

THEREFORE, BY THEIR FRUITS YOU WILL KNOW THEM: REAL ESTATE AGENCY PRACTICE AND THE NEW ETHICS IN A WORLD OF CONSUMERISM AND GLOBAL COMPETITION

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Abstract

The question dealt with in this paper is whether the traditional assumption, that law defines ethics in real estate agency, is still valid in the face of consumerism and globally inspired competition. In order to answer this one needs to be able to define the underlying theory and justification of ethics and then use this definition to construct an ethical framework.

The normative principles defined by Buber, through Kant, appear to establish the standards for conduct in this framework leading ultimately to the question of what one's conscience tells one to do. Having arrived at that point one can ask whether the law is always ethical or ethics always lawful and conclude that neither is always so. That being the case, one may see the law as a series of guideposts warning of ethical danger. Dangers outside these guides then need to be dealt with according to the dictates of conscience.

This paper then seeks out evidence of such other dangers. In Great Britain a survey reveals that a strong underlying concern is the conflict of interest that frequently arises when an agent deals with both the seller, his principal, and the buyer. The result appears to be that many buyers think the agent acts for them and a significant proportion of principals are dissatisfied with their agent's actions.

In the USA real estate literature recognises that it is often difficult to tell whom the agent represents and there is great concern with the question of disclosure. The need for such disclosure may be leading to the increasing use of buyer's agents, a trend frequently encouraged by the selling agent.

A study was made, by the writer, of principal/agent disputes dealt with in 1998 under the Property, Stock and Business Agents Act where it was found that in about 30% of cases the agent's behaviour could be considered unethical and in 15% that of the principal was so. Most of the remainder of the cases arose from an agent's incompetence or lack of communication.

In academic discussions, two views have appeared: one is the belief that real estate agency relies on *caveat emptor* and should revert to professionalism, the other that the old "one master" theory of agency no longer applies. This paper accepts the latter with its call to either a well-defined dual agency with its own rules or increasing resort to buyer's agencies as a solution to some of the ethical problems of the real estate agency industry. This is re-enforced by an American view that there is an increasing onus on the agent for informational disclosure and the avoidance of dual agency within the existing framework.

In some quarters, when considering the issues of liability arising from the ethical implications of non-disclosure and even product liability, it is suggested that agency needs to be re-invented with the role of agents to become similar to that of stockbrokers.

These problems need to be addressed but it is suggested that this ought not be through the slow process of regulatory reform. Rather, present remedies for ethical abuse should be widened and remain flexible so that responses from the industry can be timely and effective.

Introduction

This conference received a paper at Perth, 1998, from **Graham Crews**, Massey University, which illustrated the increasing accountability owed by real estate agents to third parties and the strain this was placing on the traditional agent principal relationship.

The focus of that paper was on recent legislative and judicial changes which imposed responsibilities on estate agents beyond those normally arising from the agency relationship and the law of contract. Particular attention was paid to s.9 of New Zealand Fair Trading Act which proposes that an agent whose conduct is misleading or deceptive is liable to the injured consumer no matter whether the conduct was negligent, dishonest or arising from a mistake honestly held.

Similar responsibilities exist in other countries. In Australia, for example, the 1974 **Trade Practices Act, s.51A**, says that “*where a corporation makes a representation with respect to any future matter ... and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.*” There are other provisions in that Act with **s. 51AB** being particularly noteworthy in its definition and prohibition of “*unconscionable*” conduct.

However, other forces have also been unchained. Globalisation and its concomitant competition have given rise, in Australia at any rate, to a national competition policy, the purpose of which is to demolish barriers to trade. Like fair trading legislation, the policy proposes that the market should become more transparent to all participants and that all artificial or unnecessary barriers to competition be removed. During that process the protective shell of the principal/agent relationship has been broken open.

In an article in the recent American Real Estate Society’s Monograph on Ethics in Real Estate by **Ric Small**, University of Technology, Sydney it is argued that market forces are corrupting the professional position of real estate practitioners, leading to unethical behaviour. It is suggested that, to combat this, there should be greater reliance on trust between a professional and his or her client.

Unfortunately, it is probably too late and too difficult to turn back both consumer legislation and the new globalised competition policies. It may be better, in any event, to opt for a more open relationship between the various parties in real estate transactions, one based on ethical considerations.

This, then, is the concern of this paper: Have traditional assumptions, of ethics being imposed on real estate agency practice through law, been upset by consumerism and globally inspired competition? What evidence is there of that; where are the pressure points? If there is such evidence, what should and can be done?

Ethical Considerations

Proper, and by inference ethical, behaviour in Australian estate agency practice appears to have always been equated with the law of agency and licensing legislation. Industry codes of ethics or conduct notwithstanding, real estate practice does not appear to have been subjected examination from the point of view of a structured ethical framework and it may therefore be appropriate to do so here.

Ethics is sometimes described as being the science of human duty dealing with issues of practical decision-making and its concerns are said to be the nature of human values and the standards by which actions are judged as being right and wrong.

Calling it a science, however, is probably not quite right. Ethics are not a matter of factual knowledge but rather of defining a norm or standard, which can be applied to moral problems.

Are ethics, then, a set of moral judgments and principles? It certainly is closely identified, or even synonymous, with morality, but in the context of this paper we should perhaps see morality as the practical problems we face and ethics as the standards we apply in solving those problems. In that sense ethics has been called a moral philosophy

Preston (p. 36) expresses the need for morality as having “come about because of common human needs; the living of worthwhile human lives based on friendship, love, freedom, peace, creativity and stability is best served by learning and practising a common, cooperative ethical framework.” He also goes on (**p. 37**) by saying that “(w)e should be moral (ethical) because we would expect others to treat us morally.”

