

**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 32(1)(c) of

the Valuers Act 1948 against Valuer D

**BOARD OF INQUIRY:**

P A Curnow (Inquiry Chairperson)

M E L Gamby

K R Taylor

**COUNSEL:**

J Burns for the Valuer General

Valuer D was unrepresented

**DATE OF HEARING:**

13 June 2011

**DATE OF DECISION:**

12 June 2013

## **BACKGROUND/COMPLAINT**

A complaint dated 12 September 2008 was received by the Registrar of the Valuers Registration Board against Valuer D from the complainant.

The complaint was in connection with a valuation report by Valuer D dated 30 April 2007 carried out on a residential property. This report had been addressed to the property owner. Valuer D had valued the property at \$270,000 inclusive of GST (if any). It was later established that the report was subsequently provided to two new addressees, these being Company 1 and Company 2.

The property according to Valuer D's report *"comprises a block of three well-presented residential units each including three bedrooms plus carports located on a site of 827 square metres. These three flats are held under one title"*

The owner provided the report to the complainant and this report was the basis of a mortgage advance from Company 1. The complainant stated that the true condition and value of the property became apparent a few months later when local real estate agents were approached to sell the property.

In February 2008, Valuer 1, registered valuer, carried out a valuation upon instructions from the complainant. Valuer 1 had valued the property for \$182,000 inclusive of GST (if any), some \$88,000 or 32.6% below Valuer D's valuation.

## **INVESTIGATION**

The complaint was investigated by the Valuer General. As part of the investigation, the Valuer General requested three retrospective valuations to be carried out, these to be as at the date of Valuer D's report.

The first valuation, carried out by Valuer 1, concluded that the market value was \$145,000 inclusive of GST (if any) as at April 2007.

The second valuation was obtained from Valuer 2, who valued the property at \$155,000 inclusive of GST (if any) as at 24 April 2007.

A third valuation report was obtained, this from Valuer 3, who valued the property as at 24 April 2007 at \$170,000 inclusive of GST (if any).

During the course of the investigation, it was shown in the Quotable Value sales history the complainant purchased the property in 2007 for \$270,000. The property was subsequently sold in 2008 by the complainant for over \$100,000 less than the purchase price.

Valuer D advised the Valuer General in May 2009, after the Valuer General had made attempts to contact them, where they could be contacted, as they had been moving between regions.

In June 2009, Valuer D again contacted the Valuer General to express concern that someone had suffered a loss as a result of relying on their valuation report. Valuer D also advised that the firm with whom they were working at the time of the valuation had closed and that they had had little success in locating the relevant file.

In an email dated 19 October 2009 to the Valuer General, Valuer D made the following points on a "without prejudice" basis;

- ▶ Unable to locate field notes or the complete file relating to the valuation.
- ▶ The complainant was not their client, nor was the report addressed to her or intended to convince a third party of whom they had no knowledge.
- ▶ They were outside their geographical area but did undertake considerable research.
- ▶ As to the condition, Valuer D stated that they would not describe a property in a different condition than that observed. They said it was always possible that they may have missed something.
- ▶ That their value is justifiable with regard to the primary Investment Approach and that the sales evidence would also seem to justify the value.

- ▶ Valuer D thought it possible the report may have been altered in some way and that they left the company shortly after completing this valuation.
- ▶ Valuer D provided a report completed by Valuer 4, dated 3 October 2005 at \$248,000 inclusive of GST (if any).

In February 2010 the Valuer General obtained copies of three reports held on file. These were addressed to the original owner of the subject property (from whom the complainant purchased the property from), Company 1, and Company 2. The latter two reports were signed.

Following the investigation, the Valuers Registration Board concluded, there was sufficient cause to hold an inquiry.

Prior to the inquiry held on 13 June 2011, further contact with Valuer D proved difficult. Proof of service of documents was required by the Board to be presented in evidence on the 13 June.

