

<b>COMPLAINANT:</b>	<b>Mr Andrew Gartell</b>
<b>MEMBER:</b>	<b>Mr Andrew Saunders</b>
<b>DATE OF COMPLAINT:</b>	<b>13<sup>th</sup> July 2017</b>
<b>COMPLAINTS COMMITTEE MEMBER/S</b>	<b>Chris Shaw (Chair)</b>
<b>DATE OF DECISION:</b>	<b>1<sup>st</sup> June 2018</b>

### Background

- 1 On 13 July 2017, the API received a Complaint made by Andrew Gartell (**Complainant**) against Andrew Saunders (**Member**).
- 2 The Member was engaged by the Complainant to assist with a Development Application (**DA1**) to subdivide a Homestead Property. The two subdivisions are referred to as Sunnyside Homestead (**Homestead**), and Homeward Bound Orchard (**Orchard**).
- 3 The Member and/or his company subsequently conducted multiple valuations of 'Sunnyside Homestead' 299 Nancarrow Lane, Nashdale via Orange NSW 2800 (**Property**), for the purpose of determining the fair market value for First Mortgage purposes.
- 4 The Complainant alleges that the Member;
  - a. Erroneously submitted DA1 which resulted in the Property permanently losing its residential usage entitlement.
  - b. Proceeded to conduct valuations for the Property on the basis that it still had a residential usage entitlement.
  - c. Subsequently colluded with a finance provider to improperly lodge a further development application (**DA2**) to relocate a building envelope without the Complainants instruction, consent or knowledge.

### The Complaint

- 5 The Complainant informs that in 2006/2007 the Member was engaged to prepare DA1 to subdivide a portion of the Homestead which the Complainant was in the process of purchasing.
- 6 The Complainant advises he was informed by the Member that DA1 allowed a dual usage of the Homestead as both a dwelling and fruit export sales office, the Homestead was subsequently valued several times as a residence with full dwelling entitlement which provided assurance to the Complainant that the Homestead could continue to be used as a residence.
- 7 While attempting to sell, the Complainant subsequently learned that the Homestead had lost the residential usage entitlement pursuant to DA1 which resulted in the Homestead now being limited in its use as a rural fruit sales office.
- 8 The Complainant contends that the signature and handwriting on the front page of DA1 was not signed or written by him and raises questions regarding the authenticity of the documents. The Complainant has requested forensic analysis of the document.
- 9 The former owner has provided a statement confirming that he did not consent to DA1 instigating the loss of the dwelling entitlement.
- 10 The Complainant informs that in 2008, Patfield and Company were engaged to prepare a valuation for lending purposes. The valuation report describes the Homestead as a dwelling and fails to refer to the Homestead as a fruit sales office without residential usage rights.

