

Optimum Resolution of Negligent Valuation Disputes

by

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Introduction: - allegations of negligence in valuation: the background to

Allegations of negligent valuation will occur. This is a simple premise upon which this paper is based and it seems incontrovertible. Allegations of negligence are not confined to valuers. Architects, engineers, real estate agents, doctors and lawyers have all been, and continue to be, subject to claims based on alleged professional negligence. The reasons are also relatively straightforward. First, professionals make mistakes. The leading English legal text on Professional Negligence (Jackson and Powell, 1997) contained in its first preface the truism that “There is hardly any professional man who does not from time to time do that which the courts would castigate as negligent”. While many of these mistakes will be capable of being corrected, some will not. Second, clients, and others, such as lending institutions to whom reports are shown, make use of valuations. They rely on them. Clients, whether investors in property, developers or lenders, sustain losses in some of the transactions in which they engage. They then wish to re-coup or at least partly offset those losses. Third, valuers, as professionals, represent an eligible target and potential source for recovery for clients or third parties who have sustained losses, whether or not they bear any moral responsibility for those losses. Valuers routinely carry professional indemnity insurance, which constitutes the ‘pot of gold’ which the claimant seeks. In the case of large-scale commercial work in particular, the valuer may well be from a large national or even international practice. This has beneficial consequences for the claimant as well, since the practice, in addition to its own substantial assets, has a reputation to protect, which will encourage it to try to resolve a problem in which it is implicated. Valuers, as professional people, feel a sense of responsibility and duty to their clients which make it relatively less likely that they will merely seek to distance themselves from a problematic situation.

By no means all the allegations of negligence against valuers will be well-founded. Investors and lenders can sustain losses through their own incompetence. The author was part of a research team which investigated contributory negligence by lending institutions (Crosby et al., 1998a) and this is referred to further in this paper below. The cause of the losses may be sheer misfortune or unforeseeable market movement. An allegation of negligence may even be a cynical device to try to avoid or delay payment of fees owed to the valuer.

A further point should be made at the outset. Allegations of negligence will not only occur, they will occur continually. Here a distinction may be drawn between two types of negligent valuation case. While periods of economic volatility, especially a buoyant market followed by a sharp fall and prolonged depression, unquestionably generate ‘waves’ of similar claims (Connell, 1990), Evans (1993), (Crosby et al 1998b), there can also be identified a category of routine claims which are largely unrelated to market movement (although at the margins adverse economic conditions tend to encourage claims, since favourable market trends can mask losses) and which depend more on individual circumstances and, frequently, individual human error. Standard texts on legal responsibilities of surveyors and valuers (Murdoch and

Murrells, 1995) in the UK (Joyce and Norris, 1994) in Australia, contain many such examples; they may related to inadequate knowledge of the market, insufficient time or resources for the collection of evidence or calculation, out of date understanding of methodology or law or succumbing to pressure exerted by a client or other interested party. Of course, there is no reason why one or more of these features should not also figure in one of the 'post-crash' cases, but this type of case is not reliant on market volatility, a sufficiently serious error is capable of causing loss under any conditions.

So any society which uses valuers to provide advice on property and which allocates rights of redress to parties allegedly harmed by professional inadequacy – which will include every developed society and most developing ones – must confront the fact that allegations of negligent valuation will occur. Confronting the fact necessarily involves deciding what provision to make for such occurrences.

The issue: the need for dispute resolution mechanisms

If allegations of professional negligence are made, they are likely to give rise to disputes. There may be cases where the valuer against whom the allegation is made is prepared to admit responsibility and fault and offer the assistance or compensation sought, although the role of professional indemnity insurers means that that decision is not solely or even mainly in the hands of the practitioner. But in many cases the valuer will dispute some or all of the claim on moral or legal grounds or both. The defence may be to deny a legal duty of care altogether. In Blake v Barking and Dagenham a purchaser of a council house which had fallen in value after purchase claimed that the local authority owed a duty in respect of the assessment of the sale price by its valuer. No such duty of care was found to exist in law in these circumstances.

