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Economic Cost Provisions in Fixed-Rate Home Loan Contracts and Breaches of Australian Consumer Law

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Abstract

Fixed-rate home loan contracts in Australia usually include a clause in terms of which the financial institution providing the loan can recover what is variously called an 'economic cost' or an 'early repayment adjustment' if the borrower repays the loan before the fixed term ends, in circumstances where bank funding costs have declined. In their calculation of such costs, financial institutions rely on movements in the Australian Bank Bill Swap Rate (BBSW) as an indicator of funding costs. However, market data indicates that the BBSW is an inaccurate measure of actual funding costs and that the BBSW can in fact decline when funding costs have increased. Furthermore, it can occur that the rates at which a financial institution is lending money for home loans can exceed the rate being paid by a borrower who is paying their loan early, with the consequence that the financial institution has an opportunity to mitigate its loss by re-lending the funds that have been repaid. Yet such mitigation is not taken into account by financial institutions in calculating economic costs. The result is that banks recover more than their actual losses when loans are repaid early. This breaches both the common law and Australian statutory consumer law. The article urges that the corporate regulator, the Australian Securities and Investment Commission, investigate such practices and if bring a test case on behalf of consumers to have such practices declared unlawful.

Keywords: consumer law, banking, mortgages, loans, fixed-rate, contract, penalties

1. Introduction

A class action which commenced in 2010 in which litigants challenged the validity of a range of bank fees has focussed attention on the rights of bank customers under consumer law. In the action (which, at the time of writing, is on-going), bank customers have challenged the validity of a number of fees, collectively known as 'exception fees', including fees where accounts were overdrawn or where credit card limits were exceeded. The challenge was based on the argument on that in so far as such fees bore no relation to the actual processing costs occasioned to the banks by overdraws or limit excesses, they constituted penalties, and were therefore unenforceable. In *Andrews v Australia and New Zealand Banking Group Ltd*, (Note 1) the High Court unanimously held that a fee could amount to un unenforceable penalty even in the absence of a breach of contract by the party upon whom it was imposed. The case has now been remitted to the Federal Court for a determination of whether the fees in question did in fact amount to penalties.

This article considers a different type of imposition to which a particular class of bank customers is subject, namely the charges imposed on customers who have fixed-rate home loans when the loan is paid out before the fixed-rate period has expired. Given that many home loans in Australia have a fixed-term component, liability for such charges impacts on a large group of consumers. The argument made in this paper is that the charges imposed on consumers constitute unlawful penalties for two reasons: First, because the calculation used by banks to determine economic costs bears no necessary relation to actual losses, and second, because the banks fail to take into account the mitigation of loss that they could achieve in certain market conditions by re-lending funds that have been repaid early.

Part 2 of this article discusses the concept of economic costs as they relate to fixed-rate home loans, using standard form contractual terms from major Australian banks as examples. Part 3 discusses the way in which banks calculate economic costs and examines whether the method used is consistent with consumer law. Part 4 discusses the circumstance when a bank is able to re-lend money at a higher rate than it was charging on a fixed-term loan that has been repaid, and argues that prejudice is suffered by customers because of the failure of banks to take into account the mitigation of their losses that they could achieve by re-lending the funds. Part 5 concludes the article with an analysis of the ways in which these bank practices breach both the common and statute law.

2. What Are Economic Costs?

When a customer takes out a fixed rate home loan, the bank agrees to charge an unchanging interest rate for a specified period, in contrast to the usual position where the rate on the loan will fluctuate according to market conditions. (Note 2) The advantage of a fixed rate loan for the customer is that he or she enjoys certainty as to what the periodic home loan repayments will be, and will not be subject to the risk of an increase in repayments if floating rates go up. Conversely, the customer will experience disadvantage if floating interest rates go down, as they will then be paying more than they would otherwise have to.

In order to protect themselves from loss if customers were to repay fixed rate loans early (which customers would obviously want to do when interest rates go down), banks insert what are variously labelled 'economic cost' or 'early repayment adjustment' clauses in fixed-rate home loan contracts.

