

VALUERS REGISTRATION BOARD

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

AND

IN THE MATTER OF A Charge under Section 31(1)(c) of the Valuers Act
1948 and the New Zealand Institute of Valuers Code
of Ethics against Valuer C, registered valuer.

BOARD OF INQUIRY: PA Curnow (Inquiry Chairperson)
M E L Gamby
HJ Puketapu

COUNSEL: J A L Oliver for the Valuer General
G E Rothwell for Valuer C

DATE OF HEARING: 9 November 2009

DATE OF DECISION: 9 November 2009

WRITTEN DECISION: 27 May 2010

THE COMPLAINT

A complaint was received by the New Zealand Institute of Valuers against Valuer C.

The complaint arose from the sale of Valuer C's valuation business to Company 1. It was alleged that Valuer C was undertaking work on their own behalf, while working as a full-time employee of Company 1. This being considered by the complainant as a breach of the Code of Ethics and Rules of Conduct.

INVESTIGATION

The investigation was carried out by Mr KE Parker on behalf of the New Zealand Institute of Valuers.

One of the documents supplied in the course of the investigation was the Agreement for Sale and Purchase of the business, which included a Restraint Of Trade Clause to the effect that should Valuer C leave the employment of Company 1, they would not seek employment with, nor set up a competing business, which has the core nature of being a valuation business, with the same or similar services which are offered by Company 1.

The complainant provided in support of the complaint a number of evidential items including reports prepared by Valuer C, invoices, and copies of receipts.

There were further matters raised with respect to mentoring an unregistered valuer to enable that person to obtain registration. In Valuer C's written response to Mr Parker, they admit to carrying out some of the valuation work that was detailed by the complainant.

Following the investigation, the Valuers Registration Board concluded there was sufficient cause to hold an inquiry.

THE CHARGE

(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 having sold your valuation business to Company on 23 April 2007 and being retained by the purchaser as an employee you carried out valuation assignments on your own account between 23 April 2007 and 21 December 2007 and thereby acted in breach of clause 1.1 and/or clause 4.1 of the Code of Ethics prescribed by Rule 133 of the Rules of the New Zealand Institute of Valuers'

THE HEARING

Prior to the inquiry hearing Valuer C had indicated a guilty plea. This was confirmed when Valuer C admitted the charge. The Board was provided with evidence that Valuer C was a registered valuer and had an Annual Practising Certificate as at the time of the matter subject to the complaint.

The hearing was held on the 9 November 2009, following an adjournment to the original hearing date of 12 October 2009. This adjournment was at Valuer C's request.

Mr Oliver, Counsel for the prosecution, did not call any witnesses but tabled a written submission to which he spoke.

This submission being that Valuer C had sold their valuation business to Company 1 on 23 April 2007 and being retained by the purchaser as an employee, they carried out valuation assignments on their own account between 23 April 2007 and 21 December 2007 and thereby acted in breach of Clause 1.1 and/or 4.1 of the Code of Ethics.

Mr Oliver's submission detailed Valuer C's actions.

Mr Oliver advised the inquiry that Valuer C has only had this one complaint following being in practice in excess of 40 years.

Mr Oliver pointed out to the inquiry that on page 148 of the Bundle of Documents was where Valuer C effectively admitted to the matters outlined in the complaint although there was some dispute as to the actual amount of \$18,000 of work completed by Valuer C as alleged by the complainant.

The complainants were not present to give evidence.

Mr Oliver pointed out that the breach of Restraint of Trade was a civil matter and certainly not one for the inquiry to consider.

Mr Oliver said that the inquiry should take into account that some of the work that incurred fees may well have been from prior reference to Valuer C for which they were entitled to continue. Valuer C is considered to have suffered financially already, somewhat more than the admitted fees by Valuer C.

Mr Oliver also advised the inquiry that Valuer C by entering the guilty plea had avoided costs such as the need for a defended hearing that Mr Oliver thought might at best be acrimonious.

Mr Oliver said that after seeing the submissions of Valuer C and the references attached, including from Valuer 1 (the trainee valuer mentored by Valuer C) it showed certainly two sides to the story of the complainant being critical of Valuer C's mentoring of Valuer 1.

Mr Oliver also stated that perhaps the complainant did not appreciate the acquiring of a valuation practice and the matters that go with such an action.

Upon a question of Mr Oliver by Mr Gamby, Mr Oliver said it was not a matter of the exact amount of fees that were not passed over to them, the amount was not the issue.

In considering the matter of penalty, Mr Oliver said that conventionally these matters are left to the Board, however the Board could conceivably take into account the fact that at least some of the work undertaken by Valuer C probably relates to instructions received prior to the business settlement date in April 2007. The Board might also take into account that Valuer C has suffered financially because the complainant withheld the balance of the money outstanding to Valuer C from the sale of their business which is somewhat more than the amount of the invoices to which Valuer C has admitted.

