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Valuers' Liability: the Impact of Torts Reform in Queensland

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Abstract

Historically there has been a correlation between the economic cycles and litigation in the area of professional negligence relating to valuers. Negligence actions have principally been instigated by financiers for valuations prepared during more buoyant economic times but where there has been a subsequent loss due to a reduction in property value. More specifically during periods of economic downturn such as 1982 to 1983 and 1990 to 1998 there has been an increased focus by academic writers on professional negligence as it relates to property valuers. Based on historical trends it is anticipated that the end of an extended period of economic prosperity such as has been experienced in Australia, will once again be marked by an increase in litigation against valuers for professional negligence. However, the context of valuers liability has become increasingly complex as a result of statutory reforms introduced in response to the *Review of the Law of Negligence Final Report 2002* ("the IPP Report"), in particular the introduction of *Civil Liability Acts* introducing proportionate liability provisions. This paper looks at valuers' liability for professional negligence in the context of statutory reforms in Queensland and recent case law to determine the most significant impacts of recent statutory reform on property valuers.

Key words: valuers' liability, professional negligence, proportionate liability, economic downturn.

Introduction

Historically there has been a correlation between the economic cycles and litigation in the area of professional negligence relating to valuers. Negligence actions have principally been instigated by financiers for valuations prepared during more buoyant economic times but where there has been a subsequent loss due to a reduction in property value. More specifically during periods of economic downturn such as 1982 to 1983 and 1990 to 1998 there has been an increased focus by academic writers on professional negligence as it relates to property valuers. Based on historical trends it is anticipated that the end of an extended period of economic prosperity such as has been experienced in Australia, will once again be marked by an increase in litigation against valuers for professional negligence.

The valuer acts as an independent professional whose responsibility is not only to their client in contract and in tort but this duty extends to third parties to act with reasonable care and skill as widely accepted by peer opinion (Section 22(1) of the *Civil Liabilities Act 2003* (Qld)). The context of valuers liability has become increasingly complex as a result of statutory reforms introduced in response to the *Review of the Law of Negligence Final Report 2002* ("the IPP Report"), in particular the introduction of Civil Liability Acts in each state and proportionate liability provisions. The landscape of torts in Australia, formerly within the gambit of the common law, is now largely regulated by the each state's Civil Liability Act. Although outside the scope of this paper, the application of the Australian consumer protection law also extends to the valuer, in particular section 52 of the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* Cth) and section section 38 of the *Fair Trading Act 1989* (Qld) which deal with misleading and deceptive conduct. Of further interest is the initiative of the Australian Property Institute to introduce a capped liability scheme by virtue of the Professional Standards Acts in each state (*Professional Standards Act 2004* (Qld)).

The aims of this paper are to identify the key drivers for negligence litigation against valuers and to identify the impact of statutory reforms on property valuers. The paper is structured as follows: this section is immediately followed by a review of relevant literature pertaining to valuation litigation, followed by a discussion of how the area of professional negligence is likely to be impacted by reforms to torts law and a discussion of the most recent valuation negligence case law to get a snapshot of what, if anything, has changed. Finally conclusions are drawn and areas for future research are identified.

Literature Review

Litigation against valuers seems to fall into two main themes, that which relates to human error such as reliance on inappropriate sales evidence, poor analysis of sales evidence, failure to adequately inspect the property, use of incorrect methodology or improperly applied methodology; and that which relates to valuation accuracy and may be impacted by the economic cycles.

The predominant themes which are evident in the academic literature pertaining to valuation negligence are the establishment of a link between valuation litigation and the economic cycles with a noticeable spike in valuation negligence actions arising at the end of a period of economic prosperity; and valuation accuracy and an acceptable 'margin of error' to be applied in valuation litigation.

Negligence litigation and economic cycles

There appears to be a correlation between the economic cycles and litigation against valuers for negligently performed valuations with an increase in the number of disputes occurring immediately following a downturn in the market. This may well be due to financiers not being able to liquidate the asset for the figure specified in the valuation following a mortgagee in possession action. This proposition is supported by Murdoch (2001) who has drawn the correlation between the economic cycle and litigation with property valuers based on data from UK and Australia. More specifically Murdoch refers to litigation which results from loan transactions based on property valuations undertaken during more buoyant times.