So we come to the Golden Rule from the Sermon on the Mount: “Therefore all that you wish men to do to you, even so do you also to them” (**Mathew 7.20**). The consequences of breaching this precept are described with the exhortation that “a good tree cannot bear bad fruit, nor can a bad tree bear good fruit. Every tree that does not bear good fruit is cut down and thrown into the fire. Therefore, by their fruits you will know them”.

But what is the ethical framework for estate agency practice? What is bad fruit and how do we root out the unethical practice, which produces it, root and limb? For this we need to have at least an abridged understanding of the theory of ethics and identify the main ethical problems confronting agency practice.

The Theory of Ethics

The study of ethics are generally divided into three categories:

- **Meta-ethics** which deals with the nature of moral concepts and judgments
- **Normative ethics** which is concerned with establishing standards for conduct and how one ought to live one’s life
- **Applied ethics** which is the application of normative ethics to practical moral problems

This paper will be entirely concerned with applied ethics: how we solve practical moral problems in real estate. Before we do this, however, we need to know what standards we can apply and why we do so. This involves a brief look into normative ethics.

Normative Ethics

Theorists in this area of ethics have been divided into two groups

- those who judge right and wrong by consequences and are known as teleological or consequentialist, and
- those who judge actions by their conformance to a formal rule or principle regardless of the consequences and are known as deontological or non-consequentialist.

Consequentialism

As with so much in philosophy, each division of thought seems to have further subdivisions. In consequentialism, the best-known subdivision is that staked out by **utilitarianism** of which the best-known proponents are John Stuart Mill and Jeremy Bentham. **Preston (p.41)** quotes Mill as saying, “*the happiness which forms the utilitarian standard of what is right in conduct, is not the agent’s own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be strictly impartial as a disinterested and benevolent spectator*”. Assuredly, the use of the word “agent” in this quote refers to being an agent for change or review and not to a real estate agent. However, its use in our context makes the definition more understandable.

In paraphrasing this, we can say that utilitarianism holds that everyone who has an interest in an issue is entitled to have his or her view considered. Critics of utilitarianism

however point out that this leads to the adoption of a majority view leaving minorities in the cold and disadvantaged.

It is also said (**Preston, p. 42**) that utilitarianism can be “*linked to economic instrumentalism which treats human beings as a means to serve the interests of the economy.*”

Another form of consequentialism is **ethical egoism**, which considers that self-interest should be the end or objective of ethics. This seems to fit in with society’s prevalent economic attitude and suggests that the community may, at present, support such an ethical approach.

Yet, this is a point of this paper: has the pendulum, in ethical behaviour, swung too far to self-interest? Do we need to examine more closely this attitude of ethical egoism?

Non-Consequentialism

In this approach, it is proposed that one must acknowledge duties and rights no matter what the consequences. It is frequently found in religion based morality although its best known proponent, Immanuel Kant, argued from a secular position that “*the perfect moral agent is perfectly rational because it is only when we act rationally, according to rules which are perfectly general, universal and consistent, that we will act morally.*” (**Preston, p.47**) Again, “agent” in this context was not meant as a real estate agent but the use of the word makes the quotation particularly apt.

Kant believed that the authority for a moral decision lay in the individual and not in God and **Preston (p.47)** quotes him as saying “*Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only*”.

Other Views and Approaches

In the United States there is currently some concern about ethical conduct and some guides have been published which deal specifically with real estate agency.

In one such (**Long, p. 27 et seq.**) consequentialism is described as **end result ethics** and non-consequentialism as **rules and law ethics**. It also describes two other approaches:

- **Social contract ethics** associated with Jean-Jacques Rousseau and concerned with a community’s best interest, and
- **Transformational ethics** associated with Martin Buber seeking to discover the truth that lies within each individual.

The first of these seems an extension of consequentialism while the second may be an extension of non-consequentialism.

Long (p. 40), poses a problem and, then, proceeds to consider how each of her four ethical systems would look at them.

The problem is that “*a real estate salesperson is called to meet an owner of a home in a middle class suburb. The property looks somewhat run down ...*

...When the agent asks why he wants to sell the owner looks embarrassed and (describes how the property belonged to a relative who committed murder/suicide in it, and asks the agent for advice)

While other similar properties in the area have been selling for about \$120,000, the agent knows that when buyers find out that the property was the scene of a murder-suicide, the seller will be lucky to get \$100,000.”

She suggests that the questions asked by each theory will be as follows:

1. End-results orientation - what will the consequences of my action be if I take the listing and keep the murder-suicide confidential and what will the consequences of my action be if I take the listing and disclose to prospective buyers
2. Rule orientation - what are the State laws, rules and regulations regarding disclosure in such matters
3. Social contract orientation - what does the policy and procedures manual of my office require, what does my professional code of conduct advise, what would my licensee and peers expect and what does society expect
4. Transformational orientation - what does my conscience tell me to do?

These questions seem to neatly encapsulate the approach inherent in each theory.

Is the Law Ethical; Are Ethics Legal

It may be thought, especially by those looking from a non-consequentialist, rule based, point of view, that the law is all the ethical expression we need. However, from other points of view, this may not necessarily be so and even a non-consequentialist will have a need to question a particular rule sometimes. This is a characteristic of a non-consequentialist practitioner, one who has taken the trouble to extend into transformational orientation. After all, a look at history will show that the rules by which we live change constantly.

