

VALUERS REGISTRATION BOARD

IN THE MATTER OF

an Inquiry under

Section 32(2) of the Valuers Act 1948

AND

IN THE MATTER OF

Charges under Section 31(1)(c) of the
Valuers Act 1948 concerning a
complaint against Valuer S

BOARD OF INQUIRY "Board":

Evan Gamby - Chairperson

Ken Taylor

Victoria Murdoch

COUNSEL:

Ms Sally Carter for the Valuer General

Ms Rachel Scott for Valuer S

HEARING:

18 June 2018

ORAL DECISION:

18 June 2018

WRITTEN DECISION:

7 February 2019

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Background

1. Valuer S completed a valuation report dated 7 April 2016 for a residential property for the complainant. The valuation was "...for current market value and mortgage purposes". Valuer S assessed the market value at \$623,500 inclusive of chattels and GST.
2. The property as described by Valuer S comprises a good quality three bedroom semi-detached dwelling with a basement single garage, a main floor single garage and a separate two-bedroom self-contained semi-detached dwelling. The two dwellings are located on a full section in a residential suburb.
3. In their report Valuer S described their valuation as a current market value of the property utilizing "*The Direct Comparison Approach based upon an analysis of comparable sales*".
4. A current market value was assessed after comparing two calculations, one of which was said to be a "*Summation Approach*" which Valuer S assessed at \$660,000, and the other an "*Investment Approach*" which they assessed at \$587,000. The adopted value of \$623,500 is the mid-point between the two assessments.
5. Valuer S' Summation Approach, to comply with International Valuation Standards current at the time (IVS 2013), should properly have been referred to as the "*Market Value Approach*". It was assessed by reference to analysed sales of similar properties, all of which were described as "*Residential Investment Home and Income Sales*". Apart from two large multiple bedroom dwellings which sold in early 2016 the sales referred to in the report occurred between December 2014 and August 2015. There is no indication in the report as to how Valuer S analysed the sales or made comparison between the sales and the subject property.
6. Valuer S' Investment Approach involved a capitalisation of what they said was the "*median*" rent" being the mid-point between the actual rentals obtained and an estimate of the market rent, to which they applied a gross return of 7%. There is no evidence in the report of comparable market rents or investment returns.
7. The complainant received the report on 22 April 2016 following payment of Valuer S' account. An email exchange followed with the complainant critical of the evidence used to assess the value. From the Valuer General's report as the Investigator, it appears that, in addition to the emails provided to the Board, there were other exchanges between the complainant and Valuer S. This is confirmed in Valuer S' filed brief of evidence.
8. Valuer S agreed to provide an updated assessment. Despite reminders from the complainant this was never provided. As Valuer S noted in their brief, through pressures of work and pressures in their private life they simply forgot.
9. In one email Valuer S expressed their opinion of the unreliability of information obtained from real estate agents to which the complainant took exception.
10. On the 8 July, the complainant lodged a complaint with the Property Institute which can be summarised by the Board as follows:
 - a. Valuer S had undervalued the property by around \$200,000 less than current market;

- b. The sales evidence used by Valuer S was dated and not in the same market as her property;
 - c. Valuer S agreed to revise the valuation and consider more recent evidence but did not do so over a period of three months; and
 - d. They have been "condescending to me". They have insulted real estate agents. Their manner and service have been extremely unprofessional.
11. The complaint was referred to the Valuers Registration Board. In due course, the Valuer General as Investigator presented a report dated 23 March 2017 including two retrospective assessments of the property by registered Valuers 1 and 2.
12. In his report, the Valuer General noted that there was a significant variation in the level of value assessed by Valuer S compared to the level of value assessed by the two valuers who undertook retrospective assessments.
13. As the variations from Valuer S' figures were significant and there were issues raised concerning IVS standards and unprofessional conduct the matter was referred by the Registration Board to an inquiry.

The Charges

14. Two charges were laid against Valuer S as follows:

1. Section 31(1)(c) of the Valuers Act 1948:

You have been charged with such incompetent conduct in the performance of your duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 **in that** in compiling a valuation report dated 7 April 2016 with respect to a property you grossly under-valued the said property.

