

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 W, Registered Valuer

BOARD OF INQUIRY:

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

COUNSEL:

J Burns for the Valuer General
Valuer W for themselves

DATE OF HEARING:

9 March 2009

DATE OF DECISION:

22 October 2009

DATE OF PENALTY DECISION:

20 February 2010

In its decision of 22 October 2009, the Board found Valuer W guilty of incompetent conduct in the performance of their duties as a valuer. This renders them liable to a penalty provided by the Valuers Act 1948 relating to their valuation of the subject property.

A second charge that they made a mortgage recommendation that was excessive was not upheld.

The Board considered Valuer W had adopted an incorrect methodology leading to an incompetent "as if complete" market valuation.

Valuer W did not meet the standards expected of a competent valuer with 26 years' experience. They produced a report that could not be relied upon for the purpose stated in that report, which was purported to be a "current market valuation for re-financing purposes".

Valuer W submitted that the words "current market value" and "market value" are one and the same but can be distinguished by adding to "market value", the words "as if complete". The Board found that there was no distinction whether or not "as if complete" is added. If Valuer W intended that there should be a distinction, then the words should be properly qualified and explained so that there could be no doubt in a client's mind as to what they intended.

Valuer W's evidence was that their approach allowed them the option of providing a "gross realisation", for an "as if complete" valuation, being a summation of individual values expressed as a market value. The Board disagreed based on the evidence at the hearing by Valuer 1 and Valuer 2, both registered valuers called by the prosecution.

The Board next considered the professional implications of Valuer W's actions, which could have been serious if their report had been properly relied upon. In explanation, their report could not be relied upon for the advancement of contributory mortgage funds as it was not prepared for that purpose and the proposed alterations to the property had never been completed or signed off by Valuer W. This was a mitigating factor taken into account by the Board when, having found the charge proven, it dealt with the possible sanctions that might be applied.

It is not clear how the report came into the hands of the complainant. Valuer W gave evidence that their instructions were carried out to the letter and their valuation as prepared followed their client's instructions. Unfortunately, Valuer W was unable to supply those instructions to the Board. The party who gave the instructions was not called by either the prosecution or the defence to give evidence. Valuer W described the party as having "gone to ground" in Australia.

In some respects, that could have been the end of the matter had it not been that Valuer W stated in their report that the purpose of the valuation was for refinancing purposes. Their report could have been used by a lender who was not obliged to adhere to the contributory mortgage regulations and therefore it was an incompetent report for the stated purpose.

Disciplinary Decisions - The Valuers' Registration Board

The Board has been guided by a recent decision on appeal in the matter of Jeremy David Allen King. The Board must consider first whether the disciplinary charge was established to a point that there had

been a departure from acceptable standards; and then, quite separately, whether that departure had been significant enough to warrant a disciplinary sanction.

The Board considered that the threshold had been established but added the corollary that the complainant could never have properly acted on the report and therefore the implications that arise from Valuer W's valuation should not have been as serious. However, when considering the matter of penalty, the Board has put to one side implications that may have arisen from its finding.

In completing its comments on the sanctions that might be imposed on Valuer W in terms of the Valuers' Act, the Board commented that because the report should not have been relied upon the offending was not towards the upper end of the scale and invited submissions taking various mitigating factors into account.

Penalties

Under Section 31(1) of the Valuers' Act 1948, the Board may cause the name of any registered valuer to be removed from the register if it is satisfied that they have been guilty of such improper, unethical, or incompetent conduct in the performance of their duties as a valuer as in the opinion of the Board renders them unfit to be registered under this Act.

Under Section 33(1) of the Valuer's Act 1948, the Board may, as an alternative to removing a registered valuer from the register:

- reprimand the valuer or impose a penalty on them not exceeding \$10,000, or
- both reprimand the valuer and impose a penalty on them not exceeding \$10,000, and,
- may, in addition to or in lieu of reprimanding of them, or imposing any monetary penalty, suspend their registration for a period not exceeding 12 months.

Additionally, the Board is entitled to award costs against the valuer.

Penalty Submissions

Counsel for the Valuer General has submitted that the seriousness of the matter is increased by two factors:

1. The gross over-valuation occurred by the adoption of a methodology which is fundamentally wrong.
2. The distinction that Valuer W sought to draw between "market value" and "current market value" was also fundamentally incorrect.

Balanced against those concerns, Valuer W did include some relevant safeguards in their report.

The Valuer General sought both a reprimand and a fine and noted that Valuer W has previously been the subject of charges before the Board where they have been found guilty, fined \$10,000, reprimanded and ordered to pay a contribution to costs of \$18,000.

Valuer W referred to the following in their submissions:

- a) The report was prepared for "in-house" use and it was addressed specifically to the client. Any third party should have obtained a readdressed report, at which time the matters of concern would have been addressed by them.
- b) The Board accepted that the "gross realisation" of individual unit values was reasonable and not materially different in approach or value level to the check valuers. Also, the market had been researched with sufficient thoroughness.
- c) Time delays prejudiced their ability to produce an adequate defence and the overall time involvement was manifestly unfair resulting in an extended period of anxiety and concern.
- d) The risk to the public was minimal and no money was lost by any party as a result of the report.

