

BEFORE THE VALUERS REGISTRATION BOARD

UNDER The Valuers Act 1948 ("Act")

AND

IN THE MATTER OF section 32 of that Act

AND

IN THE MATTER OF **A complaint against Valuer K**

BOARD OF INQUIRY M Evan Gamby (Inquiry Chairman)
Phillip A Curnow
Victoria L Murdoch

COUNSEL Mr Garth Gallaway for Valuer K
Ms Sally Carter for the Valuer-General

DATE OF HEARING
3 October 2017

**PENALTY AND COSTS
DECISION OF TRIBUNAL
VALUERS REGISTRATION BOARD**

Date: 7 March 2018

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Penalty and Costs

The Charges

1. On 24 July 2017, Valuer K pleaded guilty to the following charges:

1. Section 31(1)(c) of the Valuers Act 1948:

You have been charged with incompetent conduct in the performance of your duties as a valuer such as to render you liable to a penalty provided by the Valuers Act 1948 **in that** in compiling a valuation report, you significantly under-valued the current market rent of a property (assessed as at 14 November 2012).

2. Section 31(1)(c) of the Valuers Act 1948

You have been charged with unethical conduct in the performance of your duties as a valuer such as to render you liable to a penalty provided by the Valuers Act 1948 **in that** in compiling a valuation report you failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of that report and therefore breached Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.

Particulars

- (a) In breach of clause 1 of IVS 103, you failed to communicate the information necessary for a proper understanding of your valuation. In particular you failed to provide any evidence to support your assertion that the subject building, having been assessed at 50-60% of NBS, was "unleaseable" and therefore had a "nil" market rental value;

Preamble

2. This is the third decision of the Board relating to a complaint lodged by **J** against Valuer K on 15 November 2013 relating to a report dated 18 October 2013.
3. The summary of facts, which has not been disputed, is included as **Attachment 1** with Valuer K's name and other details including the specific location of the property redacted.
4. The first decision of the Board dated 18 November 2016 dealt with an application to stay proceedings. The Board does not propose to traverse the reasons for the Board refusing to grant the stay which was not appealed.
5. The second decision of the Board, also dated 7 March 2018, relates to the application by Valuer K for permanent name suppression. The Board determined that it did not have the power to grant permanent name suppression. After a consideration of the submissions for Valuer K and for the Valuer-General, the Board has ordered that Valuer K be referred to by a non-identifying initial and observed that it had no power to punish for contempt of a name suppression order. The reasons for the Board granting Valuer K the degree of anonymity that it considered was within its powers to order are set out in that decision.
6. The interim full name suppression of Valuer K has been ordered to remain in place for 10 working days post release of the Board's decision on name suppression. Otherwise, that decision does not have an impact on this decision of the Board relating to penalty and costs.

Transcript

7. A transcript of the 3 October 2017 hearing was provided to the parties, noting that there was a small section not recorded. The Board completed that section, accepted by the parties as a fair representation of what was said at the time.
8. Counsel for each of the parties spoke at length to detailed written submissions and addressed questions of the Board. Valuer K gave evidence and was questioned by the Board.

Penalty

9. The submissions for the Valuer-General stress the consequences of Valuer K assessing a nil rental value to the premises, compared to the evidence of two other registered valuers.
10. The extent to which a "nil" rental assessment by Valuer K differed from each of the two other registered valuers is significant, one rental assessment being at \$136,240 p.a. plus GST and the other at \$114,000 p.a. plus GST.
11. It is extremely rare that a property will have a "nil" rental value. This was acknowledged by one of the valuers who was to give evidence for Valuer K, who stated in his evidence:

"...I found it difficult to accept that the premises with a C grade would not be able to attract a rental even at a discounted or heavily discounted rate"

and in his summary stated:

"I find it difficult to accept a nil rental as a valid conclusion".

12. The second valuer who was to give evidence for Valuer K before the Board was not as emphatic in his statements. He expressed some sympathy for Valuer K's opinion that the premises may have been unleaseable. Despite that conclusion, the Board notes from his evidence:

"We acknowledge that Valuer K's nil rental and we understand their reasoning for this however there would in our opinion be a trigger point in rental rates where a prudent and fully informed tenant may enter into a lease for the premises".

