

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 S**

BOARD OF INQUIRY: H J Puketapu (Inquiry Chairperson)
M E Gamby
P A Curnow

COUNSEL: Ms S Carter for the New Zealand
Institute of Valuers.
Ms Whitehead for Valuer S

DATE OF HEARING: 3 August 2015

ORAL DECISION: 3 August 2015
INTERIM ORAL DECISION FOR NAME

SUPPRESSION: 3 August 2015

WRITTEN DECISION: 15 July 2016

COMPLAINT:

1. On 10 June 2014 the complainant made a complaint to the Valuers Registration Board about Valuer S which was subsequently referred to the New Zealand Institute of Valuers (NZIV).
2. The complaint involves an alleged conflict of interest in respect of a residential property in proximity to the coast.
3. The complainant acts for the trustees of a Family Trust (the Trust) who own the Property.
4. Part of a dwelling and several outbuildings on the Property encroach onto adjoining land owned by Company 1.
5. The Trust entered into negotiations with Company 1 to resolve the encroachment. Plans were prepared and an application was lodged to subdivide the property.
6. Prior to the encroachment being resolved however, Company 1 went into liquidation.
7. To satisfy the requirements of their mortgagee, the Trust obtained a valuation from Valuer S, with their assessment to be based on the assumption that the boundary adjustment was complete.
8. In the course of trying to resolve the encroachment, Valuer S was again contacted by the Trust to undertake a further valuation assessment however Valuer S declined to act citing a conflict of interest as they were now acting for the new owners of the adjoining land (Company 2).
9. In his complaint, the complainant alleges Valuer S is clearly acting in circumstances where there is a conflict of interest (and an alleged breach of the NZIV Code of Ethics) and that they are also in breach of their fiduciary obligations. It is further alleged the Trust provided Valuer S with confidential information relating to the economic resources available to the Trustees.

INVESTIGATION:

10. In light of the complaint, NZIV instructed Valuer 1 to:
- a. Consider the valuation instructions received by Valuer S and/or the purpose of the valuation, and identify, and 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 S' approach in comparison to step 2.

11. A precis of Valuer 1's response follows:
- a. (i) In carrying out the initial instruction dated 14 October 2013 from the Trust to complete an assessment of value of the Property, there are no earlier valuations or issues of a conflicting nature,
(ii) However, in carrying out an instruction from Company 2 dated 10 March 2014, Valuer 1 opines a potential or perceived conflict of interest.
 - b. Having considered a potential or perceived conflict of interest, Valuer 1 advises his first response would be to decline the instruction from Company 2. If Valuer S' involvement with the property was disclosed to Company 2, and Company 2 still wished for Valuer S to proceed, then written approval (that there was no conflict of interest) from the Trust was required. Otherwise the request could not be accepted.

Valuer 1 comments that, if he was aware the '*across boundary*' encroachment had not been resolved, then the instruction from Company 2 would be an actual conflict of interest, therefore this instruction would have been declined. Valuer S should have declined the valuation instruction on 18 March 2014 when they were aware the encroachment matter was unresolved.

- 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”.

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

THE CHARGE

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 Company 2, you breached Clause 2.2 of the New Zealand Institute of Valuers Code of Ethics relating to conflicts.*

***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.*

13. Valuer S has pleaded guilty to this charge.
14. In doing so, Valuer S has accepted that they breached clause 2.2 of the New Zealand Institute of Valuers Code of Ethics.

THE HEARING

Application for name suppression

15. Counsel for Valuer S sought name suppression.

16. Counsel referenced the decision of the Board in Q¹ whereby the Board discusses the matters to be taken into account when considering an application for name suppression.
17. Those factors are:
 - a. The Public Interest in the matter
 - b. The transparency of process
 - c. Education and informing the public and the profession
 - d. Privacy of the valuer
 - e. Justice to be done in public
 - f. The interests of the valuer
18. Counsel submits that all the factors can be achieved through publication of the facts of the case while still maintaining the privacy of the valuer.
19. Valuer S has suffered considerable stress and publication of their name would be an additional and unnecessary punishment. Further, publication of Valuer S' name could also severely affect their career.
20. Counsel submitted that this is a unique case where publication could have an effect inconsistent with the usual effects of publication, to the detriment of Valuer S, and not to any significant benefit for the public or the profession.
21. Valuer 2, a director of Valuer S' employer, provided a written submission at the hearing in support of Valuer S' character and work ethics.
22. The Board heard that as a result of this matter before the Board, Valuer S had withdrawn into themselves and had lost confidence. Valuer 2 also indicated that Valuer S suffers anxiety and dyslexia.

