

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 B**, Registered Valuer

BOARD OF INQUIRY:

M E L Gamby (Inquiry Chairperson)
H J Puketapu
P A Curnow

COUNSEL:

J A L Oliver for the Valuer General
H Fulton QC for Valuer B

DATE OF HEARING:

15 October 2007
Reconvened: 23 November 2007

DATE OF DECISION:

7 April 2010

BACKGROUND

The Complainant wrote to the Registrar of the Valuers Registration Board on 1 February 2005.

The letter referred to two valuations undertaken by Valuer B both dated 10 August 2002 but provided on different dates. The revised report recorded a valuation of a property/properties in excess of \$11.6 million.

The complainant stated in his letter that the project, which was a redevelopment of an existing office building, was not undertaken and the property sold for \$6.25 million after approximately one year of marketing.

The mortgage package offered was a contributory mortgage at 66.65% of valuation.

The complainant alleged that he; together with around 200 investors, became involved and the loan to value ratio would have been a factor considered. At a loan to a value ratio of 115% of actual value he considered that there would have been no protection for investors. In conclusion, he stated that the valuation of Valuer B was approximately 100% out.

The main part of the property valued was a proposed redevelopment of a commercial building in a central business district, with frontage on two main streets. There was also a second part of the property fronting a third street, but the value of that part was not in contention, although it forms part of the overall valuation as a title for it had not been issued. The valuation report initially provided to the Board by the complainant is referred to here as the first report.

That first report states that Valuer B's instructions were to value the property as follows:

- "(a) As is in its present condition including the Air Rights above.
- (b) As refurbished offices with vacant possession, with each floor on a separate title under the Unit Titles Act of 1972 including the Air Rights above.
- (c) As refurbished with each floor fully leased with each on a Separate title under the Unit Titles Act of 1972 including the Air Rights above."

The complainant included a summary of values at page 2 of the bundle before the Board that came from the revised report as part of the letter of complaint:

"Security

Valuer B, has valued the security property once it has been refurbished and leased as 3 separate components at:

Part A	\$ 900,000
Part B	\$9,614,628
Air Space	<u>\$1,100,000</u>
Total Security Valuation	<u>\$11,614,628</u>

On page 19 of the registered valuer's valuation report the registered valuer has recommended a maximum mortgage advance figure of \$7,493,000.00 on completion of the refurbishment, lease and strata titles (emphasis added). Lombard's maximum advance of \$7,425,000.00 would have been less than the valuer's mortgage recommendation on completion.

The cost of the refurbishment in terms of the scope of the valuation report and the issuance of strata titles totals \$620,400.00 which Lombard was to be held in trust. Lombard was to advance the \$620,400 to the borrower as refurbishment work occurred."

As noted above the complainant referred to two valuation reports in the letter of complaint but provided only one report in response to the Registrar's request. The figures in that first report do not tally with the figures stated in the complainant's letter. That much at least should have been immediately apparent to any party seeking to rely on the first report sent out to investors.

In evidence at the hearing, Valuer B produced the revised report of the same date, 10 August 2002, which was faxed through to Lombard on 20 August 2002. There are significant wording differences between the two reports. There is no comment in the revised report that the first report was retracted.

The Complainant was aware at the time he made his complaint. that there were two reports. He may not have fully understood the significance of the variations made in the revised report although it must have been apparent to him that there were variations in the figures between the report he forwarded to the Registrar and the documentation provided to him by Lombard Mortgage Nominee Co Ltd.

Nature of Property

The property valued by Valuer B originally comprised two buildings. At the time of valuation, the whole of the property was contained in a single title on land having an area of 961 m² with three street frontages. The Part A frontage site Mr Morley anticipated would have an area of around 202 m² and the redevelopment property was to have a reduced land area of 759 m², although in the first report it is referred to as 778 m².

Excluding the Part A, that was sold at the time of Valuer B's valuation for \$900,000 but not settled. as there was no separate title, the property was said to comprise a warehouse built in the 1920s converted into part parking and part office space in the 1950s with refurbishment in the 1970s or early 1980s.

The 2002 proposal was to refurbish the office floors, create separate strata titles for 5 floors with associated parking, create a separate title for Part A and a future development unit of Air Rights above Part B.

Valuer B prepared valuations for each component as separate title entities in both their first report and their revised report. They made collective mortgage recommendations under each scenario in both reports.

'As Is' Free of Encumbrances Values

Valuer B submitted the following "as is" valuations in both reports. There were no changes other than for the descriptive wording. In their first report, they described the valuation of the property "as is free of encumbrances" but in the revised report they

described the valuation as "as is free of encumbrances with new titles for Part A and Part B and the Air Rights as outlined earlier in this report."

