



Failure to make proper enquiries about serviceability costs 25%

In the Federal Court decision of *Angus Securities Limited & Ors. V. Valcorp Australia Pty Ltd*, a broker has been found to have contributed to loss sustained when a loan went into default and a property was sold below the amount of the loan.

The applicants conducted a mortgage lending business and the respondent was the Valuer who had been retained to value the property to be security for the loan by the applicants.

The valuation was \$3.6M with an allowance for a forced sale value at a reduced value of \$3.2M. Following default, the property was sold for \$1.75M.

The Court found that the applicants relied on the valuation report in entering into the transaction, to advance the sum of \$2.8M representing 80% of the valuation to the borrowers. Upon trial, the Court found that the valuation had been prepared negligently and in contravention of s. 52 of the *Trade Practices Act* and s.56 of the *Trade Practices Act* (South Australia).

However, the Applicants were found guilty of 25% contributory negligence because they failed to make proper enquiries about the borrower's ability to service the loan. In fact, it was a condition of the loan that servicing capacity be established, but it was found that the lender failed to follow its own operations manual for determining serviceability and had failed to make enquiry of the previous lender.

In addition, the Applicants were entitled to recover loss of opportunity damages and interest.

This decision reinforces the need for all lenders to properly conduct their enquiries about borrower's ability to service the loan, and to specifically follow and apply proper process and procedure, and any manuals.

A failure to do so may lead to the court finding that they have caused or contributed towards their own loss.

For more information on reviewing your existing policies and procedures in order to minimise the risk of any claims for contribution in matters of this nature or other areas of finance & banking email us at info@msslawyers.com.au or visit our website www.msslawyers.com.au. Alternatively, contact our professional team at our Gold Coast or Brisbane office.



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