

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 K

BOARD OF INQUIRY:

Evan Gamby - Chairperson

Victoria Murdoch

Ken Taylor

**COUNSEL FOR NEW ZEALAND INSTITUTE OF
VALUERS:**

Ms Sally Carter

COUNSEL FOR Valuer K:

Peter Churchman QC

Mr Gordon Davis

DATE OF DECISION:

12 June 2017

ORAL DECISION:

12 June 2017

WRITTEN DECISION:

6 November 2017

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Background

1. In a letter to the Property Institute of New Zealand dated 8 April 2016, the complainant, a trustee of the complainant Trust made a complaint to the Property Institute of New Zealand in these colorful words:

"Please be aware that the Trust's security advisors and commissioned private investigator have advised us that Valuer K is a lifelong established family member of the Malaysian mafia whose Asian network extends into the Chinese triads and other ruthless white collar and criminal networks within New Zealand." and;

"This formal complaint is written to you regarding an unethical, professionally negligent and fraudulent white-collar criminal valuation report prepared and tabled by Valuer K). After almost four (4) (sic) extensive research and preparation we are now very pleased to finally be in a position to furnish the PINZ with the attached documents which clearly evidence Valuer K's criminal complicity with the BNZ's deceptive and unlawful sales agenda for the property which Valuer K's report relates to."

2. The matter was referred to the Valuers Registration Board together with 86 pages of accompanying documents Valuations undertaken by Valuer 2 dated 14 December 2004 addressed to, the complainant, and a valuation undertaken by Valuer K addressed to the BNZ dated 21 October 2011 are relevant.
3. The New Zealand Institute of Valuers (NZIV) elected to undertake the investigation and appointed Mr Reid as its investigator.
4. The investigator's report included correspondence with the complainant, Valuer K and various reports from experts. The first report commissioned was from a registered valuer, Valuer 1, who undertook a peer review of Valuer K's valuation. Valuer 1 raised issues of compliance with the NZIV Code of Ethics but otherwise no issues in relation to Valuer K's valuation report or valuation figures.
5. A second report on the narrow matters of ethics that the investigator saw as relevant was sought from Witness 1, a lawyer. As there were some differences of opinion between Valuer 1 and Witness 1, the investigator sought a third opinion.
6. This third opinion was provided by Witness 2, an Associate Professor specializing in ethical matters. Witness 2 is also a lawyer, an acknowledged expert in his field, and is familiar with ethical matters affecting valuers. Witness 2 completed his report dated 14 December 2016. The investigator duly completed his report which was forwarded to the Board on 19 December 2016.
7. It transpired that Valuer 2 of Valuer K's employer, of which Valuer K was a director, had completed two valuations for the complainant, the first in 2004 and the second on 28 October 2005.
8. The complainant as Trustee of the complainant Trust was not happy with Valuer 2's October 2005 valuation and wanted the value level increased. Valuer K responded to the Trust for the attention of the complainant, stating:

"...we are not changing our valuation figure." and;

".. .we will not be valuing any property for you in the future."

9. Some years later, the BNZ approached Valuer K's employer and requested both a 'market value' and a 'for sale value' of the property concerned. The property was still owned by the complainant Trust. Valuer K undertook the valuation and reported to the BNZ. They did not make contact with the complainant and undertook the valuation without an inspection of the property, relying on the information in the files of their employer.

10. Valuer K's valuation report includes the following statements:

"We have been instructed by our client not to access the property at this time. We have based our internal description of the property on our previous inspections, the last being 13 January 2006. Please refer to attachment for photographs at that time. We reserve the right to amend our valuation accordingly if we find upon inspection that the interior of the dwelling has been altered significantly from this information.

Our valuation is conditional upon the issuing of a Code of Compliance Certificate by the local authority."

11. The investigator wrote to Valuer K on 13 June 2016 requesting a statement. Valuer K's reply on 28 July 2016 provided the following relevant information:

- (a) The valuation was requested by the BNZ for mortgagee sale purposes. Valuer K was instructed to complete the valuation based on the information already contained in the original valuation report completed by Valuer 2
- (b) A LIM report was provided to Valuer K which revealed that there was no Code Compliance Certificate issued for the property and that work to complete the access to the improvements had not been completed satisfactorily
- (c) Three tenders to purchase had been obtained from the Bank, at \$82,000, \$88,000 and \$164,000. The property sold at \$200,000 including GST, which was the forced sale value ascribed to the property by Valuer K in their report of 21 October 2011

12. On the same day that the investigator wrote to Valuer K, he also wrote to the Complainant, requesting a written statement with any other supporting material, including sworn statements from any other parties that could support the complaint allegations.