Therefore, a real estate agent, moved by ethical concerns, may not necessarily wish to rely absolutely on the law of agency; he may wish to move beyond and above it. If this is likely it must also be thus for other professional callings, lawyers for example.

Ross (2.18) discusses the “amoral” lawyer in the sense not of lawyers being corrupt but rather of them coming to the tasks, set them by their clients, without having or applying predetermined attitudes. This he contends **(2.11)** arises from a positivist philosophy that calls for respect for and obligation to the law and “*leaves no room for non-legal norms*”.

While positivism is no longer seen as being sustainable in this sense, it is said to still prevail in legal education and in the judiciary, “*continuing (its) influence by separating law from morals*”. The result of this separation is “*a very narrow view of law, which is corrupting to the human spirit.*”

Corruption can occur in either a lawyer-dominated model or in a client controlled one (**Ross 2.19**). In the former, the lawyer tells the client what to do and the client is put into the position of not having a right to exercise a moral judgment. In the latter the lawyer has no conscience - is amoral.

If this is a problem, the solution is said to be the “care” or cooperative model where lawyers and clients talk to each other. Neither then imposes a narrow and rigid interpretation of the law as being the end of the matter and consequently we reach to a level of morality beyond the law.

That this is necessary can be seen from the many broken legal shackles littering the social landscape of the past half-century. If it were not so, apartheid and homosexuality would continue to be illegal; feminist inequality would still prevail; aboriginal nonentity would make their recently won rights inconceivable. Unmarried women could not share with their partners and freedom of speech would be constrained.

The law, then, rests on ethics but one should never consider that the conclusions on ethics are already embodied in law.

This paper, therefore, is not simply a discussion on whether or not real estate agents are ethical and whether or not they conform to the norms of the legal system. It is that, but it is also a questioning of whether real estate agents should consider their moral responsibilities beyond the letter of the law.

This is even more important when one considers that a real estate agent “*must also grapple with the naturally complex relationship that exists between buyers and sellers.*” (Long, p.63) In being part of that relationship the agent will become involved in situations not obviously defined by the law of agency and will need to exercise considerable moral judgment if he is to maintain both the well being of the parties and his freedom from liability.

An additional consideration may be that the agent will also frequently deal with unethical behaviour by either his principal or his prospect in circumstances where the agent may not necessarily have the comfort or support of the law.

In this practical sense alone, it is worthwhile being aware of ethical arguments beyond the letter of the law.

A Synthesis of Law and Ethics Applied to Real Estate Agency

This paper does not enter into an analysis of the legal duties and obligations accruing to real estate agents but it accepts that the agent is constrained by certain duties and obligations. The point in this paper is that the real estate industry and its consumers have for practical purposes long seen these duties and obligations as being the only necessary constraints on unethical behaviour and the question is whether, given the effect of consumerism and increased competition, this view is still justified.

The law does, indeed, have ethical overtones and no doubt because it was formulated to protect the weaker party in a transaction. Nevertheless, a single-minded reliance on these rules can only satisfy those who adhere to a very basic non-consequentialist, rule oriented, approach to ethical behaviour. This, in itself, may not be bad provided the rules, or laws, are continually adjusted and tuned to respond to community requirements.

Society, unfortunately, seldom makes timely adjustments to its laws or rules, which may lead one to conclude that an ethicist should favour a consequentialist or utilitarian approach to ethical problems in real estate. After all, consensus seems an attractive view, able to deal with current aspirations of society.

However, we have already noted that this supports the majority view (p.10) and that utilitarianism can be “*linked to economic instrumentalism*” (Preston, p.42) and ethical egoism, which in fact creates the dilemma we are now examining and trying to resolve.

Social contract orientation is little better than an extension of utilitarianism and provides only a band-aid solution. We are therefore left with transformational ethics, which may be a long and roundabout way of saying that an estate agent, faced with an ethical dilemma, has to ask what his or her conscience is telling them to do - and then do it.

However, the agent’s conscience probably has to act within his or her legal obligations, for how can one’s conscience permit the breaking of the law - unless the law itself was unethical. If such a conflict did arise, unlikely as it may seem, the agent would need to act within the law to change the law, through political pressure if necessary.

The law can therefore be seen as a series of guide posts acting, as warnings to danger zones and that by going outside them the agent will be in the danger zones. In his explorations of contemporary commerce, the agent may also find other dangers, not marked by guideposts, and those dangers need to be dealt with according to the dictates of conscience, truly and honestly recognised and realised.

Having come to this point, and a theoretical conclusion, we now need to look at how questions of ethical behaviour have been, or can be recognized, in the real world of agency practice.

Ethical Pressure Points in Real Estate Practice

If this paper is correct in assuming that there is a general disturbance of traditional agency relationships, or that that traditional system is simply not working properly, one needs to look around the globe for evidence.

Survey in Great Britain

We have not been able to find any surveys in Australia of estate agents and their clients on the issue of ethics. However, **Clarke**, with the collaboration of Smith and McConville, based at the Universities of Liverpool, Leeds and Warwick respectively, completed a study from interviews with estate agents and questionnaires to consumers of real estate services. The study focused on *“the way in which existing regulation operates and the structured constraints and conflicts of interest to which they are subject and which may give rise to abuse”*. (**Clarke, p.vii**).