2. Section 31(1)(c) of the Valuers Act 1948:

You have been charged with such incompetent conduct in the performance of your duties as a valuer as to render you liable to a penalty provided by the Valuers Act 1948 **in that**, in compiling a valuation report dated 7 April 2016 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 the report and therefore breached Clause 1.5 of the New Zealand Institute of Valuers' Code of Ethics.

Particulars:

- (a) You failed to include any explanation of how you reached the land value component of the total valuation in breach of IVS103 and ANZVGN1; and/or
- (b) You failed to provide sufficient information necessary for a proper understanding of the valuation in breach of IVS 103 Reporting and ANZVGN1 (this includes failing to provide any commentary on the comparisons between the subject property and any sales evidence utilised and/or failing to provide any comparative market rental and/or failing to provide evidence to support the capitalisation rate adopted); and/or
- (c) You used sale evidence from December 2014 and early 2015 without specific commentary about any changes in the market between that time and

the effective date of your valuation report in breach of ANZVGN 1 section 6.1

The Valuation Evidence

15. The evidence filed with the Board in the event the matter went to a defended hearing included two retrospective assessments and briefs of evidence from registered valuers instructed by the Valuer-General. In addition, also filed, was the evidence on behalf of Valuer S prepared by two registered valuers. This evidence included a retrospective valuation assessment and brief of evidence by Valuer 3 and a brief of evidence from Witness 1. A brief was also filed by Valuer S.
16. Valuer 3 carried out a similar retrospective valuation assessment to that of the valuers instructed by the Valuer-General. Witness 1 undertook a review of the valuation reports prepared up to the date of his involvement including each valuer's brief of evidence. At the time he undertook his review Witness 1 was not aware of the valuation report prepared by Valuer 3
17. A summary of the four valuation assessments and percentage variations to that of Valuer S are outlined below. Witness 1 did not undertake a valuation.

Valuer	Effective valuation date	Market Value plus GST	%_value Valuer S above	%value Valuer S below	Basis
Valuer S	7-Apr-16	\$623,500	N/A	N/A	Inspection at effective date
Valuer 1	7-Apr-16	\$820,000	31.52%	-23.96%	Retrospective
Valuer 2	7-Apr-16	\$775,000	24.30%	-19.55%	Retrospective
Valuer 3	7-Apr-16	\$750,000	20.29%	-16.87%	Retrospective
Witness 1	N/A	N/A	N/A	N/A	Review only

18. The three retrospective assessments indicate that the more probable value is within the range of \$750,000 - \$820,000. The assessment by Valuer S is well outside the range.
19. Following a review of the evidence Valuer S elected to plead guilty to the charges and the matter went to a penalty and costs hearing.

Valuer 1 Evidence

20. In his retrospective value report to the Valuer-General, Valuer 1 adopted two approaches. The first approach he described as *"...the traditional market-based Sales Comparison Approach"* and the second the *"Income Approach"* by which the gross market rental was capitalised at a yield rate.
21. For the purpose of his *"Sales Comparison Approach"*, Valuer 1 included a series of analysed sales on both improved and vacant land. From these he determined a value of \$820,000. His comparative *"Income Approach"* utilised a gross return of 4.6% applied to an income of \$37,500, being the market income for the rents of both dwelling units for a 50-week period. Gross yields derived from the market were included for comparative purposes. This Income Approach assessed figure was \$815,000. Valuer 1 adopted the higher of the two assessments.

22. In his subsequent brief of evidence, Valuer 1 provided further comment on his Sales Comparative Approach, explained his consideration of land value sales included in his report, explained his approach to the potential for subdividing the property and then confirmed his valuation at \$820,000.
23. Having by then been supplied with a copy of Valuer S' report, he commented that Valuer S' comparable sales were too old and their report lacked detail on the rental/return percentages to explain the capitalisation rate adopted. Valuer 1 considered the 7% gross yield appeared high and he considered also there was no explanation in Valuer S' report as to why they did not consider a subdivision approach.

