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:	KR Taylor (Inquiry Chairperson) MEL Gamby PA Curnow
COUNSEL:	K Muller for the Valuer General M Armistead for Valuer A (Hearing) P Couldwell for Valuer A (Penalty costs and suppression)
DATE OF HEARING:	5 March 2012
DATE OF WRITTEN DECISION:	15 October 2012
DATE OF DECISION ON PENALTY COSTS AND SUPPRESSION:	20 February 2013

THE COMPLAINT

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

The complainant believes Valuer A acted in a manner which was 'improper, unethical or incompetent' as those terms are set out in Sections 31 of the Valuers Act 1948.

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

BOARD DECISION

The Board found Valuer A guilty on three charges in relation to the Code of Ethics and released its decision on 15 October 2012 and invited submissions on penalty and costs from the Valuer General by 9 November 2012 and from Valuer A by 23 November 2012. The Board also sought representation on the continuance of non-publication and name suppression.

SUBMISSIONS

Submissions for the Valuer General in relation to penalty and name suppression were received dated 9 November 2012 and a separate submission in relation to costs dated 13 November 2012.

Submissions for Valuer A in relation to penalty, costs and name suppression were received dated 26 November 2012.

SUMMARY OF FACTS

Valuer A was charged with three ethical breaches under Section 31(1) (c) of the Valuers Act 1948 and the New Zealand Institute of Valuers Code of Ethics. The charges related to the preparation of a report by Valuer A in relation to a dairy farm. Valuer A admitted all three charges and the Board determined that a sanction was appropriate.

The charges related to clauses 1.1, 1.5 and 1.6 of the Code of Ethics. Clause 1.1 of the Code of Ethics states:

"The first duty of each and every member is to render service to the member's client or the member's employer with absolute fidelity, and to practise their profession with devotion to high ideals of integrity, honour and courtesy, loyalty to the Institute, and in a spirit of fairness and goodwill to fellow members, employees and subordinates."

Clause 1.5 states:

"A member shall exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of statements, reports and certificates, as these constitute one of the most valuable assets of the profession, being relied upon by clients, employers, shareholders, investors, creditors and the public."

Clause 1.6 states:

When asked for a valuation of real property, or an opinion on a real estate matter, no member shall give an unconsidered answer. A member's counsel constitutes professional advice which must be prepared to the highest standards of competency and rendered only after having properly ascertained and weighed the facts."

Valuer A breached Clause 1.1 in that they failed to practice their profession with devotion to the high ideals of integrity, honour and courtesy. They breached Clause 1.5 by failing to exercise the utmost care and good faith to ensure the maintenance of the highest standards' in the preparation of statements, reports and certificates. They breached Clause 1.6 in preparing a valuation of real property or providing an opinion on a real estate matter in that their advice was not prepared to the highest standard of competency nor rendered only after having properly ascertained and weighted the facts.

SUBMISSIONS FOR THE VALUER. GENERAL

The Valuer General stressed in submissions that Valuer A admitted charges on reasonably serious matters in particular the derogatory comments directed at the owners of the property being valued, the complainants. The Valuer General notes the report involved breaches of three clauses of the Code of Ethics.

The submission refers to the fact that the Valuer General had withdrawn a fourth charge. The Board considers reference to· this to be irrelevant and inappropriate as the charge was not pursued in the hearing.

The Valuer General cites the decision of the Board noting that the Board had found the departure from acceptable standards was deliberate and sufficiently serious to portray indifference and an abuse of the privilege that accompanies registration as a valuer. The submission states that the departure was in providing reports that were not properly edited and making derogatory comments about third parties, the complainants. The comments made were serious allegations against the complainants.

The Valuer General notes that the complaint was dated 10 September 2008 and Valuer A was initially made aware of the complaint on 15 September 2008 with subsequent correspondence being dated 23 October 2008, 26 November 2008, 9 March 2009 and 9 April 2009. The submission notes that Valuer A made an initial response dated 3 June 2009 and made the assertion that the complaint was baseless and that they had done a professional job for their clients who had been very satisfied with what they had done for them. The Valuer General notes that Valuer A maintained their position of innocence even after charges were laid on 6 July 2011. Valuer A only indicated that they would admit three of the charges after they were served with the evidence in support of the charges immediately prior to the hearing.

