NEGLIGENT VALUERS' LIABILITY FOR MARKET LOSSES IN THE UK AND AUSTRALIA

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Abstract

This paper addresses the legal liability of valuers to mortgage lenders for professional negligence, in cases where the property market has fallen subsequent to the date of the mortgage loan. The question of whether the valuer should be responsible for the lender's additional losses attributable to the fall in the property market has been considered by the highest courts in both the UK and Australia. In *South Australia Asset Management Corporation v York Montague Ltd* (1996) (also referred to as *BBL*), the English House of Lords laid down a principle that was intended to limit the valuer's liability in this respect. However, that principle was apparently rejected by the High Court of Australia in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999).

This paper critically analyses the cases, decided in both the UK and Australia, in which this problem has been addressed. It considers the weaknesses of the *South Australia/BBL* principle as demonstrated in subsequent cases concerning contributory negligence, limitation of actions and the award of interest on damages. It examines the methods of assessing damages in this context that have been put forward and demonstrates how each of these proposed methods reacts to variables in the degree of valuation error, the loan-to-value ratio adopted by the lender and the fall in the property market.

The paper concludes that the *South Australia/BBL* principle is flawed, and suggests an alternative approach which may be acceptable to courts in both the UK and Australia.

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Introduction

There is evidence to suggest that the frequency of negligence claims brought by mortgage lenders against property valuers is related to the state of the property market. Put simply, the most common scenario for litigation of this kind is a loan transaction based on a valuation of property carried out when values are buoyant, followed by a severe fall in the property market generally and in the value of the mortgaged property in particular. Previous analysis of such cases in the UK showed that the property market slump in the early 1990s was immediately followed by a considerable increase in lender-valuer disputes reaching the courts (Crosby, Lavers, Murdoch, 1998).

While detailed research into the precise causes of this phenomenon is lacking, two particular influences seem likely:

- a fall in the property market is often reflected in poor economic conditions generally, which increases the likelihood of the borrower defaulting and the lender having recourse to the security (DETR, 2000); and
- a fall in the value of the mortgaged property increases the likelihood that the lender will not be able to cover the borrower's outstanding debt by realising the security.

It is to be noted that only in rare cases does a lender seek to claim that the valuer was negligent in failing to predict the market fall. The dispute which has been taken to the highest courts in both the UK and Australia is a rather different one, namely whether, once it has been established a mortgage valuer is guilty of negligence in some other respect, the valuer should be held responsible for all the lender's losses, *including those which result from the market fall.*

In seeking to justify imposing such extensive liability, the lender will argue simply that, had it not been for the valuer's negligence, there would have been no loan and therefore no loss: it follows that the valuer has "caused" all the ensuing losses and must compensate the lender for them. The valuer's counter-argument will be that,

since lenders are in principle perfectly willing to take on the risk of fluctuations in the property market, *and do not look to valuers for protection against that risk*, the liability of an (admittedly negligent) valuer should not extend to market losses.

The basic problem may be illustrated by the following hypothetical scenario, which will reappear at various points throughout this paper.

The problem

A lending bank (L), asked to lend on the security of real property, commissions a valuation from a qualified valuer (V). V reports that the property is worth $1m and L advances $700,000 (ie 70% of the valuation). In fact, V's valuation was negligent; the true value of the property was only $600,000. When the borrower defaults, L repossesses and sells the property. However, by this time there has been a sharp fall in property values generally; the property has declined by 60% and is now worth only $240,000. L, who has suffered a capital loss of $460,000, thereupon sues V in contract and/or tort for negligence. Assuming that liability is established, the question is how damages should be assessed.

In seeking to answer this question, it is necessary first to ask another: if V had provided L with an accurate valuation (ie $600,000), would there still have been a mortgage loan, albeit a smaller one? If the answer to this question is affirmative (known as a "successful transaction" case), then the damages payable by V will be reduced by whatever loss, if any, L would have suffered on the smaller loan. The effect of this is to free V from liability for L's market losses, since these would have been suffered in any event.

In our hypothetical example, a "successful transaction" approach would be as follows. Had L been aware that the property was worth only $600,000, the mortgage loan would have been only $420,000 (ie 70 % of that value). Given that the property was resold for a mere $240,000, this would have left L with a loss of $180,000, which cannot be regarded as a result of V's negligence. L's damages would thus be assessed at $280,000, being $460,000 less $180,000.