13. The complainant responded on 14 June 2016 that he had no further comments to make other than those contained in his original complaint and confirmed:

".. .however the 88 page complaint file tabled with you contains all the documentation we have available and pertaining to this matter."

14. The Board has thoroughly perused all of the 88 pages of the complaint. In the Board's opinion, the documents relevant to the complaint are the two reports of 14 December 2004 and 28 October 2005 completed by Valuer 2, the letter of Valuer K dated 8 May 2006 and Valuer K's report to the BNZ of 21 October 2011.

Valuer 1 - Peer Review and Opinion

15. In his detailed peer review, Valuer 1 considered potential breaches of the Code of Ethics under clauses 1.5, 'Professional Responsibility' and 2.2, 'Conflicts'. Valuer 1 also considered whether the report prepared by Valuer K complied with professional standards and, in particular, Australian and New Zealand Guidance Note 1 (ANZVGN1) on valuation procedures and ANZVGN3, valuations for mortgage and loan security purposes (for sale).
16. In Valuer 1's opinion, Valuer K conformed to professional standards and that matter has not been further addressed by the Board.
17. Valuer 1 addressed in detail clause 2.2 of the Code of Ethics and considered that the instructions to Valuer K from the BNZ posed the following ethical elements:
 - *The requirement for the property not to be inspected, as opposed to standard valuation practice requiring an inspection of the property. Reliance upon previous information collected by a colleague Valuer 2, completed five years earlier in July 2006.*
 - *Potential for a conflict of interest around the identification of the client. Valuer K's client is clearly the Bank of New Zealand, as opposed to the previous valuation completed by Valuer 2 on behalf of the complainant.'*
18. Paragraph 2.2 of the New Zealand Institute of Valuers Code of Ethics states:

"A member must not accept or carry out any instruction where there is, or may reasonably be construed to be, a conflict of interest and must withdraw from any instruction if such a conflict of interest arises or becomes known after the instruction has been accepted, unless such conflict of interest is fully disclosed in writing to all relevant parties and all such parties agree that the instruction may be accepted or continued by the member."
19. In Valuer 1's opinion a conflict of interest was created when Valuer K accepted instructions to value the property on behalf of the BNZ without obtaining a release from the complainant Trust. In his opinion written disclosure of the conflict of interest should have been given to both the complainant as the original client and the BNZ, with written permission gained from both parties before the valuation could commence. Non-compliance with 2.2 of the Code of Ethics was, in his opinion, inconsistent with the practice adopted by Valuer K.
20. Valuer 1 was less emphatic that the lack of a re-inspection and undertaking a 'desktop' valuation update breached the Code of Ethics.

Witness 1 - Opinion

21. Witness 1 took an opposing view in his opinion dated 12 October 2016 stating that:

"Valuer K is unlikely to have put themselves in a conflict of interest simply by accepting the instructions from BNZ, as we think that Valuer K's employer's duties to the complainant (except as to confidentiality) ceased at the end of that retainer (see paragraphs 4-10 below)".
22. Paragraphs 4-10 in Witness 1's report to the NZIV explains his reasoning for an absence of breach of clause 2.2, and goes on to consider a possible breach of clause 2.1 and potentially clause 1.7 of the Code of Ethics.

23. With respect to clause 2.1, Witness 1 expressed some concern that information confidential to the complainant, based on the earlier 2006 valuation by Valuer 2, may have been relied upon by Valuer K in reporting to the BNZ in 2011. That information would have been provided by the complainant in circumstances of confidence and may not have previously been made known by the complainant to BNZ through provision of the 2006 valuation to BNZ.
24. Clause 2.1 provides:
- 'Every member shall act towards that member's clients in all professional matters strictly in a fiduciary manner. Any information of a confidential nature given to the member by a client shall be kept confidential and not disclosed to any other party without the consent of the clients'.*
25. Accordingly, in summary, Witness 1 was of the opinion that Valuer K had not breached the conflict of interest provisions of clause 2.2, but may have breached clause 2.1 which prohibits the disclosure of confidential client information.
26. The Board having read the reports of Valuer K's employer provided by the complainant and the report of Valuer K has concluded that the BNZ, as the lending party, would have been in possession of the information in the earlier reports that Valuer K relied on.
27. Witness 1 also considered the application of clause 1.7C of the Code of Ethics which, he considered may also have arisen if there was a breach of 2.1. Clause 1.7 provides:
- "c) *Rely improperly upon information supplied by clients or others in the performance of their professional duties or...*"
28. That would only arise if the information was improperly relied on, but could not arise if the information was already in the possession of the BNZ.

