VALUERS BOARD OF APPEAL

CIV-2009-085-32

IN THE MATTER OF	The Valuers Act 1948
BETWEEN	JEREMY DAVID ALLEN KING Appellant
AND	VALUER-GENERAL Respondent

Hearing: 21 August 2009

Board: Judge T J Broadmore (Chairman)
Mr P J Mahoney (Valuer appointed by Appellant)
Mr J P Larmer (Valuer appointed by Respondent)

Appearances: Mr A H Waalkens QC for Appellant
Mr JAL Oliver for Valuer-General

Decision: 17 December 2009

DECISION OF VALUATION BOARD OF APPEAL

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[1] In October 2005 a Mr and Mrs Lee asked the appellant, Mr King, to advise them on the value of a house they were thinking of buying in Killarney Street, Takapuna. Mr King furnished such advice in a short form document called a *"Valuation Certificate"*. He valued the house at $620,000. He charged Mr and Mrs Lee $250 for his services.

[2] Mr and Mrs Lee did not agree with the valuation. They had expected it to be much more. They approached another valuer who furnished a full report and valued the house at $1.2m. Mr and Mrs Lee went ahead and bought the house for that price.

[3] Mr and Mrs Lee declined to pay Mr King's fee, but Mr King insisted on payment. The fee has never been paid and the dispute over it never resolved; but, as

they had threatened to do, Mr and Mrs Lee made a complaint with the New Zealand Institute of Valuers, which ultimately referred it to the Valuers Registration Board for investigation. As required under the Valuers Act, the Board in turn sought a report from the Valuer-General. He briefed two independent valuers, who valued the property at $1,110,000 and $1,100,000 respectively. The Valuer-General reported these results to the Board.

[4] Having considered the Valuer-General's report, the Board took up the Lees' complaint and instituted disciplinary proceedings against Mr King. The Board laid charges against Mr King asserting that he had been incompetent in reaching his valuation and had also been guilty of unethical conduct. After a hearing at which Mr King represented himself, he was found guilty in both respects. At a subsequent penalty hearing, he was fined $7,000 and ordered to contribute the sum of $18,000 towards the costs of the investigation.

[5] From that outcome Mr King, now represented by Mr Waalkens, appeals.

The charges

[6] The two charges are:

1. *Section 31(1)(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 15 October 2005 with respect to a property situated at 52A Killarney Road, Takapuna (now described as Lot 2 on DP 360001, comprised in CFR244053), you grossly under-valued the said property.

2. *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 our duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 **in that** compiling the said valuation report dated 15 October 2005 in respect of the above-described property, you failed to meet the standard required by clause 1.5 of the Code of Ethics prescribed by Rule 133 of the Rules of the New Zealand institute of Valuers and thereby acted in breach of this clause.

The Board's decisions as to liability and penalty

Liability

[7] The evidence before the Board came primarily from two independent valuers who had been briefed by the Valuer-General to provide reports – Mr M Taylor of Gribble Churton & Taylor, Mr S N Dean of Colliers International - and from Mr King himself. The report of another firm of valuers, Sheldon & Partners, who had valued the subject property at the Lees' request a few days after Mr King's valuation, was also before the Board. In addition, the Board visited Takapuna and looked at the subject property and others mentioned in the evidence.

[8] The Board carefully analysed the evidence of each of the witnesses, but preferred the evidence of Messrs Taylor and Dean. That was because their written reports and oral evidence demonstrated reference to market evidence which, in the Board's view, had been carefully considered and appropriately analysed. By contrast, the Board considered that Mr King had not provided clear evidence about his reference to comparable sales, nor of the way in which he had analysed such sales and applied the evidence derived from him to the subject property.

[9] Whilst not expressly stating what it considered the probable valuation of the subject property to be, the Board considered that the evidence of Messrs Taylor and Dean was *"well supported by market evidence"*, whereas the evidential basis for

Mr King's valuation was elusive and his valuation far less than that of Mr Dean, whose valuation was the lower of the two valuers instructed by the Valuer-General. It therefore concluded that he had *"grossly undervalued"* the subject property.

[10] In relation to the breach of ethics charge, the essence was that Mr King was in breach of the Code of Ethics by failing to provide a valuation report which conformed to the requirement of the Practice Standard applicable to valuers in the circumstances. It concluded that Mr King's certificate failed to meet the expectations of the Standard as to minimum content in various technical ways which we will address below in more detail. It therefore concluded that Mr King had breached the Code of Ethics.

Penalty

[11] The penalty hearing seems to have been conducted *"on the papers"*. Mr Oliver, who had represented the Valuer-General at the earlier hearing, and Mr Waalkens QC, now representing Mr King, both filed written submissions.

[12] The Board accepted that Mr King's offending was serious, *"but not towards the more serious end of the scale"*.

[13] In reaching that perhaps ambiguous conclusion, the Board noted that it had been difficult to ascertain how Mr King had valued the subject property, and that he could not clearly describe his approach to the valuation.

[14] On the other hand:

1. The offending was isolated.

2. Mr King had been a registered valuer since 1972. In that period of 33 years, he had had an earlier appearance before the Board, in 1990, on a matter completely unrelated to the circumstances of this case.

3. He had nothing to gain from his offending.

4. No one was harmed or suffered damage.

[15] Nevertheless, the Board considered that the professional reputation of all valuers had been tarnished by Mr King's low valuation and the way he responded to the Lees' complaint; and that he was not as co-operative as he could have been over the hearings.

[16] The Board determined that it would show Mr King leniency and treat him as though he was a first offender. It determined to reprimand Mr King, and imposed a penalty of $7,000.00. It also ordered him to pay $18,000.00 towards the total costs and expenses of the Board and the Valuer-General, which totalled $37,245.23.

Legal and contextual issues

Introduction

[17] It is a tedious but necessary part of the consideration of disciplinary appeals of this kind to establish certain matters at the outset. These include identifying the standards and ethical obligations pertaining to the particular profession, the powers of the profession's disciplinary bodies, the approach such bodies should take to their task, and the approach the Courts should take on appeals. Fortunately there is little dispute about these matters in this case and what follows in this section is largely narrative.

Statutory controls over the valuers' profession

[18] The Valuer's Act 1948 establishes two statutory bodies – the New Zealand Institute of Valuers, and the Valuers Registration Board.

Professional standards – the Institute

[19] The New Zealand Institute of Valuers, established under the Act, is the professional body representing valuers. All registered valuers belong to it. Mr King was so registered. Under s 10 of the Act, the functions of the Institute include the

promotion and encouragement of ethical conduct among valuers and the communication of knowledge in relation to the valuing of land and related subjects.

[20] Pursuant to those functions, the Institute has adopted two relevant documents – a Practice Standard for the valuation of residential properties, issued as of 1 January 1995, and a Code of Ethics, adopted in 1996. These remained operative as at October 2005.

[21] As stated in its Introduction, the Practice Standard is a recommendation from the Council of the Institute for adoption by members *"as a principle of best practice for the valuation of all residential properties"*. It sets out detailed recommendations covering the role of the valuer, the nature of the inspection which should be carried out, the structure of the report to be supplied, and a definition of *"market value"* having regard to a number of specified considerations.

[22] We draw attention to the following aspects of the Standard:

1. It is a recommendation as to best practice, implying both that it is not mandatory to adhere to it and also that it is not an exclusive statement of best practice. (We note that this was also the view of Mr Taylor – see the decision at page 10 of the bundle of material assembled for the appeal (hereinafter called the Case).)