Valuer 2 Evidence

24. Valuer 2 considered three approaches to assess the property's value.
25. His first approach was the "*Net Rate Approach*" which involved assessing the land from comparable sales and the value of the improvements from an analysis of improved sales. On that basis he assessed \$775,000.
26. Valuer 2 checked this assessment on a "*Hypothetical Development Approach*" by separately assessing each of the dwelling units as a potential saleable entity from which he made deductions for development expenses and other allowances. He concluded a value on that basis at \$770,000.
27. His third approach was a "*Income Capitalisation Approach*" or "*Investment Capitalisation Approach*" by first assessing a gross income, less outgoings to which he applied a net return of 4.25% in the range of 4%-5%. That calculated to \$775,000.
28. From the concluded three assessments, he said he applied equal weighting and assessed the value of the property at \$775,000.
29. In his brief of evidence, Valuer 2 outlined his assessment, and then provided comments on the report prepared by Valuer S.
30. Valuer 2 was critical of Valuer S in terms of Clause 1.5 of the New Zealand Institute of Valuers' Code of Ethics for not exercising the utmost *care* and good faith in the preparation of the report and being deficient in terms of the International Valuation Standards 2013, 103 Reporting. Valuer 2 considered the sales advanced were old, there was no comparable evidence around the adopted rentals or the capitalisation rate and no explanation why a mid-point between the two assessments was adopted as the value. In conclusion, he considered Valuer S' assessment was a gross under-valuation.

Witness 1 Evidence

31. Witness 1, a very senior valuer with many years' experience, was provided with the valuation reports and briefs of Valuer S, Valuer 1 and Valuer 2. He was instructed to undertake a "*desktop*" review. He was not instructed to undertake a valuation.
32. Following a detailed analysis of the reports and the evidence he was of the opinion that the assessment of Valuer 1 at \$820,000 was the absolute maximum the property could have been worth at 7 April 2016 and the assessment of Valuer 2 at \$775,000 could have been viewed as

optimistic. With respect to Valuer S' assessment he was of the opinion the property was worth no less than \$660,000.

33. Witness 1 provided detailed analytical comparisons which, in his opinion, provided some support for the predicament of Valuer S with little available truly comparable evidence on which to rely.
34. Witness 1 was also of the opinion some of the sales used by the Valuer-General's witnesses may not have been available to a valuer as at the date of inspection.

Valuer 3 Evidence

35. Valuer 3 assessed the retrospective market value at \$750,000. He was of the opinion that the highest and best use of the property was as a residential property investment which involved a consideration under the *Income Approach*, with the *Market Value Approach* as a check method.
36. For the Income Approach Valuer 3 adopted a market rental of \$41,080 p.a. less deductions for outgoings. The assessed value of \$750,000 was based on capitalisation rates gross of 5.48% and net of 4.21%. These returns were well-supported by his table of analysed sales. The comparative rents were also outlined in a table of his report.
37. As a check method, Valuer 3 analysed his sales as a rate/m² of floor area and, having regard to quality, adopted a rate of \$3,440/m' over the total property to indicate the same level of market value at \$750,000.
38. Valuer 3's brief was prepared in knowledge of all of the valuers' evidence including that of Valuer S. It was prepared subsequent to completion of his retrospective valuation report at which time, presumably, he did not know the other assessments of value.
39. The Board has paid considerable attention to Valuer 3's brief as his assessment, when combined with the assessments of Valuers 1 and 2, helped to assist the Board to conclude, as no doubt did Valuer S, that the probable value of this property at the time was in a relatively narrow range of \$750,000-\$820,000.
40. Of significance, Valuer 3 adopted a starting point of establishing a Highest and Best Use which, in his opinion, was a "*residential property investment*" and therefore his prime method was the "*Income Approach*". His check method was the "*Market Approach*".
41. The Board considers that the start point of Valuer 3 was correct, to identify a Highest and Best Use and his terminology was correct in terms of International Valuation Standards current at the time. In terms of IVS 103 Reporting and IVS Definitions, approaches described as "*Summation*" or "*Sales Comparison*" or "*Net Rate Approach*" are not correct terminology, though they are methods of analysis and assessment used by valuers within the overarching approaches to value.
42. All valuers utilised the "*Income Approach*" as one method, which was a correct approach using correct terminology. The order and importance of the approaches was a matter for each valuer's consideration and was not tested.
43. There may well have been a debate on the highest and best use for this property had the matter proceeded to a defended hearing. Any of the available approaches used for a valuation of this type of property required current market data, analysed and correctly described in terms of IVS Standards.

