

# Risk, Liability and Insurance in Valuation Work

## RICS Guidance

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[rics.org](http://rics.org)

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This guidance aims to make you aware of, and be better informed about, the main risks and liabilities associated with negotiating valuation contracts with clients.

By understanding key legal concepts and risk areas, you will be in a stronger position to negotiate with clients and avoid major risks and pitfalls. The risks, liabilities and insurance concepts in valuation work are complicated. After considering this Guidance, you may decide to take advice on specific aspects of your practice from your insurance brokers and from your legal advisers, and this document should assist you in doing so.

This document provides guidance on all the following points:

### Valuers' liabilities

This section covers breach of contract, negligence, the 'bracket', damages and run-off. For more information see pages 9 to 11.

### Liability caps

RICS strongly recommends the use of liability caps to members, wherever legally permissible, to manage risk in valuation work. For more information, see pages 12 to 13.

### Other parties relying on your valuation

Clients are increasingly asking valuers to allow non-client parties (known legally as 'third parties') to rely on their valuations. RICS recommends that, as a default position, valuers do not permit third party reliance. For more information, see pages 14 to 15.

### The Terms of your Contract

The focal document in the contract between the valuer and the client is known as the 'engagement letter'. The RICS Valuation – Professional Standards 2012 (the 'Red Book') requires you to record the terms of valuation engagements. The engagement letter provides you with an opportunity to think about and manage the risks faced in carrying out each valuation for your client. For more information, please see pages 16 to 18.

### Professional Indemnity Insurance

All firms must ensure they have adequate and appropriate professional indemnity insurance in place that complies with the RICS Rules of Conduct and RICS Minimum Terms. Having proper cover is a key part of managing your risk. For more information, please see page 19.

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## Risk, liability and insurance in valuation work

RICS guidance is relevant to professional competence in that each member should be up to date and should have knowledge of recommended best practice within a reasonable time of their coming into effect.

Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of RICS meet a high standard of professional competence.

Failure to follow this guidance – and to provide a reasonable explanation why it has not been followed – could be cited in any disciplinary proceedings by RICS Regulation. Best practice would be to record reasons for not following the guidance when this is the case.

This guidance is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to be aware of changes in case law and legislation since the date of publication.

This guidance is not a substitute for taking independent legal advice and all members should seek their own advice upon the matters covered by this document.

## 1.0 Background

1.1. RICS has a responsibility to its members, and to all involved in property markets, to ensure a strong and enduring property valuation profession. Informing and guiding members about risk management is central to achieving that objective. This guidance strongly recommends valuation members to take a fresh look at the way in which they conclude contracts with their clients. It is intended to equip members to engage positively with their clients in relation to the terms of their engagements.

1.2. The commercial and economic backdrop against which this guidance is produced is a challenging one for all involved in property markets. The prevailing market conditions present opportunities, including for property valuers, but they also present both valuers and their clients with an imperative to confront the challenges of the market, and to adapt.

1.3. One challenge of the market, which provides an opportunity for reflection and for adjustment in working practices, is the marked increase in the number of professional negligence claims brought against property valuers. Unfortunately there is presently very little disincentive, for those market participants who have lost money on property transactions, to try to level criticism at a valuer who had an involvement in relation to the property concerned. RICS is aware of the management time cost and the legal cost which has been incurred by members in recent years in dealing with so-called "confetti letters". RICS and its members recognise that fair claims must be dealt with by members, quickly and with integrity; but claims are costly, to clients as well as to members. Even unmeritorious claims have direct and indirect costs, including legal defence spend, management time, reputational cost, and insurance cost.

1.4. The growth in claims threatens the availability of professional indemnity insurance for valuers and the terms on which insurers are able to provide it. Professional indemnity insurance is a significant part of the cost of providing valuations and carrying on valuation business. Many insurers have withdrawn from the market for insuring valuers, and whilst that creates opportunities for other insurers, the general trend is for the cost of professional indemnity insurance to increase. The insurance cost can now be prohibitive for firms, and for some firms insurance can be obtained only on disadvantageous terms.

1.5. It is critical that these trends should not threaten the sustainability of property valuation as a service to property markets. It is in the interests of consumers, and in the public interest, for valuers to continue to be insured on sustainable terms, and for there to be healthy competition in the market for the provision of valuations. This guidance is part of a series of measures which RICS is taking, aimed at encouraging greater attention to the management of risk in valuation contracts. For further background reading on that subject, members are referred to the RICS *Report on Professional Indemnity Insurance (PII) for Valuations in the UK*<sup>1</sup>.

1.6. There is not universal understanding among RICS' members, or their clients, of certain concepts concerning liability, the terms on which valuers are retained, and professional indemnity insurance.

1.7. It is not for RICS to dictate the commercial terms on which members engage with their clients, but RICS does have a responsibility to help maintain a healthy, competitive market while ensuring that members are informed about the key legal and insurance concepts involved in risk management. Members should be equipped to engage with clients in ways which reduce the risks involved in conducting valuation practice, reduce the incidence of claims, and ensure the availability of professional indemnity insurance on affordable terms, so as to reduce the cost of valuation and other real estate services provided to property markets by valuers' firms.

1.8. Members are urged to revisit their own standard Terms and Conditions, and the basis upon which they engage with their clients, in the light of this Guidance.

<sup>1</sup> December 2011  
[www.rics.org/pii](http://www.rics.org/pii)

## 2.0 Scope and purpose

2.1. This guidance addresses risk and liability within the context of valuation contracts. Its scope does not extend to providing guidance on valuation quality assurance issues. That is an important subject in its own right and RICS has in place a separate set of Guidance Notes and Practice Standards whose objective is to ensure quality assurance in valuations. RICS Valuation – Professional Standards (The Red Book) is at the heart of this quality assurance regime.

2.2. Similarly, RICS has in place a separate regime to ensure the highest standards of ethical, professional conduct in the profession, centred around the RICS Rules of Conduct (2012 Edition).

2.3. Members' attention is drawn to the extensive guidance on engaging with clients and writing valuation reports in the Red Book. There is some danger in trying to identify particular parts of the Red Book and members are encouraged to become familiar with the entire content of the 6 core Valuation Standards, but by way of example, members' attention is drawn specifically to the following:

- **Valuation Standard 2**  
– Agreement of terms of engagement
- **Valuation Standard 6**  
– Valuation reports

2.4. Outside of the Red Book, members' attention is also drawn specifically to the following further requirements and materials:

- Members are reminded that those who undertake valuations to which VS 2 to VS 6 of the Red Book apply must join RICS Valuer Registration (VR) in accordance with the timescale and process specified. Full details of the scheme can be found at [www.rics.org/valuerregistration](http://www.rics.org/valuerregistration)
- All regulated firms need to ensure they have adequate and appropriate professional indemnity insurance in place that complies with the requirements of Rule 9 of the RICS Rules of Conduct and the RICS Minimum Terms. See also the RICS Professional Indemnity Insurance Policy document (Version 2, 1 July 2011)<sup>2</sup>
- See also the RICS user guide, Reflecting uncertainty in valuations for investment purposes (2011)

2.5. It is intended that this guidance will sit alongside the existing regulatory framework, to raise awareness of important issues concerning liability, terms of engagement, and professional indemnity insurance.

2.6. This guidance is directed at members, but it is hoped that it will be widely read. It is designed also to equip members to assist their clients to understand the issues addressed, so as to enable both parties to consider the issues and implications, particularly when they are forming new valuation engagements.

