

**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 R**

**BOARD OF INQUIRY:**

H J Puketapu (Inquiry Chairperson)

KR Taylor

PA Curnow

**COUNSEL:**

Mr Matthew Ferrier for the New Zealand  
Institute of Valuers.

Valuer R was assisted by Witness 1

**DATE OF HEARING:**

4 April 2016

**ORAL DECISION:**

4 April 2016

**WRITTEN DECISION:**

15 July 2016

## **COMPLAINT:**

1. On 20 September 2013, Valuer R completed a valuation report for the complainant Partnership for mortgage security purposes. The report relates to a central city commercial property
2. The Property was owned by the Partnership and leased to Company 1 .
3. In March 2014, Company 2 was engaged by the Partnership to undertake a market rental valuation. The valuation report was provided on 14 March 2014.
4. On 25 March 2014, Valuer R was instructed by Company 1 to prepare a rental assessment following receipt of a proposed rent increase based on Company 2's report. Valuer R produced a valuation report effective as at 1 April 2014 for rental assessment purposes.
5. While Valuer R disclosed to Company 1 that they had previously valued the Property on behalf of the Partnership, they failed to advise the Partnership that Company 1 had retained their services.
6. This failure to disclose is at the heart of the charge.
7. Company 2 assessed a market rental at \$556,000 plus GST and outgoings. Valuer R assessed a market rental at \$506,565 plus GST and outgoings.
8. The parties' valuers were engaged by the respective clients to try and resolve the difference, however the negotiations were unsuccessful, and the matter stalled. Company 1 gave notice to the Partnership that it wished the matter to be arbitrated.
9. At this point, the Partnership objected to Valuer R's involvement and they stood aside. The market rent was resolved following the appointment of an alternative valuer for Company 1.

10. The complainant Partnership, believes that in acting for both the Partnership and Company 1, Valuer R has a direct conflict of interest.
11. Further to the complaint, the Partnership asserts Valuer R provided a second valuation for a rent review on 18 March 2014. This is around the similar time Valuer R was engaged by Company 1.
12. The Partnership purport that on being aware Valuer R was acting for Company 1, the Partnership requested Company 2 provide a new valuation for rent review purposes.

## **INVESTIGATION**

13. Valuer R provided a response to the complaint in a letter dated 6 July 2015. In that, they confirm their instructions from the Partnership and subsequent report dated 20 September 2013 to carry out an assessment for mortgage security purposes.
14. Valuer R refutes there was a second valuation for rent review purposes prepared for the Partnership.
15. From the chronology of reports, Company 2 were engaged in early March and provided a report to the Partnership dated 14 March 2014. This is at odds with the allegation that Valuer R also provided a second report to the Partnership at or around the same time.
16. Valuer R carried out their assessment for rent review purposes (on behalf of Company 1) on 7 May 2014, albeit the date of rent review was 1 April 2014.
17. In light of the complaint, NZIV instructed Valuer 1 to:
  - a. Consider the valuation instructions received by Valuer R and/or the purpose of the valuation, and identify, and then consider the ethical elements of the complaint,

- b. Explain what Valuer 1 would have done in carrying out this valuation assignment, and how they would have handled the specific ethical elements of the complaint,
- c. Critique Valuer R's approach in comparison to step 2

18. A precis of Valuer 1's response follows:

- a. (i) The valuation report by Valuer R dated 20 September 2013 confirms an instruction from the Partnership to complete a market valuation of the freehold interests the subject property for mortgage security purposes only.  
  
(ii) The allegation that Valuer R provided a second report to the Partnership does not reconcile with the chronology of reports and instructions. Valuer 1 sets this allegation aside as inconclusive. More than likely there is no second report from Valuer R having been presented to the Partnership.
- b. Having considered a potential or perceived conflict of interest, Valuer 1 advises they would have placed this complaint in the potential or perceived categories and the first response would have been to decline the instruction. In acknowledging that Company 1 were made aware of Valuer R having acted for the Partnership and they still wished to engage their services, then until such time as full disclosure was sent and an approval was received from the Partnership that there was no conflict, then the instruction could not be accepted.
- c. Rule 2.2 of the NZIV 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".*

Valuer 1 confirms that a potential conflict of interest did exist and that the matter was a breach of clause 2.2 of the Code of Ethics.

19. The Valuers Registration Board concluded that it was satisfied that there was reasonable ground for the complaint and ordered an Inquiry.

### **THE CHARGE**

Valuer R was advised of a single charge on 6 November 2015.

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 dated 1 April 2014, you breached Clause 2.2 of the New Zealand Institute of Valuers Code of Ethics relating to conflicts of interest.*

**Particulars:** *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.*

20. Valuer R has pleaded guilty to this charge.
21. In doing so, Valuer R has accepted that they breached clause 2.2 of the New Zealand Institute of Valuers Code of Ethics.
22. A date for a hearing was set down for 4 April 2016.

## **THE HEARING**

23. The member records of Valuer R were acknowledged and entered with consent of Counsel for the New Zealand Institute of Valuers and Valuer R.
24. Counsel read an opening submission on penalty and costs firstly outlining the background to the complaint.
25. Valuer R acted for the Partnership and Company 1 in what can only be described as a conflict of interest, or potential conflict of interest. While Valuer R had advised Company 1 of having previously acted for the Partnership, it is clear that clause 2.2 of the Code of Ethics requires that they must withdraw from any instruction unless such a conflict of interest is fully disclosed in writing to all relevant parties and all such parties agree that such instruction may be accepted or continued by the member.
26. Valuer R failed on this point.
27. In a letter received by the Board on 21 January 2015, Valuer R responded formally to the complaint made against them. They provided a background to the complaint that was similarly covered by the investigation of the New Zealand Institute of Valuers.
28. In their letter, Valuer R apologized for their failure.
29. Other matters are covered below in mitigating factors.

