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 F**

BOARD OF INQUIRY: K R Taylor (Inquiry Chairperson)
H J Puketapu
P A Curnow

COUNSEL: T Gilbert for the Valuer General
H Waalkens for Valuer F

DATE OF HEARING: 3 November 2014

DATE OF WRITTEN DECISION: 15 June 2015

The Complaint

The Registrar of the Valuers Registration Board received a complaint against Valuer F from the Chair of the Professional Practices Committee of the New Zealand Institute of Valuers (the complainant) on 2 April 2012. The complaint concerned a valuation report prepared by Valuer F on 30 November 2011, with respect to seven residential sites. The report was addressed to Company 1.

The complaint addressed a number of factors in relation to Valuer F's valuation and report, however the basis on which the complaint was brought before the Board related to Valuer F providing an aggregate value of seven lots in a subdivision. The complainant believed that the report did not meet the standards under ANZ Valuation Guidance Note 1 which requires at clause 4.21, 'The valuation of multiple properties in one development should be completed on the basis of a single transaction'. The complainant contends that this approach should incorporate an appropriate discount to reflect costs incurred in realising the sale of individual properties. Valuer F provided an aggregate value being the sum of the seven lots and stated that the report may be used for sale, and mortgage finance purposes.

Investigation

The complaint was investigated by the Valuer General. Key to the Valuer General's investigation was a professional review and an opinion of Valuer F's report prepared by Witness 1 on 17 May 2013.

Following the investigation, the Valuers Registration Board concluded that there was sufficient cause to hold an inquiry.

The Charges

1. 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 30 November 2011 with respect to 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 the clause AUSNZ 5.7 of the International Valuation Standard 3 and/or clause 4.21 of ANZ Valuation Guidance Note 1 which relate to "sale in one line or single transaction" reporting.

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 30 November 2011 with respect to property, you prepared or certified a statement which you knew, or ought to have known, was misleading, or incorrect or open to misconstruction and therefore breached clause 1.4 of the New Zealand Institute of Valuers Code of Ethics.

Particulars:

Reporting an "aggregate value" in a manner that failed to comply with clause AUSNZ 5.7 of International Valuation Standard 3 and/or clause 4.21 of ANZ Valuation Guidance Note 1 which relate to "sale in one line or single transaction" reporting.

Valuer F denied both charges.

Prior to the hearing the Board was presented with an abbreviated bundle of the investigation report submitted in a joint memorandum from counsel.

The annual practicing certificate details of Valuer F were admitted by consent. The record shows that Valuer F was registered as a valuer in the 1990s and has subsequently held annual practicing certificates from 1995 to 2014.

Evidence for the Prosecution

Counsel presented opening submissions on behalf of the Valuer General. The two charges were laid in the alternative which meant that if the Board was satisfied that the first charge was proved, it need not consider the second charge. Put the other way, if the Board was not satisfied that the first charge was proved, it must then consider the second.

The heart of the case was the way in which Valuer F reported an aggregate value for seven sites, and that they variously used the phrases 'aggregate market value', 'aggregate value of the sites', and 'aggregate value of the individual sites'. Counsel

submitted that Valuer F, having concluded a value for seven individual sites, simply summed those values to report an 'aggregate value'. The Board was advised that there was no issue taken in relation to the value of the individual sites.

Counsel referred to the relevant standards in force at the time Valuer F prepared their report. In particular the following:

Clause 1.1 of International Valuation Standard (IVS) 3, states: *The critical importance of a valuation report, the final step in the valuation process, lies in communicating the value conclusion and confirming the basis of the valuation, the purpose of the valuation, and any assumptions or limiting conditions underlying the valuation.*

IVS3 has mandatory status.

Further, clause AUSNZ 5.7 of IVS 3 states

Sale in one line or single transaction: where a valuation is undertaken of multiple properties in one development the sum of the individual values must not be reported as the value of the development, but if aggregated it must be reported as the total gross realisation.

A sale in one line valuation must be based on the assumption of a single transaction for the total holding or a sale in one line to one buyer.

Clause 4.21 of Guidance Note 1 which has good practice status states:

Sale in one line or a single transaction: where a member undertakes a valuation of multiple properties in one development, such as lots of a subdivision or units in a building, the sum of the individual values or gross realisation assessed on the basis of an orderly marketing and sale programme should be clearly defined as the total gross realisation.

The valuation of multiple properties in one development should be completed on the basis of a single transaction or sale in one line to one buyer. This valuation approach should incorporate an appropriate discount to reflect the costs incurred in realising the proceeds from the sale of the individual properties. These costs normally include marketing and sales costs, holding costs and a profit and risk factor.

Valuer F stated in their report it was prepared in compliance with the 2009 Australia and New Zealand Valuation and Property Standards.

Counsel referenced clauses 1.5 and 1.4 of New Zealand Institute of Valuers Code of Ethics. Clause 1.5 requires valuers to 'exercise the utmost care and good faith to ensure the maintenance of the highest standards in preparation of statements, reports, and certificates, as these constitute one of the most valuable assets of the profession, being relied upon by clients, employers, shareholders, investors, creditors and the public'. Clause 1.4 requires that 'No member shall prepare or certify any statement which is known to be or ought to be known to be false, incorrect, misleading, deceptive or open to misconstruction by reason of a misstatement, omission or suppression of a material fact, any deceptive act or otherwise.'

Counsel submitted that these clauses underpin the two charges.

