

VALUERS REGISTRATION BOARD

IN THE MATTER OF

an Inquiry under

Section 32(2) of the Valuers Act 1948

AND

IN THE MATTER OF

A charge under Section 31(1)(c) of the Valuers Act 1948 concerning a complaint against Valuer G

BOARD OF INQUIRY: "Board"

Evan Gamby - Chairperson

Phillip Curnow

Victoria Murdoch

COUNSEL:

Ms Sally Carter for the New Zealand Institute of Valuers

Mr David Rendall for Valuer G

HEARING:

3 December 2018

ORAL DECISION:

3 December 2018

WRITTEN DECISION:

18 January 2019

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Background

1. The complainant had been advised by her accountant, to have a valuation prepared on the subject property to ascertain the division of the sale price between the main dwelling and the cottage as a tax apportionment. There was reference in the email from the accountant to the complainant that the chattels should also be valued.
2. Subsequently, in an email dated 30 August 2017, the complainant instructed Company 1 to undertake the valuation.
3. In later emails from the complainant to Valuer G, it was made clear that the valuation was required for taxation purposes, confirmed on 30 September 2017 in the following words:

".... and the purpose of the valuation is for tax, to determine the percentage of the cottage for tax purposes and how to apportion stuff"

4. From an earlier email dated 27 September 2017 from Company 1 to the complainant, which can be taken as the Terms of Engagement, it was stated that Company 1 understood the valuation was to be undertaken for market value purposes.
5. Valuer G became aware of the error and in their reports amended the purpose from "Market Value" to "Market Value for tax apportionment".
6. The complainant had provided a summary of the relevant property details in brief noting the \$1,165,000 purchase price and work undertaken since purchase costing a further \$120,000.
7. Three valuation reports, all dated 27 September 2017, were completed by Valuer G, each of which has a version number, either 1, 2 or 3. The version numbering will be used in this decision to identify the reports.

Version 1

8. The Version 1 report is based on an inspection of 27 September 2017, being the valuation date.
9. The purpose of the valuation is stated to be:

"To establish market value for the purpose of tax apportionment."

10. The valuation states:

"We assess the market value of the subject property to be \$1,300,000 (One Million Three Hundred Thousand Dollars)."

11. In an email of 12 October 2017, the complainant outlined deficiencies as she saw it with Valuer G's report, concluding:

"Given so many errors and omissions, I have little confidence in the valuation of the property. I conclude the valuation is not fit for purpose."

12. Valuer G responded on the same date. With reference to the purpose of the valuation their reply states:

"Hi, Sorry I have been EXTRAORDINARILY busy. I will attend to your queries in due course. Quickly, you asked for a market value of the property. That is what I provided. The email that was sent out was automated, but if you read the report thoroughly you would see the comment "to establish Market Value for the purpose of tax apportionment". Market value is Market Value, irrespective of the purpose. You cannot have two types of Market Value."

13. The 27 September 2017 Version 1 report provided an apportionment of the property as set out at page 44 of the Investigator's Report, allocating the Market Value in summary form as follows:

"Version 1

12 VALUATION

12.1 Summation

Land Value	As an occupied site	\$350,000
Unit 1		
House		
	Main House	\$678,000
Other Buildings		
	Other - storage shed	\$8,000
Other Improvements		
	Decking	
	Landscaping - fencing, driveway, etc	\$70,000
Unit2		
House		
	Main House	\$138,000
Other Buildings		
	Other - attached boat port	\$18,000
Market Value Excluding Chattels		\$1,262,000
<hr/>		
Unit 1		
Chattels		
	Floor Coverings, Light Fittings, Window Treatments	\$30,000
Unit 2		
Chattels		
	Floor Coverings, Light Fittings, Window Treatments	\$8,000
Market Value Including Chattels		\$1,300,000 "

Version 2

14. A Version 2 report, also dated 27 September 2017, was issued at a later unspecified date, correcting a number of the errors complained of by the complainant. Presumably this version was issued after 12 October 2017.
15. The Version 2 report figures are identical to the above as set out at page 83 of the Investigator's Report.
16. On the 15 October 2017, the complainant emailed Valuer G again, stating:

"I remain disappointed."
17. Valuer G responded on the same date with Version 3, correcting further errors in the report and providing identical valuation figures. These reported figures are included at page 123 of the Investigator's Report.
18. In summary, all Versions 1, 2 and 3 recorded the purpose of the valuation being "To establish Market Value for tax apportionment." Apart from amendments to descriptive terminology, there were no changes which at all times provided exactly the same figures as Version 1 and the same description as to purpose. Chattels in each case had been separated out from the value of the land and the improvements on the land.
19. In an undated letter, received on 4 December 2017 the Valuers Registration Board received a complaint from the complainant referring to many errors within the report, commenting that Version 1 was never sighted by her and Versions 2 and 3 contained errors, which were progressively corrected. The complaint cited potential breaches of Clauses 1.1, 1.5 and 1.6 of the New Zealand Institute of Valuer's Code of Ethics.
20. The matter was referred to the New Zealand Institute of Valuers who undertook the investigation.