Witness 2 - Opinion

29. Witness 2 was requested to give his opinion on whether Valuer K had breached the Code of Ethics of the **NZIV**.
30. He provided a summary of his opinion under three points, having first dismissed the question of a complaint under *clause 1.6* relating to placing reliance on a five year old inspection.
31. With respect to clause 2.2, on the matter of conflict, Witness 2 was of the opinion that the matter was arguable.
32. In the opinion of the Board of Inquiry, Witness 2's analysis of the situation is helpful. To assist the profession it is repeated in its entirety below, commencing with his conclusion on clause 1.6:

"Summary Opinion

1. *In my opinion Valuer K has a complete response to that aspect of the complaint that is based upon their failure to re-inspect the property in 2011.*

2. *In my opinion Clause 2.2 of the NZIV Code of Ethics creates an obligation upon valuers not to accept instructions that could reasonably be construed as having the valuer acting against the interests of former clients without the agreement of those clients. I think it is at least arguable that Valuer K breached that obligation.*
3. *In my opinion, Valuer K made a significant and easily avoidable error of professional judgement in accepting the 2011 instructions from the BNZ without the agreement of the complainant, arguably acting in a manner likely to bring the valuation profession into disrepute, contrary to Clause 1.2 of the Code of Ethics.*

Background to the Complaint

4. *I take the background to the complaint to be as follows:*
 - a. *In July 2006, Valuer 2 provided a valuation of the subject property to the complainant (I have not seen details of that valuation.)*
 - b. *There appears to have been a dispute over the quantum of the 2006 valuation. In a letter dated May 8, 2006, Valuer K advised the complainant that their employer would not alter their 2006 valuation figure, and that they would not accept further instructions from the complainant or the Trust.*
 - c. *In 2011, Valuer K accepted instructions from the BNZ to provide a valuation of the property for mortgage sale purposes.*
 - d. *The BNZ's 2011 instructions advised that inspection of the property would not be possible, and instructed Valuer K to "complete on the information you already have from Valuer 2's original report."*
 - e. *Valuer K's valuation, provided to the BNZ on October 21, 2011, specifies as a 'condition' of the valuation that:*

"We have been instructed by our client not to access the property at this time. We have based our internal description of the property on our previous inspections, the last being 13 January, 2006."

- f. *On April 8, 2016, the complainant lodged a complaint against Valuer K. The terms of the complaint are florid. Subsequent consideration of the complaint by way of a peer review (provided by Valuer 1) and a legal opinion (provided by Witness 1) has in my opinion correctly identified the two key ethical issues as:*

Whether Valuer K's reliance on an inspection of the property five years earlier, and so failure to inspect the property for the purposes of their 2011 valuation, amounted to a breach of the NZIV Code of Ethics.

li Whether Valuer K's acceptance of the 2011 mortgagee sales instructions generated a conflict of interest given their firm's earlier valuation of the property for the owner and mortgagor.

5. *While I agree that the issues identified in the previous paragraph are the two key issues, in my view there is a broader question about Valuer K's conduct in the current case. In essence, I believe that Valuer K made a significant and easily avoidable error of professional judgement in accepting the 2011 instructions from the BNZ without the agreement of the complainant, arguably acting in a manner likely to bring the valuation profession into disrepute, contrary to Clause 1.2 of the Code of*

Ethics. Valuer K's decision not to take that approach - set out in more detail in paragraphs 69 to 73 of Valuer 1's opinion - was especially inappropriate and unwise, in my view, given their earlier communication with the complainant described in paragraph 4b above.

The Failure to Inspect

6. *The duty to carry out an adequate inspection of valued properties is taken to rest most centrally on clause 1.6 of the NZIV Code of Ethics, and especially by the closing phrase of the clause.¹ The clause, with the closing phrase italicised, provides that:*

1.6: When asked for a valuation of real property, or an opinion on a real estate matter, no member shall give an unconsidered answer. A member's counsel constitutes professional advice which must be prepared to the highest standards of competency and rendered [only after having properly ascertained and weighed the facts].

