

VALUERS REGISTRATION BOARD

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

AND

IN THE MATTER OF charge under
Section 31(1)(c) of the Valuers Act 1948
against **Valuer N**

AND

A DECISION OF the Board of Inquiry of
the Valuers Registration Board

BOARD OF INQUIRY:

H J Puketapu (Inquiry Chairperson)
KR Taylor
ME Gamby

COUNSEL:

Mr Tom Gilbert for the Valuer General
Ms Melissa Borcoski for Valuer N

DATE OF HEARING:

2 September 2013

ORAL DECISION:

2 September 2013

WRITTEN DECISION:

19 June 2014

COMPLAINT

On 7 October 2011, the complainant wrote to the Valuers Registration Board making a

The parties purportedly reached settlement with a new valuer representing the regional council at the below land values:

- Lot 1 \$1,780,425
- Lot 2 \$1,375,103

It is against this information that the complainant reasons Valuer N's valuation to be grossly inaccurate.

The complaint was forwarded to the Valuers Registration Board ("the Board") for investigation by the Valuer General in terms of Section 32 of the Valuers Act 1948.

INVESTIGATION AND AGREED SUMMARY OF FACTS

The Valuer General wrote to Valuer N on 14 December 2011 and 15 February 2012, advising them that he would be investigating a complaint concerning valuation reports prepared by them with respect to the two ground rental assessments for Lot 1 and Lot 2 as at 1 April 2008.

Valuer N provided a comprehensive response dated March 2012 generally refuting the claim. In setting out a background to this claim Valuer N confirms that the Property is encumbered by a "perpetual lease" with seven yearly reviews to market. The leases are for 21 years, but are perpetually renewable.

Valuer N commented that they have been engaged by the regional council since 2000 to provide independent valuation advice and various professional services. With respect to the Property, they note the "Ready Mix" site was generally level in contour, and that they were unaware of any major site works. This issue is of particular importance because the rent review assessment was to "exclude" any tenant improvements.

In carrying out their assessment of the Property in 2008, Valuer N acknowledges that they undertook a roadside inspection and relied upon their 2001 records held on file. They made no allowance for Lessee land development improvements.

Valuer N assessed the following values that were the basis of the fair annual rent proffered by the regional council.

| Lot 1 | Area (m2) | Value/m2 | Total Land Value | Annual Rental (6.5%) |
|-------|-----------|----------|------------------|----------------------|
| 1 | 39,565 | \$ 110 | \$ 4,352,150 | \$ 280,000 |
| 2 | 33,135 | \$ 105 | \$ 3,479,175 | \$ 225,000 |

Valuer N mentions in their valuation report to the regional council, a lease summary including (in part):

Permitted activities - As specified in the lease, the demised premises shall be used by the Lessee for the processing of sand, shingle, concrete mixing plant, and concrete products manufacture together with associated service facilities, and bulk storage of products associated with sand, shingle, cement, concrete and other concrete products. Additional uses are permitted with the consent of the Lessor.

Other - There is a resumption clause within the lease which allows for the Lessor to resume the land for mineral excavation/flood protection works. The ground rental is abated if land is resumed.

This lease and rental assessment is governed by the procedures laid out (sic) under the Public Bodies Leases Act 1981.

No Lessors improvements are included in the rental value.

The Board accepts that these clauses are restrictive and may impact on the assessment of a fair annual rent.

Copies of the valuation reports by Valuer 1 and Valuer 2 were requested by the Valuer General for the purpose of this investigation. The reports confirm:

Valuer 1

| Lot 1 | Area (m2) | Value/m2 | Total Land Value | Annual Rental (6.5%) |
|--------------|------------------|-----------------|-------------------------|-----------------------------|
| 1 | 39,565 | \$ 50.00 | \$ 1,978,000 | \$ 128,570 |
| 2 | 33,135 | \$ 45.00 | \$ 1,491,000 | \$ 96,915 |

The assessed annual rentals were further adjusted to reflect a "*number of specific limitations*", and an allowance of 20% was adopted. His final assessment of fair rent as at 1 April 2008 is as follows:

Lot 1 - \$102,856

Lot 2 - \$77,532

Valuer 2

| Lot 1 | Area (m2) | Value/m2 | Total Land Value | Annual Rental (6.5%) adopt |
|--------------|------------------|-----------------|-------------------------|---------------------------------------|
| 1 | 39,565 | \$ 51.00 | \$ 2,015,000 | \$ 130,000 |
| 2 | 33,135 | \$ 50.00 | \$ 1,670,000 | \$ 105,000 |

Similar to Valuer 1, Valuer 2 also made further allowance for the "Restrictive Lease Covenants" concluding that a discount for the resumption clause of 10% should be applied.