## **THE CHARGE**

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

*That you have been guilty of 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 30 April 2007 with respect to a property you grossly overvalued the said property.*

## **THE INQUIRY**

At the commencement of the hearing, the Registrar, Ms M Doyer, gave evidence in the form of an affidavit. This as to the contact process taken to inform Valuer D of the complaint, where documents were to be served following the decision to hold an inquiry and that up to the 9 June 2011 (Thursday) Ms Doyer had not been the recipient of any verbal or written correspondence from Valuer D to indicate if they had received the inquiry documentation.

Ms Doyer gave verbal evidence that Valuer D rang on Friday afternoon (10 June) and that they would try to email evidence for the hearing on Sunday 12 June. Ms Doyer said no correspondence had been received as of the commencement of the hearing.

Ms Doyer also read out the affidavit of Rex Grant Davison. Mr Davison of Investigators International had been instructed by the Registrar to make inquiries regarding the whereabouts of Valuer D.

Mr Davison was not able to contact Valuer D nor locate any updated addresses.

The Board of Inquiry notes that in Section 32(2) of the Valuers Act 1948, the notice required to a valuer of the intention to hold an inquiry and of the time and place of the hearing and of the nature of the charge, may be served personally or by registered letter addressed to Valuer D at their last known place of business or abode.

The Board was satisfied on the evidence given that the inquiry could proceed without Valuer D. The prosecution is required, notwithstanding Valuer D's non-attendance, to still prove its case.

## **THE PROSECUTION CASE**

The prosecution called three witnesses. The first being the Valuer General.

Mr Sullivan outlined there is normally a defendant at the hearing and that the investigation report(s) are normally presented with consent. That not being the case at this inquiry, Mr Sullivan presented;

- ▶ Exhibit 1: The first investigation file.
- ▶ Exhibit 2: Supplementary investigation file.
- ▶ Exhibit 3: Valuer D's registered valuer record showing they had an annual practicing certificate at the time of the valuation subject to the complaint.
- ▶ Exhibit 4: Affidavit of service of Jennifer Jane Loader, legal secretary of the Crown Law office.

Board of Inquiry member Mr Gamby had some questions for Mr Sullivan arising out of Exhibits 1 & 2.

Mr Gamby inquired why the report provided by Valuer D, completed by Valuer 4 dated 3 October 2005, was not used and updated. Mr Sullivan stated he wanted a fresh and clean approach to the investigation.

Mr Gamby further inquired why Valuer 1's valuation of 2 October 2009 was not going to be relied upon as evidence at the hearing. Mr Sullivan stated that the charge was a serious matter, that a report needs to be highly credible, and have high clarity around the evidence and the answer. Mr Sullivan said he had concerns about the retrospective valuation of Valuer 1 and needed to obtain another retrospective valuation. The report needed to provide clarity of linking the evidence in the report to the final valuation.

Mr Sullivan was asked if the report completed by Valuer D dated 30 April 2007 and addressed to Company 2 met the necessary requirements. Mr Sullivan said it did not appear to and that one of the key elements was to do with the independence of instructions. The report did not

show how the instructions were received and how independent they were.

The Board notes that the report subject to the complaint was addressed to the owner. That the complainant was a different person, who was provided the report, does not in any way have any bearing on the validity or otherwise of the complaint.

### **VALUER 3**

Valuer 3 inspected the property three years after Valuer D so relied on Valuer D's description of condition. This being that the interior was "*well presented*" and the exterior was "*well presented, recently painted*". Valuer 3 doubted this condition nevertheless stressed he valued according to Valuer D's report in this respect.

At variance with Valuer D, Valuer 3 described the property as being of two three bedroom flats and one two bedroom flat. This the same as the third witness, Valuer 2.

Valuer 3 referred to ten sales of blocks of 2-5 flats over the time period October 2006 to April 2007.

Of these sales, Valuer 3 highlighted three that were considered outliers based on the analyzed yields and some suspicion he had with one of the parties involved. This based on Valuer 3's general knowledge of some specific parties active in the rental flats market of the subject area and transfers of property between them. However Valuer 3, upon a question from Mr Gamby, stated that "*the name of the parties wasn't the reason I excluded the sales - they were outliers. In valuation practice we see these types of sales and exclude them*".

It was Valuer 3's evidence that the sales provided gross yields ranging from 10.94% to 12.15% and net yields ranging from 7.13% to 7.98% on the basis of 50 week occupancy. Further, the sales provided a confined range of value between \$43,333 per unit and \$60,000 per unit.