The following statements contained in Valuer F's report were also referenced:

- Valuer F stated that they inspected the subject property 'in order to provide our opinion of the individual and aggregate market values of the subdivided land upon uplifting of titles as outlined in this report. We are aware that this report may be used for sale and mortgage finance purposes….'

- Under the heading 'purpose of valuation' on page 1 Valuer F described the purpose of the valuation as 'market value assessment on the subject properties for sale and mortgage purposes'.

- Under the heading 'Valuation' on page 1 Valuer F provided an 'individual site value summary' setting out their assessed value of each of the seven lots and at the end included a line '**aggregate value of sites**' essentially summing the seven individual values.

- Immediately below that, Valuer F stated 'we confirm the aggregate value of the individual sites at NZD$1,940,000 plus GST (if any)'.

- At page 12 of their valuation report Valuer F goes on to state 'on this basis, our assessment of individual values, together with an aggregate value of the individual sites is contained in the following schedule'. After this Valuer F repeated the same table from page 1 of their report setting out the 'individual site value summary' followed by a line, again in bold, stating **'aggregate value of sites'** summing the seven individual units.

- A similar exercise was then undertaken on page 13 of the report where Valuer F sets out, under the heading **'value conclusion'** their assessed value for the seven individual lots and then reporting an 'aggregate value of the individual sites: **NZD$1,940,000 (One Million Nine Hundred and Forty Thousand Dollars**'.

Counsel considered the breach to be significant in that the report repeatedly referred to 'aggregate market value' and similar statements. Finance was required in order to facilitate the uplifting of titles The Valuer General contended that the refinancing would clearly need to be in relation to the subdivision, not just an individual lot/lots as such, a prospective vendor, would be considering the whole block in respect of which a value was given. Counsel contended that Valuer F should have reported their aggregate value as 'the total gross realisation' as required by the Standards.

Counsel contended that the terminology used by Valuer F to be 'misleading….and/or open to misconstruction'.

Upon referring the notice of complaint from the Valuer General to Valuer F, Valuer F responded:

'I suspect the complaint relates to 4.21 of the ANZVGN1 - sale in one line or a single transaction. My instructions, which I have attached, were to assess individual values as lots were being sold individually, not as a bulk transaction in one line. With the benefit of hindsight, some comment to this effect, or discussion as to what may transpire with the sale in one line may have been appropriate'.

Valuer F had subsequently confirmed what they had done was in compliance with the required standard.

Counsel held that the charges must be proven on the balance of probability. The balance of probability means more likely than not. The balance of probabilities test is to be flexibly applied depending on the seriousness of the allegations. The more serious the allegations are, the stronger the evidence needs to be to prove the allegation but the test remains the same, mainly proof on a balance of probabilities. Counsel further stated that the Board had to satisfy a two step analysis; firstly Valuer F breached the required standards, and secondly (and separately) that a breach was sufficiently serious to warrant a disciplinary sanction. Counsel intended to deal with each of these matters in closing submissions.

The Valuer General then called Witness 1 to give evidence.

Evidence of Witness 1

Witness 1 had provided a brief of evidence dated 13 August 2013 and following receipt of the evidence on behalf of Valuer F, Witness 1 prepared a supplementary brief which is dated 23 October 2014. Witness 1 read these briefs for the benefit of the Board.

Witness 1 confirmed that he had read the Code of Conduct for Expert Witnesses as set out in Schedule 4 of the High Court Rules and agreed to be bound by it. He advised that the evidence he gave would be within his expertise. Witness 1 received instructions from the Valuer General dated 28 March 2013. He had been provided with a valuation report signed by Valuer F dated 30 November 2011. Subsequent to providing his report to the Valuer General Witness 1 had been provided with Valuer F's responses to the complaints dated 1 and 7 June 2012 respectively.

In Witness 1's view there was no evidence provided for discussion in the report as to how the aggregate value was assessed to give guidance to a purchaser or financier who could be looking at the aggregate value as a basis for securing funds across all seven lots. He noted that a simple addition of the individual lots to provide an aggregate value is a fundamental flaw in providing an assessment of the total value of the land which comprises the seven lots that form the larger subdivision. Witness 1 noted that under the heading Purpose of Valuation, Valuer F states that the purpose of the valuation is to provide a 'market value assessment of the sum subject properties for sale and mortgage purposes'. A simple interpretation of that 'purpose' would lead that reader to the view that Valuer F had assessed each property individually and provided a current market value for each individual property, which if purchased separately would have a market value as set out. As such, the market valuation could be used for sale or mortgage purposes.

Witness 1 noted that a conflict arises, however, with the stated purpose of the valuation because in the opening paragraph of their report they write that 'they inspected the above property on 28 and 29th November 2011 in order to provide an opinion of the individual and aggregate market values of the subdivided land upon uplifting of titles as outlined in this report'. The aggregate market value that has been provided is not derived from a valuation assessment of the total entities. It is simply the sum gross realisation of the seven lots as at the date of valuation. Describing this summation of the individual assessment as the aggregate value of sites, as set out in the valuation summary on page 1 of the report and again on pages 14 and 15 was in his opinion, very misleading and simply incorrect.

Witness 1 further indicated that in his view a lay person reading the report would be lead to the view that they could pay $1.94 million for the aggregate of the lots and that would represent the market value for the acquisition of the total area of subdivided

lots ready for sale subject to uplifting of titles. He considered likewise, a prospective purchaser would be lead to the view that they could base their lending decision on a value of $1.94 million and that such an approach, which provides a market value for the total area of the seven lots, was wrong. A purchaser of the total area would have to face the marketing risks, the costs of sales, has to account for the cost of time over a marketing period along with the risk that the sales might not eventuate. Witness 1's view was that the aggregate value or the value of the total site had to be something less than the simple aggregate of the gross realisations of the seven lots as assessed by Valuer F.