The conflicts observed by the authors, from interviews with agents, were similar to those one might expect in Australia although the list of ethical problems revealed by the study is somewhat short

- A listing is taken, the property sold and the original vendor now buys another property listed with the agency. How can an agency maintain its obligation to the second vendor when it is so clearly involved with the original vendor (**Clarke, pp.63 and 83**)?
- Purchaser not being aware that the agent is acting for the vendor (**Clarke, pp.95 and 191**)
- Agent allows own interest in earning commission to override the vendor's interest in obtaining the best price (**Clarke, p. 202**) This problem can be compounded when the purchaser is also not given fair treatment and the right property (**Clarke, p.285**)

To put matters in perspective we should note that in the structured answers in Clarke's survey, 57% of vendors were satisfied with the professional services of their agent in one of a number of ways, and therefore 43% were dissatisfied (**Clarke, p. 188**).

However, analysis of the qualitative responses to the dissatisfied answers shows that 16% of the dissatisfied vendors (therefore 7.0% of the total number interviewed) considered that the quality of advice was negligent, incompetent or unprofessional and, therefore possibly, unethical.

Clarke (p.207) also quotes from a (British) National Consumer Council survey conducted in 1989. Questions were asked of both buyers and sellers on whether the agent kept them informed, could be understood, the sale time was reasonable, fees were explained and acceptable and provided good service - none of which really touch on the concerns of this paper except for one question: whether the agent was thought to be on their side.

58% of vendors thought they were (with 11% thinking they were not and 31% having no opinion) and 41% of buyers thought they were (14% disagreeing and 45% having no opinion).

This seems, at the least, to raise the question of what prompted 11% of vendors to think their agent was against them. And what about the 41% of buyers who thought the agent was for them when

we know that this could involve a conflict of interest; did the agents in those cases go too far into the wrong camp or were they merely sympathetic.

Interestingly, enquiries made from the Royal Institution of Chartered Surveyors indicate that there is no programme of either public or agent education on the question of ethics. There is, of course, a code of conduct, which requires fairness, but otherwise the emphasis appears to be, as in Australia, on successful trading. Enquiries made from the National Association of Real Estate Agents (NVM) in the Netherlands reveal that they are adopting a similar approach. Both acknowledge that this is an issue in need of attention.

Literature in the United States of America

While surveys on agency ethics or even professionalism may be available - and given the American penchant for self-examination, they probably are - they could not be readily located.

What is however most obvious, and contrasts with the Australian, British and Dutch position, is that the issue of ethics in estate agency practice is widely debated and much pontificated upon. One's first reaction is that perhaps the American fear of and propensity for legal action is conditioning the market to behave.

If that is the case, it may well be considered a triumph of the market over regulation, as it is the market, which may have taken the lead in punishing the unethical agent through litigation.

That American estate agency practice appears to be conscious of the relationship between good business operations and ethical behaviour is evident when one searches for material on ethics from books on agency. We in Australia seem to produce legal references such as **Lang** and **Mendes** and, like America, we use technique boosters, published and promoted by the latest self-styled gurus on earning more money faster. However, the USA profession also receives what are effectively handbooks for business, couched in popular terms but with a serious, and seriously argued, message on underlying principles of practice. They, in effect, show an agent how to make money within certain, in this case ethical, terms of reference.

For the purposes of this paper, we closely considered **Reilly** who focuses very much on disclosure and is concerned with showing agents the borderline where on one side he or she acts for the seller and on the other for the buyer so that appropriate disclosure can be made. To illustrate that this is not a new issue he quotes (**p. 5**) a 1973 article "*Identity Crisis Realtor Style*" as saying "*It's often hard to tell which party the broker represents, and both buyer and seller are apt to visualise the broker as "their" broker.*"

As to why this issue is increasingly important he cites (**p.6**) complexity (the house in the dual role of investment and dwelling), greater buyer awareness and greater agency professionalism, co-agency but above all litigation. On the issue of litigation, it is interesting to note that he considers the usual cause of action to be "*something other than agency, such as breach of contract, misrepresentation or the decision to back out.*"

After the lawsuit is filed, however, the issue of who represents whom becomes the focal point in the majority of cases."

It is interesting to see what **Reilly (p.147)** sees in the future. Still with eyes firmly on the ethical problem of disclosure, he considers that there will be only gradual changes in ethical aspects of agency relationships. However, while they may be slow and made in the spirit of co-operation rather than adversarial, they will be far reaching and include the abandonment of

- "*the concept that all (agents) represent the seller;*
- *agents' failure to inform and educate clients and customers in advance regarding real estate principles and practices;*

- *agents' failure to refer consumers to other professionals;*
- *lack of professionalism and due diligence on the part of some agents;*
- *automatic use of sub-agency;*
- *agents' lack of formal contacts with buyers; and*
- *lack of understanding of agency relationships."*

He considers that there will be increasing emphasis by the agent on disclosing his role and function and that he will be driven to this by greater consumer awareness. However, there will be a balance in this because an agent must after all make the parties comfortable in order to create an atmosphere where a sale becomes possible.

A surprise is that there is no defensiveness in American real estate agency practice. While in Australia a discussion of ethics may be seen as being pejorative by some, a concern with ethics in America is clearly not seen as leading to the dampening of enterprise. Rather, ethical practice is seen as an opportunity to practice real estate agency in a less complex way, with better reputations and better work practices leading to greater and more efficient profitability.

A further conclusion one may draw from the level at which discussion is conducted amongst agents is that while ethical behaviour may be profitable in itself it is also seen as a necessity in warding off the spectre of litigation.

