

**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)(a) of  
the Act against **Valuer Z**

**BOARD OF INQUIRY:**

KR Taylor (Inquiry Chairperson)

MEL Gamby

HJ Puketapu

**COUNSEL:**

S Carter for the Valuer General

Valuer Z was not represented

**DATE OF HEARING:**

15 December 2014

**DATE OF ORAL DECISION:**

15 December 2014

**DATE OF PENALTY DECISION:**

27 January 2017

**THE COMPLAINT**

A letter of complaint was received by The Registrar of the Valuers Registration Board from the complainant dated 12 February 2014. The correspondence related to a letter and invoice that Valuer Z had sent the complainant on 13 December 2013. A copy of the invoice and letter was enclosed. The invoice related to Valuer Z endeavouring to recover their alleged costs incurred due to a previous complaint against Valuer Z that did not proceed to an inquiry. Both the invoice and accompanying letter contained threats of action against the complainant.

The matter was initially investigated by the New Zealand Institute of Valuers before being referred to the Valuer General to conclude the investigation. On consideration of the

investigation report, the Valuers Registration Board determined under Section 32(2) of the Valuers Act 1948 that there were no reasonable grounds not to hold an inquiry.

### **THE CHARGE**

Section 31(1)(a) of the Valuers Act 1948:

That you have been guilty of such improper conduct as renders you liable to a penalty provided by the Valuers act 1948 in that your conduct on or about 4 December 2013 did fail to uphold the reputation of the New Zealand Institute of Valuers and/or the dignity of the profession in breach of Clause 1.2 of the New Zealand Institute of Valuers Code of Ethics.

Particulars: that you sent an improper letter to the complainant containing an invoice for unreasonable costs and making threats in the event payment was not made.

1. It is alleged that Valuer Z failed to uphold the reputation of the New Zealand Institute of Valuers and/or the dignity of the profession by sending an improper letter to the complainant containing an invoice for unreasonable costs and making threats in the event payment was not made.
2. It is alleged that their conduct was in breach of clause 1.2 of the New Zealand Institute of Valuers Code of Ethics and that it is so improper that it renders them liable to a penalty under the Valuers Act 1948.
3. Clause 1.2 of the new Zealand Institute of Valuers Code of Ethics states:

*A member's conduct should at all times uphold the reputation of the Institute and the dignity of the profession and abide by all laws, statutes, regulations and rules relevant to their professional practice.*

Valuer Z denied the charge.

### **BACKGROUND**

In April 2012 the complainant lodged a complaint with the Valuers Registration Board alleging that in December 2011 Valuer Z had grossly overvalued a property that was subject to a Relationship Property proceeding. Valuer Z had acted for the complainant's estranged husband.

The complaint was investigated and then considered by the Valuers Registration Board on 10 June 2013. The matter did not proceed to an inquiry and the parties were advised accordingly.

In December 2013 Valuer Z sent the complainant the invoice and covering letter that is the subject of the current complaint. The invoice was for the amount of \$25,000.00 plus GST giving a total of \$28,750.00. In the covering letter Valuer Z made a number of statements that are pertinent to this inquiry:

*Please find enclosed my account for costs incurred and inflicted by you.*

*The account is self explanatory and if not paid within 20 days will be placed in the hand of my company's debt collector or a caveat placed on your property's title.*

*Background*

*On the 20<sup>th</sup> March 2012 you lodged a frivolous and vexatious complaint against me with the Valuers Registration Board for a valuation requested and provided to your ex-husband (letter attached).*

*You were never my client.*

*You made reference in your complaint to a valuation you received by Valuer 1 at \$972,500 (valuation attached).*

*You triggered a chain of events at huge cost to me both personally and to my professional reputation and caused immense stress that I had to defend my valuation report within Section 32 of the Valuers Act 1948 whilst at the same time continue to manage and operate my business and support my family.*