Witness 1 referred the Board to the 7 June 2012 letter from Valuer F. It was noted that in paragraph 6 Valuer F referred to 'ANZ Valuation Guidance note 1 (paragraph 4.21 - sale in one line or single transaction)'. They then contended that the first paragraph of 4.21 supported the position they had taken. That paragraph reads:

Where a member undertakes a valuation of multiple properties in the one development, such as lots in a subdivision or units in a building, the sum of the individual values or gross realisation assessed on the basis of an orderly marketing and sales programme should be clearly identified as the gross realisation.

Witness 1 noted that Valuer F had referred to the 'aggregate market value' and 'aggregate value' for the properties in relation to the $1,940,000, whereas they should have referred to the 'total gross realisation' which represents the aggregate of the individual market value assessments.

Witness 1 then referred the Board to the various standards and the Code of Ethics that have previously been reported in this decision. Of key importance to Witness 1's view was the mandatory standard being Clause AUSNZ 5.7 of IVS 3 where he considered that standard was absolutely clear and that it says 'where a valuation is undertaken of multiple properties in one development the sum of the individual values must not be reported as the value of the development, but if aggregated it must be reported as the total gross realisation'.

Witness 1's conclusion in his 12 August 2013 submission was 'in my opinion, the actions of Valuer F appear to be a serious breach of the Standards and the Code of Ethics in providing an unsupported and incorrectly assessed aggregate market value'.

Witness 1 then moved to his second brief dated 23 October 2014. In this Witness 1 provides a critique of the evidence provided by three witnesses to be called by Valuer F. While the Board had previously been provided with copies of these briefs, they had not been entered into the inquiry at that point. The Board therefore limits itself to certain key points that are of general relevance that Witness 1 raised in this secondary brief.

In this supplementary brief Witness 1 confirms the status of the rules that were applicable as at the date of valuation, being 2011, and notes that the appropriate aspects of IVS 3 and ANZ Guidance Note 1 were binding on Valuer F at the date of valuation. He also notes that Valuer F stated that their valuation was carried out in accordance with the relevant standards and guidance notes.

With reference to the written evidence of Valuer 1, he had suggested that there was no practical difference between the term 'total gross realisation' and the terms that Valuer F used. Witness 1 disagreed with this analysis and that the terms 'total gross

realisation' is specifically required by the relevant standard for good reason. It ensures readers do not make the mistake of simple summing of individual values for a market value for the whole block, which he says could be inappropriately used as a basis for lending and/or purchasing decisions. He was of the view if Valuer 1 was right and that the terms are similar, this would mean there would be no purpose in the specific standards that apply when a person is valuing multiple sites in one development.

His view was that there was a real potential for the reader to be misled into thinking Valuer F's report of an 'aggregate value of sites' (and variants) was the valuation they placed on all of the lots considered to be one block for either lending or purchasing purposes. Witness 1 believed that had Valuer F complied with the higher standards as required by the Code of Ethics, they would have used the term 'total gross realisation' mandated by the standards and the issue would have been avoided. Had they then sought to provide a 'block' or 'aggregate value' for the seven lots, a discount would have had to be applied, as set out in their first brief of evidence, including costs such as holding costs, selling costs etc.

Witness 1 then turned his attention to questions posed by Valuer 1 as to whether the reader of the report would be misled or misconstrued by the report. Valuer 1 had contended that the reader would not be a 'lay person' but a person with a degree of commercial experience reasonably anticipated to be possessed by the user of Valuer F's report. Witness 1 disagreed with these comments. Witness 1 concluded that in his opinion, the way in which Valuer F has expressed these matters is misleading and certainly open to misconstruction by people which they clearly knew might read their report.

Witness 1's primary concern was that a purpose of Valuer F's report was for refinancing following difficulties encountered by the developer. It was therefore their view that their 'aggregate value' could be relied on for a lending decision relating to the block as a whole. In Witness 1's opinion, this made the pitfalls even more apparent in departing from the mandated 'total gross realisation', in favour of the various terms Valuer F had used incorporating the words 'aggregate value'. Having failed to use the mandated term, at the least they should have clearly explained what they meant by the terms they did use so that there was no prospect of then being mistaken as a block value for the seven lots being considered in one line.

Witness 1 concluded his evidence by stating he remained of the view that Valuer F's report did not comply with the applicable standards and clause 5.7 of IVS 3 and clause 4.21 of ANZ Guidance Note 1. As such, they did not maintain the high standards required by Clause 1.4 of the Code of Ethics. Further, in his opinion Valuer F ought to have known that their report was liable to mislead or open to misconstruction contrary to clause 1.5 of the Code of Ethics. In Witness 1's view this was a serious lapse.

Witness 1 was then cross examined by Mr Waalkens on behalf of Mr Valuer F.

In opening the cross examination, Mr Waalkens made an observation that in his experience at least, it was rather unusual to receive a supplementary brief such as had been received from Witness 1. He did however observe that it helped everybody see what Witness said in response to the evidence to be called on behalf of his client. On that basis he chose not to go extensively through all that Valuer 1 had said in his statement as Witness 1 had already responded indicating that he and Valuer 1 did not agree.

Witness 1 was questioned in relation to the specific use of the words on which the case depended and the proposition was put to him – "that had Valuer F in their report used the term 'total gross realisation', we wouldn't be here today?" Witness 1 confirmed this. He was then asked to confirm that his criticism related to Valuer F's use of the word 'aggregate' as they used it in numerous ways, and whether that was the essence of the case. Again Witness 1 confirmed this.

