

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 against Valuer I

BOARD OF INQUIRY: PA Curnow (Inquiry Chairperson)
HJ Puketapu
KR Taylor

COUNSEL: Ms S Carter for the NZIV.
Valuer I was not present at the hearing, nor
had legal representation

DATE OF HEARING: 3 August 2015

ORAL DECISION: 3 August 2015

WRITTEN DECISION: 25 May 2016

BACKGROUND:

1. Valuer I was instructed by the complainant to provide a market valuation for mortgage purposes on the subject property.
2. The property covers an approximate area of 3,070m² and is a three-level structure leased to various commercial entities. The property also comprises 36 carparking spaces, some of which are included in the commercial leases but 23 of which are let separately.
3. Valuer I provided their report on 31 July 2013.
4. They concluded that the market value (conditional) was \$10,750,000 plus GST (if any).
5. The complainant obtained a second valuation dated 16 August 2013 from Valuer 1, who assessed the property value at \$11,750,000 plus GST (if any).
6. The complainant complained to Valuer I that their work is not accepted and lacks professionalism.
7. Subsequently, the complainant emailed Mr Earl Gordon, chair of the Professional Practices Committee of the New Zealand Institute of Valuers (NZIV) 10 September 2013 lodging his complaint. This complaint being that Valuer I had breached the Ethics and Standards required and that Valuer I's conduct was unprofessional.

INVESTIGATION:

8. The New Zealand Institute of Valuers instructed Valuer 2, to carry out an office-based review of Valuer I's report. This was to comment on the following matters:
 - Has there been a breach of the Code of Ethics and/or Professional Standards,
 - Based on the material provided, was Valuer I's conduct unprofessional,
 - What is an appropriate fee (Valuer I's fee was \$6,626 plus GST).
9. Valuer 2 concluded in respect of the Ethics and Standards question; "based on my interpretation of what the Standards require and how I should have approached this valuation, I believe there are issues of non-compliance. Insufficient information has been provided, no market information or comparative analysis has been provided in relation to the Company 1 component and no valuation calculation setting out a current market rent valuation, following

the traditional steps has been provided. These are breaches of IVS 101, 102, 103, and ANZVGN2. It does need to be noted, however, that a guidance note is not mandatory.

10. No valuation calculations, discussions about the origin or treatment of the operating expenses, floor areas, lack of verification and analysis of the sales and leasing information, rent or value reconciliation has been provided. These are also breaches of IVS 102,103 and ANZVGN2.
11. In respect of unprofessional conduct, Valuer 2 stated "I consider that there are some particular areas of non-compliance. As a result, it is my opinion that this report falls short of the presentation and content which I would have provided, for a property of this type".
12. As to the fee, Valuer 2's comments were "all valuation offices are requested from time to time, to undertake valuations to the briefest possible extent, with the clients hoping to minimise their fees. Perhaps this was the case here. Bearing this in mind then, for a valuation of this type and quantum, to provide a thorough valuation report meeting the minimum level of standards compliance, would in my opinion cost between \$5,000 and \$6,000 plus GST and disbursements".
13. Following consideration of this investigation, the Valuers Registration Board was satisfied that there were reasonable grounds for the complaint and referred the matter for inquiry.
14. The New Zealand Institute of Valuers then drew up the following charge.

THE CHARGE

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 31 July 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 that report and therefore breached Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.

Particulars: You failed to provide sufficient information to properly support your valuation in that you failed to provide any market information or comparative analysis in relation to the Company 1 component of the property and/or you failed to provide any comparison or summary between the market rental information and the contract rent with appropriate adjustments for overage/shortfall.

15. The Board of Inquiry convened two teleconferences in quick succession. At the second teleconference, held 2 April 2015, Valuer I stated that they did not wish to contest the charge and escalate their costs. Valuer I did raise matters around procedure that the Board found helpful for future complaint correspondence and valuer contact. It was also Valuer I's wish not to attend the penalty hearing.
16. Following the teleconference, Counsel for the NZIV lodged the submission on penalty and costs. Valuer I responded with a sworn statement of mitigation. This statement also contained a request for name suppression and non-publication that could be identified with their name and the firm they founded.