*Some of the costs incurred are listed as follows:*

- Legal opinions, legal counsel and peer reviews of the valuations.*
- Correspondence to the Valuers' Board (letters attached).*
- Affidavits to the board to defend your allegations.*

*It is publicly known that the property you had a half share in was marketed and the contract for it in 2013 realised several hundred thousand higher than my valuation of \$1,550,000 (that was provided to your ex-husband by me).*

**SUBMISSIONS FOR THE VALUER GENERAL**

Counsel for the Valuer General submitted legal principles in relation to "improper conduct" as this is not defined in the Valuers Act 1948. In doing so, the case of *Collie v Nursing Council of New Zealand AP 300/99 Wellington High Court 5 September 2000 Gendall J* was cited as the provisions of the Nurses Act 1977 includes a similar reference to bringing discredit on the profession.

Counsel also referred to a previous case considered by the Valuers Registration Board in which the valuer ultimately pleaded guilty, but in which the Board concluded that the breach “did not justify anything other than a guilty plea from the outset”.

Counsel then set out the crux of the Valuer General’s submission which is summarised as follows:

- The circumstances in which the invoice was sent and the conduct of Valuer Z is such that their behaviour reflects poorly on the profession and does not “uphold the reputation of the Institute and the dignity of the profession”
- Valuer Z had no contractual relationship with the complainant to send an invoice. The complainant was not their client and there could be no reasonable expectation, or lawful requirement for her to be responsible for the costs.
- The sums requested were excessive and out of all proportion to time that might reasonably have been spent by Valuer Z in considering the complaint. The sum concerned was of such a significant amount that undoubtedly the complainant would have been extremely concerned at potentially having to find such a large sum. Indeed the complainant herself in her complaint noted that she was “very worried about the bill.”
- The letter accompanying the invoice sought to put undue pressure on the complainant to make payment. The letter stated “*if not paid within 20 days will be placed in the hand of my company’s debt collector or a caveat placed on your property’s title.*” Thus the letter adopted a “bully” approach which not only is abhorrent to the profession but impacts on the whole complaints procedure and the willingness for persons to come forward and hold members of the profession to account for their conduct.

The Valuer General concluded that Valuer Z’s behaviour impacted poorly on the profession and did not uphold the reputation of the Institute and the dignity of the profession and that there had been a breach of rule 1.2 of the NZIV Code of Ethics which sets a benchmark for conduct which is to be considered improper.

Counsel advised that the breach was sufficiently serious to justify a disciplinary sanction and noted a number of cases to assist the Board of Inquiry which are repeated here:

- In *Valuer M (hearing) [2013] NZVRB 3* at [49] the Valuers Registration Board recognised that given the way the Valuers Act is expressed the range of possible sanctions should be kept in mind when considering whether the departure from standards is serious enough to warrant disciplinary sanction.
- The two stage test enunciated in *King v Valuer General* should not mean that only the most serious breaches should attract sanction.
- In *King* the Board of Appeal referred to the judgement of Kirby P in *Pillai v Messiter No.*

2. The following quote was cited:

*But the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.*

- It is very important to note that the comments in *Pillai* were made in the context of a charge of “misconduct in a professional respect” under the Australian legislation, a charge that was equivalent in seriousness to the most serious charge under the New Zealand Medical Practitioners Act 1968 (that of “disgraceful conduct”). The Australia state has been described as “significantly different:” to the comparable regime under New Zealand’s medical disciplinary legislation.
- Accordingly, *Pillai* had been applied in New Zealand only to the most serious disciplinary charges, such as disgraceful conduct (in the medical context) or professional misconduct (in the legal context). The same high threshold does not apply, for example, to less serious disciplinary charges such as negligence or professional incompetence.
- In *Martin v Director of Proceedings* Courtney J pointed out that Kirby J’s comments in *Pillai* were made in the context of discussing a serious charge, and one that was narrower than the category of “professional misconduct” under s100 of the Health Practitioners Competence Act (**HPCAA**). She therefore disagreed that *Pillai* was the appropriate reference point for a ‘threshold test’ regarding every disciplinary finding under the HPCAA, holding:

*[28] Given that misconduct within the scope of practice under s100(1) can now cover conduct ranging from low-level misconduct to gross negligence and even deliberate misconduct, a threshold articulated in the context of the equivalent of disgraceful conduct could not be applied to a charge under s 100(1)(a). If it did, many cases of misconduct in the scope of professional practice would be excluded from a disciplinary response, contrary to Parliament’s obvious intention.*

*[30] In identifying the threshold for disciplinary sanction, it is essential to recognise that the assessment is one of degree. ... In other words, the gravity of the misconduct should be reflected in the penalty rather than in the actual finding of professional misconduct. In comparison, under the previous schemes the gravity of the conduct was, to a significant extent, reflected in the charge itself.*

*[32] While the criteria of “significant enough to warrant sanction” connotes a notable departure from acceptable standards, it does not carry any implication as to the degree of seriousness. Given the wide range of conduct that might attract sanction, from relatively low-level misconduct of the most reprehensible kind, the threshold should not be regarded as unduly high. It is certainly a threshold to be reached with care, having regard to both*

*the purpose of the HPCAA and the implications for the practitioner, but the measure of seriousness beyond the mere fact that the conduct warrants sanction is a matter to be reflected in the penalty. The degree of seriousness does not form part of the tribunal's enquiry at the second stage of the two step process.*

- There is no clear differentiation, in terms of seriousness, between the various disciplinary offences that may be charged under the Valuers Act. Each triggers the same range of available penalties. None of the disciplinary charges available under s31 is obviously equivalent in seriousness to “professional misconduct” (under the LCA), or “disgraceful conduct” (under the old medical disciplinary legislation). In other words, there is no “most serious” charge to which the high standard in *Pillai* could attach.
- For this reason, a direct analogy with the situation that existed in *Pillai* is not appropriate, or even possible.
- It is submitted that Courtney J's reasoning in *Martin* applies equally to charges under the Valuers Act. Each of the types of breach – improper, incompetent or unethical conduct – can warrant a penalty ranging from a censure up to removal of the valuer's name from the register. Given this spectrum of penalties, each of the charges under s31 must be capable of encompassing a wide range of conduct and seriousness
- Against that background, restricting findings of liability to only the most serious breaches would entirely defeat the protective purpose of the disciplinary regime. Obviously, conduct approaching the *Pillai* threshold may be necessary before a valuer's name could be removed from the Register. But this high standard should not apply generally to charges of improper, incompetent and unethical conduct. If it did, the alternative and less serious penalties in s33 would serve no function.
- It is noted that in *King*, counsel for the Valuer-General failed to argue the appropriate application of *Pillai* in the valuer's context. As a result, the Board of Appeal did not undertake an analysis of the New Zealand case law applying *Pillai*.
- In summary, it is accepted that there is a two-step analysis required and that breaches properly described as trivial should not attract disciplinary sanction. However, it is not accepted that prior to a disciplinary sanction being imposed, the level of misconduct must reach that set out in *Pillai*. That may well be the appropriate threshold prior to removal of a valuer from the register. But it should not be applied wholesale to every disciplinary breach.

The Valuer General submitted that the factors identified above had a real tendency to bring the profession into disrepute and that the improper conduct was such that deterrence to others should be foremost in the mind of the Board. As a consequence the Valuer General considered the breach was sufficiently serious to require disciplinary action.

The Valuer General did not call any witnesses and relied on the investigation bundle as evidence. Valuer Z had previously agreed that the investigation bundle could be admitted by consent.

### **SUBMISSIONS FOR Valuer Z**

Valuer Z did not appear, nor were they represented by Counsel.