Lavers (2001) draws the distinction between the two types of negligence claims. Firstly, in periods of economic buoyancy followed by a period of sharp and possibly extended decline there will be a wave of similar claims. Lavers notes that this proposition is supported by Connell (1990), Evans (1993) and Crosby et al (1998b). Secondly, there are the more routine claims which are unrelated to market cycles and occur as a result of human error. This may be due to a variety of poor practices including pressure from the client to reach a certain valuation figure.

Murdoch (2001) further comments that it is rare for the lender to seek to claim against the valuer for failure to recognize the changing market conditions. It is more common that litigation is initiated against valuers for some other negligent action. Joyce and Sharpe (1997) made comment that during the buoyant periods of the 1980's valuers who 'cut corners' found themselves being pursued by financiers and developers. Further, even those valuers who had not cut corners 'found themselves on the receiving end of litigation as lenders and developers looked for scapegoat' (Joyce and Sharpe, 1997 at page 559).

The reality of valuation work is that clients rely on valuations to support their entry into property transactions. According to Lavers (2001) when clients seek to recoup or at least partly offset their losses sustained in transactions, property valuers represent a target due to their professional indemnity insurance, irrespective of whether they bear any responsibility morally for that loss. Although the topic of professional ethics in this era of rapid social change has also come under some scrutiny by writers such as the Kirby (1997) in relation to ethics in the legal profession, the reality is that for valuers there is not only a sense of professional responsibility towards the client to resolve the dispute but also the reputation of the firm to protect.

Interestingly, unless specifically instructed by the client the valuer is engaged to undertake the valuation on the basis of the fair market value as defined by the International Valuation Standards as at the date of valuation. It was determined in *Banque Bruxelles Lambert SA v Eagle Star Insurance*¹ that the valuer is under no obligation to inform the client on any further movements in property values or any obligation to provide commentary on what may be the 'worst case scenario' (Christensen and Duncan, 2004).

The extent to which the valuer should be accountable for the overall risks of the clients was also explored by Lee (1996) and Murdoch (2001). Murdoch (2001) provided a commentary and reconciliation of the United Kingdom as against the Australian position on this matter. The United Kingdom has taken a fundamentally different approach from that of Australian Courts.

¹ *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375

In the UK decision of *South Australia Asset Management Corporation v York Montague Ltd*² the House of Lords sought to limit the liability of the valuer by finding that the valuer was not responsible for the lender's additional losses as a result of the fall in the property market. The valuer was only responsible for the loss suffered as a result of the valuation being wrong but not for the entire loss suffered by the financier as a result of a downturn in the property market. The justification for this outcome is that loss suffered as a result of a downturn in the property market is a risk that the financier would bear as part of his normal business of lending money for property transactions.

The Australian courts have taken a fundamentally different approach as can be seen in the case of *Kenny & Good Pty Ltd v MGICA*. On appeal to the High Court it was considered that the valuer was liable for the full extent of loss of the financier and mortgage insurer including the loss that resulted from the downturn in the property market. This is because it is considered that the financier would not have entered into the transaction but for the valuers negligent advice. The outcome of this case has been criticized by some writers such as Murdoch (2001) on the basis that the lender is likely to have suffered a loss as a result of the downturn in the property market even if the property had been worth as much as the valuation stated.

Valuation accuracy

Property valuers are widely regarded as professionals as opposed agents acting on behalf of their clients. Consistent with the ethical standards required of any professional, valuers are required to use reasonable care and skill in arriving at the market value of the property. The standard required by valuers has been determined to be that which is acceptable according to peer opinion by virtue of Section 22 of the *Civil Liability Act 2003* (Qld). The fact that there may be variance of opinion as to the value of a property does not mean that the valuer has been in breach of this duty. This was confirmed in *Baxter v FW Gapp & Co Ltd*³ when Goddard LJ made the following observations:

We are all liable to make mistakes, and a valuer is certainly not to be found guilty of negligence merely because his valuation turns out to be wrong. He may have taken too optimistic or too pessimistic a view of a particular property. One has to bear in mind that, in matters of valuation, matters of opinion must come very largely into account.