Mr Waalkens then pursued whether or not Witness 1 considered that the word 'aggregate' is the same as the word 'gross', to which Witness 1 confirmed; "Not in the context of the standards". Mr Waalkens referred Witness 1 to his first brief of evidence where he stated, '. . . simple facts in this matter are that Valuer F reported a gross or 'aggregate' value,' and didn't this imply that "the word 'aggregate' is synonymous with the word 'gross'". Again Witness 1 advised, "Not in valuation terms. Not in the context that we're dealing with here."

Mr Waalkens referred Valuer 1's evidence (as reviewed by Witness 1 in his second brief) as to a definition of the word "aggregate", noting that this was fundamental to the case. He observed that Valuer 1 has been at pains to point out by reference to numerous dictionary definitions that the word aggregate means the sum total. He asked Witness 1 to confirm this.

Witness 1's response was; "Aggregate is to put together into one block, one entity. To aggregate something is to bring it together, and I use a simple analogy, when we're making concrete; the aggregate of concrete is a mixture of a whole lot of components and that makes one block of concrete. The issue here is that this is not one block that they've got, it's still the components of the block. That's the problem."

Mr Waalkens then put the proposition that, "providing the meaning or the concept of the standard is not breached, there's no obligation to use those actual words 'total gross realisation'". In response Witness 1 replied; "Yes I take that".

Mr Waalkens then put the proposition; "So if we come back to what I've just put to you. If Valuer F had used instead of 'aggregate value of sites' the words 'total gross realisation', you've rightly said we wouldn't be here today. And I suggest that what they have done is precisely set out a total gross realisation for these, in this case, seven sites. That's all they've done. And you tell me where that's wrong?"

Witness 1 responded; "It's wrong because they have not gone beyond whatever they set out and explained the significance of the valuation figure of $1.94m because that is not a figure that somebody would pay for the total as one entity and putting a security over one entity because of the issues." and "Had they put an explanation, gone further and said that figure and then the aggregate figure of $1.9m and then gone on to say if this block of land, if this was offered as one security for refinancing purposes or to sale as one block, it would have to be altered for the very reasons I set out in my evidence. Somebody buying it as one entity, one purchaser, one lender would have to allow for the issues relating to realizing the individual gross realisations down the track which would be a cost."

Mr Waalkens suggested to Witness 1, that the criticism he had made of the lack of an explanation would equally apply had Valuer F used the words 'total gross realisation' in this report instead of 'aggregate value of sites'. The report would still suffer from not having had that explanation albeit they would have used the words 'total gross realisation'.

Mr Waalkens then pursued the question as to whether or not there is a distinction between how a valuer might interpret these terms to how a lender or a prospective purchaser might. Witness 1's response was that a valuer should be reporting on the basis of how some person reading that report, should it be your lender or prospective purchaser would understand it, and the need to make sure they understand it and understand the issues and the background to the derivation of the valuation as set out. Witness 1 noted that to protect yourself and the profession, you want to make it absolutely clear what you've done.

Mr Waalkens questioned whether or not this was a serious breach, and if Witness 1 was aware of any circumstances where the failure to use the specific wording had lead to problems. Witness 1 could not identify any such circumstances, but noted that where a profession has standards a breach of these is taken seriously. He observed that there's a very strong direction and requirement to abide by the standards and guidance notes particularly when you make reference to saying you've used them.

Mr Waalkens further explored the effect of using the alternative words noting that Valuer 1 did not consider that you have to use the actual term, to which Witness 1 replied, that he disagreed and that you should be using the expression 'gross realisation'. This led to consideration of whether the sites were to be sold individually and Witness 1 noted existing agreements to sell two of the sites. This was used by Mr Waalkens to establish that a purchaser would not be misled.

Witness 1 concurred with this but he disagreed because one of the reasons for the valuation was for financing purposes and the person financing this property or re-financing which he understood the owner had to do because they had defaulted on their mortgage. So that to him, the financier or whoever is lending the money has to be, at the end of it, considered to be a hypothetical purchaser because they're lending money on it. He further advised that when somebody is raising finance or refinancing a mortgage over the total of the entities, it has to be considered as a sale in one line because that's what they're securing their money on.

The issue of compliance with standards was then considered with Witness 1 noting that Valuer F had stated that they had complied with the standards and therefore implicit in that statement was that they had read and understood the standards and should have quoted from them, particularly from where it says quite clearly that for a sale or valuation as we've got here, in one line, it shall be reported as the 'gross realisation'. Mr Waalkens suggested to Witness 1 that it was unrealistic to expect that every valuer in this country would have any knowledge of the standards of these particular guidelines and code rules that you're referring to, that you're articulating now, it's just unreasonable. Witness 1 correctly observed that this was unfortunate. He accepted that individuals don't carry all the standards around in their head all the time but noted that if you're doing a job and you've got a particular exercise to do, you should look through the standards to see what it is that applies to sales in one line.

Mr Waalkens posed the question to Witness 1; "Do you accept that it is most usual in disciplinary cases in the valuation profession for there to be a client who is unhappy or complaining. Do you accept that that's the norm?" Witness 1 confirmed this. From which Mr Waalkens drew the position that there is usually some actual loss or disadvantage that's been suffered, some actual inconvenience or disadvantage that's happened which did not apply to the current situation. Witness 1 accepted this but noted that historically there were cases where no loss had occurred but there were

other reasons why a case came before the Board. Witness 1 indicated that he was unaware of why this case had come before the Board.