Valuer Z provided a written submission to the Board of Inquiry that was accepted as their representation. The key elements of this submission are:

- *This is a private matter between Valuer Z and the complainant. The Board has no jurisdiction over the business and operations of Valuer Z.*
- *Professional Responsibility:  
1.2 states: A member's conduct shall at all times uphold the reputation of the Institute and the dignity of the profession and abide by all laws, statutes, regulations and rules relevant to their professional practice.*
- *Case law of any other profession is not relevant.*
- *The complainant was not and never has been a client.*
- *There is no client responsibility.*
- *On the 6<sup>th</sup> December a valuation was supplied to the ex-husband of the complainant. The valuation was released by the then acting solicitor in the interests of disclosure so the parties could consider an outcome for matrimonial assistance.*
- *The valuation was set at \$1,550,000.*
- *The complainant objected to the Valuer General on the 26<sup>th</sup> March 2012 before any matrimonial agreement between the parties was reached.*
- *The complaint was not made in good faith.*
- *Good faith allows for due process. It was made because did not like the number and it would allow her time to delay/stop any matrimonial settlement/outcome.*
- *The Valuer General took the side of one party in an unresolved dispute.*
- *The valuation clearly stated it was to assist with matrimonial resolution and it clearly stated that Valuer Z holds a real estate licence.*

- *If the Valuer General wishes to investigate every complaint, especially matrimonial complaints, before the settlement between the parties and before the absolute test of the market (the sale process) is concluded and up until that time the valuations are expert opinions only, it becomes a deliberate interference of due process.*
- *Why didn't the Valuer General reply back to the complainant and suggest for her to sort out her matrimonial affairs? A suggested solution in these matters is to say: "It could be best to sell your farm for the best possible price and at the end of that process let the Valuer General know the outcome and then if it is not favourable the Valuer General will investigate".*
- *Alternatively, it would have been more appropriate in the first instance to instruct your solicitor to request the valuers to meet and discuss points of difference and allow the parties to reach a mutual answer. It may have been as simple as the complainant's valuer reviewing the file.*
- *Why did the Valuer General interfere in their due process of a matrimonial dispute?*
- *There are several steps parties are expected to be professionally guided along with a matrimonial dispute.*
- *The enquiry took some 14 months and found 'there was no case to answer'.*
- *The property was marketed and sold in 2013 for \$1,882,000, (a market level \$910,000 higher than the complainant's Valuer's opinion) which meant the property had been appreciating at \$8,000 per week till the point of sale or the complainant had some very bad valuation advice.*
- *The complainant's second complaint stated "she was very worried about the bill". She gives no reason why. The complainant had already misled the board once.*
- *In the period between the valuation being supplied and the Valuer General's investigation, the complainant, had the freedom to lever the situation to the complainant's advantage and cause considerable financial loss to Valuer Z and defame and undermine them.*
- *The business loss was real.*
  - *There is the loss of income from the initial listing and marketing of the property, as instructed by the complainant's ex-husband to the total loss of all income on the sale outcome.*
  - *The valuation was supplied on the 6<sup>th</sup> December 2011.*
  - *The complainant's ex-husband listed the property for sale in 2012. Potential buyers were introduced to the property.*
  - *The complainant lodged her complaint in early 2012 to stop the sale process.*

- *The Valuer General intervened and began an inquiry which concluded on the 20<sup>th</sup> May 2013.*
- *Email correspondence in May 2013 shows the complainant's ex-husband wishing to relist the property and solicitors confirmation sought for this.*
- *The ongoing matrimonial dispute saw the complainant list the property through in a final attempt to achieve a lower value.*
- *The property was offered for sale of which there were multiple tenders and the successful buyer was introduced by Valuer Z. The sale was in 2013.*
  
- *The commission loss alone to Valuer Z was \$25,500 plus GST.*
- *Other costs incurred were in excess of \$5,000 plus GST for seeking professional advice relevant to managing this frivolous complaint and the ongoing employment loss of standard work instructions whilst not qualified, was substantial. The account rendered was fair and reasonable.*
  