NZIV SUBMISSION

17. Valuer I's valuation was arrived at via an analysis of open market sales which had varying degrees of comparability with the subject property and by doing an analysis of comparable market transactions which involved the capitalisation of a market rental at a rate of return as indicated by sales in the market place.
18. The approach adopted by Valuer I was an appropriate approach, but the content of the report failed to communicate essential information that would be necessary for a proper understanding of the valuation, this in contravention of International Valuation Standard 103; Reporting.
19. In particular, in considering the Company 1 (a motel) component of the property Valuer I stated;

"according to management, Company 1 achieves 100% occupancy during weekdays, reducing at weekends, except when major events are held in the subject area (a frequent occurrence mainly from late October to Autumn). It is evident that Company 1 can sustain the gross annual rent of \$651,811 plus GST. The annual rental is inclusive of operating expenses paid by the landlord. Comparison with local better-quality motels is difficult without knowing annual turnover (mainly accommodation receipts)".
20. Within the report Valuer I provides no sales or leasing details relating to any accommodation arrangements to compare with the Company 1 operation. Therefore, in relation to the Company 1 component of the property, there is no market information or analysis. Moreover, they have taken no steps to verify or analyse the information given to them by the management.

21. The peer review of the report conducted by Valuer 2 noted;

"the main area of concern relates to the lack of information provided concerning the Company 1 tenancy. There are no accommodation rents, sales, details of competing premises, tariff reviews, occupancy rate comparisons or any other comparative data ... The information relied upon is qualified as being sourced "according to management". With the twenty year lease and a rent which increases automatically by 2% from the end of each year after the end of the third year, the sustainability of the income raises questions. In many parts of New Zealand tariffs and occupancy rates for accommodation uses have not kept pace according to any predetermined rises, and the risk exists that a large component of the property income contributable to the Company 1 use may increase beyond market parameters and become more risky over time, especially with a lease of a duration of twenty years".

22. Furthermore, Valuer 2 notes that in the transaction details provided in respect of the other components;

- a. There is no tenancy schedule showing the current market rental assessment of the various tenancy areas, enabling their relationship to the contract rents to be immediately noted;
- b. The origin of the floor areas is nowhere noted, or the method of measurement assumed or adopted stated;
- c. There are no detailed valuation calculations and no time value of money calculations of the impact of the over renting of the other sections of the property.

23. In short, Valuer I has failed to provide any comparison or summary between the market rental information and the contract rent with appropriate adjustments for overage/shortfall. Instead Valuer I has concluded in their report that "the overall contract rentals (or rental earning capacity) for the property is considered to be at the level of the market".

24. Whilst Valuer I explains that the Company 2 contract rental of \$221,220 per annum is considered to be at 10% above the market, the Company 3 contract rental of \$81,500 is considered to be at market level, the Company 4 escalation contract rent of \$157,500 per annum is considered to be conservative and below the level of the market, the Company 1 contract rental of \$651,811 per annum is considered to be relative to the market and that the actual annualised private parking equates to \$16,900 per annum plus GST which is considered to be conservative given demand for parking in the subject area, they have provided no information for a reader to understand how they have come to the above

conclusions or how they came to the conclusion that the overall contract rentals are at the level of the market.

