

**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(l)(c) of the Valuers Act 1948 and the New Zealand Institute of Valuers Code of Ethics against Valuer X, registered valuer.

**BOARD OF INQUIRY:**

PA Curnow (Inquiry Chairperson)  
HJ Puketapu  
KR Taylor

**COUNSEL:**

J R Burns for the New Zealand Institute of Valuers  
D D Vincent for Valuer X

**DATE OF HEARING:**

14 September 2009

**DATE OF DECISION:**

14 September 2009

**WRITTEN DECISION:**

27 May 2010

**THE COMPLAINT**

The Registrar of the Valuers Registration Board received a complaint dated 7 June 2008 from the complainant, being the subject property. This property is tenanted by a government department.

The complainant alleged the professional negligence of Mr Valuer X, in that Valuer X had been commissioned to provide a market rent but apart from verbal advice a market rent valuation report was never received. The lack of a report prevented any claim of the verbal advice (the market rent has

increased by approximately \$10,000 per annum plus GST) being supplied to the tenant such notice being null and void if not accompanied by a Certificate signed by a Registered Valuer. The rent review clause required the notification no later than 2 months subsequent to any review date, "time being strictly of the essence'

The complainant was also seeking compensation for the resultant loss of rent of \$30,000 for the three-year review period.

## **THE INVESTIGATION**

The investigation was carried out by Witness 1 on behalf of the New Zealand Institute of Valuers.

The complainant's letter of complaint included his recollection of events and enclosures comprising:

- Valuation for insurance purposes
- A rent review opinion
- Mr Valuer X's current market value report for the subject property dated 8 November 2004.

These documents from the complainant outline that he verbally instructed Valuer X on or about the 12 December 2007 to furnish a valuation for insurance purposes and at the same time to provide a market rent valuation for the pending rent review due on the 15 February 2008. The complainant said he advised Valuer X of the rent review date.

According to the complainant, Valuer X advised that they would not be able to complete the valuations in December but would do so in January.

Although not produced, the complainant said the agreement to lease, was dated 21 September and provided under Clause 4.6 that "*the lease will commence on the latter of the 15 February 2005 or the date that the landlord's architect, acting reasonably and impartially, certifies practical completion of the landlord's works*"

Under Rent Review Clause 2 of the Second Schedule, the complainant says it specifies that the rent shall be reviewed on each review date in the following manner:

- 2.1(a)            "*The landlord shall no earlier than 4 calendar months prior and no later than 2 calendar months subsequent to any review date (time being strictly of the essence) give*

*notice to the tenant specifying the new annual rent proposed by the landlord as the current market rent to apply from that review date.*

*Such notice shall be null and void if not accompanied by a Certificate signed by a registered valuer..."*

The complainant advised that he received the insurance certificate with this dated 4 January 2008.

The complainant said Valuer X contacted him at the beginning of April 2008 stating they were having difficulties finding comparable evidence but would inform the complainant once the valuation was completed "*which is not far off*".

At the end of April Valuer X apparently contacted the complainant again by phone and advised that they had managed to find some comparable evidence and that their valuation was almost complete. Valuer X had suggested that the rent increase will amount to approximately \$10,000 per annum plus GST.

The complainant asserted that Valuer X had been supplied with a signed agreement to lease and that this document specified the commencement date and contained the Clause specified time for review although Valuer X has denied that they had been supplied with a signed Deed of Lease and was unaware of the commencement date.

The complainant states that Valuer X did not request a Deed of Lease nor did they seek other information about the lease for the property. The complainant states he concluded that Valuer X must have had everything required to conduct a valuation report in their possession.

Upon Valuer X being informed that the time for their valuation was too late, Valuer X advised they were going to discuss the matter with a senior manager of the agency which tenanted the property. Valuer X was also advised by the tenant that the time limit had now been exceeded for the rent review.

The complainant then states that Valuer X following the tenant's response was going to enquire about legal advice where "*time being strictly of the essence*" had been overruled by a Judge. The provided documentation, being a fax (one page of two) stating that the legal advice was that it was too late to initiate a rent review.

