

**VALUERS REGISTRATION BOARD**

**IN THE MATTER OF** the Valuers Act

1948 (the Act)

**AND**

**IN THE MATTER OF** Charges under

Section 31(1)(c) of the Act

**AND**

**IN THE MATTER OF** a complaint against

Valuer Z

**BOARD OF INQUIRY:**

M E L Gamby (Inquiry Chairperson)

H J Puketapu

P A Curnow

**COUNSEL:**

Mr T Gilbert and Ms S Carter for the Valuer General

Ms J Keating for Valuer Z

**DATE OF HEARING:**

8 July 2013

**DATE OF DECISION:**

8 July 2013

**CONFIRMED AND COSTS:**

23 August 2013

### **The Complaint**

A complaint was received from the complainant on behalf of a Trust concerning a valuation prepared by Valuer Z. The evidence before the Board was that one of the Trustees was contacted by a friend of hers, who said that she would like to make an offer to the Trust to purchase the subject property. The property had become vacant after a long-term tenant had left and the trustees had resolved to sell it rather than renting it again on a short-term basis.

Valuer Z was verbally requested by the interested party to value the Property for finance purposes and to address their report to Company 1. In their report dated 3 December 2010, Valuer Z valued the site at \$3,000 (date of inspection being 1 December 2010) and put no value on the dwelling as they considered it had no value.

In the same report, Valuer Z had also assessed a current market value of an adjoining vacant site, at \$12,000.

The two values were prepared independently, and it was upon this basis the Valuer General proceeded with his investigation.

A purchase of the Property did not eventuate as Company 1 was not prepared to loan funds. Instead, the interested party bought a nearby property for \$70,000 which the Trust considered was in a worst state of repair than the Trust property.

The Trust was concerned that it had lost a prospective purchaser and instructed Valuer 1, to prepare a valuation, which he did on 10 December 2010, concluding a value of \$62,000 for the subject property of which the improvements comprised approximately \$56,000 and the land value \$6,000.

The Valuer General instructed two valuers, Valuer 2 and Valuer 3 to prepare valuations as at 1 December 2010, taking into account only such matters as would have been available to a valuer preparing a valuation at the time. Valuer 2 assessed a value of \$55,000 including a land value of \$10,000. Valuer 3 assessed a valuation of \$65,000 including a land value of \$9,000.

The Valuers Registration Board considered the investigation file and referred the matter to an inquiry. The inquiry was set down for 8 July 2013.

### **The Charges**

There were two charges brought against Valuer Z as follows:

I. 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 3 December 2010 with respect to a property, you grossly under-valued the said property.

2. Section 31(I)(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 3 December 2010 with respect to a property, you failed to provide sufficient information to permit those who read and rely on the report to fully understand its data, reasoning, analyses and conclusions in breach of International Valuation Standard 1 Clause 5 Statement of Standards.

The two charges relating to a gross under-valuation and breach of standards were to be heard based on the evidence of the three valuers who had prepared valuations of the property, at or about the time of Valuer Z's valuation.

The complainant prepared an affidavit as secretary of the Trust. The complainant's affidavit recorded that the property remained on the market and eventually sold to at a price of \$41,400.

### **Summary of Valuations**

As a useful reference point, below are the comparative valuations of the subject property prepared by the four registered valuers who undertook assessments on the property.

<b><u>Particulars</u></b>	<b>Valuer Z</b>	Valuer 1	Valuer 2	Valuer 3
Date	1/12/20	10/12/201	1/12/2010 (retrospective)	1/12/2010 (retrospective)
Land Value	\$3000	\$6000	\$10,000	\$9000
Value of Improvements	Nil	\$56,000	\$45,000	\$56,000
<b>Total Value</b>	\$3000	\$62,000	\$55,000	\$65,000

In submissions, Mr Gilbert for the Valuer General stressed the percentage variance between the values of Valuer Z and those of the other valuers. The Board found this unhelpful in a situation where values, as in this case, are very low in any event and the major issue related to the value of the improvements, if any. Valuer Z considered they had no value at all, whereas the other three valuers considered the improvements had a substantial value ranging between \$45,000 and \$56,000.

The Board also noted the differences in land value with Valuer Z at \$3,000 whereas the other valuers' estimates ranged from \$6,000 to \$10,000.

On the evidence before the Board it was inescapable that Valuer Z's value was out of line. Had the matter proceeded to a defended hearing an explanation would have been required to justify a level of value that could, in any way, relate to a market value definition in accordance with International Valuation Standards and Property Institute New Zealand Guidance Notes. In the event, Valuer Z pleaded guilty to both charges and, therefore, the only matters for the consideration of the Board were:

1. What was the appropriate penalty in accordance with the Act, and
2. What costs should properly be payable by Valuer Z.

