



BATES
& ASSOCIATES LIMITED

PETER BATES
AUT LAW SCHOOL OCTOBER 2014

EDUCATIONAL PRESENTATION
GIVEN WITHOUT LIABILITY
THIS IS NEITHER LEGAL NOR VALUATION
ADVICE

INTRODUCTION

PETER BATES

Bates & Associates Limited – Consultant and Registered Valuer:

- ❖ forensic valuations, and;
- ❖ peer review.

Baker Law - Barrister, Solicitor and Arbitrator:

- ❖ commercial law, wills, trusts, property law, asset protection;
- ❖ consulting solicitor (to assist an existing litigation team), and;
- ❖ valuation arbitration.

Do not act as Valuer (impartial) and Lawyer (advocate) in the same matter as these are different roles and undertaken by different entities.

WARM UPS

Time to get you thinking about SAAMCo!

Please give your ideas and answers:

- ❖ What is a “cushion”?
- ❖ What is the Doctor analogy (knee and mountaineering)?
- ❖ Do you know the “3 Cs of finance”?
- ❖ Looking at the three cases considered by Lord Hoffmann – which of these “3Cs” were informed by the valuers, and to what extent?
- ❖ Is market value static?
- ❖ Is yield static?
- ❖ Who knows this?
- ❖ ***What trends are happening here?***

WHAT IS A VALUATION?

- ❖ Report?
- ❖ More than just a value?
- ❖ Purpose – relevant?
- ❖ Insurance replacement estimate and “sum insured”
- ❖ Statutory purpose (Public Works, Rating, PLA, UTA, etc)
- ❖ Rental
- ❖ Mortgage valuation purpose
- ❖ Relationship settlement
- ❖ Forensic
- ❖ Budgeting and forecasting
- ❖ Other: contracts (such as property sharing), boundary realignments etc

WHAT IS “MARKET VALUE”?

Defined as:

“The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing, wherein the parties had each acted knowledgeably, prudently and without compulsion.”

Concepts Fundamental to GAVP 5.2 ANZ Valuation and Property Standards

This definition has been adopted by the Property Institute of New Zealand (PINZ) and is in accordance with the International Valuation Standards Committee (IVSC) definition of market value.

Also see: *Spenser v The Commonwealth 1907*

CHANGES TO VALUE?

- ❖ Condition of the property
- ❖ Local market factors (house next door now blocks view or motor car racing, state housing, etc)
- ❖ In 2001 the Nobel Prize in Economics was awarded to George Akerlof, Michael Spence and Joseph E. Stiglitz for their "analyses of markets with asymmetric information"
- ❖ Economy and wider market fluctuations
- ❖ Law (language schools), zoning, taxes, etc
- ❖ "Highest and best use" can change values significantly (subdivision blocks especially)

MORTGAGE PURPOSES

Current Practice

- ❖ Known or foreseeable factors for the nature of the security (land) – such as market fluctuations
- ❖ Default, selling and legal costs, R&M, risk of holding
- ❖ Mortgage recommendation / cautions
- ❖ The Fletchers Case “previously unoccupied homes” (must state two market values: *Relicensing NZ Ltd*)
- ❖ Incentives and other arrangements
- ❖ Assumptions – make clear and qualify
- ❖ Stay within field of expertise (development costs?)

WHEN IT GOES WRONG

- ❖ Valuer Credibility
 - ❖ Client - contributory negligence
 - ❖ Third party reliance - contributory negligence
 - ❖ Lawyers
 - ❖ Professional Indemnity Insurer
-
- ❖ Sometimes you might get it wrong – then what?
 - ❖ How should we deal with this in our processes?
 - ❖ Contract, Section 4 of the Contracts (Privity) Act 1982, Tort... what is the source of obligation and what is it's scope (consider *BNZ v NZGT*)?

WHEN IT GOES WRONG THEY SUE!

“The collapse in the property market which accompanied the recession at the beginning of the present decade caused mortgage lenders to suffer serious losses. Unable to recover their advances from the borrowers or by the enforcement of their security they have sought to recover them from the valuers or solicitors on whose valuations or advice they have relied.

In some cases they have been the victims of a fraud to which the valuers and solicitors have been parties. In other cases, such as the present, they have been unable to accuse their solicitor of anything more serious than negligence.”

Bristol and West Building Society v. Mothew (C.A.) per Millett L.J. (pp 438-439)

TRENDS FROM BNZ V NZGT

“In any society individual members should be able to place reliance on others in certain circumstances. The laws which govern individual **obligations** determine what reliance people can place on others in a variety of situations.

The same laws delineate what remedies are available in the case of a breach of such obligations. A breach occurs if what the plaintiff is entitled to expect from the defendant is not forthcoming. A party to a contractual relationship is entitled to expect the other party to perform the contract. A party in a relationship of sufficient proximity with another is generally entitled to expect that other to take reasonable care. A party with whom another is in a fiduciary relationship is entitled to expect fidelity and loyalty from the fiduciary. Examples could be multiplied.

Historically the law has tended to place emphasis on the classification of the relationship giving rise to the obligation. **But more recently, for certain purposes at least, there has been a shift of emphasis from the classification to the nature of the obligation, or duty,** as it is usually called. Thus the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the particular classification or historical source of that duty. What matters is not so much the historical source, be it equity or the common law, fiduciary duty or tort, but **rather the nature and content of the obligation which has not been fulfilled.**” (pp 686-687 per Tipping J) [emphasis added]

ABOUT SAAMCO (FROM BNZ V NZGT)

“As in many areas of the law, judgment is called for in the application of broadly-stated concepts, drawing upon decisions in analogous cases.

Recent cases show a trend in favour of analysis by reference to the scope of the duty, and inquire as to the risks against which there was a duty to protect the plaintiff. In *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 the House of Lords approached in this way a case of breach of a contractual duty of care while noting that the concurrent duty in tort was of the same scope. In the speech of Lord Hoffmann, with whom the other members agreed, it was said that ***the real question in such a case is the kind of loss in respect of which the duty is owed.*** To some extent this is merely to restate the question asking ***what losses is it reasonable that the law should require the wrongdoer to compensate,*** but it is a helpful analytical approach as illustrated in the instructive treatment in Todd, *The Law of Torts in New Zealand* (2nd ed, 1997) at para 20.3.

The scope of a duty to inform, or inform correctly, has not commonly been found to extend to protect against losses arising from some independent cause where breach of the duty merely creates or preserves the circumstances in which that loss can be incurred. The *South Australia Asset Management* case concerned a negligent valuation of a property, the plaintiff having lent money on the security of that property in reliance on that valuation.

Lord Hoffmann pointed out that the scope and purpose of a duty to advise or inform may be either to provide information for the purpose of enabling someone else to decide on a course of action, or to advise someone on what course of action to take. Only in the second case would the adviser be responsible and liable for all the consequences flowing from that course of action, such as the fall in the property market which affected the value of the security in that case. It was held that the valuer's duty was of the first kind, and accordingly liability extended only to the consequences of the valuation being wrong.” [emphasis added]



ANY QUESTIONS?

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