2. It recognises that a client may require merely a verbal report rather than a report in the detailed format specified in the Standard; but goes on to require the valuer to confirm verbal advice in writing.

3. If a valuation is not made in accordance with the Standard, then the valuer is required to give reasons for that.

[23] By contrast, the Code of Ethics takes effect as a Rule binding on registered valuers. The Code is expressly within the scope of s 16 of the Act, which gives the Institute power to make rules for a number of purposes including prescribing a Code of Ethics. Such rules do not come into force unless and until they are approved by

the Minister in charge of the Valuation Department. (The Department has since subsumed into Land Information New Zealand.) In relation to the Code of Ethics, it appears that the Minister approved the Code in May 1996.

[24] As noted earlier, Mr King was charged with a breach of Clause 1.5 of the Code, which provides as follows:

> A member shall exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of statements, reports and certificates, as these constitute one of the most valuable assets of the profession, being relied upon by clients, employers, shareholders, investors, creditors and the public.

[25] It is relevant to note that the Board has a discretion as to whether or not to take disciplinary action against a valuer. The preamble to the Code records that –

> A breach of any of the provisions of this Code **may** render the person concerned liable to disciplinary action. [Emphasis added]

Discipline – the Valuers Registration Board

[26] The Valuers Registration Board is also a statutory body set up under the Act. It has a disciplinary function, as set out in ss 31 to 34 inclusive, under which there is a process specified as follows:

1. Complaints about improper or unethical conduct by valuers received by the Board are to be referred to the Valuer-General for investigation and report to the Board.

2. If, having considered the Valuer-General's report, the Board is satisfied that there is reasonable ground for the complaint, it is to hold an inquiry at which the valuer is entitled to be present and to be heard, and to be represented by counsel.

3. The Valuer-General, or his representative, acts as prosecutor at the hearing.

4. The powers of the Board upon holding such an inquiry include reprimanding the valuer, imposing a penalty on him not exceeding $10,000, both reprimanding and imposing a financial penalty, and suspending his registration for a period not exceeding 12 months.

5. The Board further has the power to remove the name of a valuer from a register if he is guilty of grave misconduct, or a sufficiently serious breach of the Institute's Code of Ethics.

5. The Board may also order a valuer to pay the costs and expenses of the inquiry and investigation.

6. There is a right of appeal from decisions of the Board to a Board of Appeal consisting of a District Court Judge and two Assessors appointed by the Board and the Appellant respectively.

[27] The Act does not deal with the procedure on appeal, but under Rule 560 of the District Court Rules 1992, still in force for the purposes of this appeal, the appeal is to be by way of rehearing.

Required approach to disciplinary hearings

[28] It is probably a testament to the general integrity and competence of valuers that the Board has not had the opportunity in recent years to consider its approach in the light of recent cases involving discipline in other professions. As a result, the approach taken in this case does not reflect current thinking.

Onus and Standard of proof

[29] It is clear that the Valuer-General had the burden of proof of the charges laid against Mr King. As to the standard of proof, there has in recent years been debate in the context of professional disciplinary proceedings generally as to whether that should be the criminal standard of *"beyond reasonable doubt"* or the civil standard of *"proof on the balance of probabilities"*. This debate has now been resolved by

the decision of the Supreme Court in *Z v Complaints Assessment Committee* [2009] 1 NZLR 1. At [118], McGrath J said this:

> ... We are of the view that in this country there is no good reason for creating an exception covering disciplinary tribunals. A flexibly applied civil standard of proof should be adopted in proceedings under the Act and other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other ruling requiring a different standard.

[30] As Mr Oliver accepted, there is no material distinction in this regard between the rules governing dentists and the rules governing valuers. The use of the words *"flexibly applied"* refers to the relative seriousness of matters to be proved and the consequences of proving them.

[31] Mr Waalkens emphasised, however, that all disciplinary charges were serious matters. That was because professional disciplinary schemes were set up both to protect the public and also to enforce high standards of conduct, ensuring that no person unfitted because of his or her conduct should be allowed to practice the profession, and to enable the profession to ensure that members conformed to standards generally expected of them.

[32] We have some difficulty with that submission. Obviously, a disciplinary charge is important to the professional whose conduct is under scrutiny. But the language of the *Z* case expressly calls for a flexible approach conditioned by the seriousness of the charge. And, as discussed below, the submission seems inconsistent with considerations relating to threshold.

Threshold

[33] Mr Waalkens contended that the Board had failed to consider this issue at all; and identified it as the central part of Mr King's appeal.

[34] The fact is that over the last ten years or so the Courts have come to realise that a finding of a breach of professional standards on its own does not justify a finding of professional misconduct warranting disciplinary sanction. The leading authority is the New South Wales case of *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197. In that case, Kirby P said at page 200:

> ... The statutory test [of professional misconduct] 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.

[35] Since then, Kirby P's observations have been adopted in a number of New Zealand cases which it is not necessary to cite particularly or discuss further, because Mr Oliver accepted the legal position. That is, to adopt Mr Waalkens' submission, that the valuers' profession, as with other professions, requires, before an adverse disciplinary finding can be made, a two-step approach as follows:

1. Whether the matters alleged in the disciplinary charge have been established to the point that there has been a departure from acceptable standards; and then, quite separately –

2. Whether that departure has been significant enough to warrant disciplinary sanction for the purposes of discipline.

[36] As to the determination of whether the departure has been significant enough, the passage from *Pillai* cited in [34] above, adopted recently by a full bench of the High Court in *Complaints Committee (No 1) of the Auckland District Law Society v APC* (CIV-2007-404-4646, 8/2/08, Randerson, Williams and Winkelmann JJ), is an authoritative guide.

[37] In this case, it is clear that the Board moved directly from a finding that Mr King had breached both professional standards and ethical obligations to the question of penalty, without asking itself whether Mr King's breaches crossed the threshold beyond which the Board was justified in imposing disciplinary sanctions against him.

[38] Whether that threshold was crossed is, we think, the key issue on this appeal.

[39] As noted earlier, there seems to be a tension between Mr Waalkens' submission that all disciplinary charges are to be treated as serious in respect of the standard of proof to be applied in determining whether such a charge is made out,

and the accepted legal position that an established departure from professional standards may nevertheless not be significant enough to attract a disciplinary sanction. In our view, that tension should be resolved by adopting a straightforward approach to the language of the Supreme Court in *Z*.

Approach of District Court on appeal

[40] Rule 560 of the District Court Rules provides that, unless provided otherwise in any enactment, any appeal shall be by way of rehearing. It is common ground that the Valuers Act does not *"provide otherwise"*.