### **Penalty Considerations**

Counsel for the Valuer General considered there were aggravating features and these fell into two categories, one relating to the gross under-valuation, and the other relating to the non-observance of standards.

The Board having already considered the matter of variations in the value estimates on a "percentage" basis concluded that the major issue was not the variations in value but Valuer Z's opinion that the dwelling had no value at all. Valuer Z's opinions both for the dwelling and the land values were at odds with the valuations prepared by all of the other registered valuers. This, the Board concluded, demonstrated a lapse of judgement on their part and how market value should be determined.

Properly, in their favour, Valuer Z referred in their report to the lack of an electricity supply and the state of the premises. However, the Board heard in submissions that Valuer Z sought to distinguish their valuation as an "as is" value, being somehow different to a standard definition of "market value". The words in their report were "as is most probable current market value". There is no definition of "as is most probable current market value" separate to a consideration of "market value". In this respect the submission on their behalf was not of assistance to the Board.

It was submitted by Counsel for Valuer Z that Valuer Z could not locate sales of dwellings in a similar condition. Valuer Z noted in their report that the property was "unoccupied" and "uninhabitable". That may have been a proper explanation if, in fact, the property was "uninhabitable" although it does not address the very low land value relative to the other valuers.

There was no evidence before the Board that the property was uninhabitable although it was in a poor state of repair, with the electricity disconnected and the grounds overgrown at the time they inspected. If Valuer Z, as they appeared to be, was firmly of the view that the property was uninhabitable then they should have advised the instructing party to obtain details that would confirm its state. Alternatively, at the very least, they could have valued the property on a habitable basis and obtained information, if they could, on the cost that would be required to bring it up to a suitable state, including the cost of an electricity reconnection.

The other three registered valuers in their reports referred to the dwelling's poor condition but none of the three considered the property uninhabitable. There was an error of judgement by Valuer Z in that respect. Further, the affidavit of the complainant included, as attachment "D", a certificate of verification as to the electrical installation on the property. That certification was dated 13 November 2009, approximately one year earlier, when someone else was interested in buying the property but, in the event, did not proceed with a conditional sale and purchase agreement at \$50,000. Although there was no electrical certification at the date of Valuer Z's report, no evidence was produced to the Board that contradicted the suitability of the property for electricity reconnection. The property continued to be unoccupied and sold in poor condition with little or no maintenance in 2011. It would be fair to say that the property had a chequered selling record history.

Valuer Z in their reply to the Valuer General stated: "I consider the complaint to be frivolous and vexatious". Valuer Z continued to maintain this position up to a month or so before the date set for the hearing, advising that they would defend any charges against them. In the Board's opinion this shows a further lack of judgement on their part and an unwillingness to carefully consider their position until, faced with the substantial evidence of three valuers, they acknowledged that it would be impossible for them to defend the charges and, prior to the hearing, entered a guilty plea via Counsel.

Counsel for the Valuer General submitted that the matter was serious and warranted both a reprimand and a fine towards the top end of the \$10,000 maximum available. In the Board's opinion the submission for the Valuer General did not fairly reflect the mitigating features acknowledged by both Counsel. The Board heard that Valuer Z had not faced a charge at any time in their previous 29 years practising as a registered valuer and, although somewhat late in the piece, pleaded guilty to the charges before the hearing. Counsel for Valuer Z submitted that a reprimand alone would be an entirely suitable and appropriate sanction.

A number of the "mitigation" circumstances referred to by Counsel for Valuer Z were not accepted, the only truly relevant matters being Valuer Z's long record without a complaint and, in the end, their decision to plead guilty.

One of the purposes of Board decisions is to be of assistance to valuers, to ensure that they meet the highest standards of the New Zealand Institute of Valuers. In this respect, Valuer Z's report did not, in a number of ways, meet an acceptable level of standards and, therefore, it is appropriate to refer to matters that they should have considered when undertaking their valuations.

Valuer Z did not comply with the International Valuations Standards and made no mention of them in their report. Their reference to standards was unhelpful in the following respects:

1. The report did not explain why the dwelling added no value to the land other than to say it was " ... unoccupied and uninhabitable in its present state" and " ... showed visual maintenance requirements which should be provided with a detailed builder's report."
2. The report failed to consider other properties that would require repair, and/or indicate what the value could have been were it to be repaired, making a recommendation as to how that should be achieved; and
3. Failed to reference sales evidence for improved properties and how these sales might be adjusted to relate to the subject. Valuer Z provided only vacant land sales.