The Buyers' Agency

A buyer's agency is not something new. During the past few decades, corporate clients throughout Australia have frequently retained consultants to act for them in acquisitions. It has also been common for investors moving into the rural sector. More recently, especially in Sydney, cash rich and time poor individuals have sought assistance from residential agents and during the past year, this practice has certainly spread to lower priced property. Nevertheless, the practice of buyers' agency does not yet appear to have been institutionalised.

In the USA the practice of buyer agency has, however, become institutionalised. The fact that structure of the activity was so recently defined and laid out makes it of interest to this paper. We have, effectively, a laboratory model of ethical concerns in real estate agency, analysed and justified for contemporary purposes.

These ethical concerns do not differ that much from the conventional seller's agency. As **Reilly (p.74)** says, "*There is nothing unique about the responsibility and duties of the buyer's broker. There is no new fiduciary duty or ethical responsibility that the buyer's broker must learn. What is different is that the broker owes conventional fiduciary duties to a different group of players, namely buyers.*"

In Australia the real estate consumer is probably frequently confused on the question of agency and it seems that the conjunction agent in multiple listing and on exclusive listings is frequently seen as being the agent for the buyer.

From the consumer's point of view, it must seem that the conjunction agent's only apparent role is to introduce a buyer. However it is frequently not obvious to the buyer that the conjunction agent, after all selected by the buyer him or herself, owes most of his duty to the owner of the house. This becomes increasingly confusing when the conjunction agent offers a succession of houses, the owners of which are, effectively, all principals to the conjunction agent. In such situations, ethics easily become trampled.

They do of course also become trampled when the immediate, listing, agent shows a buyer a sequence of houses, but here the buyer can at least understand and find it logical that he, the buyer,

came to an agent who had listed the house directly from the seller and therefore owes a primary duty to that seller.

Whatever the perception, conjunction agency sets the scene for doubts on ethical responsibility. Could this be why there is nascent interest in buyer's agency in Australia and why it is already institutionalised in the USA?

An explanation is offered in **Lyons (p. 138)** where it is suggested that, from the mid-1980s, it became increasingly common for sellers' agents in the USA to disclose to the buyer that they, the agent, acted for the seller. This is said to have made the buyer uneasy and have stimulated the engagement of agents who would act for and in the interest of the buyer.

It can therefore be said that the specialist activity of buyers' agency was spawned by the need for disclosure (whether regulatory or in fear of litigation) and that now the buyer's agent thrives because he can point out that he, and not the listing agent, works for the buyer.

Buyers' agency, then, is the product of the fear of retribution and this, in turn, is a manifestation of self-regulation where the agent needs to make an effort to avoid the punishment of a claim for damages.

From readings on buyer's agency in the USA, it would then seem that a pressing ethical problem is conflict of interest and the consequent need for disclosure. This is not to say that there are no other ethical problems, rather we may need to conclude that the newly separated discipline of buyer's agency has arisen from a need to behave ethically.

It may be unfortunate that this need to behave ethically arises from the fear of litigious retribution. What we see, nevertheless, is how market, or self, regulation shifts previously accepted practice into new patterns in order to deal with unethical situations. Legislative or peer regulation may do so on many occasions but it would be wrong to assume that this is the only way to promote ethical behaviour. Make both the consumer and the practitioner aware of a problem and its consequence and the market may well make its own adjustment by way of self-preservation.

Agent Principal Conflict - A Year of Disputes in New South Wales

In New South Wales, by virtue of s.42A of the Property, Stock and Business Agents Act 1941, real estate principals had until early 1999 recourse to a panel of experts appointed by the Minister for Fair Trading when they felt that they wanted fees, charged by their agent, to be reviewed. The panel would then assess whether, after considering work done, the fee charged by the agent was fair and reasonable. If the relationship between the fee and the work was not appropriate, the panel could reduce or increase the fee.

If the panel thought that the agent had not contributed to the process or if his efforts were counter productive it could issue a "nil" certificate. "*Long standing customs and usages*" of the industry were to be taken into account as were "*the time, effort, difficulties involved and the expenditure incurred*" (**Lang, p.420**).

"*The agent's entitlement to remuneration is "inchoate until the procedure outlined in s.42A has been followed", accordingly that section "is not a procedural provision, nor one dealing solely with remedies", but is substantive in character ...*" according to **Lang (p.419)**.

Because of these provisions, an interesting view of the relationship between real estate agent and his principal is displayed by the cases brought to the review panel. It should, however, be remembered that these reviews reflect only the relationship between the agent and the seller and do not examine problems buyers may have had with agents.

The writer examined all claims dealt with under s.42A during 1998 and categorised 88 fully heard and contested ones into one of five classes: where the agent's ethics were highly questionable, where they were thought to be merely questionable, where the owner's ethics were questionable, where there were communication problems between the principal and agent or demonstrating incompetence on the part of the agent. Following this, five matters had not been allocated and these were sorted as being either only a quantum claim or being neutral.

Basic Findings

In eight (9.75%) of the cases, the agent's behaviour may have been considered highly questionable while a further 16.5 (20.12%) were thought to be questionable. In 15.5 (18.9%), the owners' conduct could be considered unethical.

Lack of communication by the agent had created problems in 26 (31.7%) matters while the agent's incompetence caused the review to be requested in 11 (13.41%).

In 4 (4.88%) of the reviews there was no problem with the agent's behaviour and the claims were considered quantum ones only. One of the cases stemmed from problems outside the control of either party.