Economic cost clauses used by banks in Australia are broadly similar, although they may use different terms to refer to economic cost (such as 'early repayment adjustment clause'). Two are reproduced as examples. The first is from the standard form home loan contract used by the Commonwealth Bank of Australia: (Commonwealth Bank of Australia, 2012a)

> **HL11.4 When we can charge an Administrative Fee and / or an Early Repayment Adjustment**
>
> We can charge you an Administrative Fee on any full or partial Prepayment and if we make a loss as a result of the Prepayment we can make an Early Repayment Adjustment which we debit to your Loan Account.
>
> **HL11.5 When we can charge an Early Repayment Adjustment**
>
> If we work out that we have made a loss because of your Prepayment we can make an Early Repayment Adjustment. We calculate the Early Repayment Adjustment as our reasonable estimate of our loss in accordance with our usual formula which takes into account the difference between:
>
> - our wholesale market swap rate for the fixed interest period on the date the interest rate was fixed; and
> - our wholesale market swap rate as at the date of the Prepayment for the balance of the fixed interest period.
>
> We also take into account any scheduled principal repayments and the present day value of the Early Repayment Adjustment in our calculation.
>
> If the wholesale market swap rate at the Prepayment date is lower, an Early Repayment Adjustment is payable by you.
>
> Our calculation does not necessarily reflect actual transactions which we may enter into as a result of your Prepayment or switch or which we may have entered into when you fixed the interest rate. There may not be specific transactions referable to your loan because we manage the funding of loans and interest rates on a portfolio basis.
>
> If you ask us, we will give you a statement setting out how we estimated our loss as a result of your Prepayment or the formula we use to calculate our loss or both.
>
> ***Warning:*** *If the wholesale market swap rate falls, the Early Repayment Adjustment can be high and may increase the amount you owe us. You can ask for an estimate of an Early Repayment Adjustment at any time.*
>
> **HL11.6 The Early Repayment Adjustment Amount**
>
> After estimating our loss, we decide the amount of the Early Repayment Adjustment you must pay us as compensation. It will be no more than the estimate of our loss, calculated on the basis of the statement.

The second is from the fixed-rate home loan contract used by the National Australia Bank (National Australia Bank, 2007):

> 10 Economic costs for *home loans*

WARNING: Economic costs can be high and will increase the amount you owe. You can ask for an estimate of applicable economic costs at any time.

10.1 Subject to clause 9.7, if a *loan account* has a fixed interest rate, you must pay economic costs whenever an *economic costs event* occurs. Where a *loan account* has a fixed interest rate an *economic costs event* is taken to have occurred if, before the end of the *fixed rate period*:

(a) you change the interest rate for the *loan account* from a fixed interest rate to a variable interest rate or to another fixed interest rate with a new *fixed rate period*;

(b) you repay early for any reason all or part of the *balance owing* on the *loan account* before the end of the *fixed rate period*; or

(c) the *total owing* become payable because you are in default and we elect to treat it as an *economic costs event*.

Calculation of economic costs

10.2 Economic costs are an amount equal to our reasonable estimate of our loss arising from an *economic costs event*. The loss usually arises because of changes in market interest rates between the start of the *fixed rate period* and when the *economic costs event* occurs.

10.3 We calculate the economic costs by calculating the amount representing the difference between our cost of funds at the start of the relevant *fixed rate period* and our cost of funds at the date of the *economic costs event* over the remainder of that period. This is then discounted back to the net present value at the rate equivalent to our cost of funds at that date.

The object of these clauses – as explained in information provided by banks to consumers – is to enable banks to recover the loss they claim to suffer in the form of movements in costs of funds. (Note 3). The basis of the banks' argument is that early repayment by a customer of a fixed-rate home loan causes a bank to suffer a loss is that banks themselves borrow money in order to lend to customers and if, in line with a general decline in interest rates, the cost at which banks could borrow money when the fixed-rate loan is repaid is less than it was when they initially funded the loan, then the bank has suffered a loss because it still has to pay the higher interest rate on the funds that it has borrowed. Alternatively, the banks argue that if they were to repay the money they had borrowed, then they themselves would be required to pay an economic cost to their lender, and that therefore the banks must recover these costs from their home loan customers.

As indicated by the information published by the banks, the calculation of economic cost operates as follows: Assume that Ms A entered into a $ 300 000 home loan with a 10-year fixed rate period, at an interest rate of 7.5%. Assume that at the time she entered into the loan, the bank's funding costs were 5.7%. If, after 6 years (that is, with 4 years of the fixed period remaining) Ms A wanted to repay the loan, on which, say, $ 270 000 was still outstanding, and at that time the bank said its cost of funds to borrow money for 4 years was 3.5%, then the bank would claim from her an economic cost of $ 270 000 x (5.7 - 3.5 = 2.2%) x 4 years = $ 23 760, subject to an adjustment (in favour of the customer) reflecting the fact that that amount is being repaid as a lump sum, rather than over the remaining period of the loan.

