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# Ethics and the valuer's fiduciary duty to adequately inform the client

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## Introduction

Registered valuers are governed by the Valuation Act 1948. The valuers' profession, represented by the Property Institute of New Zealand ("PINZ"), incorporating the New Zealand Institute of Valuers ("NZIV"), and other bodies, has existed for more than 100 years. One of the Institute's objectives is to encourage ethical conduct. The statutory Valuers Registration Board ("VRB") also has jurisdiction over improper, unethical or incompetent conduct, as defined in the NZIV Code of Ethics and "best practice".

Changes in valuation practice in recent years has raised a number of ethical questions. They include the relationship between valuer and client, the duty to adequately inform the client, and compliance with practice standards. In the course of this article I hope to address some of these, using hypothetical examples which I was asked to respond to, with an emphasis on the vexed question of the duty to adequately inform the client.

## The valuers' profession

The 1979 British Royal Commission on legal services thought that there were five main features of a profession:

- (1) A governing body (or bodies) [that] represents a profession and has powers of control and discipline over its members;
- (2) [Mastery of] a specialised field of knowledge. This requires not only the period of education and training ... but also practical experience and continuing study of developments in theory and practice;
- (3) Admission ... is dependent upon a period of theoretical and practical training in the course of which it is necessary to pass examinations and tests of competence;
- (4) [A] measure of self regulation so that it may require its members to observe higher standards than could be successfully imposed from without;
- (5) A professional person's first and particular responsibility is to the client. The client's case should receive from the adviser the same level of care and attention as the client would himself exert if he had the knowledge and the means.<sup>1</sup>

Sociological studies of professions have traditionally focused on listing those activities which are accepted as professions in an attempt to differentiate a profession from non-profession. An alternative approach holds that the ability to obtain and retain professional status is closely related to concrete occupational strategies and to wider social forces and arrangements of power. Such an approach leads to a consideration of the social meaning of occupational tasks (perhaps an easier task with the lawyer or doctor than the architect), the resources behind the emergence and the continuation of professionalism, and the social consequences of professionalism.<sup>2</sup>

Sociologists sought to demonstrate that governing bodies were unrepresentative and ineffective regulators; professions lacked the expertise they claimed; admission criteria



had little relevance to the actual work of the professions; ethical rules were motivated by economic self-interest and failed to ensure competence; and professionals repeatedly betrayed clients.<sup>3</sup> Producers of a service who succeed in constructing a marketable commodity only become an occupation. To become a profession they must seek social exclusivity. The consumer must acknowledge the value of the producers' services, and must be convinced that they cannot produce the services themselves.<sup>4</sup>

Structural functionalists argue that this is not a conscious, self-interested strategy, but is simply the means by which society ensures that consumers receive quality services. Quality is maintained through controls on entry.<sup>5</sup> To promote competition the free-market advocates would reduce the controls on entry into professions, ignoring the fact that this is a means of maintaining standards in the public interest. If it were indeed true that professional status is for the benefit of the professional, then one would require strong evidence of some countervailing public benefit to justify any monopoly.<sup>6</sup>

The valuers' profession, as a profession, must adhere to high ethical and quality standards. In part this is based on its nature as a profession, and the legal and ethical requirements which this imposes.

## The role of ethics

The valuers' profession is not, of course, unique. The Lawyers and Conveyancers Act 2006 (NZ) introduced a new regulatory and disciplinary system. Part 7 of the Act (ss.120-272) comprises a significant proportion of the new, very lengthy and complex, statutory provisions for the legal profession. The New Zealand Law Society is now the sole compulsory membership association of lawyers (excepting the very small class of

conveyancers), and is required to establish a complaints service.

The new arrangements are based on centralised self-regulation, but moderated by the requirement for lay participation. They are unusual in that they effectively have the one agency which has investigative, prosecutorial and disciplinary functions. The Lawyers Standards Committees investigate complaints, attempt to resolve disputes, and prosecute offenders. They also have limited powers to punish, and their

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decisions are subject to appeal to the Legal Complaints Review Officer, a non-lawyer. The New Zealand Lawyers and Conveyancers Disciplinary Tribunal deals only with the more serious offences.