7. *If reliance on a five year old inspection might reasonably be thought to cast doubt on the accuracy of a valuation, such reliance seems to amount to a failure to 'properly ascertain and weigh facts'.*
8. *The Code does not on its face allow valuers to 'contract out' of the duty inspect. However the Board has taken the view that they may do so in at least a limited range of circumstances. The Board's approach appears to be a recognition that sometimes valuations are required - perhaps for mortgage sales or matrimonial property settlements - in circumstances in which an owner or occupier is not moved to be cooperative. In at least those circumstances the VRB has made clear that an explicit statement that there was no contemporaneous inspection will suffice to avoid a breach of clause 1.6.*
9. *In a decision delivered on November 1999,² for instance, the Board - having accepted that, "in accordance with the client's instructions", a valuer had relied upon an inspection carried out some six years earlier - said that:*

"There was nothing wrong or unethical about [the valuer] accepting the instructions with limitations on the thoroughness of his re-inspection. [He erred only in not making the circumstances of his inspection and valuation clear when subsequently reporting the property's values]" (p6; my italics).

10. *Similarly, in a decision delivered on August 30 2007,³ the Board, having accepted that a valuation was otherwise adequate, remarked that:*

"This leaves only the matter of a failure to properly inspect the property, and in that respect, only the interior. Had [the valuer] advised in his report that he could not inspect the interior, [that would have been the end of the matter'¹ (p.4; my italics).

11. *Taking these decisions as a guide, it seems that Valuer K has an answer to that aspect of the complaint based upon their failure to re-inspect the property in 2011. Their 2011 client, the BNZ, knew that the report supplied to them was prepared with [without sic] the benefit of a re-inspection - the [they sic] instructed them to proceed*

¹ *Though a report that fails disclose that no inspection was carried might also contravene clause 1.4 (No member shall prepare or certify any statement which is known to be...misleading... by reason of a[n]...omission...of a material fact...; viz., the fact the subject property was not inspected, or 1.5 (A member shall exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of...reports...).*

² *In the matter of a valuer, VRB, 19 November 1999*

³ *In the Matter of a valuer, VRB, 30 August 2007*

on that basis⁴ - and they explicitly reference the absence of a contemporaneous inspection in their report, which includes the statement quoted at paragraph 4.e. above.

12. The upshot is that deviation from the high standards set out in the NZIV Code may be tolerable in a narrow range of cases in which clients have a legitimate interest in a valuation and in which that interest would be thwarted were the profession to insist that valuers could never provide a report which did not meet those standards. In those circumstances tolerating reports prepared to a lower standard, and requiring, as the Board currently does, that any deviation from the highest standards be declared and explained in the report seems an acceptable compromise.
13. In summary, in my opinion, Valuer K has a complete response to that aspect of the complaint that is based upon their failure to re-inspect the property in 2011.

Conflict of Interest

14. Clause 2.2 of the NZIV Code of Ethics provides that:

A member must not accept or carry out any instruction where there is, or may reasonably be construed to be, a conflict of interest and must withdraw from any instruction if such a conflict of interest arises or becomes known after the instruction has been accepted, unless such conflict of interest is fully disclosed in writing to all relevant parties and all such parties agree that the instruction may be accepted or continued by the member.

15. The two opinions obtained thus far from Witness 2 and from Valuer 1 differ over what clause 2.2 requires.
16. Valuer 1 takes what may, I think, be regarded as the standard 'valuers' view⁵ On this account, if the interests of the complainant and the BNZ were or could reasonably be construed to be in conflict in 2011, Valuer K, having acted for the complainant in 2006, could not accept instructions from the BNZ in 2011 without disclosing the conflict in writing to both parties and receiving agreement that they could proceed.
17. We will see that Witness 1 takes a different view. Before turning to that view, it will be useful to note two preliminary points.
 - a. First, Witness 1 feels able to take a different approach in part because, he reports, he has "been unable to find any applicable precedents in the valuers' context, and have therefore turned to parallel principles in the context of lawyers and their duties to clients - recognizing that the relationships, and the codes of ethics are not identical".⁶ With respect, that seems a little quick. It may be true that there is no judicial precedent concerning valuers, but the valuers' view described in paragraph 15 above is well established in cases before the VRB. Those cases may not have the standing as precedent enjoyed by judicial precedents concerning lawyers upon which Witness 1 relies, but they do provide a background to the view preferred by Valuer 1. The differences between these cases before the VRB and those concerning lawyers which have come before the courts will be clearer once we have the legal view set out in a little more

⁴ As a matter of completeness, it might be noted that the instructions of the client cannot of themselves set aside the duty to properly ascertain and weigh the facts that are necessary to "maintain the highest standard in the preparation of ...reports" (Code, 1.5), or to provide counsel "prepared to the highest standards of competency" (Code, 1.6). Clients may often be satisfied with reports that do not meet the highest standards of preparation or competency, but the proliferation of such reports would threaten the reputation of the profession.

⁵ Valuer 1 Opinion, para 79.

⁶ Witness 1 Opinion, para 9.1.

detail, and I will return to them at that point.