3. The Bank Bill Swap Rate as the Basis upon Which Economic Costs Are Calculated

As is obvious from the above, the method by which banks calculate cost of funds is fundamental to the determination of the liability of a customer who repays their loan early, and it is in relation to this issue that consumers suffer prejudice. This part of the article examines the method by which banks calculate cost of funds and discusses how consumer rights are being infringed.

In determining whether movements in interest rates would result in a loss where a fixed-rate home loan is repaid early, banks do not disclose the details of particular funding transactions at the time the consumer took out a fixed-rate loan or the time it is repaid. Instead they use a wholesale money market rate - specifically the Bank Bill Swap Rate (BBSW) - as the indicator of movements in funding costs. This is the case with Clause HL 11.5 of the Commonwealth Bank of Australia's fixed-rate home-loan contract, reproduced above. If a bank chooses to use cost of funds as an indicator of economic cost, it must do so with reference to a rate or index that accurately reflects that cost. A calculation that does not reflect cost of funds is not a valid estimate of loss, and thus amounts to a penalty, which is void under the general law of contract. The question is whether the BBSW is an accurate measure.

Put simply, the BBSW is the rate at which banks in Australia lend money to each other. Access to the day's prevailing rates by consumers is limited - rates of up to five years are published in the *Australian Financial*

Review, but current rates for longer periods are not generally available to the public. The only way of accessing live rates for the entire range of periods (as well as historic rates, which are obviously important when trying to determine what funding costs were when a loan was taken out) is by subscribing to a service offered by the Australian Financial Markets Association (AFMA), at a cost of $ 6 050, which is beyond the means of most consumers. (Note 4)

The use by banks of the BBSW as the indicator of funding costs is consistent with the approach taken by the Financial Ombudsman Service (hereafter referred to as 'FOS'). Credit providers are required by s 45 of the *National Consumer Credit Protection Act 2009* (Cth) to belong to an external dispute resolution scheme, defined in s 11(1)(a) of the Act as a dispute resolution scheme which has been approved by ASIC. FOS is the scheme established for the banking industry. In 2009 FOS retained an actuary to consider what a reasonable method was for the determination of movements in costs of funds. The advice given by the actuary was that it would be reasonable to use the difference between wholesale Bank Bill Swap Rate (BBSW) at the time the loan was taken out and the time the loan is repaid. (Financial Ombudsman Service, 2009, p. 1). The advice has been used by FOS as the basis for its determination of disputes between customers and financial institutions where the customer disputes the amount of the economic costs for which the financial institutions say they are liable.

Notwithstanding this advice, I would argue that the presumption upon which it is based – that movements in the BBSW provide a consistently accurate measure of costs of funds - is incorrect. The basis of this argument is data relating to movements in the BBSW as they affected specific quotes for economic costs, given during the period 2010 – 2012. (Note 5)

First, as to movements in funding costs during this period, charts in an article of the March 2010 issue of the Reserve Bank Bulletin (Brown, A., Davies, M., Fabbro, D. and Hanrick, T., 2010, p. 41) indicated a rise in bank funding costs since early 2008 and March 2010. Similarly, it is readily apparent from a financial market report tracking bank borrowing costs from January 2007 to March 2012 (Eureka Report, 2012) that there was a rise in funding costs between the second quarter of 2011 until March 2012. Finally, the minutes of the 7 February 2012 meeting of the Reserve Bank Board (Reserve Bank of Australia, 2012) state that bank funding costs rose between mid-2011 and early 2012.

Against the background of this data, an analysis of an actual quotation of an economic cost adjustment given to a consumer which gave a result two and a half times in January 2012 what it was in May 2011, must be questioned. (Note 6) The quotation was based on a decrease in the BBSW during that period, yet data cited in the previous paragraph indicates that bank funding costs rose during the same period. Therefore, it cannot be true that swap rates accurately reflect movements in funding costs, given that swap rates declined over the same period. How is this contradiction to be explained?