[41] Past controversies as to what is required on an appeal by way of rehearing have been resolved by the judgment of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, an appeal concerning possible confusion between similarly-named trademarks. The basis of the appeal was that the Court of Appeal had failed to give sufficient weight to the decision of the Assistant Commissioner of Trademarks. As to that, the Supreme Court said, at [5]:

> An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[42] Later in the judgment, at [16], the Court said this:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[43] In order to emphasise the point that the Supreme Court was making, it is worthwhile to contrast the views of the Court of Appeal, with which the Supreme Court disagreed. At [30] that Court said this:

> In our view, this was a case where deference by the High Court to the expertise of the Assistant Commissioner was called for. We say that because

> the conclusion reached by the Assistant Commissioner, in relation to an issue calling for an evaluative assessment on her part, appears to us to be a conclusion which cannot be fairly characterised as wrong. She adopted an orthodox approach to the task and directed herself appropriately as to the legal test she had to apply. Having done so, she reached a conclusion which involved a value judgment on the likelihood of confusion or deception, which appears to us to be soundly based. That being the case, the High Court Judge ought not to have embarked on a reconsideration of the issue without considering, and giving weight to, the Assistant Commissioner's conclusion. He was, of course, entitled to reach a conclusion contrary to that reached by the Assistant Commissioner, but not to do so without giving weight to her views. If he had done that, we believe that he would have upheld the Assistant Commissioner's decision. We are satisfied that that should have been the outcome of the High Court appeal

[44] It follows that we must come to our own view, as Mr Waalkens submitted, by considering and weighing all of the materials which were before the Board. In this case, it is relevant that two of our number are themselves experienced valuers, so that the factor of deference to a specialist Tribunal has even less significance than it might otherwise have had in terms of *Austin Nicholls*.

Issues on appeal

[45] We therefore approach the appeal on the basis required by *Austin Nicholls*. That appears to require us to reach our own conclusions on the following issues:

1. Whether Mr King breached either the professional standards or the ethical obligations he was required to observe as a registered valuer.

2. If so, whether the breach crossed the threshold beyond which the Board was justified in imposing disciplinary sanctions against him.

3. Again if so, whether the sanctions imposed were appropriate in the circumstances.

4. Whether the charges against Mr King were duplicitous in the legal sense of both covering the same ground.

Issue 1 - were there breaches?

[46] This issue in turn requires the consideration of a number of issues, primarily factual, as follows:

1. The nature of the instructions Mr King had from Mr and Mrs Lee.

2. Whether the market value of the property as assessed by Mr King was shown to amount to a *"gross under-value"* having regard to the definition of market value in the Standard. Consideration of that question involves considering, in particular:

    - The acceptability of Mr King's professed approach.

    - The usefulness of the check valuations carried out by other valuers at the request of the Valuer-General as comparables for Mr King's valuation, both as to their professed approach, their degree of analysis, and their selection and use of comparable sales evidence.

    - The significance of the Board's post-hearing site visit.

3. Whether, apart from the primary issue of under-value, Mr King's actions in carrying out his instructions were acceptable in the circumstances in terms of the Standard or Code of Ethics.

Mr and Mrs Lee's instructions to Mr King

[47] It is fundamental in any case in which a professional person is criticised by a client to know what the client's instructions were. This is a question which is relevant to both charges.

[48] In this case, neither Mr nor Mrs Lee gave evidence before the Board; and the evidence as to their instructions to Mr King is indirect and tenuous. It consists of the following:

1. In Mrs Lee's letter to Mr King dated 2 November she complained that:

> [Mr King's] assessed market value was "well below" the expected selling figure ...

and expressed the view that Mr King's assessment was *"substandard"*.

2. In his letter of 5 November 2005 to Mrs Lee, Mr King reiterated:

> My advice is not to pay more than the value I placed on the property ... I printed off recent residential sales to assist you in your purchase ... if you require more assistance by way of sales evidence, I will help.

3. There is reference in Mr and Mrs Lee's response of 17 November 2005 to Mr King to *"your market figure"*.

4. The valuation certificate issued by Mr King and dated 15 October 2005 states "*purpose of valuation – market value*" and at the foot of the first page, gives a market value of $620,000.

[49] Although we note that the tax invoice rendered by Mr King's company described the services performed as being for "*mortgage valuation*", all the other contemporary evidence strongly indicates that Mr and Mrs Lee were looking for a professional assessment of the market value of the property for the express purpose of assisting them in their negotiations to purchase it.

[50] Mr King's evidence at the hearing is consistent with that.

[51] In cross-examination, Mr Oliver drew attention to a more comprehensive report on another property which Mr King had prepared, and the following exchange then occurred (Case 71):

Q. Why didn't you provide that sort of report to Mr and Mrs Lee?

A. It was a valuation certificate. They didn't need a full valuation.

Q. And why?

A. They wanted a lower price fee. They wanted a valuation certificate, far less. **They only wanted an indication**, there was no mortgage recommendation. (Emphasis added)

[52] On the next page (Case 72) the following exchange occurred:

Q. What did they actually ask you for by way of valuation?

A. **An indication of what they should buy the property for**. And I said, well, if you only want that, how about a valuation certificate which I think at the time was a $250 fee, half the price of a full valuation fee. And they said "*yes, that would be sufficient*". (Emphasis added)

Q. Do you think they actually knew what a valuation certificate was?

A. Yes, because all I said, it is virtually a very brief description of the property with a valuation of it and I went further, free of charge, and gave them a list of comparable sales.

[53] A few lines later, having been challenged on the list, Mr King said:

Yes it is surprising **they** haven't produced it, isn't it. (Emphasis added)

[54] We next refer to some standard boilerplate conditions attached to Mr King's certificate, from which the following are relevant extracts:

> The valuation is our opinion of the current market value as at the specified date on a willing buyer / willing seller basis. Value may change over time due to market conditions and to the state of the subject property.
>
> The valuation provides our assessment of market value. Market value is the estimated amount for which a property should exchange for [sic], in money terms on the date of valuation between a willing buyer and a willing seller in an arms length transaction after property marketing where the parties each act knowledgably, prudently and without compulsion.
>
> The report and valuation is relevant as at the date of preparation. Within a changing economic environment values can vary – sometimes over a relatively short time-span. ...

[55] Finally, we draw attention to a passage in Mr King's evidence at Case, 67. He told Mr Oliver that the Lees had told him they wanted to pay $1.2 million for the property, and then went on to say:

> ... I put $630,000 on it and they said to me if I don't increase it up to $1.2 million they would go to the Registration Board and complain.

This passage, if it truly reflects the Lees' position, gives rise to inferences about their real motivations in seeking a valuation. It further underlines the need, in cases like this, to have the clients available to give evidence as to the instructions given to the valuer, and so that they may be available for cross-examination.

[56] On the face of this evidence, it would seem that Mr and Mrs Lee were seeking Mr King's professional advice to equip themselves to negotiate for the purchase of the property and were not seeking any deeply reasoned or elaborate advice; and that Mr King approached the assignment on that basis. Had Mr and Mrs Lee given evidence at the hearing, then it is quite possible in our view that they would have agreed that they did not want an elaborate (and expensive) valuation, but rather the experience-based advice which would be useful to them for the purposes they had specified.

[57] Before going further, we are bound to point out a curious aspect of the timing of events. Mr King's valuation certificate is dated 15 October 2005, and records the date of his valuation as 12 October. But, as noticed by the valuer members of the Tribunal and apparently unremarked previously, 12 October was in fact the date of the sale to the Lees. This is the date recorded in the report Mr King subsequently obtained from RPNZ to ascertain the statutory rating valuation: see Case 129. In our view this timing again raises inferences about the true motivation of the Lees in approaching Mr King.

[58] We accept that Sheldon & Partners prepared a formal valuation report when Mr and Mrs Lee turned to them after receiving Mr King's report. But again, we do not know, either from the Lees or from Sheldon & Partners, what the Lees' instructions were; and whether, for example, the valuers might have recommended a detailed report as a means of providing authoritative validation or rebuttal of Mr King's views.