The valuer may admit that the duty of care exists but deny that it has been breached, in that the standard of professional conduct achieved meets that of the ordinary competent practitioner: Bolam v Friern Hospital Management Committee and Chin Keow v Government of Malaysia. It is by no means an easy matter either in law or in practice to show that a valuer has been negligent. As Mocatta J said in Shacklock v Chas Osenton, Lockwood and Co., "I do not think that [the defendant's] valuation can be faulted legally so as to show that he was professionally negligent...merely by going through these items and criticising them meticulously and suggesting that they are on the high side". Against this must be noted the 'margin of error' concept which has been employed both in the UK in cases such as Mount Banking v Brian Cooper and Co and in Australia, albeit in a modified form, in cases such as Trade Credits Ltd. v Baillieu Knight Frank (NSW) Pty Ltd. and MGICA (1992) Ltd. v Kenny and Good Pty Ltd. In theory at least, the margin of error ought to make establishing breach of duty by a valuer easier and less dependent on subjective considerations of fault. In reality, the concept has been fraught with difficulty in its application in both jurisdictions (Crosby et al, 1998c), (Crosby et al 1998d), so the propensity for dispute about professional standards in valuation is probably as great as ever.

Disputes can also arise out of the issue of causation, specifically the extent to which negligence, even if admitted, has caused the loss suffered. The House of Lords complicated rather than clarified this issue in South Australia Asset Management Corporation v York Montague, where the liability of valuers for all losses resulting

from a negligent valuation was in question, including those additional losses caused by a sharp deterioration in the market. The House of Lords drew a distinction between a valuer acting as adviser, who would be responsible for all losses flowing from the original negligence once proven and a valuer merely supplying information, whose liability would be limited to the actual consequences of that information being incorrect, if so proven. While this may have enabled the litigation in question to be decided, this aspect of causation is seen as likely to generate further disputes about the role in which a valuer was acting in any given situation, especially when the market cycle again replicates the conditions which gave rise to the South Australia case, i.e. the ‘boom-crash’ scenario.

There may also be disputes about specific defences which the valuer would wish to offer to the claim, such as the passage of time, as in Mullins Investments Pty Ltd v Richard Ellis (WA) Pty Ltd in Western Australia or Horbury v Craig Hall and Rutley in the UK. The defence of contributory negligence, involving as it does a *tu quoque* accusation against the accuser, is also a recipe for dispute. Such a defence has been available to New Zealand valuers since Kendall-Wilson Securities v Barraclough in 1986, but it was not until the early 1990s in the UK, with cases such as PK Finans International (UK) Ltd v Andrew Downs and Co. Ltd. and subsequently the South Australia Asset Management case, that such a contention became recognised in valuation.

It is safe to say, therefore, that allegations of negligence in valuation have a propensity to generate disputes. This is wholly unsurprising. The subject of negligence, with its associations with incompetence and moral blame, is emotive. The stakes can be very large, both financially and in terms of professional reputation (these are considered further below). The subject matter is often subjective: Lindgren J in MGICA v Kenny and Good called valuation a “very inexact science”, although in the case of Cash Resources Australia Pty Ltd. v Ken Gaetjens Real Estate Pty Ltd the Supreme Court of South Australia appears to have taken a much harder line as to how much inexactitude was permissible.

The central issue for this paper is how such disputes should be resolved, given that some will inevitably occur (although this is not to adopt a counsel of despair – no doubt many can be prevented through improved practice and minimisation of risk exposure). Before considering the options as to dispute mechanisms, it will be appropriate to consider the characteristics of negligent valuation disputes, since these will influence the choice of mechanisms for optimum dispute resolution.