Valuer 3 said he made inquiries with rental agents as to the appropriate rental levels that could have applied at the date of valuation. As a result Valuer 3 considered the two bedroom unit at \$115 per week and the three bedroom units at \$130 per week each. This giving a gross income of \$18,750 per annum for the 50-week year. To estimate the net income, \$6,199 of costs were deducted to arrive at \$12,551 per annum.

The Board of Inquiry, in order to clarify the matter of actual and available rental information, recalled Valuer 3 to give evidence after hearing the evidence of Valuer 2 in this respect.

The Board was satisfied with the answers Valuer 3 had in respect of the rental evidence to use in his investment approach methodology.

Valuer 3 considered two further approaches, these being Depreciated Replacement Cost and Sales Comparison per unit.

These three approaches produced the following figures;

▶ Depreciated Replacement Cost	\$180,000	
▶ Investment Approach	\$170,000	(inclusive of \$6,000 chattels)
▶ Sales Approach	\$170,000	(inclusive of \$6,000 chattels)

Valuer 3 concluded the Investment and Sales Approaches had greatest weight as they are directly related to the sales evidence. The Market Value was \$170,000, inclusive of chattels and inclusive of the Goods and Services Tax (if any).

On the Investment Approach this valuation equates to cap rates of 11.02% gross and 7.38% net, both at the lower end of Valuer 3's range. From the Sales Approach this valuation equates to two three-bedroom units at \$60,000 each plus the two bedroom unit at \$50,000.

It was Valuer 3's opinion that there were enough sales in the subject area from which to draw a reasonable conclusion and that it was not a particularly difficult valuing environment.

## VALUER 2

Valuer 2 also adopted the property condition as outlined in Valuer D's April 2007 report as they inspected the property in November 2009.

Valuer 2 inspected the interior and states that there are two three bedroom flats and one two bedroom flat.

It was Valuer 2's evidence that of the 15 residential flat sales in his database search, only seven were relied on for his valuation. Of these 15 sales, three were regarded as non-arm's length (two of these similarly identified by Valuer 3). Two were in fact single dwelling houses and the other three sales were for blocks of either two or five flats that were considered less relevant than blocks of three to four flats.

In answer to questions on the "non-arm's length sales", Valuer 2 said that he was aware of two parties acting in a way he considered unethical. That these parties were trying to "hydraulic" the market or sell to each other. Valuer 2 said that valuers operating frequently in the location will have been aware of this activity.

Valuer 2 further went on to state that he had been instructed by one of the parties in the past where a property was being purchased for \$200,000 when the same property was advertised for sale at \$125,000.

Valuer 2 was firm in his view as to the appropriateness of the available sales evidence.

Valuer 2 utilised several valuation techniques to arrive at his market value of \$155,000 inclusive of GST (if any).

These techniques included;

- Net Rate Sales Comparison Approach where sales were analysed to a building rate \$m<sup>2</sup> and land value, arriving at an assessment of \$147,000.

- Return on Gross Income using a rental of \$105 per week for the three bedroom flats and \$95 per week for the two bedroom flat. Applying a 48 week year and a cap rate range of 9.25% to 9.75% to the \$14,640 per annum gross rental, resulted in a value range of \$150,000 - \$158,000.
- Net Income Approach, from the \$14,640 per annum 48 week rental, costs of \$5,750 were deducted to provide a net income of \$8,890 per annum that was capitalised using a range of 5.7% to 6.1% to provide a value spread of \$146,000 to \$156,000.

In evidence Valuer 2 said he also used the Per Unit Approach and that his analysis of sales on a per unit basis were contained in Attachment A of his Brief of Evidence. Questioned upon the full analysis shown in Attachment A, Valuer 2 stated the rentals used were his own assessments of the flat rentals and no inquiries were made as to the actual rentals.

## **VALUER D'S REPORT**

With the absence of Valuer D, the Board of Inquiry could only test their evidence and approach against the two witnesses for the Valuer General.