Similarly, it is noted in *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners*⁴ (in Crosby et al) that a level of variation in value is tolerable. Lord Denning MR goes on to further make comment:

Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.

² *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191

³ *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER at 457

⁴ *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99

There is substantial UK case law to support the view that the method as opposed to the result is most highly scrutinized such as *UCB Home Loans Corporation Ltd v Roger North & Associates*⁵, *Singer & Friedlander Ltd v John D Wood & Co*⁶, and *Zubaida v Hargreaves*⁷.

It is noted by Crosby et al (1998) that despite these judicial comments relating to the method the valuer employs and the context of the valuation there is still seemingly a judicial recognition of the link between the outcome of the valuation and negligence. More specifically anything that is outside the tolerable limits of the valuation figure will be seen as negligent. The size of the bracket of tolerance has also been the subject of much judicial discussion. In *Singer & Friedlander Ltd v John D wood & Co*⁸ the tolerable margin of error was considered to be 10% with the possibility that this may be extended in exceptional circumstances to 15%. There is significant judicial precedent to support a figure of around 10% with a higher variation being acceptable depending on the context of the valuation.

The level of potential variation in the market value of a property has resulted in considerable attention by academic writers on the topic of variation in value and valuation accuracy. Parker (1998) has defined valuation accuracy to be the 'proximity of a valuation (or prediction of the most likely selling price, often being an expectational assessment) to market price (or the recorded consideration paid for a property, being a current time or actual assessment)'. Boyd and Irons (2002) have further considered the concepts of valuation accuracy and negligence. Specifically, the study undertaken by Boyd and Irons scrutinized the case of *Interchase Corporation Ltd v ACN 010087573 Pty Ltd*⁹ which was appealed from the Queensland Supreme Court to the Queensland Court of Appeal which upheld the decision of the Supreme Court involving the valuation of the Myer Centre in Brisbane. At the time of the valuation of the Myer Centre the property was considered to be quite unique with a lack of comparable market evidence. The case involved the valuation of the Myer centre and the degree of variation by valuers engaged to value the property. Despite the significant variation between the valuers end value for the Myer Centre property the courts in this case looked not to the range of figures to determine negligence but rather to the valuers performances based on their reports and evidence presented to the court.

Similarly Parker (1998) has undertaken a case study into the accuracy of the valuations of a portfolio of investment properties held by an Australian Institutional investor which were for sale by tender closing November 1995. This was a case involving simultaneous valuation and transaction for 7 of the properties in the portfolio. In addition, the valuations did not inform the transacted sale amount which was determined through open market competition. The outcome of the case study was that there was a considerable range of accuracy from 8.8% above market value to 14.3% below. Only 15% of the valuations reviewed were accurate to within 5% of the transacted market value of the property.

Whilst valuation inaccuracy may not be acceptable to the end user of the valuation report, Parker (1998) notes that the literature supports the fact that valuation inaccuracy is a

⁵ *UCB Home Loans Corporation Ltd v Roger North & Associates* [1995] EGCS 149

⁶ *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84

⁷ *Zubaida v Hargreaves* [1995] 1 EGLR 127

⁸ *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84

⁹ *Interchase Corporation Ltd v ACN 010087573 Pty Ltd* [2000] QSC 13

fundamental feature of valuation practice with a 5% to 15% variation in value generally accepted by the courts according to court precedent. Similarly Crosby et al (1998) identified a bracket of 10-15% of value variation which is generally considered acceptable to the courts in the United Kingdom. The concept of an acceptable level of value variation was initially introduced by valuers acting as expert witnesses and most notably was introduced in the case of *Singer & Friedlander Ltd v John D Wood & Co*¹⁰. It is noted by Crosby et al (1998) that the notion of an acceptable margin of error by courts in the United Kingdom is lacking in an empirical basis and runs counter to available evidence.

