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August 2007 Newsletter

>> What's Happening

Congratulations....

On 18 May 2007 Philip van den Heever and Dayan Goodsir –Cullen were both admitted as solicitors of the Supreme Court of New South Wales.

Both Philip and Dayan have been with Jackson Smith Lawyers now for some time and we are pleased that Dayan has accepted our offer to remain with us as a solicitor.

We all congratulate Philip and Dayan and I am sure the clients of the firm that Dayan has assisted, will be delighted that he will be staying at Jackson Smith Lawyers.

>> Feature Article...

The Court Refuses to Grant a Son an Interest in the Family Home Even Though he Handed Over his Pay Packet to his Father and Mother to Contribute to the Purchase of the Home.....

Mr Parente and his son migrated to Australia in October 1967. The father and the son both worked and the son handed over his pay packet to his father so that a home could be purchased for the whole family.

A property was purchased in Broadmeadow in late 1969 in the father's name for \$9,275.00. \$3,825.00 was paid by way of a deposit from Mr Parente and the balance of \$5,450.00 was borrowed from the Commonwealth Bank. Mrs Parente and seven other children came to Australia in March 1970 and the whole family lived in the new home at Broadmeadow.

The son gave evidence that he handed over his pay packet first to his father and later to his mother until about mid 1979. The Commonwealth Bank mortgage was paid out in March 1975.

The son gave evidence that his father had told him that he needed his help to buy a house and support the family and that one day a share of the house would be his. In part of his affidavit, the son said that the father had told him that one day half of the house would be his. The son also gave evidence that the father said on a number of occasions that in his Will he had given half of the house to him.

Until about September 2003 family relations were good. but at about that time the father accused the son of poisoning some of his prized trees, and after that family relations deteriorated.

In 2005, the son sued the father for half of the house.

The Judge held that the promise was quite vague and never contemplated that an interest in the property would be obtained by the son until the father died. The Judge said that when the father spoke of leaving property to the son after his death it was because he was grateful for what the son had done.

The Judge held that he could not see that the son had relied on any promise that caused him to pay over the money. The money was paid over because it was the filial duty of the son to support the father and his family.

The Judge commented that after the father's death, the son might have a good claim against the estate.

Once again, the lesson to be learnt from this case is that if arrangements are made in the family, legal advice should be sought so that a written agreement is prepared that will achieve what the family members want.



Legal Terms

Following are some terms that are often seen when a Will is made

Testator A testator is the person who is making the Will and wishes to make provision for the parties named in the Will.

Beneficiary A beneficiary is a person for whom provision is made in a Will.

Bequest A bequest in a will is a specific direction that some item of furniture, jewellery or a particular sum of money, is left to a nominated person.

Executor The executor is the person who is given the task of instructing solicitors to attend to the filing of documents to obtain probate.

Trustee A trustee is the person appointed in the Will who has the obligation to act as trustee of a particular trust that might be made in the Will.

Administration An administration occurs when a person dies and does not leave a Will. An application is then made to the Court for Letters of Administration.

Administrator The administrator is the person who applies for Letters of Administration.

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LAWYERS

New Office Location....

Jackson Smith Lawyers have moved offices. The new office details for Jackson Smith Lawyers are:

Level 7, 217 Clarence Street, Sydney, NSW, 2000

T: (02) 9262 1770 F: (02) 9262 1771 DX: 13132 Sydney West

Post: PO Box Q245 Queen Victoria Building Post Office Sydney 1230.

We look forward to seeing our clients at the new offices. All email addresses remain the same.



>> Feature Article

Some Big "Watch Outs" For Guarantors Of Other People's Borrowings...

Guarantors now increasingly understand that they have rights if they are sued when the debtor does not pay the debts which were guaranteed.

A guarantor can raise a number of types of claims:

- ♦ a claim that tries to set aside the guarantee completely,
- ♦ a claim that sets off some of the debt because of actions that are complained of by the guarantor or
- ♦ a direct right that a guarantor might have because of the conduct of the creditor. That conduct might have been such as to sacrifice the security or diminish the value which the security might have obtained on a sale.

Guarantors and their advisers must be aware though that most guarantee documents contain a clause that requires that the entire debt be paid as a precondition of the guarantor taking any action that might have the effect of reducing the debt.

In a recent NSW case after considerable argument a court held that this type of clause in the guarantee document was valid and bound the parties.

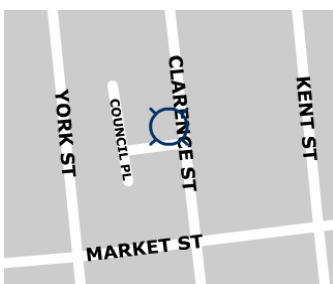
Guarantors should be made aware of this type of clause and should negotiate with the creditor when entering into a guarantee to delete or vary the clause... or negotiate with the debtor to better protect his future position.

>> Short Case Note

On 18 April 2007, the Court of Appeal delivered judgment in the matter of Dr Bronte Douglass v Lawton Pty Ltd.

The landlord, Lawton Pty Ltd, had claimed unpaid rent from the guarantor of the lessee company that had gone into liquidation. The guarantor claimed that he was not responsible for the rent because of a number of defences, including that the tenant had not been given quiet enjoyment of the leased area, had been charged for car parking spaces contrary to an agreement, and had failed to deliver up items in the fit out.

All of the defences failed in the District Court and the guarantor was unsuccessful in the Court of Appeal.



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