The valuations in both cases are as follows:

Part B and Improvements	\$5,700,000
Part A adopt sale price	\$ 9 0 0 , 0 0 0
Air Rights above Part B on separate freehold title	<u>\$1,100,000</u>
	<u>\$7,700,000</u>

Significantly, in the Board's opinion, the description of the Air Rights value also changes between the two reports.

Under the first report, they are stated as:

"Air Rights above Part B on separate freehold title"

In the revised report, they are stated as:

' Air Rights above Part B on separate freehold title with existing building in condition satisfactory to allow additional floors to be erected."

When it came to making mortgage recommendations, there are variations between the two reports both in terms of the description and in terms of the mortgage recommendation amount.

The mortgage recommendation in the first report is described as "property as is" and the recommendations are as follows:

"60% of land and buildings (Part B)	\$3,800,000
50% of Air Rights above Part B	\$ 550,000
60% of Part A	<u>\$ 540,000</u>
	<u>\$4,890,000"</u>

In the revised report, the heading is expanded and is stated as:

"Property As Is Free of Encumbrances with new titles for Part B, Part A and the Air Rights as outlined earlier in this report:

"66% of land and buildings (Part B)	\$3,762,000
50% of Air Rights above Part B	\$ 550,000
66% of 13 Part A	<u>\$ 600,000</u>
	<u>\$4,912,000"</u>

In summary, the changes between the two reports are considered significant as they relate to the "As Is" values.

If the first report was relied upon then, provided a separate title was issued for the Air Rights, it would have been safe to lend on that part in accordance with Valuer B's report, to a level of \$550,000:

That was not the case for the revised report as there was also a requirement that the existing building had to be in a condition satisfactory to allow additional floors to be erected. As the Board heard in evidence no one at any time had established whether the building was in a satisfactory condition to support further development.

In summary then, what the Board heard was that, based on the first report it appears that Valuer B's intention was that no lending should take place until a separate clear and unencumbered title was made available for the revised area estimated at the time as 778 m².

In the revised report, the expectation was that unencumbered titles were to be made available for both the reduced land area of 759 m² and the remaining property known as Part A before lending occurred.

Valuation Calculations for Refurbished Office Stratas

In their first report, Valuer B provided a valuation that totals \$10,917,203 and for completeness, their figures are set out below:

Original - Table 1

Level	Lettable Area	Value Rate	Indicated Value
Carparks	55 AU's	\$47,500	\$2,612,500
Level 1	698.3 m ²	\$1,450	\$1,012,500
Level 2	698.3 m ²	Leased	\$1,360,790
Level 3	698.3 m ²	\$1,500	\$1,047,450
Level 4	698.3 m ²	Leased	\$1,396,595
Level 5	628.0 m ²	Leased	\$1,487,368
Total	3421.2 m²		\$8,917,203

Plus	\$ 8,917,203
Air rights as a Separate Freehold Title with existing building in condition satisfactory to allow additional floors to be erected	\$1,100,000
Part A, Adopt Sale Price	<u>\$ 900,000</u>
	\$10,917,203

The assessed values in the revised report do not change, but the heading has been expanded to include the following additional words:

"... with each floor completed and on (sic) a separate title under the Unit Titles Act of 1972 and Part A and the Air Rights being on separate freehold titles as outlined earlier in this report."

Significantly, there is the expectation, more fully explained in the revised report, that separate titles must be provided for all of the strata floors and for the Air Rights and for Part A.

The explanation of what is being valued has also changed to incorporate the words in the revised report as follows:

"The sum of these values is not the value if sold as one lot".

Valuation of Refurbished Office Stratas Subject to Leases Free of Encumbrances

For this third scenario, in the revised report Valuer B both reviewed the heading associated with the value, and the values provided.

The heading was expanded from the first report to incorporate the words:

"... with each floor on separate strata titles under the Unit Titles Act of 1972 and Part A and the Air Rights on separate freehold titles as outlined earlier in this report".

The words and figures in the original first and revised reports are repeated below.

Original First Report - Table 2

"Taking into account the level of assumed contract rents within the subject units, the long lease terms. and assuming the total refurbishment of the building a potential yield of 9.5% to 10% would be viewed as realistic upon completion of the individual floors."

