

VALUERS REGISTRATION BOARD

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

AND

IN THE MATTER OF charges
under Section 31(1)(c) of the
Valuers Act 1948 against
"VALUER A"

BOARD OF INQUIRY:

K R Taylor (Inquiry Chairperson)
M E L Gamby
P A Curnow

COUNSEL:

K Muller for the
Valuer General M
Armistead for Valuer
A

DATE OF HEARING:

5 March 2012

DATE OF WRITTEN DECISION:

15 October 2012

THE COMPLAINT

A letter of complaint was received by The Registrar of the Valuers Registration Board from the complainants. The complaint referred to a valuation of a rural property.

The complainants advised that Valuer A was engaged by the purchaser and provided a valuation dated 15 June 2006. The valuation made a number of criticisms of the complainants. In particular, it stated several times that the farm had been grossly mismanaged and that the complainants had attempted to mislead prospective purchasers. Their conclusion was that the farm had been set up to achieve a high sale price rather than to be run efficiently as a viable business.

The valuation was used to support a claim for misrepresentation made by the purchaser.

This claim has since been settled. However, the complainants believe that Valuer A has acted in a manner which was 'improper, unethical or incompetent' as those terms are set out in Sections 31 of the Valuers Act 1948. They believe Valuer A is unfit to be registered and make this complaint against them.

The matter was initially investigated by Mr KE Parker on behalf of the Professional Practices Committee of the New Zealand Institute of Valuers. The file was subsequently referred to the Valuer General to conclude the investigation. The initial report from the Investigator was received by the Registration Board on 8 June 2009. In his report the investigator advised that in a written response Valuer A advised that they had done a professional job for their clients. Valuer A advised that they were not farmers and had entered into a contract to purchase the property as a going concern. They had engaged them as they had previously advised them on a number of prospective farm purchases. Valuer A advised that they were very satisfied with the report that they had provided them. They advised that their clients did not proceed with the purchase and that a claim against the complainants for misrepresentation was settled out of court.

Valuer A further advised that they practiced as a farm supervisor and valuer when they were running their own farm property while setting up their current company. Valuer A advised that they have a hands on feel of how well a farm is managed and how good the livestock are.

The Valuer General subsequently reported to the Board on 28 June 2010 in particular advising that he had obtained a report by Valuer 1 in relation to the professional conduct of Valuer A. Valuer 1 identified himself as a Fellow of the New Zealand Institute of Valuers who was registered as a valuer in 1972. He identified the relevant standards and Code of Ethics under which Valuer A was required to operate in 2005.

The Board notes that the quantum of the valuation is not at question in this complaint.

THE CHARGES

- (1) Section 31(1)(c) of the Valuers Act 1948 and the New Zealand Institute of Valuers Code of Ethics:

That you have been guilty of such unethical 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 preparing a valuation report dated 15 June 2006, with respect to a property, you breached the requirements of Clause 1.1 of the Code of Ethics in that you failed to practice your profession with devotion to the high ideals of integrity, honour and courtesy.

- (2) Section 31(1)(c) of the Valuers Act 1948 and the New Zealand Institute of Valuers Code of Ethics:

That you have been guilty of such unethical 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 preparing a valuation report dated 15 June 2006, with respect to a property, you breached the requirements of Clause 1.5 of the Code of Ethics in that you failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of statements, reports and certificates.

- (3) Section 31(1)(c) of the Valuers Act 1948 and the New Zealand Institute of Valuers Code of Ethics:

That you have been guilty of such unethical 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 preparing a valuation report dated 15 June 2006, with respect to a property you breached the requirements of Clause 1.6 of the Code of Ethics in that preparing a valuation of real property, or providing an opinion on a real estate matter your advice was not prepared to the highest standard of competency nor rendered only after having the property ascertained and weighted the facts.

Valuer A admitted all three charges.

The annual practicing certificate details for Valuer A were admitted by consent. The Board notes that Valuer A has been registered as a Valuer since 26 March 1969 and they have held an annual practicing certificate since records commenced in 1990.

Valuer A was a Registered Valuer holding an annual practicing certificate at the date of the subject valuation.

BACKGROUND

As Valuer A had indicated that they would be entering a guilty plea prior to the commencement of the Hearing, Counsel had advised that they would not be calling witnesses, therefore not producing briefs of evidence from any witnesses. The Board was advised that the procedure would relate to the information contained in the bundle previously provided to the Board and the Defence. This included the letter of complaint accompanied by the valuation report prepared by Valuer A. The valuation report held in the bundle did not include all the appendix information referred to. This information was provided by Valuer A at the Hearing however as it was not part of the original investigation it has not been given significant weight by the Board. The written

response from Valuer A in relation to the complaint was also provided.

