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April 2008 Newsletter

>> Case Notes - Compensation For Loss

If Compensation Is Sought For Loss That Did Not Happen Because Of Injury To The Individual Or Damage To Property, What Rules Apply?...

The Supreme Court of South Australia recently examined this question in a novel case where Mr Sheehan, who was the Liquidator of a company and the Trustee in Bankruptcy, sold property. Individuals and companies that had given a guarantee in respect of the debt, complained that he did not sell the property for the best price he could and claimed damage against him...

Mr Sheehan put to the Court that no such action existed in our law and the claim should be dismissed. The Judges disagreed and the matter was allowed to go to Trial to examine whether or not Mr Sheehan had breached his duty to the guarantors of the debt.

The Court set out the principles that apply when damage is sought for economic loss that was not connected to injury to a person or damage to property. These are:

Knowledge of the risk and its magnitude.
The case for imposing a duty for economic loss is strengthened if the defendant knew of the risk and its magnitude. The significance of the defendant's knowledge of the risk and its magnitude will depend on the facts of each case.
Vulnerability
The vulnerability of the person making the claim is an important requirement. This vulnerability refers to the person's inability to protect himself from the consequences of the defendant's lack of reasonable care.
Proximity
There must be a sufficiently close relationship to give rise to a right to claim a pure economic loss.
Indeterminacy of Liability
No claim can be made if liability is indeterminate. This will happen when the claim, the number of them or the nature of them, cannot be realistically calculated.
Individual Autonomy
The law generally allows people to go about their business and does not impose a duty on someone conducting their business if some other person suffers loss. In the case of Mr Sheehan, the Court said that he had obligations to creditors in the normal way because of his role as a Trustee in Bankruptcy and Liquidator of companies and therefore it is not incompatible that he should have duties to people who guaranteed a debt.
Inconsistent Duties
No duty for economic loss can arise if the duty is inconsistent with other duties that the person who caused the damage might have. In the case of Mr Sheehan, it was concluded that there was no inconsistency and that he did owe a duty.
In South Australia there will be a hearing to decide whether or not Mr Sheehan breached the duty imposed on him.

Thanks And Praise For The Work Of Ryan Kim...

I write to record my heartfelt appreciation for the hard work and good performance that you demonstrated during the hearing on 12 to 14 February 2008.

Best regards
Poh Kiat - Singapore

>> Short Case Note

The Directors of a Company are Held Responsible for Promises Made...

In the case For the Good Times Pty Ltd v Coltern Pty Ltd, the plaintiff alleged that promises were made that development projects that the plaintiff invested in, were progressing well. The directors of the companies were joined as defendants and each of them had promised throughout the transaction, that they would use their best endeavours to ensure that a second mortgage would be provided to the investors.

The Judge found that the promise to use best endeavours to arrange the mortgage was not kept and that the directors should be held liable in the same way that the companies should.

It is important to realise that if an individual makes the promise, the fact that he or she is a director of a company, is not a certain protection from being required to accept responsibility for the consequences of the promise not being kept.

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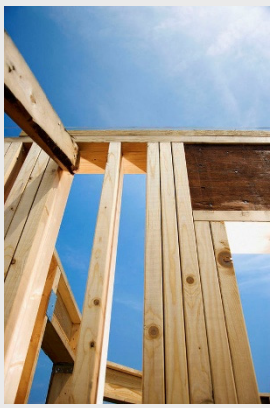
>> Short Case Note - Unfair Transactions

An Unfair Transaction Should Not Be Confused With An Unfair Or Unjust Contract…



The Court Will Not Give Compensation If The Transaction Is Unfair Rather Than The Contract…

Mr and Mrs O'Brien in 1982, decided to sell their home at Blacktown and buy a new Hooker home on the central coast.

They applied for a loan from Citicorp and were successful in the loan application.

The same solicitor acted for Citicorp, Hooker Homes and Mr and Mrs O'Brien.

The Trial Judge decided that the solicitor was negligent and the Citicorp contract was unjust. He ordered that the interest payable under the Citicorp contract be adjusted and that the solicitor pay $2.00 in compensation.

The Court of Appeal decided that the Trial Judge was wrong. They said that while the transaction might have been unfair to Mr and Mrs O'Brien because they ultimately could not make the payments on the loan. The contract wasn't unjust and they lost the appeal. The Court of Appeal found that the solicitor had no obligation to advise Mr and Mrs O'Brien as to the prudence of entering into the transaction and was not negligent.

It is important to be aware of the difference between an unfair transaction and an unjust contract. Although there might be considerable difficulty caused by an unfair transaction, it does not necessarily mean that the Courts will order compensation.

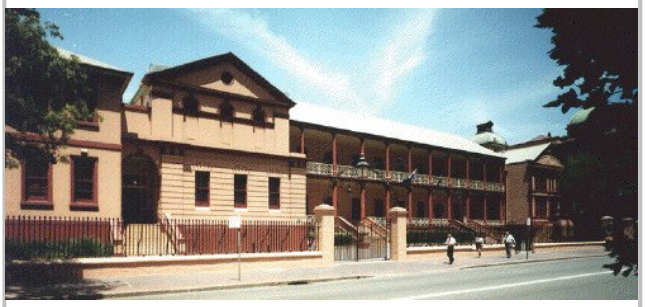
>> Short Case Note - Conveyancing

An Amendment To The Conveyancing Act Introduced Into the New South Wales Parliament To Further Protect Borrowers…

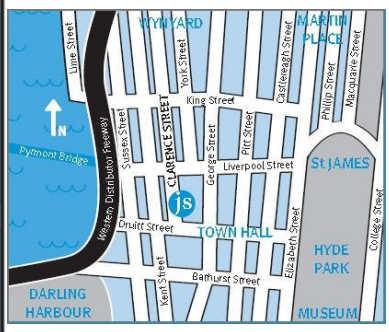
In the year 2000, Peter Jackson of Jackson Smith drafted for Mr Don Page, the MP for Ballina, an amendment to the New South Wales Conveyancing Act that required lenders when selling property to take all reasonable care to obtain at least the market value of the property or if there is no market value, the best price reasonably obtainable.

In the Parliament there were long negotiations and delays because of the 2003 Election. Finally the Bill was reintroduced in December 2007.

This amendment to the Conveyancing Act will give additional protections to borrowers facing the forced sale of their property. The present test obliges the lender to not act recklessly and sacrifice any equity that the borrower may still have in the property. The new legislation will require the lender to get the market price and if there is no market price, the best price reasonably obtainable.



It is hoped that the amendment will become law in early 2008.



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