It should be noted that the two half cases above derive from one matter where it could be considered that both the agent and the owner acted unethically.

Unethical behaviour on the part of the agent therefore accounted for 28.65% of the disputes. However, poor handling of a matter, by way of lack of communication and incompetence, caused 45.11% of the disputes. The agents therefore can be said to be responsible for 73.76% of the disputes.

In view of the fact that all disputes were brought by principals, it is a surprise that the principal can be said to be responsible for a significant proportion of the disputes. It is even more surprising that in almost one out of five of the real disputes the principals could be observed as being unethical over their side of the transaction.

Description and analysis of the Reviews

The highly questionable transactions involve agent behaviour, which, in many cases, is tantamount to fraud. This meant

- unauthorised alteration of documents,
- trickery,
- acting without authority,
- distortion of market information and
- conflict of interest.

Questionable ethics manifested themselves as

- promising more than could reasonably be delivered or delivering less than promised
- unreasonably claiming fees in addition to those normally payable or which had not been earned or which had not been agreed
- hiding information from principal
- over estimating sale price of property on purpose or without knowledge of true price
- not acting in interest of principal, against principal's wishes or preying on principal's vulnerability
- exposing principal to claim by third party by acting in self interest

The unethical actions of owners were

- Cutting out the agent by dealing with a purchaser or tenant introduced by the agent

- Allowing agent to do requested work but then dealing with another purchaser and denying agent any payment
- Simply refusing to pay agent who, principal agreed, had done all that which was required or refusing agent any payment when the agent had done significant work
- Allowing agent to do part of work but then withdrawing authority so agent could not complete work and recover fees for work done
- Requiring agent to pay, without previous agreement, unusual expenses out of selling fee
- Requiring agent to misrepresent
- Deliberately not keep agent fully informed

In many cases involving lack of communication, the agent had done his work as required and usually in a competent way. Unfortunately by not understanding the principal's nature or expectations, being inefficient, succumbing to pressure of work or through plain arrogance on the part of the agent the principal frequently did not know or understand that all was well and that his objective was being achieved.

These disputes are unnecessary and because of this could be considered fringe breaches of ethical obligations.

Incompetency frequently involved silly mistakes on the part of the agent. Given that the agent had not settled the matter, the latter would appear to either be unrepentant of the mistake or not understand that he had made one.

The principal, of course, expected that the agent was competent and would not make silly mistakes. In that light these matters could frequently be seen as breaches of ethical standards for a principal can surely expect service to an industry norm and the agent should not venture to provide services which he was not competent to deliver.

For example, an agent should know

- how to complete negotiations,
- the limits of his skills,
- when a deposit needs to be invested,
- how to handle sales procedures, documentation and advertising material and
- what his particular market is doing and how to communicate this to the principal

yet, the cases involving incompetence showed that there are agents prepared to act in a sale without having one or more of the above skills.

Conclusions

The number of disputes handled by the s.42A review process is relatively small, but it is probably also one of the few information sources permitting an insight into what may trouble the principal/agent relationship.

In these matters, one expects to find a high level of unethical conduct because the sample is, after all, a distillation of disputes from all real estate transactions. However just under 10% can be considered as hard core unethical conduct while a further 20% of the disputes reveal a milder lack of ethics by agents. Compare this with the almost 20% of cases showing a lack of ethics by the principal (where the principal obviously felt the aggrieved party).

But if one goes to lack of knowledge, care, skill and diligence a further 45% of the case reflect badly on agents and this does give a view that agents presenting such a cavalier attitude may also be displaying a lack of ethics.

The only conclusion one can draw from this analysis is that when principals are unhappy with their agents, 3 out of 10 will be concerned about a true lack of ethics and almost half will be

unhappy about knowledge, care, skill and diligence. The remaining 2 are likely to be confused about their own ethics.

This suggests that agents may need help not just simply about their own ethics but also about how to cope with unethical principals in an ethical way.

Academic Views on Ethics in Real Estate Practice

An Australian View - Professionalism & Real Estate

This paper seems to infer that the specialisation of buyer's agency, and its concern with the ethics of disclosure comes through market adjustment. A different view is posited in a paper prepared for a Monograph on Ethics in Real Estate, just published by the American Real Estate Society but apparently not yet generally available in Australia.

Its author, RG **Small** of the University of Technology, Sydney, deals with "*Professionalism and Real Estate*" and argues (p.21) that the meaning of professionalism "*may once have connoted techne, inspiring trust in a gentlemanly sense of duty and tied to the positive attributes of status, that meaning of professionalism may have only belonged to a moralistic world, perpetuated for a time by a romantic one. The twentieth century, with the ascendancy of the market as the dominant ethical symbol, may be re-making professionalism in a form consistent with self-interest, as observed by Smith, Durkheim and Foucault. In such a world, a professional is merely someone whose activities have to be carefully checked by the client and who may be sued for greater amounts when found wanting.*"

Small calls this the "*post-modern professionalism*". While professionalism was originally founded on duty, he thinks that that duty has now been eliminated by the professional who nevertheless retains the power of status without returning a dividend on the trust the consumer still reposes in him.

The ethical behaviour of this new professional is supposed to be based on self-interest which Small considers part of the utilitarian approach to ethics (p.15). We have already noted (p.5) that in modern society, there is an ethical sub-model of utilitarianism, or consequentialism, called ethical egoism and it seems this is what Small is talking about.