Two final points were made under cross examination; Witness 1 accepted a proposition by Mr Waalkens that ANZ Guidance Note at 4.21 the end of the third line reads, 'the sum of the individual values or gross realisation' and to the profession the terms were synonymous, summing up or totalling the individual values is phraseology for gross realisation'.

Under re-examination by Mr Gilbert, Witness 1 explained the difference between 'gross realisation" and the value in one line noting that because when you acquire the total entity which could be all of the lots as one entity, you have costs involved with marketing and selling them or raising finance on them as was the case in this instance. You have to allow for the risk if you ever have to use the powers under your mortgage to recover your assets assuming there have been no sales. That's the risk involved and the marketing risk, cost of time, cost of money.

In response to further questioning about the application of standards Witness 1 advised the he thought it would be utterly irresponsible for valuers not to be aware that there are standards and to use the standards and to comply with the standards.

The re-examination then returned to the application of IVS3 Clause AUSNZ 5.7 to which Witness 1 confirmed that in his view, it was clear that if individual values are aggregated, they must be reported as the total gross realisation, and that the sum of the individuals must not be reported as the value of the development.

Counsel posed to Witness 1; "You have been asked some questions about whether 'aggregate' means 'total' or 'gross'. Considering the phrase and not just the word 'aggregate' but the phrase 'aggregate value', in your view does that connote something materially different to 'total gross realisation'?" Witness 1 responded that it probably does because aggregate value is the aggregation of the values of the individual lots. In response to a further question as to whether there is any significance in the fact that the term mandated by the standards excludes the word 'value' from it?", Witness 1 responded that he considered this to be the crux of the issue because it says, 'it must not be reported as the value of the development but if aggregated must be reported as a total gross realisation because the value of the development will be less than the aggregated value of the sum of the gross realisation for the very reasons he had previously set out.

Witness 1 was then asked by the Board to provide definitions of 'aggregate value' and 'total gross realisation'. In response he advised; "the aggregate value is the aggregation of the valuations of the individual lots", and "The total gross realisation is the total of the realisation you would expect to get from the sub division as at the date you are assessing it, and that is the figure that is used then to assess the block value or the value of the total, and therein is the enigma that this whole case runs around because it's used to assess the start point for the assessment of the block value or the value of the whole on one line. And that's the problem we have there". He then confirmed that 'total gross realisation' would be the sum of those figures used to assess the block valuation. He further accepted that the two would be the same figure.

Witness 1 was then referred to the definition of 'market value' which he read; *'The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller at an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without*

compulsion.' He confirmed that Valuer F had reported a market value for the individual blocks but not for the whole lot as one block. He was then referred back to the definition *'. . . after proper marketing wherein the parties had each acted knowledgably, prudently and without compulsion'* whether a lender assuming the aggregate was the value of the block as a whole would be acting in this manner. Witness 1 considered this to be a risk and that $1.94m did not represent the market value of the development, and should not form the basis for lending.

Witness 1 was referred to the instructions to Valuer F to provide 'individual and aggregate market values' – plural. He was also referred to the disclaimer in Valuer F's report 'however no third party shall rely on the contents or findings of this report'. It was suggested to him that it was clearly stated that somebody relying on it effectively beyond Company 1 would need to contact and seek approval from Valuer F to use the valuation, a point that he acknowledged.

Witness 1 was then questioned on the hierarchy of the wording between IVS3 5.7 and the ANZ Guidance Note to which he responded that compliance with both was required as Valuer F stated that they complied with the International Standards and guidance notes. He further advised that the difference in the wording between the two was not material, but that the standard was the mandatory requirement and failure to comply was the most serious issue.

As to the seriousness of the breach Witness 1 related this primarily to the fact the figure presented a valuation that a prospective financier would potentially lend money on, on the basis that it's described as a market value and is not for all of the blocks as one entity where the security would be taken over all of those individual lots to refinance the mortgage on the property.

Witness 1 was further questioned on the basis of the standard and noted that it was required because people could misconstrue in a hypothetical subdivision or a sale in one line, that the gross realisation as being the value of the total lot and either pay too much for it or advance too much money on it when in fact that wasn't it's value, it's not the lot value, it's the gross realisation. To get to the market value as one lot, you have to have something less and that had not been explained by Valuer F.

Finally he was asked if there was any opportunity for alternative wording to be used and it still mean the same thing. In response to this his view was that any alternative should be explained. Under re-examination Witness 1 confirmed that he disagreed with the view that the words "aggregate market value" (or similar) were synonymous with "total gross realisation".

Evidence for the Defence

Mr Waalkens in opening made the following application to the Board (and we quote from the transcript):

That you can bring to an end your inquiry given the evidence that you have thus far heard and I want to set out why that it is so. There are broadly five points to make and a few sub points to make on the way through:

The first is one that my friend and I agree on and that is onus. The prosecution carry the onus of proving the charge and Mr Gilbert quite properly opened on that basis and that's not in contest. And indeed, that's consistent with what discipline is all about. Yes you conduct an inquiry under the Act, but it's an inquiry into a disciplinary charge.

And our system in New Zealand throughout all sorts of things is that prosecution has to prove and they prove to the balance of probability standards that my friend said.

