

VALUERS REGISTRATION BOARD

IN THE MATTER OF

an Inquiry under

Section 32(2) of the Valuers Act 1948

AND

IN THE MATTER OF

Charges under Section 31(1)(c) of the Valuers Act 1948 concerning a complaint against Valuer J, registered valuer of Auckland.

BOARD OF INQUIRY 'BOARD':

Evan Gamby – Chairperson

Phillip Curnow

Victoria Murdoch

COUNSEL:

Ms Sally Carter for the Valuer-General

Valuer P for Valuer J

HEARING:

18 November 2019

ORAL DECISION:

18 November 2019

WRITTEN DECISION:

9 March 2020

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Background

1. A formal complaint was lodged on 30 August 2017 against Valuer J by lawyers acting for the complainant X, alleging a breach of professional responsibilities in accordance with Sections 1.1 and 1.7 of the Code of Ethics (**Code**) of the New Zealand Institute of Valuers (**NZIV**) and a breach of responsibility to X in accordance with Section 2.1 of the Code.
2. As part of the complaint X sought a new valuation report by Valuer J compared to surrounding properties to comply with Sections 1.1 and 1.7, a formal apology and disciplinary action in accordance with Section 2.1. The lawyers on behalf of X provided a correspondence timeline over the period 12 June – 11 August 2017 accompanied by some, but not all, email correspondence between the parties.
3. Valuer J was the supervisor of a qualified but unregistered valuer who, it would appear, undertook much of the work under Valuer J's supervision. The initial correspondence was between the complainant and the unregistered valuer. Later correspondence was between X the complainant and both the unregistered valuer and Valuer J.
4. In total 25 emails between the parties and others were submitted with the complaint. X alleged that the evidence included in the report did not support the valuation assessed and was not in accordance with evidence in the surrounding location. Valuer J requested any evidence that might support an alternative conclusion and offered to review the valuation.
5. X requested the basis of the analysis and judgement to reach the conclusion to which initially the unregistered valuer and then Valuer J responded. Valuer J's offer to review the valuation was not taken up by X.
6. In an email timed at 3.01pm on 7 August the accountant of Valuer J's firm advised that the fee was outstanding, requested confirmation that the invoice had been received and advice that payment had been made.
7. On 4.29pm the same day X responded by email alleging incompetence and breach of privacy issues to which both the unregistered valuer and Valuer J responded. Valuer J again requested additional information that would enable a review of the report. In the event that no information was forthcoming and the fee not paid by Friday 11th August, the firm would instigate legal proceedings in accordance with its Letter of Engagement and Scope of Work.
8. Further emails between the parties followed the same evening and continued on the following day.

The Valuation

9. Valuer J, in conjunction with an unregistered valuer, completed a valuation of a commercial supermarket property in South Auckland in a report dated 23 June 2017. Two methods were used, one described as the 'direct capitalisation approach', which was the principal method of assessment, and the other described as the 'sales comparison approach' based on a rate /m² of the developed property.
10. For clarity, in terms of International Valuation Standards both are methods not approaches, one being a method under the 'Investment Approach' and the other a method under the 'Market

Approach'. The correct terminology will be used in this decision. The value assessed of \$2,330,000 was slightly above the sales comparison method and slightly below the direct capitalisation method. The Board considers that the market approach and the income approach were both appropriate in this situation.