Level	Lettable Area	Face Rental Rate	Net Face Rental	Capitalisation Rate	Indicated Value
Carparks	55	\$60.00/wk	\$171,600	10.00%	\$1,716,000
Level 1	698.3 m ²	190.00/m ²	\$132,677	9.75%	\$1,360,780
Level 2	698.3 m ²	190.00/m ²	\$132,677	9.75%	\$1,360,790
Level 3	698.3 m ²	195.00/m ²	\$136,168	9.75%	\$1,396,595
Level 4	698.3 m ²	195.00/m ²	\$136,168	9.75%	\$1,396,595
Level 5	628.0 m ²	225.00/m ²	\$141,300	9.50%	\$1,487,368
Total					\$10,078,918

Revised - Second Report Table 3

"Valuation of the Refurbished Office Stratas subject to Leases Free of Encumbrances with each floor on separate titles under the Unit Titles Act of 1972 and Part A and the Air Rights on Separate Freehold titles as outlined earlier in this report.

Level	Lettable Area	Face Rental Rate	Net Face Rental	Capitalisation Rate	Indicated Value
Carparks	55 parks (8 tandem) at \$47,500 per space				\$2,612,500
Level 1	698.3 m ²	190.00/m ²	\$132,677	9.75%	\$1,360,780
Level 2	698.3 m ²	190.00/m ²	\$132,677	9.75%	\$1,360,790
Level 3	698.3 m ²	195.00/m ²	\$136,168	9.75%	\$1,396,595
Level 4	698.3 m ²	195.00/m ²	\$136,168	9.75%	\$1,396,595
Level 5	628.0 m ²	225.00/m ²	\$141,300	9.50%	\$1,487,368
Total	3421.2 m²				\$9,614,628

Plus

Air Rights as a Separate Freehold Title with the existing building in condition satisfactory to allow additional floors to be erected \$1,100,000

Part A Adopt Sale Price \$ 900,000
\$11,614,628"

The carparks calculation is significantly different between tables 2 (original first report) and table 3 (revised report), and, the Board notes, the figures in table 2 don't sum correctly.

In terms of the mortgage recommendations made, there are minor differences between the calculations in the first and the revised reports. Significantly, although each of the strata titles has been individually valued, they have been accumulated for the purpose of providing a single mortgage recommendation. Accordingly, the Part B value of \$8,917,203 has a mortgage recommendation of \$5,944,207 in the original report, and \$5,885,350 in the revised report, subject to titles.

The inference is clear and admits of no alternative construct that Valuer B anticipated a single mortgage over the summed total of individual property values.

The titles are individually valued, subject to completion of redevelopment and a single mortgage can be secured over all titles collectively. There is no allowance for holding costs such as real estate agents commission and a profit and risk allowance, but titles must first be issued. On this basis a mortgagee could not have been adequately protected.

Before turning to the charges and the valuations presented in evidence for the Valuer General, it is difficult to conclude how any lending could or should have occurred "as is" based on Valuer B's valuations, particularly noting the conditions imposed by Valuer B in their revised report.

Under the first report, there was a requirement for a clear and unencumbered title to be available for the 778 m² parcel of land. This was made more certain in the second report where a clear and unencumbered title was to be made available for both the 759m² site (change from 778 m²) and the remaining property known as Part A.

In both reports there was a requirement for a separate freehold title for the Air Rights before they could be used for mortgage finance purposes. That is sufficiently clear in the first report where it is stated: "Air Rights above Part B on separate freehold title" as a value of \$1.1 million, with a mortgage recommendation of \$550,000.

In the revised report, it is even clearer as the full description is: "Air Rights above Part B on separate freehold title with existing building and conditions satisfactory to allow additional floors to be erected." The mortgage recommendation is also \$550,000.

The "as is" value is therefore conditional. No lending on a redeveloped basis should have taken place until those titles were issued. It is probably immaterial that a resource consent would have been required, that may not have been achieved, or that the building needed to be proven as structurally sound and no work had been undertaken at the time Valuer B reported, or indeed at any later stage as far as the Board could determine, based on the evidence at the hearing.

Valuations for the Valuer General

The Valuer General relied on valuations prepared by Valuer 1 who was instructed to undertake valuations on the same basis as Valuer B, and Valuer 2, who had carried out valuations for Company 1 a few days earlier than Valuer B.

Valuer 1's assessments were carried out retrospectively in March 2006, approximately 3.5 years after the valuation by Valuer B prepared as of 10 August 2002. Valuer 1 was unable to gain access to inspect the building other than for the 3 carpark floors known as Basement 1, Basement 2 and the ground floor.