[59] Bearing in mind that, as we have pointed out earlier in this judgment, the Valuer-General bore the onus of proof, we do not think that he established the instructions Mr King received from Mr and Mrs Lee, or their expectations, to any standard from which an inference adverse to Mr King could be drawn. Whether consciously or not, Mr King recognised where the onus lay: in answering Mr Oliver's question about the list of comparable sales - [53] above – he implicitly took the stance that it was not up to him to produce the evidence.

[60] The failure on the part of the Valuer-General to establish the nature of the Lees' instructions to and expectations of Mr King is a weakness in the Valuer-General's case in our view. There is no evidence to contradict the evidence of Mr King as to his instructions. The Board failed to consider the issue at all.

Professional standards charge - was Mr King's valuation a "gross under-value"?

[61] We accept the view of the Board that a valuation which deviates by more than 10-15% from an objectively *"correct"* valuation is likely to be judged unacceptable and incompetently prepared. But of course it is up to the Valuer-General to establish what the *"correct"* valuation is. In this sense, *"correct"* may mean no more than that a valuation which is in the middle of a range indicated by properly applying accepted principles.

The valuations

Introduction

[62] The Board had before it no fewer than five valuations. First, there was of course Mr King's valuation. Next, there were valuations from two valuers appointed by the Valuer-General - Messrs Taylor and Dean. Messrs King, Taylor and Dean all gave oral evidence from in respect of the valuations they had prepared. The other two valuations were the Sheldon & Partners valuation sought by Mr and Mrs Lee after they rejected Mr King's valuation, and the statutory rating valuation. All valuations except Mr King's and the statutory rating valuation clustered around

$1.1m to $1.2m. Mr King's valuation was $620,000. The rating valuation, dated as at 1 September 2005, was $540,000.

Instructions

[63] As we have already observed in discussing the Lees' instructions to Mr King, we do not know what instructions they gave to Sheldon & Partners, although it would appear from the first sentence of the report that they were instructed to *"assess the current market value for mortgage advancement purposes"*. That is consistent with the inference drawn from the date of the valuation and the recorded date of the sale, noted at paragraph [57] above, that the Lees had committed themselves to a purchase (or at least a price) by the time they had instructed Sheldon & Partners.

[64] The nature of the instructions to Messrs Taylor and Dean are of some interest. They were instructed by the Valuer-General in order to provide a check on Mr King's valuation. It is clear that the Valuer-General's instructions were rather different from those given by the Lees to Mr King. The relevant passage from the letters sent to each valuer is in the following terms:

> I would appreciate your assistance in the preparation of a market valuation and mortgage recommendation for this property. Please complete the valuation having regard to market conditions prevailing at 16 October 2005, being particularly careful to use only such sales and rental evidence as would have been available through normal avenues to a valuer in practice at that time.
>
> Please note that valuation reports prepared for possible disciplinary hearings are frequently the subject of intensive cross-examination. It is therefore important to include in your report a detailed analysis of the comparable market evidence relied on. You are also to asked to include in your report confirmation of compliance with or explanation for any departure from the relevant NZIV standards.

[65] The difference between these instructions and those given by the Lees to Mr King hardly needs elucidating. The Valuer-General sought formal and detailed valuation reports with mortgage recommendations, in contrast to the *"bare bones"* report sought from and provided by Mr King. That contrast is reflected in the contrasting fees. Mr King charged $250. Sheldon & Partners, and Mr Taylor's and Mr Dean's firms, all charged amounts in the area of $2,000.

[66] In those circumstances, it is scarcely surprising that the other three valuers devoted a lot more time to their task; and their reports each evidenced detailed analysis and thorough discussion of aspects thought to be relevant.

Mr King's valuation

[67] The certificate Mr King gave to the Lees is a very basic document. It expressly states at the outset that it is not a full report. It is in a standard form, the first page of which is in a tabular format with headings in the left hand column and responses to the headings in the right hand column. The headings identify such matters as the legal description, the zoning and the identity of the local authority, and the interior and exterior condition of the property. The responses are brief. The remaining three pages contain standard information and conditions of a boilerplate nature of little direct relevance to this case except for references to and descriptions of market value which are referred to elsewhere in this decision.

[68] The certificate contains no information as to how Mr King approached his task – eg. by reference to comparables or to the application of standard and identified valuation techniques.

[69] The certificate shows a valuation of the land at $300,000 and the improvements at $320,000, a total of $620,000.

[70] There is much to criticise about the contents of the certificate. The title details, including the land area, are wrong, because Mr King furnished the details relating to the unsubdivided section of which the property was merely a part. It is unclear whether the chattels have been included. The sections of the form providing for responses to headings as to the interior and exterior condition of the dwelling and the probability of growth or decline in value have not been completed. As to this latter point, Mr King maintained at the hearing that these sections had in fact been completed by (as we understand it) by colour highlighting of the applicable pre-printed option which had not come out on the photocopy, but there was nothing to confirm or discount that suggestion.

[71] On Mr King's evidence at the hearing, the primary basis for his valuation was the evidence derived from comparable sales, taking into account also his calculations of the value of the land and the value of the improvements. He told Mr Puketapu, a member of the Board of Enquiry, that he had based his assessment of the land value on his knowledge of the area, and of the improvements on the basis of cost less depreciation, having regard to the area, quality and construction. But he admitted that he had left his calculations at the office.

[72] There was some debate at the hearing as to whether or not Mr King had in fact referred to comparable sales in reaching his valuation. Mr King asserted in his evidence before the Board that he had done so; and that is confirmed by his letter of 5 November 2005 to Mrs Lee reminding her that he had *"printed off recent residential sales to assist you in your purchase"*. Consistently with the unsophisticated way in which Mr King prepared his case for the hearing, he was unable to produce a copy of this list. Nevertheless, as we have noted above, the onus was on the Board; and, Mr King having given evidence along the lines noted, it was on the Board to rebut it which it did not. In our view it is likely that Mr King did refer to recent sales evidence in reaching the valuation which he gave to the Lees.

[73] In any case, at the hearing, Mr King sought to justify his valuation by reference to sales which he regarded as comparable.

[74] We do not intend to analyse the alleged comparables in any detail. Mr King made detailed written submissions concerning his comparables. We are bound to say that, on the face of it, the points he makes have some merit.

[75] Mr King also made adverse comments about the subject property itself, including its location on a fairly busy street, its design (essentially a square two-storied box, lacking in appeal to Mr King), its location on a rear section lacking any street appeal, and the fact that the Fire Station was virtually across the road. By contrast, however, the section of his certificate which expressly provided for a description of the detriments of the property showed *"nil"*; and the attributes section claims as an advantage the fact that the property was on a rear section.

[76] More significantly, Mr King drew a contrast between his comparables and the general location of the subject property. Although close to Takapuna Primary School and the Westfield/Hall's Corner shopping area, the subject property has no significant outlook; and particularly has no outlook towards or real connection with either Lake Pupuke or Takapuna Beach. (But the certificate claimed as an attribute of the property that it was *"within walking distance of Takapuna centre, Lake Pupuke and the beach"*.)

[77] By contrast, Mr King maintained, a number of the comparables selected by Messrs Taylor and Dean included properties in what he termed *"the Golden Mile"*, which had the favourable location and outlooks which this property lacked, and which were valued accordingly by the market in his opinion.