Witness 1 - Peer Review and Opinion

21. On the 12 April 2018, the Investigator requested a report from Witness 1 on Valuer G's work, in a task requiring three steps, which were summarised in Witness 1's report at page 163 of the Investigator's Report, repeated below:

"a) Consider the instructions received by the complained valuer and/or the purpose of the valuation statement in the valuation report and identify, then consider the ethical elements of this complaint.

b) Explain what we would have done if we were undertaking this valuation assignment and how we would have addressed the specific ethical elements of the complaint.

c) Critique what the complained valuer has done in comparison to the above."
22. The report of Witness 1 is contained in the Investigator's Report at pages 163-171.
23. Noting that the complainant had identified Clauses 1.1, 1.5 and 1.6 as potential departures from the New Zealand Institute of Valuers Code of Ethics, Witness 1 was of the opinion that only Clause 1.5 was a matter of concern, and stated at paragraph 32:

"Whilst the stated "Purpose of valuation" is consistent with the client's requirement as evidenced only in the email correspondence, the valuation report does not actually specifically provide an apportionment of value, other than a summation worksheet on page 30."

Paragraph 20.1 of IVS 101 states:

"All valuation advice and the work undertaken in its preparation must be appropriate for the intended purpose."

Furthermore, paragraph 20.3(f) of IVS 101 requires:

"The purpose for which the valuation assignment is being prepared must be clearly identified as it is important that the valuation advice is not used out of context or for the purposes for which it is not intended."

24. In the following paragraphs of his report to the Investigator, Witness 1 outlines his opinion that the valuer should have sought further clarification from the client, or been directed by the client to have her accountant prepare a directive based upon Internal Revenue Department Guidelines as to the accepted method of apportioning value. Witness 1 suggested that, as an example, it may be necessary to apportion the underlying land value between the dwelling and the cottage on a pro rata basis.
25. Witness 1 also noted that Valuer G's reports make reference to the purchase in August 2016 for \$1,165,000 and the work done to the property since the purchase date, said to be worth \$120,000.
26. Central to the complaint is that the complainant considered Valuer G's report was not fit for purpose. Witness 1 concluded that:

"... as the valuation report did not include an apportionment of value it may not have been fit for its intended purpose. We therefore consider that the report may not have been prepared to the highest standards and may be in breach of Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics".

The Charge

27. A single charge was prepared and is set out below:

1. 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 2017 with respect to a residential property you failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of the valuation report and therefore breached Clause 1.5 of the New Zealand Institute of Valuers' Code of Ethics.

Particulars

- a) The valuation and the work undertaken in its preparation was not appropriate for the intended purpose in breach of IVS101 Scope of Work, including failing to appropriately identify the purpose for which the valuation was prepared and

failing to appropriately provide a means for apportioning value between the dwelling house and cottage on the property.

The Joint Memorandum

28. Counsel for the Valuer-General (New Zealand Institute of Valuers) and for Valuer G prepared a joint memorandum submitted to the Board confirming that there would be no defended hearing and that Valuer G intended to plead guilty to the charge.

Submissions for New Zealand Institute of Valuers

29. The submissions for the New Zealand Institute of Valuers set out the background and the correspondence between the complainant and Valuer G, including reference to the changes made between Versions.
30. It was submitted that there were clear breaches of IVS 101 Scope of Work as no apportionment of value was provided and therefore the valuation was not fit for purpose. Further, Valuer G, failed to confirm by enquiry what their client needed.
31. One aggravating factor was said to be the issue of multiple versions of the same report under the same instructions with the same date of inspection. The Board notes that each of the versions was identified by a version number on the face of the report but the report date remained unchanged being 27 September 2017. There was no "issue date" and no descriptive content within later versions as to what changes had been made. It would require an eagle-eyed client to differentiate between each of the three versions on a line by line basis to identify what changes had been made. There was no indication in any of the versions that earlier versions had been retracted. Accordingly, Version 1 could continue to be acted upon even if the client had either of Versions 2 or 3.
32. The Board was provided with an earlier decision with respect to Valuer G in which that Board recorded:

"The Board having reviewed the Investigation Report, the report later received from Valuer 1 and the Joint Memorandum remains of the opinion that there are issues with the reports of Valuer G, the most significant being the issue of three reports with the same date, without any attempt in the later reports to explain why an earlier report needed to be amended. In addition, the Board notes, there appeared to be no attempt in the later reports to retract the earlier reports. The practice of having more than one report in the market at the same date containing different information is of concern to the Valuers Registration Board which has received a number of complaints of this nature in recent years."