Categorisation of Complaint

11. Up to the date of making the complaint, no errors in the report had been identified by the complainant and no additional information that might assist Valuer J to revise the value had been provided.
12. The alleged breach of privacy was a discussion about the property with an agent by either Valuer J or the unregistered valuer. This was denied by Valuer J in an email of 12 July 2017. There was no evidence before the Board of a discussion or a breach of privacy to support the alleged breach of Section 2.1 of the Code.
13. Valuer J provided a detailed letter of response to a request from the Valuer General. In the response, Valuer J outlined the relationship between the valuation firm and the complainant, referred to other valuation work that had been undertaken for X by the firm and noted that X operates a real estate consultancy practice mainly for the Chinese community.
14. The instruction by X was to complete a valuation for sale. From information provided by Valuer J and email correspondence between the parties the Board has concluded that X has a substantial knowledge of the property market. In response to the Valuer General, Valuer J noted that the property was listed on the market at \$2.8 million at or about the time X was alleging in correspondence to J that offers were being received at prices in excess of \$3.0 million.
15. The property went to auction on 13 September 2017. It sold at a price of \$3.44 million. X purchased an 'uncle's' interest. It was said in submissions to the Board on Valuer J's behalf there were 'suspicions' as to the authenticity of the sale process. The property transferred to X's 'father', and a share of the property controlled by an 'uncle' to X.
16. From correspondence between Valuer J and the Valuer General, it was apparent Valuer J's firm endeavoured to collect the outstanding sum through the Disputes Tribunal. Valuer J advised the Valuer General that the Disputes Tribunal dismissed the allegation of privacy, confirmed that X was the silent bidder at the auction and reserved its decision on the matter of valuation standards, pending the Board's decision on the complaint. No documentation of the Dispute Tribunal's decision was before the Board.
17. In subsequent correspondence with the Valuer General, Valuer J provided details of sales relating to the subject property over a period of years as follows:

+	22 May 2000:	\$4,950,000
+	22 February 2004:	\$1,200,000
+	13 September 2017	\$3,440,000 to related parties (on the market prior at \$2,800,000)

The Valuations

18. The Valuer General commissioned reports to be prepared as at 23 June 2017 as retrospective valuation assessments by two independent registered valuers, familiar with the type of property and location.
19. Set out below in summary table form, are Valuer J's assessment and the two valuations prepared retrospectively, as at 23 June 2017. The factual property information, but not Valuer J's valuation, was provided to *Valuers 1 and 2* to ensure consistency of data.

Registered Valuer	Effective Date	Valuation	Remarks
Valuer J	23.6.17	\$2,330,000	Plus GST if any report issue date 6 July 2017
<i>Valuer 1</i>	23.6.17	\$2,800,000	Plus GST if any report issue date 24 July 2018
<i>Valuer 2</i>	23.6.17	\$3,000,000	Plus GST if any report issue date 20 September 2018

20. Valuer J's valuation is 16.79% below *Valuer 1* and 22.33% below *Valuer 2*.
21. The Board, having determined that the complaint may relate to a possible 'under-valuation' by Valuer J, ordered an inquiry.

The Charges

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

You have been charged with 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 6 July 2017 with respect to a commercial property **located at South Auckland** you significantly under-valued the said property.

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

You have been charged with 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 6 July 2017 with respect to a commercial property **located at South Auckland** you failed to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of the valuation report and therefor breached clause 1.5 of the New Zealand Institute of Valuers' Code of Ethics.

Particulars

- a) You failed to provide sufficient information necessary for a proper understanding of the valuation in breach of IVS103 Reporting and ANZVGN1.

Joint Memorandum

22. The Board of Inquiry received a joint memorandum on behalf of the Valuer General and Valuer J inviting the Board to adopt the following:
 1. Valuer J would plead guilty to Charge 1 in the Notice to Valuer.
 2. The Valuer General will then seek leave of the Board to withdraw Charge 2 in the Notice to Valuer.
 3. Valuer J acknowledges that the withdrawal of Charge 2 by the Valuer General, if allowed by leave of the Board, does not reflect an inability to prove the Charge 2.
 4. Rather, the parties agree that the withdrawal of Charge 2 was in the interest of resolving the prosecution short of a defended hearing, which confers time and cost benefits to the profession, Valuer J and the Board.
 5. Following the entry of a guilty plea to Charge 1 by Valuer J, the parties will proceed to a penalty hearing before the Board on 18 November 2019.
23. The Board accepted the joint memorandum. The matter proceeded to a penalty and cost hearing. The Board notes that, based on the evidence before it, received prior to the hearing and on which the Board was not in the position to cross examine witnesses, there appeared to be insufficient substance for Charge 2 to proceed.