Valuer 1 did gain access to the upper-level office floors later in 2007 and saw no reason to alter his valuation assessments. Nevertheless, he was working at a disadvantage compared to that of Valuer 2 and Valuer B in that he had not seen the property in August 2002 or even by 2006. Inevitably, where a retrospective valuation is required some years after the date and a full inspection cannot be made at the time, not to mention internal demolition in preparation for refurbishment having occurred, it would not be at all surprising that Valuer 1 could have a somewhat pessimistic view of the property as a redevelopment proposition.

Those concerns would not have been an issue for Valuer 2, who inspected the property at or about the same date as Valuer B. He fully inspected the property, prepared his valuation for the same purpose as that of Valuer B and, because his valuation apparently did not satisfy Company 1, Valuer B was instructed. It was said in evidence by Valuer B, that Valuer 2, did not prepare a valuation that complied with the Securities Act (Contributory Mortgage Regulations) 1988 as the valuation excluded that part of the title known as Part A. That statement is patently incorrect as the report of Valuer 2 in the bundle refers to the whole of the title, and the valuation is

stated to include "... the two existing buildings occupying one title". The valuation set out of pages 17 & 18 of the report clearly is for the whole of the title, and the mortgage recommendations carry this through to the balance of the document.

As it transpired, an earlier draft of the same report was prepared and put in evidence as 'Appendix A'. It may be said that report did not comply with the Securities Act (Contributory Mortgage) Regulations 1988.

Set out in Table 4 is a summary of the respective value positions of each of the three valuers.

10/8/02 - "As Is" Value Excluding Part B

Subject to Title

	Valuer B 10/8/02	Valuer 1 10/8/02 (retrospective)	Valuer 2 7/8/02
Part B	\$5,700,000	\$3,200,000	\$3,323,780
Mortgage Recommendation *	\$3,762,000	\$1,920,000	\$1,994,268
Air Rights	\$1,100,000	Nil	Not referred to
Mortgage Air Rights Recommendation	\$550,000	Nil	Not referred to

* based on percentage adopted by each valuer

10/8/02 - Valued Fully Let - Aggregate Value

	Valuer B 10/8/02	Valuer 1 10/8/02 (retrospective)	Valuer 2 7/8/02
Fully Let	\$9,614,628	\$7,335,000	\$8,412,000
Vacant	\$8,917,203	\$6,615,000	\$7,100,000
Air Rights	\$1,100,000	Nil	\$1,100,000
Mortgage Air Rights Recommendation	\$550,000 subject to title	Nil	\$550,000 subject to title

Seven charges were prepared and are repeated below:

- (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 report dated 10 August 2002 with respect to the "as is" value of a property, you grossly over-valued the said property.

- (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 the said valuation report with respect to the "as is" value of the said property, you provided a mortgage recommendation that was excessive.

- (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 compiling the said valuation report with respect to the "as is" value of the said property, you included a valuation figure for airspace when you knew or ought to have known that the property in its "as is" condition would not support any additional floors and thereby acted in breach of clause 1.4 and/or clause 1.5 of the Code of Ethics prescribed by Rule 133 of the Rules of the New Zealand Institute of Valuers.

- (4) 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 10 August

2002 with respect to the refurbished and partly leased value of the said property, you grossly overvalued the property.

- (5) 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 the said valuation report with respect to the refurbished and partly leased value of the said property, you provided a mortgage recommendation that was excessive.

- (6) 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 10 August 2002 with respect to the refurbished and fully leased value of the said property, you grossly overvalued the property.

- (7) 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 the said valuation report with respect to the refurbished and fully leased value of the said property you provided a mortgage recommendation that was excessive.

There was no application for the removal of any of the charges and the inquiry proceeded accordingly.

The Inquiry

Valuer B pleaded not guilty to all seven charges, three of which related to gross overvaluations under the three scenario values prepared by Valuer B, three related to an excessive mortgage recommendations and one (Charge 3) a breach of the Code of Ethics of the New Zealand Institute of Valuers.

The Evidence

"As Is" Value.

Valuer B had assessed a value of **\$5,700,000** as an "as is" value of Part B exclusive of Part A and exclusive of Air Rights. By comparison, Valuer 1, assessed a value of **\$3,200,000** and Valuer 2, a value of **\$3,323,780**.

Part A should be excluded as it was subject to provision of a separate title and there is essentially no substantial difference of opinion between the valuers that needs further discussion.

Otherwise Valuer B's assessment is 78.13% above that of Valuer 1, and 71.53% above Valuer 2.

The principal difference of opinion between the valuers is that Valuer B considered Part B to have a residual value in the improvements. Valuer 1 and Valuer 2 did not. Accordingly, their total valuations are little, if any, different from their assessment of bare land value.