Although these Committees are part of the New Zealand Law Society's complaints service – the old District Disciplinary Tribunals have been abolished – it is anticipated that the new committees will be based in the districts. Whereas there was a distinction between the investigative and prosecutorial role of the District Law Society's officers and the disciplinary role of the District Disciplinary Tribunals, in the new system these roles have effectively been combined. This is a departure from the approach adopted in most other jurisdictions reviewed, and its likely effectiveness is unknown. Because the district law societies – apart

from Auckland – have disappeared, local committees are associated with branches of the New Zealand Law Society.

The Real Estate Agents Act 2008 introduced a new complaints system, which provides transparent and fair processes for all parties involved in a complaint. All agents must have procedures for handling complaints. Using those procedures may be the quickest way to resolve your concerns. If you are unable to sort things out this way you can complain to the Real Estate Agents Authority under the Real Estate Agents Act 2008. Other existing consumer protections, such as those provided by the Fair Trading Act 1986 and the Consumer Guarantees Act 1993, also continue to be available to consumers.

A profession will tend to be concerned with personal confidence of the client in the technical competence of practitioners, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole.<sup>7</sup>

Because standards cover conduct and competence, both technically and ethically, control must be exercised over both entry into the profession and conduct within it. It follows that by membership practitioners may be subject to sanctions for acts or omissions which do not violate the criminal or civil law.<sup>8</sup> Only statutory regulation can ensure that the disciplinary sanctions are effective.

Controls over the conduct of members of the valuers' profession include personal remedies in tort, contract or equity; the criminal law; an educational standard for entry; procedural and substantive requirements for admission. Some of these controls belong to the wider law, but some are specific and reflect the fact that members of the profession voluntarily submit to higher standards of



conduct than those required by ordinary citizens, and thereby render themselves liable for professional misconduct in addition to any penalty which the common or statute law may impose.<sup>9</sup>

## Fiduciary duty

Registered valuers are accountable to the VRB, PINZ and NZIV. Valuers, because of their professional role, owe a fiduciary duty to their clients.<sup>10</sup> While the precise implications of this may be unclear, the general law imposes certain obligations,

and the codes of ethics and practice standards of the profession provide others.<sup>11</sup>

## Duty to inform clients

Perhaps central to the duty of valuers is the duty of inform clients. Related to this is the question of who precisely is the client, and what are the obligations with respect to the content of the valuation report. I will use a series of examples to illustrate some of the points of tension, and then attempt to draw these together.

### Example 1

A valuation company employed a senior valuer who was understood to have a good reputation. The valuation company director became aware that some work completed by the valuer was apparently not up to standard. The valuer was immediately dismissed and went without dispute.

The valuation company then advised their professional indemnity insurer that there would be potential claims. The valuation company, which has a good reputation and longstanding clients, wished to mitigate any damage or loss to the clients by immediately withdrawing the relevant valuation reports to prevent reliance on the reports (proposing a full refund). It is possible that reliance on the documentation had not yet occurred and the valuation company wished to immediately advise the clients to prevent loss to the client and third party who would reasonably be expected to rely on the report, such as a specified financier.

The insurance company's lawyers advised the valuation company not to advise or contact the clients under any circumstances. This prevented mitigation of any loss or damage arising from the reports or reliance on them. The situation was clearly explained by the valuation company to the insurer and their solicitors. There was grave concern at the valuation company, despite the full appreciation of preserving the reputation of the company by not disclosing any defects. It was perceived that the ethical and appropriate thing to do would be to advise the client immediately to prevent any loss.

#### Response:

A negligent valuer such as this (and vicariously the valuation company) is exposed to legal liability, including negligence.<sup>12</sup> Foreseeable reliance by people in close legal proximity, including banks, creates potential liability for negligent misstatement. Whether or not an action or inaction is negligent is determined by the courts (though, since s.10 of the Valuers Act 1948 requires the profession itself to promote ethical standards, the code of ethics could be influential in guiding a court). The solicitor for the insurance company has a conflict of interest, in that they are the insurance company's advisers, and cannot be seen to be neutral.