If the answer to the above question is no (that is, that revelation of the property's true value would have resulted in no loan at all – a "no transaction" case), then a different problem arises. Should V be held responsible for L's entire capital loss (here $460,000), or would it be appropriate and/or desirable to shield V from any part of that loss? If there is to be a shield, then further questions arise as to how exactly it will operate in practice (for example whether it will simply exclude "market losses") and whether there is any existing legal mechanism which can accommodate it. These questions have, over the last five years, produced some fundamentally different answers from both judges and academic commentators.

The UK approach

The first UK case to explore these issues was *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 (commonly known as *BBL*). At trial, in the English High Court, Phillips J made clear his sympathy with the valuer's position:

> "Where a party is contemplating a commercial venture that involves a number of heads of risk and obtains professional advice in respect of one head of risk before embarking on the adventure, I do not see why negligent advice in respect of that head of risk should, in effect, make the adviser the underwriter of the entire adventure. More particularly, where the negligent advice relates to the existence or amount of some security against risk in the adventure, I do not see why the adviser should be liable for all the consequences of the adventure, whether or not the security in question would have protected against them."

This might appear to suggest that a court should seek to discover precisely what protection the "security in question" (ie a property as valuable as the valuer had stated) would or would not have given, with a view to setting limits to the valuer's liability. However, the line taken by Phillips J was rather less subtle; the judge simply excluded all losses attributable to the fall in the market (that is, the difference between the true value of the property at the date of valuation and its reduced value at the date of realisation). In our hypothetical example, V would be liable for only $100,000.

When appeals in *BBL* and five other cases were heard together, the English Court of Appeal took a very different view. The court unanimously agreed that market losses were foreseeable (and therefore not too remote); that there were no policy reasons for restricting the valuer's duty of care; and that:

> "Since the valuer's negligence caused the lender to enter into the transaction, which he would not otherwise have done and because he cannot escape from the transaction at will, we regard that negligence as the effective cause of the loss which the lender suffered as a result. The market fall cannot realistically be seen as a new intervening cause."

It followed that the valuer was responsible for all losses suffered by the lender as a result of entering into the loan transaction; $460,000 in our hypothetical example.

Of the six cases decided by the Court of Appeal under the name of *BBL*, two (though not *BBL* itself) were further appealed to the House of Lords. They were accompanied by a third appeal, that in *South Australia Asset Management Corporation v York Montague Ltd*, or *SAAMCO*, by which name the cases are generally known. The resulting decision of the House of Lords, reported at [1997] AC 191, represents the current position under English law. The controversial ruling has attracted critical commentary from a number of writers, including Dugdale (1996), McLauchlan (1997), Stapleton (1997), O'Sullivan (1998), Wightman (1998), Ilett (1999) and Dugdale (2000b).

A court seeking to exclude a certain type of loss (eg that resulting from a market fall) from the damages for which a defendant is responsible has various conceptual tools at its disposal for this purpose. It may for example declare that the loss is too remote, or that it has not been caused by the defendant's negligence (Dugdale, 2000a; Murdoch, 2000). However, the approach adopted by the House of Lords in *SAAMCO* was to focus on the scope of the valuer's duty of care, which they identified as being to take reasonable care to provide accurate information. This analysis led to the conclusion that the valuer should not be liable for losses which the lender would have suffered, even if the property had been worth as much as the valuer said. As Lord Hoffmann put it:

> "[A] person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. *He is responsible only for the consequences of the information being wrong.* A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them."

As to *why* the House of Lords regarded this approach as appropriate, some idea may be gleaned from their later decision in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [[1998] 1 All ER 305. As Lord Nicholls explained:

> "[A] defendant valuer is not liable for all the consequences which flow from the lender entering into the transaction. He is not even liable for all the foreseeable consequences. He is not liable for consequences which would have arisen even if the advice had been correct. *He is not liable for these because they are the consequences of risks the lender would have taken upon himself if the valuation advice had been sound.* As such they are not within the scope of the duty owed to the lender by the valuer."

The effect of *SAAMCO* (as derived from the actual decisions in the three cases) is clearly is that the damages which a lender is entitled to recover from a negligent valuer are subject to a "cap", equivalent to the amount by which the property has been overvalued. On our hypothetical figures, V's liability would be capped at $400,000.