[78] Mr King also referred to the statutory valuation of $540,000, which is dated as at 1 September 2005. Mr King would not have been aware of that valuation at the time of his advice to Mr and Mrs Lee – it would not have come out until some time in 2006 - but he relied on it at the hearing as corroborating his own views. He pointed out that the sale price was 118.5% higher than the statutory valuation, a variation far greater than that in any other sale of a property within 2 kilometres of the subject property between January and October 2005. (The next greatest variation was 30.9%.)

[79] Mr King finally drew attention to the implications to be drawn to the sale price of the identical unit built on the front section. That house was sold in August 2006, the best part of a year later, for $930,000. He asserted that the two units were *"similar in construction and design"*. He asserted (Case 62) a 10% rise in overall values over that period, so that the front unit price represented a price of $860,000 as at October 2005. He maintained that a directly comparable selling price for the subject property would be $150,000 less than that, because it had *"less view, less outdoor living space and less street appeal"*. Therefore, on the basis solely of the selling price for the front unit nearly a year later, the value of the subject unit would have been $710,000 as at October 2005. It was therefore all the other valuers who had grossly over-valued the subject unit rather than he who had undervalued it.

Mr Taylor's valuation

[80] Mr Taylor valued the subject property at $1,110,000: $500,000 for the land, $590,000 for the improvements, and $20,000 for the chattels.

[81] As noted earlier, he was given detailed instructions by the Valuer-General, including advice to take particular care because of the purpose for which the valuation was required and because of the possibility of cross-examination.

[82] Mr Taylor, like Mr King, identified some 16 sales in the Takapuna area which he considered worthy of consideration to provide evidence of comparable sales. He then considered the relationship of the comparables with the subject property. He took into account publicly available information as to the land and building areas of the comparables. He also had regard to his own opinions as to the respective location, ages, designs, construction standards, and other attributes such as views and convenience of the subject property and the comparables. He was then able to locate the subject property within the range of comparables.

[83] By way of cross-check, and using public information as to the land area and building area, Mr Taylor was able to calculate a *"land and building"* rate per square metre, producing an average figure of $5,329 per square metre over the 16 sales surveyed. He then considered where the subject property would sit within the comparables selected, located the subject property in the mid-range of the comparables and identified a rate per square metre of $5,362 per square metre, which turned out to be slightly above the average of all comparables.

[84] Mr Taylor was satisfied that the cross-check of the land and buildings approach corroborated the net rate approach, so that he was happy to settle on a final valuation of the figure mentioned.

Valuation of Mr Dean

[85] Mr Dean valued the property at $1,100,000: $400,000 for the land and $700,000 for the improvements, including the chattels. He had received instructions from the Valuer-General identical to those received by Mr Taylor.

[86] Like Mr Taylor's valuation, he based his valuation on identifying a range of comparable sales, although the comparables he selected did not completely match Mr Taylor's selection. Mr Dean also identified some eight land sales (ie. essentially bare land), which covered a rather wider area than the sales used by Mr Taylor, or, for that matter, Mr King.

[87] Like Mr Taylor, Mr Dean identified a *"mid-rate"* for the comparables he had selected and, from the range thus obtained, identified a net rate appropriate to the subject dwelling of $3,250 per square metre, giving a value of $700,000 to the dwelling, which we assume include the deck and other improvements. Using the evidence both of the sales of dwellings and of the land sales, Mr Dean identified a land value of $400,000, so that his total valuation was $1,100,000.

[88] Both Mr Taylor and Mr Dean commented that there was not a lot of evidence of directly comparable sales, and that such evidence was not conclusive. However, they both considered that there was sufficient evidence available to enable a detailed analysis of the kind they had undertaken to produce useful results.

[89] It will be noted that, although Mr Taylor and Mr Dean came up with almost identical figures, Mr Taylor valued the land at $500,000 whereas Mr Dean valued it at $400,000. However, Mr Taylor's report contains a mistake as to the land area: it is 321m², not 391m² as stated. If Mr Taylor in fact used this figure as the basis for his calculations and appropriate adjustments are made, he should have valued the land at about $410,000. On this basis it would follow that his valuation overall should be reduced by $90,000 to $1,020,000. (This cannot have been just a typographical error: in his oral evidence (Case 44), he corrected the description of the land area (379m²) of one of his comparables to say that it was *"similar"* to the subject property.)

Sheldon & Partners valuation

[90] It will be recalled that Mr and Mrs Lee obtained a valuation from Sheldon & Partners following their dissatisfaction with the figure Mr King had given them. The valuer concerned, who appears to have been a Mr J B Rhodes, did not give evidence. He valued the property at $1,200,000: $675,000 for the land, $500,000 for the improvements, and $25,000 for the chattels. Mr Rhodes did not give evidence. Although the Valuer-General did not rely on the valuation, it was included in the evidence before the Board and is admissible before us under r 51 of the Valuers Regulations 1949 and r 560(6) of the District Court Rules 1992.

[91] The Sheldon & Partners valuation would normally be given less weight than those of Messrs Taylor and Dean on account of Mr Rhodes' unavailability for cross-examination; but that consideration is not particularly compelling in this case because Mr King did not cross-examine Messrs Taylor and Dean. We take it into account, but attach rather greater weight to the other valuations.

[92] As with the other valuers, the starting point for the Sheldon valuation is consideration of a number of comparable sales, 11 in total. There is some overlap with the comparables selected by Messrs Taylor and Dean. The valuation states its basis as follows:

> The property has been valued by way of direct comparison to sales, with suitable subjective adjustments to allow for particularly physical and locational characteristics including age, condition, style of architecture, degree of refurbishment etc. The concluded value has been apportioned as summarised above indicating the analysed net rates per square metre over the building components. The land value is an *"in use"* value which makes due regard for the existence and location of improvements on the site.

[93] Put another way, it appears that the Sheldon valuation proceeds on much the same theoretical basis as the others.

[94] It should be noted that the Sheldon's valuation was dated 24 October 2005 and was for *"mortgage advancement"* purposes. As noted earlier, it appears that Mr and Mrs Lee had already signed up to purchase the property for $1,200,000 at that stage. It is likely that Mr Rhodes of Sheldon & Partners knew that: the

reference to mortgage advancement implies a done deal – or at least a conditional sale in which the price was settled.

Market conditions

[95] As we pointed out in paragraph [54], a clause in Mr King's certificate emphasises that values can vary, sometimes over a relatively short time span, in a changing economic environment.

[96] The evidence reveals uncertainty about the prevailing market conditions:

1. The report Mr and Mrs Lee obtained from Sheldon & Partners following their dissatisfaction with Mr King's valuation contains the best part of a page on market conditions (pages 6-7, Case 111/112). The report refers to "*mixed sentiments and inconsistent market indicators*". It goes on to refer to sustained periods of high activity in recent times, with such activity holding up despite predictions of a plateau; and refers to factors which could have a "*negative impact on property values*".

2. The valuation of Mr Taylor, referred (at page 7, Case 148) to "*rapidly increasing prices*" over the two years prior to October 2005, and to indications of a slowing and consolidating market.

3. Mr Dean made no direct comment on market conditions in his report, but made an express reservation, similar to that made by Mr King in his certificate, as to the possibility of market movements leading to significant and unexpected changes in value.

