

VALUERS REGISTRATION BOARD

IN THE MATTER OF

an Inquiry under
Section 32(2) of the Valuers Act 1948

AND

IN THE MATTER OF

two charges under Section 31(1)(c) of the Valuers Act
1948 against **Valuer A**

BOARD OF INQUIRY:

P A Curnow (Inquiry Chairperson)
H J Puketapu
K R Taylor

COUNSEL:

Ms S Carter for the Valuer General
Valuer A representing themselves

DATE OF HEARING:

7 October 2013

WRITTEN DECISION:

21 October 2014

DATE OF PENALTY & COSTS DECISION:

27 July 2015

Background:

1. A complaint was received by the Registrar of the Valuers Registration Board on 22 April 2010 from the owners of the property, a rural homestead. This complaint was lodged as a result of the valuations completed by Valuer A in reports dated 12 October 2005 @ \$900,000 and 22 December 2009 @ \$380,000.
2. The complainants questioned the differing methodology Valuer A used between the two reports and that either the original valuation was overvalued and/or the second was an under valuation.
3. The Valuer General investigated the complaint and obtained two further valuations. These were from Valuer 1 and Valuer 2. These two valuations respectively were \$424,000 inclusive of GST (if any) and \$435,000 inclusive of GST (if any). These retrospective valuations were both carried out as at the effective date of 12 October 2005.

The Charges:

4. As a result of this investigation two charges were laid. These being;
 1. Section 31(1)(c) of the Valuers Act 1948:

That you have been guilty of such incompetent conduct in the performance of your duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that in compiling a valuation report dated 12 October 2005 with respect to a property, you grossly over-valued the said property.
 2. Section 31(1)(c) of the Valuers Act 1948:

That you have been guilty of such unethical conduct in the performance of your duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 in that in compiling a valuation report dated 12 October 2005 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 that report and therefore breached Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.

Particulars: Failure to comply with International Valuation Standard 1 Clause 5 in that you failed to use appropriate methods and techniques in estimating the market value by using a subdivision potential analysis without applying due diligence to the limitations therein and/or you failed to apply due diligence in considering the Resource Management Act 1991 conditions and/or you failed to fully and completely explain the valuation basis/approach applied in your conclusions.

5. Valuer A entered a plea of not guilty to both charges.

Decision of the Board:

6. Following the evidence presented at the hearing on 7th & 8th October 2013, the Board of Inquiry found in its decision dated 21st October 2014, that both charges had been proven to the required standard. Notwithstanding the finding by the Board of Inquiry in respect of Charge 2, it declined to impose a sanction in the interest of fairness.
7. The Board then invited submissions as to the sanction for Charge 1 and costs for the proceedings generally.

Submission by Valuer General on Penalty and Costs:

8. The Valuer General summarised the following aggravating and mitigating factors for the Board of Inquiry to consider.

The aggravating factors of the offending:

(a) The high percentage by which Valuer A had over-valued the property. They valued the property at \$900,000. The Board considered the correct value was \$467,000. Valuer A's valuation is therefore 92.7% above the correct value;

(b) As a consequence of Valuer A's over-valuation an overinflated loan was secured on the property which ultimately the complainants were unable to service. Loss has inevitably been caused to the complainants and/or the mortgage company;

(c) This is not the first time Valuer A has appeared before the Board. Their competence has previously been found to be below the threshold standard required of the profession.

a In mitigation it is recognised that this report was undertaken in October 2005 and it would appear that Valuer A has not appeared before the Board since that date.

b Because Valuer A contested the hearing there can be no reduction for any guilty plea.

9. From the penalties available to the Board of Inquiry, the Valuer General pointed out these can range from a reprimand through to a fine not exceeding \$10,000, suspension from the register for up to twelve months and removal from the register.

10. It was the Valuer General's submission that a reprimand and a fine in the region of \$8,000 should be imposed.

11. With respect to costs, the Valuer General stated the total costs were \$49,303.40 and summarised these as follows, but also included in the submission fuller detail.

➤ Legal fees	\$19,924.63
➤ Investigation/prosecution costs associated with witnesses, Valuer General and his staff	\$20,614.57
➤ Board expenses	\$8,764.20

12. The Valuer General cited three brief legal interpretations of costs which for clarity are repeated as follows;

In *Canterbury District Law Society Committee No. 2 v Iosefa*¹, the Lawyers and Conveyancers Disciplinary Tribunal said:

The Tribunal has no difficulty in restating the principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault if at all possible, rather than on his or her professional body as a whole¹.

In *Gurusinghe v Medical Council of New Zealand*² the High Court said:

The ordering of payment of costs is not in the nature of a penalty. The penalty is removal from the register. The order for costs is to enable recovery to a greater or lesser extent of the costs and expenses of and incidental to the hearing.

¹ [2009] NZLCDT 5 at [41].

² *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139.

¹Canterbury District Law Society Complaints Committee No. 2 v Iosefa [2009] NZLCDT 5.

There is no requirement that the Council should necessarily reduce an award of costs because of the fundamental consequences of removal of name from the register³.