The answer lies in the fact that it is highly unlikely that swap rates could accurately reflect movements in funding costs, given that, as banks themselves state, funding costs depend on the rates at which funds are borrowed from a multiplicity of wholesale markets, domestic, overseas, both long and short term. (National Australia Bank, 2010, p.3) The reality is that cost of funds from these varying sources can (i) move in different directions to each other and (ii) can move *in the opposite direction to* BBSW rates. Therefore, if cost of funds was to be the basis for the calculation of economic costs, I would argue that an aggregate of the weighted averages of these sources of funding should be used, rather than BBSW rates, which clearly do not constitute a reasonable measure of bank funding costs. Here it is worth noting that during the period 2010- 2012, the banks complained vociferously that they could not pass Reserve Bank rate reductions on to the public, because domestic rates did not reflect the banks' costs of borrowing, which were affected by a multiplicity of factors, including the costs of borrowing overseas. (Cratchley, D., 2010; Poljak, V., 2011, p. 37; Janda, M., 2011 and Liondis *et al* 2012, p. 2) The banks cannot plead inconsistently - if their borrowing costs were going up justifying non-reduction in its home loan rates, then that fact would also have led to a reduction in its economic costs under fixed-rate home loans which were repaid early

4. Mitigation of Lenders' Losses

As discussed in Part 1 above, where a bank has lent money on a fixed-term basis, customers will usually have an incentive to repay their loan early and re-finance with another lender only where market rates are lower than they were at the time they took the fixed-rate home loan. However, because banks set interest rates on home loans of differing terms based on forecasts of the condition of financial markets appropriate to each term, it can occur that some home loans on offer to customers at the time a fixed-rate home loan is repaid early may in fact be priced at a *higher* interest rate than was being charged on the loan that has been repaid.

For example, if a customer with a 10-year fixed-rate loan on which they were paying 7.5% interest sought to repay the loan after 6 years, and at that time the bank was offering 3-year fixed-rate loans at 8%, it would not be correct to say that the bank's losses should be based solely on the differential between costs of funds when the fixed rate was taken out and when it was repaid. Even if banks used a correct measure to determine costs of funds (rather than the inaccurate tool of the BBSW), a true picture of the consequences to a bank of early repayment - and thus what its actual loss is – could not be gained unless account is also taken of the ability of the bank to re-lend the money to a new customer at a higher rate, where that is possible, instead of simply repaying it to whoever the bank had borrowed the funds from. It might be that money could be lent at a higher rate for only part, rather than all, of the remaining term of the fixed-rate loan that was paid out (as in the example posited earlier in this paragraph), but the fact remains that whether, and to what extent, a bank has suffered a loss as a consequence of early repayment depends on a consideration not only of the negative impact on the bank's financial position resulting from early repayment, but also on the positive impact that can occur because of that occurrence, manifesting itself in the opportunity the bank has of re-lending the money at a higher rate than it had been receiving. Yet the evidence of quotations for economic costs given in just such circumstances – that is, where the bank giving the quotation was charging a higher rate for some home loans than it was charging on the loan in relation to which the quotation was sought – is that banks do not take mitigation into account.

Therefore, a bank's position in the event of an early repayment of a loan has to be viewed in the totality of market conditions at the time that that occurred - that is, taking into account any loss the bank would sustain because of the difference in borrowing costs *and* any gains it could make upon re-lending the money at a higher rate. Despite this, and as is stated above, current banking practice is not to take into account the rates at which a bank is lending money when giving quotations for economic costs – the issue of mitigation is simply ignored.

5. Implications for Consumer Law

The banks' use of what is, in practice, an arbitrary measure of their costs of funds (the BBSW) and their failure to take into account the duty not to mitigate loss (or, to state it differently, their practice of claiming losses that could have been avoided) has significant implications for consumer rights under both common and statute law.

5.1 Breaches of the Common Law

So far as the use of the BBSW rate is concerned, the starting point in this discussion is the general common law rule that a party is restricted to recovering only their reasonably foreseeable actual losses if a contract is breached. The rule is that they can recover such losses as would put them in the same position they would have been in had the contract been performed - they cannot be put in a better financial position. This principle was discussed at length by the High Court in *Commonwealth of Australia v Amman Aviation Pty Ltd.* (Note 7)

