VALUERS REGISTRATION BOARD

IN THE MATTER OF an Inquiry under Section 32(2) of the Valuers Act 1948 (The Act)

AND

IN THE MATTER OF charges under Section 31(1)(c) of The Act against **Valuer Y**

BOARD OF INQUIRY: K R Taylor (Inquiry Chairperson)
M E L Gamby
PA Curnow

COUNSEL: R May for the Valuer General
S Ryland for Valuer Y

DATE OF HEARING: 6 March 2017

DATE OF DECISION: 1 September 2017

The Complaint

1. This matter arose as a result of a complaint from the complainants alleging:

    - That the zoning was incorrectly stated in the report
    - The sales evidence for a comparable sale used in the report was wrongly stated, being inclusive of GST
    - The rental assessments substantially over valued the land as a result of unwavering reliance on one sale and in comparison to rating value.

2. The complaint was received by the Valuers Registration Board on 21 July 2014.

3. The complaint was investigated by the Valuer General and Valuer Y was subsequently advised of three charges laid against them including four sub sets of each of the first two charges. A number of these charges were dismissed or consolidated prior to the hearing and three charges were submitted to the Board.

Charges

4. Section 31(1)(c) of the Valuers Act 1948, you have been charged with such unethical 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 May 2013 with respect to a property, you failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of the report and therefore breached Clause 1.5 of the NZ Institute of Valuers' Code of Ethics.

   Particulars:

   (a) In breach of Clause 5(k) of IVS (2011) 103, you failed to confirm that the assignment had been undertaken in accordance with the IVS; and/or
   (b) In breach of Clause 5(l) of IVS (2011) 103, you failed to make reference or adequate reference to the approach or approaches adopted and/or the key inputs used, and/or the principal reasons for the conclusions reached.

5. You have been charged with such unethical 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 31 January 2014, 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) In breach of Clause 5(k) of IVS (2013) 103, you failed to confirm that the assignment had been undertaken in accordance with the IVS; and/or
   (b) In breach of Clause 5(l) of IVS (2013) 103, you failed to make reference or adequate reference to the approach or approaches adopted and/or the key inputs used, and/or the principal reasons for the conclusions reached.

6. You have been charged with such unethical 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 valuation reports dated 7 May 2013 and 31 January 2014, 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 reports and therefore breached Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.

Particulars:
You allowed two reports under the same instruction and with the same effective date to be in the market place, each containing a different valuation with no explanation in either report as to why the valuations were different or that there existed another valuation by you under the same instructions.

7. The remaining charges had been withdrawn by agreement prior to the inquiry.

8. Valuer Y pleaded guilty to the charges.

Background

9. The complainants own a motel located at the subject property. The motel is located on two areas of leasehold. The leases, Lease 1 and Lease 2 are 'Glasgow' leases. On 7 May 2013 Valuer Y assessed the annual rental for Lease 1 at $12,180 per annum excluding GST (if any) and Lease 2 at $10,780 per annum excluding GST (if any). Valuer Y subsequently revised the rental for the two properties to $10,150 for Lease 1 and $9,030 for Lease 2.

10. While the dispute centred on Lease 1 which had the earlier expiry subsequent events also led to a rental settlement for Lease 2, well below that of Valuer Y. As part of the rent review Valuer 1 assessed the rental for Lease 1 at $8,510.87 excluding GST and Valuer 2 assessed Lease 1 at $5,200 per annum excluding GST. The rentals were subsequently agreed between Valuer 2 and an arbitrator at $6,075 per annum excluding GST for Lease 1 and $4,712 per annum excluding GST.

11. While there is clearly a vast difference in the rentals assessed by Valuer Y and those subsequently accepted at arbitration, and indeed the original complaint from the complainants alleged over valuation, this matter was not pursued in the charges presented to the Board of Inquiry.

12. Two of the charges subsequently brought before the Board related to Valuer Y's failing to meet the requirements of the relevant International Valuation Standards in the preparation of their reports dated 7 May 2013 and 31 January 2014. The third charge related to the fact of Valuer Y having two reports purporting to provide valuation advice at the same date providing different outcomes. There was no indication in the second report that a previous report had been issued or any attempt to withdraw that earlier report.