The nature of negligent valuation disputes

Reference has already been made briefly to the only characteristic of negligent valuation disputes which is capable of absolute generalisation, namely, the emotive nature of the allegations against the valuer. This must now be dealt with in more detail. It is axiomatic that allegations of negligence by professional people are painful, virtually always for the accused and sometimes for the accuser, who may, for example, be a client of long-standing. But the point will bear repetition. It is by no means the same in other disputes in the property and construction sector. A decision of an independent expert in a rent review, or an arbitration of a dispute on interpretation of a construction contract, or the hearing of a planning appeal, will

often be a purely technical matter, keenly fought if the stakes justify it, but lacking in any suggestions of wrong-doing or blameworthiness. The expression ‘Nothing personal’ accurately describes a dispute between two commercial entities which is entirely neutral in moral terms. The expression ‘Nothing personal’ is not appropriate at all in a dispute arising from an allegation of negligent valuation. In common law countries like Australia, New Zealand and the UK, the claimant can only succeed in making good a claim for professional negligence by attacking the conduct and the competence (even if it is specific rather than general) of the professional. To succeed in law, which would normally be the requirement for a payout under a professional indemnity policy as well as for victory in court, the claimant must devote resources to criticism of the valuer (or other professional) and must inflict some damage, or lose. This is virtually the opposite of a neutral, purely technical dispute. The outcome for the professional can be devastating, and the word is chosen advisedly. A typical human reaction to reading the judgments of reported negligent valuation cases is anguish at the plight of the defendants, notwithstanding errors they may have made. Paul J’s judgment in Hardy v Wamsley-Lewis contains the most scathing comments and records almost chronologically the disintegration of the defendant’s case. Mr Wamsley-Lewis had tried to point out that he was doing a quick inspection for a reduced fee, of which the judge commented that “it is just a little surprising to find that a professional man puts that in the forefront of his defence...when he comes to give evidence he is not prepared to say a word to support it...not one word was said in support of that suggestion to me...one begins just to wonder exactly what was in Mr Wamsley-Lewis’s mind at the time that this defence was drafted”. The defendant’s evidence as to the inspection itself fared worse, if anything. He tried to claim that he had failed to note dry-rot because it was covered by furniture. The judgment concludes on this point as follows: “Mr Wamsley-Lewis says, of course, there was furniture there. He says there was a wardrobe in the very spot where subsequently it was found that there was waviness in the skirting. I am quite satisfied...that there was no wardrobe there at all.” In his evidence – in chief, the defendant has said that he had “not picked up the carpet...because it was fastened down” while in cross-examination he said “I did pick up the carpet at that corner”...Not for one moment do I suggest that Mr Wamsley-Lewis has done other than come here to try and tell me the truth but I am afraid the situation here is that he is rather over-borne by this case, and is, perhaps, allowing his imagination to run away with him”. More succinct, but equally coruscating, was Watkins J’s treatment of the defendant valuer in Singer and Friedlander v John D Wood. In carrying out a residual valuation for a residential development site, the valuer should have contacted the local planning authority regarding plot density ratio, infra-structure and the future prospects for development. Watkins J said he found himself driven to a “drastic conclusion”. The valuer “failed to persuade me that he at any time telephoned the planning department of the Gloucestershire County Council...He has, I regret to say, in an effort to avoid a finding of professional negligence yielded to the temptation of doing that which I am sure is contrary to his usual inclination and standard, that is to say, he claims to have done that which he did not do. To put it bluntly, he has told me an untruth”. These examples are given not to try to justify incompetence or falsehood, but to show the prostration which can result from being a defendant in a professional negligence action. It is to avoid a disastrous result of this kind, combining defeat with public castigation, that the defendant is fighting; again, the word is apposite.

To obtain a true picture of what is at stake, however, the claimant's position must also be understood, since that can also contribute significantly to the contentiousness of the dispute. It is not possible to generalise. At one end of the size spectrum are some huge commercial losses, usually sustained by lenders. In Nyckeln Finance Co Ltd. v Stumpbrook Construction Ltd., the Swedish lenders advanced £21 million (approximately A\$55 million) on the strength of a valuation of £30.5 million commissioned by the borrowers and faxed to them in Sweden in May 1989. The security was an office block in central London, which was sold in July 1992 on the borrower's default for £3.1 million. But however large the lender's losses, they remain ultimately commercial losses in a risk-prone business. At the other end of the scale in size terms are the residential cases like Perry v Sidney Phillips and Kenney v Hall Pain and Foster, where the financial losses might be small in money terms but would constitute a family's only major asset. In the latter case, as in a number of the reported residential cases, the person bringing the claim had been rendered functionally bankrupt. In the Kenney case, this had occurred as a result of entering into a purchase contract for a new property using bridging finance in reliance on the confident assurance of an estate agent that a high sale figure on the old house could be readily achieved. Self-evidently, whatever the level of the money sum in dispute, its effect on the character of the dispute will be more marked if it represents everything the claimant has.