It is permissible for a party to a contract to quantify the damages it will suffer of the contract is breached or, alternatively, to put into the contract a formula whereby damages are to be calculated. A clause doing either of these things will be classified as a liquidated damages clause. However, if the losses as calculated are disproportionate to what would actually be suffered, then the clause containing the calculation constitutes a penalty clause and is invalid. These principles were laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* (Note 8) and applied in Australia in *AMEV-UDC Finance Ltd v Austin,* (Note 9) where the court emphasised that the rule on penalties operates irrespective of the will of the parties as expressed in the contract - in other words it is a rule whose operation cannot be excluded. (Note 10) The doctrine was also applied by the High Court in *Esanda Finance Corp Ltd v Plessnig* (Note 11) and *Ringgrow Pty Ltd v Peden.* (Note 12) The doctrine of penalties was most recently applied in *Andrews v Australia and New Zealand Banking Group Ltd*, (Note 13) where the High Court held that the doctrine is not restricted in its application only to events which amount to a breach of contract, and will apply to amounts imposed for other events occurring under a contract. The courts have also emphasised that an important factor to be taken into account in determining whether a clause is a penalty will be influenced by whether its amount is not a fixed sum and is instead determined by the party seeking to rely on it, (Note 14) and that in all cases involving penalties, the courts will pay attention to the practical effect of the clause on the position of the party relying on it. (Note 15) Where a contract contains a liquidated damages clause that is in fact found to be a penalty, the courts will substitute their own determination of what losses the party seeking to rely on the clause has actually suffered. (Note 16) In light of the above principles, it is true to say that in cases where the BBSW leads to a bank recovering more in claimed losses than it has actually suffered, consumers have been subjected to an unlawful penalty at common law.

So far as failure to take into account mitigation is concerned, this breaches the common law principle that a party to a contract is unable to recover such losses as they were reasonably able to avoid by taking normal commercial steps. This principle was enunciated in *Payzu Ltd v Saunders,* (Note 17) and subsequently applied in *Hasell v*

Bagot, Shakes & Lewis Ltd, (Note 18) *Wenham v Ella*, (Note 19) and most recently in cases such as *Sural SpA and Anor v Downer EDI Rail Pty Ltd*, (Note 20) *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [No. 2]*, (Note 21) *Elfar v Registrar General of New South Wales* (Note 22) and *Pialba Commercial Gardens Pty Ltd v Braxco Pty Ltd & Ors*. (Note 23)

The test for whether the obligation to mitigate has been breached, which was formulated in *British Westinghouse Electric & Mfg Co Ltd v Underground Electric Railways Co of London Ltd*, (Note 24)and was most recently applied in Australia in *B M & J A Holdings Pty Ltd v Clarence Street Developments Pty Ltd* (Note 25) is:

> What would such a man [that is, the plaintiff in an action for breach of contract] do to avoid further loss to himself, supposing that, from insolvency of the other party, or from some other reason, he could not get any damages?

Applying that test, a bank that does not re-lend funds in order to avoid loss (when market conditions are such as to provide an opportunity to do so) breaches the common law by recovering losses that it is not entitled to.

5.2 Breaches of Statutory Provisions

So far as statutory protections of customers of financial institutions are concerned, the key legislation is Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (hereafter referred to as 'the ASIC Act'). This applies because the ASIC Act governs consumer law in relation to financial products, and a home loan is a financial product within the meaning of s 12BAA(7)(k) of the ASIC Act, as read with Regulation 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth). Also relevant is the *National Credit Code*, which forms Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth).

The fact that calculations of economic costs based on the BBSW bear no necessary relationship to actual losses, and that banks fail to take mitigation into account, both of which lead to the banks recovering more in economic costs than they are entitled to, amount in each case to breaches of the following statutory provisions:

(i) A term of a contract which either refers to the BBSW, or which is applied with reference to the BBSW and / or which is applied without taking mitigation into account, amounts to an unfair term under s 12BF of the ASIC Act. Such a term constitutes an unfair term as defined in s 12BG of the Act because by permitting the bank to recover more than it has actually lost, it causes an imbalance in rights between the parties, is not reasonably necessary to protect the position of the bank and causes detriment to the consumer if relied on by the bank.

(ii) Reliance by a bank on a term referred to in (i) above constitutes unconscionable conduct under s 12CB of the Act. Factors tending to indicate unconscionability contained in s 12CC of the Act which are present in such circumstances are that the bank is usually in a stronger bargaining position than the customer (s 12CC(1)(a)), that because the bank recovers more than it is entitled to, the term obviously goes beyond what is necessary to protect the interests of the bank (s 12CC(1)(b)) and, finally, that home loan contracts are usually in a standard form, the terms of which banks are unwilling to negotiate with consumers (s 12CC(1)(j)(i)).

(iii) Any calculation that has been given to consumers using the inaccurate measure based on the BBSW constitutes a misleading statement, in that it indicates that the bank has suffered a greater loss than is truly the case, and therefore amounts to misleading and deceptive conduct under s 12DA of the Act.