Following receipt of this letter, the complainant states he asked Valuer X whether they would accept responsibility for the fact that the complainant's business was unable now to initiate a rent review. The

complainant comments that Valuer X said that the valuer and I, as property manager, should have a shared responsibility and that Valuer X saw their part of the responsibility taken care of by not invoicing us for their fees.

The complainant stated that that was unacceptable to him.

Following further discussions with Valuer X, the complaint arose as the complainant states that in the absence of Valuer's X completed valuation report, their negligence contributed to an annual loss of \$10,000 per annum up to the next rent review and that the complainant sought compensation.

The report provided as per the complaint by the complainant, dated 8 November 2004, from Valuer X to the complainant was for the purpose of advising the current market value of the subject property. The property at the time of the report was a building that had been utilised for storage and merchandising of building materials and was currently being retrofitted to provide predominantly open plan medium to high stud office accommodation.

The valuation report includes a section titled Lease Details. This states that Valuer X had been supplied with a draft Lease Agreement known as "*The Public Sector Standard Lease*". This document, Valuer X states, contains standard conditions and consents commonly associated with documents of this type including the definition of rent for rent review purposes being the "*current market rent*" plus comments regarding the outgoings.

The complainant in his complaint states that the report outlines that the building is leased from the 15 February 2005 for a term of six years and a rent review after three years.

There is no reference the Board can sight within the document provided that outlines those dates or lease terms.

Valuer X's response to the complaint and investigation was to outline a chronological list of events.

Valuer X effectively confirms the timing the complainant states regarding instructions to carry out the insurance and rental valuations, this being the 12 December 2007.

Valuer X confirms the insurance valuation was completed and dated 4 January 2008.

Valuer X further states that their instruction form completed themselves was that the required date for the insurance valuation was the 25 January 2008 but with no date specified in relation to the rental review.

Valuer X goes on to state their attempts to obtain directly comparable information, being those that had been converted to office accommodation, proved difficult.

Valuer X admits to contacting the complainant by telephone on a number of occasions, likely to be at monthly intervals and certainly around the middle of February. Valuer X also acknowledges that they made phone contact with the complainant in early and late April 2008. It being at this time that Valuer X advises the complainant brought to their attention the "*time being strictly of the essence clause*".

At the completion of the investigation the matter was referred to an inquiry.

## **THE CHARGE**

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 on 12 December 2007 you accepted instructions to undertake a market valuation for rental purposes of a property but you then failed or refused to provide that valuation report to your client and that you thereby acted in breach of clauses 1.1 and/or 1.2 and/or 1.5 and/or 1.6 of the Code of Ethics prescribed by Rule 133 of the Rules of the New Zealand Institute of Valuers*

## **THE HEARING**

The hearing took place on the 14 September 2009.

Valuer X gave an early indication that they would plead guilty and this was confirmed following the reading of the charge.

Evidence was provided of Valuer X being a registered valuer and having an Annual Practicing Certificate as at the date of the matter subject to the complaint.

Mr Burns, Counsel for the prosecution, provided a written submission to which he spoke. The submission covered the points outlined in the original complaint. The main point being that Valuer X

accepted instructions to undertake a market valuation for rental purposes but failed or refused to provide that valuation to the client thereby acting in breach of the Code of Ethics.

Mr Burns stated that it was a clear breach of the Code of Ethics for a registered valuer to accept instructions from a client to provide a valuation and then not provide the client with the requisite valuation.

Such action being a breach of Clause 1.1 and or 1.2 and or 1.5 of the Code of Ethics. These clauses individually and collectively impose a duty on a registered valuer to undertake and provide any market valuation in accordance with the requirements of the relevant rules of professional practice.

Mr Burns acknowledges that Valuer X, after receiving the charge, admitted the charge and advised they would plead guilty.

Mr Burns said in relation to costs there were two components. The first being the Boards costs of \$3,086.95 plus the costs of prosecution being \$3,934.38. Both totals being inclusive of GST. This being a total of \$7,021.33.