- b. Witness 1 initially queries whether the interests of the complainant and the BNZ were or could reasonably be construed to be a conflict in 2011. Given a mortgagee sale, the idea seems to be, the complainant and the BNZ should both want an accurate valuation, and so "[t]his is not a case in which the parties have "diametrically opposite aspirations".⁷ However, even allowing for the mortgagee's obligation to secure the best price reasonably obtainable at the time of sale it is easy to see conflicts between the interests of a mortgagor in default and a mortgagee exercising their right of sale. The mortgagor may have an interest in delaying the sale, or in taking steps to maximize the sale price, for instance - interests at odds with those of a mortgagee whose patience has been exhausted. Certainly, it seems that the interests of the complainant and the BNZ at the time of the mortgagee sale can 'reasonably be construed to be' in conflict. Ultimately, Witness 1 may agree: having raised the possibility that there is no conflict he conclude [concludes sic] "that said, we think the existence of conflicting interests between these two parties is clear in the circumstances".⁸

18. We can now turn to Witness 1's central argument that, pace Valuer 1, no conflict of interest arose when Valuer K accepted the BNZ's instructions in 2011. As noted, Witness 1 relies upon relevant cases which have specified the nature and limits of lawyers' duty to avoid conflicts of interest. The key feature of those cases is that while lawyers have a duty of loyalty to their clients, and so must avoid commitments or activities that might distract them from the pursuit of their clients' interests, that duty extends only to the information, skills, and knowledge related to the matter for which the lawyer is engaged, and comes to end once that matter comes to an end. The lawyer must not disclose or use confidential information gained during an engagement, but, provided they do not do that, there is no 'lingering fiduciary duty' to former clients. Lawyers, then, are permitted to act against former clients - provided only that they do not use confidential information when they do so.⁹

19. We can now usefully consider the VRB cases that I have suggested evidence the valuers' view favored by Valuer 1. As noted, Witness 1's reports that he was 'unable to find any applicable precedents in the valuers' context, but consider the 2004 VRB decision concerning a valuer.¹⁰ In September 2000, a valuer valued a rest home for its owner. The valuation was obtained in order to assess the current freehold going concern value of the property for mortgage purposes. The business was subsequently sold to a tenant who leased the premises from the owner. In October 2002 a valuer accepted instructions from a prospective purchaser to value the land and buildings subject to the lease. He did not obtain the owner's agreement to take on the 2002 instructions, and the owner complained to the VRB.¹¹ During the investigation stage of the proceedings, The valuers lawyer appears to have offered the 'lawyer/client' analysis of conflict sketched in paragraph 17 above by way of a defence, arguing that, following the 2000 valuation, "there was no continuing engagement by the owner, the circumstances of the rest home as a business had changed dramatically and there was no use of previously obtained information", and that there was, therefore "no

⁷ *Ibid.*, para5.

⁸ *Ibid.*

⁹ The leading case is the House of Lords case *Prince Jefri Bolkiah v KPMG* (1999]2 AC222, 235, per Lord Millet: "Where the court's intention is sought by a former client...[the]...court's jurisdiction cannot be based on any conflict of interest, real; or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality or information imparted during its subsistence".

¹⁰ In the matter of a valuer, VRB, 8 June, 2004.

¹¹ // is clear that the owner's complaint was motivated in large part by a significant reduction in the valuations, but the Board considered the change in the quantum of valuation was justified.

conflict of interest (actual or potential) and the was obliged neither to seek the owner's consent nor was he constrained from acting for the potential purchaser." Before the Board, however, the valuers lawyer appears to have accepted that, given the wording of clause 2.2, his client was obliged to have obtained the owner's agreement before accepting the instructions from the subsequent purchaser. Unfortunately, there is relatively little argument before the Board (and there is some suggestion that the Board did not accept that the valuer had not referred to his earlier records, so muddying the waters around confidentiality a little). Still, on its face, the decision favors the valuers' over the lawyers' approach to conflict of interest, accepting that the wording of Clause 2.2 does create an ongoing obligation to previous clients, at least in conditions (such as, in the above mentioned case, providing a valuation for a prospective purchaser of a former clients' property) in which 'there might reasonably be construed to be' a conflict between the interests of the vendor and the interests of the purchaser.