13. As Valuer Y had indicated a guilty plea to the charges, the Board of Inquiry was convened in order to hear submissions on penalty and costs. While Counsel had expressed a desire that the matter be determined on papers, the Board was of the view that it was important for the Board of Inquiry to hear the submissions on behalf of the

Valuer General and on behalf of Valuer Y. It was noted that in this context neither Counsel were going to call witnesses.

14. The Board would have considered it appropriate had Valuer Y appeared to hear the charges and to provide their view on any matters of mitigation.

Submissions on behalf of the Valuer General

15. The Valuer General through Mr May noted Valuer Y's guilty plea but also observed that this did not arise from breaches that occasioned loss, or called into question Valuer Y's integrity. He did however advise that the number and significance of the breaches were such that a sanction is warranted. He broke this down into three aspects:

16. Firstly, the failure to comply with IVS which the Valuer General suggested might be viewed as a relatively low level of carelessness.

17. Secondly, the failures to adequately refer to and explain the approaches and reasons for the conclusions reached in the two reports are more than matters of administrative 'hygiene'. The duty to provide a reasoned conclusion is a core responsibility of registered valuers, as this provides the basis for clients and other readers of a report to understand, critique, and rely upon it. He noted that IVS 103 which was relevant at the time states: '*it is essential that the valuation report communicates the information necessary for a proper understanding of the valuation.*'

18. Thirdly, allowing two reports with the same effective date to be in the market place with different valuations (charge 3) with no explanation as to why is not a matter of no importance. Although no loss appears to have occasioned in this case, this state of affairs creates a significant risk of confusion, and might even allow an unscrupulous client to misrepresent a valuer's true conclusions.

19. The Valuer General observed that Valuer Y's own witness, Witness 1 (an expert on Standards related matters) had also observed that the failures involved were of significance. On this basis the Valuer General concluded Valuer Y's submission that no substantial sanction is warranted is at odds with the evidence they themselves had filed. The Valuer General therefore considered that modest sanctions were an appropriate reflection of Valuer Y's conduct. The Valuer General therefore sought a reprimand against Valuer Y and also a financial penalty of $1,000.

20. As to costs, the Valuer General reminded the Board that they could recover costs from a valuer who was subject to a disciplinary finding. The Valuer General noted that the costs associated with this matter were $14,395.23. The Valuer General noted that if the Board did not impose a cost order on Valuer Y, then others registered under the Act will carry the full burden of funding the investigation and the disciplinary function of the Board.

21. The Valuer General provided the authorities for accepting this approach, in particular *Canterbury District Law Society Complaints Committee No.2 v Iosefa, Gurusinghe v Medical Council of New Zealand* and *Cooray v Preliminary Proceedings Committee* in relation to the appropriateness of levying costs against a practitioner.

22. He further noted that the starting point for recovery of costs is often 50%, but this amount could be increased if there were aggravating factors to justify an increase, or decreased where mitigating factors exist that would justify this course of action. The Valuer General took the approach that this case had no particular aggravating or mitigating aspects and therefore recommended costs of 50% are recovered which he then rounded to the sum of $7,200.

23. Mr May was questioned by the Board of Inquiry on a number of aspects relating to the case. Firstly as to why the Valuer General was seeking a $1,000 fine when the Act provided for a fine of up to $10,000. The advice in response was that for breaches that occasioned loss, are deliberate or were repeated even more than twice, should attract a high level of sanction. The observation was that there had been no loss in this case and a guilty plea to the charges which acted in mitigation. The Valuer General's submission was that this was a breach of standards that required scrutiny and was serious enough to warrant a reprimand and/or a small fine but not a high level of sanction.