The Valuer General submitted that the circumstances of the case were sufficiently serious for the Board to conclude that a reprimand would not be sufficient sanction. Conversely the Valuer General recognised that neither was the offending at the upper end of the scale so as to warrant the valuers removal from the register or a suspension. It was concluded that the position would be best met by the imposition of a fine.

The Valuer General notes that Valuer A had advised that their report contained both valuations and farm management due diligence. Irrespective of this the report itself clearly purported to be a valuation report and was signed by Valuer A as a registered valuer. At the hearing Valuer A acknowledged they had used inappropriate wording in their report and had shown a lack of courtesy to the complainants, contravening the acceptable practice standards and provisions of the Code of Ethics. Valuer A had expressed regret to the complainants for any inconvenience they may have caused and acknowledged they did not take the utmost care in completing the report and did not have it peer reviewed before release to their clients.

The Valuer General considered any mitigating circumstances in relation to the penalty and noted in particular:

- Valuer A noted that they had met the requirements of their client, however the Valuer General submitted that if a departure from a valuers professional duties can be excused

or mitigated because the valuers perceived role in serving their clients particular interests; owners would be less inclined to cooperate with the valuers as independent professionals with ethical obligations to the detriment of the profession and general public. In effect the Valuer General did not regard this as a mitigating factor.

- It was acknowledged that Valuer A has a long-standing registration as a valuer, has not previously appeared before the Board and has no criminal convictions. It was noted that the Board in its decision had found this to be an 'unusual lapse for a valuer with a long history of service to the industry'. The Valuer General accepted that this was a mitigating factor in that the offending would appear to be an anomaly.

- It was noted that Valuer A had submitted that at the hearing they were semi-retired, and they were working in their family valuation practice. Valuer A advised the Board that they had put in place practices that would prevent any such re-occurrence. The Valuer General did not acknowledge whether or not this was a mitigating factor.

- Delay was raised in mitigation. The Valuer General traces the history of the proceeding and does not accept that this is a true mitigating factor.

The Valuer General submitted that a penalty in this case should be in the order of a fine of $6,000· to $7,000 bearing in mind that the maximum fine the Board can impose is $10,000, Valuer A has not been shown to be fundamentally incompetent and Valuer A had admitted obvious and fundamental safeguards such as peer review.

As to costs the Valuer General noted that costs to date comprised $55,765.61. This is made up of:

Board costs:	$4,985.65
Valuer General's staff costs:	$2,077.18
Legal costs previously billed:	$30,250.53
Legal costs estimated:	$6,325.00
Expert witness costs:	$12,127.25
Total	**$55,765.61**

The Valuer General sought a contribution of 60% of actual costs, i.e. about $33,450.

The Valuer General noted that in spite of not pursuing a fourth disciplinary charge laid against Valuer A this would not have a significant effect on the costs incurred in the investigation and subsequent hearing.

The Valuer General also made submissions on the continuation of name suppression.

The submission reviewed the history of name suppression/non-publication in relation to this case including the unexpected initial application from Valuer A. The Valuer General noted some process issues directly in relation to name suppression and non-publication where a hearing was conducted in public.

The Valuer General reviewed an extensive array of case history relating to decisions on name suppression. In particular reliance was placed on the case Director of Proceedings vs Nursing Council of New Zealand providing information in relation to the power or otherwise of this Board to order nonpublication or name suppression. The Valuer General concluded that the Board had very limited powers in this regard and reliance on the provisions under Section 6 of the Valuers Act which enables the Board to 'regulate its procedure in such a manner as it sees fit' does not provide a general authority for a suppression.

The Valuer General also referred to *Guy vs Medical Council of New Zealand*, a series of cases involving the Bankers Trust and related case reviews.

The Valuer General concluded that if, contrary to the submission above, the Board considers that it has an implied power to make an order for name suppression, that power is very limited. This flows from the Bankers Trust judgement in the Full Court, in the cases in which the approach of the majority has been approved in connection with investigative examinations. In the case of private hearings before the Board it is a power; by necessary implication to take 'all reasonable steps which were necessary to secure a 'private', rather than a public hearing'. The precise scope of the power has not been examined but the case suggests it is effectively limited to (at the most) the time of the hearing and the drafting of the Board's decision, or (in the case of an investigative body) the duration of the investigation.

