

expert update

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With the benefit of hindsight

*Australian Executor Trustees Limited v Propell National Valuers (WA) Pty Ltd
(18 May 2011) [2011] FCA 522*

When real estate is offered as security for a loan, banks and finance companies often require a report by a property valuer as to the estimated value of the property being offered.

In this case, a firm of valuers prepared a report on behalf of a client stating that the estimated market value of a given property was \$1.6m as at 3 April 2007. The report stated that it could be relied on in assessing the property as security.

Having regard to the report, a loan for \$1.2m (75% of the estimated value) was advanced to the valuer's client, but shortly thereafter the loan went into default and the client became bankrupt. The mortgagee entered into possession and the property was sold at auction in February 2010 for \$0.98m.

Claims were made by the mortgagee against the valuer under the Trade Practices Act that (amongst other issues) representations about the value of the property were false, or incorrect, and not based on a reasonable degree of professional skill and care.

The mortgagee called a valuer, Mr H, to provide expert evidence regarding the value of the property at 3 April 2007, being the time the defendant assessed the value to be \$1.6m. Having regard to sales evidence before April 2007, Mr H considered the market value to be \$1m and that the original value by the defendant was excessive.

The defendant disputed the claims and engaged Mr K, who suggested a value of \$1.475m having regard to sales evidence of 13 other properties, two of which were in the months before April 2007 and 11 after April 2007.

A key point of difference between the experts was whether, subject to there being no supervening events which altered the conditions previously existing, it was permissible to have regard to sales that occurred after the valuation date in expressing an opinion on what the property was worth.

Justice Barker found that, in determining whether or not a competent valuer could have produced a particular value on the available sales evidence at a particular point in time, the task was to be conducted without hindsight.

*Hindsight is always
20/20, but not
always relevant*



Comment

This case highlights circumstances when it may not be permissible for an expert to take account of subsequent events in forming an opinion.

This does not mean that hindsight has no relevance in all matters. For instance, subsequent events may be considered in an assessment of loss at a point in time if the subsequent events help shed light on the value of an item at the earlier point in time. As an example, the takings of a business after its purchase might be relevant if they help clarify representations concerning the business or its value at the date of purchase, subject to allowance being made for changes in the business and unexpected impacts (ie: unforeseen competition).

Experts and their instructing solicitors need to be careful when considering the relevance of subsequent events in a matter. Distinctions may also need to be drawn between events that followed inherently from the conditions previously existing, and those which were independent or extraneous from the matter.

In this case, subsequent property sales had no relevance in determining whether the valuer, having regard to comparable sales evidence at the date of valuation, was negligent or breached section 52 of the Trade Practices Act.



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