Penalty and Cost Submissions

24. For the Valuer General it was submitted that the penalty should be \$2,500 and costs awarded at the standard rate of 50% of properly incurred costs.
25. For Valuer J it was submitted that the penalty should be \$1,500 and costs should be awarded at 25% of properly incurred costs.
26. The Board delivered an oral decision, noting that this matter was at the low level of offending. A sanction and a fine towards the lower end of the scale was appropriate, also noting there was little if any issue of public interest and/or public protection.
27. The Board had been supplied with and read the reports and evidence of the two valuers prepared at the instructions of the Valuer General prior to the hearing. The evidence would have been heard and cross examined.
28. There was relatively little directly comparable market evidence in those reports. The judgement required of *Valuers 1 and 2* to reach a conclusion on value relied firstly on their interpretation of the rental market for a supermarket of this type in this specific location of South Auckland and secondly as the principal method the application of a net return under the capitalisation rate method. *Valuer 2* also considered the potential for further development on the land.
29. Evidence presented in the reports was collated from a wide geographic area. Although there appeared to be potential for further development or redevelopment of the subject property, this was dependent on either waiting for the expiration of the existing lease or, entering into negotiations with the existing lessee. Neither Valuer J nor *Valuer 1* made an explicit allowance for this potential. *Valuer 2*, who assessed the highest value level of \$3.0 million made an explicit allowance, by adjusting the capitalisation rate downwards, which provided an upward adjustment to the value of 10%-15%.

30. The Board considers that adjusting the value for development or redevelopment potential without evidence would have been the subject of intense questioning, of *Valuer 2*. There was no empirical evidential basis for the adjustment to the capitalisation rate. By that, the Board means that none of the evidence of capitalisation rates, used as comparisons, identified development potential.
31. The impact is apparent as the capitalisation rate shorn of a 10% adjustment would otherwise have been 6.1% rather than 5.5% and at a 15% adjustment 6.5% rather than 5.5%.
32. To provide comparability of capitalisation rates and hence valuations between *Valuer J* and *Valuer 1*, and *Valuer 2*, simply removing the potential for redevelopment from the capitalisation rate of *Valuer 2*, which in the Board's view was speculative, brings the valuations closer together. The Board notes that the contract rent and estimated market rents of all three valuers were sufficiently similar that the contract rent of \$161,740 p.a. plus outgoings and GST would be a fair basis for comparative analysis.

Valuer	Capitalisation Rate	Market Value
Valuer J	6.94%	\$2,330,000
Valuer 1	5.77%	\$2,800,000
Valuer 2 (excluding 10% adjustment)	6.1%	\$2,635,000
Valuer 2 (excluding 15% cap rate adjustment)	6.5%	\$2,490,000

33. While on this comparative analysis *Valuer J* is still below both *Valuers 1 and 2*, the variations are not such that, had the matter proceeded to a defended hearing, the matter could have been proven to the required standard.

Oral Decision – 18 November 2019

Valuer J prepared a market valuation dated 23 June 2017 on a commercial supermarket property located at South Auckland. Valuer J assessed a value of \$2,330,000 plus GST, if any. A complaint was made against Valuer J in a letter dated 30 August 2017 by Lawyers on behalf of X for whom the valuation was prepared; alleging a breach of the Code of Ethics of the New Zealand Institute of Valuers. Central to the complaint was an allegation that the property was not valued in comparison with the surrounding properties because of lack of information and knowledge of comparative properties in the surrounding area.

The Valuer General investigated the complaint. As part of his investigation the Valuer General commissioned two retrospective valuations, one of which was at \$2,800,000 and the other at \$3,000,000, prepared on the same basis as that of Valuer J. The percentage that Valuer J was below the two assessments is: 16.79% and 22.33% respectively.

The Board being not satisfied that there were no grounds for the complaint, ordered an inquiry. Two charges were drawn:

Charge 1 - of a significant under valuation

Charge 2 – a charge of incompetent conduct and by failing to exercise the utmost care and good faith to ensure the maintenance of the highest standards in the preparation of the valuation report, a breach of Clause 1.5 of the New Zealand Institute of Valuers Code of Ethics.