It follows from this ruling that, if the overvaluation is sufficiently great, the lender may recover for its entire loss, including both capital and interest. If the overvaluation is less than the lender's total loss, then the lender recovers the amount of the overvaluation. Importantly, however, in neither case is any account taken of how the lender's loss is made up, for example by identifying that part which results from a fall in the property market.

The Australian reaction

The *SAAMCO* principle was considered by the Australian courts in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*, or *MGICA*. This case concerned a valuation for mortgage purposes of a residential property which was nearing completion. The valuer placed a value of $5.5m on the property "as completed" and, significantly, also stated that it was "suitable security for investment of trust funds to the extent of 65% of our valuation for a term of 3-5 years". This report and valuation was relied on for both the making of a loan on mortgage (at a loan-to-value ratio of 65%) and the issue of a mortgage indemnity guarantee policy. When the borrower defaulted, a catastrophic fall in the property market left the lender (and thus the insurer) with substantial shortfall, for which it sued the valuer. The latter was held liable in negligence, and it was found that the true value of the property at the date of the defendant's valuation was between $3.9m and $4m.

At trial ((1996) 140 ALR 313), Lindgren J conducted a detailed analysis of the UK authorities, agreeing with the English Court of Appeal that, if an award of damages were to exclude any part of the lender's loss, this could only be under the doctrines of causation or remoteness of damage. And so, having decided that the whole of the insurer's loss was caused by the valuers' negligence and was not too remote, his Honour held the valuers liable in full.

The decision of Lindgren J was unanimously upheld by the Full Court of the Federal Court ((1997) 77 FCR 307). Unfortunately, however, the appeal court's rejection of the *SAAMCO* principle was marred by its apparent misunderstanding of that principle. In referring to the question of what losses would have occurred "even if the information had been correct", the court appears to have taken this to mean, not "even if the property had really been worth $5.5m" but "even if the defendants had valued the property at $3.9-4m". And, since the evidence clearly established that, given a valuation of less than $4.5m, there would have been no insurance and therefore no loss, the court simply treated the *BBL* principle as irrelevant to the case before it.

A further appeal by the valuer, to the High Court of Australia, was also unsuccessful. However, while the court *appears* unanimously to have rejected *SAAMCO*, the four

judgments, both individually and collectively, paint such a confused picture that it is impossible to say with any degree of confidence how market losses are to be treated under Australian law in a normal case of negligent valuation. As with the *SAAMCO* ruling, that in *MGICA* has provoked a number of critical appraisals, including those from Waddams (1997), Drummond (1999), McLauchlan and Rickett (2000), Mullany (2000) and Dugdale (2000a).

Briefly, what the Australian judges had to offer was as follows:

Kirby and Callinan JJ (in a joint judgment), regarded *SAAMCO* as irrelevant for the same (misguided) reason as the Full Court of the Federal Court.

Gaudron J, while appearing in terms to reject *SAAMCO*, nevertheless stated that:

> "[A] person who negligently provides information or advice should not be held liable for loss that would have been suffered if the information or advice were correct. Thus, if some part of the loss suffered by [the mortgage lender] would have been suffered even if the property were worth $5.5m, [the valuers] cannot be held liable for it".

This in fact looks exactly like the *SAAMCO* principle, but her Honour did not regard it as of any assistance to the valuer in *MGICA*. This was on the (highly dubious) ground that it had at no stage been suggested that, if the property had really been worth $5.5m, the lender would still have suffered loss.

Both McHugh and Gummow JJ based the valuer's liability firmly on the fact that he had given, not merely a valuation of the property, but an assurance that it would remain good security for a loan of 65% of the valuation (plus any accrued interest) for up to five years. This crucial fact rendered *SAAMCO* irrelevant to the decision, but both judges took time to consider what the position might be in a normal case (ie one in which there is no assurance as to the maintenance of future value). And both stated in effect that a valuer is not normally liable for that part of a lender's losses which result from a market fall. As McHugh J put it:

> "Ordinarily, however, the valuer will not be liable for the monetary difference between the true value of the property and any lesser price obtained because of a market decline, notwithstanding that declines in market values are reasonably foreseeable in a general way. The reason for this conclusion is that, in so far as a decline in the market was reasonably foreseeable, it will already be factored into the assessment of the true value of property as at the date of valuation. In so far as the market decline was not reasonably foreseeable, any loss arising from the decline must be regarded as outside the contemplation of the parties to the valuation arrangement and not recoverable in an action for negligence or breach of contract."

