IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-395
[2020] NZHC 2050

IN THE MATTER	of the Declaratory Judgments Act 1908
AND IN THE MATTER	of the Valuers Act 1948
RE	VALUERS REGISTRATION BOARD Plaintiff

Hearing:	5 August 2020
Counsel:	C F Finlayson QC and S H Hussain for Plaintiff D P H Jones QC and R B Moon for New Zealand Institute of Valuers A H Waalkens QC and M J Francis for Intervenor
Judgment:	13 August 2020

JUDGMENT OF SIMON FRANCE J

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[1] There is uniformity in the law governing disciplinary procedures brought against a member of a profession. Generally, in determining whether a charge is proved, the decision maker will undertake a two-step inquiry. However expressed, the two steps are:

(a) first determine whether the alleged conduct fulfils the requirements of the charge, be that charge negligence, incompetence, misconduct, conduct unbecoming, or malpractice. How the charge is worded will reflect the applicable statutory regime; and

(b) second, if so, undertake a discrete assessment of whether the proven conduct is such as to merit a sanction. It is not every failure to meet standards that merits a formal finding of guilt and sanction.

[2] Sometimes captured by the observation that "mere negligence" is not enough, an early formulation of the second stage inquiry was that of Elias J (as she then was) in *B v Medical Council*,[1] where her Honour described the issue as being whether the conduct of the practitioner was deserving of discipline.

[3] One of the cases Elias J referred to was a New South Wales Court of Appeal decision, *Pillai v Messiter (No 2)*.[2] That case applied the two-step approach, and became regularly cited for this proposition. There was, however, another aspect to *Pillai* that also became a focus of analysis, but which was not as uniformly adopted as the two-step aspect.[3]

[4] When considering what conduct meets the threshold for professional misconduct, as the charge was in that case, Kirby P observed:[4]

> …the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. *It includes deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of privilege which accompany registration as a medical practitioner.*

[5] The issue that emerged from this, and which arises again in this proceeding, is whether the italicised statement is laying down the test that must be met for all disciplinary charges, or whether a lower level of negligence can suffice for lesser allegations. The argument has been settled for many professional areas by a process of legislative reform where the various disciplinary schemes have been redrafted in a way that makes such a high threshold inapt for the wide range of conduct able to be charged.

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1 *B v Medical Council* HC Auckland HC11/96, 8 July 1996. A Note of the decision appears at [2005] 3 NZLR 810.
2 *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (CA).
3 Cases taking a different view are cited at footnote 43 below.
4 *Pillai*, above n 2, at 200.

[6] This case, however, is about the disciplinary scheme under the Valuers Act 1948 (the Act). The date of the Act points to why the issue has re-emerged; it self-evidently is not one of the Acts where the disciplinary offence scheme has been legislatively modernised. The language of the provisions reflects the drafting practice of the times, with an apparent focus on serious misconduct.

[7] The lack of legislative attention does not mean that the correct approach to disciplinary procedures under the Act has not been considered. There is under the legislative scheme a Board of Appeal which is the final decision-maker for these matters.[5] In 2009, in a case called *King v Valuer-General*, the Board of Appeal reviewed the processes and implemented a *Pillai* approach.[6] In doing so it implemented the full *Pillai* approach in the sense of both the two-step test and the formulation of the high-threshold test identified by Kirby P, outlined at [4] above. Importantly, the Board of Appeal considered the high-threshold test applied to the second-stage of the two-step inquiry - in determining whether any conduct has been significant enough to warrant sanction.[7]

[8] In circumstances needing some explanation, the Valuers Registration Board,[8] which is the initial decision-making body and which lies below the Board of Appeal, has initiated these proceedings under the Declaratory Judgments Act 1908. The aim of the proceeding is to have this Court declare that the high threshold adopted in *King* for the step-two assessment is an incorrect gloss on the statutory scheme.