From the substance of the dispute, it is possible to make some observations. The claimants against valuers will nearly always be lending institutions or individuals. The lenders may have commissioned the valuation from the valuers, or they may have relied upon a valuation prepared for the borrower, in which case any claim they have will be in tort rather than contract. The individual will either have commissioned the valuation or will have relied in making the decision to purchase the property upon the loan valuation commissioned by the lenders. This latter possibility has been upheld in cases like Smith v Eric S Bush and Yianni v Edwin Evans.

The disputes themselves are sometimes a mixture of law and fact, although the majority are disputes as to fact. The rules on the existence of the duty of care and how its extent can be restricted, e.g. by the use of disclaimers, are fairly well established. The tests for required standard of conduct and the margin of error principle are reasonably clear in law, (the former, at least), but are both complex. Issues of causation and damage are also well-established in law, albeit complex, but there is scope for argument about reliance and about quantum of loss. As has been stated, the defence of contributory negligence is no more and no less than an accusation of negligence in itself, with similar scope for factual disagreement and subjectivity. The relative importance of factual issues in proportion to legal issues is of importance in the next stage of the discussion, which is to examine the options for dispute resolution in view of the nature of those disputes.

Dispute resolution: the options

At first sight, the answer to the question as to how negligent valuation disputes should be resolved is obvious. The optimum method of resolution is by agreement through negotiation. If settlement cannot be reached, the parties have a long-established, officially sanctioned route open to them, namely the court system. It has a number of features to recommend it. Above all, the court system has expertise in dealing with

legal issues. No serious commentator suggests that the courts of Australia, New Zealand, the UK or any other developed common law country are financially corrupt. However, serious reservations do exist about the appropriateness of the judicial system as a means of dealing with negligent valuation disputes. The Woolf Report on Civil Justice in the UK in 1996 was highly critical of practical aspects of the litigation system, reflecting long-standing dissatisfaction amongst its consumers: “it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, the wealthy and the under-resourced litigant. It is too uncertain: the difficulties of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants” (Woolf, 1996). This is by no means confined to the UK. In the US, “There are few things managers dread more than litigation. Even petty cases have a way of damaging relationships, tarnishing reputations and eating up enormous sums of money time and talent” (Allison, 1990). These types of criticism are common in most commercial sectors and beyond; they are nonetheless valid. But more specific doubts about litigation exist in the context of negligent valuation disputes. Whereas the Allison-type criticisms can, and have been, to some extent addressed by reform of efficiency, other flaws are more fundamental. Valuation is a highly technical subject and one in which the courts are almost entirely in the hands of expert witnesses. This has been a source of concern to the judges themselves: in Leigh v Unsworth, His Honour Judge Everett recognised the weakness of his position: “since we are dealing with the standard of care required in a professional man in connection with a profession in which of course the court is not expert, the court has to depend upon expert evidence itself, because the test is of course an objective one – what was required in the particular circumstances of the case to discharge the duty of care, or comply with the implied term, by the defendant. In some ways it may be thought that it is not an entirely satisfactory way of resolving disputes of this kind...”

Research with which the author has been involved has amplified these concerns by focussing on the role of the expert valuation witness. A joint project between Oxford Brookes University and the University of Reading (Crosby et al., 1999) recorded large discrepancies between valuations carried out by expert witnesses for claimant and defendant respectively. These discrepancies and a survey of the views of valuers, judges and arbitrators suggested widespread lack of confidence in the objectivity of the expert evidence presented in court. While no fraudulent intent was imputed (usually), there was a strong impression that the lack of objectivity of many experts could confuse or even actively mislead the court. The Commercial Court judges in their evidence to the Woolf Inquiry (Woolf, 1996) had alleged widespread failure to maintain the required degree of impartiality, noting in particular their “polarisation of issues and unwillingness to concede issues from the start” and their “insufficient observance of the confines of expert evidence and expansion into the realms of rival submissions”. The in-house journal of the Bar put it in stronger language (Counsel, 1994). “Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their fields. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients”. Sir Thomas Bingham, presiding in the Court of Appeal in Abbey National Mortgages plc v Key Surveyors Nationwide Ltd. described “The experience of the courts over many years” as follows: “For whatever reason, and whether consciously or unconsciously, the fact