25. The purpose of the report is so that a proper assessment can be made for the purposes of lending and/or borrowing money. Where information is significantly lacking, the report will provide no creditable basis for a decision to be made and will either result in delaying the decision making process and/or result in the client having to obtain another report (which occurred here). Ultimately such failings bring the profession into disrepute.
26. Accordingly, the report falls well short of the high standards expected of the profession and is in breach of Clause 1.5 of The New Zealand Institute of Valuers Code of Ethics.
27. In mitigation, this is the first time that Valuer I has appeared before the Board and they have entered a guilty plea, thereby accepting the deficiencies in their work on this occasion.
28. In respect of the appropriate penalty, Counsel for NZIV stated that the purpose of professional disciplinary regimes is to ensure that appropriate standards of professional conduct are maintained and although it is not to punish the professional, this may be the inevitable result¹
29. Central to this is a requirement to protect the public from professionals who do not meet the relevant standards of conduct or competence.
30. The appropriate penalty is a matter of the Board, coming to a view about the seriousness of the conduct in question. Essentially the Board are imposing a penalty on Valuer I for not doing a full and thorough job in relation to the inquiries that they made to come to their valuation. Their conduct had consequences for the client who had to instruct a different valuer to provide a report.
31. It is accepted that this conduct does not form the most serious end of the spectrum, nevertheless, it is not an inconsequential failing.
32. On account of this being Valuer I's first time before the Board it is submitted that a fine in the region of \$1,500 is appropriate. This should be coupled with a reprimand.
33. As to costs, Section 33A of The Act provides the power to order the valuers subject to a disciplinary finding to pay costs.

¹ *Z v Dental Complaints Assessment Committee 2009 1 NZLR 1 at [97] (SC)*

In any case to which Section 31 or Section 33 (1) of this Act applies, the Board may order the valuer concerned to pay such sum as the Board thinks fit in respect of either or both of the following;

- a. *The costs and expenses of and incidental to the inquiry by the Board;*
- b. *The costs and expenses of and incidental to the investigation conducted under Section 32 in relation to the complaint to which the inquiry relates.*

34. The costs total \$14,054.71, which Counsel advised were split as follows;

❖ Legal fees	\$5,965.11
❖ Investigation/prosecution costs	\$4,801.25
❖ Board expenses	\$3,287.35

35. Counsel went on to note that were the Board not to impose costs on Valuer I, then others registered under the act will carry the full burden of funding the investigation and the disciplinary functions of the Board.

36. Counsel outlined three legal decisions for the assistance of the Board in considering this matter.

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

*The Tribunal has no difficulty in restating the principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault if at all possible, rather than on his or her professional body as a whole.*³

38. In *Gurusinghe v Medical Council of New Zealand*⁴ 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.

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

³ [2009] NZLCDT 5 at [41].

⁴ *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139.

*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.*⁵

39. In *Cooray v Preliminary Proceedings Committee*⁶ 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'.⁷

40. Numerous decisions of disciplinary tribunals have adopted this direction and assessed costs at a starting point of 50%, 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 action⁸

41. With these factors in mind, Counsel submitted that costs should be assessed at 50% of total costs to shift the burden in part from the shoulders of others in the profession.

42. Accordingly, costs of \$7,026.85 are sought which represents approximately 50% of total costs.

43. In respect of the application by Valuer I for name suppression, Counsel, in a verbal submission, outlined the key matters for the Board to consider.

44. These being the requirement for open justice and that the particular hardship that Valuer I faced as a result of the name being released had to be beyond the normal hardship a guilty finding or plea would generate.

45. Counsel also referred to the Board of Inquiry decision in 'Q', dated 10 May 2012. The matters to be taken into account in this decision were;

- a. The public interest in the matter.
- b. The transparency of process.
- c. Education and informing the public and the profession.

⁵ [1989] 1 NZRL 139, 195.

⁶ *Cooray v Preliminary Proceedings Committee* HC Wellington AP23/94; 14 September 1995.

⁷ HC Wellington AP23/94; 14 September 1995 at [9]

⁸ For example, *Auckland District Law Society v Mathias* [2010] NZICDT 10, *Auckland District Law Society*

- d. Privacy of the valuer.
- e. Justice to be done in public.
- f. The interests of the valuer.

46. Counsel outlined that Valuer I application for name suppression did not directly address these matters above. Rather, the matters Valuer I referred to (itemised in the mitigation submission following) were, in Valuer I opinion, likely to "burden Valuer I's firm and the two very fine young valuers who now direct that firm".