The supplementary report provided by the Valuer General which formed part of the bundle was also provided. This included an investigation by Valuer 1 in relation to the conduct of Valuer A.

While subsequent statements had been provided to the Registrar, these reports were not considered by the Board as the agreement between Counsels specifically excluded this information. The admittance of this information would have required the witnesses to be present and subject to cross examination.

NON-PUBLICATION APPLICATION

There is no specific statutory authority power for the Board to prohibit publication of the name of the valuer or part of the proceedings. The Board has, in the past, been advised that it does not have such a power. At the commencement of the Hearing the Board raised this matter and invited an application in the event that any party considered that the Board has more extensive powers than those outlined in the Act. Counsel for Valuer A took up the offer and made an application for non-publication which was also interchangeably described as an application for name suppression. The Board heard submissions by Counsel for Valuer A and the Valuer General.

The Board has previously considered a similar application in the matter of "Q" and ordered interim name suppression and non-publication. The Board has the right to regulate its procedure under Section 6 of the Valuers Act 1948. This right is not dissimilar to that applicable under the nursing legislation. It was confirmed by the High Court that it is within the powers of a Board where no express powers are provided in the Act, to order name suppression and non-publication.

Matters to be taken into account when considering such an application are:

- The public interest in the matter
- The transparency of the process
- Education and informing the public and the profession
- Privacy of the Valuer
- Justice to be done in public
- The interests of the Valuer

Counsel for Valuer A advised the Board that Valuer A had been a Valuer for 46 years and had not previously faced any complaints before the Board. She further advised that Valuer A did not have any criminal convictions. She submitted that the nature of the charges was that the complainants were the purchasers of the farm who are not their clients and that Valuer A had not in fact received any complaints from their clients. She advised that the investigation process had made it difficult for Valuer A in dealing with the complaint, not least because their report was completed six years previously and the complaint was raised a couple of years after that. She finally submitted that the prejudice to Valuer A would outweigh any benefit to the public from having their name publicised and available.

Counsel for the Valuer General advised that even though the Courts who have an express power to grant name suppression understand that it is to be used sparingly because of the right to freedom of expression in the New Zealand Bill of Rights Act, though there is obviously also a public interest in proceedings of this kind. He advised that registration as a valuer is a privilege and if they face disciplinary action there is no reason why their name should be suppressed.

Having carefully considered the above, the submissions for Valuer A and the representation for the Valuer General, the Board ordered interim name suppression until such time as its decision was made at which time it would consider a further application, if made. The Board noted that the order applied to any member of the press or other party attending the Hearing. The Board would require any such person to adhere to both non-publication and interim name suppression until the Board's decision was final and the relevant statutory process had been concluded.

EVIDENCE FOR THE VALUER GENERAL

Counsel for the Valuer General provided a written opening submission. In this submission Ms Muller advised of four charges, however the Board notes that the fourth of these charges had been withdrawn and has not been referred to.

Ms Muller outlined the complaint as follows:

The complainants are the owners of the subject property. The letter of complaint says that the report made a number of criticisms of them. In particular, it stated several times that the farm had been grossly mismanaged and that they had attempted to mislead prospective purchasers. The Report concluded that the farm had been set up to achieve a high selling price rather than be run as a viable business. The Report was used to support a claim for misrepresentation by the purchaser of the farm, which was subsequently settled.

The complainants were surprised and distressed at the tone and aggressive stance taken by Valuer A. They considered that they had not acted in a professional and appropriate manner, and that the stance they took was not supported on any reasoned basis.

By way of introduction Counsel provided a background to the subject property. At the time of valuation it consisted of 1,400 hectares of freehold land, plus 80 hectares leased land (40 hectares of which was grazing land) and a lease of 600 hectares, which was a dry cow block. In the 2004/2005 season the milking platform was 800 hectares plus a further 190 hectares which could be used in a cut and carry operation for once a day milking.

It was advised that the complainants had operated the property as a dairy farm since 1996 and in 2004 they placed the property on the market. It was indicated that the complainants were seeking a premium over any valuation for the property and were asking a purchaser to pay for the future potential of the property. They did not expect to sell it to a dairy farmer, but rather to an offshore buyer or person who might use it as a tourist operation, who might pay a premium.

In 2004 the complainants agreed to sell the land and the company, the dairy farm business to Company 1. The consideration was just under \$25,000,000 for the land and just over \$2.5 million for the business, both exclusive of GST. Company 1 accepted the complainant's suggested price without negotiation. The price was subject to due diligence but not a valuation. The purchaser confirmed the contract as unconditional and continued to have access to the farm and its records. The sale of the dairy herd and business assets were to settle in 2005.