The significance of the margin of error bracket is noted by Crosby et al (1998) in that it is most commonly relied upon in valuation negligence litigation and may in fact be valued above the method and context of the valuation in determining the negligence of the valuer. It is noted in *Mount Banking Corporation Ltd v Brian Cooper & Co*¹¹ with the following comments by the Deputy Judge:

If the valuation has been reached cannot be impeached as a total, then however erroneous the method or its application by which the valuation has been reached, no loss has been sustained because.... It was a proper valuation.

Bretten and Wyatt (2000) undertook an empirical study in the United Kingdom into variance in commercial property valuations for lending purposes found that the main cause of variation in valuation was attributable to individual valuer 'behavioural influences'. The study also concluded that parties to a valuation instruction widely accepted the principle of a tolerable margin of error as a test of negligence. Interestingly it is also noted by Bretten and Wyatt (2000) that valuers do not operate from a platform of perfect market knowledge. They rely on external influences such as client instructions and various pressures which influence the end valuation figure. The results of the survey undertaken by Bretten and Wyatt (2000) showed that 60% of the valuers surveyed agreed that they would increase their valuation figure if external parties exerted pressure on them to do so. Similarly Gallimore and Wolverton (2000) also considered the influence of client feedback on valuation accuracy.

Reforms to torts law

The Valuer is an independent professional who potentially has liability in tort, contract and under the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)). However, this paper is limited to an analysis of the reforms to the area of torts law, in particular recent statutory reforms.

Torts law was once firmly in the domain of the common law. However, the landscape of torts has changed in Australia with the introduction of Civil Liabilities legislation (*Civil Liabilities Act 2003* Qld) in Australia in response to the *Review of the Law of Negligence Final Report 2002* ("the IPP Report"). In addition to documenting the standard of care required by a professional the most notable impact of the Queensland *Civil Liabilities Act 2003* is the introduction of proportionate liability provisions (part 2 of the Act). Valuers would be classified as a

¹⁰ *Singer & Friedlander Ltd v John Wood & Co* [1977] 2 EGLR 84

¹¹ *Mount Banking Corporation Ltd v Brian Cooper & Co* [1992] 2 EGLR 142

'professional' under Section 20 of the *Civil Liability Act 2003* (Qld) in that they are a 'person practicing in profession'.

According to the then Queensland Attorney General, the proportionate liability provisions were introduced 'in response to the concerns raised by professional bodies about excessive professional indemnity premiums and the potential for unlimited liability for large claims' (Wellford, 2003). The Australian Property Institute has further introduced a capped liability scheme under the respective Professional Standards Act for the various states of Australia (*Professional Standards Act 2004* Qld).

The proportionate liability provision of the *Civil Liabilities Act 2003* (Qld) will in fact seek to apportion liability among contributing parties to an event or concurrent wrongdoers with a tortfeasor only being liable to the extent that they contributed to the overall damage. These provisions seek to correct the former situation where the tortfeasor would be entirely liable for the damage suffered as a result of negligence even if they were not wholly responsible for the loss of the plaintiff. In effect where there are two or more concurrent wrongdoers the plaintiff is now barred from recovering 100% of their loss from any one wrongdoer. Section 7(3) of the Act prevents parties from 'contracting out' of the proportionate liability provisions. This is a significant change to valuation litigation and may have a significant influence on the quantity of negligence actions against valuers and the quantum of damages awarded in any given negligence litigation.

The *Civil Liabilities Act 2003* (Qld) also outlines the standard of care required of a practicing professional which is essentially an embodiment of the common law. The standard is essentially determined by what would be deemed to be widely accepted according to peer professional opinion (Section 22(1)). However, where the court considers it to be inappropriate to rely on peer professional opinion because it is 'irrational or contrary to written law' then the court need not rely on peer professional opinion (Section 22(2)).

The situation may arise that although the valuer is found to be negligent, losses that have been sustained through the property transaction are largely due to the conduct of the client. Where this has been established the valuer can invoke the contributory negligence sections of the *Civil Liabilities Act* (Sections 23 and 24). It may be that the claim against the valuer is defeated entirely and the client is found to be 100% responsible for their own losses despite any negligence on the part of the valuer.