Mr Vincent, Counsel for the defence, provided a written submission, which he spoke to, and this included:

- Fax information from Valuer 1, registered valuer, with respect to rental evidence dated 10 April 2008.
- Copy of a letter from Valuer 1 dated 7 September 2009 detailing his contact with Valuer X following the initial phone call in mid-January 2008 from Valuer X seeking comparable office rentals.
- Copy of the rental valuation that had been inspected on the 14 August 2008 to assess the rental as at 5 February 2008. This rental report including a rental assessment providing a rental increase of 5.4% or \$9,360 per annum.
- A written statement from Valuer X outlining that they have been public valuing since 1973 and for the last 25 years involved in the commercial and industrial sectors where they have undertaken assessments of current market value, rental and insurance. Valuer X also stated they have carried out significant work in the last 20 years within a nearby CBD and that they have also been involved with the NZ Institute of Valuers as branch secretary and Chairman, plus mentored numerous valuers through to registration and thereafter.

Mr Vincent's submission outlined many of the points which were common to the investigation and the submission for the prosecution.

The submission does state that Valuer X, when they were instructed in December 2007, was not provided with the Deed of Lease and it appears they were not given specific instructions as to when the rental assessment needed to be completed by. Valuer X does accept, however, that they have put in their instruction form that the date the reports were required by was 25 January 2008. Valuer X also accepts that they had the Agreement to Lease which ought to have flagged the rent review date to be sometime early 2008 for them. In the absence of specific directions from the client, however, Valuer X did not act promptly on the request.

Mr Vincent states in mitigation that the difficulty in finding comparable data would have contributed to the delay. Mr Vincent states that Valuer X was in contact with the client, monthly by telephone

Mr Vincent also advises that Valuer X has faced a private civil action for damages which they have settled.

In mitigation, Mr Vincent states that Valuer X was genuinely unaware of the rent review date, that they had attempted to find comparable rentals which were difficult to locate and that although unsuccessful, they contacted the tenant directly and tried to negotiate. Thus, taking all practical steps to try and resolve matters after they learnt of the situation.

Mr Vincent also states that Valuer X has practiced as a valuer for over 30 years, and that although there have been previous matters before the Board, they are not directly relevant to this charge.

In further mitigation, Mr Vincent states, that Valuer X has pleaded guilty to the charge and accepts responsibility for failing to provide the report on time. They have also incurred the cost of representation in respect of the hearing and the loss of a client as a result of their actions.

Mr Vincent submits that Valuer X actions are at the lowest end of the scale of seriousness, and that given the mitigation the Board ought to reprimand Valuer X and impose only a modest contribution towards costs. This was not a case of deliberate misconduct, but rather an oversight.

Valuer X then took the stand and was sworn in as a witness. Much of Valuer X's evidence was around the difficulty of obtaining comparable evidence as there was none available in the area. The property being a converted timber merchant required enquiries further afield and that Valuer X preferred to get at least three comparable. One better property, one poorer property and one that was similar.

Valuer X confirmed they had been in contact with the client monthly, and that the client knew they were seeking rental information.

Valuer X did however state that they did not look at the lease obtained in 2004. This being when the current market valuation was carried out whilst the building was being retrofitted.

Neither Mr Burns nor the Board had any questions of Valuer X.

At the conclusion of the hearing the Board retired to consider their decision.

### **FINDING OF THE BOARD OF INQUIRY**

After considering the matters the Board brought down the following oral decision.

*" Valuer X has pleaded guilty to the charge "of unethical conduct in the performance of their duties as a valuer.*

*The Board has considered the submissions made by the prosecution and the defence.*

*The Board does not accept that the awaiting of rental evidence, when time is of the essence, to be a satisfactory mitigating factor.*

*A valuer frequently will have to make a rental valuation on the best information at that time.*

*A rental report should have been provided in a timely manner.*

*In determining a penalty, the Board has taken into account Valuer X appearing today and being represented by Counsel.*

*The Board having considered the matter has determined that Valuer X be:*

- *Reprimanded*
- *That Valuer X be required to pay a penalty of \$2,000 inclusive of GST*
- *That Valuer X pay a contribution towards costs of \$4,000 inclusive of GST. A written decision will follow in due course"*

The Board confirms its oral decision.

  
Phillip Curnow  
Inquiry Chairperson

The question of compensation to the complainant is not one for the inquiry to consider.