### Example 2

Where a valuation company provides rating value advice to a Local Authority do they have a conflict of interest if they accept instructions from a rating value objector to undertake a valuation report for the purposes of a rating value objection?

#### Response:

The PINZ Rules of Conduct, rule 5.0, states that a valuer "shall not accept instructions where there may be, or may reasonably be considered to be a conflict of interest". Receiving instructions in such a situation would create a conflict of interest because they would be potentially utilising information gathered for one client for the advantage of another.

### Example 3

A valuation company is approached by a longstanding client to undertake a market valuation of a commercial property for mortgage purposes. The client agrees to pay the fee. Instructions are initially given by that 'client'. A bank then sends 'instructions' (purported instructions) for the valuer to provide the market value report directly to the bank and not provide the report to the paying client who initially instructed the valuer.

#### Response:

It is not ethical for the valuer to fail to send the report to the client. This is interference in the contractual arrangement between client and valuer, unless it could be argued that there is an implied or express condition of the contract that the report is to go to the bank only – which is unlikely. The client is not the bank, and the latter has no right to issue instructions to the valuers. Equally, the valuers ought not follow such instructions unless it is clear that this is what the client wishes.



### Example 4

There appears to be significant confusion in the valuation profession about who the client is. Members of the public phone, email or otherwise contact the valuation offices with a view to obtaining valuation and property consulting advice. These people pay the fee. The reports are then extended to various organisations usually in the form of a letter and/or valuation report with the letter headed to the organisation to which the report, advice and liability are extended with an additional statement (usually below 'Re') stating the client name.

#### Response:

The client is the client who engages the valuer. Any third party who might foreseeably rely on the valuation report is covered by the law of negligent misstatement. A letter of engagement could easily clarify that the person who initially instructs the valuer – and pays them – is the client.

### Example 5

Multi-disciplinary practices exist in the professional world. There are many known examples of these, particularly with accounting and law firms. Recently and for that matter traditionally, there have been valuation companies that provide both "independent" valuation advice but also are involved in the sale of real estate.

#### Response:

The sale of real estate and the provision of valuation reports are two distinct functions which can easily be in conflict. It might in some situations be theoretically possible to adopt "Chinese walls", where there is a clear and complete separation between the operational units responsible for the two functions. In practice, however, it would probably be necessary to disclose the actual or potential conflict of interest, and possibly withdraw from one or other activity.

### Example 6

A valuer provides a standard "market value" report for mortgage security purposes to Mr Joe Bloggs who instructs the valuer and pays the fee. Further to his instructions, the valuer extends the report to a bank. A year later, the bank forecloses on the property and proceeds with a mortgagee sale. The bank contacts the valuer and requests an updated valuation for the purposes of market value assessment and estimated sale price at mortgagee sale.

#### Response:

In this case, the private person who engaged the valuer was clearly the client, and the bank a third party. Bloggs may legitimately ask for an updated report which is not to go to the bank; however, if the bank itself asks for an update, this is actually a new contractual arrangement, and not an "update". To use the information collected for the original client would be a breach of the valuer's duty to that client.

### Example 7

Rating valuations are provided for statutory purposes in accordance with legislation, regulations and the rating rules issued by the Valuer General. Rating valuations are not provided for mortgage security purposes. Do local authorities (or their subcontractors who undertake valuation assessments) bear any liability where banks or the public rely on such rating valuations? Do banks who arrange a mortgage security based on rating valuation have a duty to their clients (the mortgagor) to clarify whether rating valuations are an appropriate method of assessing market value for mortgage security purposes? If subcontractors who provide rating value assessments to local authorities guarantee or extend these values to mortgagees (or the mortgagors for that matter) do they undertake a liability for the reliability of such information for such a purpose? Do they breach their obligations to the local authority in doing so?

#### Response:

The use of valuation reports for purposes other than that for which they were created could be unethical, and expose parties to liability for negligent misstatement, or for negligence. Local authorities who produce valuation reports may be liable in tort to any other parties where there is foreseeable reliance upon them. This could include banks, though it could be countered that banks ought to know that reliance on rating valuations is not a sufficient safeguard. Banks relying on such valuations could potentially be themselves liable to their clients, if such reliance is held by a court to be in breach of a duty of care.