It was evident on the face of the report subject to the complaint, that there were several errors. The first error being the address shown incorrectly. The date of inspection was given as 24 April 2007, however the valuation was stated as being 24 April 2006. This is clearly incorrect and at odds with the dates of Valuer D's sales. These mistakes could be checked against the further reports addressed to Company 1 and Company 2

The property was described as three, 3-bedroom units whereas both Valuer 2 and Valuer 3 found two, 3 bedroom units and a two bedroom unit.

Valuer D had assessed a Market Value in their report of 30 April 2007 at \$270,000 inclusive of \$15,000 chattels and GST (if any).

This calculation based on an annual gross income of \$20,280 capitalised at 7.5%.

Reference in the assessment process was also made to the amount per unit from sales of \$45,000 to \$75,000 plus the sale of an individual unit at \$125,000.

Rentals were said to typically range from \$80 to \$125 per week for two bedroom units and three bedroom units at \$110 to \$140 per week. Valuer D did not show how they applied these rentals to arrive at their total of \$20,280 per annum. Simple analysis by Valuer 3 showed the rental would equate to three units at \$130 per week for 52 weeks. Valuer 3 also used \$130 per week for the two three-bedroom units, however his income was over a 50 week year.

Valuer D's sales evidence comprises six blocks of flats and three separate units. One of these separate units is effectively described as a cross-lease but the report is silent on the legal description of the other two units. The only analysis in the report is on a per unit basis, no rationale for the 7.5% cap rate is offered.

The report contains no commentary on the local market. Instead, it refers to the wider economy and a market outside of the subject region.

The flat block sales and their respective values per flat seem to have been overshadowed by Valuer D's one individual sale at \$125,000.

Valuer D's valuation equates to an average value for the three units at \$90,000 which is at odds with their sales evidence.

Both retrospective valuers in evidence were critical of Valuer D's report and valuation conclusion. The consensus the Board drew from these two witnesses was that Valuer D did not have a proper foundation or acceptable valuation reasoning for their figure of \$270,000. Both valuers concluded this valuation was grossly excessive.

The Board also had concerns as to the mistakes on the face of Valuer D's report. In the absence of Valuer D, the Board confined matters to the proof of such aspects as the number of bedrooms per flat, the appropriate sales and rental evidence and what was the appropriate valuation methodology.

The Board accepts the contention in Valuer D's emails of 9 June and 19 October 2009, that the valuation was completed at the peak of the market. The Board does not accept that a third party could not reply on the report. There were two further signed reports, with the only change being the correction to the street address. The Company 2 report did not meet the necessary requirements for this addressee according to the Valuer General.

The Board did not place any weight on the Valuer 4 report of 3 October 2005 provided by Valuer D. A valuation at the same date as Valuer D's assessment would have been more appropriate.

## **SUMMARY OF ISSUES/FACTS/LAW**

The prosecution has the burden of proof of the charge laid against Valuer D.

As to the standard of proof, this has been established by the decision of the Supreme Court in *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at para 118, McGrath J said "*... we are of the view that in this country there is no good reason for creating an exception covering disciplinary tribunals. A flexibly applied civil standard of proof shall be adopted in proceedings under the Act and other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other ruling requiring a different standard*".

This *civil* standard, commonly referred to as "proof on the balance of probabilities". This standard to be flexibly applied. The more serious the allegation, the natural tendency will be to require stronger evidence to satisfy the balance of probabilities standards.

*King v Valuer General* (17 December 2009, DC Wellington CIV 2009 - 085-32) confirms that the *Z* decision applies to disciplinary proceedings under the Valuers Act 1948.

## The Charge

The charge is that Valuer D grossly overvalued the subject property.

The Board of Inquiry is required to consider if the evidence presented, meets the necessary threshold, that Valuer D departed from accepted standards in the preparation of their report.

In this deliberation, the Board is guided by the following observations in the New South Wales case of *Pillai v Messiter (2) (1989) 16 NSWLR 197*. In that case, Kirby P said "... *the statutory test [of professional misconduct] is not met by mere professional incompetence or by deficiencies in the practise of the profession. Something more is required. It includes 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...*"

The first question to be answered is, did Valuer D grossly overvalue the subject property?