2.7. This guidance is directed at both residential and commercial valuation work, but RICS recognises that some of the guidance it contains may not apply in practice to both of those sectors. Where possible, the guidance makes clear those parts which are particularly applicable to one sector.

2.8. Whilst many of the subjects it deals with are legal concepts, it is not intended that this guidance should provide an alternative to members seeking legal advice where appropriate.

2.9. The guidance is based primarily on English law. Some key differences in Scots law are identified but members are recommended to take specialist advice on issues of Scots law. Similarly, although Northern Ireland law is very similar to English law, firms in Northern Ireland are recommended to take specialist advice on issues of Northern Ireland law.

2.10. This guidance is not a substitute for taking independent legal advice and all members should seek their own advice upon the matters covered by this document. It is hoped that the guidance will also serve as at least a valuable starting point for international members, and for those UK members engaging in valuation work in other jurisdictions, on the subjects which it addresses.

<sup>2</sup> [www.rics.org/pii](http://www.rics.org/pii)

### Breach of contract

3.1. The primary basis for a claim against a valuer is for breach of contract. This is a claim open only to the valuer's clients: only clients are party to the valuer's contract and therefore only they may take action against the valuer for breach of it.

3.2. Whether its terms say it or not, a contract for professional services is usually considered to be subject to an 'implied term' that the services to be provided by the professional will not fall below the standards of skill and care expected from a reasonable body of the particular professional's peers. In effect, this means that the professional undertakes not to act negligently.

### Negligence

3.3. In addition to claims for breach of contract, valuers may also be sued in 'tort'. A 'tort'<sup>3</sup> is an umbrella term for all civil wrongs recognised by the law, other than breach of contract. When we refer to claims against valuers in 'tort', we usually mean claims for the tort of 'negligence'. In practice, a tort claim holds a valuer to the same standard of care as the implied contractual term not to act negligently, as referred to above.

### The standard of care of a valuer: 'The bracket'

3.4. As referred to above, valuers are expected to live up to the standard of skill and care which can be expected from a reasonable body of the valuer's peers. Whether a claim against a valuer is brought for breach of contract or in tort, the question the courts ask is whether the valuation given was one which no reasonable valuer in the actual valuer's position could have given. The courts invite expert evidence from other, independent valuers ('expert valuers') to assist their decision-making in each case. If a court decides, after hearing the experts, that a reasonable valuer in the same position could have given the same valuation as the one in question, then the valuer will not be found negligent or in breach of contract.

3.5. In reaching a decision on this issue, the courts recognise that there is subjectivity in valuation: two valuers may reach different valuations of the same property at the same time without either of them being negligent. The usual question which the courts ask is what were the maximum and minimum valuations which could have been given by a reasonable valuer in the actual valuer's position. To be found negligent, the actual valuation must generally have fallen outside that 'bracket' of hypothetical reasonable valuations.

3.6. As well as deciding what the 'bracket' was for a particular valuation, and whether the valuer's valuation fell within the bracket, the courts may sometimes also consider whether there were any specific errors made by the valuer in the course of the valuation. If there were, that could increase the chances of the valuation being held to be outside the bracket. This means that a valuer cannot focus purely on the end figure: the process followed by the valuer, and the text of a valuation report are also important.

### The differences between contract claims and negligence claims

3.7. A claim for breach of contract can only be brought by a party to the contract: i.e. the client. But who can bring a claim against a valuer in the 'tort' of negligence? A valuer can be sued in negligence by those 'third parties' (i.e. those who are not party to the valuation contract) to whom the valuer expressly accepts a 'duty of care', or those to whom the court says the valuer has assumed a 'duty of care'.

3.8. A 'duty of care' is a duty to observe the skill and care of a 'reasonable' valuer in conducting a valuation. In English law, it can be a difficult legal question to know whether a 'duty of care' is owed to any particular third party, but the one situation where valuers need to be particularly careful is where they are asked to permit third parties to rely on their valuations. If the valuer does consent to reliance by a particular third party, they will probably be considered to owe that third party a duty of care, and therefore to enable that person to sue the valuer for negligence if the valuer has not exercised reasonable skill and care in conducting the valuation.

3.9. There are some technical legal differences between claims for breach of contract and claims for the tort of negligence, but the claims are very similar, and it is therefore very important that a valuer does not lightly accept a duty of care to a third party. A separate section of this guidance is devoted to Third Party Reliance (Section 5).

### Damages

3.10. The remedy for breach of contract and for the tort of negligence is basically the same: if the claimant proves their case, damages will be awarded against the valuer to the extent necessary to put the claimant in the position they would have been in if the contract had been performed fully and not been breached, or if the negligent act had not been committed.

<sup>3</sup> The term 'Delict' is used in Scots law instead of 'tort'.



**3.11. The SAAMCO Cap:** The most important principle in the law of damages as it presently applies to property valuers is the so-called ‘SAAMCO Cap’. (The name comes from the name of the House of Lords decision in 1996 in which the principle was established). This restricts the damages for which a property valuer can be held liable to the difference between the valuer’s valuation figure and the figure which the court decides was the actual value of the property at the date of the valuation. For example, if a valuer values a property at £140,000 and the court decides that the valuation was negligent and the actual value was £100,000, the maximum damages for which the valuer can be liable is £40,000 (plus interest), even if the client’s losses are higher than that amount. Importantly, this means that valuers are not generally liable for additional losses suffered by their clients by market depreciation in the property between the date of the valuation and the date of the claim.

**3.12. Indemnities:** Occasionally, clients ask valuers to include an indemnity in the terms of engagement, which “holds harmless” or “fully indemnifies” the client in respect of all losses flowing from negligence in the valuer’s valuation. Members should be aware that legally, clients may seek to argue that an indemnity of this type extends the valuer’s liability beyond the scope of the conventional liability for common law damages. Members should bear this in mind in deciding whether it is wise to agree to such an express indemnity. If an express indemnity is not agreed, the default position will be the ‘common law’ measure of damages. The common law measure of damages is the recognised body of judge-made law about the appropriate damages to award, which has emerged over a long time from decided cases, rather than coming from statute, or coming from express provisions about damages made in a contract. The SAAMCO Cap is part of the common law on damages. RICS recommends that the giving of such indemnities should be avoided, to avoid any arguments as to whether the common law, including the SAAMCO Cap, will apply.

### The legal entity which provides the valuation / personal liability

**3.13.** In general, a claimant will bring any negligence claim in respect of a valuation against the entity which provided the valuation. If the client is bringing the claim, this will mean the claim will be brought against the entity which entered into the retainer contract with the client. Usually, this will be the valuer’s firm.

**3.14.** If a firm carries on practice as a partnership, and it is the partnership which enters into the engagement contracts with the firm’s clients, the partners are *individually* responsible for the firm’s liabilities, including claims. If a claim succeeds against a partnership for, say, £500,000 in damages, the claimant can choose to enforce the claim against as few or as many partners as the claimant wishes until the full amount is paid: as between themselves, the partners are able to insist on sharing partnership liabilities according to their partnership agreement and partnership law, but vis-a-vis the claimant, they each have 100% liability.<sup>4</sup>

**3.15.** By contrast, if the firm’s business is conducted through a Limited Liability Partnership (LLP) or a Limited Liability Company, that should mean that the partners in the firm (strictly speaking, they are called ‘members’ in an LLP, but they are usually still referred to as partners), and the Directors of the company, are not personally liable for the firm’s debts. This should also mean that they are not personally liable for any liabilities the firm has for professional negligence claims. Therefore from a risk perspective, the use of an LLP or a Limited Liability Company confers a significant advantage.