Recent Case Law

Since the introduction of torts reforms in Australia there have been a substantial number of cases of litigation against valuers for negligence. Not surprisingly much of the litigation follows similar historical themes as seen prior to the statutory reform. The issue of an acceptable margin of error in valuation figures when considering whether there was a failure by a valuer to exercise reasonable skill and care was addressed in the case of *Genworth Financial Mortgage Insurance v Hodder Rook & Associates*¹². The decision in this case provides further support for the notion of an acceptable range or 'bracket' in terms of valuation accuracy. There was an

¹² *Genworth Financial Mortgage Insurance v Hodder Rook & Associates* [2010] NSWSC 1043

obvious connection in the decision by Einstein J between the value being outside of the acceptable 'bracket' and negligence by the valuer as opposed to a critical analysis of the valuation methodology and method adopted by the valuer. Einstein J made the comment, '

*On the evidence, the Hodder Rook valuation exceeded the upper end of the acceptable range of opinion by a little more than 10% and the lower by more than 26%. I accept that this is sufficient to allow the Court to conclude that the valuation was negligent.*¹³

The *Genworth Financial Mortgage Insurance* case also addressed the issue of duty of care and the extension of that duty to a party who was not a party to the contract for valuation services i.e., the mortgage insurance provider. This case followed the precedent established in *Kestrel Holdings Pty Ltd v APF Properties*¹⁴ where it was established that a duty may exist outside a contractual relationship to a third party who has relied upon the valuation. In this case Gray, Mansfield and Tracey JJ stated,

A duty of care is recognized to exist where the valuer actually knows or ought to have known that the person in question would rely upon the valuation so prepared. In respect of the objective limb of that formulation, it is noted that subjective knowledge of the particular recipient or purpose to which the valuation would be put is not relevant. In addition, there is the further requirement that a finding of a duty of care be reasonable in all the circumstances. Accordingly, the subjective knowledge, actual or potential, of the valuer is a relevant consideration in determining reasonableness.

Further the position regarding mortgage insurance and valuers was addressed in *Kenny & Good Pty Ltd v MGICA*¹⁵ when the clarification was made that despite the contract being specifically between the valuer and the bank and the insurer, MGICA, was not a party to that contract. However, MuHugh J stated,

the scope of the duty of care which the appellant owed to MGICA is identical with the contractual duty which the appellant owed to the Bank and which is to be deduced from the terms of the contractual arrangement entered into by those parties. That is because the contract specifically contemplated MGICA as a party which was entitled to rely on the valuation.

There is little doubt that the introduction of proportionate liability laws should reduce excessive compensation payments for valuers who are found negligent due to the correction of some of the inequities surrounding joint and several liability. The impact of proportionate liability is clear with successful apportionment of liability for damage suffered in *Genworth Financial Mortgage Insurance v Hodder Rook & Associates*¹⁶ In the case of *Solak v Bank of Western Australia Ltd & Ors*¹⁷ the issue of apportionment of liability was considered by the Victorian Supreme Court in view of the fact that one of the wrongdoers had acted fraudulently. In this case the fraudulent

¹³ *Genworth Financial Mortgage Insurance v Hodder Rook & Associates* [2010]NSW 1043

¹⁴ *Kestrel Holdings v APF Properties* [2009] FCAFV 144

¹⁵ *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413

¹⁶ *Genworth Financial Mortgage Insurance v Hodder Rook & Associates* [2010] NSWSC 1043

¹⁷ *Solak v Bank of Western Australia Ltd & Ors* [2009] VSC 82

party was held responsible for 50% of the loss. This was despite the fraudulent party's overwhelming moral blameworthiness for the overall loss. It was noted by in the Court that,

The fraudster's portion of liability would swamp that of the others if moral blameworthiness were the overriding criteria to determine apportionment. However, it seems to me that the primary focus of the apportionment provisions is not to give expression to moral sanction but to apportion as between operative causes.