However, Valuer W also accepts that the purpose of the valuation departed from accepted valuation practice and they did not carry the valuation through from a "gross realisation" to a current market value. They believed that a reprimand would be appropriate.

Valuer W opposed any award of costs against them because of the severe economic downturn and the time delay in bringing the matter to a hearing.

Valuer W has previously appeared before the Board once only in 2005 on the basis of a valuation report prepared in 2003. That appearance also related to a property located near to the subject property. In a similar fashion to the subject, there was a very significant margin between the valuation by Valuer W and those of the other registered valuers who gave evidence at the hearing.

In that decision, the Board was minded to note:

"As shown in the Board's decision, Valuer W's inability to clearly articulate what their valuation was meant to be (i.e., a valuation of the land and buildings, or some other state), combined with the fact that their reporting of "current market valuation" was not consistent with the requirements and expectations of the definitions contained within the New Zealand Institute of Valuers Valuation Standards, might, if repeated, be considered a "deliberate departure from professional methods". However, given that this is Valuer W's first appearance before the Board, the Board believes that it cannot be deemed to be a "continual disregard of all rules" by Valuer W. The Board has therefore decided that removal from the Register is too harsh a penalty, and therefore inappropriate on this occasion. "

There is a similarity between Valuer W's offending on this occasion and their offending in 2003. Valuer W at that time was also minded placing their own interpretation on the words "current market valuation" which was not in accordance with accepted valuation practice. The Board's concerns in its latest decision are therefore well founded.

For completeness, it is useful to set out the table that was included with the penalty decision of Valuer W on the previous occasion which they appeared in front of the Board, by comparison with other hearings, extended now to include the current matter.

Case	Valuer 3	Valuer 4	Valuer W, previous occasion	Valuer W – subject property
Valuation	\$3,732,000 as at 15 December 1986	\$3,000,000 as at 12 February 1999	\$1,475,000 as at 24 April 2003	\$18,773,000 as at 6 April 2005
Summary of charges	<ul style="list-style-type: none"> • Gross overvaluation • Excessive mortgage recommendation 	<ul style="list-style-type: none"> • Gross overvaluation • Excessive mortgage recommendation 	<ul style="list-style-type: none"> • Gross overvaluation 	<ul style="list-style-type: none"> • Gross overvaluation • Excessive mortgage recommendation
Board assessment of most likely value	Between \$2 million and \$2.5 million	Between \$1,850,000 and \$2,150,000	In the range \$450,000 to \$525,000	In the range \$11,200,000 to \$13,800,000
Assessed valuation/	\$3,732,000/ \$2,500,000	\$3,000,000/ \$2,150,000	\$1,475,000/ \$525,000	\$18,773,000/ \$13,800,000

most likely value	= 1.49 times	= 1.39 times	= 2.80 times	= 1.36 times
Money lost as a result of the valuation	No	No	No	No
Other issues included in findings:	<ul style="list-style-type: none"> • Sales evidence did not support their assessment of rental return • Area of the property was wrongly stated in their report • Proposed subdivision had not been approved, contrary to their belief • Mortgage recommendation was considered excessive by the Board 	<ul style="list-style-type: none"> • Did not appear to understand the difference between a concluded sale and conditional sale, nor the weight that should be applied to each. • Did not understand the correct valuation methodology involved in calculating the net present value of cash flow, and in particular the above market component of rent. • Did not refer to relevant sales or rental information. 	<ul style="list-style-type: none"> • Unclear in the report as to what they valued (going concern, land and buildings, something between) • Valuation bore no relation to sales evidence • Errors in methodology • Relied on, but did not refer to, confidential market evidence 	<ul style="list-style-type: none"> • Market value on a gross realization basis being summation of individual property values • Incorrect understanding of “market value as if complete” • Individual values were found to be reasonable • “as if complete” market value could not be relied on for mortgage purposes

On the previous occasion the Board concluded that the degree of competence shown by Valuer W was, on the face of it, similar in many, if not most, respects to that shown by the comparatives, being the valuations by Valuer 3 and Valuer 4. Valuer 3 was suspended for 6 months and on appeal, the Board's decision was upheld.

Valuer 4 was also suspended for 6 months and would likely have been de-registered were it not that they intended to retire from practice as a valuer and gave assurances to that effect.

The Board has given consideration to the various matters raised and sets out in the following table, factors to be considered in determining the appropriate penalty. The comparisons again are with Valuer 3, Valuer 4 and the previous occasion on which Valuer W appeared before the Board.

