

**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 C',  
Registered Valuer

**BOARD OF INQUIRY:**

P.A. Curnow (Inquiry Chairperson)

M.E.L. Gamby

K.R. Taylor

**COUNSEL:**

Ms Sally Carter for the Valuer General

Mr James Dymock for Valuer C

**DATE OF DECISION:**

5 December 2017

**WRITTEN DECISION:**

27 July 2018

**BACKGROUND:**

1. On or about the 19<sup>th</sup> June 2015, the complainant, the current owner of the subject property, made a formal complaint to the Property Institute of New Zealand in respect of a valuation completed by Valuer C. This complaint was then resubmitted to the Registrar of the Valuers Registration Board on the 21<sup>st</sup> July 2016.

2. The complaint was in respect of a valuation report dated 27<sup>th</sup> September 2013. This report was commissioned by the previous owner of the subject property, who wanted an updated valuation, as a previous valuation had been carried out by Valuer C in 2003. The report instruction was noted as for "asset and evaluation/sale purposes".
3. This valuation was for \$308,000 inclusive of chattels and the Goods and Services Tax (if any).
4. The complainant and his wife in 2013, at the time of the valuation by Valuer C, owned a motel in a neighbouring town that was on the market. An agreement was made with the purchaser of the motel to accept a swap for the subject property, a flat in a different region and the balance in cash. As a result of the valuation the motel sale was concluded.
5. Subsequently, in late 2014, the rating valuation from Quotable Value was released, with this valuation being \$240,000.
6. In June 2015, the complainant spoke to Valuer C about the difference in the rating valuation with their valuation. It was the complainant's contention that Valuer C "did not seem to be interested in trying to resolve the issue".
7. The complaint was referred to the Valuer General. As part of the investigation two retrospective valuations were commissioned by the Valuer General. The first valuation was from Valuer 1. This valuation was \$235,000 inclusive of chattels and the Goods and Services Tax (if any). The second valuation was from Valuer 2. This valuation was at \$255,000, also inclusive of chattels and the Goods and Services Tax (if any).
8. Upon considering the Valuer General's report, the Valuers Registration Board (the Board) was not, in terms of Section 32(2) of the Valuers Act (the Act) satisfied that there were no reasonable grounds for the complaint. An inquiry was ordered.
9. The Valuer General drew up the following charges;

**The Charges:**

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 renders you liable to a penalty

provided by the Valuers Act 1948 in that in compiling a valuation report dated 27 September 2013 with respect to a property, you grossly over-valued the said property.

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 27 September 2013 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 New Zealand Institute of Valuers' Code of Ethics.

**Particulars:**

- (a) You failed to include any explanation of how you reached the land value component of the total valuation in breach of IVS 103 and ANZVGN1; and/or
- (b) You failed to provide sufficient information necessary for a proper understanding of the valuation in breach of IVS 103 Reporting and ANZVGN1; and/or
- (c) You failed to prepare and confirm an agreed scope of work in breach of IVS 101 and 103 and/or to set out clearly the purpose of the valuation by simply stating it was for "*asset evaluation/sale purposes*"; and/or
- (d) You failed to identify and confirm the applicable International Valuation Standards in breach of IVS 101 and 103.

10. Notice of the charges were forwarded to Valuer C on 23 June 2017.

11. A prehearing teleconference was held by the Board on the 19<sup>th</sup> September 2017 and a further teleconference 8 November 2017, at which time it was confirmed that Valuer C would plead guilty to the charges. To expedite matters, a penalty and costs hearing was scheduled for 5 December 2017.

**The Valuer General:**

12. The Valuer General sought costs in the order of \$8,390.96 and a penalty of a reprimand together with a fine in the region of \$3,000 - \$4,000. This against a range of powers the Board has under Sections 31 and 33 of the Act which in increasing seriousness include;
  - (a) Reprimand;
  - (b) A fine not exceeding \$10,000;
  - (c) Suspension from the Register for up to 12 months; and
  - (d) Removal from the Register
13. The first two penalties can be imposed either individually or in combination.
14. The Valuer General submitted that one of the aggravating factors of Valuer C's conduct was that the complainant suffered financial loss upon selling the property in 2016 for \$245,000. This loss was in the realm of \$60,000, not including an adjustment for the value of the ride on mower included in the original sale. Additionally, if Valuer C had not grossly overvalued the property it is less likely the complainant would have suffered such a loss.
15. Further, that the sequence of departures from the required Standards would indicate a clear lack of regard for the Standards or, at worst, a lack of knowledge of the Valuation Standards in force at the time.
16. Also, that when the complainant approached Valuer C with his concerns, Valuer C showed no apparent interest to assist in resolving the matter of the valuation level.
17. It was submitted that the only mitigating factor was that Valuer C had not appeared before the Board before and therefore may be entitled to some recognition of their previous unblemished character.
18. The Valuer General outlined the schedule of costs incurred, totalling \$16,781.92, and further noted that, if the Board decides not to impose a costs order on Valuer C, then others registered under the Act will carry the full burden of funding the investigation and the disciplinary functions of the Board.
19. To assist the Board, the Valuer General outlined three decisions whereby 50% of costs are considered a starting point, increasing the amount if there are aggravating factors to justify an increase or, decreasing it where mitigating factors exist that will justify that course of action.