**3.16.** Rarely, but sometimes, claimants try to bring claims against individual partners, or individual employed valuers, even if the services are provided by an LLP. This means that it is prudent to include a clause in the valuer’s terms of engagement excluding all personal liability, a subject to which we return below in addressing contractual terms: see paragraphs 6.8 – 6.9.

<sup>4</sup> In Scotland, the position is different, because unlike in England and Wales, a partnership is a separate legal entity from the partners in the partnership. Scottish firms should take specialist advice about the implications of this.

How long after a valuation is there a risk of being sued over it?

3.17. Generally speaking, the limitation period for bringing a claim<sup>5</sup> against a valuer will be six years from the date of the valuation<sup>6</sup>. This period can be longer, particularly where the claim is brought as one for the tort of negligence (see paragraphs 3.3 and 3.7 – 3.9) rather than for breach of contract. In a professional negligence claim, there are two ways<sup>7</sup> in which the period may be longer than six years from the date of the valuation:

3.17.1 The six year period for bringing a professional negligence claim does not begin until the claimant incurs loss, which may not be the date when the negligent professional services were provided. In a valuation claim, this requirement for loss can enable the court to inquire into the date on which the valuation was relied upon, rather than the date on which it was delivered, and that can lead to a delay in the commencement of the six year period. By way of example, in the context of a valuation provided to a lender, this may mean, in some cases, that the six year period begins to run at the date of the drawdown of the relevant loan by the lender's customer, rather than the date of the valuation.

3.17.2 In addition, in 1986, an important change was made to the Limitation Act 1980<sup>8</sup>, to allow an extra period for a claim to be brought, because it was seen to be unfair that the six year period could run out before the claimant realised that they were legally entitled to bring a claim. Therefore in a negligence claim<sup>9</sup>, the Limitation Act gives the claimant three years to bring a claim, beginning on the

date on which the claimant learned about their entitlement to bring the claim. This three year period applies even if it results in a period longer than the conventional six year period referred to above, but it is subject to a 'long-stop' period of 15 years from the date of the negligent act, which in a valuation context will usually mean 15 years from the date of the valuation report.

3.18. These two points can lead to complex factual and legal issues in particular cases, particularly in determining when the claimant suffered loss, and when the claimant acquired the knowledge necessary to bring a claim. Those issues are beyond the scope of this Guidance, but the important point to which RICS wishes to emphasise is that in some situations, a claim in respect of a valuation can be brought more than six years after it was provided to your client.

3.19. There are insurance consequences of the limitation periods referred to above. A separate section of this guidance (Section 7) is devoted to Professional Indemnity Insurance (PII), but the fundamental point must be made in this introduction to the key concepts that PII is provided to firms of valuers on a 'claims made' basis. That means that in order for there to be insurance for a claim, there must be an insurance policy in place when the claim is made, regardless of when the valuation was conducted. For example, for valuations conducted in 2013, the firm should continue buying insurance every year until at least 2019. There is still a risk of a firm, or its partners, being sued if it ceases practice during that intervening period, which is why RICS requires firms to buy 'run-off' PII to cover the period after ceasing practice<sup>10</sup>.

<sup>5</sup> Statutory limitation periods control the time allowed for a claimant to commence court proceedings. Commencing court proceedings is what is meant in this section by 'bringing a claim'.

<sup>6</sup> The equivalent period in Scotland is generally 5 years.

<sup>7</sup> This describes only the legal position in England and Wales. Scottish firms should take specialist advice.

<sup>8</sup> By the Latent Damage Act 1986, introducing section 14A of the Limitation Act 1980.

<sup>9</sup> This is the position in claims for financial loss or property damage. A different statutory regime applies to personal injury claims.

<sup>10</sup> The RICS regulatory requirement for run-off cover is contained in the 2011 RICS Professional Indemnity Insurance Policy Document: [www.rics.org/pii](http://www.rics.org/pii)

## 4.0 Liability Caps

4.1. A liability cap is a contractual agreement that a client can only claim damages up to the amount agreed, even if the law would otherwise award a greater sum in damages.

4.2. As a surveying specialism, valuers have been slower than some to embrace the use of liability caps, but liability caps are now used more and more frequently by members in valuation work. One of the most important purposes of this guidance is to explain what liability caps are and how they work, and to encourage members to use them.

4.3. RICS strongly recommends the use of liability caps to members, wherever legally permissible, as a way in which to manage the risk in valuation work, and to ensure that there is a fair allocation of risk and reward between members and their clients.

4.4. Commercially, capping liability is a sensible way in which to regulate risk in a professional / client relationship. Legally, liability caps are enforceable as long as they are properly incorporated into the contract, and they are 'reasonable'.

4.5. If it is drafted properly, a liability cap specifically applies even where a valuer has conducted a valuation negligently.

4.6. A liability capping clause is not difficult to draft: a sample liability capping clause is set out at paragraph 4.15.

4.7. It is important to distinguish between a liability cap and your firm's professional indemnity insurance limit. The insurance limit is set out in your firm's insurance policy and is fixed on your annual PII renewal: it is the maximum amount which your insurers will pay in any particular claim. A liability cap is an altogether separate agreement, between you and your client, fixed when you enter into a valuation engagement. The two are not really related, and there is no legal or regulatory reason why a liability cap needs to be as high as your insurance policy limit, or often, anywhere near it. It would be unwise to agree a liability cap greater than your insurance policy limit, but it would still be better from a risk perspective than not agreeing one at all.

4.8. If a claim arises for an amount greater than the agreed liability cap, and your client tries to challenge the liability cap, the court will need to ask itself: (a) whether the liability cap was properly incorporated into the contract; and (b) whether the level of the cap is 'reasonable'. Some of the factors which the court will consider in determining reasonableness are set out below, but essentially, in a contract which has been freely negotiated between two commercial parties, the court will usually find liability caps to be enforceable.

4.9. The level of a liability cap is a matter for you to negotiate with your client. In doing so, some assistance can be derived from the key factors which the court will look at in deciding whether a cap is 'reasonable', some of which are set out below. All of these are to be judged as at the time the engagement was entered into between the valuer and client:

- **The level of fees:** Seeking to cap liability to an amount less than the anticipated fee will generally not be reasonable. However, there is no reason for the liability risk you take when you provide a valuation to be disproportionate to the reward to your firm.
- **The limit on your professional indemnity insurance policy, and the cost to your firm of buying the insurance.** The limit of your cover is a factor which the court may take into account when considering the reasonableness of a cap, but as stated above, there is no need for the cap to be the same level as your insurance limit, or even necessarily near it. For obvious reasons, it would be unwise to agree to a cap in excess of your insurance limit.
- **The potential liability that might be incurred without a cap.** In a valuation instruction, this factor should cause you to consider what loss your client may incur if your valuation is negligent; but again, there is no need for the cap to be at or necessarily near that figure. The guiding principle is reasonableness, and you and your client are free to negotiate any figure which together you consider to be reasonable.
- **The respective bargaining position of the parties to the contract.** If the court forms the view that the provider of goods or services has imposed a liability cap on a customer who had limited or no bargaining power, that will increase the chance of the cap being held to be unreasonable. In the valuation context, this may require particular consideration if your client is a domestic consumer, but it is less likely to be an issue if your client is a commercial organisation which has a similar bargaining position to your firm's, or a stronger one.
- **How effectively the cap is brought to the client's attention.** This is another factor the court will consider in deciding whether the cap was 'reasonable' when the contract was entered into. Therefore best practice is to draw a client's attention to a liability cap, particularly the first time it is incorporated into a valuation contract: it should not be 'buried away' in fine print.