44. Valuer 3 was critical of specific aspects of the reports and briefs of Valuers 1 and 2 yet, in one way or another, all three registered valuers have concluded by their assessments that Valuer S missed the upward movement in the market by adopting dated sales, their report lacked current evidence, details of analysis, and reasoning for the reported conclusion.
45. The Board accepts that none of the evidence filed was tested by cross examination which would have better assisted a clearer understanding of all the reports and briefs.

Valuer S' Evidence

46. A brief of evidence was filed on behalf of Valuer S confirming that they had worked as a registered valuer since 1979. They have undertaken valuation work a variety of areas during that time.
47. Valuer S confirmed that they had valued two properties for the complainant, and there were no issues about the second valuation.
48. Following completion of the report and noting the complainant's concerns, Valuer S recorded that they located two further sales. Based on these two additional dated sales they concluded that the valuation they prepared of \$623,500 was still within the range of the sales evidence.
49. Valuer S was of the opinion that they had used the most recent sales available to them. The sales provided by the complainant were not purpose built residential investment properties and were not suitable as comparisons. They did not locate more recent evidence or identify an upward movement in the market.
50. Valuer S acknowledged in their brief that they had reviewed and reassessed their original report and established that the original assessed value of \$623,500 was accurate. There was no evidence at the time to depart from that assessment. They were willing to prepare a new valuation report but could not see how that would assist the complainant as there was nothing to support a valuation at the level she desired.
51. On reflection, with regard to professionalism, they accepted that they could have handled the complainant's concerns differently. Valuer S acknowledged that they were frank and short in their emails because the subject matter had already been covered and explained. It was obvious to them that the complainant did not understand their position or was not willing to accept it.
52. Although accepting that their comments about real estate agents were inappropriate, they were offended by the suggestion that, despite their years of experience as a registered valuer, they should accept advice on valuations from real estate agents. Valuer S considered the email had been taken out of context. Their evidence states that they worked as a real estate agent for approximately seven years and thus had a good knowledge of that profession.
53. Valuer S acknowledged that they may have aggravated the position by failing to respond to the complainant's final emails. They accepted this was a mistake on their behalf.
54. The bulk of Valuer S's evidence is a criticism of the evidence of Valuers 1 and 2 which was filed but not tested. They were of the opinion both the valuations submitted were optimistic.

Submissions for Valuer-General

55. In the opinion of the Valuer-General, all three valuers who made retrospective assessments demonstrated that Valuer S's assessment of value was well short of a market level and, "... at least \$150,000 below the correct valuation."

56. When adopting the Income Approach Valuer S provided no evidence of market rental and no evidence to explain the capitalisation rate that they adopted. As stated for the Valuer-General:

"Consequently Valuer S' valuation report fell woefully below what is required to be included in a valuation report and specifically breached IVS 103 and ANZVGN1."

57. In the opinion of the submissions for the Valuer-General, there were aggravating factors including reference to a matter before the Board in March 2015 where Valuer S was found guilty of a breach of ethics.

58. In mitigation, it was noted that a guilty plea had been entered, but at a relatively late date when the evidence had been filed.

59. The submissions cited the decision in "Z"¹ which confirmed that the penalty is not intended to punish the professional (although that may be the inevitable result).

60. As the Valuer-General was not aware of any other mitigating factors, it was concluded that, based on earlier Board decisions, notably *Valuer C [2015] NZVRB 2* and *Valuer N [2014] NZVRB 4* the appropriate penalty was a fine in the range of \$3,000- \$4,000, coupled with a reprimand.

