

NEWSLETTER

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>> **Relatively Simple Errors in Loan Documents or Very Simple Misunderstandings of Basic Obligations Can Have Horrific Consequences for Both Lenders and Borrowers...**

Perpetual Nominees Ltd claimed that on 6 June 2005 Parist Holdings Pty Limited was in default of its loan and therefore Perpetual was entitled to possession of certain land at Kurnell.

On 1 December 2004, pre-existing loans with Perpetual were consolidated into a single term loan agreement. The advance was for just over M\$22 to be repaid on 1 December 2005. The security documents provided for when default occurred, and also provided for the right to enter and take possession if there was a default.

On 6 June 2005, Perpetual took possession of the land because it decided there had been a default in the repayment of principal. When the loan was drawn down on 1 December 2004, \$625,000.00 of the capital advanced was applied to capitalised interest.

When calculating whether or not there had been a default on 6 June, the Judge had to look at how interest was calculated and how much had been paid. The agreement provided that Parist would pay interest on the principal sum at the higher rate, or if paid within seven days of the due date, at the lower rate

The higher rate was defined to mean the lower rate plus 4%. The lower rate was the aggregate of the Benchmark Rate and the margin. The difficulty arose in the definition of the Benchmark Rate because in effect the definition left it completely to Perpetual to decide what that rate was.

Parist argued that there was no agreement because a vital agreement between itself and Perpetual had been left completely to one of the parties, Perpetual. The Judge agreed and the provision was declared to be void.

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This meant that the other parts of the interest equation were left intact and after looking at what had been paid, the Judge held that there had been no monetary default. The \$625,000.00 was sufficient to cover the lower rate of interest at 3% for about eleven months. Therefore there had been no default in the payment of interest as at 6 June 2005.

Unfortunately for Parist, there had been another default that Perpetual was able to rely on.

The loan documents provided that if an undertaking that was given was not honoured, that would be a default.

Parist had undertaken to provide evidence as to the payment of outstanding rates. Although there was no question that the rates had been paid, the evidence had not been provided and the Judge found that this was a breach of an undertaking and a default that entitled Perpetual to take possession.

A more thorough understanding of the documentation and the seriousness of even apparently minor omissions could have avoided problems both for the lender and the borrower. On the lender's side, the method of calculating interest might not have been declared void, and on the borrower's side, the simple matter of notification of the payment of rates would have been complied with.

>> Professional advice should be sought before applying the information in this newsletter to particular circumstances.

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