19.1 *In Canterbury District Law Society Complaints Committee No.2 v Iosefa*<sup>1</sup> the Lawyers & Conveyancers Disciplinary Tribunal said:

*A 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 whole.*

19.2 *In Gurusinghe v Medical Council of New Zealand*<sup>2</sup> 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. 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 register*<sup>3</sup>.

19.3 *In Cooray v Preliminary Proceedings Committee*<sup>4</sup> 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 figure.*

20. The Valuer General concluded that 50% of costs were appropriate in Valuer C's case.

21. In respect of the penalty, the Valuer General stated that each case has its own unique facts and it is therefore often difficult to reference a comparable case. In this case, the margin of overvaluation is not as great as many appearing before the Board, but it is combined with a fairly comprehensive disregard for some of the more fundamental requirements under the Valuation Standards, most notably failing to include sufficient

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<sup>1</sup> [2009] NZLCDT 5.

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

<sup>3</sup> [1989] 1 NZLR 139, 195.

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

information for a proper understanding of how the valuation has been reached and failing to confirm an agreed scope of work.

**Valuer C:**

22. Valuer C attended the hearing and read out a statement in mitigation. This is repeated in full.

22.1 *"I am a sole practitioner in practice in the subject area. I have practiced for over 33 years.*

22.2 *In September 2013 I was asked by the previous owner of the subject property to value the subject property. At no time did he tell me why he wanted the valuation or that he would be providing it to the complainant. I do appreciate that it is incumbent on me to be proactive and obtain clarification from the client and that is now my approach.*

22.3 *When I received the call from the complainant I was caught completely off guard. I was (sic) just did not feel as though I was in a position at that time to be offering advice and recommendations. That was the only time I heard from the complainant. It all happened very quickly, and I found it quite affronting.*

22.4 *Since receiving the Investigation Report I have had an opportunity to reflect on my report. I accept that I erred and my lack of compliance with professional standards was not good enough. Importantly this no longer reflects my current practice.*

22.5 *I have found this whole process very stressful. As a senior valuer it is embarrassing to be appearing before the Board. I plan on retiring next year and I am disappointed to be ending my career on this note.*

22.6 *Finally I apologise to the Board and the profession for what has happened".*

23. Mr Dymock, Counsel for Valuer C, made further submissions. Valuer C considered the appropriate penalty to be a reprimand and a fine of \$1,000. As to costs, a contribution of around 25% to 30% was appropriate due to the uncertainty in relation to the extent of overvaluation and the numerous mitigating factors.

24. It was submitted that the threshold test for professional misconduct is set out in *Pillai v Messiter*<sup>5</sup>, which held:

24.1 *The statutory test [of professional misconduct] is not met by mere professional incompetence or by deficiencies in the practice of the professional. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of privilege which accompanies registration.*

24.2 *In King v Valuer-General*, the Board of Appeal confirmed *Pillai* was applicable, that the Valuers Registration Board should adopt a two-step process in disciplinary matters and ask itself<sup>6</sup>:

*Whether the matters alleged in the disciplinary charge have been established to the point that there has been a deliberate departure from acceptable standards; and then, quite separately –*

*Whether that departure has been significant enough to warrant disciplinary sanction for the purposes of discipline.*

25. In respect of the overvaluation Valuer C accepts that they did not always hold this view, but after being given the opportunity to review and consider the retrospective valuations, they now accept their valuation was too high.

26. As to the extent of the overvaluation, Valuer C notes that the retrospective valuers both struggled to find sales evidence for comparative purposes. Valuer 1 expressly noted this in his report. Whilst Valuer 2 did not make the same observation, he clearly experienced the same issue as he included a sale 60 kilometres to the south and of different contour and soil type.

27. Valuer C's valuation was 31.06% above Valuer 1's valuation and 20.78% above Valuer 2's valuation. These valuations had quite different values to each other on the improvements and land.

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<sup>5</sup> *Pillani v Messiter (No 2)* (1989) 16 NSWLR 197: applied by Complaints Committee (No 1) of the Auckland District Law Society v APC (CIV 2007-404-4646, 8/2/08, Randerson, Williams and Winkelmann JJ).