33. The reports prepared by Valuer G on this occasion are all dated as the inspection date of 27 September 2017, a mere two months after the date of the Board's earlier decision. The only difference at that time Company 1 had made to its reporting protocol was to note that each report should have a different version number. This is quite inadequate to address the issues identified in the Board's earlier decision concerning the same and the same franchisee valuer, Valuer G.
34. On the previous occasion, Valuer G was found not guilty, as the peer reviewer considered the issues to be of a minor to very minor nature. Although the Board on that occasion considered

it was bound by the evidence, it noted in its decision that it was concerned with the practice of issuing multiple reports without obvious distinctions between reports, even where no changes were made to the values.

35. The current matter can be distinguished as, not only are there three versions of the report, but none addressed the fundamental issue of a valuation apportionment for tax purposes which was the intended purpose of the instructions, acknowledged by Valuer G but never provided.
36. The New Zealand Institute of Valuers submitted that a reprimand and a fine in the region of \$1,000 to \$2,000 should be imposed.
37. With respect to costs, these totalled \$15,531.05 as follows:

Legal fees (including GST)	\$	5,610.03
Investigation/prosecution costs associated with witnesses, NZIV and staff (including GST)	\$	6,394.00
Board expenses	\$	3,527.02
Total:		\$15,531.05

38. For the usual reasons including the decisions in *Gurusinghe v Medical Council of New Zealand*¹ and *Cooray v Preliminary Proceedings Committee*², it was submitted the start point for a costs award should be in the region of 50%.
39. In the opinion of the New Zealand Institute of Valuers nothing warranted departure from the 50% commonly adopted starting point.
40. A full outline of the costs incurred were set out in a Schedule of Costs Incurred as an appendix to the submissions.

Submissions for Valuer G

41. In the submissions for Valuer G, it was stressed that, at paragraph 60, page 170 of the Investigation Report, Witness 1's opinions were relatively muted, giving the following as an example:

"... there was ambiguity in the valuation instructions, ... "

and further, at paragraph 64, page 170 of the Investigators Report with respect to the lack of apportionment for tax purposes:

"... the report may not have been prepared to the highest standards and may be a breach of Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics."

42. In the submissions for Valuer G, neither the investigator nor Witness 1 the peer reviewer took serious issue including noting the following:

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

² *Cooray v Preliminary Proceedings Committee* HG Wellington AP 23/94, 14 September 1995.

"... we are certainly not overwhelmingly convinced that there had been a breach."

43. It was submitted that despite the less than convincing report of the Investigator Valuer G entered a guilty plea in the knowledge that the institute considered this matter to be:

"...towards the minor to very-minor end of the scale of possible seriousness ... "

44. On that basis, it was submitted for Valuer G that a reprimand was an appropriate sanction for this very minor level of seriousness and that the matter for this complaint was different to the set of circumstances for the previous complaint.
45. With respect to costs the submission for Valuer G was that because of the early guilty plea and the extensive matters in the complaint that did not need to be traversed, costs should lie where they fall. Alternatively, at the very worst for Valuer G it was submitted that an apportionment should have a starting point of \$5,177.16 being an even apportionment over the three potential breaches of the Code of Ethics, only one of which was proceeded with as a single charge. On that basis, 50% of \$5,177.16 in accordance with *Cooray v Preliminary Proceedings Committee* is \$2,588.58 as a maximum.

Valuer G Statement

46. Valuer G was unable to attend the penalty hearing for health reasons. The Board accepts their explanation.
47. The Board also accepts that Valuer G made genuine attempts to correct descriptive errors in subsequent versions of their report and notes that they responded promptly to their client's emails.
48. Valuer G stated:

"As a group, Company 1 have implemented stringent checks to ensure that any amendments to a report, including minor grammatical changes, are noted clearly on the second page of our valuation reports providing any users of the reports with clear guidance as to what changes have been made in noting the version number."

49. The stringent checks by Company 1 to which Valuer G refers may have occurred sometime prior to the hearing date of 3 December 2018 but had not been implemented as at the valuation report date of 27 September 2017.

50. Valuer G's final sentence in their statement is:

"I have also further researched the methodology pertaining to tax apportionment valuations of residential properties."

51. It would have been helpful if Valuer G had explained what guidance they have gained from their further research.

Oral Decision

52. The Board considered the submissions and issued an oral decision which is repeated below.

"The charge is that Valuer G failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of a valuation report for a, in breach of Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.

Valuer G has pleaded guilty to the charge that the work undertaken was not appropriate for its intended purpose in breach of IVS 101 Scope of Work including failing to identify the purpose for which the valuation was prepared and failing to provide a means of appropriately apportioning values between the dwelling house and cottage on the property, required for tax apportionment purposes.