## Example 8

Practice Standards require certain things in a valuation report. However, there is an exception rule which provides that a valuer may not fulfill all the aspects of the report, as set out by the Practice Standards and Guidance Notes, where the valuer discloses that the report does not fulfill those requirements and an explanation is given as to why.

The reasons for this can be that the bank approaches a valuer to value a property for mortgagee sale, but no access is available to the valuer and the bank's instructions are to assess the value of the property with or without access. The valuer then proceeds with a "street side valuation" to give the best information to the bank based on the limited access available to that valuer.

### Response:

In New Zealand, the client is normally a layperson. Partial reports, which do not meet the requirements of the Practice Standards and Guidance Notes, present a particular risk for them. Whether it is unethical for a valuer to provide a valuation of this sort will depend on several factors, perhaps the most important of which is the extent of the disclosure to the client. The valuer who does not fully inform the client of the limitations of the valuation report could be liable for negligent misstatement, or for a breach of the Consumer Guarantees Act. A bank would not be liable for the accuracy etc of a report which they paid for on behalf of a client. It is inappropriate for a bank to advise a vulnerable client to use a substandard report, rendering them potentially liable in negligence.

## Example 9

The valuer provides a market value for mortgage security purposes to a married couple and accepts the instructions on the basis that the client is 'Mr & Mrs Brown' and the payment is received from Mr & Mrs Brown. Two years later Mrs Brown contacts the valuation company to provide an update valuation for matrimonial/relationship settlement purposes.

### Response:

In this case the original client is Mr and Mrs Brown jointly. As partners in the legal sense they have joint and several liability, and are jointly and severally parties to the original contract. Mrs Brown is a new client, and the pre-existing duty to the original clients remains, creating a conflict of interest.

## Example 10

In Australia, banks pay valuers. Valuers vie for the few major clients. In New Zealand the members of the public pay valuers. Valuers compete for a diverse market of clients and arguably retain greater autonomy. If banks in New Zealand paid valuers to value property and the bank's client (a prospective purchaser) did not receive funding from that bank due to the prospective purchaser's income, could the valuer accept instructions from the prospective purchaser to value the property, or would the valuer have a conflict of interest due to the remaining duty to the bank? Does the bank have the right to stop or not consent to the valuer working on that property for another bank (to prevent losing market share)?

### Response:

The valuer would receive instructions from the bank, as this would be the client. They could receive instructions from the prospective property purchaser (cf from the bank now), but it is likely that this would not be accepted; the purchaser does not have the standing of the bank. Once the valuer has accepted the bank as his or her client a duty is owed to that client. Working for another client on that property would create a conflict of interest.

## Example 11

An unregistered graduate valuer drives all over a region valuing real property. The graduate emails the reports to a NZ registered valuer in another city, or perhaps even overseas. The registered valuer never inspects the properties, or the sales. Please address the ethics and legality involved with regard to the duty to the client.

### Response:

A registered valuer is responsible both ethically and legally (for instance under the Consumer Guarantees Act) to complete the valuation report him or herself. Completion of the research by an unregistered valuer, under supervision, may be acceptable, but not a report wholly made by an unregistered valuer.



## Example 12

Practice standards require that a mortgage recommendation is provided for mortgage security

reports (where valuers provide valuation reports extended to a bank which is advice relied on related to the process of lending funds and taking security over property). Some financiers are "instructing" valuers not to provide mortgage recommendations.

Traditionally, the valuers would provide a mortgage recommendation of no more than 50% for vacant sites and two-thirds of the market value (excluding fixed chattels) for improved properties. With adjustments, as appropriate, for each specific property (eg: high land value in relation to very low improvement value). Is it unethical for a Registered Valuer to ignore the Practice Standard requirements at the request of the mortgagee without adequately explaining these issues to the valuer's client, the mortgagor?

### Response:

The valuer should only omit the mortgage recommendation, subject to the client's prior consent, rather than acting on the instructions directly from the bank. This is because the norm would be to include the mortgage recommendation.