Valuer 1's final assessment of fair rent is as follows:

Lot 1 - \$117,000

Lot2 - \$94,500

Both Valuer 1 and Valuer 2 also made reference in their respective reports to a reasonable amount of fill over the site. Both valuers further commented that their assessments exclude this fill and assumes the land in its original state.

Accordingly, the complainant did not accept the fair annual rental as assessed by Valuer N and sought the matter be determined by arbitration pursuant to the Public Bodies Lease Act 1969.

The process as outlined in the agreed summary of facts from this point required the parties to appoint two persons as arbitrators, who prior to commencing their valuation, appoint an umpire.

Valuer 1 was appointed to represent the Lessee, and the regional council appointed Valuer 3. Valuer N agreed to step back from this matter, as there was some concern of bias, outside of this particular case.

Agreement was reached between the parties on the basis that the land was valued prior to deducting a value for Lessees improvements. This is summarised as follows:

| Lot 1 | Area (m2) | Value/m2 | Total Land Value |
|------------------|------------------|-----------------|-------------------------|
| 1 | 39,565 | \$ 57.50 | \$ 2,274,988 |
| 2 | 33,135 | \$ 54.00 | \$ 1,789,290 |

An adjustment was made for Lessees improvements and an annual rental yield of 6.15% was adopted.

While there were differing views by the valuers as to the methodologies adopted in the assessment of a fair market rent, pertinent to the complaint was the assessment of the underlying land value that Valuer N had ascribed to the Property.

The Board confirmed that an Inquiry be held.

Notice in writing was forwarded to Valuer N on 11 June 2013 of the intention of the Board to hold an inquiry, and of the time and place of the hearing, and the nature of the charges.

THE CHARGES

Valuer N faces two charges under s 31(1)(c) of the Valuers Act:

- (1) 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 dated 21 May 2008 with respect to Lot 1 you grossly over-valued the said property, and consequently, the fair annual rent.

- (2) 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 dated 21 May 2008 with respect Lot 2 you grossly over-valued the said property, and consequently, the fair annual rent.

The hearing was set down for 2 September 2013.

A pre-hearing telephone conference was held on 13 August 2013 between the Board of Inquiry, Counsel for the Valuer General (Mr Gilbert) and Counsel for Valuer N (Ms Borcoski) to confirm hearing day procedures.

The Board of Inquiry was advised by Ms Borcoski that Valuer N would plead guilty to the charges and that Counsel would be submitting pleas in mitigation and defence as to penalty and costs.

THE HEARING AND FINDINGS

At the opening of the hearing, the two charges were read.

Valuer N admitted these charges.

PENALTY AND COSTS

Penalty

Mr Gilbert - Counsel for the Valuer General, submitted that there were no methodological errors, material to the charges. The overvaluation has simply resulted from Valuer N's use and weighting of differing comparable sales. The Board confirms that the over valuation of the underlying land value was the basis of the complaint.

At a little under twice what the other valuers arrived at, Mr Gilbert submits this is a serious example of over valuation. While Ms Borcoski's - Counsel for Valuer N, view is that something more than a high valuation is required for the charges to succeed.

The Board shares a view that Valuer N's assessment reaches a sufficient threshold to question what is high and what is gross in the context of either a percentage basis, or quantum. Every complaint for over valuation, and the extent to which that valuation is high or gross, will be assessed on the evidence presented.

Mr Gilbert further submits that the Lessee became involved in a protracted legal battle to achieve a fair annual rent. The Board agrees with Ms Borcoski in this regard, in that there is insufficient evidence other than a letter from the complainant to confirm this is the case.

The Board heard details of Valuer N's background and acknowledges their early guilty plea. The letter of support from the regional council goes some way to highlighting the quality of work they have undertaken for this client.

The Board concurs with Mr Gilbert, that a strike off or suspension is not warranted in this case, but that a reprimand and a fine is justified.

Costs

Inevitably, costs to prepare for a hearing before the Board are substantial whether or not a matter is defended or a guilty plea is entered. These costs increase over time and, if a valuer is found to be guilty of a charge, to the extent that they are not paid for by the valuer, fall back to the profession.