¹ Q (hearing) [2012] NZVRB 1

INTERIM ORAL DECISION

The Board issued an interim oral decision granting interim name suppression until such time as a specialist medical report together with further submissions from both Counsel is received by the Board. The time was agreed to be within 2 months.

BACKGROUND

23. Part of a dwelling and several outbuildings on the subject property, encroach onto adjoining land formerly owned by Company 1.
24. On 14 October 2013, Valuer S' employer was requested by the Trust to provide a valuation for mortgage purposes of the subject property and the adjoining land. The request was assigned to Valuer S to complete.
25. In a report dated 24 October 2013, Valuer S provided a single assessment of market value for both the subject property and the adjoining land (on the basis that the Trust would have freehold ownership of the adjoining land).
26. Prior to the encroachment being resolved however, Company 1 went into liquidation and the adjoining land was sold at mortgagee sale to a third party, Company 2.
27. On 10 March 2014, Company 2 sought valuation advice from Valuer S in relation to the land adjoining the subject property and an adjoining separate parcel of land, for possible subdivision and development potential.
28. In carrying out this assignment, Valuer S says that they visited the Property and spoke to one of the occupiers of the Property on 18 March 2014. It is unclear as to the precise nature of their conversation however Valuer S advised the occupier that they were valuing the land adjoining the subject property and another adjoining parcel of land for a new purchaser. They say that that there was no objection or issues raised by the occupier about any conflict.
29. Valuer S completed a market value assessment of the land adjoining the subject property in a report dated 24 March 2014 and addressed to Company 2.

30. On or around 3 June 2014 the occupier telephoned Valuer S to assess a separate value for the land adjoining the subject property as the Trust were still looking to purchase this property off the new owner.
31. Valuer S declined to act citing a conflict of interest as they were now acting for the new owners, Company 2.
32. Prior to any charge being laid, Valuer S asserted they did not believe there was a conflict of interest, however they did acknowledge that they failed to disclose any potential conflict of interest in writing. They have further denied passing on any confidential information about the Trustees resources.

Aggravating and Mitigating Factors

33. It is submitted that the following aggravating features are present:
 - a) Valuer S understood the boundary issues were unresolved at the time they undertook their second valuation for Company 2.
 - b) They have overlooked their obligations to the Trust.
 - c) Having visited the occupier at the time of their second valuation, Valuer S allegedly discussed with her any concerns she might have.
 - d) There is no clear record of the occupier's response nor the capacity in which she was able to act, whether or not on behalf of the Trust.
 - e) Valuer S acknowledges that they should have procured written, not verbal, consent from the parties if they were to act in relation to the land adjoining the subject property.
34. In mitigation, Valuer S can rely on the following factors:
 - a) Their early guilty plea,
 - b) Their long history in the profession which has not involved any previous disciplinary proceedings

- c) Valuer S' exemplary character and support thereof. Character references were provided by:
 - a. A former President of the Property Institute of New Zealand
 - b. A CEO of another local valuation business
 - c. A manager of a further local valuation business .
- d) Valuer S is involved in a number of charitable works including surf lifesaving, coast guard and Chair of the local Primary School Board.
- e) Valuer 2, a Director of Valuer S' employer attended and provided a written submission at the hearing in support of Valuer S' character and work ethics. The Board recognises the significant contribution Valuer S has made to the various communities he has been involved with.

Submissions on Penalty and Costs

- 35. 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).
- 36. Central to this is a requirement to protect the public from professionals who do not meet the relevant standards of conduct or competence.
- 37. 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

38. It is submitted that Valuer S should be subject to a mid-level fine, a reprimand and a costs order.

39. With respect to costs, the NZIV submitted the detailed total costs were \$10,089.11, and summarised these as follows;

- Legal fees \$5,712.86
- Investigation/prosecution costs associated with witnesses,
Valuer General and his staff \$2,156.25
- Board expenses \$2,220.00

40. Prosecution Counsel cited three brief legal interpretations of costs which for clarity are repeated as follows;

In *Canterbury District Law Society Committee No. 2 v losefa*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.