24. In relation to costs it was noted that Valuer Y was seeking a lower level of costs partly due to delays in the proceedings. The Valuer General was of the view that Valuer Y's actions in the conduct of the case had contributed to these delays. He also noted that while Valuer Y referred to previous decisions of the Board of Inquiry (in particular *Valuer V (hearing) [2011] NZVRB 2*, a case that also related to a breach of professional standards and where costs of 30% were awarded), the circumstances relating to those cases were different. In particular *Valuer V* was only found guilty of one of two charges and that *Valuer V* was 'financially straightened'. The Valuer General did not relate either of these situations to Valuer Y in a way that would deflect from the more widely supported adoption of 50%.

25. The Board of Inquiry also turned its attention to the questions of "deliberate departure" versus "indifference". It was acknowledged that all valuers should know that they must comply with Standards. Therefore a conclusion could be drawn that if Valuer Y was not aware of the relevant Standards they presumably didn't care about them. From the evidence it was not a case that they did not deliberately fail to comply with Standards but one of indifference as to whether they considered them one way or another. Alternatively it could be construed that they deliberately didn't comply by failing to make the effort to be aware of the relevant Standards.

26. With reference to the third charge of having two reports under the same effective date and instruction "… to be in the market place, each containing a different valuation with

no explanation in either report as to why the valuations were different or that there existed another valuation by you under the same instructions…", the Board of Inquiry enquired of counsel if they were aware of previous decisions of the Board in relation to similar charges. In particular the case of *'Q'* was referred to. Neither counsel was aware of this case.

27. Having been made aware of the case Mr May noted that in the case of *"Q"* there had been multiple breaches whereas in the current case only two reports were in existence. This sustained the Valuer General's request for a lower level of sanction. He also confirmed the level of costs sought in recognition that in the case of *'Q'* not all the charges were proven and the quantum of costs had been considerably higher.

Submissions on behalf of Valuer Y

28. Valuer Y through Ms Ryland submitted that as they had pleaded guilty no further sanction was required.

29. Valuer Y's submissions relied on the advice of Witness 1 who had provided an affidavit on Valuer Y's behalf. The Board of Inquiry noted that as Witness 1 was not present to be cross examined on his evidence this could only be taken as read.

30. It was noted that one of the primary purposes of disciplinary action is the protection of the public, but counsel advised that this was not a situation where the public needed protecting. Valuer Y's submission was that the current charges represent minor breaches more akin to omissions or a lack of knowledge of the relevant Standards, but that they were not being deliberately misleading in their valuations or being deliberately negligent or seriously negligent in what they had done. It was submitted that they had rightly admitted their mistakes, not only in relation to pleading guilty, but early on by correcting the errors in their report.

31. Valuer Y submitted that they had sought Witness 1's opinion to gauge the strength of the charges against them and whether sanction would be likely to enable them to make an informed decision on how they wanted to proceed. So in counsel's submission, the Board could obtain guidance from Witness 1's comments in that regard.

32. Witness 1 had reached a conclusion that, in his opinion, professional Standards and ethical obligations were breached but his view was that each of those individual charges did not warrant any disciplinary sanction. He did however consider some of the breaches more serious than others. Valuer Y submitted that it was still not justifiable that further sanction be required just on the view that some breaches were more serious than others.

33. Witness 1 did however conclude that the breaches in relation to explaining methodology are perhaps more serious and that; "Each issue viewed separately may not reach a threshold for the requirement of disciplinary sanction", but he then noted

in his affidavit that they may bring into doubt the professional performance. He considered it was more a case of omission and/or a lack of knowledge of the change in requirements, and perhaps as suggested it might be a poor document management issue rather than a deliberate disregard for those Standards. His view was; "I do not believe this is a situation where the Valuer was seriously negligent as to portray an indifference and abuse of the privilege by the registration as a Valuer".

34. The Board of Inquiry was reminded of the test in *King v Valuer General (Valuers Board of Appeal, CIV 2009-085-32, 23 October 2009)* and the need to consider here whether there had been a sufficient departure to warrant a sanction. Attention was also drawn to the decision in *Bates v The Valuers Registration Board [2015] NZHC 1312* where in that case, the Appeal Board noted that the disciplinary process should not be used as a form of punishment for minor misdemeanours that do not engage the public interest in the maintenance of professional Standards or the integrity of the profession in the eyes of the public. The case of *a Valuer v Valuers Registration Board [1992] 1 NZLR 720* was also referred to where a similar comment was made, "… where disciplinary proceedings need to be seen in terms of their regulatory function and purpose", and, ". . . the exercise by the Board of its powers is not by way of punishment but rather than to enforce the high standard of proprietary and professional conduct".