13. All four valuers who were to give evidence before the Board were therefore of the opinion, to a greater or lesser extent, that a "nil" rental was unsustainable for the premises. It was therefore proper for Valuer K to plead guilty to the charge of a significant under-valuation.
14. On the matter of consequential loss, the Board is not in a position to determine whether or not any loss accrued and has not taken that factor into account.
15. On the issue of apparent bias, assessing a "nil" rental did signal a partisan approach, the reasoning for such a conclusion being nowhere explained in the report, deemed by Valuer K to be a certificate. Their claim that the report was a "certificate" was made despite a statement in the report signed by Valuer K of compliance with standards, later referred to in this decision.
16. No comparable data, either in the "certificate", as it was described by Valuer K but not accepted by the Board, or in the "full report" later provided to the Board, substantiated the conclusion of a "nil" rental. Valuer K breached both a requirement to provide a valuation relating to the current market and breached Clause 1 of IVS 103 by failing to communicate the information to the reader so that there would be a proper understanding of their valuation. Valuer K therefore also breached the NZIV Code of Ethics which requires compliance with standards.
17. On the evidence, there was no proof that the property was "unleaseable" at the time and that the premises had a "nil" market rental.

18. For the Valuer-General, a penalty of \$7,000-\$8,000 within the maximum of \$10,000 was considered the appropriate level.
19. For Valuer K, the general principles were first outlined relating to *King v Valuer-General* and, more specifically, *Pillai v Messiter* with the guideline of the two-step approach continuing to be appropriate.
20. The Board accepts that consistency in sentencing as outlined in a decision involving a *valuer* and in *Valuer Q* is appropriate. Recent sanction decisions are appropriate in deciding the appropriate level of a fine, having regard to the method of reporting and non-compliance with standards.
21. The Board does not accept that there was a genuine mistake relating to standards on behalf of Valuer K, despite their evidence before the Board that there was confusion that they said existed in the profession around the time.
22. In explanation, as the Board found in the matter of *Q*, non-compliance with standards by departing from them is either deliberate or displays *indifference and an abuse of privilege*.
23. For Valuer K, it was submitted that other practitioners had provided certificates that did not meet the standards and that the professional body had not properly educated the profession to the extent required to ensure that valuers were fully aware of their obligation to comply with standards.
24. It is a valuer's responsibility to be fully conversant with standards in their specific area of expertise. Valuer K is recognised as a senior practitioner in assessing office rentals in the subject area.
25. The Board does not accept the submission for Valuer K relating to certificates of other practitioners as being directly or even broadly comparable to the valuation report of Valuer K. The certificates put before the Board can be readily distinguished in that each certificate confirms a market rental assessment but does not indicate that it complies with standards, whereas Valuer K's report can be considered a standalone valuation report document, specifically stating:

"Valuation Standards:
Our valuation has been prepared in accordance with International Standards 2011, Australia and New Zealand Valuation Guidance Notes, and PINZ/NZIV Code of Ethics and Rules of Conduct"
26. The Board notes also that the certificates referred to by Valuer K would have been clearer had they referenced a report to which the certificate related.
27. There can be no doubt that Valuer K's report as framed does not conform to the requirements of Clause 1 of IVS 103. Further, there is no reference in Valuer K's report of some two pages and a short general comment that there existed another "full" report which was privileged and confidential to the client.
28. As it later transpired, when the "full" report was disclosed, it contained nothing more of significance that was any more informative than the report on which the complaint was based. That full report of some seven pages provides no supporting data, also concludes a "nil" rental and contains the same statement as to compliance with Valuation Standards.
29. One submission for Valuer K was that the Valuer-General did not make stronger endeavors to obtain the "full" report.
30. The Board notes for the record that the Valuer-General has no power to order that a party or a valuer release a privileged report. As it transpired, even if the Valuer General had obtained the privileged document, it would not have assisted Valuer K's defence as it disclosed no better compliance than the report on which the complaint was made.