Factors to be considered in determining penalty (as submitted by the Counsel for the Defence)	Valuer 3	Valuer 4	Valuer W, previous decision	Valuer W, subject property
Years as a Registered Valuer	22 years	35 years	21 years	26 years
Previous appearance before the Board	None	Once - found guilty of a breach of the Code of Ethics	None	Once - found guilty of gross over-valuation.
Respected by his clients	No evidence to support this or to the contrary	No evidence to support this or to the contrary	References submitted.	No References submitted.
Willing to admit errors	Not explicitly stated - if they were willing to admit errors, this is likely to have	No - Decision in ethics case notes they "failed to understand the deficiencies of their behaviour".	During the inquiry, they acknowledged making a number of mistakes, and stated they should	No. Adhered to their belief as to a specific definition of market value without justification.

	been reflected in the decision.		have reported more clearly to remove ambiguity.	
Any loss to any third party as a result of the valuation	The majority decision of the Board of Appeal emphatically rejected this as grounds for a reduced penalty as the potential for loss. was there, and given the Board's role in protecting the public interest, this potential was seen as being insufficient grounds for a harsher penalty.	Uncertain, but appears that potential existed as the report included a mortgage recommendation and complaint arose from a person who was consulted by a client in relation to a contributory mortgage investment over the building	No, but potential existed	No. Report as presented should not have been relied upon but potential existed for a loss to occur.
Financial situation	Not explicitly stated	In a difficult financial situation.	Only source of income is their work as a sole practitioner.	Only source of income trading in difficult economic times.
Other Factors		Made a public announcement of their intention to retire from valuation practice		Mitigating effect of delays in bringing matter to a hearing. Safeguard in report before lending

				should occur.
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King Decision

The Board now turns to the importance of the King Decision, which is a December 2009 decision on appeal by the Valuers Board of Appeal in the matter of Jeremy David Allen King and the Valuer General.

The Board notes from that decision that the law has moved on since the hearings of Valuer 3, Valuer 4 and Valuer W's previous appearance were decided.

The Board is required to take into account, as it affects Valuer W's gross over-valuation, the mitigating factors that have already been identified, the most significant of which are:

- i. Over a period of 26 years, Valuer W has previously appeared only once before the Board and their appearance on the subject occasion related to a report prepared after the date of the previous report but before the date of that decision.
- ii. Valuer W's report was not addressed to the complainant and was not intended for the purpose relied on by the complainant. Specifically, the report could never had been utilised for contributory mortgage lending.
- iii. Valuer W had nothing to gain from their offending.
- iv. There is no evidence before the Board that anyone was harmed or suffered damage as a result of the report.
- v. There were safeguards in the report that should have prevented lending in any event.
- vi. The matter has dragged on for an unnecessary length of time before it was heard through no fault of Valuer W

Balanced against these mitigating factors, the Board in its role of protecting the public reinforces and advises all valuers, that a departure from practice standards without adequate explanation cannot be tolerated, particularly where the departure gives rise to a gross over-valuation.

Under Section 33(1) of the Valuers Act 1948, the Board reprimands Valuer W and imposes on them a penalty of \$5,000.

Costs and Expenses

Under Section 33a of the Valuers Act 1948, the Board may order the valuer concerned to pay such sum as the Board thinks fit in respect of either or both of the following:

- Costs and expenses of, and incidental to, the inquiry by the Board.
- The 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.

Counsel for the Valuer General has provided a breakdown of the costs and expenses incurred by the Valuer General.

The Board's costs amount to \$6,064.50, and the Valuer General's costs \$56,268.31, a total of \$62,332.81.

Counsel for the Valuer General has sought an appropriate award of costs against Valuer W.

Valuer W submits that no costs should be awarded because of the current adverse economic conditions, and time taken to bring the matter to a hearing.

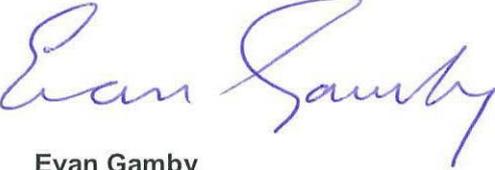
Decision on Costs

The Board, in reaching a determination on costs associated with any penalty imposed takes into account whether the actions of the valuer have contributed to, or helped mitigate, the costs incurred, mindful that any costs not awarded fall back to be paid by the profession. The Board has, for example, on many occasions reduced the costs award as a result of an early guilty plea. Conversely, on other occasions, the Board has awarded higher costs where higher than normal costs have been incurred as a result of the complexity of the hearing, or where costs have been greater than normal as a result of the valuer's actions.

In this case, the Board considers Valuer W adopted a defence around their methodology which had no hope of success involving, as it did, their own interpretation of definitions, without explanation, that depart from Standards. The principles of valuation that involve the determination of a single value for multiple units after allowing for costs and a profit and risk allowance have not changed over many years. Full costs, and profit and risk allowances must be made from a gross realisation to assess a market value whether it is to be determined as a "market value", or a "current market value" and whether completed "as is" or qualified "as if complete". Partly balanced against these concerns the Board has

noted the length of time that it took for the matter to be brought to a hearing which was largely outside Valuer W's control.

The Board has determined that Valuer W should pay a significant contribution to costs in relation to the penalty. Accordingly, costs and expenses in the sum of \$25,000 inclusive of GST are awarded against Valuer W.



Evan Gamby

Inquiry Chairperson

20 February 2010