35. It was submitted therefore, that the sanctions are not about punishing the Valuer, as said there, but to enforce the standards of professional conduct. The view was expressed that these standards had already been enforced by the guilty plea, and Valuer Y was already making changes to their conduct in terms of tightening up with their references to the appropriate Standards. So therefore, any further sanction would only serve as punishment. It was also suggested that this is not a case where the valuation profession's integrity has been questioned. It was further noted other valuers have likewise failed to follow some of the Standards as well, so it is perhaps better that some further education of the profession may be warranted.

36. In relation to the element of whether any loss could occur and whether there could be any confusion by the two reports being of the same date it was submitted that the reports specifically state that they are intended for the use of the addressee only, and a third party cannot rely on them. The presumption, it was submitted was that as the instruction to review aspects of the report had come from the lessor in relation to some issues raised by the lessee, there was no confusion that the second report was meant to be used instead of the first one, and that was the reason why the valuation figures differed. It was put to the Board of Inquiry that there was no evidence that the reports were being used for a wider purpose and were in fact creating confusion among other members of the public.

37. Having been referred to *"Q"* counsel pointed out that in that case there were multiple incidents with various reports prepared with different valuation amounts in them and no explanation. It was also noted that the reports had a specific purpose and perhaps a more important and strict purpose being for financial reporting. It was noted that

"Q" throughout the process held the position that more than one value could be put on these properties as to justify why there were so many different reports done for the various properties. It was pointed out that was not accepted by the expert evidence, and suggested this was an aggravating factor when compared with the current charges. It was therefore submitted that as *"Q"* was reprimanded and a penalty of $5000 was imposed, in the current case no further sanction beyond the guilty plea was warranted, given the differences in the offending.

28. The Board of Inquiry was then reminded of other cases which had been considered by the Valuers Registration Board. These included *Valuer D (penalty) [2014] NZVRB 2;* that was a case about a gross overvaluation. It was noted that there had been no admission of any wrong doing in that regard but the valuer was found guilty leading to a reprimand and a $5000 fine. Secondly *Valuer W (penalty) [2010] NZVRB 1,* that was a case of incorrect methodology which led to an incompetent valuation and led to a reprimand and a fine of $1000, and thirdly *Valuer V (penalty) [2012] NZVRB 2*, where no sanction was imposed for a breach of the Code of Ethics, and another charge about a valuation that was not proven. It was therefore submitted that in the current case there was no accusation of actually using an incorrect methodology or concluding an incorrect valuation amount.

29. In relation to costs, it was submitted that this could be approached from one of two ways. If the Board is minded that no further sanction is required then any award of costs should be minimal. Alternatively, if the Board determined that there is further sanction to be imposed then that be minimal based on the evidence in the other cases referred to. It was not suggested that no costs be awarded, just that these should be consistent with the other cases.

30. The question of the reasonableness of the costs was raised along with the mitigating factors that should apply. It was submitted that the Valuer General's costs relating to a Board member's recusal should be discounted from the total costs. The situation had arisen as a result of the late appointment of an expert to assist the hearing. It was assumed that additional costs had been incurred and that these should not be reflected in any award of costs.

31. The second point questioned the appropriateness of the Valuer General's submission that an award of 50% of the costs should apply. While it was acknowledged that previous decisions do appear to set 50% as a starting point, the Board's attention was drawn to the *Valuer V* and *Valuer W* decisions noted above where the starting point was 40%. It was submitted that another mitigating factor here is that from whatever the starting point taken, Valuer Y has fully co-operated with the proceeding.

32. The question of delay was then traversed and the relationship of the notice of charges that were actually laid versus the original complaint. It was suggested that if Valuer Y had received all the information the course of proceeding may have been different and therefore it was not reasonable for all of those costs to be put on them.