31. Consistency in sentencing was outlined in a decision involving a *valuer* and the seriousness of a breach was dealt with in matters relating to *Valuer X* [2015] NZVRB 9, *Valuer Q (penalty)* [2012] NZVRB 7, *Valuer Z* [2013] NZVRB 9 and *Valuer A (penalty)* [2015] NZVRB 6.
32. The Board has prepared a simple table as a guide to determining K's level of offending by comparison with previous decisions:

The Valuer	Date	The Penalty	Seriousness of Offending
Valuer X	23 Dec 2015	\$7,000	Serious - five charges of incompetence and unethical conduct. Valuer pleaded guilty. Used incorrect methodology and allowed themselves to be influenced by a client to increase the valuation. The valuer had no regard for standard valuation approaches, provided the client with two reports, inconsistent valuations on the same instructions and with no explanation for the inconsistency.
Valuer Q	12 Dec 2012	\$5,000	Serious - with a repetition of different valuations in various reports of the same date for various properties, use of the correct methodology and accuracy of their valuation conclusion. Penalty reduced on account of their family situation, the complexity of the valuation and the impact on the firm's business as well as Valuer Q's high profile. No guilty plea and found guilty of six of the 12 charges of ethical breaches
Valuer Z	23 Aug 2013	\$5,000	Serious - involving a "nil" valuation but described as 'not at the most serious end of offending.' Two counts of incompetence, one of gross under-valuation and the second of failing to provide sufficient information in the report, making no reference to International Valuation Standards.
Valuer A	27 Jul 2015	\$7,000	Serious - an over valuation of 92.7%, loss suffered by the complainant, no reduction for a guilty plea and mitigated by a first appearance before the Board.
Jeremy Allan David King	6 Aug 2008	\$7,000	On Appeal - \$7,000 was considered " <i>far too high</i> and no fine was imposed."

33. In each of the above comparisons, the Board reprimanded the valuer in addition to imposing a fine.
34. It was submitted for Valuer K that the best comparison is that of *Valuer Z* as both involved a "nil" valuation, there are two charges, a late guilty plea and a first appearance before the Board.
35. It was also submitted for Valuer K that the appropriate fine should be less than the \$5,000 in *Valuer Z* as the degree of seriousness was lower and, unlike *Valuer Z*, there were no comparable sales on which Valuer K could rely.
36. The Board does not accept that the degree of seriousness is less for Valuer K than in *Valuer Z*. Further, *Valuer Z* made no reference to standards at all which was an omission whereas Valuer K made reference to compliance with standards which was clearly not correct.
37. A submission for Valuer K was that there are no aggravating factors and substantial mitigating factors which should indicate a penalty "at the highest end" of \$5,000 but, in this case, a maximum of \$3,000 and a reprimand is appropriate.
38. In summary, the Board finds similarities between this matter and that of *Valuer Q (penalty)* and *Valuer Z*.

39. The Board agrees that the range within which a penalty can be imposed at this level of offending is within the powers to reprimand and impose a fine, noting that the maximum fine it can impose is \$10,000. It is irrelevant to this decision that the fine has not been increased for many years.
40. The Board reprimands Valuer K and imposes a fine of \$5,000.

Costs

41. The submission on costs for the Valuer-General referred to the numerous decisions of disciplinary tribunals as a starting point of 50%, increased if there are aggravating factors or decreased where there are mitigating factors.
42. The Board can impose costs in accordance with Section 33a, stated for both the Valuer-General and Valuer K, as outlined below:

33a Costs and Expenses

In any case to which Section 31 or Section 33(1) applies, the Board may order the valuer concerned to pay such sum as the Board thinks fit in respect of either or both of the following:

- (a) The costs and expenses of and incidental to the inquiry by the Board;
- (b) The costs and expenses of and incidental to the investigation conducted under Section 32 in relation to the complaint to which the inquiry relates

43. Costs are summarised in the submissions for the Valuer-General and total **\$118,531.35**.
44. The full schedule of costs was attached as Appendices to the Valuer-General's submissions as follows:

(a) Legal Fees	\$ 41,645.54
(b) Investigation/prosecution costs associated with witnesses, Valuer-General and his staff	\$ 35,161.41
(c) Board expenses	\$ 41,724.40

45. The Board accepts that the starting point is at 50% and that the authorities support the principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault rather than on the professional body as a whole.
46. That said, it is not the intention that the payment of costs is in the nature of a penalty although that may, inevitably, appear to be the outcome where, as in this case, costs are high as a result of applications made to the Board, firstly for a stay of proceedings, and secondly for name suppression.
47. The Board having no legal representation obtained legal opinions. These opinions were not challenged by Valuer K, although the costs of only one of the legal submissions has been included.
48. The Board accepts the submission for Valuer K that there were no aggravating factors, although a late guilty plea inevitably adds to the costs for consideration.
49. The Board does not accept that there were no comparable rentals. The evidence for the Valuer-General and for Valuer K was that a "nil" valuation could not be substantiated.
50. The fact that Valuer K had difficulty accepting their wrongdoing is not unusual either with respect to the level of valuation or non-compliance with standards.

