

Case Alert

Shaping the future of insurance law

NSW Court of Appeal provides guidance on limitation periods for actions against valuers

Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Limited [No. 2] [2020] NSWCA 81

5 MAY 2020

AT A GLANCE

- Wotton + Kearney acted for a valuation firm in proceedings commenced in the Supreme Court of NSW regarding its valuation of a property at Wallalong, NSW. The valuers asserted a limitation defence and successfully applied to have that defence determined as a separate question. The hearing of the separate question was removed to the NSW Court of Appeal.
- The NSW Court of Appeal answered the separate question in favour of the valuer and dismissed the proceedings on the basis that the lender's actions in negligence and misleading or deceptive conduct were statute barred.
- For insurers and their insureds, this decision provides appellate court guidance on when a cause of action accrues against a valuer. The lender's causes of action were held to have accrued when it became clear that the lender could not recoup the amount advanced under the mortgage from the sale of the mortgaged property, regardless of the existence of personal covenants that could provide an alternative avenue of recovery.

OVERVIEW

On 14 June 2018, a lender commenced proceedings against a valuation firm (the valuer) in the Supreme Court of NSW seeking damages for professional negligence and statutory breaches regarding a valuation of a property at Wallalong, NSW (the property). Wotton + Kearney acted for the valuer.

The property was valued for mortgage lending purposes at \$7,450,000, against which the lender lent the sum of \$3,073,000 to an individual borrower. On 23 May 2012, after the borrower defaulted on the loan, the lender exercised its rights

under the mortgage and entered into a contract for the sale of the property for \$1,250,000.

The valuer raised a limitation defence and successfully applied to have it determined as a separate question. The separate question raised a discrete question of law which, if answered in its favour, would resolve the proceedings entirely. The determination of the separate question was removed to the NSW Court of Appeal.

THE ISSUE

The separate question for determination by the NSW Court of Appeal was:

“Did the plaintiff sustain loss or damage for the purpose of its claims against the defendant by the time of entering into the contract for the sale of the property on 23 May 2012 with the consequence that the plaintiff’s claim was statute barred?”¹

The valuer argued that the lender’s causes of action accrued when it became clear that the lender could not recoup the amount advanced under the mortgage from the sale of the property. The lender contended that any cause of action will only arise when it is ascertained, or reasonably ascertainable, that the moneys advanced (or the balance) cannot be recouped from the borrower under a personal covenant in or implied into the mortgage, or in loan documentation associated with the mortgage.

This issue was critical because the sale of the mortgaged property, for an amount significantly less than both the valuation and the moneys advanced, occurred more than six years before the proceedings against the valuer were commenced.

THE DECISION

On 30 April 2020, the NSW Court of Appeal answered the separate question in the affirmative in favour of the valuer and dismissed the proceedings with costs.² In particular, the NSW Court of Appeal held that:

“The very purpose for which the mortgage security was obtained was defeated by no later than when the sale of the mortgaged property yielded an amount significantly less than that for which the property had been valued.”³

The NSW Court of Appeal considered relevant High Court authorities⁴ and found that:

- Those authorities establish a link between the timing of the accrual of the cause of action and the nature of the interest infringed.⁵
- In this case, the “risk that called the valuer’s duty into existence” (i.e. that recoupment of the secured moneys out of the proceeds of sale of the mortgaged property would be inadequate) “materialised when the sale of the property yielded significantly less than the amount advanced against the mortgage”.⁶
- Put another way, the nature of the interest infringed by the valuer’s alleged negligence was found to be the mortgagee’s ability to recoup the moneys advanced by way of loan⁷ from the proceeds of sale of the mortgaged property.
- Once the lender had lost the opportunity to recover the full balance of the loan against the secured property, the cause of action against the valuer accrued.

The NSW Court of Appeal rejected the lender’s contention that its causes of action did not accrue until it became “reasonably ascertainable” that the borrower could not repay the debt under personal covenants contained in the loan documentation.⁸ The NSW Court of Appeal held that any prospect of recovering moneys subsequent to the sale of the mortgaged property from the borrower under the personal covenant did not affect the question of time at which the lenders cause(s) of action against the valuer accrued, but rather was relevant to quantum, loss and mitigation of damage.⁹

In doing so, the NSW Court of Appeal held that any loss suffered by the lender due to the alleged negligence and or misleading conduct of the valuer was suffered at least by the time the secured property proved inadequate, on its sale, to recoup the totality of the loan. Accordingly, the causes of action against the valuer arose no later than the time the mortgaged property was sold on 23 May 2012.¹⁰

¹ *Todd Hadley Pty Limited v Lake Maintenance (NSW) Pty Limited* [No. 2] [2020] NSWCA 81 (Judgment), at [3].

² Judgment at [89]-[90].

³ Judgment at [7].

⁴ *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; *Kenny & Good Pty Ltd v MGICA* (1992) Ltd (1999) 199 CLR 413; [1999] HCA 25; *Hunt v Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10.

⁵ Judgment at [68].

⁶ Judgment at [8].

⁷ Judgment at [69].

⁸ Judgment at [59].

⁹ Judgment at [11], [69]-[70], [77].

¹⁰ Judgment at [6]-[10], [68]-[69], [79].

IMPLICATIONS FOR INSURERS

As a general proposition, the very purpose for which a mortgage security is obtained is defeated when a sale of mortgaged property yields an amount significantly less than the valuation of the property. Once a lender loses the opportunity to recover the full balance of a loan against a secured asset, that lender has suffered “actual damage” and a cause of action in negligence or misleading or deceptive conduct against the valuer of that property accrues no later than the date of the sale of the secured property.

This decision provides important guidance on the accrual of causes of action against valuers regarding allegedly deficient valuations. It may provide opportunities for insurers and their insureds to resist proceedings commenced out of time and potentially avoid significant legal costs and damages.

For a detailed discussion on the Courts’ discretion to determine the limitation defence as a separate question please see our previous [article](#).

NEED TO KNOW MORE?

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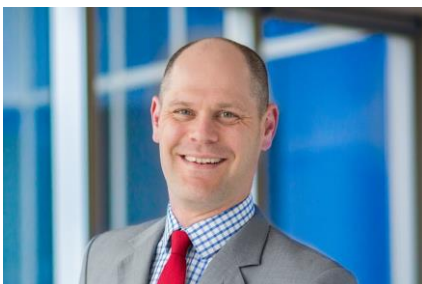


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