With respect to costs, Mr Oliver sought a contribution to both the Board and prosecution costs which are likely to be in the order of \$8,710.95. This is made up of the Board's costs of \$4,103.45, the investigation costs of \$607.50 and the Crown Law costs were unlikely to exceed \$4,000.

Counsel for the Defence

Valuer C was represented by Mr GE Rothwell who presented a written submission, which he spoke to and this submission included a letter from Valuer 1 regarding his experience while being employed at Company 1.

This letter was very supportive of Valuer C, advised of what Valuer 1 considered the extent to which Company 1 went to make Valuer C's time at the office "*as unpleasant as possible*" and that they resigned from Company 1 giving notice in November 2008. Valuer 1's letter was dated 28 September 2009. It is noted he is now a registered valuer and signed his letter as such.

Mr Rothwell's submission included a further seven-character references in support of Valuer C. These from a range of business and professional people that Valuer C had contact with.

Mr Rothwell's submission outlined that Valuer C had been in practice for 45 years, which they considered a not insignificant achievement, and that Valuer C is now 72 years old.

Valuer C outlined the sale of the business, the employment situation, client care and mitigation.

Mr Rothwell states that, at first reading, the charge Valuer C is facing does not reflect well on Valuer C and appears to indicate that they were very "disloyal" to the complainants. Mr Rothwell however goes on to state that if Valuer C's account of the bills that were rendered to non-clients of the complainants is accepted by the Board (as Mr Rothwell thought Mr Oliver did), their "disloyalty" is basically cut in half.

However, as the inquiry has already heard, the quantum is not the matter in question. Mr Rothwell also raised some financial matters in respect of money Valuer C believed was owed to them by Company 1. These are not matters for this inquiry.

Mr Rothwell also made reference to the publication of Valuer C's name but admitted that he was unsure of the Board's practice.

The inquiry heard from Mr Rothwell that Valuer C found it difficult after 36 years of self-employment to become an employee, that they were frustrated in this employment but accepted this was still no excuse to render the invoices. Mr Rothwell referred to Valuer C as "*a square peg in a round hole*".

Mr Rothwell said that Valuer C cared about their clients and this may have overcome their professional approach. Mr Rothwell went on to state that Valuer C considered their "*duty to the client is greater than to the employer*" but Valuer C accepts that their duty to their employer was breached.

Notwithstanding the sale of their practice, Valuer C still thought of the clients as "*theirs*"

Mr Rothwell said that Valuer C should not be suspended from practicing as a valuer although they are semi-retired now. Mr Rothwell said that the Board needs to know that this cannot happen again, and Valuer C is no longer employed by Company 1.

Mr Rothwell said that Valuer C was prepared to front up to the inquiry and was certainly prepared to answer any questions put forward.

The inquiry had no questions of Valuer C, considering these were more than adequately addressed by Mr Rothwell.

Mr Gamby had a question of Mr Rothwell. That was whether Valuer C had breached the Restraint of Trade in the agreement, to which the answer was "*to my knowledge, they didn't breach it*"

FINDING OF THE BOARD

Valuer C had pleaded guilty to the charge and following the submissions of both the prosecution and defence, the Board retired to consider the decision.

The Board provided an oral decision as follows:

“The Board thanks Valuer C for attending and entering the early guilty plea to the charge of a Breach of Duty to their employer.

The Board agrees with Counsel, the breach is Clause 1.1 of the Code of Ethics, not Clause 4.1.

Turning now to the question of penalty. We accept Counsel's submission that this is the first occasion Valuer C has come to the attention of the Board over 45 years.

The Board has considered the sanctions that it can impose from a reprimand to deregistration.

Given the character references and matters raised by Counsel in mitigation, this is a matter at the lower end of the scale.

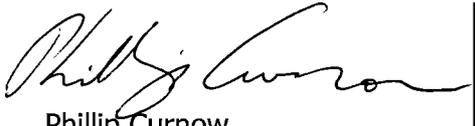
The Board reprimands Valuer C.

As to the matter of costs. The Board is currently imposing costs in the order of 60% of the costs incurred by the Board. Given the circumstances raised by Counsel the minimum that can be imposed in this case is \$4,000 inclusive of GST.

A written decision will follow in due course”

Following the decision Valuer C was advised that for their interest the Board takes no action as to the publication of their name, but the decision is sent to the complainant and the New Zealand Institute of Valuers.

The Board confirms its oral decision.



Phillip Curnow

Inquiry Chairperson