20. Witness 1 argues, however, that the analysis of conflict of interest seen in the lawyer/client cases should apply to valuers: "We think", he writes "that the same analysis would apply in the valuers context. In our view, it would be unlikely if the drafters of the Code of Ethics intended to prohibit valuers from accepting any retainer from a person whose interests could conflict with those of a former client. Such an interpretation could create practical difficulties, particularly in areas with a small population".¹²

21. However I am unconvinced:

- a. First, at least some of the details of Witness 1's conclusion, as stated in paragraph 19, seem to me overstate the case. Witness 1 implies that recognizing an obligation to former clients would mean that a valuer could not accept instructions that could conflict with the interests of those clients. However, an obligation to avoid actual conflict or circumstances in which it would be reasonable to construe as threatening conflict, need not have such sweeping consequences. In the current case, the potential for conflict is clear and at the heart of the engagement by the BNZ. The BNZ is engaging Valuer K because they want a valuation they will use against the complainant's interests. One could read Clause 2.2 as generating obligations to former clients in circumstances such as those seen in Valuer K's case - circumstances in which conflict is clear - without thinking the clause prohibited accepting instruction whenever there was the mere possibility of a conflict. Whether potential for conflict is sufficiently clear to generate an obligation to decline instructions or to obtain a former client's agreement would on this account be a matter of judgement, but that is to be expected in matters which cannot be regulated precisely, and easily accommodated in a clause which includes a 'may reasonably be construed to be' test. The upshot is that the valuers' view of the conflict of interest rule need not unreasonably restrict valuers' ability to take on work that merely could generate conflict with former clients.³
- b. Second, and more generally, I think there are significant differences between the positions of lawyers and valuers. In the straightforward case, the lawyer acting for multiple or successive clients brings their legal skills to bear anew on the cases for which they are engaged. They may act, for the BNZ say, in one case and against the BNZ in another, without calling upon any of the information or knowledge relevant to one engagement while carrying out the other. There is a general question here (best answered by valuers) about the degree to which this is likely to be true of a valuer. Perhaps a valuer could accept instructions to prepare a valuation

¹² Witness 1 Opinion, para 9.5.

¹³ This is unsurprising since not even all legal jurisdictions follow the lawyers' approach as characterized here. U.S. lawyers who have formerly represented a client in a matter are typically prohibited from 'thereafter representing another person in the same or a substantially related matter in which that persons' interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing' (Rule 1.9, Model Rules).

which will be used against the interests of a former client in circumstances in which their engagement by the former client was irrelevant to the new valuation. I am somewhat skeptical, at least if the subsequent valuation had the valuer relying upon the information they have only because of their original engagement, but we do not need to settle the general question here for certainly, in the current case, Valuer K is not starting afresh, applying their skills to the valuation anew. They are using knowledge and information gained while working for the complainant. Indeed, they appear to have been retained by the BNZ precisely because of their former engagement by the complainant and the knowledge and information they gained as a result of that engagement, and I think that places them in a very different position from that of the ideal lawyer starting representation afresh.

22. *In my view, Clause 2.2 creates an obligation upon the valuers not to accept instructions that could reasonably be construed as having the valuer acting against the interests of former clients without the agreement of those clients. I think it is at least arguable that Valuer K breached that obligation.*

Confidentiality

23. *Witness 1 points out that, in the legal context, the duty of confidentiality (unlike the duty of loyalty) continues after the end of the engagement or retainer. Witness 1 considers the possibility that Valuer K was prevented from using the information gathered as part of their original engagement by the complainant by the duty of confidentiality, but concludes that the information upon which Valuer K relied in 2012 had been supplied to the BNZ by the complainant, and was therefore not confidential.*
24. *The wording of the BNZ's instructions to Valuer K are at least ambiguous as to whether Witness 1's reading is correct. The BNZ appears to assume that Valuer K has access to Valuer 2's 2006 report, not that the BNZ has it and can supply it to Valuer K: "[P]lease complete on the information you already have from Valuer 2's original report...", they write, and they attached only a LIM report.*
25. *Still, as Witness 1 and Valuer 1 point out the 2006 report was probably supplied to the BNZ at some point.*
26. *I note however that even in the legal context the already stringent obligation of confidentiality is seen to be even stricter when the information in question has been obtained through a prior professional engagement: the duty of confidence is sometimes said to be "colored by the prior duty of loyalty".¹⁴ In the leading case, *Prince Jefri Bolkiah v KPMG* {1999} 2 AC 222 (House of Lords), Lord Millet says:*

"It is...difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged¹⁵, the case for a strict approach is unanswerable ... This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse

¹⁴ Glazebrook, Justice Susan, *Conflicts of Interest: The New Zealand Perspective* (August 11, 2006). Available at SSRN: <https://ssrn.com/abstract=1334323> or <https://dx.doi.org/10.2139/ssrn.1334323>, p.5.

¹⁵ Where 'privileged information' refers precisely to information arising from communications between lawyer and client.

interest".