- 11 In 2010, the Complainant approached Stacks Finance (**Finance Provider**) to refinance his existing loan portfolio. The Finance Provider appointed Mitch Staniforth of Saunders and Staniforth, the Member's Valuation Firm, to conduct a valuation for the Homestead. This valuation report assessed the Homestead as a rural dwelling and at no time was it considered to be a much less desirable and less valuable rural sales office without residential usage.
- 12 In 2012, an additional valuation was conducted by the Members Firm at the instruction of the Finance Provider, the Complainant believes the valuation indicated the property still could be used for residential purposes.
- 13 Upon electing to sell the Homestead in 2013, the Complainant was made aware that the Homestead had not had a residential entitlement since 2006/2007.
- 14 The Complainant discussed the issue with the Member and Raine and Horne Principle Roger Eddy.
- 15 The Complainant alleges that the Member admitted to the Real Estate Agent that he had made a terrible mistake and f\*\*\*\*\* up DA1 and subsequent valuations and that he would attempt to correct the mix up.
- 16 The Complainant understands that the Member held numerous discussions with Cabonne Council but the restriction on residential usage was unable to be reversed or remedied.
- 17 The Complainant was presented with the option of moving a residential usage approval from the Orchard to the Homestead, however the Complainant considered this would significantly devalue the Orchard by leaving the commercial property without a managers residence.
- 18 The Complainant informs that the Finance Provider engaged the Member's Valuation firm to conduct a valuation of the Homestead on 17 January 2014. The Complainant notes that this valuation report includes references to bedrooms and bathrooms and appears to confirm dual usage as both residential and rural sales office despite the Member being aware of the issues regarding residential use.
- 19 The Complainant contends that the Member deliberately misled the Finance Provider as to the lack of residential entitlement and failed to bring this deficiency to the Finance Provider's attention.
- 20 The Complainant alleges the Member manipulated the LVR of the Complainant's property portfolio to fit with the Finance Provider's requirements and to not draw attention to the Member's earlier errors. The Complainant queried the 2014 valuation with the Member and was allegedly advised by the Member that *"houses have come back in value a lot this year but orchards have gone up, I have everything under control and the sum of your LVR across the properties will be fine and more or less unchanged"*.
- 21 The Member contends that it is beyond belief that the Member responsible for preparing DA1 that extinguished the residential entitlement of the Homestead could subsequently provide a valuation report which did not detail the lack of residential usage rights.
- 22 The Complainant claims the Members gross errors misled the Finance Provider into advancing funds significantly over and above the value of the property and entrapped the Complainant into loans and subsequent penalties that could not be repaid by selling the asset.
- 23 The Complainant states that he became trapped in a debt scenario that could not be solved by selling the Homestead as there were no likely buyers for a specialist rural fruit sales office, subsequently the Complainant claims he was forced to fire sale the adjoining fruit packing shed for an amount significantly lower than the property's value and was left without his primary source of income.
- 24 The Complainant asserts the lack of fruit packing income impacted his overall financial position and forced him to sell the Orchard and the property in which the Complainant resided.
- 25 The Complainant informs that whilst there were significant arrears on his loan, at no time was the Lender ever mortgage in possession of his assets.
- 26 The Complainant received correspondence from the Finance Provider requesting that he sign DA2 in blank, the Complainant informs that at the time he was under vast emotional duress and subsequently signed blank DA2.

- 27 The Complainant understands the signed blank DA2 was then provided to the Member who allegedly completed and submitted DA2 to Cabonne Council.
- 28 The Complainant asserts that despite his requests the Member did not contact the Complainant during the process of completing DA2, it is alleged the Member was taking his instructions directly from a third party to lodge DA2 without his proper knowledge or consent, the Complainant states he has never sighted the completed DA2.
- 29 The Complainant informs the Orchard building envelope was located in line with the best and most valuable use of the property as detailed in a 2009 Orchard valuation.
- 30 The Complainant alleges that without his knowledge or consent and with the benefit of DA2 signed in blank, the Member completed the pre-signed DA2 in collusion with the Finance Provider and submitted DA2 to relocate the building envelope to new location.
- 31 The Complainant speculates the motive to move the building envelope to a position with commanding views meant the property could be quickly marketed to the mass rural lifestyle market. However, the new position would require the removal of a vast number of fruit trees and make it less attractive to a farmer to purchase.
- 32 The Complainant informs he attempted to raise the matter with the Member in an attempt to resolve the matter amicably, however it is claimed the Member has responded with aggressive and bullying threats from the Member's law firm.
- 33 The Complainant has accused the Member of breaching rules 1.1, 1.7, 1.16, 3.1g, 6.3b, and 6.4d of the API's Code of Professional Conduct (**Code of Conduct**).

#### **The Member's position with respect to the Complaint**

- 34 Pursuant to clause 7.3(d) of the API Complaints Policy (**the Policy**) the Member was presented with the opportunity to provide a submission in response to the comments made within the complaint.
- 35 The Member denies any admission of error as expressed in the complaint.
- 36 The Member asserts that the valuations conducted in 2009, 2010, 2012 and 2014 were undertaken with integrity, independence and without bias.
- 37 The Member informs the various valuations were undertaken after the subdivision process was completed, the valuations were conducted with professional research, market evidence and analysis and full inspections. The Member states his approach to these valuations is no different to any other valuation done for its intended purpose.
- 38 The Member acknowledges it is not uncommon for him to complete development application forms to assist clients, however the member denies the allegation that he signed the DA1 form and/ or forged the Complainants signature.
- 39 The Member refutes the allegation he has made any planning errors and informs that the change in Local Environmental Plans has not assisted with the future use of the land.
- 40 The Member contends that the Complainant was well aware of the intent of the LEP clause relied upon to subdivide the Homestead away from the Orchard, in addition it is claimed the Complainant was well aware the Cherry export office was an integral part of DA1.
- 41 The Member informs that the Complainant signed the DA2 form without pressure, was provided with the approval, engaged his own surveyor and provided supporting information to assist with the DA2 application.
- 42 The Member informs that in 2015 he was instructed by the Finance Provider to relocate a dwelling envelope for Lot 200, the Complainant was allegedly made aware of the requirement for DA2 to assist with selling the property and proceeded to sign the form. The intent to move the dwelling envelop was based on buyer feedback as to the preferred dwelling location.
- 43 The Member informs he has notified his insurer of the matter however they have not taken any action, in addition he demonstrates that Cabonne Council are not prepared to pursue the Complainants allegations.