51. The best comparisons in terms of consistency are those of *Valuer Q (penalty)* and *Valuer Z*. In the first, costs were awarded at 35% with significant mitigating circumstances and in the second at 40%.
52. The Board has concluded that a costs order should lie above the 35% in *Valuer Q (penalty)* at the 40% level in *Valuer Z*. The Board does not accept that it would be at the lower defended hearing order for costs in *Valuer V (penalty)* [2012] NZVRB 2 at 30%.
53. Actual costs are set out in the submissions for the Valuer-General. The Valuer- General's legal fees were not challenged and are accepted as **\$41,645.54**.
54. The Valuer-General's costs were challenged with respect to two of the witnesses and the magnitude of "fees" relative to other witness's costs. The Board cannot distinguish a reason for reducing those costs and they are accepted in total at **\$35,161.41**.
55. The Board's memorandum of costs relating to the hearing of the application to stay the proceedings, hearing into the complaints and penalty hearings total **\$41,724.40**, exclusive of the costs of Matthew McClelland QC which were not claimed as a Board expense. The costs are summarised as follows:

(a) Legal Fees	\$	41,645.54
(b) Investigation/prosecution costs	\$	35,161.41
(c) Board expenses	\$	<u>41,724.40</u>
	\$	118,531.35

56. The Board has determined that the appropriate level of costs payable by Valuer K is 40% of properly incurred costs or \$47,412.54, which the Board has rounded to \$47, 413.00, a sum which is immediately payable on release of this decision.

Summary of Penalty and Costs

57. The Board reprimands Valuer K and imposes a fine of \$5,000.
58. The Board orders that Valuer K pay \$47,413.00 being approximately 40% of the properly incurred costs.

M E Gamby
 Inquiry Chairperson
 7 March 2018

Attachment 1
Summary of Facts
for
Valuer-General

SUMMARY OF FACTS

1. On 15 November 2013 J filed a complaint relating to a report that had been completed by Valuer K dated 18 October 2013.
2. The report that is the subject matter of the complaint is at pages 3-5 of the Investigation Volume.
3. The report was for a commercial lease. The report was completed on instruction from the tenant/lessee solicitors for the two-year period commencing 1 February 2013 but assessed as at 14 November 2012.
4. Valuer K was instructed to provide the report to quantify loss in the context of a dispute between the landlord of the property and the tenant/lessee over the assessed rental basis. The dispute had arisen due to a misrepresentation by the landlord (the complainant in this matter) that the building was at 80% NBS when in fact, as at 14 November 2012, it had been determined to be at 50-60% NBS. The critical structural weakness of the building was 50%.
5. Valuer K concluded that the premises would have been unleaseable at the relevant time under the lease terms and conditions on offer, including permitted use. As a result of this conclusion, they were unable to place a rental on the premises and adopted a nil rental position.

Charge One

6. The Valuer General obtained two retrospective rental assessments, one from Valuer 1 and one from Valuer 2
 - (a) Valuer 1 provided a rental assessment for a review date of 14 November 2012 of \$130,000 (at \$200 psm) per annum assuming premises of 650m²
 - (b) Valuer 2 provided a rental assessment as at the same date of \$107,240 (at \$165 psm) per annum assuming premises of 650m²
7. Valuer K significantly undervalued the market rental assessment in their report of 18 October 2013.

Charge Two

8. In their three-page report of 18 October 2013 Valuer K failed to provide any evidence to support their "nil" market rental value in breach of IVS 103, Valuer K also issued a detailed seven page report on the same date to the commissioning party,
9. At the operative time IVS 103 stated:

General Principle

1. The final step in the valuation process is communicating the results of the assignment to the commissioning party and any other intended users. It is essential that the report communicates the information necessary for proper understanding of the valuation or valuation review.
2. A report shall not be ambiguous or misleading and shall provide the intended reader with a clear understanding of the valuation or other advice provided.

10. In failing to comply with IVS 103 Valuer K failed to exercise the utmost care and good faith to ensure the maintenance of the highest standard in the preparation of their report and therefore breached clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.
11. There are no previous matters recorded against Valuer K before the Valuers Registration Board, Valuer K has been a registered valuer since 1989 and a Fellow of the NZIV and PINZ since 2007.