27. *Given the points in paragraph 26, I am inclined to think that if there is uncertainty about whether the information relied upon by Valuer K in 2011 was confidential - perhaps because it was not supplied to the BNZ at the outset - then a conservative approach should be followed; an approach which makes it less rather than more likely that confidential information supplied to Valuer K's employer by the complainant during the 2006 engagement was used against his interests in 2011.*
28. *That conservative approach might also be supported by the fact that the confidentiality provision in the NZIV Code is stated as an incidence of the fiduciary duty owed by valuers to their clients. As Witness 1 notes (footnote 8), in making the obligation of confidentiality an aspect of the valuer's fiduciary obligation, the NZIV Code goes further than the confidentiality provisions in the Lawyers Code.*
29. *I do not think that necessarily supports a finding that Valuer K breached the confidentiality provisions of the NZ/V Code. I do think It gives a further reason to think that Valuer K should have declined the 2011 instruction from the BNZ.*

Some Practical Points

30. *It seems to me pertinent, at least from a practical perspective, that the 2006 relationship between the complainant and Valuer K's employer ended on poor terms. As noted in paragraph 4.b below, the complainant seems to have complained about the quantum of the 2006 valuation, prompting Valuer K to advise him that their employer would not alter their valuation figure and would take on no further valuation work for the complainant or the Trust. On the one hand, if one takes Witness 1's view, that exchange might have seemed to have drawn a very clear line under the 2006 engagement. From a more practical perspective, the exchange suggests that it should have been clear Valuer K and their employer, - since they wrote the 2006 letter responding to the complainant's complaint to their firm - that the complainant would take umbrage at Valuer K's employer acting against his interests. Most generally, the background might make it more reasonable to construe the dealings between Valuer K, the BNZ, and the complainant as involving a conflict of interest.*
31. *While I agree that issues identified by the previous reviewers, the failure to inspect the property in 2011 and the acceptance of the 2011 instructions without the complainant's agreement are the two key issues, I think there is also broader question about Valuer K's conduct in the current case. In essence, I believe that Valuer K made a significant and easily avoidable error of professional judgement in accepting the 2011 instructions from the BNZ without the agreement of the complainant. In failing to advise the BNZ that they could only accept the bank's instructions with the complainant's instructions, and so, given the relationship between Valuer K's employer and the complainant, and between the complainant and the BNZ, that Valuer K's employer, could probably not accept the instructions and suggesting that the Bank approach another firm, Valuer K acted in a manner likely to bring the valuation profession into disrepute, contrary to Clause 1.2 of the Code of Ethics. Valuer K's decision not to take that approach - set out in more detail in paragraphs 69 to 73 of Valuer 1's opinion - was especially inappropriate and unwise, in my view, given their earlier communication with the complainant described in paragraph 4b above."*
33. Following a consideration of the three opinions, which in parts are in conflict, the Valuers Registration Board put the matter to an Inquiry.

The Charge

34. One charge was preferred against Valuer K as follows:

"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** by providing a valuation to the Bank of New Zealand in relation to a you breached clause 2.2 of the NZIV Code of Ethics relating to conflicts of interest.

Particulars

- a. You completed the said valuation in circumstances where there was, or may reasonably have been construed to be, a conflict of interest, without fully disclosing such conflict of interest in writing to all relevant parties and subsequently obtaining such parties' agreement to undertake the valuation."

The Hearing

- 35. The duly appointed Board of Inquiry (Board) allocated a hearing date of 12 June 2017.
- 36. Prior to the hearing the Board was advised that Valuer K intended to plead guilty to the charge. In a telephone conference on 26 May 2017 the Board set a timetable for exchange of penalty submissions and noted that Valuer K would appear and answer any questions put to them by the Board.
- 37. Submissions were received from the NZIV on penalty and costs and, in response, from Valuer K.

Submissions on Penalty and Costs

- 38. For the NZIV, the factual matters were outlined. Valuer K had acknowledged that there was a clear conflict of interest by accepting instructions to value the property on behalf of the Bank and, in particular in using the information that had been obtained through earlier instructions from the complainant.
- 39. The concern for the NZIV was that Valuer K appears to have made no attempt to either advise BNZ of the possible conflict or to have taken any steps to have obtained the complaint's acceptance to their instruction.
- 40. In mitigation, it was noted that Valuer K has entered a guilty plea and this is the first occasion on which Valuer K had appeared before the Valuers Registration Board.
- 41. For the NZIV, the appropriate penalty was considered to be a reprimand, a fine of \$5,000-\$6,000 and costs at 50%.
- 42. For Valuer K, it was acknowledged that the facts are largely uncontentious, and "*...it is common ground that the interest of the Trust and the BNZ were not aligned*". Put another way, there was a conflict of interest.