The Valuer General noted therefore that the relevant considerations were:

- Public interest in the board process being open and transparent.

- The need to ensure the disciplinary process is seen to be accountable

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- There is a public interest in knowing the name of the valuer found guilty of professional misconduct.

- The importance of freedom of expression, a right enshrined in section 14 of the New Zealand Bill of Rights Act 1990 is a public interest factor in and of itself. ·

- The extent to which other valuers may be unfairly impugned if the valuer's name is not published is also relevant.

- Against this, the interests of the subject on the inquiry can also "properly be considered". Baragwaneth J noted that, even in the courts, "orders of name suppression may be made, and in rare cases made permanent, where, for example, a disgraceful allegation is without foundation (when) it would be unfair to expose the victim to the added burden of publicity.

- The fact that this is a continuation of the name suppression ordered at the hearing in March 2012 should not give rise to any presumption that it should be continued.

- There is no evidence to support the claim that Valuer A's practice, or that of their family will be damaged, since measures have been put in place to avoid similar breaches in the future. Damage is more likely to occur to the practices in the subject area wrongly suspected of being the subject of the inquiry.

The Valuer General concluded that the application for name suppression should be refused.

SUBMISSIONS FOR VALUER A

Counsel for Valuer A reviewed the case to date and noted the range of penalties available to the Board. Counsel noted that the Board is not required to apply a sanction. Counsel also observed that the Board had previously held that the complaint process itself can be sufficient lesson or penalty.

Valuer A noted that the Valuer General sought a fine of $6,000 to $7,000.

Valuer A raised a number of submissions in mitigation that were considered relevant;

- They have been in practice as a valuer for 43 years. They have a long and unblemished record with no prior complaints, charges or other disciplinary action or notices (this is not in dispute).

- The Board itself also concluded that the current breaches were 'an unusual lapse for a valuer with a long history of service to the industry'.

- They have provided excellent service to the industry over their career. They have been
    - On industry committees
    - Chairman and Vice Chairman of a range of agricultural societies

- They intimated a guilty plea prior to the hearing and entered pleas to all three charges after they had finally received all of the evidence.

- Their breaches are at the less serious end of the scale. They have accepted that the comments made were inappropriate, discourteous and contravened the professional standards required from valuers. However, they submit they were not, included in the report for any ulterior motive or with any view to causing the complainants harm or loss. While their views were undoubtedly badly expressed, they were truly held and disclosed in the belief that a frank assessment of the state of the property and its management would be of benefit to their client. There is also no suggestion that the quantum of valuation reached was incorrect.

Valuer A further submitted that a number of factors were relevant to the Board's determination on sanction:

- They have expressed remorse and has sincerely apologised to the complainants for any offence caused by their report;

- They have suffered significant and ongoing stress as a result of this complaint and the protracted investigation process. The Valuer General has referred to delays. From Valuer A's perspective, the delay was not so much from the complainants, but from the Valuer General. It is also disingenuous (and in fact wrong) for the Valuer General to submit that Valuer A contributed in any way. Valuer A then outlines the sequence of events from the complaint to the hearing.

- The ongoing delays attributable solely to the Valuer General's conduct of the complaint and subsequent investigation and hearing have resulted in Valuer A suffering stress and anxiety in respect to this matter for more than four years. Valuer A is over 70 years old and this ongoing stress has had a significant impact on their health and wellbeing. They have suffered considerably throughout this process.

- Valuer A is especially stressed and anxious at the harm they may have inadvertently caused to their family, who have operated the valuation practice since 2004;

- Valuer A is now semi-retired and carries out only occasional work. They intend to retire shortly.

- Valuer A has ensured that processes are in place to prevent any other breach occurring. In particular all their valuations are thoroughly checked, peer reviewed, and they no longer combine their opinions on farm management with valuation reports.

- No other complaints have ever been made against Valuer A.

On this basis Valuer A submits that while in breach of the Code of Ethics and their professional obligations, their conduct is at the less serious end of the scale. They therefore conclude and draw attention to the fact that in less serious breaches, the Board has previously considered a reprimand to be sufficient sanction. They therefore submit that a reprimand alone would be entirely suitable and appropriate sanction in this case. However, if the Board chose to disagree and elect to order that a fine be imposed, Valuer A submits that a nominal sum of up to $2,000 would be appropriate.