- 44 The Member advises of his reluctance to provide extensive evidence in respect of the allegations made by the Complainant should he commence Court proceedings.

### Chronology of Events

Date	Event
2006 - 2007	DA application submitted to Cabonne Council to subdivide the Homestead.
30 April 2008	Homestead valued as a residence with full dwelling entitlement – Patfield and Company.
11 July 2010	Homestead valued as a residence with full dwelling entitlement – Saunders and Staniforth.
2012	Homestead valued as a residence with full dwelling entitlement – Saunders and Staniforth.
2013	Complainant elected to sell the Homestead and discovered it had lost the residential usage entitlement.
17 January 2014	Homestead Valued as a residence with full dwelling entitlement despite the Member being aware this was no longer the case.
16 March 2015	Complainant received correspondence from Cabonne Council confirming the residential entitlement for the Homestead has been lost in 2007.
21 April 2015	Homestead valued taking into account the non-approved residential usage – Toner and Associates.
23 June 2015	Complainant was requested to sign the DA in blank for the Orchard.

### API complaints process

- 45 The Complaints Committee was provided with the following materials for consideration:

	Document	Prepared by	Date
a.	Complaint Form	Complainant	13 July 2017
b.	Development Application	Complainant	15 December 2006
c.	Note	Previous Owner	28 October 2015
d.	Valuation Report	Robert Patfield	30 April 2008
e.	Valuation Report	Member	12 January 2010
f.	Correspondence between Real Estate Agent and Complainant	Roger Eddy and Complainant	6-31 August 2013
g.	Valuation Report	Member	17 January 2014
h.	Confirmation of Homestead Usage	Cabonne Council	16 March 2016
i.	Valuation Report	Gregory Toner	21 April 2015

	<b>Document</b>	<b>Prepared by</b>	<b>Date</b>
j.	Correspondence from Lender re DA	Mark Newnham and Complainant	23 June 2015
k.	Valuation Report: non-Subject Property	Member and R Patfield	28 April 2009
l.	Correspondence from Complainant to Member	Complainant	12 November 2015
m.	Member's Response	Member	30 October 2017

46 Between 24<sup>th</sup> April 2018 and 1 June 2018, the Chair, Mr Chris Shaw, independently considered this Complaint pursuant to clause 26.7(a) of the Policy.

47 No conflicts of interest were identified.

48 Requirements of the Policy having been met, the Chair reviewed the issues raised by the complaint and made a determination in relation to each issue raised.

## Findings

The Chair addressed the alleged breaches of the Code of Conduct as follows:

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**Rule 1.1** Members must carry out their professional duties ethically, with honesty, competence, and in good faith, without personal bias, and in a manner which upholds the values and reputation of the property and valuation profession

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49 The Chair finds that there is a prima facie evidence that the Member breached rule 1.1 of the Code of Conduct by:

- (a) Allegedly failing to competently carry out his professional duties. The Member was engaged by the Complainant to provide Town Planning services in the form of providing advice and representation with respect to a development application 2007/0161 for the "subdivision of two lots and a business for packaging and marketing of cherries." The lots being subdivided were lot 15 in DP 621509 and lot 46 in DP 1097737. The consent for the development application incorporated condition 6 as follows:

*"The residential dwelling located on Lot 100 is to be only used as an office. No residential use of the building is permitted."*

It is apparent from the lack of evidence submitted by the Member that the Member failed to bring this limitation to the attention of the Complainant and failed to advise the Member of the consequences of this condition prior to the development consent being acted upon and therefore enlivened. The Member later proceeded to undertake valuations ignoring condition 6 of consent 2007/0161.

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**Rule 1.7** A Member must obtain or confirm in writing all instructions and variations of instructions of the client or the client's representatives.