[97] Neither Mr Taylor nor Mr Dean, nor for that matter Mr King, said anything further relevant to market conditions in their oral evidence at the hearing.

[98] The Board did not discuss market conditions in its decision, or comment on any significance they might have in advising a client on market value. But a fair inference from the evidence just referred to is that the market was arguably becoming very *"toppy"*.

Discussion

[99] All of the valuations of which the Board had evidence are open to criticism.

[100] Although the Sheldons, Taylor and Dean valuations all came up with very comparable figures, it is noteworthy that the breakdown of the figures varied quite widely. The land valuations ranged from $400,000 (Dean) to $675,000 (Sheldons). It is not easy to escape the inference that the three valuers thought, on the basis of the evidence of sales which they regarded as comparable, that the value of land and buildings combined was within the area of $1.1m to $1.2m[1], and that the theoretical under-pinnings of the valuation were not quite as important as the end result.

[101] That reflects the view, which was explicitly acknowledged by the valuers, that there is a strong subjective element in any valuation. That is not necessarily to be critical of the valuers: what a client pays for, as is often the case with professionals, is the skill and judgment evolved out of many years experience.

[102] Having said that, we are troubled by the choice of comparables. As we have said in discussing Mr King's evidence, it is not easy to criticise his choice of comparables. Moreover, we think that some of the points he made in criticising the other valuations were well made. We refer in particular to his comments about the value as comparables of other properties, seemingly quite close to the subject property, but on the Takapuna Beach side of Lake Road and Hurstmere Road, or with views towards Lake Pupuke, both of which areas would appear to have strongly positive factors; and also to his negative comments as to the lack of outlook from the subject property, its complete lack of street appeal, its proximity to the Fire Station, and its stark external appearance.

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1 On the basis that Mr Taylor was in error as to the land area, his valuation (see paragraph [89]) should be reduced to $1,020,000.

[103] A negative factor in assessing Mr King's evidence on these matters is that, as we noted in paragraphs [75] and [76], it is not easy to reconcile it with the brief comments he made on his certificate as to the attributes and detriments of the property. His evidence therefore carries an element of hindsight justification.

[104] Mr King's strong local knowledge, from having lived in Takapuna as a child and from having until 2004 owned a house in the same street, cannot be overlooked either.

[105] The statutory valuation is an outcome of mass appraisal techniques and would normally carry rather less weight than the detailed inspections and assessments of the valuers concerned. Nevertheless, the extreme deviation of the sale price from the statutory valuation, far greater than any other such deviation in that area over the same period, also provides some support for Mr King.

[106] Finally, the sale price of the front unit in August 2006, and the extrapolations made by Mr King from that figure, also provide support for his position.

[107] We note, however, that there is an issue as to the relevance of the statutory valuation and the sale price of the front unit to the question of what a competent valuer would have valued the rear unit as at October 2005. That is, of course, because that evidence was not available in October 2005. Even if Messrs Taylor and Dean knew about the statutory valuation and the sale of the front unit when they carried out their valuations, in terms of their instructions from the Valuer-General they could not make use of such material: see paragraph [64] above.

[108] However, we think that it was open to Messrs Taylor and Dean to take some limited account of the front unit sale price, and perhaps other directly comparable sales in the period after October 2005, to try to confirm trends evident from the comparables utilised in October 2005. But it would be dangerous, in our view, to place undue reliance on that particular sale on its own as evidence of a trend. In his evidence at Case 62, referred in paragraph [79] above, Mr King used the front unit sale to support a proper market value for the rear unit at $710,000 as at October 2005, on the basis of a 10% appreciation in average values over the 10 month period

between the two sales. But an examination of other comparables may have confirmed such a continuing upward trend, leaving the sale of the front unit to be treated as itself being out of line, with the price attributable to particular and unknown factors.

[109] Earlier in this judgment, we discussed the market conditions prevailing at the time, and concluded that the market was showing signs of being quite *"toppy"*. We have considered the significance of that conclusion for the valuation of the property. The significance of unusual market conditions is discussed extensively in the Board of Appeal decision of *Kennedy* (30.5.89) by reference to English authority. The Board of Appeal concluded (page 27) that:

> ... the accepted principles of the [valuers] profession governing the valuation of land **for mortgage purposes** [required] extra caution and indeed conservatism in a buoyant and speculative market ... (emphasis added)

[110] Despite generalised and standardised cautions about market conditions, none of the valuers (Mr King included) expressly articulated, much less discussed, any need for caution in the prevailing market conditions. Mr King may be excused for that, because he was not instructed to value the property for mortgage purposes. But not the others, who were so instructed. Particularly Sheldon & Partners and Mr Taylor, who, as we have observed in paragraph [95] above, both offered some detailed comments about the market. That is a shortcoming in the evidence in our view.

[111] Nevertheless, we think that the preponderance of the evidence available to the Board is that, whatever the true market value of the property was, it should properly have been valued, as at October 2005, at a figure considerably higher than Mr King's assessment. We regard Mr King's valuation as unreliable on the evidence. We reach those conclusions because we are satisfied, where relevant to the standard of the balance of probabilities, of the following matters:

1. We consider that Mr Taylor and Mr Dean were appropriately qualified to give expert evidence as to the value of the subject property;

2. We consider that their evidence was credible in that they demonstrated the application of accepted methodology and their calculations, analyses and the like were clearly set out; and their conclusions followed logically. (An important aspect of this is that Mr Taylor's error as to the land area could easily be detected and corrected for.)

3. To the extent that their valuations depended on their selection of comparables which might have been open to criticism – as to which see our earlier comments and [155] below – we do not consider that any difference in the final outcome would have been anything like sufficient to bring Mr King's valuation within an acceptable range.

4. By contrast, Mr King adduced no contemporary evidence as to either his selection and use of comparables (granted that we accept that he had made a selection as earlier discussed) or as to his calculations and analyses. That he failed to adduce this material is entirely his responsibility – see paragraphs [146] and [159] below. Whether he knew the correct area of the property at the time of his valuation is uncertain.

5. Mr King's evidence at the hearing as to these matters was largely an *ex post facto* attempt to justify his valuation. We do not know whether the comparables he presented at the hearing were the ones he considered when making his valuation (although one might expect at least an overlap). Further, and as pointed out earlier, his criticisms of the property made at the hearing were inconsistent with his comments on the valuation certificate.

[112] Whether the value of the property was as high as the levels assessed by the valuers other than Mr King is, however, open to question on the totality of the evidence, for reasons we have already given. The two valuations cited by the Valuer-General (particularly Mr Dean's, on the basis that Mr Taylor's valuation is

adjusted downwards), and the Sheldon valuation, may well have been above the true market range at the relevant date.

[113] It follows, therefore, in our opinion, that Mr King's valuation of the property was at a figure substantially less than the lower end of the range of probable values; but in the light of the concerns we have about the other valuations, we are not prepared to say by how much.

[114] The word *"gross"*, used in the charge and by the Board to describe the extent of Mr King's under-valuation, has pejorative overtones which we do not think are justified in this case. Nevertheless, in our view the evidence establishes, to the standard of the balance of probabilities, that the valuation was so far below the range of realistic valuations that Mr King's conduct in arriving at it was incompetent.