Valuer 1 and Valuer 2 are very similar both in their opinions as to value, and their analysis of the available sales evidence. Valuer B is clearly an outlier.

The Board heard cross-examination and asked questions of all three valuers. The Board is satisfied that, based on the evidence it heard, it would be very difficult to conclude a value at or anywhere near the value placed on the property by Valuer B.

With respect to each of Valuer 1 and Valuer 2 they were criticised on their approaches, particularly Valuer 1 who was unable to inspect the property at the time he prepared his valuation. He made a number of assumptions such as the stud height between the floor levels and the restrictions on parking for large and 4-wheel drive vehicles. The photographs in exhibit C appeared conclusive evidence that 4-wheel

drive vehicles, vans and large vehicles can be parked in the premises, although it was not said that they could be parked in every location of the premises.

Counsel for Valuer B was critical of Valuer 1 for mistakenly describing the redevelopment as 6 office floors and 2 levels of parking and noting the car parking height as being too low for 4-wheel drive vehicles.

Valuer 1 admitted errors in his evidence before the Board. It cannot, however, be said as submitted by Counsel for Valuer B that Valuer 1 was prejudiced against the building. He quite rightly took a conservative approach, and the Board has no criticism of him for that. In his evidence Valuer 1 concluded, following a full inspection at a later date, that there was no residual value in Part B, and he was unshaken in that opinion.

Valuer 2 considered the "as is" value both under a land redevelopment option, and as a refurbishment proposition. He was aware at the time the property was purchased that the highest bid was for refurbishment and the two under bidders were proposing to redevelop the site.

Valuer 2 acknowledged that there may have been some limited remaining value in the improvements to a developer prepared to refurbish. Valuer 2 was also unshaken in his opinion as to the "as is" market value.

Valuer B was no less certain of their approach and that they had correctly valued the property "as is". However, they could not adequately explain why there was a discrepancy between the sales evidence as analysed by Valuer 1 and Valuer 2, and their adoption of figures giving rise to a valuation of \$5.7 million.

The Board then heard that the property later sold, based on an agreement signed on 6 September 2002, at \$5,350,000 although the transaction did not settle until 17 January 2005.

That figure tallies with the complainant's statement that the property was sold for \$6.25 million, the difference between the two being the sale of \$900,000 for Part A.

It should be recalled that Valuer B had assessed a value of \$6.8 million on 10 August 2002, having included a sum of \$1.1 million for Air Rights subject to provision of a separate title and proof that the building could structurally be capable of supporting additional development.

Those two figures, being \$6.25 million and \$6.8 million are not strictly an apples with apples comparison as the resale of the balance Part B, one year later, included the same potential for Air Rights, but without any certainty that a title could be created.

Valuer B gave evidence that the market has scarcely changed over the intervening 12-months period up to 2003. No other valuer gave evidence as to the movement in the market between 2002 and 2003 so, to that extent, the Board must accept the opinion of Valuer B.

A first consideration suggests that little or no weight should be placed on the later September 2002 sale as it was described variously as a market transaction or a mortgagee sale and was reputed to have occurred some considerable time after the date of valuation. The Board is disinclined to take that view although it could not have been known at the time to any of the valuers. As the primary difference of opinion between the valuers is the residual value, if any, of Part B and there is no evidence before the Board that by the later sale date values had increased significantly, the Board is not convinced that Part B had no residual value. Valuer B clearly believed that it did, and Valuer 2 acknowledged the possibility.

The margin between the values is not the important issue in this case but the difference of opinion relating to the value if any of Part B for refurbishment is important. It is necessary to put the issue of Air Rights to one side in considering the difference between Valuer B's \$5.7 million and the sale of \$5.35 million. That is because Valuer B had a heavy caveat on the suitability of the air rights value which was to be based on:

- + A separate Certificate of Title
- + Structural integrity suitable for additional floors to be erected.

The difference between Valuer B's value of \$5.7 million and the sale of \$5.35 million is 6.5% in a stable market with no evidence to the contrary. That is evidence that a prospective purchaser was prepared to pay a sum significantly greater than land value for the property.

The mortgage recommendation approach of Valuer B diverges from Valuer 1. Valuer 1 was prepared to recommend a lower percentage than Valuer B's two-thirds of a building suitable for refurbishment and some passing income from the ground level carpark. Valuer 1 originally suggested 60% but later felt more comfortable with 50% because he considered there was no value in the building.

It should be recalled that Valuer B's 66% could only be lent on the basis that separate titles were provided. That had not occurred.

It is pertinent to note that there were also different opinions as to the value of air rights (if any) in the "as is" valuation.