So does this mean that market losses are to be excluded, as Phillips J excluded them at trial in *BBL*? Apparently not, for McHugh J later stated that:

> "In the case of money lent on a valuation, the damages are confined to the difference between what was lent and what would have been lent on the true value of the property together with such expenses and other losses that were sufficiently likely to result from the breach of duty to make it proper to hold that they flowed naturally from the breach of duty or that they were within the reasonable contemplation of the parties to the contract or arrangement."

Should the valuer's liability be limited?

A number of commentators, while criticising the actual decision of the House of Lords in *SAAMCO*, have expressed the view that it would be unjust to hold the valuer liable for all the lender's loss, including market losses (Coote, 1997; Davidson, 1997; O'Sullivan, 1997; Loke, 1999). Their reasons have been differently expressed but, in the present writer's opinion, they can all be seen to share a common consideration: an intuitive feeling that liability should be allocated in accordance with the risks which are assumed by lender and valuer respectively in the mortgage valuation context. Three particular ways of presenting this consideration are worth a closer examination.

The mountaineer's tale

In *SAAMCO*, Lord Hoffmann gave a hypothetical example in support of his view, that there should be no liability for losses which would have been suffered even if the

information given had been correct (ie the property had been worth as much as the valuer said it was worth). This was the celebrated "mountaineer/doctor" scenario:

> "A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering, but has nothing to do with his knee.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice, because it would have occurred even if the advice had been correct."

The current writer's explanation for this is that, while the mountaineer looks to the doctor for advice about certain risks (ie those related to his knee), he does not seek protection against all the other risks inherent in mountaineering.

The unreality of "no transaction"

Central to the decision of the English Court of Appeal in *BBL* was the division of lender-valuer negligence actions into "successful transaction" and "no transaction" cases. As noted earlier, a "successful transaction" case is one where, had the valuation revealed the true value of the property, the parties would still have entered into a loan transaction, albeit for a smaller amount and perhaps on different terms. A "no transaction" case, by contrast, is one where revelation of the property's true value would effectively have ruled out the possibility of any loan at all, either because the lender would not have been prepared to lend or because the borrower would not have wished to borrow the smaller amount on offer. The Court of Appeal ruled that, in a "no transaction" case, the lender is entitled to say: "Your negligence caused the loan and therefore caused all the loss resulting from it."

It is suggested that this division is too simplistic, since there are many other "what if" possibilities, such as a loan to the same borrower on another property or a loan to a different borrower altogether (Dugdale, 1995; Stapleton, 1999). In any event, the "no transaction" scenario is inherently flawed, because the assumption on which it rests is that the lender, by cancelling the proposed loan, would thereby have safeguarded its capital from all risk. Such an assumption is surely unrealistic, given that the lender is in the business of lending money and will do so wherever possible. In the absence of any cogent evidence as to what really *would* have happened if the valuer had informed the lender of the true value of the property, the assumption should surely not be: "Nothing", and yet that is in truth what "no transaction" assumes.

The nature and purpose of a mortgage valuation

Dugdale (1995) argued that, since the purpose for which a lender commissions a valuation is to protect the lender from advancing money on inadequate security, a negligent valuer's liability should be limited by the deficiency in the security (ie the difference between the valuation and the true value of the property, the measure in fact adopted by the House of Lords in *SAAMCO*). Davidson (1997) regarded the difference between a valuation and a forecast as critical in deciding whether lender or valuer should bear the risk of a subsequent market fall. Lord Hoffmann in *SAAMCO* identified a further important distinction in stating that, while a negligent *adviser* is responsible for all losses resulting from the course of action taken on his or her advice, a negligent *provider of information* is responsible only to the extent that the information is wrong (thus excluding any loss that would have been suffered even if the information had been correct).

It is suggested that all these arguments come down in the final analysis to the question of risk. A mortgage lender is perfectly willing to accept the risk of a fall in the property market, provided that the property in question is worth as much as the valuer says it is worth at the time the transaction is set up. There is therefore no justification for permitting the lender to shift on to the valuer any losses which would have been suffered *even if the property had been worth as much as that*.

How should the valuer's liability be limited?

Although there is considerable support for the view that a negligent valuer should not automatically be held liable for the full amount of the lender's loss, there is no consensus as to precisely how the liability should be limited. Three different approaches have been put forward.