- *Valuer Z has by written statement, offered to close this.*
  
- *It is the standard practice of Valuer Z to include on every invoice issued that in the event of non-payment accounts will be lodged with a debt collecting company and further costs will be incurred.*
  
- *As a private matter the valuation profession has not been brought into disrepute.*

### **BOARD OF INQUIRY CONSIDERATION**

The Board of Inquiry recognised the case presented by the Valuer General but, in the absence of witnesses who could be questioned by the Board or cross examined by Valuer Z the Board is required to balance the written submissions.

Likewise Valuer Z did not appear or produce witnesses so therefore the opportunity to ask questions and clarify aspects of the defence was not provided.

The Board of Inquiry therefore draws its own conclusions based on the submissions presented and the following observations.

- A person is entitled to lay a complaint with the Valuers Institute or Valuers Registration Board at any time.
  
- The Institute or Valuer General is required to investigate a complaint once received.
  
- The circumstances (in this case a matrimonial dispute) do not preclude this process.

- The Board of Inquiry does not accept that a Registered Valuer is absolved of liability while operating within a company entity.
- It is noted that Valuer Z signed the letter sent to the complainant as a "Registered Valuer".
- The alleged business losses alluded to by Valuer Z are not a matter that the Board of Inquiry can consider.

Having given consideration to the legal cases referred to above the Board of Inquiry is satisfied that there has been a breach of the conduct expected from a Registered Valuer and that this breach was, in terms of *Pillai* deliberate, portrayed indifference and abuse of the privileges which accompany registration as a Registered Valuer. Accordingly a sanction is justified.

### **ORAL DECISION OF THE BOARD OF INQUIRY**

The Board of Inquiry made the following oral decision on conclusion of the hearing: "The Board has considered the charge against Valuer Z. Valuer Z wrote a letter to the complainant on 4 December 2013 and enclosed an invoice for \$25,000.00 plus GST in relation to costs associated with a previous complaint. The Board accepts submissions from the Valuer General that sending such an account was inappropriate. Significantly the accompanying letter that included threats against the complainant reflected inappropriately on the valuation profession. The Board has therefore found Valuer Z guilty of the charge of improper conduct."

### **PENALTY AND COSTS**

The Board of Inquiry subsequently sought submissions on penalty and costs.

**The Valuer General provided a submission dated 19 December 2014 as follows:**

### **PENALTY**

#### ***Aggravating and mitigating factors***

- 1 *The acts found proven speak for themselves. The letter adopts a "bully" approach which is not only abhorrent to the profession but impacts on the whole complaints procedure and the willingness for persons to come forward and hold members of the profession to account for their conduct.*
- 2 *The aggravating features of the behaviour include the amount of money that Valuer Z attempted to obtain from the complainant, the intimidatory tactics used and the period of time that elapsed before Valuer Z withdrew the invoice.*

3. *Furthermore this is not Valuer Z's first appearance before the Board. On 23 August 2013 they were reprimanded and fined \$5,000 including GST for grossly undervaluing a property. The behaviour relating to the current charge occurred less than 4 months later.*
4. *It is to Valuer Z's credit that they did finally withdraw the invoice however they have shown no remorse for their behaviour and the fact that they contested the charge means that they are not entitled to any discount for a guilty plea.*

### **Powers of penalty**

1. *The disciplinary powers of the Board are set out in s31 and s33 of the Act. 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.**
2. *Any of the first three penalties can be imposed individually or in combination.*
3. *In the event that a suspension is imposed it does not take effect for 21 clear days in order to allow an opportunity for an appeal to be lodged, in which case the suspension does not take effect until that appeal is resolved.*