Nature of proceeding

[9] The Act establishes three entities relevant to the current issue – the Valuers Registration Board,[9] the New Zealand Institute of Valuers[10] and a Board of Appeal.[11] The first two are permanent; the Board of Appeal is constituted on an ad hoc basis to hear appeals when they arise. The members are taken from an available panel.

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5 Valuers Act 1948, s 34.
6 *King v Valuer-General* Valuers Board of Appeal CIV-2009-085-32, 17 December 2009 at [35]-[36].
7 At [36].
8 See the Valuers Act, s 3.
9 Section 3.
10 Section 9.
11 Section 34(2).

[10] The Registration Board, as its name suggests, is responsible for maintenance of the Register of Valuers, including placing people on the Register and removing them.[12] The head of the Registration Board is the Valuer-General.[13]

[11] The Institute of Valuers has a number of functions which can be summarised as promoting the interests of the profession, maintaining its standards, and maintaining its standing in the community.[14] The Institute has promulgated a code of ethics.[15]

[12] There are two disciplinary procedures. First, the Institute may impose a fine of up to $500 for a breach of its code of ethics.[16] Second, the Act identifies a range of conduct which renders a member of the profession liable to sanction.[17] These are the disciplinary offences to which the *King* decision was directed.

[13] The process set out by the Act is that a complaint is forwarded to the Valuer-General who prepares a report for the Registration Board.[18] Where the alleged misconduct involves improper, unethical or incompetent conduct while carrying out the duties of a valuer, the Institute has the option of choosing to replace the Valuer-General as the investigator/report writer.[19] Upon receipt of the report, the Registration Board must hold an inquiry unless it is satisfied there is no reasonable basis for the complaint.[20] The inquiry attracts the usual procedural rights and obligations. The range of penalties is reprimand, fine, suspension, or removal from the Register.[21] Combinations of these sanctions are permitted.[22] Costs may be imposed.[23]

[14] Appeals against a decision of the Registration Board must be lodged within three months.[24] A Board of Appeal consists of a District Court Judge and two assessors

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12 Sections 18-30A.
13 Section 3(2)(a).
14 Section 10.
15 Section 16(1)(l).
16 Section 16(1)(m).
17 Sections 31-33B.
18 Section 32(1).
19 Section 32(1).
20 Section 32(2). Where the Valuer-General has investigated, he or she cannot sit on the hearing: s 32(4).
21 Sections 31(1) and 33(1).
22 Section 33(1).
23 Section 33A.
24 Section 34(1).

drawn from a panel.[25] Its decision is "final and conclusive".[26] In keeping with this, there are no further appeal rights, even on a question of law.

[15] The Registration Board and the Institute have applied *King* in the 10 or more years that have passed since it was handed down. However, they consider it is inhibiting their ability to use the disciplinary procedures of the Act as a means to establish and enforce standards. In particular, lesser levels of misconduct, negligence or incompetence that might appropriately attract a fine and/or reprimand are being protected from sanction by what is submitted to be the incorrectly high threshold test adopted in *King*. Accordingly, a declaration as to the correct interpretation of ss 31-33 of the Act has been sought.

[16] The use of the declaratory judgment procedure by a tribunal lower in the hierarchy to challenge a decision of a body higher in the same hierarchy is unusual. However, for two reasons I consider it to be a sound use of a broad and flexible procedure.

[17] First, the two bodies carry out an important public function, and are doing so in circumstances in which they consider they are being hindered by an incorrect decision. Second, and related, there are no real options to this procedure other than for the Registration Board to ignore the binding authority of *King* and hope to thereby generate an appeal. This is not a desirable approach. Further, the absence of any further appeal right, and the limited role that the initial decision-maker might anyway play in such an appeal, further restricts the options. Finally, it can be noted the current test is valuer-friendly in the sense that it sets a high liability threshold for a charged practitioner. This makes a judicial review of a Board of Appeal decision initiated by a practitioner much less likely.

[18] None of the parties represented challenge the use of this process and, for the reasons given, I consider it to be an appropriate use.