### **Aggravating and Mitigating Factors**

30. It is submitted that Valuer R did not excuse themselves from complying with their responsibility under the Code of Ethics. They accepted their fault immediately upon being served with the charge.
31. Valuer R can also rely on the following factors:
  - a) Their early guilty plea,
  - b) Their history in the profession which has not involved any previous disciplinary proceedings,

- c) At no time did Valuer R attempt to deliberately conceal their role,
- d) The quality and reporting of Valuer R's valuation and rental assessments have not been brought into question,
- e) Witness 1, a representative of Valuer R's employer attended and provided a written submission at the hearing in support of Valuer R's character and work ethics. The Board recognizes the significant contribution Valuer R has made to the valuing profession.

### **Submissions on Penalty and Costs**

- 32. The purpose of professional disciplinary regimes is to ensure that appropriate standards of professional conduct are maintained in the occupation concerned. It is not to punish the professional (although that may be an inevitable result).
- 33. Central to this is a requirement to protect the public from professionals who do not meet the relevant standards of conduct or competence.
- 34. The disciplinary powers of the Board are set out in S31 and S33 of the Valuers Act 1948. In increasing seriousness these powers include:
  - (a) A reprimand;
  - (b) A fine not exceeding \$10,000;
  - (c) Suspension from the Register for up to 12 months; and
  - (d) Removal from the Register
- 35. It is submitted that Valuer R should be fined \$2,000, and a costs order made.
- 36. With respect to costs, the NZIV submitted the detailed total costs were \$10,089.11. This cost could not be confirmed, and the Board requested an accurate breakdown. Counsel for the NZIV has provided a supplementary memorandum as to costs totaling \$11,501.51 and this is summarized as follows;

- Legal fees \$4,770.46
- Investigation/prosecution costs associated with witnesses,  
Valuer General and his staff \$2,576.00
- Board expenses \$4,155.05

37. Counsel for the NZIV cited three brief legal interpretations of costs which for clarity are repeated as follows;

In *Canterbury District Law Society Committee No. 2 v Iosefa*<sup>1</sup>, 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?*

In *Gurusinghe v Medical Council of New Zealand*<sup>3</sup> the High Court said:

*The ordering of payment of costs is not in the nature of a penalty. The penalty is removal from the register. The order for costs is to enable recovery to a greater or lesser extent of the costs and expenses of and incidental to the hearing. There is no requirement that the Council should necessarily reduce an award of costs because of the fundamental consequences of removal of name from the register.*

In *Cooray v Preliminary Proceedings Committee*<sup>4</sup> the High Court reviewed costs awards in various disciplinary cases before the Medical Council and said:

*It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as*

<sup>1</sup> Canterbury District Law Society Complaints Committee No. 2 v Iosefa [2009] NZLCDT S.

<sup>2</sup> 2009] NZLCDT 5 at [41].

<sup>3</sup> Gurusinghe v Medical Council of New Zealand [1989] 1 NZLR 139.

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

*a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure.*

In any case to which Section 31 or Section 33 (1) of the Act applies, the Board may order 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 of this Act in relation to the complaint to which the inquiry relates.*

38. The NZIV submitted that were the costs not to be imposed on Valuer R then others registered under the Act will carry the full burden of funding the investigation and the disciplinary functions of the Board. It was therefore submitted that costs should be assessed at 50% of the total costs.

39. The NZIV sought costs in the sum of \$5,750.76.

#### **BOARD'S ORAL DECISION**

*Valuer R appears on a single charge of unethical conduct in the performance of their duties in that by providing a valuation dated 1 April 2014 they breached clause 2.2 of the New Zealand Institute of Valuers Code of Ethics relating to conflict of interest.*

*The charge focuses only on the failure of Valuer R to discharge their obligation under clause 2.2 of the Code of Ethics - that is they did not fully disclose potential conflicts in writing to all relevant parties and subsequently obtain their agreement to undertake the valuation.*

*Valuer R has pleaded guilty to the charge in their early written submission on or about 21 January 2015, after receiving notice of the charge.*

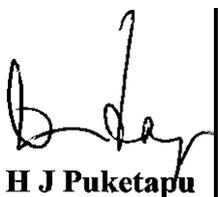
*The Board of Inquiry agrees that this matter is at the lower end of offending and accepts that there are no issues raised in relation to Valuer R core competency as a valuer.*

*We have heard from Witness 1 that Valuer R is held in high regard within the profession and by their employer. In their written submission, Valuer R has offered to pay a contribution towards the Board's cost of investigating this complaint.*

*Accordingly, the Board reprimands Valuer R and imposes a fine of \$2,000. As to costs, relative to other Board decisions, the Board awards 50% of the costs properly incurred following the revised cost amount as to the Board's costs. The Board recognizes Valuer R's attendance and support from Witness 1.*

**BOARD OF INQUIRY DECISION:**

40. The Board confirms its' oral decision. The Board reprimands Valuer R and imposes a fine of \$2,000.
41. Further, the Board orders a contribution of \$5,750, being 50% of the costs properly incurred.

  
**H J Puketapu**

Inquiry Chairperson

15 July 2016