is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties”. A similar complaint was made by Wright J in the first instance hearing of Arab Bank plc v John D Wood: “The court has not been assisted by the tendency which I detected in all the expert witnesses who gave evidence before me to take upon their own shoulders the mantle of advocacy and themselves to seek to persuade the court to a desired result rather than to offer dispassionate and disinterested assistance and advice to the court to enable it to arrive at a fair and balanced view of the conflicting contentions of the parties”.

Dispute resolution: alternative approaches

Given the difficulties identified with litigation, it remains to consider possible alternative approaches. Of course, radical re-structuring of the court process might be possible. The UK, following the Woolf Report, has moved towards encouragement of a single expert in the belief that “There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective valuation, may prove a reliable source of expert opinion”. Unfortunately, this much-advocated reform (Lord Woolf is said informally to have mentioned valuation as a strong candidate for this type of approach) is fraught with difficulty. The Reading-Oxford Brookes research (Crosby et al., 1999) discovered widespread resistance to a single expert witness, giving rise to the likelihood that the parties will still retain their own. Joint-appointed experts are likely to prove hard to agree, and the courts in the UK at least have shown little enthusiasm for the French model of the court-appointed expert (Cohen, 1997). There is the added difficulty that the margin of error research suggested that the startling divergences between expert witness valuations tended to be reduced where more experts were involved, as was noted in the Australian cases studied (Crosby et al., 1998c). So moving towards one expert is likely to increase concerns about the reliability of the valuation against which the defendant’s performance is judged.

But objectivity and technical accuracy are not the sole reasons for turning from litigation to an alternative approach. It was observed above that the emotive nature of negligent valuation disputes makes the public arena especially traumatic. A study of the Valuers Registration Board cases reported in the New Zealand Valuers Journal (Lavers, 1994), albeit before a different tribunal, emphasises the harrowing effects of public condemnation. The cases of Henry Simkin and Stephen Mihaljevich both contain forthright criticism of a “basic lack of knowledge of the property market... and a deficiency of fundamental research” while in the Francis Evans case, the valuer was described as “completely out of his depth”. No group or race outside the legal profession much relishes the litigation experience. But in some cultures it is an anathema, wholly inconsistent with personal dignity and commercial reputation. For this reason alone, arbitration may have a claim to be preferable to litigation. A Singaporean thus describes a preference for the privacy of arbitration over the public glare of litigation: “our Chinese mentality abhors any attendance in the Court of Law...’maintaining one’s face’ or ‘giving one’s opponent face’ have much to do with the tendency not to bring disputes into the open” (Koh, 1981). Arbitration also has the advantage of at least the potential for a decision-maker who is a valuation expert, which is likely to command confidence in the decision reached. The expertise issue

was also noted by Judge Everett in Leigh v Unsworth: “it would be helpful for the court to have...an independent qualified assessor”. But arbitration is not a panacea and is in fact not extensively used for resolution of negligent valuation disputes. Part of the problem lies in its similarity to litigation in terms of cost, delay and complexity. A comparison of a 5 day arbitration and a 5 day court hearing in the UK showed estimated costs of £47,000 for the arbitration and £44,000 for litigation (Bingham, 1992). But arbitration has other potential deficiencies. Some observers criticise the quality of the arbitrators. Lawyers involved in technical arbitrations put it thus: “The arbitration process has flaws that the aggrieved participant is not happy about. The process of selecting the arbitrator is not sophisticated. Often the arbitrator doesn’t have a proper view of the merits. Often he splits the costs and the decision perhaps 60/40. People who have experienced it are not likely to want to use it again” (Brooker, 1997).