Valuer B assessed air rights at \$1.1 million and made a mortgage recommendation of \$550,000. Valuer 1 said the Air Rights had no value. Valuer 2 did not value them in his "as is" valuation as having any additional value, but did so later, subject to caveats.

The value of air rights is illusory. Utilising Valuer B's caveats the only way that the property could have had an air rights value in an "as is" context is on "... a separate freehold title with the existing building in a condition satisfactory to allow additional floors to be erected".

The Board was told that that no one had undertaken the steps necessary to determine whether or not the building was in a satisfactory condition to allow additional floors to be erected and, given its age having been built sometime around the 1920s, it would be extremely unlikely that condition could have been fulfilled without strengthening

to the point where demolition and reconstruction may have been a more feasible option.

Charge 1 being the charge of a gross overvaluation "as is" has not been proven to the required standard. However, the Board is in no doubt that Valuer B's valuation is in excess of the market value. Charge 2, relating to the mortgage recommendation is also dismissed as unproven.

Value of the Refurbished Office Stratas - Vacant

One difficulty of comparing the valuers' figures is that Valuer B was instructed to value the strata floors on a vacant possession basis but in fact did not do so. They described in their original report and their revised report that they valued on the basis of floors 2, 4 and 5 being leased because the owners had, letters of intent for the leasing of those 3 floors.

Where that leaves a comparison with the other valuers is uncertain. On a vacant basis, Valuer 2 had assessed a value for the strata units (aggregated but assessed individually) of \$7.1 million. Valuer B had assessed a value individually and aggregated at \$8,917,203, a difference of some 25.59%, but with floor 2, 4 and 5 leased. Valuer 1's assessment vacant was \$6,615,000 with Valuer B some 34.8% above.

The Board cannot speculate and assess values on a partially leased basis to fill the gaps in the evidence.

The charge of a gross over-valuation on a partly leased value of the said property (Charge 4) must fail as there was no comparative evidence. Charge 5 relating to the mortgage recommendation must also fail for lack of a comparative. However, in saying that, Valuer B's approach of aggregating strata title values and then making a single mortgage recommendation is clearly wrong in principle as they made no allowance in the single mortgage recommendation for holding costs such as real estate agents commission and a profit and risk allowance.

Valuer B assessed air rights at \$1,100,000 subject to the same conditions and limitations as for their "as is" value. Valuer 2 also considered they had a value of \$1,100,000. Valuer 1 continued to hold to his opinion that they had no value. The mortgage recommendations of \$550,000 are the same for Valuer B and Valuer 2

As the conditions attached to the reports for Valuer B and Valuer 2 are essentially the same, there can be no criticism of Valuer B that could not equally be applied to Valuer 2. No charge was laid against Valuer B with respect to air space under Scenario 2 or for Scenario 3.

Valuation of Refurbished Office Stratas - Subject to Leases

Valuer B had assessed a value of \$9,614,628 fully let, exclusive of air rights. Valuer 2 had assessed a value of \$8,412,000 exclusive of air rights. The margin between the two is 14.3%.

Valuer 1 assessed \$7,335,000, a larger margin to Valuer B's value of 31%. The Board notes that Valuer 2 is approximately 14.68% higher than Valuer 1, or in the alternative Valuer 1 is approximately 12.8% below Valuer 2.

Given the difference of opinion relating to rentals, capitalisation rates, lease incentives and carparks, all of which individually and collectively affect value, it is difficult to conclude that Valuer B was sufficiently different to the other valuers that would warrant further detailed consideration by the Board.

It is perhaps pertinent to note that there was a significant difference of opinion as to the cost of refurbishing Part B varying between \$620,400 for Valuer B up to a range of \$1.8 - \$2. million by Valuer 1.

The Board is inclined to the view of Valuer 2 that, despite being aware that refurbishment could be in the order of \$1.4 million, the actual cost of refurbishment would not necessarily affect an assessment of value, once completed.

What is significantly more important is the extent to which the upgrading would improve the appearance and lease potential of the building. Based on the evidence before the Board that is a highly subjective consideration. The Board is of the opinion that any valuation prepared on a "refurbished" or "subject to plans and specifications upgrading" basis should be subject to a final inspection prior to confirmation of value and final release of funds. Progress inspections and retention of funds based on accurate confirmed costs to complete would have been the appropriate method of dealing with this matter. No evidence was tendered in that respect.