The evidence before the Board is that Valuer 3 valued the property at \$170,000 and Valuer 2 valued the property at \$155,000.

Both witnesses were familiar with the market, analysed in detail available sales and flat rental evidence and applied more than one methodology before reaching a conclusion.

Mr Burns, Counsel for the prosecution, in his written closing submission states that based on the evidence of these two witnesses "*an objectively correct value*" for the property as at 24 April 2007 is \$162,500 (inclusive of GST).

Valuer D's value was 66.15% above that amount and further it is submitted by Mr Burns that this is a serious departure from acceptable standards.

The Board of Inquiry testing of the two valuers reports and understanding of the market, did satisfy the Board that the value level lay in the parameters of \$155,000 to \$170,000.

In the final analysis the Board accepts that the "correct value" is more than likely at the upper end of the range provided by the two witnesses. A value level of \$170,000 is 37% below Valuer D's value of \$270,000 or in the reverse, Valuer D's valuation is some 58.8% higher from what might be considered the "correct" figure.

In determining if a gross over valuation has been proved, the Board has never accepted a particular margin of difference from what might be considered the "correct" figure.

## **Finding**

The evidence before the Board of Inquiry was that Valuer D made rudimentary and fundamental errors in their valuation.

The first of these, by not correctly identifying the property i.e. 2 x 3 bed units plus 1 x 2 bed unit versus their 3 x 3 bed units. This mistake on its own would lead to overvaluation.

The analysis by Valuer D of their sales evidence was inadequate. This analysis was only on the per unit basis, of which one property was incorrectly analysed. There was no income analysis to determine gross or net yields, yet Valuer D states in their report *"The most appropriate method is the Investment Approach..."*. Valuer D then goes on to show a gross income of \$20,280 per annum capitalised at 7.5% to provide a valuation of \$270,000.

The second approach of Valuer D was to apply sales *"Analysed on a per m<sup>2</sup> rate"*. No valuation calculation however was shown, nor had the sales been analysed in the report on this basis.

Valuer D stated in their report that they had used a third approach, this being Depreciated Replacement Cost, in which the depreciated value of improvements is added to the land. Valuer D acknowledged in the report that these figures were not shown. The valuation apportionment between land and improvements in the Valuation section on page one of the

report was not based on any land sales evidence. Indeed, there is no evidence that this Depreciation Replacement Cost Approach was considered by Valuer D.

In weighing up the report of Valuer D with their sales evidence, valuation methodology and understanding of the market as opposed to the two witnesses, the Board concludes first, that the charge of gross over valuation has been proven to the required standard, and further there was a serious departure from acceptable standards by Valuer D.

## **DISCIPLINARY SANCTION**

In King v Valuer General, the Board of Appeal held that the Valuers Registration Board should adopt a two-step process in disciplinary matters and ask itself:

*Whether the matters alleged in the disciplinary charge have been established to the point that there has been a departure from acceptable standards; and then, quite separately-*

*Whether that departure has been significant enough to warrant disciplinary sanction for the purposes of discipline.*

Kirby P affirmed in Pillai that the primary purpose of sanctions for misconduct is not the punishment of the practitioner, but the protection of the public.

The public interest involved in the disciplinary process was also the subject of consideration by the Supreme Court in Z v Dental Complaints Assessment Committee:

*The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.*

In a Valuer v Valuers Registration Board, Eichelbaum J referred to the common thread of scope and purpose of disciplinary procedures in relation to a professional body;

*Such provisions exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standard generally expected of them.....*

*Obviously and distinctly, it is in the public interest that in respect of such professions and callings, high standards of conduct should be maintained.*

Those decisions confirm that the use of sanctions to maintain requisite professional standards in the public interest is a primary consideration for disciplinary bodies.

The privilege that accompanies registration as a valuer is the trust that is placed on the valuation reports of registered valuers, especially by vendors of property, purchasers and lenders.

The Board of Inquiry has determined that a disciplinary sanction should be imposed on Valuer D.

The Board now invites submissions as to the sanction and costs. Counsel for the Valuer General to respond by 8 July 2013 and Valuer D by 29 July 2013.



Phillip Curnow  
Inquiry Chairperson