A further matter that concerned the Board was a submission on behalf of Valuer Z that a valuation on an "as is" basis is in some way different to a valuation prepared in accordance with the definition under IVS 1 at Clause 3.4; such valuation to be based on *"the most probable use of a property, which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the property being valued"*. None of the other valuers who prepared reports assessed a value based on an "as is" definition being less than market value which therefore in this matter appeared to be peculiar to the approach of Valuer Z. As Valuer Z pleaded guilty and did not give evidence, the Board is none the wiser as to what Valuer Z meant by "as is most probable current market value" and how that could be distinguished from "market value".

Whether by a display of over-caution or poor judgement, not appreciating the true value of the property, Valuer Z grossly under-valued the property. This may, in the opinion of the Trust, have had consequences in terms of the possible sale of the property but it is not for the Board to test the seriousness of those consequences other than to note the chequered attempts to sell the property since 2008. A series of agreements were entered into from 2008 through to 2009 at prices between \$50,000 and \$80,500. All were conditional and all failed for one reason or another. It was only the sale in 2011, 12 months after the event, that gives any certainty around value.

This matter is clearly not at the most serious end of offending. There is no suggestion that Valuer Z should face either deregistration or a suspension. After due consideration the Board determined that Valuer Z be reprimanded and pay a fine of \$5,000 inclusive of GST.

### **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. That said, the Board notes that Valuer Z has been contributing to all of the costs of the Board for a period of 29 years and this is their first offence.

Both Counsel accept that the starting point for consideration of costs is 50% and then, to the extent that matters are aggravated or mitigated, that percentage can be varied.

Counsel for the Valuer General submitted that the appropriate percentage is 60% having regard to the aggravating factors in this case. The Board does not accept that there were aggravating factors to the extent that they were not offset by the mitigating factors of a guilty plea and a lack of any other complaint over a period of 29 years. The starting point is therefore 50%.

Counsel for Valuer Z referred to a number of matters for the Board to consider and the extent to which the Board has awarded costs in the past. However, each of these turns on its specific facts.

Valuer Z, for reasons unknown to the Board, initially considered the complaint frivolous and vexatious. They intended to defend the complaint up to a time close to the hearing. It was only on the appointment of their Counsel and a reconsideration of the file that they elected to change their position. That is to their credit.

The costs fall into 4 categories:

• The investigation phase	\$ 6,718.25
• The Valuer General's staff cost and briefing valuers	\$ 6,917.48
• Legal costs (as presented at the hearing)	\$21,548.38
• Board of Inquiry costs	\$ <u>4,440.65</u>
Total	<u>\$39,624.76</u>

including GST

The Board considers that some costs, notably those relating to the Inquiry Board's costs of \$4,440.65, are overstated and reduces that sum to \$3,255.85.

With respect to the Valuer General's costs, the figure relating to the costs of Valuer 1 are out of line with those of the other two valuers. Unlike the other valuers Valuer 1 is resident close to the subject property, and should have had the least amount of research to undertake with virtually no travel costs. After a consideration of those costs the Board has concluded that the appropriate Valuer General costs for consideration are \$11,115.25.

With respect to the legal costs, the Board called for additional detail, noting that a bald statement that legal costs are \$21,548.38 is not acceptable to the Board.

Counsel for the Valuer General filed a memorandum of legal fees which totalled \$21,634.69 including GST. Those fees, properly, did not include the time of Junior Counsel and were itemised on an hourly basis. In the Board's opinion they are appropriate notwithstanding they appear to be relatively high for what amounted to a relatively simple matter.

The costs that the Board is prepared to consider total \$36,005.79 as follows:

Board of Inquiry costs	\$ 3,255.85
Valuer General's costs including witnesses	\$11,115.25
Legal costs	<u>\$21,634.69</u>
Total	<u>\$36,005.79</u> incl GST

50% of those costs amount to \$18,002.89.

Costs are not intended to be a punishment. Equally, costs increase as matters proceed closer to a hearing.

In this case, had Valuer Z determined that they would plead guilty at a far earlier stage, a large proportion of those costs would not have been incurred.

Accordingly, the Board does not accept the submission of Counsel for Valuer Z that the costs should be as low as \$5,000 just as it is not accepted that there are aggravating features that would warrant an award of costs in the region of \$21,600.

On balance, and taking all factors into account, the Board considers that an appropriate award of costs is \$14,500. This reflects around 40% of the costs that were properly incurred, or a little less based on actual costs. Such an award acknowledges the mitigating factors in this case.

### **Summary of Penalty and Costs**

The Board confirms its decision at the hearing that Valuer Z be reprimanded and fined \$5,000 including GST.

The Board reserved the matter of costs. Following receipt of submissions and the receipt of an itemised Memorandum of Costs for legal fees, and a consideration of all the costs presented, the Board has determined that Valuer Z pay \$14,500 including GST of the total costs properly incurred of \$36,005.79.



**Evan Gamby**

Inquiry Chairperson

23 August 2013