Before turning to the ethics charge, we need to say something about the Board's visit to Takapuna. This took place after the hearing. Both the Valuer-General and Mr King consented to it. The Board drove around the various localities which had been mentioned. It accepted that prices were influenced by localities, so that valuers required *"significant local knowledge"*. It also accepted that Messrs Taylor and Dean had established their credibility in that regard. Mr Waalkens criticised the Board for going beyond the bounds of a *"view"*, as that term is normally understood in the law of evidence. But the Board has the power to receive any evidence whether legally admissible or not. We therefore reject Mr Waalkens' criticism – although the Board should be circumspect about conclusions it draws from such visits, and be ready to refer such conclusions back to the parties for comment if they seem likely to be contentious.

Ethics charge – was Mr King in breach of the Practice Standard?

Evidence and Board's stance

[115] The ethics charge arises out of an alleged breach of Clause 1.5 of the Code of Ethic, requiring the maintenance of the highest standards in the preparation of reports.

[116] There is no question but that Mr King's valuation merited Mr Taylor's description of it as *"minimalistic"*.

[117] The Board judged the certificate against the Practice Standard in a number of ways which we do not find it necessary to set out in detail. Among the more important criticisms are that there is no indication of the land area which would pertain to the unit following completion of the subdivision, it did not summarise the data and market conditions upon which it was based, and it did not specify the valuation methods adopted in order to arrive at a value.

[118] Mr King's stance on the content of the certificate was that it was adequate in the circumstances of the case because all the Lees wanted to know was the valuation figure: they already knew the property.

[119] We have already noted Mr Taylor's description of Mr King's valuation in his written brief as *"minimalistic"*. In his oral evidence (Case 45-6), he appears content to have pointed out the many respects in which Mr King's certificate failed to comply with the Practice Standard, and to doubt that, whether or not the Standard was mandatory, a certificate such as Mr King's could ever be acceptable.

[120] Mr Dean offered detailed comment in his oral evidence on short form reports. As Mr King's report was described as a *"certificate"* he conceded that *"certain brief references"* might be appropriate. Later in his evidence, in response to a question from a member of the Board, he said this:

> I am aware that on many occasions valuers are instructed to provide valuations that do not necessarily have all of the contents. And I mean quite often I am required to provide myself valuation certificates. They are not valuers' reports in terms of standards. But by the same token there is scope I believe in the standards for a client to instruct the method by which the reporting is to take place. So while I stuck to the standards as I usually do in a matter like this I could just as easily have supplied a certificate if that was what was required.
>
> I would have certainly made reference that this is not our normal standard of full reporting and represents merely a certificate. And I would have also **probably** said that a full report could have been provided should it have proved necessary. (Emphasis added).

[121] Mr Dean went on to emphasise that providing a value by means of a certificate in this way should not affect the quality of the analysis supporting it – it was simply a modification of the means by which a properly assessed value is conveyed to the client. And that would be true even if the reporting was verbal. We accept that. But the ethics charge is not concerned with the quality of the valuation, simply the means by which it was conveyed.

[122] Mr Dean also spent some time outlining a number of matters not dealt with in Mr King's certificate, some of which are reflected in the comments of the Board in its decision; but it is not clear to us that these comments amounted to criticisms in the light of the opinions he also expressed about the acceptability of short form certificates.

[123] In our view Mr Dean's approach is more realistic.

[124] As the Board pointed out, the Practice Standard contains provision for reports which do not conform to the Standard: if a verbal report is furnished, the valuer is required to confirm the advice in writing; and if a written report does not conform to the Standard then the valuer is required to give reasons for that.

[125] In this case, Mr King's certificate did not include a statement of or reasons for non-conformity with the Practice Standard. In those circumstances, and having regard to its analysis of the many divergences of the certificate from the Standard, the Board concluded that Mr King had breached the code of ethics.

[126] In relation to Mr Dean's comment that there was *"nothing wrong in doing this in a certificate if it conveys everything it needs to convey"*, the Board considered that Mr King's certificate was inadequate because of the *"inaccurate and inadequate recording of information around the completion of the subdivision and the new certificate of title that was yet to be issued"*.

Discussion

[127] The two issues critical to a finding against Mr King on the ethics charge are proof to the requisite standard that Mr King did not comply with the Lees' instructions; and a sustainable conclusion that, whatever the Lees' instructions might have been, a valuation provided in a form which fails to conform to the Practice Standard is unacceptable and a breach of the Code.

[128] The Board failed to make any finding on what it was that Mr King was instructed to do. Mr King's evidence was in essence, as we have already discussed, that the information he provided in his certificate was all that he was asked for, and that he supplemented the written information with a printed off list of comparable sales. The Valuer-General provided no evidence to rebut that. In the absence of such evidence, it follows that the Valuer-General failed to prove, to any standard, that Mr King failed to comply with the Lees' instructions.

[129] As to the Practice Standard, it is only a recommendation of best practice. It follows, as Messrs Dean and Mr Taylor both accepted, that advice from a valuer provided in a form which does not comply with the Standard is not necessarily unacceptable. And, having regard to Mr Dean's use of the word *"probably"* in the passage of his evidence which we have set out above, it would appear that a failure to offer to furnish a full report is not critical.

[130] The two valuers differed as to whether it was necessary to record explicitly that advice is provided in a form which deviates from the Practice Standard. Mr Taylor expressed the view that a deviation should be explicitly noted. This view no doubt reflects the wording of clauses 3.1 and 6.1 of the Standard. On the other hand, Mr Dean observed that the certificate Mr King produced expressly did not purport to be a full report, and accepted that *"brief references"* might therefore be appropriate. Mr Dean went on to state that the actual contents of any shortened valuation report depended on the nature of the work he was undertaking, and that there was nothing wrong in doing this in a certificate if it conveys everything it needs to convey.

[131] For our part, we think that a valuer is entitled to provide a short form and unembellished report to clients whose instructions are to provide a report in that form. Formal observance of the Standard is not necessarily required. Provided that clients are made aware, formally or informally, that a more detailed form of report can be provided, we can think of no reason why they should be forced to accept, and by inference required to pay for, a report which goes beyond the needs which they have communicated to the valuer.

[132] As the Valuer-General did not lead evidence to contradict Mr King's evidence as to the instructions he had from the Lees, and as the Board made no finding on that matter, it could not properly conclude that Mr King's certificate was unacceptable in form in the circumstances.

[133] On the basis of our own consideration of the evidence, we have concluded that the charge brought under the Code of Ethics was not made out. The appeal in respect of that charge therefore succeeds.

Summary to date

Having found that the charge of incompetence through gross undervaluation was made out (although with the reservations as to the word *"gross"* which we expressed earlier), it is now necessary for us to consider whether Mr King's proved conduct crossed the threshold beyond which disciplinary sanctions should have been imposed on him.

Threshold

[134] In paragraph [37] above, we noted that the Board had concluded that both charges against Mr King had been made out, and proceeded directly to consider the question of penalty. That approach is no longer acceptable for the reasons set out in paragraphs [33] to [36] above. The first question the Board should have asked itself was whether Mr King's established conduct warranted disciplinary action.

[135] That first question is also arguably inherent in the preamble to the Code of Ethics, which, as we noted in paragraph [16] above, gives the Board a discretion to proceed with disciplinary action against a valuer who has breached any provision of the Code. This is consistent with the approach evident from the cases and applicable to professional discipline in general.