### **Submissions on Penalty**

1. *The appropriate penalty is a matter for the Board having come to a view about the seriousness of the conduct in question.*
2. *The purpose of the 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).*
3. *The behaviour of Valuer Z in invoicing the complainant in the way that they did has a real tendency to bring the profession into disrepute. It is the sort of behaviour that potentially exploits the vulnerable and can lead to a public loss of confidence in the profession. Whilst Valuer Z did eventually withdraw the invoice it was some six months after they had sent it and no apology has been forthcoming from Valuer Z to the complainant. Moreover they chose to defend the charge, which albeit their right, demonstrates that they see that they did no wrong in the way they behaved.*
4. *In the circumstances it is submitted that a simple reprimand would not suffice. It is submitted that a fine in the region of \$4,000 to \$5,000 should be imposed.*

## **COSTS**

The Valuer General provided the background to establishing an award of costs and sought 65% of the actual costs incurred.

**An undated submission was received from Valuer Z on 5 January 2015 as follows:**

### **FACTUAL BASIS**

1. *The complainant was never a client of Valuer Z*
2. *The complaint was made during an unresolved matrimonial settlement.*
3. *The property in question was later sold for \$1,882,000 by tender. This outcome destroyed all the complainant's allegations against Valuer Z*
4. *The losses incurred by Valuer Z are real.*
5. *The claim of costs is not excessive – they are tangible and justifiable.*
6. *No valuer can manage a complaint from a party they were never employed by.*
7. *There was no case to answer in the original complaint.*

### **POWERS OF PENALTY:**

8. *Valuer Z will not renew their registration licence which is effectively their resignation from the profession.*
9. *There should be no fine.*

### **COSTS**

10. *There should be no costs. The board created this situation by becoming involved in an unresolved matrimonial of which there are hundreds around the country at any time.*
11. *Where is the apology from the complainant when there is no case to answer in the original complaint?*
12. *The losses to Valuer Z were tangible, not excessive and justifiable.*
13. *The 'bully' comment made by counsel is strongly objected.*
14. *Valuer Z did not bring the profession into disrepute.*

## **BOARD OF INQUIRY CONSIDERATION**

The Valuer General recommended a reprimand and a fine in the range of \$4,000 to \$5,000. Conversely Valuer Z clearly does not accept the findings of the Board of Inquiry and did not consider any penalty appropriate. Valuer Z also advised of their intention not to renew their practising certificate.

The Board of Inquiry noted that this was the second appearance by Valuer Z before the Board in a relatively short time frame. While the two situations are different the Board notes that on the previous occasion Valuer Z was reprimanded and fined \$5,000. A lesser penalty on this occasion is not warranted. The Registration Board does not consider that Valuer Z deciding not to renew a practising certificate or resigning from the profession is a reason not to follow due process when considering a complaint.

The Board is conscious that where costs are not recovered, they fall on other members of the profession.

The costs incurred in this case were:

Legal Fees	\$5,509.07
Investigation costs	\$569.25
Board expenses	<u>\$4,423.05</u>
Total	\$10,501.37

A recommendation of 65% of costs was made by the Valuer General with the sole justification being that this was a second appearance by Valuer Z. The Board of Inquiry does not accept this justification.

Valuer Z submitted that there should be no award of costs and accused the Board of creating the situation. The Board of Inquiry does not accept this position and refers to the earlier dialogue that sets out the requirements for the Board to investigate complaints.

**DECISION OF THE BOARD OF INQUIRY**

The Board of Inquiry confirms its oral decision that Valuer Z is guilty of bringing the profession into disrepute and therefore breaching Clause 1.2 of the New Zealand Institute of Valuers Code of Ethics.

The Board of Inquiry reprimands Valuer Z and imposes a fine of \$5,000.

Costs of \$5,250 are awarded against Valuer Z representing 50% (rounded) of the properly incurred costs.

All amounts are payable immediately.

A handwritten signature in cursive script that reads "Kenneth R Taylor".

KR Taylor  
Inquiry Chairperson  
27 January 2017