4.10. Commercially, the aim should be for a liability cap to be set at a level which is proportionate to the risks and rewards for both parties entailed in the instruction. There are a number of factors which members should take into account when considering the level of a proposed liability cap. These include:

- The purpose of the instruction
- The characteristics of the property to be valued
- The scope and complexity of the instruction
- The parties who may rely upon the valuation
- The anticipated value to be reported
- The level of the anticipated fee
- The amount of PI insurance cover held by the valuer's firm

4.11. Consideration should be given to the basis upon which the liability cap is to be calculated. For example, it can be based upon a multiple of the proposed fee, a percentage of the anticipated level of value to be reported, or a percentage of the amount intended to be loaned (in the case of valuations for loan security purposes).

4.12. Master valuation contracts which seek to set a liability cap at the same level across differing valuation instructions from a particular client should be considered very carefully, because the question of what level of liability cap is reasonable may vary from one instruction to another.

4.13. If a liability cap, or the basis for calculating the liability cap, is included in your standard Terms & Conditions, rather than being included in an engagement letter which is specific to a particular valuation instruction, it should be in a prominent position in the Terms & Conditions. It may improve your position further if you also refer to the existence of the liability cap in the body of the valuation report.

4.14. There are some circumstances in which the use of a liability cap is limited or prevented by law. For example, valuation reports prepared for inclusion within prospectuses under the FSA Listing Rules may not exclude liability to parties other than the client (See Red Book UK Appendix 7, FSA Listing Rules). Specialist legal advice may be required in such situations. In addition, in those circumstances members should have regard to the risks and liabilities involved when agreeing terms for such work.

4.15. Your liability cap can be worded along the following lines:

*"The Royal Institution of Chartered Surveyors recommends the use of liability caps to members as a way in which to manage the risk in valuation work. Our aggregate liability arising out of, or in connection with this valuation, whether arising from negligence, breach of contract, or any other cause whatsoever, shall in no event exceed £[x]. This clause shall not exclude or limit our liability for actual fraud, and shall not limit our liability for death or personal injury caused by our negligence."*

4.16. If a single engagement letter covers several valuations, or a single valuation of several properties in a portfolio, you should make clear in the engagement letter whether the figure specified for the liability cap applies to each valuation, each property, or the whole of the engagement.

4.17. In some situations, the law permits a professional to go beyond capping or limiting liability, by excluding legal liability altogether. The particular situation in which valuers should consider doing so is if they provide advice without charging a fee. To maximise the chances of such a complete exclusion being enforceable, members should ensure that the exclusion of liability is in writing, and specifically drawn to the attention of the recipient of the advice.

## 5.0 Third Party Reliance on Valuations

5.1. The conventional position is for valuers to include an express clause in the engagement letter, and/or in the valuation report, stating that the valuation may be relied upon only by the valuer's client; not by any third parties.

5.2. Increasingly, valuers are being asked by their clients to agree to permit third parties to rely on their valuations, for various reasons. As explained at paragraph 3.7 above, a 'third party' is any party who is not party to the valuer's contractual engagement: i.e. parties other than the firm's client. By way of example, if the firm's valuation client is a lender, third parties may include the borrower, or a financial house which is investing in the lender's primary loan.

5.3. RICS recognises that there is a practice of permitting valuations of residential properties provided to lenders to be disclosed to the borrower/ purchaser. In certain circumstances, this may extend the duty of care to that borrower/purchaser. Other than where that specific practice is adopted by agreement between firms and their lender clients, RICS recommends that, as a default position, valuers do not permit third party reliance. As a default position, RICS recommends that Terms and Conditions exclude third party reliance, with any exceptions made clear, taking into account the points highlighted at paragraphs 5.6 to 5.9 below and at paragraph 6.21.

5.4. RICS wishes to ensure that members appreciate the risks in permitting third party reliance, and that they make a decision to permit third party reliance only on an informed basis.

5.5. Permitting third party reliance, on the one hand, is different from merely permitting a third party to 'see', or to have 'disclosed' to them the valuation report. Merely permitting third parties to 'see' or to have 'disclosed' to them a valuation report does not automatically give rise to a legal duty to the third party. However members should still take care even in allowing this, because there is a risk that that might be construed as the same thing as permitting reliance. If members do agree that a valuation may be 'shown to' or 'disclosed' to a third party, they would improve their position by making it clear, in writing, not only to their client but also to the third party, that this is being permitted without assumption of any legal liability to that third party. It is recognised that this may not be possible in all circumstances, but it is important that members understand the risks entailed.

5.6. Because the practice of valuers permitting third party reliance is a relatively recent one, the courts have not had to consider the precise consequences of it for valuers, but the following points are risks which RICS perceive in this practice.

5.6.1. Valuers' client relationships should be based on the mutual trust that exists between any professional and their client. Permitting third party reliance can expose valuers to third parties whom the firm does not know, who might look on the valuation very differently, and who might have a different attitude to bringing claims against your firm.

5.6.2. Permitting disclosure in the regulated investment context may entail regulatory risk (i.e. exposure to the risk of regulatory investigations) as well as more conventional liability risk.

5.6.3. Some of the third parties with whom your valuations are shared might be based in different jurisdictions, and may try to bring claims against you before the courts of those jurisdictions, with very different laws from the laws which govern the relationship between you and your client. It is also possible that such claims may not be covered by your PII, if they are brought in jurisdictions that do not fall within the geographical limits of your policy.

5.6.4. Your contractual terms of engagement (including the terms set out in this Guidance, such as the liability cap you have agreed with your client) may not be binding on the third parties. In addition, some of the legal defences which you might be able to raise if your firm faces a claim from a client may be more difficult for you to raise in response to a claim from a third party.

5.6.5. Members should be particularly careful if they are asked to give consent to third party reliance at a date later than the effective date of their valuation. Valuers will improve their position in that situation if they tell both the client and the third party, in writing, that they have not re-valued the property, and that the valuation may already be out of date, because the effective date of the valuation has not changed.

5.6.6. You should think carefully whether you had communications with your client at the time of submitting the valuation which affect the way in which the valuation should be used: is it necessary for those communications to be passed to the third party so that the valuation report is placed in the proper context? If so, you should try to influence the way in which the valuation report is passed to the third party so as to ensure if possible that the valuation report is passed on only together with those other communications.

5.6.7. Permitting reliance by third parties who are in a different position from your client (such as the property owner, where your client was the lender) may expose your firm to claims of a different type.

5.6.8. Your firm's insurance may impose specific conditions concerning third party reliance on valuations, and may exclude indemnity in relation to certain third party claims - see paragraph 5.9 below.

5.7. If you do agree to permit third party reliance, be as specific as possible about who the permitted third parties are: permitting an entire 'class' of third parties to rely on the valuation will add greater risk.

5.8. RICS recommends also that where members do permit third party reliance, this is done only in a way which ensures that:

- The third party is bound by the terms and conditions of the firm's contract with its client (including the liability cap)
- The third party understands and acknowledges (if it is the case) that the firm has not conducted a fresh valuation and that the effective date has not changed simply by the act of permitting third party reliance; and
- The purpose for which the valuation has been provided has not altered simply by permitting third party reliance

5.9. In considering whether to permit third party reliance, it is very important to bear in mind the scope of your PII. The RICS Minimum Terms permit PII insurers to place limitations on the cover available for claims brought by third parties to whom your valuation contract has been assigned. As long as that the minimum cover required by the Minimum Terms is provided by the policy, the question of precisely what limitations on cover for third party claims are put in place in each policy is a question for commercial negotiation between individual firms and their insurers.