The exclusion of market losses

The solution adopted by Phillips J, the trial judge in *BBL* was to deduct, from the lender's total loss, that element which resulted from the fall in the market value of the property subsequent to the loan. This was on the basis that the risk of such a loss was one which the lender had willingly assumed, and against which he did not look to the valuer for protection. In *MGICA*, two members of the Australian High Court (McHugh and Gummow JJ) also took the view that market losses should be excluded as being unforeseeable and thus too remote (although the way in which McHugh J would have assessed the damages was different from Phillips J).

Although superficially attractive, it is suggested that this approach is fundamentally flawed. To say that a lender assumes the risk of a fall in the property market is only part of the story; it would be more accurate to say that the lender is willing to assume that risk, *so long as the property is worth what the valuer says it is worth.* To exclude market losses altogether, without making any allowance for the conditional nature of the lender's assumption of risk is thus to paint a distorted picture of the underlying balance of risk which the parties have accepted.

The hypothetical alternative transaction

As noted earlier, courts in lender-valuer actions are accustomed to asking: "What if the valuer had reported the true (lower) value to the lender? Would there still have been a mortgage loan?" And, if the answer is "Yes", then damages will be adjusted to take account of the loss which would have been suffered in that event.

Although the exact meaning of his judgment is not easy to discern, it appears that McHugh J in *MGICA* would adopt a similar technique for limiting damages in a case where the evidence showed that, given awareness of the true value, there would have been no loan at all. In short, his Honour would regard it as legitimated to treat a case

as falling within the "successful transaction" category, notwithstanding clear evidence that it was in truth one of "no transaction". In the present writer's opinion, such an approach would be entirely unjustified.

Loke (1997) offers a variation on this approach, by attempting to hypothesise just what alternative transaction the lender might have entered into, on cancelling the loan actually proposed when learning of the true value of the property. However, the difficulty of establishing the nature and terms of such a hypothetical loan led Loke to suggest a more statistical approach, based on the extent to which the relevant segment of the property market has fallen and the probability of default by the hypothetical alternative borrower. In the present writer's opinion, it is highly unlikely that any court would permit damages to be assessed on so highly speculative a basis.

The hypothetically more valuable property

The novelty of Lord Hoffman's reasoning in *SAAMCO* lay in replacing one question: "What if the valuer had reported the true (lower) value to the lender?" with another: "What if the property had actually been worth as much as the valuer said it was worth?" His lordship's answer to that rhetorical question was that the lender would then have had a greater level of security than it actually had, and it was this reduction in security that his lordship identified as the "consequences of the valuation being wrong" and thus the extent of the valuer's liability. According to Lord Hoffmann:

> "The consequence of the valuation being wrong was that the plaintiffs had £10m less security than they thought. *If they had had this margin, they would have suffered no loss*. The whole loss was therefore within the scope of the defendant's duty."

In the opinion of the present writer, Lord Hoffmann asked the right question but gave it the wrong answer. It is the right question because it exposes the extent of the risk which is voluntarily assumed by a mortgage lender – as suggested earlier, the lender is perfectly prepared to assume the risk of a fall in the property market, so long as the property is worth as much as the valuer says it is worth. However, it is the wrong answer because of its implicit assumption that the hypothetically more valuable property would have retained its value until the date of repossession and resale, even

though every other property (*including the mortgaged property itself*) has shown a sharp fall in value. In *SAAMCO* itself, where the property had been negligently valued at £15m against a true value of only £5m, the House of Lords ruled that the valuer could thus be held responsible for losses of up to £10m, even though the property had then halved in value between the date of the loan and the date of repossession and realisation.

In the opinion of the present writer, the best solution to this problem lies in the adoption of a modified version of the *SAAMCO* principle. By all means ask: "What if the property had truly been worth £15m?", but then answer: "It would have been worth only £7.5m at realisation,", and use that lower figure to represent the "cap" on the valuer's liability. Returning for the last time to our original hypothetical example, we can say that, if the property had really been worth the $1m at which V valued it, its value would have fallen to $400,000 by the time of its resale and so L would still have lost $300,000. V would thus be liable, not for the $400,000 produced by the *SAAMCO* formula, but for $160,000 (the total loss of $460,000 less the $300,000 which would have been suffered in any event).

