

NEWSLETTER

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>> **Court Sets Aside Mortgage As Unjust ...Borrower Was Not Able to Service the Loan at The Time She Took It Out ...**

Mrs Gusevski was a well educated woman who worked for an insurance company as a pay clerk, and the mortgage that Mrs Gusevski complained about had been explained to her before she signed it.

Unfortunately Mrs Gusevski had an unhappy life. Her marriage was unsuccessful and she had a number of illnesses, including what Dr Klug, a psychiatrist, diagnosed as a dependent personality disorder. Because of her illness, Mrs Gusevski had difficulty making everyday decisions without an excessive amount of advice and reassurance from others.

Mrs Gusevski had a relationship with a Mr Silkman who asked her to take out the loan that was the subject of the Court case. There was no evidence that Mr Silkman forced Mrs Gusevski to take out the loan or that the lender Permanent Trustee Australia Ltd knew about Mr Silkman, or Mrs Gusevski's illnesses.

When Mrs Gusevski took out the loan, her living expenses, including the living expenses of her children, were about \$1,421.00 per month. At the same time, her income averaged \$1,630.00 per month. The property that was put up as se-

curity was unencumbered and so the lender was able to rely on the security.

The lender had a Procedures Manual in place and that part of the Manual that dealt with the assessment by officers who were approving loans said the following:

'Capacity':- when assessing capacity it is necessary to take into account the type of borrower.

'Individuals': - assessment should consider the net income after allowing for our interest and sufficient income after tax to meet normal living standards. Income from spouse and the demands of children and other dependants should also be considered when evaluating the income available for supporting living standards.'

The Court decided that neither the loan agreement nor the mortgage conditions were unfair. However the Court held that the mortgage should be set aside because the lender did not properly investigate Mrs Gusevski's financial situation at the time when the loan was approved.

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This was another case where the lender was prepared to lend on the asset of the borrower without any proper regard as to whether or not she could service the loan.

The result was that Mrs Gusevski did not have to pay back the loan and the mortgage was removed from her title.

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

>> We hope that our newsletters are of interest to you. If you wish a particular topic examined, please let us know.

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