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25 Section 34(2).
26 Section 34(4).

[19] A brief comment on the parties is needed. The Registration Board and the Institute are aligned in this proceeding. They have consulted with the profession and out of that process one of the bigger valuation firms, TelferYoung Ltd, has taken on the role of contradictor. As intervenor, TelferYoung advances a case to support the status quo. As will be seen, part of its reasoning requires the Court to consider the correctness of two prior High Court decisions concerning what exactly are the "offences" prescribed in the Act.

[20] Initially, two declarations were sought. The first asked whether a decision of a Board of Appeal binds the Registration Board in its disciplinary functions to the extent that the Board of Appeal decision lays down rules and principles of wider application. All parties agree such a decision binds the Registration Board. I am not aware of any reason to differ. The effect of this is to establish that *King* binds, and accordingly a challenge to its correctness is of utility. The orthodoxy of the conclusion on precedence is such that a declaration to that effect is not needed.

The statutory scheme

[21] The scheme of the disciplinary procedures is awkward, and to most eyes the order of the provisions is difficult to follow. It is convenient to arrange them in a way that seems more helpful and which omits uncontroversial procedural rules and directions.

[22] I start with the process provision, which is s 32. Section 32(1) refers to "the last preceding section", which is s 31 containing the offence provision:

> **32 Inquiry by Board into charges of misconduct**
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> (1) Every complaint that any registered valuer has been guilty of any act or default specified in the last preceding section shall be referred to the Valuer-General who shall investigate the matter and report thereon in writing to the Board:
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> provided that the Council of the Institute may appoint a person to investigate and report in writing to the Board on a complaint that a registered valuer has been guilty of an act or default specified in subsection (1)(c) of that section, and if it does so the Valuer-General shall not investigate the complaint and report thereon to the Board.

(2) The Board shall, unless it is satisfied that there is no reasonable ground for the complaint, hold an inquiry into the matter, and shall give to the valuer concerned not less than 30 clear days' notice in writing of its intention to hold the inquiry, and of the time and place of hearing, and of the nature of the charge to be inquired into. The notice may be served personally or by registered letter addressed to the valuer concerned at his last known place of business or abode.

[23] Next, s 31 provides:[27]

31 Removal of name from register if registered valuer guilty of offence or grave misconduct

(1) The Board may cause the name of any registered valuer to be removed from the register if it is satisfied, after inquiry as hereinafter provided, but not otherwise,—

(a) that he has been guilty of such improper conduct as renders him in the opinion of the Board unfit to be registered under this Act, or has been convicted (either before or after his registration) of an offence punishable by imprisonment for a term of 2 years or upwards:

(b) that he has been convicted (either before or after his registration) of an offence which tends to dishonour him in the public estimation:

(c) that he has been guilty of such improper, unethical, or incompetent conduct in the performance of his duties as a valuer as in the opinion of the Board renders him unfit to be registered under this Act.

(2) Unethical conduct for the purposes of paragraph (c) of the last preceding subsection means conduct in breach of the code of ethics prescribed by the rules of the Institute.

[24] Finally, s 33(1) states:

33 Further disciplinary powers of Board

(1) After any inquiry made as provided in the last preceding section into a complaint against any registered valuer the Board may, by writing under the hand of the chairman, reprimand the valuer or impose a penalty on him not exceeding $10,000, or may both reprimand him and impose such a penalty, and may in addition to or in lieu of reprimanding him or imposing any monetary penalty suspend his registration for a period not exceeding 12 months.

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[27] Emphasis added.

Issue one – what are the offences that must be proved at step one of the process?

[25] Applying the two-step approach identified above at [1], the first question in any disciplinary process is what are the offences that must be proved. What is the charge, and what are the requirements of that charge?

[26] Two decisions of this Court have tackled the issue raised again in these proceedings by Mr Waalkens QC for TelferYoung.[28] In relation to s 31(1)(c), actions occurring in the performance of duties as a valuer, does the Act prescribe an offence of:

(a) improper, unethical or incompetent conduct; or alternatively

(b) conduct of that type but only where it is of sufficient severity to render a valuer unfit to be registered?