By Joint Memorandum dated 14 November 2019, the Valuer General and the defendant valuer, Valuer J, invited the Board to adopt a jointly submitted approach that would have Valuer J plead guilty to Charge 1 in which event the Valuer General would seek leave of the Board to withdraw Charge 2. The Board accepted the memorandum in this respect and the Penalty Hearing proceeded on that basis, with Valuer J pleading guilty to Charge 1.

Penalty

For the Valuer General it was submitted that a sanction and penalty of \$2,500 was appropriate and for Valuer J it was submitted that the penalty should be set at \$1500.

The Board reprimands Valuer J and imposes a penalty of \$1500 recognising that this matter is towards the lower end of the scale of matters that come before the Board, with little if any impact on public protection in this case.

Costs

Costs for the Valuer General are yet to be finally determined and may in total amount to a sum in the range of \$30,000 – \$35,000, recognising that the guilty plea was submitted at a late stage by which time evidence had been completed. The Board's costs in addition are likely to be in the order of \$5,000. For the Valuer General the start point of 50% was advanced as the proper level, neither increased for aggravating factors nor reduced for mitigating factors to an extent that would vary from the generally adopted 50%.

For Valuer J it was submitted that costs should be awarded at 25% based on mitigating circumstances. The Board has considered the five matters outlined at paragraph 4.2 of the submissions for Valuer J and sees no reason to depart from the 50% level, applied to properly incurred costs. The Board expects that the Valuer General's costs will exclude any proportion of costs relating to Charge 2. The Board therefore awards against Valuer J, 50% of properly incurred costs excluding costs relating to Charge 2.

Costs of the Valuer General are to be confirmed to the Registrar within 5 working days, that date being 25 November 2019 including, separately identified, the costs that the Valuer General may incur to consider any further details on name suppression.'

Addendum

The Board notes that, prior to delivering its Oral Penalty and Costs Decision, interim name suppression was granted, pending documentary evidence in support of matters outlined in brief to the Board.

Costs

34. Cost which are set out below have subsequently been received in a Memorandum of Costs from the Valuer General as follows:

Legal fees	\$10,251.71
Investigations/Prosecution Costs	\$21,751.53
Boards Expenses	<u>\$ 5,001.85</u>

Total

\$37,005.09 inclusive of GST

35. Costs are therefore awarded against Valuer J at 50% in the sum of \$18,502.54.

Name Suppression

36. The Board granted interim name suppression to Valuer J, pending documentary evidence in support of matters outlined in brief at the hearing. The Valuer General did not oppose name suppression but submitted that no substantial grounds on behalf of Valuer J had been put to the Board by the date of the hearing. For that reason, the Board requested additional information to which the Valuer General would have a right of reply.
37. This matter is unusual in that, for personal reasons, Valuer J, having made apologies to the Board for non-attendance at the hearing has ceased to practice, resigned employment and has not applied for an annual practicing certificate for 2020. Although unusual from a professional perspective the Board notes that Valuer J could apply for an annual practicing certificate at a later date. Provided no valuations were made in the interim Valuer J would not be in breach of the Act.
38. Even resignation as a registered valuer would not be an overly significant factor in isolation as a valuer is not prevented within the statutory time frame of reapplying for registration and an annual practicing certificate.
39. Arguably what is of greater significance is that the Board was advised Valuer J has given up his employment as a valuer for health reasons, apparently as a result of the stress of the complaint. Collectively, the combination of factors in this case is, in the Board's view, significant. Valuer J has a history of medical issues that include mental health issues.
40. The Board's initial concern was that insufficient information had been placed before it that would provide guidance to reach a decision that would adequately balance the high threshold of anonymity with the requirement for public openness and public protection.
41. For Valuer J it was submitted support had been sought in the past in relation to mental health matters. Valuer J was extremely hesitant to provide information, particularly in a format where it could be transmitted electronically. Apparently, in the past information in paper form from a general medical practitioner had been obtained when making an application for life insurance.
42. The result was that Valuer J's insurance life policy was endorsed for matters relating to mental health. Around that time in November 2017, when Valuer J was 56 years of age, the life policy was provisionally accepted with endorsements that were specific in terms of mental health, with a long list of exclusions ranging from mental health disorder through to psychosomatic disorders.
43. The endorsement was extended to include physical disorders notably relating to cancer including cancer for which Valuer J had already obtained treatment. One exclusion was colon cancer for which it was submitted Valuer J's father died at the same age Valuer J was at the time life insurance was granted with that exclusion.
44. Counsel for the Valuer General in a detailed memorandum outlined the principles applying to the applications for name suppression before the Board and offered comment on the material filed.