In relation to costs, Valuer A acknowledges that costs awarded by the Board could be 60% of the total costs incurred. However, they also submit, that without the benefit of having seen a breakdown of costs, the Valuer General's costs appear very high in this case. They invited the Board to consider:

- Whether the considerable delay investigating and prosecuting this complaint had led to a significant amount of duplication between the various and different staff in the Valuer General's office being involved on the file from time to time and

- The fact that Kristina Muller took over conduct as counsel for the Valuer General (from Ken Steven) oh 16 November 2011. Clearly, as Crown Laws costs date back to 19 April 2011 (and presumably for the work done since 2008) there must have been duplication in the costs incurred by the Valuer General at this relatively late stage of the complaint.

In relation to name suppression Valuer A notes that the basis of their application was that:

- This is the first charge brought against them during a 43-year long career;

- The report was written over 6 year ago, so there has been a significant passage of time between the breaches giving rise to the complaint and any determination on liability and/ or penalty;

- Valuer A has subsequently changed their practice;

- Prejudices to Valuer A should their name be published outweighs any benefits that would be obtained from publication.

Valuer A accepted that the Board has no express statutory power to make an order for name suppression but noted that Section 6 of the Act provides that the Board may regulate its own procedure in such manner as it sees fit. They therefore advised that accordingly, if the Board does have that power, they submit that an order for name suppression and non-publication should be made on the grounds set out below.

Valuer A then referred to non-identifying determination and advised that irrespective of whether or not it has the power to order name suppression, the Board has the power to issue non identifying decisions. The Valuer General accepts this is the case.

Valuer A submitted the following factors were relevant in the decision on name suppression or non-identification:

- There is little public interest in the determination as the valuation was drafted more than 6 years ago, and Valuer A is now semi-retired;

- The Board is able to demonstrate the transparency of the disciplinary process and/or inform and educate the public and profession by publishing in its determination in a manner that does not identify Valuer A personally;

- Valuer A would be disproportionately affected if they were identified in the publication of the determination as:

    - They are semi-retired and intend to retire shortly.
    - They have enjoyed a 43-year long career as a valuer during which they have received no other complaints, charges or other disciplinary action or notices.
    - It is likely that the stigma attached to disciplinary proceedings such as these will damage their reputation, and that of their firm, if published.

- They have suffered significant and ongoing stress as a result of these charges and investigation, which would increase if their name was published.

The Valuer General has raised concerns that valuers who practice in the subject area could be unfairly impugned if the Board were to publish the location of the property but not the name of the valuer concerned. Valuer A accepted that this may be relevant, but submitted it could easily be alleviated if the Board concluded with a notice in its determination to the effect that the valuer in question was not practicing within the area.

In conclusion, Valuer A respectfully submitted that

- A reprimand would be suitable and a sufficient sanction in this case.
- It the Board nevertheless considers that a fine is required, then a sum of up to $2,000 is appropriate;
- The Board should issue orders for permanent name suppression and / or non-publication if it has the power to do so;
- If it does not, the Board should use its discretion to issue non identifying determinations on liability and sanction in this case;
- The Valuer General's costs should be reduced significantly to take into account that the costs were increased by its own delays and the duplication in work, by in particular, changing counsel at a relatively late stage.

SANCTION

The sanctions, which the Board is prepared to entertain, range from a reprimand to a fine in accordance with the legislative constraints. The Board does not regard the offending to be at the top end requiring consideration of suspension or removal from the register. The Valuer General sought a fine in the range of $6,000 to $7,000. Counsel for Valuer A noted that given the circumstances a reprimand would be sufficient sanction. Valuer A did however acknowledge that a fine of up to $2,000 could be considered.

The Board has considered recent sanction decisions on other matters, noting that fines in the range of $5,000 to $10,000 have been imposed. The Board has also previously considered a reprimand as appropriate in relevant circumstances.

Mitigating factors for Valuer A can be briefly identified as:

- This is the first complaint against Valuer A in a valuation career spanning some 43 years.

- As concluded in the decision this is an unusual lapse for a valuer with a long history of service to the industry.

- Valuer A has provided excellent service to the industry including participation in relevant boards and committees.

- Valuer A intimated a guilty plea prior to the hearing, albeit only after all the papers were served. Valuer A has demonstrated sincere remorse and has apologised to the complainants for any offence caused by their report.