The second point is to pick up on some points and in fact Mr Curnow rather stole my thunder with some of the questions that were asked, good questions. But it needs to be borne in mind, and if I can ask you to look at the report that we have written by Valuer F at Tab 2, only on the first page. The first is of course the report is written to Company 1. That doesn't mean it's the end of it but the advice is provided to Company 1 and I'll say something more about that, the consequences of that in a second. But secondly, a lot has been made in some of the phraseology used but note the use of the plural. In the 2nd line, there's a reference to the providing of an opinion of the individual and aggregate market values. They have never been talking about a market value for the whole of the property, its market values of the land. And that's clear from what then follows. And secondly, with this in mind under the bolding half way down that page 'purpose of valuation', again we see 'of the subject properties'. And we see at the very end of it, the word 'sites'; it's used in duplicate there. So it's incomprehensible to suggest that a reader, least of all a prudent reader could interpret this as being a report of values other than vis-a-vis the individual sites that are listed there. That's the point I want to make about the report; that sets the background to what then follows.

My third point is Witness 1 quite properly conceded that had Valuer F used the term 'total gross realisation' rather than the various adaptations of the words aggregate values, and there are numerous of them. Witness 1 said had they used the term 'total gross realisation', we would not be here today; instead they've used the aggregate value references. And quite properly, that's the focus of the disciplinary charge.

The fourth point and allied to this, is what do these terms mean and we've heard a good deal about that already. But Witness 1's own evidence, in cross examination, and it was illustrated by a reference to the guidance note which is beneath Tab 7 at 4.21, and if I can say of course, this is as plain as a pikestaff. The concept or the term; 'the sum of the individual values' is the same as 'gross realisation'. There can be no suggestion that what Valuer F has reported is as to the total gross realisation albeit they have used a different term for it; they've called it 'aggregate value' but it's one and the same thing. I don't accept the point at all but even if the prosecution are correct, the Standard IVS3 at 5.7 is mandatory, that you have to use the term 'total gross realisation' and I don't concede that at all but even if it is right, it's hair splitting because Valuer F has reported that in the phraseology that they have used, as conceded by the evidence for the prosecution. In fact I haven't quite finished the fourth point. That issue about the synonymous nature of these terms is very clearly put by Witness 1 in his primary brief of evidence at paragraph 40 where he makes the point 'they should have referred to 'total gross realisation' which he says represents the aggregate of the individual market value assessments, and I say precisely, there's that point conceded again, we're talking the same meaning. But at paragraph 44 he says 'The simple facts are that Valuer F reported a gross or aggregate value'. So again there is no contest here on the evidence that the message or the interpretation to be put on what Valuer F has reported actually meets these guidelines or rules albeit they do not use the actual term 'total gross realisation'

The fifth point really speaks to wrapping this whole thing up and that is as to the uniqueness of this case. We all know that threshold is a concept that's alive and kicking in all disciplines, particularly so in the valuation profession and the King case, which Mr Gilbert alluded to in his opening – which I have a copy of if you want it but I presume you're familiar with it. The relevant paragraph is 136. I acted for Mr King

and it was a significant undervaluation of property with a complainant and all the usual hallmarks of the case. Mr King had breached standards that were very clearly articulated; there was no argument about what the standards meant. That was a case all about threshold. The Board, on appeal, the District Court said at 136 'We are satisfied that in this case, the breach which we have found Mr King to have committed, namely undervaluing the subject property did not justify disciplinary action against him primarily that is because to use the language of Justice Curly (Australian judge in a case called Pillai) set out paragraph 34, 'we are not satisfied (the Appeal Board said) that Mr King deliberately departed from accepted standards or was guilty of such serious negligence as, although not deliberate, portrayed indifference and an abuse of privilege which accompanied his registration as a valuer.' And if you went back in King to paragraph 34 - that is precisely the metes and bounds of what must be established in order to find discipline. So, my fifth point I introduced is the uniqueness of this case. Witness 1 quite rightly conceded that; there's no complainant, there's no complaint from the party, there's no hint of a suggestion that anyone, anybody has suffered any loss or inconvenience. And just digressing for a moment, we've heard much about it, of course, it's entirely for you, but nor could it be suggested that there could be any harm or inconvenience caused. Why is that? Because of the three categories of disaffected people, it can only be Company 1 - and you've had no complaint from them, and Witness 1 evidence conceded that they're a happy camper, so they can't count; Purchasers – well Witness 1 again acknowledged that plainly these seven properties were being sold individually, there already was one and possibly two conditional agreements on that lot. So it's not a case where this is being marketed or promoted as a single line matter for purchasers. Nor is there a hint of any of that. And I would suggest to you even if you were to be attracted by that suggestion, 'well there might be some purchaser out there who might be confused', how on earth is a purchaser going to be any better helped by the term 'total gross realisation'? These aren't easy terms to work with. It's incomprehensible to suggest that members of the public, purchasers are likely to be confused by the failure to use the words 'total gross realisation'; to instead use 'aggregate value of the individual sites' plural as is set out so very clearly in the report. So those are the purchasers; it doesn't withstand scrutiny to suggest that the category of prospective purchasers could be confused or there could be any concerns out there. But fundamentally of course, as Witness 1 said, there's no evidence at all of people in fact being hurt or harmed or inconvenienced. Nor so a lender. A lot of questions have already been asked and Witness 1 has already given quite proper concessions that a lender with 'half a brain' (my terms) really couldn't possibly have interpreted confusion around this report as having or speaking to a single line or total market value of the whole of the seven units or sites. So there are no people affected and Witness 1 rightly conceded that this is a very unique case in that regard. And nor are there any other circumstances. I don't pretend for a moment that to bring a disciplinary charge successfully, you have to have at least a complainant or at least someone who's suffered harm or loss because that's just artificial. There will be other good reasons for it and Witness 1 did say, or other circumstances, but there are no other circumstances that would warrant an adverse disciplinary finding. And Witness did say, and it was quite proper for him to concede this, that discipline is serious; this is hell on earth for Valuer F and they would very much like this matter to be dealt with.