Small considers further (p.17) that in Australian real estate agency there are three practices which ultimately involve the principle of *caveat emptor* and that the use of *caveat emptor* is unethical for professionals. It is interesting to see that these unethical practices are the over estimation of price in order to gain a listing, misrepresentation of property to the purchaser and the subsequent talking down of price to facilitate a sale.

While one can readily accept, and this paper certainly points in that direction, that any form of utilitarian or consequentialist ethical approach is inappropriate in real estate practice one should perhaps also question Small's argument that it is market forces which are corrupting ethical standards. His call for a return to "*genuine professionalism*" (p.22) is argued on narrow, perhaps even subjective, aspects of what may be, and probably always has been, an industry. And how can we be certain that his opaque, deliberately screened professionalism, a shadow play depending on trust, will not again be abused by professional self interest as has been the case with other professions, especially the law. His remedy, of teaching professional candidates for this profession right from wrong, is reasonable in itself but may not be enough and, by itself, is probably a case of optimism triumphing over experience.

If teaching estate agents, alone, is not enough it is also true that market forces alone are unlikely to be enough. Perhaps it should therefore be a combination of education and the market, which will

provide the necessary stricture against unethical behaviour. This would be especially so if it involved the cooperative model described in the conclusions to this paper.

That model may be able to take care of an industry, or profession, in a state of change especially if it takes as its starting point the non-consequentialist ethical approach already described (p.5).

In any event, is real estate agency practice now really being built on the principle of *caveat emptor*? A reading of law affecting agency, particularly the responsibility to third parties and the obligations imposed by the Trade Practices Act, would indicate that this might not be so.

A New Zealand View - Real Estate Agents and the Law

In a paper submitted to the 4th Pacific Rim Real Estate Society Conference in Perth in 1998 GL Crews of Massey University, New Zealand argues that “*Agents are now required to act in the best interests of their principal, the vendor, but must also act in the interests of the third party, the buyer.*” This imperative is said to arise from legislative changes to consumer law reinforced by decisions in courts of law. This combination then makes the agent increasingly and independently responsible to the buyer whereas formerly this responsibility went hand in glove with any responsibility the vendor might have had to the third party. Such an interpretation quite evidently demolishes reliance on *caveat emptor*.

Crews, therefore, seems to take an approach which is different from Small. Where the latter appears to consider that professional ethical standards are being lowered by reliance on *caveat emptor*, the former feels that ethical responsibility is being widened by the changing *mores* affecting consumers. In other words, a combination of the market and consumer legislation is preventing the real estate agent from relying on *caveat emptor*.

The argument in Crews’ paper focuses on the ethical questions of conflict of interest and of disclosure which to him become irreconcilable when matching the “*one master*” theory of agency with present day requirements brought about by consumerism. His solution is to develop either a dual agency relationship, with its own attendant set of ethical/legal rules, or to have recourse to buyer’s agencies.

An American View - Informational Disclosure

In a 1992 paper for the American Real Estate Society Moore and others indicate (p.217) that about “*70% of all sales made through multiple listing services (MLS), the broker responsible for locating the buyer is not the same broker that is listing the property*” and raise queries already noted in this paper: what is the buyer’s perception about the role and function of the selling broker (agent).

Moore further quotes that 71% of buyers involved in such transactions think the selling agent is their agent. In other words, he suggests that almost half of all buyers of USA residential real estate mistakenly believe that the agent who sells them a property is working for them.

It is interesting to compare this with Clarke (p.191) who concludes that “*46.6 per cent (of buyers) perceive the agent as neutral, ... 38.4 per cent as on the seller’s side, and ... 16.2 per cent as on their own, the buyer’s side. These figures seem to reflect precisely the position we discovered in field research.*” Clarke goes on to be concerned that agents should, but do not, make it clear that they act for the vendor. He thinks that if they made it clear, there would not be a perception of neutrality and we would not have to conclude that almost 55% of British buyers did not understand the role of their agent.

Worse still, **Moore (p.219)** suggests that “*most real estate agents held beliefs inconsistent with conventional “sub-agency” concepts*” meaning they perceived at best that there was a dual agency at work.

If both Clarke and Moore are correct, the perception of duality may be the ethical conundrum of our time especially since the purpose of Moore’s paper was to examine the effect of mandatory disclosure of the agent’s role.

They were able to carry out such a survey because a number of USA States had introduced mandatory disclosure of the agent’s obligation to the vendor. From observations in Ohio, Moore considered that compliance with disclosure was good, 84% of buyers recalling receiving the disclosure. Despite this, a majority of buyers (62%), in sales where there were separate listing and selling agents, still thought the selling agent was working for them (**p.222**) and of the agents 11% thought they represented the buyer while a further 19% thought they represented both the buyer and the seller.

In context of what has already been said, it would therefore seem that even with mandatory disclosure the key ethical requirement of agency is not understood in Ohio by almost a third of agents nor by almost two thirds of buyers. The potential jeopardy of agents is arresting.

A second American View - Product Liability

These Australian, New Zealand and American views and solutions are recent. However, as long ago as 1991 **Potter**, Nelson and Nelson published a paper on “*Product Liability Issues in Real Estate Brokerage*” through the American Real Estate Society which extended concern from actions which might be taken by purchasers to those which might be started by owner clients. They are concerned not with negligence, however, but with product liability.

This may be the extreme edge of the issue raised by **Crews** for it contemplates liability for defects, which the agent may not be aware of, and which he cannot take measures to avoid. Is it, therefore, an ethical issue?