It is a question on which member firms should take specialist insurance or legal advice. The key point which RICS wishes to emphasise here is that each member firm should make sure that the firm understands clearly what limitations the firm's own PII policy contains in this regard, and ensure that the firm's approach to permitting third party reliance is consistent with the terms of the PII cover. If a firm does not do so, there is a real risk of the firm facing claims which will not be covered by the firm's PII. This would mean you would also be in non-compliance with RICS Rules and risk regulatory action.

5.10. The provisions of the Minimum Terms for PII are technical, and RICS recommends that firms take specialist advice from insurance brokers or solicitors if they decide to permit third party reliance in the course of their practice. This is particularly important for those firms which are asked to permit reliance for the purposes of the securitisation of loans, loan syndication, and stock exchange listing and other investment memoranda.

5.11. Like all decisions involving risk, members should consider whether permitting third party disclosure should command an additional fee, including to cover the relevant insurance cost.

6.1. An engagement letter is the contract between the valuer and the client<sup>11</sup>. Recording the terms of contract in an engagement letter is required by the RICS Red Book<sup>12</sup>. It is also an important opportunity for the valuer to regulate the risks which attend the engagement, and that opportunity should not be passed up.

6.2. Before turning to the terms of engagement, the fundamental point should first be noted that ultimately, there is no compulsion on the part of valuers to accept a valuation instruction. Where, in the valuer's opinion, the risks and rewards are not balanced, the valuer should consider whether it is appropriate to accept the instruction.

6.3. In this section, we set out the clauses of an engagement letter which are the most important from a risk perspective. Where appropriate, an example clause is given after the explanations below. These clauses are generic examples only and will not suit all situations: members should consider taking legal advice on their requirements for specific situations.

6.4. Although we use the word 'clause', and we refer to a 'contract', the engagement letter can have the appearance of any other business letter: there is no particular form in which the clauses need to be set out.

6.5. Many firms choose to prepare standard Terms & Conditions for all retainers. This enables engagement letters for individual matters to be prepared very easily, by reference to those standard Terms & Conditions, and it will usually mean that the negotiation with the client at the outset of each new matter can be confined to the key points specific to that matter.

6.6. Frequently, a client will ask a valuer to agree to provide a valuation on the basis of the client's own standard Terms & Conditions. The question of whose Terms & Conditions prevail is a subject for commercial negotiation with the client, but if the client's Terms & Conditions prevail, then clearly members should read them, and should bear in mind that, like every contract, their terms should be capable of negotiation.

6.7. Even where a firm does have standard Terms & Conditions for valuation work, there are at least three key terms which should be considered by the firm from a risk perspective in the context of every valuation instruction, as set out below. These three key terms should be regarded as related, and therefore considered alongside one another in the context of each instruction.

- **The scope of the work** - The requirements for a valuation engagement letter in scoping each instruction are set out in full in the Red Book<sup>13</sup>.
- **The fee** - The Red Book also requires that the engagement letter specify the basis on which the valuation fee will be calculated<sup>14</sup>. Fees are also addressed briefly at paragraphs 6.13 - 6.15.

- **The liability cap** - Liability caps are the subject of a separate section of this guidance (section 4).

### Contracting entity/ Exclusion of personal liability

6.8. The engagement letter should state the entity which is entering into the contract to provide the valuation. The firm's name shown on the front/ back of the valuation report should be consistent with the engagement letter. This is important for the reasons given at paragraphs 3.13 - 3.16 above.

6.9. The engagement letter can include a clause which expressly prevents any of the firm's individual partners or employees being named as a defendant in any claim brought relating to the valuation. This requires words along the following lines:

*"None of our employees, partners or consultants individually has a contract with you or owes you a duty of care or personal responsibility. You agree that you will not bring any claim against any such individuals personally in connection with our services."*

### Proportionate liability

6.10. Sometimes the services of a valuer are provided in a particular matter alongside those of other professionals, such as quantity surveyors, solicitors, architects, engineers, buildings surveyors etc. Under the law as it stands, these various professionals can in some cases be categorised as 'joint tortfeasors'<sup>15</sup>, which has one particularly onerous consequence: if more than one tortfeasor is liable to the claimant, they are deemed to be 'jointly and severally' liable. This means that the claimant can choose to enforce judgment against as few or as many of them as the claimant wishes to. It also means that if one of the joint tortfeasors is unable to pay a fair share of the claimant's loss (for example, if that party has no insurance and/ or is insolvent), the others are required to step in and meet the judgment in full.

6.11. It is possible to contract out of this effect, by including a clause which says that, even if the valuer is negligent, the extent of the valuer's liability is restricted to the loss which can properly be said to have been caused by that negligence. Note that such a clause is different from a 'liability cap', as explained below. A proportionate liability clause<sup>16</sup> would be along the following lines:

*"If you suffer loss as a result of our breach of contract or negligence, our liability shall be limited to a just and equitable proportion of your loss having regard to the extent of responsibility of any other party. Our liability shall not increase by reason of a shortfall in recovery from any other party, whether that shortfall arises from an agreement between you and them, your difficulty in enforcement, or any other cause."*

<sup>11</sup> In Scots law, there are differences as to what makes up the contract with a valuer and how the contract is concluded: specialist Scots law advice should be sought.

<sup>12</sup> Red Book (2012 Edition) VS 1.4: "The member must always confirm to the client, before any report is issued, the terms on which the valuation will be undertaken."

## Liability caps

6.12. A separate section of this guidance (section 4) is devoted to liability capping clauses, but they are also included in this list of clauses, being one of the key clauses of an engagement letter. Together with the fee clause and the scoping clause, they are one of the three clauses of engagement which RICS recommends should be thought about from a risk perspective in accepting every valuation instruction, rather than being left for inclusion in standard Terms & Conditions.

## Fees

6.13. The fee to be charged should be considered in the context of every valuation instruction, and not left for inclusion in standard Terms & Conditions, even with regular clients.

6.14. The size of the liability risks attendant on a valuation can be disproportionate to the fee charged. Accordingly, RICS recommends that within each firm, those members who are responsible for pricing valuation work should ensure that they are aware of the cost to their firm of buying and maintaining professional indemnity insurance, as well as all other costs of the business.

6.15. The firm should consider the scope of work which it is intended will be provided for the fee, and then ensure that the client's expectations in that regard are the same as the firm's. See generally the Scope of Work section paragraphs 6.16 - 6.20. By way of specific examples:

- What is the nature of the inspection to be conducted?
- Will the valuation include any measuring services?
- Will the valuer need to call on other specialist input (for example, from quantity surveyors) from within the firm?

## Scope of work

6.16. Frequently, claims against valuers arise because of a mismatch between the work which the valuer intended to do to prepare the valuation, and the work which the client anticipated that the valuer would do. The engagement letter is the valuer's opportunity to ensure that the client's expectations match those of the valuer as to what the valuer is going to do, and just as importantly, what the valuer is not going to do.

6.17. The "scoping" process should be aligned with the process of calculating an appropriate fee and liability cap (see section 4 above).

