their processes included that once back in the office their administrative assistant created a skeleton valuation using a template document, saved under the new formatted number for the job. The assistant then entered the details of the property into the template using their dictation.
31. Valuer A advised that they did not complete the valuation by inserting the final valuation figure because, at that point, they received a phone call from the complainant. The complainant instructed Valuer A to complete a valuation for the property for the purposes of arranging finance for the purchaser and informed them this should take priority over the REAA valuation. Valuer A ceased the REAA valuation and the information that had been entered into the REAA valuation in respect to the property was copied across into a new template for mortgage valuation. Valuer A then entered a figure of \$456,000 for the mortgage valuation based on their assessment.
32. Valuer A said that when they went back to complete the REAA valuation they did not notice that it already had been populated with a figure of \$440,000. They considered that it is likely that this figure was left over from a previous template document. The valuation was then sent out by their assistant who had done a quick check, to see that the fields were populated and assumed it was complete.
33. These circumstances meant that Valuer A issued two valuations both dated 24 November 2016, one for \$456,000 and one for \$440,000. Valuer A advised that the \$440,000 valuation was a clerical error as set out above and their initial valuation of \$456,000 was what they initially considered to be the correct value, based on some internal painting that needed to be finished and which they understood the purchaser was planning to do.

34. Valuer A observed that when the discrepancy between the valuations was pointed out to them, they reissued the valuations at \$450,000 which they considered to be the correct valuation, having recalled this was the amount of the purchase price. They now acknowledge that in reissuing the valuation at \$450,000 they were influenced by the fact the purchaser had informed them of the purchase price of \$450,000.
35. Valuer A responded to the issue of apparent conflict in preparing a report for both vendor and purchaser and observed that while there was potential for conflict in this situation, such conflict could be managed as long as the valuer maintained independence. In this situation the outcome of the valuation assessment should be identical regardless of who has instructed them.
36. Valuer A referred to the aggravating factors identified by the NZIV and while they accepted that the two different values show the property in a positive light for each party that they were not in fact motivated by giving such a perception. They advised that at no time did they intend to give either party a more favourable valuation outcome than they considered was accurate. They acknowledge that they made a clerical error initially and then made a further error by allowing themselves to be influenced by the purchase price. They submitted therefore that the apparent bias should not be an aggravating factor.
37. As to potential loss Valuer A acknowledged that this was a consequence of their incorrect valuation however was of the view that there was no actual loss and that the potential loss of \$9,000 was at the lower end.
38. Valuer A also acknowledged their previous appearance however they noted that this was almost nine years ago and that they had been practising as a registered valuer for over 30 years. They noted that in the previous matter the VRB had accepted that it was at the lower end of the scale and that a reprimand was appropriate.
39. Valuer A then indicated mitigating factors that should be considered, in particular that they had taken positive steps to address the issues which have been brought to light. That they were in the process of reflecting on past practice, enhancing their professional support system as well as investing in continued education in future planning.
40. As to the offence Valuer A noted that they were in a particularly busy period leading up to Christmas however they acknowledged that these matters did not excuse their conduct.
41. Following the incident Valuer A has taken a number of steps to change their practice including their collaboration with other valuers. In particular they are looking at a collaboration agreement with another valuation firm. They are also meeting with another valuer on a regular basis to review their reports.
42. Valuer A also advised that they actively engage in opportunities for professional support noting that they were a member of the 'Independent Valuers Google Group'

which is a group of sole practitioners which meets bi-monthly to discuss their practice, valuation trends and the local market. Valuer A also advised that that they are conscious of the need to keep up with the mandatory CPD requirements.

43. Valuer A considered that they had cooperated with the investigation and had responsibly acknowledged their errors by pleading guilty at the earliest opportunity. They also noted that they had chosen to travel to appear before the Board and understands the importance of acknowledging and 'fronting up to their actions'.
44. In terms of penalty, Valuer A submitted that while the NZIV had made the case that they were subject to two ethical charges (1.5 and 1.7 breaches), by using the noted Valuer B case as a comparison, Valuer B was also guilty of two charges albeit different ones. Valuer A submitted that Valuer B's conduct was in fact far more serious because there were five different valuations submitted, all with different amounts that were gradually increasing. The range between the valuations was therefore substantial.
45. Valuer A submitted that in this case a starting point for the fine should be \$6,000 (equivalent to that of *Valuer B [2017]*) and then that a 20% discount should be applied to account for the mitigating factors referred to above which would result in a fine of \$4,800. Valuer A believed that the sentencing outcome would then be the same as in *Valuer B* which is appropriate when it is considered that while, unlike Valuer A, Valuer B did not plead guilty at the first opportunity. It was acknowledged however that Valuer B had no previous complaints history that had led to a finding of guilty.
46. As to costs Valuer A accepted that they should contribute to costs however believed that in view of the mitigating factors referred to above it would be appropriate that they paid 40% of costs incurred or a payment of \$4,302.81. It is noted that the fine and costs would have to be met personally by them.
47. In concluding Valuer A submitted that the positive steps they had taken since reflecting on this incident would assist them to avoid further mistakes in the future. These together with the financial penalty which will be imposed, should provide the NZIV and the VRB with comfort that such an incident will not be repeated and the public will be adequately protected.