45. Annexed to the memorandum was the decision of the Board in *Valuer General v K*¹. Having regard to that decision the Valuer General was of the view that the information before the Board remains insufficient.

46. For the Valuer General the guiding principles were outlined as follows:

- a) *'While the Board has no express power to grant name suppression, it could proceed on the basis that it has the power;*²
- b) *If the Board does grant name suppression, it has no power to prohibit any party from publishing or in any way disclosing the name of any persons;*³
- c) *If the Board does grant name suppression, its power is restricted to identifying a person by initial or other descriptive but non - identifying information;*⁴
- d) *There is no blanket requirement for the Board to consider name suppression when applied for, and any application will be considered on a case-by-case basis.*⁵

47. The memorandum for the Valuer General records the correct test to apply in determining an application for name suppression in accordance with the legal opinion the Board had previously obtained in the matter of Valuer K⁶

'the Board accepts the submissions it has received on behalf of both parties and opinion from Mr David Laurenson QC that the correct test is not one of 'exceptional circumstances' alone. Rather, it is one where the Board should also have regard to whether it is 'proper' or 'appropriate' to grant name suppression given the competing interest of the openness required for natural justice and protection of the public interest.

48. In applying this test, the Board then discussed the importance of the public interest and the openness of proceedings against registered valuers ⁷

The Board has concluded that the public interest in any one case might be relatively narrow but that part of the public that relies on a valuer's integrity and compliance is a significant factor that must be protected. Any decision to grant name suppression could have adverse implications such as the public being prevented from knowing that a particular valuer has committed a transgression requiring a penalty imposed by the Board.

The Board has therefore determined that in general, the balancing act of determining whether or not to grant name suppression, which could be described as a 'threshold to displace the presumption of openness', is high.

There must be strong reasons why name suppression would be granted even to the extent of identifying a valuer by 'initial or other descriptive but non-identifying information'. The Board notes that it cannot prosecute for non-observance of its decision on name suppression.

¹ *Valuer General v K Valuers Registration Board*, 7 March 2018

² At [59].

³ At [60]

⁴ *Valuer General v K*, above n1 at [63]

⁵ At [64]

⁶ At [58]

⁷ At [65]-[69]

49. Having regard to these tests and considerations required of the Board, for the Valuer General the memorandum made reference to the following:

'Mental Health

The Valuer General considers that ordinarily, stress and anxiety as a result of disciplinary proceedings is not in itself sufficient to displace the principle of open publication. However, in some cases, orders for non-publication would be appropriate where it can be shown through appropriate medical evidence that publication will be detrimental to a registered valuer's mental health, so as to make it proper for such an order to be made.

Valuer P advises that Valuer P has had difficulty obtaining medical records to substantiate the submitted adverse impact on Valuer J's mental health from publication. No medical evidence is tendered but rather a general life insurance policy endorsing Valuer J for mental health. Valuer P acknowledges that the risk to Valuer J's mental health from publication cannot be quantified but submits that this policy, and Valuer J's concern that stress is linked to Valuer J's previous suffering from cancer and mental health issues, supports granting of the order sought in this case. Valuer P submits that the most prudent approach is to avoid unforeseen potential harm.

The Valuer General considers that the Board is not assisted by the material filed. Given that the 'threshold to displace the presumption of openness' is high and requires 'strong reasons' to depart from 'the openness required for natural justice and protection of the public interest', the Valuer General considers that Valuer J needs to tender sufficient medical evidence as to mental health that then enables the Board to adequately perform the balancing act of determining whether or not a grant of name suppression is appropriate. Such evidence would enable the Board to evaluate the probability of harm, rather than speculate or guess as to Valuer J's present or future condition.

