Valuer S [2010] NZVRB 5

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 S**, Registered Valuer.

BOARD OF INQUIRY: MEL Gamby (Inquiry Chairperson)
HJ Puketapu
PA Curnow

COUNSEL: J A L Oliver for the Valuer General assisted by Ms J Andrew
D Vincent for Valuer S

DATE OF HEARING: 22 February 2010

DATE OF DECISION: 7 April 2010

BACKGROUND

The Valuers Registration Board received a complaint from the complainant that Valuer S, acting for the landlord, assessed a rental for her premises of $88,150 per annum plus GST to apply for a rent review term commencing 1 July 2008. That rental was said to be out of line with the market. The existing rental at the time was $24,000 per annum plus GST and had apparently remained unchanged since 1 July 1999. The lease was summarised in Valuer S' report, but a copy of the lease was not provided.

The complaint was that, as a result of the high rental assessment by Valuer S, she was obliged to obtain her own valuation. This she did from Valuer 1, who assessed a rental of $47,474 per annum plus GST which, the complainant says, was in line with her expectations.

A letter from the complainant to a local Trust (the Trust) on 25 August 2008 referred to the negotiations as not having been resolved and that arbitration was her only remaining avenue to resolve the dispute.

Before the arbitration could occur, there were "without prejudice" discussions between the valuers. Following the discussions Valuer S provided a revised valuation of $47,823.00 per annum. In a letter to Valuer 1 dated 5 November 2008 Valuer S advised that they would recommend to their client that the assessment by Valuer 1 be accepted as being a fair representation of current market rental.

Not surprisingly the complainant was less than satisfied that Valuer S had undertaken a professional assessment and considered that the unrealistic expectations of her landlord were the result of Valuer S' incorrect assessment. The complainant stated that this had soured an amicable relationship enjoyed up to that time.

In response to a letter from the Valuer General, Valuer S was to provide a statement but, if they did so, it was not provided to the Board.

The matter was referred by the Board to a formal inquiry and in due course two charges were made out for a hearing to occur on Monday 9 November 2009, deferred to 22 February 2010.

The Charges

The charges are repeated below:

(1) Section 3l(l)(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 20 June 2008 in relation to a rental review, you provided an assessment of current market rental that was grossly excessive.

(2) Section 3l(l)(c) of the Valuers Act 1948 and the New Zealand Institute of Valuers Code of Ethics:

> 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 you failed to supervise or properly supervise the work of an unregistered valuer and thereby acted in breach of clause 1.5 of the Code of Ethics prescribed by Rule 133 of the Rules of the New Zealand Institute of Valuers.

Pre-hearing Directions Conference

The Board held a pre-hearing directions conference at which Counsel for Valuer S advised that Valuer S would plead guilty to the first charge. Mr Oliver for the prosecution advised that no evidence would be advanced on the second charge.

The Hearing

At the commencement of the hearing, Valuer S pleaded guilty to the first charge of providing an assessment of current market rental that was grossly excessive. The second charge was dismissed. The background to the matter was confirmed as set out in the bundle of documents before the Board.

It transpired that the valuation report signed by Valuer S was prepared by Valuer 2, an unregistered valuer who was a qualified "real estate appraiser" of the United States and had considerable experience in the United States, but did not meet the requirements of registration in New Zealand.

Valuer S did inspect the premises, unbeknown to the complainant and, under the mistaken belief that the rental evidence researched and analysed had been undertaken to a competent standard, signed the report and therefore takes full responsibility for it.

The existing rental of $24,000 was clearly very much below the market rental and the evidence used by Valuer 2 did indicate a significant increase, but that evidence was not directly comparable to the space occupied by the complainant’s business. Her premises were more akin to service accommodation rather than secondary retail space with street access.

Valuer 2 and therefore Valuer S were not aware of other rentals in the same building that had already been agreed. Valuer 1 by comparison was aware of other rentals in the building when he undertook his assessment and they were said to demonstrate that the assessment by Valuer S was too high. Apparently, for that reason, when they became aware of the rentals in the building Valuer S quickly adjusted their assessment to a level which was consistent with that of Valuer 1.

There was no opportunity for the Board to question Valuer S as they did not give evidence. However, through Counsel, the Board asked how other evidence in the building was known to Valuer 1 and not to Valuer S to which the response was that Valuer 1 had had previous dealings with the owner. The information was not known to the public. While that does not relieve Valuer S of the responsibility to prepare an accurate assessment, particularly as they were acting for the landlord, it does explain how Valuer 1 became aware of information that was not in the possession of Valuer S.

Through Counsel, Valuer S was also asked to explain why they did not include a compliance statement in their report. Complying with the Property Institute New Zealand's standards is mandatory.

The answer through Counsel was less than satisfactory as, apparently, the wrong template was used for the valuation.

Penalty

Counsel for the prosecution did not make a submission on penalty and left the matter for the Board.

Counsel for Valuer S outlined the rationale for the valuation and also outlined the personal circumstances of Valuer S at the time of valuation. There is no particular advantage in repeating those personal circumstances, but it is clear that Valuer S was under undue pressure with responsibilities that they found personally difficult to cope with in conjunction with their professional responsibilities.

It was submitted that Valuer S was deeply affected, and it was said that they had lost confidence to the extent that they made a decision to focus only on residential property valuations as a result of the complaint. The Board has taken the mitigation submissions into account in its decision on both sanction and costs.

Costs

Costs for the Board and prosecution total $9,183.30 including GST. The decision by Valuer S to plead guilty mitigated costs in that Valuer 1 was not required to give evidence and the hearing was substantially shorter than it would otherwise have been.

The prosecution sought a contribution to costs without specifying the level of contribution considered appropriate. Counsel for Valuer S submitted that given Valuer S' reduced financial circumstances a modest contribution would be appropriate.

The Board retired and indicated it would provide an oral decision.

Oral Decision of the Board

In its oral decision, the Board noted that Valuer S had pleaded guilty and the complaint could therefore be taken as proven.

The Board noted that Valuer S was relatively young and had put their faith in a more senior person who, although working for them and unregistered, they believed was a very competent valuer, with more experience than they had.

The Board noted that it had not heard evidence from Valuer 1 and was not satisfied that with respect to the rental valuation all that might have been known would have been deduced by way of evidence had Valuer 1 been called.

The rental had not been reviewed for many years. The increase agreed was just over 96% above the previous contract rent.

Although Valuer S' assessment was a very much higher percentage increase again, whichever way the matter was considered, the Board was not satisfied that the actual figure was as precise as that presented by Valuer 1 in his report and agreed to by Valuer S. It is unusual for two valuers on the basis of sparse evidence to arrive at a rental within $300. The Board is uncertain that the rental agreed was a market

figure. Most of the evidence relied upon by Valuer 1 and produced in his report was for rent reviews which, of themselves, are not the best market evidence.

The Board then considered the sanctions open to it with respect to the proven charge of a grossly excessive rental assessment. The Board is not required to apply a sanction. This complaint has been a salutary experience for Valuer S and one which undoubtedly, they would never wish to have repeated. The offending is very much towards the low end of the scale.

Costs

With respect to costs, there were substantial savings by Valuer S pleading guilty. Although Valuer 1 agreed to keep the date free, he did not charge for his time.

One of the two charges, the alleged non inspection of the premises, was not proceeded with and therefore costs relating to that charge cannot be recovered.

In the Board's opinion, a contribution to costs is appropriate. After considering the circumstances and the fact that one of the charges was dismissed, the Board has determined that the appropriate contribution would be $3,500 inclusive of GST. The Board orders accordingly.

Evan Gamby

Inquiry Chairman

7 April 2010