61. With respect to costs, these were identified in an updated submission in accordance with the attached appendices summarised as follows:

a.	Legal Fees	\$	8,393.89
b.	Investigation/prosecution costs associated with witnesses, Valuer-General and his staff	\$	14,721.42
c.	Board expenses	\$	4,435.65
	Total costs	\$	27,550.96

62. As the Board has come to expect, the submissions for the Valuer-General were that 50% of those costs which were properly incurred should be paid by Valuer S², increasing the amount if there are aggravating factors to justify an increase or, decreasing when mitigating factors exist that would justify that course of action.³

63. More recently, tribunals have imposed up to 100% of the costs of practitioners⁴.

¹*Z v Dental Complaints Assessments Committee* [2009] 1 NZLR1 at [97] (SC)

²*Cooray v Preliminary Proceedings Committee* HC Wellington AP23/94, 14 September 1995

³*Auckland District Law Society v Mathias* [2010] NZLCDT 10, Auckland District Law Society

⁴*Wellington Standards Committee v Hay* [2018] NZLCDT 10

Submissions for Valuer S

64. In terms of the charges, the submissions for Valuer S were that they accept the charges and the factual matters in the submissions made on behalf of the Valuer-General.
65. It was noted that Z was applied in a valuation context in *King v Valuer General*⁵. For Valuer S it was stressed that in nearly 40 years of practice they had no other formal complaint about their competency in forming their valuation reports or outcomes. Although acknowledging that Valuer S had previously appeared before the Board, this related to an ethical matter and not to their competency.
66. It was submitted there are mitigating factors including the opinions of Valuer 3 and Witness 1 who, having reviewed the work carried out by Valuer S, indicated there were factors which were sympathetic to their position including:
- a. The difficulty that the Valuer-General had in obtaining a good amount of truly comparable evidence, and
 - b. That retrospective valuations can be influenced by later events.
67. The Board has already commented with approval on the approach, report and the brief of evidence of Valuer 3.
68. With respect to Witness 1's evidence, the Board sees nothing particular in his evidence that would support Valuer S' position noting, however, the absence of anything truly comparable and the possibility that some of the sales may not have been available at the date of inspection.
69. Aspects that relate specifically to Valuer S' personal position, advanced in support, were their long employment in the industry of nearly 40 years and their hearing loss impairment.
70. With respect to the lateness of the guilty plea, it was submitted that Valuer S was simply unsure of the defects in their work until they obtained their own valuation and spoke at length with Valuer 3.
71. With respect to penalty, Valuer S accepted the submissions for the Valuer-General that a penalty of between \$3,000 and \$4,000 coupled with a reprimand is suitable in the circumstances.
72. With respect to costs, Valuer S did not dispute either the figures reached or the starting point of 50% for division of costs.
73. Notwithstanding that position, the following matters were considered relevant by Valuer S to a significant reduction from the starting point at 50%:
- (a) *The constructive attitude that Valuer S has taken to these proceedings;*
 - (b) *That Valuer S has attended the penalty hearing, thus taking this matter extremely seriously;*
 - (c) *The guilty plea entered by Valuer S thus taking steps to ultimately limit the costs incurred by each of the parties;*

⁵ *King v Valuer General*, 17 December 2009, DC Wellington CIZ 2009-085-32

- (d) *The financial situation that Valuer S is faced with. If they are suspended, they will be prevented from earning an income."*

74. The submission was that costs between 20%-30% should be ordered against Valuer S.

Oral Decision

75. *The Board delivered the following oral decision on 18 June 2018:*

"Valuer S has pleaded guilty to two charges laid against them pursuant to Section 32(2) of the Valuers Act 1948.