In *Cooray v Preliminary Proceedings Committee*⁴ the High Court reviewed costs awards in various disciplinary cases before the Medical Council and said:

It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure⁵.

In any case to which Section 31 or Section 33 (1) of the Act applies, the Board may order in respect of either or both of the following:

- (a) The costs and expenses of and incidental to the inquiry by the Board:
- (b) The 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.

13. The Valuer General submitted that were the costs not to be imposed on Valuer A, then others registered under the Act will carry the full burden of funding the investigation and the disciplinary functions of the Board. It was therefore submitted that costs should be assessed at 50% of the total costs, notwithstanding the fact that no sanction will be imposed in respect

³ [1989] 1 NZRL 139, 195.

⁴ *Cooray v Preliminary Proceedings Committee* HC Wellington AP23/94, 14 September 1995.

⁵ HC Wellington AP23/94, 14 September 1995 at [9].

of the guilty finding on Charge Two. The Valuer General went on to note that Charge Two had been found proved.

14. The Valuer General sought costs in the sum of \$24,651.70.

Submission by Valuer A on Penalty and Costs:

15. Valuer A made a written submission and noted several matters that they considered the Board should have regard to in arriving at the penalty and costs they should face.
16. Valuer A considered that it was the complainants' own management skills and the global financial crisis that caused the loss the complainants suffered. Even if the mortgage was half the total loans secured of \$600,000, or somewhere in between, the complainants would still have suffered a degree of loss due to the liquidation of their business.
17. The complainants were unhappy the property was valued at \$900,000, believing it should be higher, and in consequence had refused to pay the valuation invoice.
18. The sale of the complainant's property under mortgagee sale conditions for \$330,000 in January 2010 was when the blame was apportioned to Valuer A for their losses.
19. Valuer A considered the Board of Inquiry hearing should have only taken one day and thereby would have significantly reduced the cost.

20. Valuer A considered that the costs of two valuer witnesses at approximately \$16,000, without seeing itemised invoices, seemed "ludicrous".
21. Valuer A outlined their valuation history and estimated the number of valuations since commencing work for the current valuation firm in 1997 at 10,000 plus. Even with two VRB hearings since 1997, this only equates to 0.0185% of the valuations completed.
22. Valuer A said it was common knowledge that valuation practice was extremely contentious from the peak periods of 2005 – 2007 through to post the global financial crisis.
23. Further, it was Valuer A's view that it was the desire of the complainants to "extract some revenge" for valuing the property lower than they thought it was worth.
24. Valuer A estimates the costs of preparing and attending the hearing at \$25,000. Further, Valuer A considered the "contentious issues" within the witnesses reports contributed to the extra costs. Valuer A was of the view that this complaint issue had significantly penalised them already.
25. Valuer A cited the case of another complaint in the subject area involving another valuer. In this instance there was some differences between the retrospective valuations and the complained of valuation. The Board concluded that the gross over-valuation was not proved and that the valuers were required to exercise their judgement in a situation where "comparable evidence is sparse to the point of being almost unavailable". Further matters arose from this decision that the Board declined to take further, demonstrating the difficulties in valuing properties in the subject area at certain times.

Penalty Considerations:

26. The Board of Inquiry in its written decision of the 21st October 2014 had determined that Valuer A significantly departed from acceptable standards and that a disciplinary sanction should be imposed in respect of Charge One, the gross over-valuation.
27. The arguments put forward in mitigation by Valuer A are noted however the extent of the over valuation is regarded by the Board of Inquiry as serious.
28. The Board notes that the purpose of professional disciplinary regimes is to ensure that appropriate standards of professional conduct are maintained. It is a requirement to protect the public from professionals who do not meet the relevant standards of conduct or competence.
29. The Board accepts the Valuer General's submission that the over valuation was significant and does note that this was not Valuer A's first appearance before the Board.
30. The Board reprimands Valuer A and imposes a fine of \$8,000.

Costs:

31. Section 33A of the Act provides the power to order a valuer subject to a disciplinary finding to pay appropriate costs.

32. The Board of Inquiry accepts that Valuer A will have incurred significant costs in the preparation and attending of the hearing. Nevertheless, as noted previously, any costs not ordered against Valuer A will fall to those registered under the Act.
33. The hearing took two full days. Both witnesses were required to attend for much of that time. The total costs of the original valuations and preparation and attendance at the hearing was \$18,402.06 (inclusive of GST). The Board recognises this is a significant but unavoidable cost.
34. The Board has in a number of recent decisions considered 50% as the starting point for costs, increasing this amount where there are aggregating factors to justify an increase or, decreasing the amount where mitigating factors exist that will justify that course of action.
35. The Board is not persuaded by Valuer A's submission that the general direction of the Tribunal of ordering 50% costs should be altered in this instance.
36. The Board therefore orders Valuer A to pay costs in the sum of \$24,650, representing approximately 50% of the total costs.

Summary of Findings:

- Reprimand and fine of \$8,000
- Costs ordered of \$24,650

P.A. Curnow

Chairperson Board of Inquiry