[136] We are satisfied that, in this case, the breach which we have found Mr King to have committed, namely undervaluing the subject property, did not justify disciplinary action against him. Primarily, that is because, to use the language of Kirby P in *Pillai*, set out in paragraph [34] above, we are not satisfied that Mr King deliberately departed from accepted standards or was guilty of such serious negligence as, although not deliberate, portrayed indifference and an abuse of privilege which accompanied his registration as a valuer.

[137] There are a number of reasons why we take that stance:

1. We refer to and adopt the factors the Board regarded as mitigating in considering penalty, as set out in paragraph [14] above.

2. We consider that Mr King's valuation was honestly made. As we have commented earlier, we think that he genuinely held the view on the basis of his experience and of the comparables he selected that the subject property was not worth anything like the amount the Lees were proposing to pay for it.

3. There is no evidence that the Lees required a valuation containing any greater depth of analysis or reasoning than the certificate Mr King supplied, granted that they were entitled to (and as we have just said, received) an honest assessment.

4. As we have pointed out earlier, the other valuations of which the Board had evidence are themselves not above criticism: they furnished a valuation for mortgage purposes; they are inconsistent between themselves even though arriving at roughly comparable

values; and there may well have been some substance in Mr King's criticisms of them.

5. With the advantage of hindsight, there are grounds for thinking that Mr King's valuation may have been closer to the mark than the strictly relevant evidence considered by the Board revealed.

   Even though we have discounted the hindsight evidence, consisting of the statutory rating valuation and the sale price of the front unit, in reaching a decision as to the competence of Mr King's valuation, we think that we can rely on it in order to help determine whether that incompetence justified disciplinary action. As we have already discussed, both items of evidence tend to support Mr King's position, although each of them is subject to the limitations we have identified earlier.

6. To the extent that the Board took into account Mr King's approach to the hearing, we think it was unfair to attribute the whole responsibility to him.

[138] Some discussion of this last matter is warranted because of its significance for the Board's procedures generally.

[139] It will be recalled that the Board criticised Mr King for his failure to put his case to the check valuers called by the Valuer-General; and for his failure to bring to the hearing his papers relevant to his dealings with the Lees and his valuation.

[140] Relevant to these concerns are the terms of a document issued by the Board entitled *"Memorandum for Guidance – Disciplinary Inquiries"*, sent to valuers when being notified by the Registrar of the Board of the charges against him or her.

[141] Under the sub-heading *"Valuers denying charges"*, there is a paragraph covering the valuer's right to cross-examine prosecution witnesses. It is limited to advising the valuer of the situation concerning documentary material which the

valuer might require prosecution witnesses to examine. It notes that any such material should be part of the valuer's own evidence; and points out that if it is not part of the valuer's evidence he or she may not be able to use it either in cross-examination or as part of his or her defence.

[142] This paragraph does not advise a valuer that he or she is required to *"put the case"* to prosecution witnesses.

[143] A further paragraph in the section mentioned says:

> Please bring your complete file on the matter under inquiry to the hearing. The Board may ask you to refer to original workings, sketch plans or notes.

[144] At the hearing, Mr King cross-examined neither Mr Taylor nor Mr Dean in any formal way. For example, he did not challenge them on their selection of comparables or on the existence of localities in the Takapuna area of relatively higher and lower levels of desirability and where the locality of the subject property might sit in that range, or seek their opinions on the various negative views he had formed of the subject property. Nor did he cross-examine either valuer about his particular experience in valuing properties in Takapuna.

[145] At the conclusion of the evidence of both valuers, Mr King made short general statements as to his own practice but without seeking any comment from either valuer.

[146] With Mr King's approval, the Board released Messrs Taylor and Dean from further attendance at the hearing, and they departed.

[147] This left the Board in a difficult position when Mr King came to give evidence and proceeded to criticise the other valuers' choices of comparables and the different levels of value prevailing in different parts of Takapuna.

[148] When Mr Oliver asked Mr King why he had not cross-examined the other valuers on these matters, Mr King's response was that it was *"because they are too far out and ridiculous"*.

[149] As any litigation lawyer would know, Mr King had an obligation to put his case to the other valuers so that the Board, as the trier of fact, would have their views on the precise matters to be raised in evidence by Mr King.

[150] However, the Memorandum for Guidance does not refer at all to any obligation to put the case. Lay persons could well think that all they were required to do was to give evidence supporting their valuation and allow the Board to make up its mind having heard from all concerned. Thus it is not easy to criticise Mr King for his undoubted failure in this area.

[151] It would not require lengthy exposition for the Board to advise valuers of the basics of their obligations about putting their case. For example, the text *"Introduction to Advocacy"* published by the New Zealand Law Society and used in its Litigation Skills Programme includes, at page 234 of the 2001 reprint, the following short passage:

> ... If you intend asking the Court to disbelieve an opposing witness, you must put to that witness that part of your case that conflicts with the witness' evidence. ... This is in order to ensure that conflicting evidence is properly tested for the Judge or jury which has the task of weighing it and deciding which evidence to accept and which to reject. (Edited).

[152] We consider that Mr King's failure to put his case to the valuers as he should have done adversely affected his case. That is because we think that debate between Mr King and the other valuers concerning comparables, location and the arguably negative aspects of the subject property could well have elicited concessions from the other valuers that some of the points made by Mr King had substance. Further, he might have elicited information from them to assist him in demonstrating that he had greater experience in valuing properties in the Takapuna area than did they.

[153] Finally, had Mr King cross-examined the other valuers about preparing reports in order to meet the instructions from the client rather than to conform to the Practice Standard, he might well have elicited further concessions helpful to his case.

[154] In summary, therefore, we conclude that putting his case to the other valuers would likely have been to Mr King's advantage, and that his failure in that respect is

at least partly attributable to the failure of the Board to have advised Mr King, and valuers generally, of their responsibilities.

[155] That failure should not, therefore, have been held against Mr King.

[156] Turning to the issue of failing to bring his papers to the hearing, the position is that the Memorandum for Guidance clearly states the valuer's responsibilities and Mr King has only himself to blame for his failure in that respect.

[157] In conclusion on the issue of threshold, therefore, for the several reasons just set out, we conclude that no disciplinary action against Mr King was required.

[158] We reiterate that we do not condone Mr King's performance in this matter. We have found that his valuation was incompetent. Nothing we have said in this section of our decision should be taken as detracting from that conclusion.

Penalty

In the light of our decision as to Mr King's liability, we do not intend to deal with this topic. But we cannot help but observe that, on the basis of the mitigating factors identified by the Board and set out in paragraph [14] above, we consider that a penalty of $7,000 out of a maximum available of $10,000 is far too high.

Duplicity

[159] We do not intend to deal with Mr Waalkens' submission that the charges were duplicitous.

Conclusion

[160] It follows in our view that the charge of incompetence, though made out, did not require disciplinary action against Mr King. The charge of a breach of ethics is not made out as we have already explained. The appeal overall is therefore allowed. The reprimand, penalty, and costs order are all set aside.

[161] Mr King is entitled to costs on the appeal in terms of Items 12-16 in Schedule 2A to the District Court Rules 1992. We consider that the appeal should be classified as a Category 3 proceeding and that Band C is appropriate. Should the parties disagree with this classification, or otherwise be unable to resolve the question of costs, memoranda may be submitted to Judge Broadmore for decision.

T J Broadmore	J P Farmer	P J Mahoney
District Court Judge	**Member**	**Member**
Chairman		