The opening statement further advised that in the 2004/2005 milking season the property had commenced the season with 2,300 cows but then experienced a serious somatic cell count problem, which the complainants had never seen before. The cell count problem affected the projected production figured. The complainants advised Company 1 of this.

On 14-17 May 2005, Valuer A inspected the property on instructions from Company 1. Valuer A was told of the cell count problems. It is advised that Valuer A did not prepare any written valuation report based on this inspection.

On 1 June 2005 the settlement of the sale of the herd and business assets was due but did not proceed due to the purchaser's refusal to settle. The staff had arranged to leave the property in anticipation of the settlement, leaving the complainants with a full herd and no employees. In July and August 2005 the complainants disposed of the majority of the cows in the herd, most by sale and some by lease.

On 11-13 February 2006 Valuer A inspected the property again, this time on behalf of Company 2. There were some 945 cows in the herd, with numbers increasing. During the 2005/6 season the milking platform used increased to 500 hectares at most. Valuer A reported to Company 2 on 15 June 2006. In November 2006 Company 1 brought proceedings against the complainants and their company in relation to the sale of the subject property, claiming misrepresentation. Valuer A gave expert evidence for Company 1, attaching their report. The complainants became aware of the report at that time. These proceedings were subsequently settled.

Counsel then broke down the complaint into three areas:

1. Criticism of management practices on the subject property: in the report reference was made to a number of clauses in the report that indicated a criticism of the management of the property. This included statements such as 'the property has not been managed or operated in a normal good husbandry fashion with normal production carrying capacity parameters.' 'It has in my opinion been grossly mismanaged.' Based on this statement Valuer A considered it necessary to put aside actual farm production provided by the vendor and their agent and assessed the value of the property based on their own assessment of what an average efficient farmer would produce from the property in its present state. Additional statements related to suggesting that 'management was aimed at short term gains to the detriment of the milking cow herd.' 'On inspection it seemed the cow herd had been managed very poorly resulting in poor condition animals with very low production.' The report also indicted that, 'the herd was in such poor condition that a high number had to be culled, approximately 70% of the herd;'

The Board was advised that the complainants disputed these claims and that the reasons for the reduction in the cow herd was the result of the unexpected high somatic cell count problems experienced during the 2004/2005 season, and secondly that they had to de-stock the property due to lack of staff when Company 1 failed to take possession of the farm.

2. The second point raised by Counsel in response to the complaint was the attempt to mislead the purchaser. In their report Valuer A had alleged that the vendor of the property provided misleading information to them, both directly and in a Wrightson brochure, and was 'attempting to mislead prospective purchasers'. Valuer A states that various factors 'confirmed that the vendor and their agents were trying to hide the fact that the property needed additional development'.

The Board has found it necessary to refer to matters in the bundle in order to verify why the complainant considers these aspects to be incorrect and defamatory. In particular the information supplied at pages 91 through 99 of the bundle which represent in a response by the complainants to an affidavit prepared by Valuer A. The affidavit that is being cross referenced was not provided to the Board.

3. The third area on which the complaint relies is criticism of the vendor for failing to provide production information. In particular that information on production levels was not made available.

Again the Board has had to rely on the information at page 95 of the bundle which is a response by the complainant in relation to the provision of information where they state in their notes that no information was withheld.

Due to the agreement between the parties prior to the Hearing the Board has been unable to cross examine the complainants or Valuer A in relation to these matters.

As part of the investigation the Valuer General requested a report from Valuer 1, a registered valuer in relation to the aspects of the complaint. In the report Valuer 1 concludes that there were breaches of the Code of Ethics. Valuer 1 concluded "with regard to the then operative New Zealand Institute of Valuers Code of Ethics, there are significant short comings in the report particularly with regard to professional responsibility paragraphs; 1.1 in relation to honour and courtesy, 1.2 Upholding the Reputation of the Institute and abiding by all Laws, Statutes, Regulations and Rules relevant to the Professional Practice, 1.5 with regard to Preparation of Statements; Reports and Certificates and 1.7 with regard to Independence and Impartiality.;" The Board notes however that the charges were brought under Sections 1.1, 1.5 and 1.6 of the Code of Ethics and therefore can only apply Valuer 1's thoughts in regard to those sections.

The Board was unable to cross examine Valuer 1 in regard to his report.

EVIDENCE FOR THE DEFENCE

As Valuer A pleaded guilty to the charges no evidence in defence was brought before the Board. Valuer A did however provide a statement in mitigation.

Valuer A provided a background outlining their experience as a valuer noting that in a 46 year career they had worked in a variety of areas and had never been subject to a previous complaint. They further advised that they had provided significant service to the

profession and to associated organisations. Valuer A provided a background to the valuation request that had been made including a statement from their client as to the nature of the request.