The Valuer General considers that, at this time, Valuer J's circumstances appear to fall short of displacing the open justice principle.

Risk to Public

Valuer P submits that because Valuer J has resigned and is no longer working as a registered valuer, there is little threat to the public and that this also supports grant of the order sought in this case.

The Valuer General observes that, at the present time, there is no bar to Valuer J resuming practice as a registered valuer in the future, should his submitted condition improve and he wish to do so. In the circumstances, while the public interest in the case might be relatively narrow at the present time, the part of the public that relies on a registered valuer's integrity and compliance remains a significant factor that needs to be protected by the Board. The Valuer General invites the Board to carefully consider this key interest in determining the application in this case.

In conclusion, the Valuer General is of the view that information before the Board remains insufficient for it to grant the application.'

Decision of the Board on Name Suppression

50. In the matter of Valuer K, The Board exercised its discretion noting Section 6 of the Act which provides:
- 'Except as expressly provided in this Act or in regulations made under this Act, the Board may regulate its own procedure in such manner as it sees fit.'*⁸
51. The Board in Valuer K referred to its past practices referring to the 'exceptional circumstances' test outlined at paragraphs [15]-[22] noting that of the six occasions on which an application has been made, two have been declined and four granted. That number can now be extended to five granted before consideration of the application by Valuer J⁹
52. In Valuer K, the full submissions for the parties were outlined and a summary table prepared at [78]¹⁰ following which the Board determined whether or not the tests required had been met. Importantly, the Board was of the opinion that the particular matter in Valuer K cannot be extended as a precedent to embrace another set of facts or circumstances. 'The balancing act' required of the Board required a consideration of specific circumstances on each application to determine whether the high threshold test of public protection has been displaced, which is the test the Board applied in its most recent decision.

Decision of the Board

53. The Board re-affirms its decision in Valuer K that, based on legal opinion and submissions, it does not have the power to grant permanent name suppression and, even if it had the power, it could not punish for contempt of a name suppression order made by the Board.
54. The Board notes again, as it did in Valuer K [83], given the uncertainty of authorities it can proceed on the basis that it does have the power to grant permanent name suppression.¹¹
55. The Board concluded in Valuer K that, given uncertainty and legal authorities to date and based on legal opinion and submissions, it has the implied power to make more limited name suppression orders by identifying a person in its decision by '*initial or other descriptive but non-identifying information*' but could not punish for contempt of a breach.¹²
56. This matter is unlikely to be unique. There are no medically supported defining characteristics that separate Valuer J's medical condition from any other valuer who could suffer from a mental disorder, whether or not it was linked to a physical condition and might be the subject of a complaint.
57. The specific matters for consideration are:
- 1) This matter is at or towards the low end of offending
 - 2) Valuer J has ceased employment
 - 3) Valuer J has not renewed a practising certificate
 - 4) There is little if any public interest
 - 5) There are concerns as to the nature of the complaint

⁸ *Valuer General v K* [9]

⁹ *Valuer General v K* [15]-[22]

¹⁰ *Valuer General v K* [78]

¹¹ *Valuer General v K* [83]

¹² *Valuer General v K* [84]

- 6) The evidence though not tested appears on its face inconclusive
- 7) Despite obvious health and physical factors that have given rise to extensive endorsements under a life policy Valuer J has concerns about providing any further information
- 8) The impact of personal and family medical history on Valuer J are an additional factor.

58. Exercising its discretion, the Board has concluded that the balancing act in this matter favours the interests of Valuer J and therefore properly justifies displacement of the *presumption of open publication* and that it is *proper* and *appropriate* to identify Valuer J by an initial.

59. The Board accepts that to have a meaningful consequence, the names of the complainant, the valuers who have provided retrospective valuations, their evidence and the address of the property need also be sanitised in its decision. For its decision to be meaningful the nature of the complaint being an under valuation of a commercial supermarket property in South Auckland is not anonymised.

60. The interim full name suppression ordered by the Board is to remain in force for a further 10 working days post release of this decision, after which it is lifted and will cease to apply. In this matter from that date the valuer is to be identified as Valuer J.



Evan Gamby

Inquiry Chairperson

9 March 2020