Valuer B made a mortgage recommendation of \$5,885,350 on an overall basis applied as a single figure over all floors. Both Valuer 1 and Valuer 2 were critical of this approach. The Board is equally critical of Valuer B's approach of making a mortgage recommendation on a collective basis without an appropriate deduction for holding costs such as real estate agent commission and a profit and risk allowance. Just as a gross realisation is not suitable for the advancement of mortgage funds and all valuers recognised that this was so, values for strata titles should be prepared individually and not aggregated. A mortgage recommendation on an overall basis is clearly inappropriate as it exposes a lender to unduly high-risk lending. Valuer B's approach was wrong.

Charge 6 was that Valuer B grossly over-valued the fully leased property. The Board finds that charge unproven to the required standard.

Charge 7 was that Valuer B provided an excessive mortgage recommendation.

The charge of an excessive mortgage recommendation could only have been determined after refurbishment. None of the valuers considered a proviso of a revaluation, progress inspections and/or retentions as a necessary part of a refurbishment or development programme. The Board heard no evidence that this should occur and yet is firmly of the view that it is a pre-requisite. That being the case, each of the valuers' reports would not adequately have protected the mortgagee as mortgage recommendations could have occurred on a basis that the Board would consider unsatisfactory. The Board finds Charge 7 unproven against Valuer B.

Code of Ethics

Charge 3 is that Valuer B " ... included a valuation figure for air space when they knew or ought to have known that the property in its "as is" condition would not support any additional floors and thereby acted in breach of Clause 1.4 and/or Clause 1.5 of the Code of Ethics ... "

The Board repeats its earlier comment that any valuation of the air rights at the time was illusory as it depended on the issue of a separate title and the building structure being satisfactory to support additional floors.

If those two conditions could not be met, then the air rights had no value.

The evidence before the Board was that nobody had established what work would be required to put the building in a condition suitable for additional floors to be constructed. That comment applied either in an "as is" condition or on refurbishment. If the charge could be made out against Valuer B, for an "as is" value, then it could equally be made out against Valuer 2 for his value of a refurbished building. Both air rights value were on a condition precedent to certain events. Those events had not occurred.

The Board notes Counsel's final submissions for Valuer B which for their careful construction are repeated below, although the Board does not necessarily agree with all comments:

"Unethical Conduct

1 There is one charge of unethical conduct. It arises from including a valuation for air rights in the "as is" valuation. It is said Valuer B knew, or ought to have known, the building as is would not support additional floors.

2 *Unethical conduct properly understood is that which is dishonest or with an intention to deceive. It is not simple negligence / incompetence. Examples are many but would include:*

- *Failure to disclose the valuer's personal interest in the property.*
- *Undertaking an instruction where the valuer lacks experience held out to the client.*
- *Breach of fiduciary duty of confidentiality.*

3 *A concept of "ought to have known" is not a question of ethics. It is a concept of negligence. This part of the allegation is inappropriate to the charge.*

4 *The prosecution (opening) submission is that the charge is able to be sustained on the basis that Valuer B "**misunderstood** the information that they had", so as to give rise to breaches of ethics. This submission is plainly wrong on a proper understanding of what amounts to a breach of ethics and the application of those principles. A "misunderstanding" is far distant from unethical (mis)conduct.*

5 *This basis for the prosecution further misreads and misapplies the clauses of the Code of Ethics relied upon, 1.4 and 1.5.*

1.4 endorses the requirement of moral obloquy: it is addressing a statement that is not simply a state that ought to be known to be false (a concept of negligence). It is to be that which is known or ought to be known to be false, incorrect, misleading, deceptive or open to misconstruction by reason of misstatement, omission, or suppression of material fact or deceptive act. The casual connection is encapsulated by "deception" and requires conduct of that equivalence.

*1.5 Requires utmost care **and** good faith to ensure high standards of the profession. This is for a standard of reporting so as not to bring the profession*

into disrepute. Care is to be coupled with good faith, and that is obviously necessary because not every error, misstatement or omission is to be assumed to bring the profession or the member into disrepute.

- 6 *The prosecution closing clearly demonstrates that the ethics charge is not addressing ethical matters but alleging error, the error in this case to include an immediate right to establish additional floors to this building without further or additional requirements when introducing air rights to an as is valuation. Even if the prosecution could be correct in its contention (which it is not) it is not and cannot be an ethical breach. The prosecution does not allege Valuer B knew to the contrary. Neither does it allege they **ought** to have known to the contrary by reason of omission, suppression, deception or misstatement (that be concealed so as to include the statement they know, or ought to have known, to be wrong).*
- 7 *As to the allegation they knew, but falsely reported, the building would not support additional floors, there is no evidence to support it. Nowhere does the evidence show Valuer B had actual knowledge that they intentionally misrepresented.*
- 8 *The real allegation is that Valuer B reported on air rights for his "as is" valuation without reporting conditions apply as mentioned in Valuer 2's report. Factually the allegation is wrong. Valuer B's operative report is exhibit B (not the report in the prosecution bundle). On page 18 their section on air rights clearly advises air rights are conditional on a number of requirements to be met (so are not yet established) including demolition of some part of the top floor, town planning, strengthening. This is immediately followed by their as is valuation subject to "existing building in condition satisfactory to allow additional floors to be added" No other statement was appropriate. There is no proof by the prosecution thesis that the building is presently unfit to extend.*
- 9 *Taking these factors into account the charge is unsustainable.*