The difference between the two is that the latter definition means the Act is only dealing with the most serious departures from accepted standards.

[27] *Findlay v Valuers Registration Board* involved allegations of incompetence, it being alleged a valuation grossly exceeded the true market value.[29] The charge as framed made no reference to the conduct being such as to render Mr Findlay unfit for registration.[30] The charge therefore assumed that the proscribed conduct was the first option of incompetent conduct, unqualified by an allegation of seriousness.

[28] Doogue J considered the process set out in s 32(1) to be an important indication of the correct definition of the proscribed conduct.[31] It requires a complaint to be referred to the Valuer-General for an initial report. The "act or default" which is the subject of the complaint referred to in s 32(1) had to be a reference to the mere conduct. Otherwise, the person doing the referral would themselves have to assess, even before

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28 *Findlay v Valuers Registration Board and Valuer General* HC Hamilton M171/87, 14 December 1987; and *Bates v Valuers Registration Board* [2015] NZHC 1312.
29 *Findlay*, above n 28.
30 At 9.
31 At 21.

getting a report on the matter, whether it was a complaint of conduct to that level to render the valuer unfit for registration. That would require pre-determination.[32]

[29] I would also observe it would be practically difficult to make such an early assessment. Where, for example, the complaint is a challenge to the correctness of a valuation, an assessment cannot be made on the bare challenged figure. Further independent valuations are inevitably obtained as part of the assessment phase, so as to provide some information on the extent to which the challenged valuation is consistent or otherwise with the independent valuations.

[30] Doogue J concluded that the words in s 31 which refer to conduct rendering a person unfit to be registered were to be seen as describing the penalty, not as part of the charge.[33] He accordingly upheld charges that alleged only "incompetent conduct in the performance of your duties".

[31] This Court returned to the issue in *Bates v Valuers Registration Board*.[34] There the charge against Mr Bates under s 31(1)(c) was that he was guilty:[35]

> of such unethical conduct in the performance of your duties as a valuer as renders you liable to penalty

[32] A second charge was similarly worded, but alleged improper conduct under s 31(1)(a). The important aspect for present purposes is that the charges were again of only unethical or improper conduct, not charges of such conduct as rendering Mr Bates unfit to be registered, thereby suggesting that the conduct itself was what had to be proved at step one.

[33] Kos J considered it plain that "complaint" in s 32(1), must, as Doogue J held, refer only to the mere conduct – improper, unethical or incompetent.[36] His Honour saw the issue as being whether, before referring such a complaint on for investigation by the Valuer-General or the Institute, the referrer must filter it according to a threshold

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32 At 21.
33 At 30.
34 *Bates*, above n 28.
35 At [21].
36 At [50].

of seriousness. That filter would necessarily be that the complaint alleges conduct that if proved "may" render a person unfit to be registered.[37]

[34] Kos J identified a number of reasons why a filtering exercise was not appropriate:[38]

(a) there was nothing in the parliamentary debates to suggest charges were to be restricted to grave misconduct;

(b) related to this, had that been the parliamentary intent it could have been achieved more easily than the current wording of ss 31-33;

(c) such a standard would leave little work for the lesser penalties in s 33(1);

(d) it involves adding a further restraint on charging. Section 32(2) requires the Board to consider if there is a reasonable ground for the complaint to go to a hearing. This would add that it must also be satisfied it is of sufficient gravity to result in deregistration;

(e) the practical difficulties in determining the appropriate, even in terms of potential appropriate gravity, prior to there being a hearing; and

(f) related to this, who is the person to make this pre-assessment.