The costs in this matter fall into 3 categories:

- The investigation phase/Valuer Generals costs and prosecution \$9,688.75
- Legal costs (as presented at the hearing) \$12,476.21
- Board of Inquiry costs \$ 4,882.05

Total including GST \$27,047.01

The Board has considered Counsels submission as to costs, and particular reference was made to *Cooray v Preliminary Proceedings Committee* (HC, Wellington, AP 23/94, 14 September 1995), in which it was said:

"It would appear from the cases before the Court that the Council in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order of costs and has in individual cases where it has considered it justified gone beyond that figure. In other cases, where it has considered that such an order is not justified because of the circumstances of the case where the practitioner pleaded guilty and lesser orders were made, the Council has made a downward adjustment".

As to whether the costs in the first instance are reasonable, the Board heard from Ms Borcoski that perhaps the valuer witness costs (approximately \$8,200) should not be met by Valuer N, as their briefs of evidence were not required. Mr Gilbert submitted that a briefing for the witness valuers had to take place 10 weeks before the hearing (set down for 2 September 2013). That would have been 24 June 2013 (this concurs with his oral submission that he briefed the valuers at the end of June). The valuers completed their briefs of evidence in early/mid July.

Notice of the charges was forwarded to Valuer N on 11 June 2013 and they did not admit to the charges until the telephone conference with the Board on 13 August 2013. Up to this point, it must be said that Valuer N was going to plead not guilty.

The Board upholds this particular cost as being reasonable. Legal costs and the Board of Inquiry costs were not challenged.

In giving weight to recent determinations of this Board and the evidence before it as to costs, the Board confirms a reasonable cost of **\$27,047.01**. The conventional starting point in any award is 50% of the total reasonable cost, with discretion then to be exercised, increasing or decreasing that amount depending on the particular circumstances of the case.

The Board further upholds Counsels view that this matter is not one whereby methodology is an issue but rather the quality of Valuer N's information. This has principally led to Valuer N's assessment of a high underlying land value.

Valuer N has shown, in the Board's view, a willingness to cooperate in this hearing by appearing before the Board in person. While Valuer N did not enter a guilty plea until the investigations by the Valuer General were completed, the Board considers this prevented further hearing costs had the matter been defended.

The Board has an appreciation of Valuer N's contribution to the property profession in the subject region and acknowledges Valuer N's unblemished professional record.

A reference from the regional council at least sees them being held in high regard by their client.

The Board sees no reason to adjust 50% of total reasonable costs. Valuer N is ordered to make a contribution of \$13,523.50 being 50% of the total reasonable cost of \$27,047.01.

ORAL DECISION

At the conclusion of the hearing the Board issued its oral decision as follows:

Valuer N has pleaded guilty to two charges of over-valuation of

- *Lot 1, and*
- *Lot 2.*

The Valuers Registration Board has heard penalty and costs submissions by Counsel for the Valuer General and Counsel for Valuer N. The Board can-not ignore the significant margin of difference between Valuer N's assessment of the underlying land value and that of Valuer 2's figure as shown at paragraph 7 of the agreed statement of facts. Of course the Arbitration stands on its own.

So with reference to paragraph's 5, 7 and 14 (of the summary of facts), these have been helpful to confirm this significant margin of difference.

The Board agrees that as Valuer 1 took a different approach, no direct comparison can be made with Valuer N's assessment.

The Board further confirms that the matter is not one whereby methodology is an issue but, the Board is concerned as to the quality of Valuer N's information.

Valuer N has shown, in the Board's view, a willingness to cooperate in this hearing, as evidenced by their appearance today. The Board acknowledges that Valuer N has voluntarily contributed to the local profession.

Valuer N has an unblemished record and a reference from the regional council at least sees them being held in high regard by their client.

To the Penalty - the Board does not consider that the ultimate penalties are relevant in this case and therefore agrees with the submissions of Counsel. Within the range of

penalties the Board consider are appropriate, the Board determines that Valuer N be reprimanded and imposes a fine of \$5,000.

Costs are reserved in this oral decision.

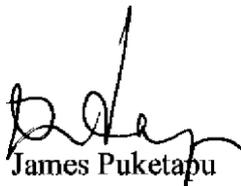
Both penalty and costs will be farther expanded upon in our written decision to follow.

That is the decision of the Board.

Summary of Penalty and Costs

The Board confirms its oral decision that Valuer N be reprimanded and imposes a fine of **\$5,000.**

The Board reserved the matter of final costs. Following consideration of all the costs presented, the Board orders that Valuer N pay **\$13,523.50 including GST** of the total costs properly incurred of \$27,047.01.



James Puketapu

Inquiry Chairperson

19 June 2014