6.18. The scoping process is also a good opportunity for the valuer to state those areas of specialist work which the valuer is **not** going to deliver in this instruction. The valuer may believe that the client knows that these specialist works are being provided by other specialists, but it is preferable to state this in express terms. For example, if the valuer is not going to carry out the following services, the valuer should consider saying so in terms:

- Inspect the property in person (i.e. the valuer is to carry out a 'desk-top' valuation only)
- Measure the property
- Inquire into the accuracy of planning information provided to the valuer
- Comment on condition
- Examine the structural soundness of the property
- Comment on the strength of a tenant's covenant in valuing a property which has been let
- Inquire into the accuracy of passing rental figures provided to the valuer
- Read leases or other legal documents other than where the valuer has expressly undertaken to do so

6.19. Members' attention in this regard is also drawn to the following sections of the Red Book:

- VS 2.2: Special assumptions
- VS 2.3: Marketing constraints and forced sales
- VS 2.4: Restricted information
- VS2.5: Revaluation without re-inspection

## Dispute resolution

6.20. If no other provision is made, the default position in England and Scotland is that disputes between valuers and their clients are to be referred to the courts, for litigation. The Appendix to this guidance addresses this subject.

<sup>13</sup> Red Book (2012 Edition) VS 2.1: Confirmation of terms of engagement.

<sup>14</sup> Red Book (2012 Edition) VS 2.1 (f).



## Third party reliance

6.21. A separate section of this guidance (section 5) is dedicated to the subject of third party reliance on valuations. As a default position, RICS recommends that valuers include a clause in their engagement letters which prevents third party reliance. This can be included in a firm's standard Terms & Conditions. For completeness, RICS recommends that this clause is replicated in a prominent position in the body of the valuation report as well. The clause can be along the following lines:

*"Our valuation is provided for your benefit alone and solely for the purposes of the instruction to which it relates. Our valuation may not, without our written consent, be used or relied upon by any third party, even if that third party pays all or part of our fees, or is permitted to see a copy of our valuation report. If we do provide written consent to a third party relying on our valuation, any such third party is deemed to have accepted the terms of our engagement."*

## Governing law and jurisdiction

6.22. Some clients (or third parties who bring claims against your firm) may try to bring claims against your firm in their 'home' jurisdiction. If they are able to do so, you might find yourself being judged under a different system of law from that with which you are familiar or had in mind

when you accepted the relevant valuation instruction. It is also possible that your PII does not cover the claim, if your policy contains geographical limitations on cover. You can prevent this happening in the vast majority of cases by including a simple clause stating that the contract, and any claims arising from the valuation, are subject to the exclusive jurisdiction of the courts of England and Wales, and English law. This is even necessary within the United Kingdom: if you value a Scottish property, or you send your valuation to a client in Northern Ireland, this may create uncertainty as to governing law and jurisdiction, so it is recommended to include an express choice. The clause can be along the following lines:

*"Our contract with you for the provision of this valuation is subject to English law. Any dispute in relation to this contract, or any aspect of the valuation, shall be subject to the exclusive jurisdiction of the Courts of England and Wales, and shall be determined by the application of English law, regardless of who initiates proceedings in relation to the valuation."*

6.23. This clause can be adapted for Scottish use by replacing "English law" (in both places) with "Scots Law" and "the Courts of England and Wales" with "the Courts of Scotland".

7.1. All regulated firms need to ensure they have adequate and appropriate professional indemnity insurance in place that complies with the requirements of Rule 9 of the RICS Rules of Conduct and the RICS Minimum Terms. See also the RICS Professional Indemnity Insurance Policy document (Version 2, 1 July 2011).

7.2. Insurance is a key part of managing your firm's risk. That firms maintain insurance is also in the interest of members' clients and therefore the reputation and standing of the profession. This is one of the main reasons RICS takes a role in ensuring that firms are adequately insured.

7.3. Whilst this guidance focuses specifically on valuation contracts, a member firm's PII policy will also cover all other aspects of the firm's professional services. All members should be aware of the following points about PII:

7.3.1 In arranging PII, you should ensure that the amount of cover purchased is consistent with the nature of your firm's practice and proportionate to the risks taken by your firm. Always consult specialist insurance brokers in arranging your firm's PII.

7.3.2. Your firm's risk management must not begin and end with putting in place professional indemnity insurance, because insurance is a contract, which contains limits, conditions, and exclusions: It is not a guarantee, and it will not cover everything. Careful attention to the terms of engagements (including the use of liability caps), and ensuring consistent quality in valuation practice and reporting, continue to be fundamental to effective risk management.

7.3.3. Claims on your PII affect directly the cost and terms of your insurance in the future. In practice, that means that it is in the interests of the firm's partners and senior staff to maintain an active involvement in risk management, so as to minimise claims under the policy.

7.3.4. Valuers' policies typically are provided on a 'claims made' basis, almost invariably on an annual basis. This means that the policy which responds to a claim is the annual policy in force when the claim is made, regardless of when the relevant work was done. This offers great simplicity, but it does entail some pitfalls: in particular, if a firm were to allow its insurance to lapse from a particular date, it would have no insurance cover for claims made after that date.

7.3.5. As a specific consequence of the point above, it is imperative that member firms ensure at all times that in the event of the firm's practice ceasing, there will be 'run-off insurance' in place to protect the firm's partners and its customers. There will remain a risk of claims against the firm and its partners for at least six years after a cessation, and those claims may not be covered if the firm does not have run-off insurance for the duration of that period. This is a subject which should be considered by all firms at all times, not only those for whom a practice cessation is an obvious or imminent threat. As can be seen from paragraph 3.17 above, six years should be looked on as a minimum, because it is possible that claims may be brought more than six years after a valuation has been provided.

7.3.6. RICS requires firms to put in place run-off cover<sup>17</sup>. In addition to the consequences detailed in paragraph 7.3.5 above, a failure to comply with this obligation may be a disciplinary matter.

7.3.7. All insurance policies will have an uninsured excess (deductible) which is payable by the firm, a limit on the maximum amount the insurers will pay on any single claim, and may have an overall maximum amount the insurers will pay in a single policy year. Sometimes policies are also subject to 'sub-limits' relating to certain types of claims, such as loss of documents.

7.3.8. Although larger firms sometimes have designated partners or employees who manage the firm's insurance arrangements, it is important that all partners and senior valuers are involved to an appropriate extent and have at least a working knowledge of the firm's professional indemnity insurance, including the cost of arranging it, and the points set out above. This is to ensure that:

- They comply with the requirements of the policy, including giving appropriate disclosure to the insurers and giving prompt notification of claims, and circumstances which may give rise to claims
- They are able to have informed engagement with clients about allocation of risk in their firm's engagements
- They more readily appreciate the importance of prudent risk management and the use of appropriate terms of engagement including liability caps

<sup>17</sup> See the 2011 RICS Professional Indemnity Insurance Policy Document: [www.rics.org/pii](http://www.rics.org/pii)

## 8.0 Concluding remarks and further reading

8.1. Effective risk management is a dynamic process. It is intended that this Guidance, the Red Book, and the other materials referred to in this document will equip members to understand the issues they address, but they cannot be a substitute for firms and individual members constantly seeking to identify the risks which confront their practice, and to take steps to control and manage those risks. This is the responsibility of all members: a responsibility they owe to their profession, to their clients, and to all participants in property markets.