[35] For these reasons Kos J concluded the scheme did not require grave misconduct before a valuer may be the subject of investigation and inquiry.[39]

[36] Mr Waalkens challenges the correctness of these decisions, submitting that they are contrary to the plain reading of the statutory language. He accepts that limiting the disciplinary process to only the most serious of misconduct would

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37 At [52]. It is unclear from where the concept of "may" is derived. It may be a practical limit on the strict wording of s 31(1) but it is not the statutory language. If s 31(1)(c) is the source, "may" should be replaced by "would".

38 At [53]-[60].

39 At [60].

undermine the effectiveness of the Act and in particular s 32(2), but submits that is a matter for Parliament. Further, there is an ability to fine valuers for breaches of the code of ethics.[40] This is a mechanism for dealing with less serious conduct.

[37] I accept there is a literal reading of the Act that supports the intervenor's position. The language of s 31(1)(c), on its face, suggests that the captured conduct is not just improper conduct, for example, but "such" improper conduct as to mean the valuer is no longer fit to remain on the Register. Further, s 31(2) defines unethical conduct as being a breach of the code of ethics. Section 16(1)(m) of the Act provides that breaches of the code may be punished by fines of up to $500. In defining the offence provision of s 31(1)(c) by reference to the same code of ethics, it must be thought Parliament had in mind that more serious breaches of the code would be dealt with under s 31. This points to s 31 being about serious misconduct, as indeed do the offences set out in s 31(1)(a) and (b).

[38] I also agree that in itself the use of "act or default" in s 32(1) does not advance matters. It is neutral and can refer to either of the two possible meanings.

[39] All this being acknowledged, such an interpretation should only be adopted if no other interpretation that better suits the purposes of the Act is available. *Findlay* and *Bates* have both held that such an alternative does exist, and I see no reason to differ. The primary reasons are that the literal interpretation not only does not advance the purposes of the Act, it actively hinders them; and the literal interpretation is impractical in terms of implementing the Act's procedures.

[40] As to purposes, it has often been emphasised that the role of a disciplinary process is to ensure professional standards are maintained.[41] This is for the advantage of clients, the public in general, and the members of the profession who have a collective interest in the standing of the profession being maintained. The literal interpretation in the present case would impede the ability of those charged with maintaining standards to do so. There is no benefit in that to anyone. The ability to

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40 Valuers Act, s 16(1)(m).

41 See, for example, Collins J in *McLanahan v New Zealand Registered Architects Board* [2016] NZHC 2276 at [164].

impose small fines for breaches of the code of ethics is some amelioration, but would still leave a situation where the scope of the Act is significantly deficient.

[41] As noted in the earlier decisions, it is hard to reconcile the express availability of lesser sanctions such as a fine and reprimand with the proposition that only conduct which renders a person unfit to be on the Register is caught by the disciplinary offences. It is no answer to this inconsistency to posit that cases may arise even with serious misconduct where removal is not the necessary outcome. While that is so, the statutory scheme would not provide this wide range of sanctions merely to give flexibility when dealing with the occasional. The more obvious conclusion is that the range of penalties reflects the contemplated range of offence conduct, the bottom end of which does not engage registration issues.

[42] The literal interpretation is also not practical, as Doogue J noted many years ago in *Findlay*.[42] It is neither sensible nor possible to make assessments about the gravity of alleged breaches prior to there being an investigation.

[43] The alternative to the literal interpretation, namely that what is prohibited is improper, unethical or incompetent conduct, does not carry risk of over-reach. First, those terms each inherently contain a level of seriousness. It is not, for example, every mistake that merits a label of incompetence or every misjudgement that can be called unethical or improper. Then, of course, there is the protection offered by the existence of the two-step assessment process. The conduct having qualified for the label of incompetent or unethical, a further assessment of whether it deserves discipline is still required. Finally, there is the range of penalties which allow a measured response.

[44] I accordingly conclude that the conduct prohibited by s 31(1)(c) is improper, unethical or incompetent conduct by a valuer in the performance of their duties as a valuer.

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[42] *Findlay*, above n 28, at 21.

Issue two – was the Board of Appeal correct to adopt the *Pillai* threshold?