So those are the five reasons why you can conclude the inquiry now. There won't be any evidence you can uncover that will warrant a disciplinary finding against Valuer F. So if you apply all these principals, it's got to be so. Just on the role of the Board, Section 32.2 and this wonderful way this existing valuer's legislation exists, it doesn't help at all, does it. It's completely silent on actually what you're supposed to do on a whole lot of things and I'll say a little more about it later.

Because in fact if you look at the heading of Section 31, it rightly addresses (and I don't have it in front of it nor have a copy of the Act), it's headed something like 'Disciplinary Finding following an offence' and it's talking about a criminal offence. Or it says 'Serious misconduct' or 'bad conduct' or 'grave misconduct'. I can't remember the adjectives used, but its serious stuff. But your powers under Section 32.2 are to conduct an inquiry – no-one can say you haven't done that. It doesn't say where that inquiry is to go and in my submission, it is entirely open to you, having looked at the issues of onus and the other things I've spoken about, to make a determination that there is no utility in proceeding further with this investigation and I seek to have the charges dismissed. And those are my submissions.

Mr Gilbert opposed the application and in his submission advised that the inquiry should take its course: *"There's been one ordered and so it should proceed in my respectful submission. Indeed, the only evidence you've heard so far is from Witness 1 who is an extraordinarily experienced man in this field and his evidence is that, at least in his opinion, there was a failure to comply with mandatory standards, that that failure had the real capacity to mislead both prospective purchasers and lenders, and that in his opinion, that this is a serious thing, not something to be swept under the carpet. That is the sum total of the evidence you've heard and in my submission, if you were at this point to essentially discontinue your inquiry and say, having heard that with that basket of evidence in front of you, at the moment, the public - and this is a regime like all disciplinary regimes – who this regime seeks to protect would be startled at that outcome.*

Just to recap on the evidence, Witness 1 says that the aggregate value in this case or the value of the total site has to be something less than the summation of the individual lots. To use his words 'that's a fundamental valuation methodology requirement when valuing in this type of situation to account for risk and profit, etc.'. That notion is explicitly captured in your standards; it's your standards as a profession. There isn't actually any ambiguity in it: 'Where a valuation is undertaken on multiple properties in one development, the sum of the individuals must not be reported as the value of the development but if aggregated, must be reported as the total gross realisation'. Now if all this is a semantic slip, your valuation standards must be pointless and that can't be the case. In my submission, the real crux of this case, if I can put it this way, is that a reader of this report picked it up and said we've inspected the property in order to provide our opinion of the individual and aggregate market values of the sub divided land, would take a look at this and say 'Well where is this aggregate market value?' And the answer is, it jumps right off the page at you $1.94m bolded, capitalised, italicised and on the last page of the report underlined as well. And if that is the outcome that a reader of the report could get then it would be, in the words of the Code of Ethics, open to misconstruction. And if a reader of this report could get $1.94m as an aggregate market value, he or she would be grossly mistaken. And yet that is clearly one construction of this report if not, in my submission, the likely construction of it. So if somebody was to read it and take the bold, capitalised, italicised figures as the dominant figure and then make a lending decision, for example, based on that, and remember this was to be provided to the mortgage; the developers having been in some trouble. If they made a lending decision on that and then had to realise their security, they could well be a long way out of pocket. And as I submitted before, if you were to countenance that and yet turn around and dismiss the charges at this stage of the inquiry, that would be a very surprising result.

My final point I want to address relates to the issue of threshold. Now threshold in my submission is something which more properly should be addressed at the end of the inquiry, if, and only if, you determine in fact there's been a breach of standards. It's

not appropriate to do that at this point. But even if you were to do that, the situation is a little more complex than what was set out in the King case. As the members of the Board may be aware, unfortunately counsel for the Valuer General in that case didn't even argue the applicability of Pillai in the NZ Valuers context. What your statute allows is for a range of disciplinary sanctions to be imposed, ranging from a reprimand right up to a strike off and various things in between. It is not the case that in order for a disciplinary finding to be made that a person, a valuer, needs to have grossly departed from acceptable standards as one would get if you were just to take that isolated quote from Pillai outside of its context. This has been recognised by you as a Board, actually, in recent times, and at least two of you will have sat on the case of Valuer M (hearing) [2013] NZVRB 3 in which you as a Board pointed out that immediately prior to Justice Kirby's judgement cited in King, his Honour gave examples of the type of conduct which might amount to relevant misconduct which could include gross negligence, especially if accompanied by indifference to or lack of concern for the welfare of the patient and departures from elementary generally accepted standards; or which a medical practitioner could be heard to say he or she was ignorant. And then you as a Board went on to say 'A range of sanctions is available to the Board under Section 33.1 of the Valuers Act given the way the Act is expressed, the range of possible sanctions should be kept in mind when considering whether the departure from standards is serious enough to warrant disciplinary sanction'. So this might not be a case – probably isn't, almost certainly isn't going to be a case where Valuer F could ever be struck off the register – but that doesn't mean to say that they ought not to be subject to a disciplinary finding depending on your ultimate conclusions and subject to one of the much lesser sanctions.