- (1) The first charge under Section 31(1)(c) was that in preparing a valuation report dated 7 April 2016 of a property they grossly undervalued the property.*
- (2) The second charge under Section 31(1)(c) was that they breached Clause 1.5 of the New Zealand Institute of Valuers' Code of Ethics by failing to exercise the utmost care and good faith to ensure the highest standards in the preparation of the report in the following ways by:*
 - (i) Not providing an explanation of how the land value component was arrived at*
 - (ii) Breach of IVS 103 and ANZVGN1 by not providing a proper understanding of the valuation; and*
 - (iii) Using sales evidence one or more years prior to the date of valuation with no commentary on any change in the market, in breach of ANZVGN1 Section 6.1*

The Board has considered submissions for the Valuer-General and Valuer S on penalty and costs.

Penalty

Within the range of penalties that the Board can impose, the Valuer-General submitted that Valuer S be reprimanded and a fine in the range of \$3,000-\$4,000 be imposed based on the facts in the investigation bundle and in the briefs of evidence of registered valuers 1 and 2 which indicated substantial variations in value from the assessment of Valuer S in the range of under-valuations of 24.3% and 31.52% respectively.

Registered valuers Witness 1 and Valuer 4 reached the conclusion that the sales used by Valuer S were out of date and that their conclusions lacked detail and reasoning.

The Board is not convinced all of these sales would have been available to Valuer S at the date of valuation.

Aggravating factors are:

- a. The extent of under-valuation;*
- b. Conduct of Valuer S following the complaint by the complainant; and*
- c. A near absence of comparable data on which the valuation was based.*

For the Valuer-General it was submitted there are no mitigating factors.

Aggravating and mitigating personal factors are:

- a. *A previous guilty finding by the Board; and*
- b. *Some recognition of acceptance by Valuer S by a guilty plea but at a late stage.*

For the Valuer-General it was submitted that the offending was towards the lower end by comparison with other cited cases before the Board.

For Valuer S, it was submitted that in nearly 40 years of practice they have had no other formal complaints about their competency and acknowledges they have a previous guilty finding on an ethical matter.

For Valuer S it was submitted there are mitigating factors as outlined in the evidence for Valuer S by Witness 1. Those factors will be dealt with in greater detail in the Board's written decision as they have relevance, noting too that a formal hearing was not required, and the evidence was not cross examined.

On a personal basis, Valuer S' hearing disability is advanced as a mitigating factor. This is at odds with Valuer S' stated position that valuation is an appropriate profession for a person affected in that way. The Board concludes that Valuer S must know that extra care is required as a result of a hearing disability particularly in personal communications with clients.

For Valuer S it was accepted a reprimand and fine of \$3,000-\$4,000 is suitable.

The Board agrees with both submissions, reprimands Valuer S and imposes a fine of \$3,000.

Costs

The starting point for an award of costs is recognised as 50%.

The Valuer-General submits that no less than 50% should be imposed noting numerous decisions and with a tendency for some tribunals to award up to 100% of costs. The Board has never imposed that level historically and currently has no precedent before it in this matter to do so.

In a supplementary submission for the Valuer-General costs are in total \$27,556.97 of which 50% are sought being \$13,778.49.

For Valuer S it is accepted that 50% is the general starting point with adjustment up or down for aggravating and mitigating factors, in this case down to 20%-30%.

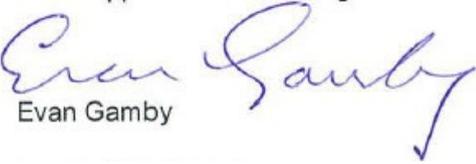
Comparisons with other professional disciplinary tribunals were provided, submitted as being similar, noting also Valuer S' age and financial circumstances. Valuer S' financial circumstances have not been elaborated on before the Board.

The Board acknowledges the general comments made for Valuer S at paragraphs 54-58 and has determined a reduction from 50% is appropriate but not to the level of 20%-30%.

The Board awards costs against Valuer S of \$11,000 being approximately 40% of the total costs incurred."

Decision of the Board

76. The Board confirms its oral decision, compliments Valuer S for their constructive attitude and appreciates their willingness to make a statement in person at the Inquiry.


Evan Gamby

Inquiry Chairperson

7 February 2019