Probably not in the sense that we have been examining an agent’s behaviour and Potter’s paper looks at matters which may not be within the agent’s control - even the most ethical agent, having behaved impeccably, can be sued for defects caused by others.

What is of interest in this paper is the remedy suggested by Potter (**p.96**): that agents

- “*Rewrite all contractual material, particularly listing agreements, to eliminate all references to agency relationships. Instead, refer to obligations as a market maker.*”
- *Require full disclosure to buyers in the form of a prospectus prepared by a third party.*
- *Require a third party physical inspection of the property.”*

Taking such steps would see real estate agency practice being taken on a completely different path, placing it with “*stock brokers, commodity dealers and other market makers*”. This would change the ethical requirements of the industry completely and allow market forces to dictate process and procedure.

Conclusions

Real estate agency practice in Australia has, for more than fifty years, relied on regulation for its ethical backbone.

However, there has undoubtedly been a major reconsideration of the traditional “one master” principal and agent relationship. Consumer legislation and a co-incidental increase in competition

have given additional impetus to this shift with the consequence that an agent now has well-defined obligations to third parties as well as to the principal.

As a result, ethical responsibilities have also undergone change. Real estate agents now have an increased obligation to third parties and they need to examine the ethical issues arising from that. In addition, they must review their ethical obligations to their principals. While doing this they will find that their traditional reliance on existing legal and regulatory constraints will not always be sufficient to resolve the new conflicts of interest.

These changes have been little recognised in Australia although it appears to be well addressed in the USA. At the core of this American recognition are the concern with proper disclosure and efforts to avoid the creation of, even an accidental, dual agency. In the USA it has given rise, inter alia, to the institutionalising of buyers' agencies.

That it is, at the least, a latent problem in Britain is evidenced by a, now, relatively old survey showing a general lack of understanding of the role and duty of the agent. As this is also shown in an American survey, there is no reason to think that it might be otherwise in Australia.

Traditional ethical problems undoubtedly continue to manifest themselves as is evident from the gamut of issues revealed by the survey of disputes under S.42A of the Property, Stock and Business Agents Act.

However, the survey also shows that 45% of those disputes arise from agents not exercising the proper level of knowledge, skill, diligence and care. Until recently, this may have been seen as a lack of education at best or carelessness at worst but in the climate of militant consumerism, and faced with increasing competition, these matters can be seen as containing ethical issues.

The major conclusions, then, are, firstly, that non-disclosure, and consequent conflicts of interest, is looming as a major ethical and consumer problem and, secondly, that an apparent lack of knowledge, skill, diligence and care are giving rise to disputes which an agent ought, ethically strive to avoid.

There has been no legislative response to these nascent problems and they will probably not be aired in judicial precedent for some time, if at all. They are nevertheless problems, which can, and should be, dealt with now. Doing so will mean not only that future problems are averted but also that industry will increase the goodwill toward it, thereby creating a better environment where trust and efficiency will grow.

The Genetic Modifications Necessary for Better Fruit in the Future

If these conclusions were correct, the place to start dealing with them would be through a better understanding of ethical theory. This can then form the foundation for a structure of checks and balances to improve the way real estate agency does business. It is not enough, merely, to proclaim a reliance on ethics: practitioners need to understand the principles, which support the precept. Therefore, development by industry organizations of educational courses on ethics, supported by consumer groups or regulators, will have to be a first step.

Next, both practitioners and consumers need to be given greater understanding of ethical issues: practitioners through formal education and consumers through public awareness programmes.

None of this will have much effect unless there is also a place where conflict can be quickly, simply and efficiently resolved. In New South Wales the Commercial Division of the relatively new Fair Trading Tribunal has jurisdiction to hear applications under s.42A of the Property, Stock and Business Agents Act 1941. This permits the assessment of an agent's fees and charges in the light of fairness and reasonableness and the issuing of orders increasing or reducing those fees.

It would seem that unethical conduct might be unfair, making the fees and charges demanded by the agent subject to review. Effectively the Tribunal, having the power to consider fairness, can therefore deal with ethical issues where there is no sanction by legal precedent or by regulation. This makes it an ideal bellwether in terms of this paper where it is advocated that ethical issues cannot be easily or quickly legislated upon but that, nevertheless, parties to disputes involving questions of ethics should be given an avenue of relief.

If the Tribunal is able to take up this challenge, and if consumers are made aware of this avenue of relief, unethical estate agents will have their fees reduced or even taken away, thereby suffering a penalty which is akin to a fine.

What this paper is trying to avoid is the creation of further regulation as being too narrow and rigid and therefore likely to cause problems in the future. Consumerism may be thought of as needing the support of regulation but commercial activity, in today's climate of competition, equally needs to remain flexible. Such flexibility can be maintained, with fairness to the consumer, by a referee such as the Tribunal.

Industry organizations should also consider the institutionalising of buyers' agencies. This will obviously help in creating an atmosphere where dual agency can be avoided but it will also make the real estate market more open, create a fair balance between seller and buyer and add to the professionalism of real estate agency. If generally adopted, these buyers' agencies would also help overcome one weakness of adjudication by Tribunal: the fact that only principals (those who pay fees) have recourse to reviews under s.42A.

Beyond these resolutions, the industry ought to consider the impact of product liability as well as the possibility of the entire nature of agency practice changing. However, if these issues were to be pursued they would raise entirely new issues on questions of licences and about who can and should practise the sale of real estate. Some possible answers may destroy real estate agency as we know it but they will not remove the need for ethical behaviour and the need to know the foundation of these ethical needs.

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