8.2. By necessity, the coverage of some subjects in this guidance is brief. As well as taking steps generally as referred to immediately above, it is one of the stated objectives of this guidance to cause members to take a fresh look at the Terms and Conditions on which they engage with their clients. In doing so, members are urged to take specific legal advice on the particular points to which their practice gives rise. However, members are also referred to the further reading materials referred to below, all of which are available to members on the RICS website, to assist further in that process.

### 8.3. Further Reading:

8.3.1. RICS Report on Professional Indemnity Insurance (PII) for Valuations in the UK December 2011  
[www.rics.org/pii](http://www.rics.org/pii)

8.3.2. RICS Valuation – Professional Standards (The Red Book)

8.3.3. RICS Rules of Conduct (2012 Edition)  
<http://www.rics.org/uk/regulation/how-rics-regulates/rules-conduct/rules-of-conduct-for-firms/>

8.3.4. RICS Valuer Registration (VR)  
[www.rics.org/valuerregistration](http://www.rics.org/valuerregistration)

8.3.5. RICS Professional Indemnity Insurance Policy document (Version 2, 1 July 2011)  
[www.rics.org/pii](http://www.rics.org/pii)

8.3.6. Reflecting uncertainty in valuations for investment purposes (2011)

8.3.7. 2011 RICS Policy Wording (Minimum Terms)  
[www.rics.org/pii](http://www.rics.org/pii)

**‘After the Event (ATE) Insurance’** an insurance policy put in place by a claimant, at the time of a claim, which insures specifically against the risk of losing and being ordered to pay the defendant’s costs

**‘bracket’** – the bracket of hypothetical reasonable valuations which is used to assess whether the valuation actually given was negligent

**‘claims made’** – the basis on which most professionals’ (and all valuers’) professional indemnity insurance is provided. It means that the relevant policy for any claim is the policy in place when the claim is made (not when the work is provided to the client, or any other time)

**‘Common law damages’** – the recognised body of judge-made law, from decided cases, about the appropriate damages to award, as opposed to principles set out in statute, or express provisions about damages made in a contract

**‘Conditional Fee Agreement (CFA)’** – a ‘no-win-no-fee’ agreement between a claimant and their legal advisers (i.e. all or part of the fee payments to the legal advisers are conditional on the claim succeeding)

**‘contingency fees’** – a fee arrangement between a claimant and their legal advisers whereby the legal advisers are paid by taking a share of their client’s damages in the event of a successful claim, rather than by conventional fees or a CFA. Historically contingency fees have been prohibited in the UK, but they to be permitted, at least in England & Wales, in some claims, from a date to be decided. They will be called Damages Based Agreements, or DBAs

**‘delict’** – ‘delict’ is used in Scots law instead of ‘tort’

**‘desk-top’ valuations** – valuations conducted without a site visit

**‘disclosure’** – permitting a valuation to be seen by or disclosed to a third party (i.e. a person or entity who is not party to the valuer’s contract of engagement) without assumption of a duty of care

**‘duty of care’** – the duty in ‘tort’ assumed by a professional to observe the skill and care of a ‘reasonable’ valuer in providing professional services: such a duty may in certain circumstances be assumed to a ‘third party’ as well as to the professional’s contracted client

**‘expert valuers’** – independent valuers giving expert evidence to courts and tribunals

**‘implied terms’** – terms of a contract which are not stated expressly but which ‘go without saying’. In a contract for professional services this includes a term that the services to be provided will not fall below the standard of skill and care which would be expected from a reasonable body of the professional’s peers

**‘indemnity’** – a contractual agreement sometimes given by a party providing professional services to ‘hold harmless’ or ‘make whole’ the client in respect of the

client’s losses arising from the matter

**‘joint and several liability’** – the liability partners have to claimants for claims against the partnership, and ‘joint tortfeasors’ have to claimants. It means that the claimant can choose to name as defendants as few or as many of the partners or joint tortfeasors as the claimant wishes to name. Assuming that there are no defences to the claim, the claimant will recover the whole loss from those who the claimant chooses to name as defendants, regardless of the extent of responsibility each defendant actually has for causing the problem, leaving the defendants to sort out amongst themselves their respective proportions of liability and payment. Those going into partnership with each other should expect to share responsibility in this way, but it is important to understand that, in some circumstances, professional firms can share the same type of liability with other professional firms, where they work alongside those other professional firms on a project.

**‘joint tortfeasors’** – parties (usually professional firms) who take on responsibilities ‘jointly and severally’ to a particular client or claimant, when they work alongside each other – see ‘joint and several liability’.

**‘liability cap’** – a contractual agreement that a client can only claim damages up to the amount agreed, even if the law would otherwise award a greater sum in damages

**‘limitation periods’** – the periods specified by statute and the common law for a claimant to commence legal proceedings. The periods vary depending on the type of claim and the type of services provided. When the period is over, the claim becomes ‘statute barred’ and can no longer be pursued.

**‘Limited Liability Partnership’** – or ‘LLP’ - a type of legal entity for carrying on business, governed in the UK by the Limited Liability Partnerships Act 2000 and the Limited Liability Partnerships Act (Northern Ireland) 2002. Unlike a partnership, an ‘LLP’ does have a legal existence as an entity separate from its partners (called ‘members’ in an LLP), and it is that entity which enters contracts and provides services. Practising through an LLP is an effective and recognised way for partners in professional firms to manage the risks associated with personal liabilities.

**‘litigation funders’** – parties which make a business out of investing in litigation. Litigation funders are not party to the litigation, but they fund the costs for one party or the other, in exchange for taking a share of any success.

**‘members’ (LLP)** – see ‘Limited Liability Partnership’ above. Although many firms which operate as LLPs still refer to their principals as ‘Partners’ the technically correct term for the principals of an LLP is ‘Members’.

**‘negligence’** – negligence is a ‘tort’. In the case of a professional, negligence is a failure to provide services with the standard of skill and care which would be expected from a reasonable body of the professional’s peers

**'PII'** – Professional Indemnity Insurance

**'Pre-Action Protocols'** – the regime applicable to legal disputes in England and Wales whereby parties exchange correspondence and documents before commencing formal legal proceedings, with a view to avoiding altogether the need for formal legal proceedings if possible. There is a specific Pre-Action Protocol applying to professional negligence claims.

**'Red Book'** - RICS Valuation – Professional Standards (The Red Book)

**'run-off insurance'** – a form of insurance which can be bought to provide cover for claims arising after a firm or individual has ceased trading. Valuers have a particular need for it because valuers' PII is provided on a 'claims made' basis, meaning that there will only be insurance cover for a claim if there is a policy in place when the claim is made – even if the claim is made after the valuer (or firm of valuers) has ceased practice

**'sub-limits'** – specific limits within a PII policy for certain specified types of claims, such as loss of documents

**'SAAMCO Cap'** – an important principle in the common law of damages as it applies to property valuers, which ensures that valuers can only be liable for the losses they can properly be said to have caused

**'third party'/ 'third parties'** – anybody who is not a party to the valuation contract. Usually this means anyone who is not the valuer's client. Examples include the borrower, in a situation where the valuer's client is a lender.

**'tort'** – The umbrella term for all civil wrongs recognised by law other than breach of contract. The most commonly referred to tort is the tort of negligence.

## Dispute Resolution

If the contract between a firm of valuers and their client is silent as to how disputes are to be resolved, the default position will be litigation: That is, formal proceedings in the court.

The parties can choose not to go to court. The principal alternatives are explained below. These alternative choices can be made after a dispute has arisen, but only by mutual consent, and by that stage, one party may already have resolved to go to court, so if your firm prefers one of these alternative routes for resolving disputes with clients, it would be better to agree that 'up front' in the engagement letter or standard Terms & Conditions.