33. The issue of whether or not costs are a penalty was then raised. It was recognised that the legislation does not frame costs in this situation as a penalty and it's recognised that there is case law to that effect. However it was submitted that the reality of the situation was that costs are a way of informal penalty. Reference was made to the case of *Muthutantirige Kalanasiri Ranjith Cooray v The Preliminary Proceedings Committee* (HC Wellington AP23/94, 14 September 1995) as that case seemed to accept that point. It was further submitted that the very exercise of looking at mitigating factors is very penalty like. Valuer Y was not in disagreement with the principle that the costs should not fall on the profession as a whole; however there were a number of mitigating factors that make it less appropriate for the full amount of costs to be imposed on them.

34. Further mitigating factors were then introduced:
    - The fact that this is their first disciplinary action.
    - The charges are for relatively minor breaches, particularly those relating to failures of form.
    - Other Valuers that are failing to do some of these things as well. So if that is the case here, then the profession is actually gaining value through this enquiry.
    - The guilty plea and the willingness to have the penalty hearing heard on the papers (It was however acknowledged the Board's need to hear submissions in person and the value of that process).
    - The delay aspect.

35. The submission of Valuer Y was therefore for an order for 15% of costs based on the case of *Valuer V (penalty) [2012] NZVRB 2*. In that case 30% of costs were ordered. The factors suggested to support a lower penalty were that Valuer V did not plead guilty, a full hearing was required and in the end no sanction was imposed.

36. In response to a question from the Board of Inquiry as to the evolution of standards counsel responded that there had always been a Code of Ethics that always required the highest standards. This point was considered relevant in terms of both sanction and costs and the relevance of the older cases referred to above. Counsel also noted that the submissions on costs were not so much based on the fact of the Code of Ethics and the particularisation of the Standards but more about the mitigating factors of not deliberately failing to refer to the Standards and getting them wrong through mistake, or not being as up to date.

37. Counsel suggested that it was not so much that the earlier cases refer to different Standards versus what the Standards are today and referred to the test identified in *King* expressing the view that it had to be a significant departure to warrant disciplinary sanction. The Board was reminded that this was not met by mere professional incompetence or by deficiencies in the practice; but something more was required. It included deliberate departure from accepted Standards or such serious negligence as although not deliberate to portray indifference and an abuse of privilege. Counsel

submitted that the factors of an abuse of privilege and serious negligence were not apparent in this case but were in the earlier cases.

38. The Board suggested to Counsel that by the mere fact of Valuer Y appearing completely unaware of the Standards they were displaying not only indifference but an abuse of privilege. There was no evidence in their reports or subsequent correspondence that they were aware of the Standards and that it was almost as if they were saying that they didn't need to concern themselves with these Standards.

39. Counsel responded by referring the Board to the written statement from Valuer Y that they had made changes to the reporting systems to make them clearer to the reader, to ensure there is linkage between the market evidence and how they've derived their valuation assessment; putting in that there's a Scope of Works for every new job and it's provided to the client; and also their acknowledgement that the assignment is undertaken in accordance with the IVS. Counsel suggested that through this statement they were acknowledging quite clearly now the appropriate Standards and ensuring that each valuation and report done now will comply with those.

40. This then raised the question of what steps Valuer Y had made to rectify this lack of knowledge since becoming aware of the complaint. Unfortunately the Board of Inquiry was not provided with any evidence from Valuer Y that they had complied with the requirement to attend professional training in standards and ethics in the past four years. Indeed, it was noted that Valuer Y was silent on what steps they had taken in this regard. It was therefore put to counsel that this demonstrated indifference.