- Valuer A is now semi-retired and carries out only occasional work and they have indicated their intention to retire shortly.

- Valuer A has put in place processes to ensure similar matters do not arise again either in their personal career or that of their business association.

In view of these factors the Board imposes a sanction being a reprimand in this case.

COSTS

Under section 33A of the Valuers Act 1948, the Board may order the valuer concerned to pay such a sum as the Board considers is appropriate in respect of either or both of the following

a. the costs and expenses of and incidental to the inquiry by the Board

b. Costs and expenses of and incidental to the investigation conducted under Section 32 of this Act in relation to the complaint to which the inquiry relates

The Board and Valuer General have incurred costs of $55,765.61 in relation to this case. The Valuer General sought a contribution of 60% of these costs, i.e. about $33,450. The Valuer General submitted that no reduction should be made for the withdrawal of the fourth charge.

Valuer A acknowledged that costs could be charged to the valuer, however submitted that certain costs may have been exaggerated due to duplication of the services and the lengthy time and delays. The Board accepts in part that there will have been a duplication of services with Crown Law due to the change of counsel partway through the process.

A breakdown of costs was provided by the counsel for the Valuer General. This breakdown does not allow the Board to identify any potential duplication therefore the Board has considered a different percentage of the component of the costs. The Board has determined that Valuer A should pay a contribution calculated as follows:

Board costs	$4985.65	60%	$2,991.39
Legal costs already billed	$30,250.53	50%	$15,125.27
Legal costs estimated	$6,325.00	60%	$3,795.00
Expert witness costs	$12,127.25	60%	$7,276.35
Valuer General staff costs	$2,077.18	60%	$1,246.31
Total			$30,434.32
Adopt:			**$30,000.00**

APPLICATION FOR NAME SUPPRESSION/PUBLICATION

The application on behalf of Valuer A was based on the following:

1. This was the first charge brought against Valuer A during their 43 year long career;

2. The report was written over six years ago, so there has been a significant passage of time between the breaches giving rise to the complaint and any determination on liability and/or penalty;

3. Valuer A has subsequently changed their practice; and

4. The prejudice to Valuer A should their name be published outweighs any benefits that would be obtained from publication.

In submissions Valuer A further submitted:

1. That there was little public interest in the determination and the valuation was drafted more than six years ago, and Valuer A is now semi-retired;

2. The Board is able to demonstrate the transparency of the disciplinary process and/or inform and educate the public and profession by publishing this determination in a matter which does not identify Valuer A personally or their business;

3. Valuer A would be disproportionately affected if they were identified in the publication of the determination as:

    a. They are now semi-retired and intend to retire shortly.

    b. They have endured a 43-year long career as a valuer, and they have received no other complaints, charges or other disciplinary action or notices;

    c. It is likely that the stigma attached to disciplinary proceedings such as these will damage their reputation and that of their business, if published;

    d. Valuer A has suffered significant and ongoing stresses as a result of these charges and investigation, which would increase if their name is published.

Valuer A also provided a process of mitigation in relation to other valuers operating in the area by the Board inserting a clause noting the valuer concerned was from outside the district.

The matter was extensively set out in the submissions for the Valuer General, referring to the High Court judgement in the *Director of Proceedings and ANOR vs The Nursing Council of New Zealand and ORS*, noting that the Court of Appeal in *Clarke vs Attorney General (no 1*), supported by the Court of Appeal as judgement in *Re Liddell*. Other cases were also cited. Against this background, the application by Valuer A does not meet any of the required criteria for continued name suppression. The courts, it would seem, have always been mindful of the anguish that the result might cause associated with a guilty finding, but that does not outweigh the fundamental principles of open justice, freedom of expression and public interest.

Notwithstanding the Section 6 discretionary power of the Board to regulate its procedure in such a manner as it sees fit, there is no power for the Board to limit publication and no specified general

power to order 'name suppression'. The Board believes that this extends to the non-identification option raised by Counsel for Valuer A

Accordingly, and notwithstanding the effects on Valuer A and their family and business and the other matters raised on their behalf, the penalty imposed and the award of costs, the Board removes the confidentiality interim application granted by the Board subject to Valuer A's rights of appeal.

Kenneth Taylor
Inquiry Chairperson
20 February 2013