Banks instructing valuers to not provide mortgage recommendations are interfering with the duty of the valuer to the client. Subject to the client's prior consent, the valuer, in such a case, should indicate in the report that they have not provided a mortgage recommendation at the request of a third party (the bank), and that the report was not in compliance with the PINZ Practice Standards. While the bank knows the risks involved in this practice, the client may not. It would be unethical, and in breach of their duty to the client, to fail to adequately inform them.

## Example 13

Considering The Valuers Act 1948 s.9(1) are Rules 149 and 150 of the NZIV Rules ultra vires? Ultra vires is the doctrine in the law of corporations that holds that if a corporation enters into a contract that is beyond the scope of its corporate powers, the contract is illegal. Could they be used, or are they of no effect?

### Response:

Section 9 of the Valuers Act establishes the NZIV. The Rules of the NZIV are passed by members and approved by the Minister under the Act, and have statutory authority. However, Rules 149 and 150 concern the possibility of the winding up of the NZIV. Since one of the purposes of the Act (as stated in the long title), is the establishment of the New Zealand Institute of Valuers, it might be assumed that the NZIV remains in existence unless and until abolished by further statutory reform. The NZIV is not an incorporated society, and the provisions of Rules 149 and 150 indeed would appear to be ultra vires. The Rules of the Institute (s.16) are meant to cover matters concerned with carrying out the objects of the Institute, and this appears to not include winding it up.

## Conclusion

There are a number of serious ethical issues facing the valuer's profession. It behoves the professional bodies, and individual valuers to tackle these head on. The major ones are the identity of the "client", and the contractual, tortious and ethical obligations to them. The second – related – issue, is the role of the bank as "instructor". Thirdly, is the vexed question of the use of valuation reports which are not compliant with the valuers' code of ethics and practice standards.

Non-compliant reports aren't inherently unethical in themselves, but failure to sufficiently highlight the degree of non-compliance, and any other limitations in the reports, would be. It would also render the valuer potentially liable in contract or tort, and under consumer legislation. All or almost all of these difficulties can be avoided or minimised by use of full disclosure and clear letters of engagement.

Since there is no such creature as a registered report, all reports by registered valuers ought to comply with the relevant requirements. Failure to do so must be signalled clearly to the client, and anyone who might reasonably be expected to rely on the report. ■

## Notes

<sup>1</sup> (1979) vol 1 at para 28, 30.

<sup>2</sup> Klegon, "The Sociology of the Professions: an emerging perspective" (1978) 5 *Sociology of Work and Occupation* 259.

<sup>3</sup> Abel, *The Legal Profession in England and Wales* (1988) 7.

<sup>4</sup> Ibid, 10.

<sup>5</sup> Ibid, 12.

<sup>6</sup> McKay, "Professions at risk" [1993] NZLJ 104.

<sup>7</sup> *Royal Commission of Inquiry into Civil Rights* (1968-71) (McRuer Report) Ontario No 1 Vol 3 at para 1161.

<sup>8</sup> Flaus, "Discipline within the New Zealand Legal Profession" (1973) 6 VUWLR 337 at 338.

<sup>9</sup> Abeyesuriya, "The Legal Profession" in "Selected extracts from papers given at the [LAWASIA 1993 Colombo] conference" [1993] NZLJ 414.

<sup>10</sup> See M. Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 *Law Quarterly Review* 452-80; E.J. Weir, "The Fiduciary Obligation" (1975) 25(1) *University of Toronto Law Journal* 1-22.

<sup>11</sup> See also James Edelman, "When do fiduciary duties arise?" (2010) 126 *Law Quarterly Review* 302-327; *Woolfsen v Gibbons* [2002] All ER(D) 69.

<sup>12</sup> A duty ultimately derived from *Hedley Byrne v Heller & Partners* [1964] AC 465. See also *Yianni v Edwin Evans & Sons* [1982] 2QB 438 [1981]; 3 All ER 592 (noted 1982) 1 BCB 31; (see also report in N.Z.Vol 25, No. 2, June 1982, p100).