- 10 *This may be tested on the evidence that air rights are available. They are accepted as such in the check valuation that adds the same value as for Valuer B. The difference with Valuer 2 is the latter would not include his value in an as is valuation. That is a difference of opinion and judgment. In this difficult and unusual area Valuer 2 was able to express that opinion, and it is not proved to be knowingly in error in so doing. (Valuer 2 refers to the unusual phenomenon of these air rights at transcript 59).*
- 11 *Air rights do not comprise an existing ability to erect additional floors to the existing building. They are rights to do so. As with the exercise of any right they are subject to other conditions, consents or approvals. That is obvious from their report.*
- 12 *The condition of the building to take extra floors, is also subject to conditions and approvals. As with the remainder of the report dealing with the condition of the building, the report did not purport to give any certificate or representation about its condition or structure. As is common, the report excludes any structural description and requires the recipient to obtain that information from appropriate professionals. The true report as issued draws attention to a requirement for further strengthening.*
- 13 *Including a value of air rights follows from Valuer B's proposition that the as is valuation is not a valuation of land alone. In their view, supported by the owner and its intentions with architectural support, the existing building has use and value, so that air rights attaches to that even if they are arguably to be excluded from pure land value (transcript 190). Further, Valuer B is correct to include the possibility of an individual sale of air rights to a third party".*

Charge 3 is dismissed.

Summary

Valuer B faced seven charges, three of a gross over-valuation, three of excessive mortgage recommendations and one of unethical conduct. The Board has found all seven charges unproven to the required standard.

The Board is required to consider whether the appropriate standard of proof has been met and then deal with what is commonly now referred to as the two-step process which requires the Board firstly to determine whether or not a charge has been proven and then secondly, if it finds a charge proven consider any sanctions or penalties that could be imposed against the valuer.

At the time of the hearing, it was generally accepted that charges should be proven to the standard of beyond reasonable doubt - the criminal standard. The standard of proof has swayed between the criminal and civil standards. It is now accepted that the decision in *Z v. The Medical Practitioners Authority* is the appropriate standard being on the balance of probabilities, applied flexibly. The Board has applied that standard to a consideration of the evidence. The evidence did not permit the Board to reach a conclusion that would find the charges proven.

The Board does not condone the actions of Valuer B and considers that on the evidence all of their valuations were above market. Percentage variations between values are inappropriate where matters are as complex as the value of a property suitable for refurbishment, and the value after refurbishment, subject to title, quality of finish and even, as in this case, whether the building was in a condition suitable for air rights to be established.

The Board found that there were enough protections in the revised report such that no mortgage advance should have been made until refurbishment was completed and new titles issued. Valuer B gave evidence that, to their knowledge, nobody lost as a result of their valuation reports. Lending should not have occurred in any event even on the "as is" valuations as there were conditions as to title and various events that were required before that could happen.

The Board is critical of Valuer B in that they confused matters by having more than one report in circulation. The same criticism might also be levelled at a prosecution witness. Additional reports surfaced during the investigation with respect to Valuer B and during the hearing with respect to Valuer 2's valuation. Valuers must take great care when they send out revised reports or issue drafts that only one report is finally in circulation and that any later report makes it clear that any earlier report has been retracted.

The wording in the revised report of Valuer B was explicit. However, it would not have adequately protected a lender had the project proceeded, the refurbishment been completed, and the strata titles issued. That is because Valuer B aggregated their mortgage advances for individual strata titles, and that was wrong. However, having found the valuations not grossly excessive, it was not possible, in the Board's opinion to find the mortgage recommendations excessive. Based on the evidence the Board heard, nobody at the date of valuation would have been able to determine the ultimate final form or standard of the refurbished building.

As a final comment, the Board finds no fault with either of the valuation assessments prepared by Valuer 1 and Valuer 2. Correctly, in the Board's opinion, they adopted a degree of conservatism when valuing a property as complex as the Part B refurbishment project.



Evan Gamby

Inquiry Chairman

07 April 2010