<sup>6</sup> *King v Valuer General* at [35]

28. To “cherry pick” Valuer 1's land at \$110,000 and Valuer 2's improvements at \$164,000, a “market value” may be \$274,000, resulting in Valuer C's valuation only being 12.1% (sic) higher than this.
29. It was submitted therefore that due to the limited sales evidence and remote location of the property there is justification for an acceptable range of between 10% and 15% from what might be considered the “correct” valuation.
30. This is consistent with the decision of the Board in Valuer E [2015] NZVRB 7.
31. Valuer C accepted their lack of compliance with professional standards was not good enough but that these breaches in 2013 should not be viewed as representative of their current practice.
32. In respect of the financial loss, Valuer C disputes the loss at \$60,000. It was submitted that the complainant did not best present or market the property, relying on a roadside sign and Trade Me. Appraisals from five Real Estate Agents ranged between \$235,000 and \$300,000, so raises the question in Valuer C's mind as to whether the property was undersold.
33. As to the Standards Charge 2(a-d), individually the particulars are unlikely to pass the statutory test of misconduct in King v Valuer General. If it is accepted that the Standards Charge only reach the King threshold on a cumulative basis, then the cumulative nature cannot be seen as aggravating, they are instead the basic elements of the offending. Something more than breaching the Standards is required before it can be “aggravating”.
34. It is submitted that the complainant had already decided he wanted to make a complaint and he had no real intention of trying to resolve matters with Valuer C. The complainant only rang Valuer C at the insistence of The Property Institute of New Zealand.
35. Valuer C did not know the complainant and, until the phone call, did not know the previous owner of the subject property had provided the valuation to him. Valuer C was put on the spot about a resolution to a valuation completed two years prior. It is considered unfair to view this as an aggravating factor.

36. As to mitigating factors, other than in Valuer C's statement, it was submitted that they have been in practice as a valuer for over 33 years, have a long history of service to the industry, the breaches were at the lower end of the scale and they are embarrassed that, through carelessness, they have found themselves facing disciplinary charges. Valuer C is nearly 70 years old and the ongoing stress has had a significant impact on their health and well-being. Valuer C obtained no personal benefit and after receiving professional advice, admitted the charges promptly.

**Board of Inquiry Decision:**

37. In respect of Charge One, the Board of Inquiry has never accepted a percentage range from what could be considered the "correct" valuation. Each valuation charge is considered quite separately from any supposed "rule of thumb" range in value.
38. In this case, Valuer C has pleaded guilty to Charge One and consequently the Board have not had to hear evidence and argument in respect of the "correct" valuation.
39. The Board however, is mindful that in this case the retrospective valuations were in the range of \$235,000 - \$255,000 and it was evident that "comparable" sales were difficult to source. The Board does not accept Valuer C's contention of cherry picking the two valuation figures for land and improvements from the separate retrospective valuations to arrive at the appropriate valuation.
40. In respect of Charge Two, it was self-evident on the face of Valuer C's report that there were deficiencies. Clearly Valuer C now accepts that they fell below the required Standards in 2013. As to their practice in 2017, we have no evidence and can only accept Valuer C's submission that they have "a deep respect for the duties and values of the Code of Ethics and a commitment to professionalism in the practice of valuation". That being the case, the risk to the public should be no different from instructing any valuer as compared to Valuer C.
41. The Board is not able to comment in respect of the actual financial loss incurred other than note the matters admitted to by Valuer C. The Board is only concerned with matters of competence and ethical standards.
42. As to Valuer C's conduct, when contacted by the complainant, the Board notes that this was the first and presumably last contact between Valuer C and the complainant.

43. The Board accepts that to discuss a valuation with the complainant, then a stranger, in the absence of clear instructions and authority from Valuer C's client (the previous owner), has the potential to aggravate matters, at least in the mind of the complainant.
44. The Board has some sympathy with the position Valuer C found themselves in. That is not to say that Valuer C didn't have options as to how this contact did develop. Nor does it suggest that whatever other course of action that Valuer C may have taken would have avoided the complaint being laid.
45. At the conclusion of the hearing, the Board of Inquiry made the following oral decision.
- 45.1 *"Valuer C has pleaded guilty to two charges, the first being a gross overvaluation of the subject property. The second charge being, that in respect of the valuation report, Valuer C 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 New Zealand Institute of Valuers Code of Ethics.*
- 45.2 *The Board has heard the submissions of both the prosecution and the defence. Further, we have been provided with a statement from Valuer C reflecting on their valuation, accepting their lack of compliance with Standards and apologising to the Board and the profession for their actions.*
- 45.3 *The Board recognises Valuer C's attendance, as not all valuers charged appear before their professional disciplinary body.*
- 45.4 *The Board accepts that the margin of overvaluation is not as great as many who have appeared before it, but the overvaluation is combined with some fundamental failings in valuation Standards.*
- 45.5 *The Boards reprimands Valuer C and fines them \$1,500.*
- 45.6 *As to the matter of costs, these are fixed at \$8,390, 50% of the total costs properly incurred. The Board has not heard in the submissions any good reason to deviate from 50% of costs."*
46. The Board of Inquiry confirms the verbal decision.

*P.A. Currow*

Phillip Currow

Inquiry Chairperson

27 July 2018