[45] The analysis of the statutory scheme provides the answer to this as well. A standard that is appropriate for more serious cases where a valuer's place on the Register is at risk will, if applied to all allegations, undermine the statutory scheme. It is unnecessary to set such a high standard given the protections already within the system and identified earlier: the use of terms such as improper which define the offence conduct in a way that inherently imposes a level of restraint; the existence of the discrete second-step inquiry which is a protection against over-reach and a reminder of the purposes of such schemes; and then the availability of a range of penalties which enable a reinforcement of standards without unduly impeding a valuer's ability to continue to work.

[46] There is nothing in the statutory scheme to support the *Pillai* type of fetter on the disciplinary regime. That such a high liability threshold has the potential to undermine the scheme is evidenced by this proceeding. The statutory bodies responsible for giving effect to the Act's intent and processes consider the high threshold is inhibiting their ability to maintain standards. That is a situation that is not in anyone's interest.

[47] Mr Finlayson QC took the Court through a number of decisions which had declined to adopt the *Pillai* threshold.[43] The point is made that the offence under consideration in *Pillai* was what would be called "disgraceful conduct" in many schemes.[44] It is conduct at the higher end of the scale and will normally engage questions of fitness to be registered.

[48] In my view, the rejection of the *Pillai* threshold is not limited to the particular statutory regime but reflects a more general assessment that it is not an apposite standard. It is difficult in these days to imagine that conduct at the level of deliberate misconduct or gross negligence really even needs the second-step inquiry. Perhaps if

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43 *Martin v Director of Proceedings* [2010] NZAR 333 at [27]-[28]; *Johns v Director of Proceedings* [2017] NZHC 2843 at [80]-[84]; *H v Director of Proceedings* [2018] NZHC 2175 at [25]; *W v Auckland Standards Committee 3 of New Zealand law Society* [2012] NZCA 401, [2012] NZAR 1071 at [43]-[44]; *Lago Lago v Wellington Standards Committee 2* [2016] NZHC 2867 at [66]-[69]; and *Chapman v The Real Estate Agency of New Zealand* [2016] NZHC 414 at [31].

44 *Martin*, above n 43, at [26].

the only available sanction were removal from the Register, the issue could arise, but otherwise such conduct will surely merit some response?[45] The real need for the second step comes about because conduct much less grave is routinely caught. As the inherent seriousness of the conduct diminishes, it is timely to remind oneself of the purposes of the disciplinary regime and whether sanction is needed. The second step has a real purpose in these cases.

[49] For these reasons I conclude that the Board of Appeal in *King* erred in adopting the high threshold for the step-two inquiry that was identified in *Pillai*. I confirm the need for the second-step inquiry but consider no more detailed articulation of what is involved in it is required.[46] I do however, with respect, suggest that the formulation of Elias J in *B v Medical Council* remains apt – notwithstanding a finding of breach, overall is the conduct deserving of discipline?[47] It is an issue likely to arise only at the lower end of offending.

Conclusion

[50] The offences provided for in s 31(1)(c) of the Act are improper or unethical or incompetent conduct in the performance of duties as a valuer.

[51] The established two-step approach for determining whether to impose a sanction remains the correct approach.[48]

[52] The decision of the Board of Appeal in *King v Valuer-General*, to the extent to which it adopted the *Pillai* threshold and applied it to when conduct merits a sanction, is incorrect. The second-step inquiry is an inquiry into whether the proven misconduct is deserving of discipline. If it is, all relevant factors should then be considered when determining the appropriate sanction.

[53] There is no need for formal declarations.

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45 One can always imagine cases of extreme personal circumstances where their effect is to largely remove culpability. My observations are directed at the more run-of-the-mill case of its type.

46 A similar observation was made by Courtney J in *Martin*, above n 43, at [30].

47 *B v Medical Council*, above n 1.

48 See, as an example, [1] of this judgment.

[54] I understand there to be no costs issues.

Simon France J

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