Methods of assessing damages

The following Tables show how damages are calculated under the various methods discussed in this paper (including the modified version of the *SAAMCO* principle favoured by the present writer); they also demonstrate how the results achieved under each of those methods are affected by three main variables: the loan-to-value ratio adopted by the lender; the extent to which the valuer has overvalued the property; and the amount by which market forces have caused the value of the property to fall.

Table 1 Variation in size of mortgage loan

Basic facts	Valuation	1000000	1000000	1000000	1000000	1000000
	Mortgage loan	500000	600000	700000	800000	900000
	True value	600000	600000	600000	600000	600000
	Resale price	360000	360000	360000	360000	360000
Basic figures	Valuer's error	400000	400000	400000	400000	400000
	Market fall	240000	240000	240000	240000	240000
	Capital loss	140000	240000	340000	440000	540000
"Successful transaction"	Smaller loan	300000	360000	420000	480000	540000
	Hypothetical loss	0	0	60000	120000	180000
	Damages	140000	240000	280000	320000	360000
BBL	High Court	0	0	100000	200000	300000
	Court of Appeal	140000	240000	340000	440000	540000
	House of Lords	140000	240000	340000	400000	400000
"Hypothetical higher value"	Hypothetical loss	0	0	100000	200000	300000
	Damages	140000	240000	240000	240000	240000

Table 1 shows the effect of different lending policies ranging from 50% to 90% of the valuation. Not surprisingly, it is seen that an increase in the loan-to-value ratio results in an increase in L's total loss. According to the Court of Appeal in *BBL*, such an increase falls on V. Even the approach adopted by Phillips J in the High Court results in V carrying an ever-increasing burden of liability, since it merely excludes that element of loss attributable to the market fall (an element which remains constant). By contrast, both the original and the modified form of the *SAAMCO* principle produce a cut-off point, beyond which an increase in L's losses flowing from a decision to lend more will not be reflected in the damages recoverable.

It is suggested that the latter result is wholly consistent with the view that this area of law should be governed by the idea of risk. The more L is prepared to lend, the greater the risk of loss. V's liability should surely not extend beyond the point at which even the higher (assumed) value of the security would not have ceased to protect L.

Table 2 Variation in size of valuation error

Basic facts	Valuation	1000000	1000000	1000000	1000000	1000000
	Mortgage loan	700000	700000	700000	700000	700000
	True value	800000	700000	600000	500000	400000
	Resale price	480000	420000	360000	300000	240000
Basic figures	Valuer's error	200000	300000	400000	500000	600000
	Market fall	320000	280000	240000	200000	160000
	Capital loss	220000	280000	340000	400000	460000
"Successful transaction"	Smaller loan	560000	490000	420000	350000	280000
	Hypothetical loss	80000	70000	60000	50000	40000
	Damages	140000	210000	280000	350000	420000
BBL	High Court	0	0	100000	200000	300000
	Court of Appeal	220000	280000	340000	400000	460000
	House of Lords	200000	280000	340000	400000	460000
"Hypothetical higher value"	Hypothetical loss	100000	100000	100000	100000	100000
	Damages	120000	180000	240000	300000	360000

Table 2 shows the effect of overvaluations ranging from 25% to 250% above the true value. It is clear that, as V's error increases, so does L's overall loss (because the property, starting as it does from a lower value, will be worth correspondingly less on realisation). Thus, since V's error impacts directly on L's over-exposure and resulting loss, it seems entirely reasonable that V's liability should also vary, and all the methods of assessment achieve this to a greater or lesser extent.

Table 3 Variation in size of market fall

Basic facts	Valuation	1000000	1000000	1000000	1000000	1000000
	Mortgage loan	700000	700000	700000	700000	700000
	True value	600000	600000	600000	600000	600000
	Resale price	420000	360000	300000	240000	180000
Basic figures	Valuer's error	400000	400000	400000	400000	400000
	Market fall	180000	240000	300000	360000	420000
	Capital loss	280000	340000	400000	460000	520000
"Successful transaction"	Smaller loan	420000	420000	420000	420000	420000
	Hypothetical loss	0	60000	120000	180000	240000
	Damages	280000	280000	280000	280000	280000
BBL	High Court	100000	100000	100000	100000	100000
	Court of Appeal	280000	340000	400000	460000	520000
	House of Lords	280000	340000	400000	400000	400000
"Hypothetical higher value"	Hypothetical loss	0	100000	200000	300000	400000
	Damages	280000	240000	200000	160000	120000

Table 3 shows the effect of falls in the market value of the mortgaged property ranging from 30% to 70%. Not surprisingly, as the fall in the market becomes greater, so does L's total loss. The approach adopted by Phillips J in *BBL* excludes this factor altogether, so that the damages recoverable remain constant. The *SAAMCO* principle places a fixed limit on the total damages (including both capital and interest) equivalent to V's error; on these figures the "cap" comes into operation at $400,000.