Valuer A advised that the nature of their instructions required them to carry out several valuations of the subject property and the farm business and provide a detailed report on the farm management. In doing so they inspected the property on two separate occasions for several days each time and gathered a substantial amount of information which is referred to in the report and contained in the appendix to their valuation. This appendix includes various documents including numerous comparable sales which they analysed, the full Wrightsons brochure, numerous photos of the property, maps, titles and the lease. This appendix was not included with the valuation report provided in the bundle. This is a very substantial document and was tabled at the Hearing but was not entered into evidence. The Board however has considered this document and the information it contains but given limited weight in this decision.

In their statement of mitigation, Valuer A noted that their clients had not made a complaint about the report and were very happy with the service provided. They referred to a letter from their client which was attached to their submission.

Valuer A noted that their valuation report contained a substantial amount of information including current market valuations, going concern valuations, indicated market valuations and development expenditure information along with a due diligence farm management report. They do however observe in hindsight they would have been better providing a separate report dealing with the valuations and the farm management due diligence matters. They acknowledged that their 15 June 2006 valuation report suffered from far too much detail.

Once again Valuer A noted that they found it problematic to gain information from the vendor. As noted previously, in the information contained in the bundle the complainants have categorically denied this aspect. This became a point of concern at the Hearing and Counsel sought to debate the issue. It is however noted that the parties had agreed on aspects of fact and had chosen not to proceed to a defended Hearing. It was clear that both Valuer A and the complainants had a different view of what had happened and that this was unlikely to be clarified even if witnesses had been called as both parties had their own recollection of the circumstances.

Valuer A accepted that some of the wording they had used to describe the management should not have been included in the report and that this showed a lack of courtesy towards the complainants. They acknowledged that the use of this language in their report contravened the applicable practice standards and Code of Ethics when completing a valuation report. They expressed regret to the complainants for offence that they may have caused. Valuer A " further

acknowledged that they did not take the utmost care in completing their valuation report and that the report was not peer reviewed before release to their clients.

Valuer A concluded by advising that in light of this complaint they had changed their valuation practice and put in place processes which would prevent such an occurrence happening again. " Valuer A apologised to the Board for the standard of their report.

SUMMARY AND CONCLUSION

Valuer A has pleaded guilty to the three charges brought before the Board. Counsel for the Valuer General has provided a background to the nature of the charges and the failure to comply with the three provisions of the Valuers Code of Ethics. This presentation was somewhat disjointed, and the Board has had to rely on its own reading of the bundle in support of the statements made by Counsel. Valuer A has in their own words accepted that their report included statements which were not courteous to the complainant. They further acknowledged that their report was poorly structured and therefore failed to meet the requirements of a valuer.

Nonetheless it is clear from the evidence presented to the Board that this is an unusual lapse, for a valuer with a long history of service to the industry.

BOARD DECISION

In this case Valuer A has pleaded guilty to the three charges brought before the Board.

The guilty plea to all charges is accepted.

In considering whether or not a sanction is appropriate the Board has taken into account the decisions in the court cases referred to as Pillai and also King.

In the matter of '*Pillai v Messiter (No. 2)(1989) 16 NSWLR 197*', it was said that

'.. the statutory test [of professional misconduct] is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes deliberate departure from accepted standards or such negligence, as although not deliberate, to portray indifference and an abuse of privilege which accompanies the registration ...'

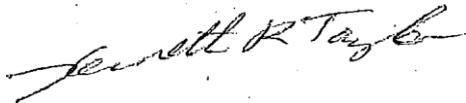
This gave rise to what is described in *King* as the two- step process as follows:

'i. whether the matters alleged in the disciplinary charge has been established to the point where there has been a departure from acceptable standards.;

ii. whether that departure has been significant enough to warrant a disciplinary sanction for the purpose of discipline'.

The Board is satisfied that the departure was deliberate and sufficiently serious to portray indifference and an abuse of privilege which accompanies registration as a valuer. The deliberate departure was by providing reports which had not been properly edited and by making derogatory statements about a third party. These departures did not maintain the highest standards expected of a valuer.

The Board has determined a disciplinary sanction is appropriate and, in determining the appropriate sanction, the Board invites submissions on penalty and costs by 9 November 2012 from the Valuer General and 23 November 2012 from Valuer A. The Board also seeks representation from Counsel on the continuation of non-publication, name suppression in relation to this Hearing.

A handwritten signature in black ink, appearing to read 'Kenneth Taylor', written in a cursive style.

Kenneth Taylor
Inquiry Chairperson
15 October 2012