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. 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.

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

³ 2009] NZLCDT 5 at [41].

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

In *Cooray v Preliminary Proceedings Committee*⁵ 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.

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.

41. The Prosecution Counsel submitted that were the costs not to be imposed on Valuer S, 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.

42. The Valuer General sought costs in the sum of \$5,044.55.

BOARD'S INTERIM ORAL DECISION

The Board's brief decision includes the interim name suppression imposed during the hearing, hereinafter referred to as "the Valuer".

It is clear that the character references in support of the Valuer confirm the Valuer is held in high regard by their peers.

⁵ *Cooray v Preliminary Proceedings Committee* HC Wellington AP23/94, 14 September 1995.

The Valuer has not had any previous convictions, and the Board notes that the Valuer has dedicated considerable time to charitable community works.

The Board of Inquiry agrees that the Valuer's transgression is at the lower end of offending.

Accordingly, the Board reprimands the Valuer and imposes a fine of \$2,000.

As to costs, relative to other Board decisions, the Board awards \$5,000 being 50% of the costs properly incurred.

NAME SUPPRESSION/NON PUBLICATION

43. In the written statement of Valuer S an application was made for name suppression and non-publication.
44. The Board in the matter of 'Q' 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.
45. 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.

The decision in ‘Q’ referenced matters placed in front of that Board of Inquiry that are relevant here.

46. The first of the matters is the High Court judgement in *The Director of Proceedings and Anor v The Nursing Council of New Zealand and Others*⁶. 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.
47. Further, the Nursing Council was also required to consider the interests and wishes of the defendant nurse, including particular privacy interests which require protection.
48. *Clark v Attorney General*⁷ 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 a presumption in favour of disclosure of all aspects of court proceedings which can be overcome only in exceptional circumstances”.

⁶ The Director of Proceedings and Anor v The Nursing Council of New Zealand and Others HC774/98 7 December 1998 ⁷ Clark v Attorney General (Name Suppression) CA213/04 2 December 2004

49. And at para 43; *“No exceptional circumstances have been pointed to in this case justifying departure from the open justice principle”*.
50. The Court of Appeal in *R v Liddell*⁷, in connection with publication, made the observation; *“the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as “surrogates of the public”*.
51. A more recent decision regarding name suppression is the Supreme Court judgement in *Barry John Hart v The Standards Committee (No 1) of the New Zealand Law Society*⁸. 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”*.
52. 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 relevant 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.....”*
53. The Board affirms the starting principle is open justice. In *Southland Standards Committee v W 2013 NZLCDT28, LCDT 010/12*, the New Zealand Lawyers and

⁷ R v Liddell [1995] 1 NZLR 538

⁸ Barry John Hart v The Standards Committee (No 1) of the New Zealand Law Society SC129/2011 [2012] NZSC4

Conveyancers Disciplinary Tribunal concluded that the principle of open justice had been displaced where there was evidence from the respondent's general practitioner and a consultant psychiatrist indicating clearly that publication of the respondents name would put the respondent's personal safety and wellness at risk.

54. The Board has received a medical certificate stating that Valuer S is suffering from mild depression and that the publication of his name is very likely to exacerbate the severity of their mental illness.
55. The Board has considered the above matters in relation to the application by Valuer S. The Board is not satisfied that there are any exceptional circumstances that apply to Valuer S and while it is accepted that there will be implications for a professional from a disciplinary tribunal decision where a guilty plea has been entered, those potential implications do not outweigh the range of other matters the Board is to consider.
56. The interim name suppression granted to Valuer S at the hearing until the Board had fully considered the matter, is now lifted.

BOARD OF INQUIRY DECISION:

57. The Board confirms its' oral decision to reprimand Valuer S and imposes a fine of \$2,000.
58. Further, the Board orders a contribution of \$5,000 being 50% of the costs properly incurred.
59. The interim name suppression granted to Valuer S at the hearing until the Board had fully considered the matter, is now lifted.

H J Puketapu

Inquiry Chairperson

15 July 2016