### Court Proceedings/ Litigation

The court process is usually the most reliable and thorough way to resolve a dispute, but unfortunately it can also be slow and expensive. Over the past decade, the English courts have taken steps to address this: first, by requiring more active 'Case Management' by the courts, and secondly, by implementing the 'Pre-Action Protocols'.

There is a specific Pre-Action Protocol for professional negligence claims, which includes claims against valuers. The purpose of the Protocol is to require the parties to exchange correspondence and documents, and investigate the dispute fully, before commencing Court proceedings. A claimant is supposed to start proceedings only if the Protocol has been complied with and it has not brought the matter to an end.

It is important to understand the costs consequences of court proceedings. The basic rule is that the loser pays the other side's costs as well as their own costs (although in fact the other side's costs are generally reduced by approximately 10% – 40% depending on the nature of the costs order made, or even more in Scotland). Many claimants, including some claimants against valuers, now buy an insurance policy, when a dispute begins, to insure specifically against the risk of losing and being ordered to pay the defendant's costs: that is called an 'After The Event' ('ATE') policy. In addition, claimants often agree 'no-win-no-fee' fee arrangements (called Conditional Fee Agreements, or 'CFAs') with their own lawyers. With an ATE policy and a CFA in place, the litigation becomes almost risk free for a claimant: they pay nothing, or very little, if they lose. What is more, if the claimant wins, the ATE premium payable to the insurer, and the CFA success fee payable to the claimant's lawyers, are both recoverable from the defendant. This can make litigation a formidable process for professional firm defendants. Any differences in Scotland should be considered.

The rules are scheduled to change in April 2013. The precise way in which the costs regime will change from that date remains under review at the date of publication of this Guidance, but one important change will be that ATE premiums and CFA success fees will no longer be recoverable from the defendant. The fundamental 'loser pays' regime will not change. It is likely that there will be some form of 'contingency fees' permitted, whereby claimants' lawyers are able to take a share of their client's damages in the event of success. These will be called 'Damages Based Agreements' (or DBAs). In addition, the investment in litigation as a business, by 'litigation funders' looks set to become a permanent feature of litigation in England and Wales.

### Arbitration

Arbitration is very similar to litigation, but the parties appoint their own judge (arbitrator), when the dispute arises. The most important difference from court proceedings is that the arbitration process is private: The judgement (called the award in an arbitration) is confidential to the parties. It can be quicker and less expensive than court proceedings, but that is not always the case. As in court proceedings, the arbitrator will make a decision about the costs of the process after deciding the substantive dispute, and just as in court proceedings, the default position is that the loser pays both parties' costs.

### Expert determination

Expert determination is similar to arbitration, but it is less formal. Arbitration is an 'adversarial' process, like litigation, where each party presents its case and the Judge/ Arbitrator makes a decision. By contrast, expert determination is an 'inquisitorial' process, whereby the expert conducts inquiries with the parties' assistance before making a decision. It is usually less expensive and quicker than either arbitration or court proceedings. The process is best suited to resolving disputes over specific technical issues. It is often used in valuation disputes, but it must be understood that it can also be less thorough than court proceedings or arbitration: The expert is usually not bound to apply legal principles, and the decision can only be challenged in extremely limited circumstances.

## Mediation

Mediation is a negotiation, facilitated by a mediator. The mediator is often a lawyer, but does not have to be, and in many valuation disputes, it is a chartered surveyor. Mediation will only resolve the dispute if both parties agree to the outcome: The mediator does not make a decision, or even (unless specifically asked to by both parties) express a view on the merits of the dispute. Because it is consensual, it works best against the backdrop or pressure of one of the more formal processes outlined above. Often, contractual parties, including valuers and their clients, agree at the outset of an engagement that, if a dispute arises, they will at least try mediation before resorting to more formal processes.

## Ombudsman

The Financial Services Ombudsman has jurisdiction to hear complaints and to award financial redress of up to £150,000 if a firm is carrying on regulated activities, or is providing ancillary services, including providing valuation advice, in connection with regulated activities. The Ombudsman may become involved if a valuer's services are provided as part of a mortgage application.

In addition to the Financial Services Ombudsman, there are currently two Government approved providers of Ombudsman services for property services businesses: Ombudsman Service: Property (OS:P); and The Property Ombudsman (TPO). Both of these providers offer consumer redress for firms involved in the property sector, including estate agents and valuers, without charging the consumer for the use of the service.

**Table 1**

**Appendix B  
Self-test and checklist**

Question	Paragraph reference	Firm comment
Have you reconsidered your firm's valuation Terms & Conditions in the light of this guidance (including taking specialist legal advice where required)?	1.8; and Section 6	
Are all of your firm's valuers familiar with Valuation Standard 2 – Agreement of terms of engagement?	2.3	
Are all of your firm's valuers familiar with Valuation Standard 6 – Valuation reports	2.3	
Have all of your firm's valuers joined RICS Valuer Registration (VR)?	2.4	
Does your firm have in place PII that complies with the requirements of Rule 9 of the RICS Rules of Conduct and the RICS Minimum Terms?	2.4; 7.1	
Do your firm's valuers understand the difference between claims by clients for breach of contract and claims by third parties for breach of a duty of care?	3.1 – 3.9	
Do members realise that being asked to give an indemnity when they provide a valuation may increase the risks for your firm in giving the valuation?	3.12	
If your firm is presently a partnership, have you considered the advantage from a risk perspective in converting to a Limited Liability Partnership or a Limited Liability Company?	3.13 – 3.15	
How long after a valuation has been provided is there a risk of your firm being sued over it?	3.17	
What is the view of the RICS towards liability caps for valuation work?	4.3	
Having regard to RICS' view on liability caps for valuation work, do you have a policy for putting in place liability caps in your valuation contracts wherever possible?	4.3	
What are the legal considerations which determine whether a liability cap works?	4.8 – 4.9	
What commercial considerations should you apply innegotiating a liability cap with your client for each new valuation instruction?	4.10 – 4.11	
Do your valuers know when they are not allowed to use liability caps?	4.14	
What is the difference between allowing a third party to see a valuation and allowing them to rely on it?	5.5	



Table 1

**Appendix B**  
**Self-test and checklist continued**

Question	Paragraph reference	Firm comment
Does it increase the risks to your firm if you permit third party reliance on your valuations?	5.7	
What is RICS' view on permitting third party reliance?	5.3	
Will your firm always be insured for claims brought by third parties who you permit to rely on valuations?	5.9	
Are you required to record the terms of a valuation instruction in writing?	6.1	
Is it compulsory to accept a valuation instruction?	6.2	
What are the three key clauses in an engagement letter from a risk perspective?	6.7	
Can a valuer be sued personally for a valuation, or can claims only be brought against the firm?	3.16; 6.9	
Can your firm ever be liable for mistakes made by other professional firms who are instructed at the same time as your firm is instructed to provide a valuation?	6.10	
Where should your firm record an exclusion of third party reliance?	6.21	
Will your firm always be insured for a claim arising from a valuation as long as your firm had PII in place when that valuation was provided?	3.19; 7.3.4	
Is it compulsory to put run-off PII in place, and if so, when?	3.19; 7.3.6	
Is your firm's PII cover appropriate for your firm's business and the risks it entails? Have you taken professional advice on the PII?	7.3.1	

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RICS has a worldwide network. For further information simply contact the relevant RICS office or our Contact Centre.

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