There were three versions of the report. Although there were changes made between versions the values remained the same in all versions. There was no rationale to explain what changes had been made although it is noted that all versions are said to have been prepared for tax apportionment purposes. There is no explanation in any of the versions as to how the values have been calculated, including the methodology adopted to determine the percentage of the cottage relative to the entire property.

Errors in Version 1 were progressively corrected in Versions 2 and 3 but there was never a proper explanation of how the values were assessed and how the valuation could have been used for tax apportionment purposes. As noted by the peer reviewer, Valuer G "... should have sought further clarification from the client to have their accountant prepare a directive based upon Inland Revenue Department guidelines as to the accepted method of apportioning value." This would have required an amendment to the Scope of Work once identified.

Submissions for the New Zealand Institute of Valuers identify the lack of care and failure to confirm what the client needed, which it was said "...adversely affected the utility and approach of the valuation." The Board agrees. The client's needs did not change at any stage.

Further its submitted for the New Zealand Institute of Valuers that three versions of the report were prepared and at no stage was it identified that earlier reports were retracted, what amendments had been made or, more fundamentally, in the Board's opinion, how the reported value figures were assessed for tax apportionment purposes.

The Board accepts the plea of guilty and comments that, in its opinion, none of Versions 1, 2 and 3 were fit for purpose, irrespective of the changes of detail.

Submissions for Valuer G and for the New Zealand Institute of Valuers indicate there was some level of ambiguity in the instructions. The Board disagrees, the purpose was clear.

Penalty

The Board does not accept submissions that the matter was minor to very-minor. The Board considers the failure to properly identify the purpose of the instruction and provide a valuation fit for purpose is more than minor. In essence, Valuer G did not convince either their client or the Board of their competence to prepare a valuation for tax apportionment purposes.

Within the range of penalties available to the Board, the Board reprimands Valuer G and imposes a fine of \$2,000 in line with submissions, but noting its concerns as to the competence of Valuer G to undertake a valuation of this nature.

Costs

Costs are summarised and total \$15,531.05. All of the costs were properly incurred and for the reason frequently stated: The start point for awarding costs is 50%. Both submissions for the New Zealand Institute of Valuers and Valuer G agree that is the correct starting point. They disagree on the level to which costs should be awarded. Costs are less than if the matter had been defended. The Board notes, however, that the guilty plea was not at an early stage and all costs that were incurred related to the matter in the charge before the Board.

The Board finds no reason to depart from the 50% start point and awards costs against Valuer G of \$7,765.52."

Decision

53. The oral decision is confirmed. The Board reaffirms that it does not consider this matter to be minor to very minor and notes the following:
- (a) The purpose of the valuation was identified by the client in their instructions.
 - (b) At no stage did Valuer G undertake the exercise correctly and provide an apportionment for tax purposes. The report was therefore not fit for purpose, in particular it did not comply with IVS 101 Scope of Work.
 - (c) There was a clear breach of Clause 1.5 of the Code of Ethics. The report was not prepared to the highest standards.
 - (d) Valuer G may not at the time have been competent to undertake the instruction without direction and supervision.
54. With respect to subparagraph (d) above and based on Valuer G's reports, had the matter proceeded to a defended hearing the competency of Valuer G to undertake a tax apportionment assessment without guidance and supervision would have been questioned by the Board. Clause 2.4 of the Code of Ethics is relevant:
- "A member should not undertake any work for which the member is not qualified or where the member is in any doubt or ought to be in any doubt as to the adequacy of the member's professional competency and/or experience to undertake the work unless such work is completed under the supervision of a person of adequate competence.*
55. No charge was brought under Clause 2.4 because that clause was not considered in the Investigator's report or addressed in evidence. In accordance with his instructions Witness 1 focussed his peer review and opinion to the specific ethical clauses referred to by the complainant.
56. Had Witness 1 addressed not just the "...specific ethical elements of the complaint" identified by the complainant but instead considered the complaint in a broader context the Board considers he should have identified and commented on the ethical requirement to comply with Clause 2.4.

57. Witness 1 focussed his comments on Clause 1.5 as the only clause of the three identified by the complainant as being relevant which refers to "... *the maintenance of the highest standards in the preparation of statements, reports and certificates...*".

58. There is the following comment in Witness 1's report which relates to the complainant's concerns, which the Board considers raises the question of competency:

The valuer should have sought further clarification from the client or directed the client to have their accountant prepare a directive based upon Internal Revenue Department guidelines as to the accepted method of apportioning value."

59. The Board considers that, on this occasion, it may have been an error adhering only to the complainant's outline of why the work completed was "not fit for purpose" in terms of an investigation of specific ethical clauses.

Evan Gamby
Chairman

18 January 2019