Sanction

48. The Board of Inquiry appreciates that Valuer A pleaded guilty to the charges and appeared in person before the Board.
49. The charges made against Valuer A are of a serious nature. The second charge relating to bias is considered particularly serious, especially as it crosses over to the role of the valuer under other statutes (in this case the REAA). While the apparent bias may have been unintentional, three parties were affected with potential financial consequences.

50. Of particular concern is the production of the third report with a value of \$450,000 when Valuer A advised that they considered the correct value to be \$456,000. This has further implications as it would imply that the purchase did not meet the requirements of the REAA.
51. While the fact that Valuer A has acted for both the vendor and the purchaser in this case without any written clearance from the parties has not been pursued by the NZIV as a specific charge, the Board of Inquiry notes this as an aggravating factor.
52. The presence of multiple reports of the same date with a range of values provides the opportunity for third parties to use such reports to their advantage and create a significant risk to the credibility of the valuer.
53. Even if the alternate values were an error, the business practices that would allow such an error are of concern for any professional.
54. The Board of Inquiry therefore considers the starting point for any sanction to be that sought by the NZIV of a reprimand plus a fine in the region of \$7,000. The Board of Inquiry does not consider the starting point of \$6,000 reduced to \$4,800 based on *Valuer B (appeal) [2017] NZVRBA 1* to be appropriate given the significant nature of the second charge relating to Clause 1.7 of the NZIV Code of ethics.
55. From the starting point of \$7,000 the Board of Inquiry is prepared to take into account Valuer A's guilty plea, their appearance at this inquiry and the verified changes to their business practices. A reduction in the vicinity of 20% is considered appropriate.

Costs

56. Under section 33A of the Valuers Act 1948, the Board may order the valuer concerned to pay such a sum as the Board considers is appropriate in respect of either or both of the following:
 - (a) The costs and expenses of and incidental to the inquiry by the Board.
 - (b) Costs and expenses of and incidental to the investigation conducted under Section 32 of this Act in relation to the complaint to which the inquiry relates.
57. The Board and NZIV have incurred costs of \$10,757.02 in relation to this case. The NZIV sought a contribution of 50% of these costs, i.e. \$5,378.51.
58. Valuer A accepted that they should contribute to costs and submitted that \$4,302.81 would be appropriate being 40% of the costs.
59. The Board of Inquiry reviewed the schedule of costs and note that as Ms Murdoch was required to be present for other VRB business only 50% of her travel costs should be applied. This would reduce the total costs by \$269.00 to \$10,488.02.

60. The Board of Inquiry has not been advised of any good reason to reduce or increase the accepted rate of contribution from 50%, other than by rounding.

Oral Decision

The Board issued an oral decision at the Hearing:

'Valuer A has pleaded guilty to two charges under section 31(c) of the Valuers Act 1948. A charge of incompetent behaviour in breach of Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics and a charge of unethical behaviour in breach of Clause 1.7 of the New Zealand Institute of Valuers Code of Ethics. The Board of Inquiry notes that this is not the first time Valuer A has appeared before it.

The Board of Inquiry has considered the submissions made by counsel for the New Zealand Institute of Valuers and for Valuer A. The Board also acknowledges that Valuer A attended the Inquiry.

In recognition of Valuer A's guilty plea, the changes that they have implemented in their practice and their attendance at this inquiry the Board reprimands Valuer A and fines them \$5,500.

Costs of \$5,000 are awarded against Valuer A representing approximately 50% of the properly incurred costs.

A written decision containing reasons for the penalty and costs will follow.'

Summary of Penalty and Costs

The Board confirms the above oral decision and reprimands Valuer A and imposes a fine of \$5,500. The Board of Inquiry also awards costs of \$5,000 against Valuer A.



Ken Taylor
Inquiry Chairperson
27 February 2018