(iv) Finally, s 76(1) of the *National Credit Code* states that a transaction may be re-opened if unjust. Among the considerations used to determine whether a credit contract is unjust are the respective bargaining power of the parties (s 76(2)(b)), whether the terms of the applicant for credit was reasonably able to negotiate for the alteration of the terms (s 76(2)(d)) and whether the terms were reasonably necessary for the protection of the interests of the party relying on them (s 76(2)(e)). Reasoning similar to that used in relation to unconscionability in paragraph (ii) above leads to the conclusion that a term of a contract which either refers to the BBSW, or which is applied with reference to the BBSW and / or which is applied without taking mitigation into account, amounts to an unjust term.

6. Steps Forward

The conclusion to be reached from the above is that the rights of a broad class of consumers are infringed as a matter of course by banks. The fact that FOS, the industry alternative dispute resolution body from whom consumers might expect redress, uses the same erroneous measure to determine economic costs as does the banks, gives added reason for concern.

There are two possible avenues that could be used to remedy the situation: The first is that ASIC could use its investigative powers under Part 3 of the ASIC Act to investigate the banks' conduct and to institute proceedings under s 50 of the Act as a test case to seek redress for consumers who have been charged excessive amounts in economic costs.

The second is that a provision should be inserted into the Act requiring that where providers of financial products calculate economic costs on the basis of cost of funds, that calculation should be based on the average cost of funds from all sources over a defined period immediately prior to the date upon which the economic costs are determined. This would prevent the banks from using the BBSW as a blunt and inaccurate instrument as the basis for such calculations. The Act should also require that calculations of economic costs must take into account any profit (or avoidance of loss) the provider could have achieved by re-lending funds that are repaid early, having regard to lending rates that it was offering to the public at the time the economic cost calculation was done. Such a provision would put into statutory form the common law duty to mitigate which the banks currently fail to take into account.

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Notes

Note 1. [2012] HCA 30.

Note 2. A home loan contract might be one in which the entire amount borrowed is subject to a fixed interest rate for a specified term (commonly between 1 and 10 years), or might be a 'split loan', where part of the loan is subject to a floating rate and part to a fixed rate.

Note 3. See, for example Commonwealth Bank of Australia (2012b). 'Early Repayment Adjustment (ERA) Fact Sheet & Calculation Example' retrieved from http://www.commbank.com.au/personal/home-loans/fact-sheets/early-repayment-adjustment-fact-sheet-and-calculation-example.pdf and National Australia Bank (2011) 'Early repayment of fixed rate loans – Things you need to know' retrieved from http://www.nab.com.au/wps/wcm/connect/1383de004b9d4877a2e8e3f1eeeae8e9/early_repayment_of_fixed_rate_loans_march_2011.pdf?MOD=AJPERES&CACHEID=1383de004b9d4877a2e8e3f1eeeae8e9&WT.seg_1=SEBBB&WT.ac=SEBBB

Note 4. See the AFMA site at http://www.afma.com.au/data/bbsw.html.

Note 5. Documentation containing this and other quotations which indicate an increase in economic costs claimed by banks on the basis of a decrease in the BBSW, at a time when overall funding costs were increasing, are on file with the author.

Note 6. Quotation on file with the author.

Note 7. (1991) 174 CLR 64 per Mason CJ and Dawson J at 81, Brennan J at 98-99, Toohey J at 136-138, Gaudron J at 155-157 and McHugh J at 162-164.

Note 8. [1915] AC 79 (per Dunedin LJ at 86-88).

Note 9. (1986) 162 CLR 170.

Note 10. Ibid, per Mason and Wilson JJ at 186-190.

Note 11. (1989) 166 CLR 131.

Note 12. (2005) 224 CLR 656.

Note 13. 13 [2012] HCA 30.

Note 14. See *Hughes v Fresh-Pak Fruit & Vegetable Market Ltd* [1965] WAR 199, per Jackson J at 203).

Note 15. *Premier Metal & Gravel Pty Ltd v Smith's Concrete Pty Ltd* [1968] 3 NSWLR 755 (NSWSC), per Helsham J at 779.

Note 16. *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 186 and 212.

Note 17. [1919] 2 KB 581.

Note 18. (1911) 13 CR 374.

Note 19. (1972) 127 CLR 454.

Note 20. [2007] NSWSC 1234.

Note 21. [2010] WASC 385.

Note 22. [2010] NSWSC 539.

Note 23. [2011] QCA 148.

Note 24. [1912] AC 673.

Note 25. [2012] NSWSC 1236.

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