43. It was accepted by Valuer K that, at the time they were instructed by the BNZ, they did not ask for and did not obtain confirmation that the earlier 2006 valuation prepared by Valuer 2 could be used for the 2011 valuation.
44. In mitigation, various points were raised. Some, relating to the LIM, resource consents and lack of a Code Compliance Certificate, were not relevant as the major issue was the lapse of judgement by Valuer K in accepting the instructions.
45. Further, notwithstanding that any other valuer instructed by the BNZ may have had less knowledge of the property than Valuer K, given their access to the 2006 valuation of Valuer 2, these do not mitigate against their lack of judgement in this matter.
46. It was submitted for Valuer K that they had pleaded guilty at an early stage, had not been involved in any previous disciplinary proceedings, did not attempt to conceal their role and there is no issue as to the quality of their valuation advice within the bounds of their instructions.
47. The Board heard that Valuer K is committed to the professional standards required of all valuers, takes their obligations very seriously and with some pride and has been an active member of NZIV since 1986. Valuer K's NZIV service includes having served as a committee member of NZIV for 20 years including five years as chair of their local branch. They have twice been a convener of the conference committee for the national conference of Property Institute New Zealand (PINZ) as a national membership committee member and had served on the editorial Board of the PINZ magazine.
48. In a wider role, Valuer K had devoted time to local badminton and Rotary having been awarded for their service. There can be no doubt that Valuer K has had a distinguished career both in the valuation profession and service to their community.
49. In summary, the submission from Valuer K was that they be reprimanded and pay a modest contribution to costs.

Valuer K

50. Valuer K appeared before the Board to answer questions and acknowledge their lapse of judgement which they considered were out of character and from which they had learnt a valuable lesson.
51. The Board commends Valuer K for their appearance and frank disclosure.

Penalty and Costs

52. The Board considers that this matter is towards the low end of the scale of matters that come before the Board. The Board is mindful that there was disagreement between the experts on what might constitute a correct interpretation in this matter of clauses 2.1 and 2.2 of the New Zealand Institute of Valuers Code of Ethics and what, if any, clause had been breached.
53. Valuer K pleaded guilty to the one charge of a breach of 2.2 being a conflict of interest. The instances where a conflict of interest may arise turn on their individual facts. In this case there was some disagreement on the correct interpretation of clause 2.2. In the event Valuer K

pleaded guilty. Valuer K's admission that, they could have done better is a fair acknowledgment of their error of judgement.

Oral Judgement

54. At the conclusion of the hearing, the Board issued the following verbal decision, to be expanded into a formal written decision:

1. *Valuer K, has pleaded guilty to the one charge against them being a breach of clause 2.2 of the New Zealand Institute of Valuers (NZIV) Code of Ethics, in that they completed a valuation of a property in circumstances where there was, or may reasonably have been construed to be, a conflict of interest, without fully disclosing such conflict of interest in writing to all relevant parties, specifically in this case the complainant of the Trust for whom a previous employee of Valuer K's employer had acted.*
2. *The Board has heard submissions on penalty and costs on behalf of both the NZIV and for Valuer K who appeared and answered questions from the Board for which they are to be commended.*

Penalty

3. *Within the range of penalties to which the Board may have regard, this matter is towards the low end of the scale and is considered to be an uncharacteristic lapse of judgement on the part of Valuer K who; in all other matters has acted over many years in a manner that does them credit both professionally and privately.*
4. *The Board has considered that having regard to submissions, it should reprimand Valuer K.*

Costs

5. *Costs total \$19,282.30. The Board has concluded that all of the costs presented to it were properly incurred.*
 6. *Total costs for consideration are therefore \$19,282.30. Valuer K pleaded guilty at an early stage. Had they not done so costs would have been significantly higher.*
 7. *Valuer K is to be commended for recognizing their lapse of judgement and pleading guilty to the one charge against them. The starting point for an award of cost is 50% of properly incurred costs.*
 8. *In this matter, the Board has heard of the significant contribution of Valuer K to the NZIV over many years and their other contribution to the community which does them credit. The Board has concluded that from the starting point of 50% in this case costs should be reduced and has fixed the awarded sum at \$6,750 which is approximately 35% of total costs.*
 9. *A full written decision will follow in due course.*
55. The Board confirms its verbal decision, reprimands Valuer K, and awards costs against them of \$6,750 including GST.

Evan Gamby

Evan Gamby

6 November 2017