Mr Waalkens responded in reply with 3 points:

My friend suggested that the determination that I recommended to you would be analogous to you 'sweeping under the carpet' what's happened and I would suggest to you that it's just unable to be construed that way. All I'm asking you to do is to act upon the evidence you've heard from the prosecution. There's no sweeping of this under the carpet. I can tell you of one person in this room who would certainly not agree that this thing has been swept under the carpet and that's the most important person in all this room, Valuer F. This has been anything but a sweeping under the carpet. And the assertion that the public may be startled, well the public would be grossly misinformed if they were to conclude one of being startled if they were given any analysis of what these provisions mean, and that would be expected in your decision upholding what I've said. You would set out what it means and you would refer no more than to what Witness 1 has said. That would be more than sufficient. No member of the public, properly informed, could be startled. So it's not a sweeping under the carpet at all.

My second point is, my friend said that if this is to be construed as some kind of semantic slip then the standards are pointless. Well he mixes metaphors there. And he went on to say, referring to the market value of the whole development, this is the point; if Valuer F, had written a report had said 'the market value of the whole development is $1.94m' that would be a breach of the standard that we've got. But they haven't done that. They set out an aggregate of the total of the individual sites, a sum total, which as we've heard already from Witness 1 and we can read it for yourself what exactly total gross realisation is. So you needn't get attracted by the suggestion that we're saying the standards are pointless, we're not saying that at all. The standard is just not engaged in this case, that's the point.

But if it is, and this is my third point, this is surely not a case which is ever going to get close to discipline. And my friend referred to the Pillai case. Pillai is widely cited under all the old fashioned disciplinary – and this is one – models of which valuers … just the same as used to happen with dentists, doctors, lawyers. There's a morass of lawyers' decisions under the previous Law Practitioners Act which adopt Pillai as the appropriate starts and it's still the benchmark. And the District Court in the King case were correct when they applied it. So the epithets used in Pillai are just simply, this case falls woefully short of any of that.

Consideration of Application for Dismissal

The Board considers the application of standards and guidance notes as foundational to the valuation profession. Standards and guidance notes have been developed to prevent incorrect methodology and to ensure the public is well served when it receives valuation advice.

The application of IVS3 Clause 5.7 and ANZVGN 1 Clause 4.21 is to ensure that the recipients of valuations for subdivision properties do not assume that the sum of the value of individual properties is the value of the block as a whole where costs associated with subdivision are incurred before the individual lots can be realised.

In the Board's view, the New Zealand Institute of Valuers correctly lodged a complaint against Valuer F when they not only failed to strictly comply with IVS3 Clause 5.7 and ANZVGN 1 Clause 4.21 and also to claim that they had when indeed they had not. The Board is of the view that the matter was also correctly referred for an inquiry under Section 32 of the Valuers Act 1948.

Both Counsel agree that the onus of proof was on the Valuer General to prove the charge (or in this case either charge in the alternative). The Valuer General called one witness to support the case, Witness 1, who correctly identified the importance of Standards and operating within the Code of Ethics.

The defence elaborated on five reasons in support of dismissal:

1. The onus of proof referred to above.
2. In reporting aggregate values Valuer F had never implied that this was a market value of the entire property. *This was traversed in cross examination of the prosecution witness and this view was not negated.*
3. Witness 1 conceded that had Valuer F used the term 'total gross realisation the complaint would not have been made.
4. The use of the terms was a matter of phraseology. *While there remains some debate as to the requirement to use the precise wording in the standard, the Board was not presented with convincing evidence either way.*
5. With reference to *King v Valuer General,* the charge against Valuer F was not proven to a level requiring disciplinary action. In particular no party had been adversely affected by the actions of Valuer F.

Mr Gilbert in response refers to the second charge in relation to Clause 1.4 that the statement made by Valuer F could be open to misconstruction. A view that the Board shares, but this was not convincing on the evidence presented. He then challenged aspects of *King* and in particular the application of *Pillai* correctly noting that the Board has a range of sanctions available when determining the seriousness of a departure from standards.

The Board confirms that adherence to standards and guidance notes are critical to the practice of valuation. But, in this case, the Valuer of General has not provided the level of proof that Valuer F is guilty of either charge. The Board is therefore of the view that continuing the hearing and incurring further costs to both the profession and Valuer F is not justified and therefore the charges should be dismissed.

Oral Decision on the Application for Dismissal

The Board made the following oral decision:
The Board has considered the application by Mr Waalkens for the charges against Valuer F to be dismissed. The Board has also considered the representations by Mr Gilbert on behalf of the Valuer General in relation to the case proceeding.

As agreed by Counsel, the onus of proof lies with the prosecution and the charges must be proven on the balance of probabilities.

I refer to the instructions that Valuer F was given on page 32 of the bundle that was admitted, and this is an email from the client to Valuer F dated 16 November 2011 at 11.20 a.m. 'We will require individual values for the seven sites and the two remaining undeveloped units' – (we've heard nothing about the undeveloped titles today but that's not part of this case).

We know in particular that Valuer F was asked to provide an aggregate of the values. So in relation to the first charge, the Valuer General has not proven to the required standard Valuer F failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of their report. That charge is therefore dismissed.

Charge 2 was laid in the alternative. The relevant words in this charge are 'You prepared a statement which you knew or ought to have known was misleading or incorrect or open to misconstruction'. In reporting an aggregate value as opposed to total gross realisation, the Board does not believe that on the balance of probabilities that a breach of Clause 1.4 has been proven to the required standard. The charge is therefore dismissed.

Full reasons for the decision will follow. We therefore complete this Hearing.

The Board confirms this oral decision.

Kenneth R Taylor
Chairman
15 June 2015