VALUER I'S SUBMISSION

- 47. Valuer I had advised the Board of Inquiry that they would not be attending the penalty and costs hearing. They did however provide a sworn statement of mitigation.
- 48. This included several pages of sales and motel rents in a line by line table format. The sales were of leasehold, freehold and going concern motel sales over the period 2012 - 2014. The sales were shown on a unit price basis and with capitalisation rates where applicable.
- 49. The rental table was analysed on a per unit basis along with annual rental and ratio of rental to turnover.
- 50. Also attached to the statement of mitigation was a newspaper article dated 25 June 2015. This article reporting a Teacher Disciplinary Tribunal decision of May 2015. Valuer I made reference in their statement that the relevance of the newspaper article was a contrasting view on costs to the NZIV stance. The Board of Inquiry did note that the article included an apparent quote from the decision. This being that the action of the teacher was "serious misconduct at the lower end of the scale". The teacher concerned was censured and ordered to pay 25% of the costs incurred by the Teachers Council Complaints Assessment Committee in taking the case to the tribunal.
- 51. The Board of Inquiry has no particular reference point with this decision and how it may or may not impact on the penalty and costs that flow from Valuer I effective guilty plea. These penalties and costs decisions have more of a reference point from previous Board of Inquiry decisions.
- 52. Valuer I mitigation statement clearly articulated the matters they saw as relevant. In brief these were;

- The complainant was not able to precisely reference the actual complaint. That this was determined by the parties appointed by NZIV. Valuer I does not excuse themselves because of that aspect, but believes the motivating factor was the complainant didn't receive the market value that they were expecting and it was a pathway to avoiding paying the valuation fee.
- The property had been purchased by way of property exchange for \$11,900,000. Latter listed by the complainant for sale at \$12,000,000. Almost two years later the property was on the market at a reduced price of \$11,000,000. Valuer I made particular reference that their valuation was \$10,750,000.
- Although Valuer I did not contest the charge based on Standards, they contend that the "valuation accuracy is of paramount importance".
- Valuer I accepts that the omission of sales and rental data contributed to the charge. They cannot explain why in this instance they made a "regrettable oversight".
- Valuer I contends the fine sought by NZIV of \$1,500 and 50% of the costs (\$7,026) are excessive. Reference is made to the Board of Inquiry decision in the case of *Valuer O* [2014] NZVRB 5 (no fine, costs \$5,932) and *Valuer K* [2014] NZVRB 9 (fine \$1,500, costs \$6,850) for actions Valuer I contends are "*infinitely more serious than mine*".
- Valuer I makes specific reference to the NZIV submissions where the starting point for costs is 50% and decreasing for mitigating factors. In this connection, Valuer I contends the scale of offending should be considered. Apart from the previous reference to *Valuer O* and *Valuer K*, Valuer I did not elaborate on this "scale of offending".
- It was twelve months (13 August 2014) after the valuation that the Board advised there were reasonable grounds for the complaint. However, it was not until 9 February 2015 that the specific charge was outlined. Valuer I stated that this slow process was not only stressful after a thirty-five-year unblemished valuation career, but the loss of their valuation fee was a further penalty. Further, that this complaint and lengthy process has been instrumental in an earlier than planned retirement from their firm and as a registered valuer. This retirement was recorded in a letter to the Board dated 10 July 2015.
- Valuer I sought name suppression and outlined a number of factors they believed were relevant. These comprise a thirty five year career without complaint, first urban valuer in the local branch to receive the award of Fellowship of NZIV, past member of the local Land Valuation Tribunal, former NZIV Branch Chairman, and that their high profile will burden their firm and the two valuers that now direct that firm. Valuer I contended that the charge was at

the "very lowest end" of charges. Also, that they had paid into NZIV and the Valuers Registration Board for thirty five years.

BOARD OF INQUIRY DECISION:

53. The Board issued a brief oral decision following the hearing, with the full written decision to follow at a later time.