Dissatisfaction with traditional methods of dispute resolution has led to the encouragement of alternative approaches. Australia has been at the forefront of developing and implementing these approaches and is probably second only to the US in the strength of the Alternative Dispute Resolution (ADR) culture. This has largely been confined to specific sectors. The Australia monograph in the 20 country study carried out by Commission W100 of the Conseil International du Batiment records the development of ADR in construction (Watts, 1998). The Monash University Centre for Commercial Law had previously recorded that “more than 85 percent of identifiable ADR is taking place within the construction/civil engineering industry” (Rickert J, 1990). The Institute of Arbitrators Australia’s Rules for the Mediation of Commercial Disputes offer the possibility of “a high success rate...the costs of the process are small compared to more formal arbitration and litigation processes” (Watts, 1998) and the Australian Commercial Disputes Centre (ACDC) has produced Commercial Mediation Guidelines. In the UK, the Royal Institution of Chartered Surveyors (RICS) offers a dispute resolution service which includes mediation for disputes involving chartered surveyors and others. Mediation has much to commend it as a means of addressing the requirements of privacy and expertise and it is not coincidental that it is “by far the most popular form of ADR” (York, 1996). While some commentators note that it is “a consensual process which depends upon the willingness of the parties to enter and continue negotiations” (York, 1996), this does not mean that it is necessarily unsuitable for emotive subject matter. In New South Wales, the Land and Environment Court introduced an in-house mediation mechanism for planning and environmental disputes which can be highly contentious. Mediation, while the best known ADR technique, is not the only one which may have relevance to negligent valuation disputes. The mini-trial was largely introduced to Australia by Sir Laurence Street, the Chief Justice of New South Wales, who undertook an adaptation of it called ‘senior executive appraisal’, “a less adversarial, more consensus orientated process than the American mini-trial” (Watts, 1998). This is likely to be of interest where there is genuine uncertainty as to the probable legal outcome of a dispute and can bring a recalcitrant party face-to-face with the legal realities of the respective cases. It may be observed also that Australia has favoured the development of specialist mechanisms such as the Land and Environment Court (Stubbs, 1998) and the tribunals under the State of Victoria’s Building Act 1993 (Lovegrove, 1997). These have the real advantages of tribunal expertise and relative efficiency in term of cost and time. As a panacea for dealing with negligent valuation disputes, they may lack privacy – in the Land and Environment Court mediation

hearings, third parties are virtually encouraged to be involved and of course they do require legislative will and Parliamentary support to put in place.

Conclusions

Given that negligent valuation disputes will occur, the question must be answered by any developed society as to how they are to be resolved. This cannot simply be a matter for professional bodies, since there are issues of civil justice, chiefly of recoverability of compensation to be addressed. A previously-reported study of the hearings of the New Zealand Valuers Board was nevertheless illuminating of some of the characteristics of typical negligent valuation disputes. And it is necessary to have regard to the features of negligent valuation disputes in order to decide upon their optimum resolution. Traditionally, those cases not resolved by negotiation have been litigated. While the kind of legal issues involved in some negligent valuation disputes make the courts a suitable medium, litigation has some qualities which raise serious questions about its appropriateness. The process of establishing responsibility almost inevitably involves damaging, perhaps destroying, the professional credibility of the defendant. In turn, allegations of contributory negligence, such as by a lender, can involve damage to the commercial reputation of the claimant. There are particular difficulties inherent in the role of expert witnesses in proving or disproving factual negligence, especially in maintaining objectivity. Yet judges rely heavily on the expertise of expert witnesses, the more so in technical subjects like valuation. Their lack of expertise is not helpful to confidence in the system. The cost, delay and proceduralism of court hearings are well-documented and much criticised.

While arbitration has potentially offered an alternative dispute resolution mechanism, the requirements of negligent valuation disputes may render ADR a more eligible approach. Techniques such as mediation and mini-trial have developed in certain specialist sectors in the US, in Australia and more recently, in the UK. The characteristics of these techniques namely privacy, third party expertise and a less formalistic approach fit more closely with the characteristics of negligent valuation disputes examined above in this paper. In the absence of a specialist tribunal like the Land and Environment Court, it is probable that it is in structured mediation or 'senior executive appraisal' that solutions offering optimum resolution of negligent valuation disputes will be found.

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