In the cases of *Ginelle Finance Pty Ltd v Diakakis*¹⁸ and *Chandra v Perpetual Trustees Victoria Ltd*¹⁹ that a significantly higher proportion of responsibility was allocated to the fraudster. It is noted that the higher the proportionate responsibility to the fraudster the more difficulty the plaintiff may have in receiving compensation for their loss.

There appears to be an inconsistency with how proportionate liability has been applied by the courts in Australia. An attempt to rely on proportionate liability laws by a valuer to reduce their contribution to compensation was rejected by the Victorian Supreme Court of Appeal in *St George Bank Limited v Quinerts Pty Ltd*²⁰ In this case Quinerts (the valuer) was held to be wholly liable for the loss of the lender. The valuer has sought to have liability apportioned to the borrower and the guarantor on the basis that they were concurrent wrongdoers. However, the court held that they were not concurrent wrongdoers and consequently no liability was apportioned to them. Further, the court clarified that apportionment is available where two or more wrongdoers have contributed to the same damage. In this instance the valuers and borrowers and guarantors did not contribute to the same damage being that of the negligently prepared valuation which lead the lenders to make the loan or at least lend more than they otherwise would have. The borrowers and the guarantors did not participate in this action. The failure by the borrower and guarantor to repay the loan amount was not connected with the granting of the loan.

Conclusions

The law of torts, once solely within the realm of the common law, has been reformed by the introduction of Civil Liabilities Acts in each state of Australia. The *Civil Liabilities Act* 2003 (Qld) sets out the standard of care required of professionals as being that which would be deemed acceptable according to peer professional opinion. The notion of an acceptable 'bracket' for a valuation figure in determining whether a valuer has met the requisite standard of care seems to be firmly entrenched in the Australian case law and seems to be held in greater consideration than the methodology adopted by the valuer of the application of that chosen methodology.

Contributory negligence is also outlined in the Act and can completely defeat a claim against a valuer for compensation for negligence. Whilst these provisions are significant the most significant introduction with the Civil Liabilities Acts has been the introduction of proportionate liability laws. This sought to correct some of the inequity associated with joint and several liability for professionals to limit liability for large claims where the wrongdoer may not be solely responsible for the loss of the plaintiff.

¹⁸ *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60

¹⁹ *Chandra v Perpetual Trustees Victoria Ltd* [2007] NSWSC 694

²⁰ *St George Bank Ltd v Quinerts* [2009] VSCA 245

The introduction of proportionate liability laws in Australia are still relatively recent and it may take some time to see trends in the application of these laws to valuation disputes. Some decisions have been favourable to the lender and against the valuer such as is seen in *St George Bank Ltd v Quinerts*²¹. Other decisions such as *Solak v Bank of Western Australia Ltd & Ors*²², *Ginelle Finance Pty Ltd v Diakakis*²³ and *Chandra v Perpetual Trustees Victoria Ltd*²⁴ are more favourable to the valuer but may result in the plaintiff (lender) experiencing difficulty in attaining compensation.

Whilst the introduction of proportionate liability provisions are significant in limiting liability of professionals the Australian Property Institute has also introduced a capped liability scheme through the *Professional Standards Act 2004* (Qld). However these measures limit the professional liability for valuers, there is a strong argument for increased professionalism and ethical standards for valuers.

The writing of this paper has identified several areas that are worthy of further academic investigation and research. Firstly there is considerable academic commentary on the link between economic cycles and valuation litigation with a spike in valuation litigation immediately following an extended period of economic up turn. Whilst this statement appears to intuitively be accurate there is little academic empirical research to support this proposition. Further analysis of the link between economic cycles and valuation litigation is required.

When considering the valuation litigation case law the conduct of the valuer in undertaking the valuation is closely scrutinized to determine whether the valuer has breached the requisite standard of care owed to the client in undertaking the valuation. Whilst it is necessary to determine the conduct of the valuer to an objective standard, the notion of the influence of the client in the valuation process and in particular the client expectation of the of the valuation outcome and the influence that this has on valuer behaviour would be worthy of further academic consideration.

²¹ *St George Bank Ltd v Quinerts* [2009] VSCA 245

²² *Solak v Bank of Western Australia Ltd & Ors* [2009] VSC 82

²³ *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60

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