54. The oral decision was as follows;

Valuer I has pled guilty to the charge. In respect of the penalty, the Board reprimanded Valuer I and imposes a fine of \$1,500. In respect of the costs, the Board imposes costs of \$7,000 which is approximately 50% of the properly incurred costs.

The application by Valuer I for name suppression and non-publication has yet to be fully considered by the Board. The Board reserves the decision in respect of name suppression and non-publication. As a consequence, this is interim name suppression.

55. The full reasons for the Board's decision on penalties and costs are provided along with the decision on the reserved name suppression and non-publication.

Penalty:

56. The options available to the Board in respect of penalty under Section 33 of the Valuers Act 1948, range in increasing seriousness from;

- a. A reprimand
- b. A fine not exceeding \$10,000
- c. Suspension from the register for up to twelve months; and
- d. Removal from the Register

57. Any of the first two penalties can be imposed either individually or in combination.

58. Valuer I with their guilty plea and comments in mitigation accepts that their reporting was not up to the necessary standard.

59. The NZIV accepts that Valuer I conduct in relation to the report was not at the most serious end of the spectrum, nevertheless it was not an inconsequential failing.

60. Valuer I's client (the complainant) as a result commissioned another report.
61. The quantum has not been an issue for the Board of Inquiry to address.
62. The provision of sales and rentals as part of the mitigation statement is of interest to the Board. However, the matter of Valuer I's professional competence and knowledge in the valuation field within which the subject property resided, were not in question.
63. It was that the presentation of the report failed to provide the necessary and expected information to enable the reader to fully understand the valuer's conclusion.
64. The NZIV has for some years now required members to comply with International Valuation Standards. In the absence of an agreement with the client as to any limitation on information to be contained in the report, then this information is expected to be included.
65. Indeed, Valuer I noted within the Compliance Statement at the rear of their report, that the report complies with Australia and New Zealand Valuation and Property Standards (mandatory practice status effective 1 October 2009) as follows;
- IVS 1 - Market Value Basis of Valuation IVS 3 - Valuation Reporting, and
IVA 2 - Valuation for Secured Lending Purposes (with the exception of excluding a mortgage recommendation as requested),
Various Guidance Notes (best practice status).
66. The Board notes these Standards had been superseded 1 January 2012, nevertheless, the reporting requirement had not diminished in the appropriate standards applicable for a report dated 31 July 2013.
67. By reference to Valuer I's own submission, they are a very experienced practitioner which makes the lapse in judgement inexplicable.
68. Valuer I has not appeared before the Board before, has entered a guilty plea and accepted the deficiencies in their report.
69. The Board of Inquiry accepts the NZIV contention that the conduct does not fall at the most serious end of the spectrum and that a fine of \$1,500.00 is appropriate, coupled with a reprimand.

Costs:

70. Section 33A of the Act provides the power to order a valuer subject to a disciplinary finding to pay appropriate costs.
71. The Board has in a number of recent decisions considered 50% as the starting point for costs, increasing this amount where there are aggravating factors to justify an increase or, decrease the amount where mitigating factors exist that will justify that course of action.
72. The Board is not persuaded by Valuer I's submission that the general direction of the tribunal of ordering 50% costs, should be altered in this instance. The Board confirms its oral decision.
73. The Board therefore orders Valuer I to pay costs in the sum of \$7,000, representing approximately 50% (rounded) of the total costs properly incurred.

NAME SUPPRESSION/NON-PUBLICATION

74. The Board in the matter of *Q (hearing)* [2012] NZVRB 1 has previously recognised that under Section 6 of The Valuers Act 1948 the Board has the right to regulate its own procedure. This right is not dissimilar to that applicable under the nursing legislation. It was confirmed by the High Court that it is within the powers of a Board where no express powers are provided in an act, to order name suppression and non-publication.
75. Matters to be taken into account, as outlined in 'Q', when considering such an application are;
- ❖ The public interest in the matter;
 - ❖ The transparency of process;
 - ❖ Education and informing of the public and the profession;
 - ❖ Privacy of the valuer;
 - ❖ Justice to be done in public; and
 - ❖ The interests of the valuer.
76. In the written statement of Valuer I's such an application was made for name suppression and non-publication. The details of the application have been referred to at length previously.