The most intriguing results in Table 3 are those on the bottom line. The surprising effect is that, as L's losses increase, so the damages payable by V decrease! An instinctive reaction to this solution is that it must be wrong; however, on closer examination it appears perfectly logical. V's actual losses are suffered on a $600,000 property which has depreciated at a certain rate; V's hypothetical losses (which are to be offset against those actual losses) relate to a notional $1m property which is assumed to have depreciated at an equivalent rate. In absolute terms, the hypothetical property must always be affected to a greater degree than the actual property, simply because it is more valuable to begin with. In consequence, the greater the loss, the more there is to offset against it.

References

Coote, B (1997). Is there hope, still, for negligent valuers? *Journal of Contract Law*, **12**, 145.

Crosby, FN, Lavers, AP and Murdoch, JR (1998). Contributory Negligence by Overseas European Banks in Property Valuation Negligence Cases in the UK. *Journal of Property Valuation and Investment*, **16**, 273.

Davidson, E (1997). *BBL* and damages: some problems in applying the *ratio decidendi*. *Professional Negligence*, **13**, 89-93.

Department of Transport, Environment and Regions (2000). *Monitoring the Code of Practice for Commercial Leases*. London.

Drummond, SW (1999). Liability of valuers and other professionals: *Kenny & Good v MGICA*. *Torts Law Journal*, **7**, 217.

Dugdale, AM (1995). A purposive analysis of professional advice: reflections on the *BBL* decision. *Journal of Business Law*, 533.

Dugdale, AM (1996). *South Australia Asset Management*: answers and questions. *Professional Negligence*, **12**, 71.

Dugdale, AM (2000a). Conceptualising Limits to Valuers' Liability. *Tort Law Review*, **8**, 7.

Dugdale, AM (2000b). The impact of *SAAMCO*. *Professional Negligence*, **16**, 203.

Evans, H (1995). Liability for losses from the fall in the property market. *Professional Negligence*, **11**, 7.

Ilett, F (1999). Damages: *SAAMCO* and *Platform Home Loans* – an accountant's perspective. *Professional Negligence*, **15**, 29.

Loke, A (1999). The valuer's liability for negligent valuation – toward a more principled allocation of the risk of market decline. *Legal Studies*, **19**, 47.

McLauchlan, DW (1997). A damages dilemma. *Journal of Contract Law*, **12**, 114.

McLauchlan, DW and Rickett, CEF (2000). *SAAMCO* in the High Court of Australia. *Law Quarterly Review*, **116**, 1.

Mullany, NJ (2000). An invaluable lesson? *Professional Negligence*, **16**, 17.

Murdoch, JR (2000). Negligent valuers, falling markets and risk allocation. *Tort Law Review*, **8**, 183.

O'Sullivan, J (1998). Negligent professional advice and market movements. *Cambridge Law Journal*, 19.

Stapleton, J (1997). Negligent valuers and falls in the property market. *Law Quarterly Review*, **113**, 1.

Stapleton, J (1999). Valuer liability and normal expectancies. *Torts Law Journal*, **7**, 296.

Waddams, SM (1997). Liability of valuers: *Kenny & Good Pty Ltd v MGICA (1992) Ltd. Torts Law Journal*, **5**, 218.

Wightman, J (1998). Negligent valuations and a drop in the property market: the limits of the expectation loss pirnciple. *Modern Law Review*, **61**, 68.

LENDER - VALUER CLAIM

BASIC FACTS	
Valuation	1,000,000
Mortgage loan	700,000
True value	600,000
Price on resale	240,000
Valuer's error	400,000
Market fall	360,000
Capital loss	460,000

DAMAGES	
Smaller loan	280,000
BBL (HC)	100,000
BBL (CA)	460,000
SAAMCO (HL)	400,000
Higher value	160,000