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50 The Chair finds that there is prima facie evidence that the Member breached rule 1.7 of the Code of Conduct. The Member has not submitted any details of his instructions with respect to the Development Application or the various valuations undertaken for the Complainant. Failure

to do so in light of the allegation made by the Complainant and without any alternate explanation can only lead to a conclusion that Rule 1.7 was not complied with.

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**Rule 1.16** A Member must not directly or indirectly exert undue pressure or influence on any persons, whether by the offer or provision of any payment gift or favour or otherwise, for the purpose of securing instructions for work, or accept instructions from any person where there is reason to believe that undue pressure or influence may have been exerted by a third party in expectation of receiving a reward for the introduction.

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- 51 The Chair finds that there is prima facie evidence that the Member has breached rule 1.16 of the Code of Conduct.
- 52 This allegation is raised in reference to the Complainant's claim that he was coerced into signing DA2 in blank which was utilised by the Member to relocate a building envelope to the Orchard.
- 53 The Member contends that he was engaged by Stacks Finance, the finance provider for the Complainant and that the Complainant signed the DA without pressure, was provided with the approval, engaged his own surveyor, and provided supporting cherry export information to support the DA. No supporting documentation has been provided by the Member to substantiate this submission or a submission that the Complainant was properly informed as to the content of the development application or the consequences of the development application. As the owner of the property and the individual most likely to be impacted by the outcome of the development application it is reasonable to expect that the Complainant would have been informed of these matters. No communications have been provided in evidence by the Member in this regard.
- 54 It is also reasonable to expect that in light of the long professional involvement that the Member had with the Complainant that the Member would see fit to ensure that the Complainant was fully informed with respect to the development application.
- 55 Based on the material before the Complaints Committee, there is prima facie evidence to conclude that the Member is in breach of rule 1.16.

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**Rule 3.1g** A member must maintain the strictest independence and impartiality when making a valuation and/or where the exercise of objective judgement is required. In such circumstances, a member must not:

g) act in any way inconsistent with the duties of independence and impartiality.

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- 56 The Chair finds that there is prima facie evidence that the Member breached rule 3.1g of the Code of Conduct.
- 57 The Complainant alleges the Member breached this rule by colluding with the Finance Provider to relocate the building envelope to within the Orchard.
- 58 The Member asserts the valuations were undertaken after the Complainant completed the subdivision process, and were done with professional research, market evidence and analysis, and full inspections.
- 59 The carrying out of development application duties in an effort to influence the value of the property as well as carrying out valuation duties is sufficient to lead to a prima facie conclusion that the member acted in breach of rule 3.1g.
- 60 The Member does not directly address the allegations of collusion however his engagement by the Finance Provider to deal with the Complainant's property without disclosure to the Complainant as to the consequences of the Member's instructions and the consequences of

the development application, which was at odds with the Complainant's expectation as to the location of the proposed building envelope leads to a conclusion that there is a prima facie breach of rule 3.1g.

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**Rule 6.3b** When undertaking a valuation, a member must take reasonable steps to:

b) ascertain and verify such relevant facts and information as a prudent valuer would have ascertained or verified in order to provide a professional valuation of the property.

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- 61 The Chair finds that there is prima facie evidence that the Member has breached rule 6.3b of the Code of Conduct.
- 62 The imposition of condition 6 in development consent 2007/0161 is a significant restriction imposed on the property and thus the value of the property. A review of the valuations provided to the Complaints Committee indicates that this restriction was omitted from consideration by the Member, notwithstanding that it is apparent that the Member was aware of this restriction.

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**Rule 6.4d** A Member must include in a valuation report:

d) a statement of all assumptions made in arriving at an opinion of value and all conditions, requirements or limitations arising from the client's instructions or arising due to any other circumstances;

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- 63 Based upon the omission to address the impact of condition 6 of DA 2007/0161 and the impact of that condition on the valuation of the property, it is apparent that the Member has failed to make a statement of limitations "arising due to any other circumstances." As such the Chair is of the opinion that there is prima facie evidence that the Member breached rule 6.4d of the Code of Conduct.

### **Charges**

- 64 The Chair lays a charge against the Member for professional misconduct pursuant to prima facie evidence that goes to a breach of rules 1.1, 1.7, 1.16, 3.1g, 6.3b, 6.4d of the Code of Conduct.

I confirm that this is an accurate account of the decision of the Chair of the Complaints Committee in relation to this Complaint.



Date 1<sup>st</sup> June 2018

**Chris Shaw**  
**Chair of the API Complaints Committee**