77. New Zealand Institute of Valuers had no written submissions on this application, but Counsel spoke to those matters outlined in 'Q'.
78. The case regarding the teacher, put forward by Valuer I, did not have the background spelt out of how exactly the matters related to the present case of Valuer I.
79. The decision in 'Q' referenced matters placed in front of that Board of Inquiry that are relevant here.
80. The first of the matters is the High Court Judgment in *The Director of Proceedings and Anor v The Nursing Council of New Zealand and Others*⁹. This decision noted in relation to obligations of the Nursing Council, this Council was obliged to consider in the hearing procedure the public interest and in particular the importance of;
- i. The transparency of and resulting confidence in the process;
 - ii. The safety of the public;
 - iii. Educating and informing the public including other health professionals.
81. Further, the Nursing Council was also required to consider the interests and wishes of the defendant nurse, including particular privacy interests which require protection.
82. *Clark v Attorney General*¹⁰ reinforced the principles, with Glazebrook J at paragraph 42; "*With regard to Mr Ellis' comment that there is no public interest in the publication of Mr Clark's name, we remark that the principles of open justice and related freedom of expression create an presumption in favour of disclosure of all aspects of court proceedings which can be overcome only in exceptional circumstances*".
83. And at para 43; "No exceptional circumstances have been pointed to in this case Justifying departure from the open Justice principle".
84. The Court of Appeal in *R v Liddell*¹¹, in connection with publication, made the observation; "*the starting point must always be the importance in a democracy of freedom of speech, open*

⁹ *The Director of Proceedings and Anor v The Nursing Council of New Zealand and Others* HC774/98 7 December 1998

¹⁰ *Clark v Attorney General (Name Suppression)* CA213/04 2 December 2004

¹¹ *R v Liddell* [1995] 1 NZLR 538

Judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public".

85. A more recent decision regarding name suppression is the Supreme Court Judgment in Barry John Hart v The Standards Committee (No 1) of the New Zealand Law Society¹². Paragraph 2 of the decision notes; *"The primary basis for the proposed appeal is the contention that the usual open Justice approach adopted in cases such as R v Liddell should not apply in the case of a professional person with a high profile facing disciplinary charges, particularly where, as here, criminal offending is not alleged"*.
86. Further, in paragraph 3; *"A tribunal or Judge deciding whether to allow suppression is exercising a discretion which, in a disciplinary context, must allow for any relevance statutory provisions as well as the more general need to strike a balance between open Justice considerations and the interest of the party who seeks suppression. The likely particular impact of publicity on that party will always be relevant, but it is untenable to suggest that professional people of high public profile, such as the applicant have anything regarding a presumptive entitlement to suppression "*
87. The Board has considered the above matters in relation to the application by Valuer I.
88. The Board is not satisfied that there are any exceptional circumstances that apply to Valuer I or to the two directors of the firm they founded. It is accepted that there will be implications for a professional from a disciplinary tribunal decision where a guilty plea has been entered. In this particular case, those potential implications do not outweigh the range of other matters the Board is to consider. The interim name suppression granted to Valuer I at the hearing until the Board had fully considered the matter, is now lifted.

SUMMARY OF FINDINGS:

89. The Board confirms their oral decision as follows;
90. The Board reprimands Valuer I and imposes a fine of \$1,500;
91. The Board imposes costs of \$7,000, which is approximately 50% of the properly incurred costs.
92. The Board lifts the interim name suppression and non-publication order imposed at the hearing now that the matter has been fully considered.

¹² *Barry John Hart v The Standards Committee (No 1) of the New Zealand Law Society* SC129/2011 [2012] NZSC4

A handwritten signature in blue ink, appearing to read "P. A. Curnow", is positioned above a solid horizontal line.

P A Curnow

P A Curnow

Chairperson

Board of Inquiry