41. The Board of Inquiry also sought clarification from counsel in relation the matter of "further sanctions" and the effect on Valuer Y's valuation practice. In response the Board was advised that this went to considering whether it's obviously appropriate to impose a "further sanction" based on the requirement that Valuer Y will be required, under the terms of engagement that the various banks put out, to disclose that they are guilty of these breaches. The submission was that no "further sanction" was warranted and that if further sanction was imposed, then this would have a disproportionate effect on Valuer Y's ability to conduct work in that area. The submission was that these breaches are relatively minor and that as Valuer Y had already taken steps to address the issues that caused the breaches to occur, no further sanction was warranted. It was also suggested that there was no risk to the public in Valuer Y continuing to practice, but that if a "further sanction" was imposed on Valuer Y that would in effect risk their practice.

42. The Board of Inquiry noted that by Valuer Y pleading guilty to the charges the first stage of *King* had been met. Therefore referring to a "further sanction" was not strictly correct as the consideration of a sanction was the second stage. Counsel clarified this by suggesting that no formal reprimand or fine is required in these circumstances and that further stigma was not justified in terms of disclosure to any future employers or panels that they might be doing work on.

Sanction

53. The Board of Inquiry appreciates that Valuer Y pleaded guilty to the charges. The Board is however concerned that there has been nothing received in mitigation from Valuer Y other than in reference to changes to reporting, to demonstrate that Valuer Y has grasped the importance of Standards or undertaken the required professional development in relation to Standards and Ethics to prevent a further breach.

54. In the Board's view this reflects a degree of indifference that should be reflected in the sanction applied.

55. The Board of Inquiry considers adherence to professional standards as being fundamental to the provision of an appropriate level of service to the public. The Board does not accept that even at the time of Valuer Y's reports, a defence that too little had been done by the profession to make members aware of the required standards. The Board notes that it is the professional's obligation to be familiar with Standards and that continuing professional development requires regular attendance at seminars or workshops dealing with the matter.

56. The Board of Inquiry having taken all matters into account accepts that in this case the offending is at the lower end of the scale. The starting point for the Board on each aspect of the case is therefore:

    - Firstly, the failure to comply with IVS: A reprimand.
    - Secondly, the failures to adequately refer to and explain the approaches and reasons for the conclusions reached: A reprimand and a fine of $2,000.
    - Thirdly, allowing two reports with the same effective date to be in the market place with different valuations: A reprimand and a fine of $2,000.

57. The Board of Inquiry does however have before it a submission on behalf of the Valuer General for a reprimand and a fine of $1,000 covering all three aspects.

58. Conversely Valuer Y has submitted that no sanction is imposed due to their perception of the low level of the offences and the impact that having pleaded guilty will have on their professional practice. Mitigating factors in this case include the guilty plea and advice that changes have been made to their reporting format, although no evidence was submitted to verify this.

59. Taking account of all factors under Section 33(1) of the Valuers Act 1948 and the submissions received, the Board **reprimands** Valuer Y and imposes on them a fine of **$1,000.**

Costs

60. Under section 33A of the Valuers Act 1948, the Board may order the valuer concerned to pay such a sum as the Board considers is appropriate in respect of either or both of the following:
    (a) The costs and expenses of and incidental to the inquiry by the Board.
    (b) 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.

61. The Board and Valuer General have incurred costs of $14,395.23 in relation to this case. The Valuer General sought a contribution of 50% of these costs, i.e. about $7,200.

62. Valuer Y acknowledged that costs could be charged to the valuer, however submitted that certain costs may have been exaggerated due to issues relating to the recusal of one member of the Board of Inquiry and delays incurred in bringing the matter to a conclusion. The Board notes that at most this would have amounted to a very small portion of the legal fees of $3,745 (at most $500) that were incurred. It is also confirmed that the need for this at least in part arose from the late appointment of a particular defence witness.

63. Valuer Y also cited a number of previous cases where costs of less than 50% had been awarded and then sought a further reduction due to their guilty plea, the practice changes made subsequent to the complaint and the element of fairness.

64. The Board of Inquiry does not see any unusual mitigation factors that support a reduction from the 50% of costs adopted in more recent cases.

65. In recognition of the submissions the Board of Inquiry does however accept a minor reduction to the costs recommended by the Valuer General and awards costs of **$7,000** against Valuer Y

Ken Taylor
Inquiry Chairperson
1 September 2017