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February 2009 Newsletter

>> IS YOUR BANK MAKING YOU ILL?

Is it possible to claim for your health problems caused by the bank's conduct?...

On a regular basis bank clients complain that the conduct of the bank or financier caused them to become ill and the bank should be held responsible by being made to pay financial compensation.

This question came before the court recently in South Australia in the case of Politarhis. Mr Politarhis had been given a line of credit by Westpac and the Australian Central Credit Union Limited and some of his credit was given by the bank and the credit union by mistake.

Mr Politarhis claimed that the credit given to him caused various psychological and psychiatric conditions including gambling, drug addition and paranoia. Mr Politarhis claimed that access to easy credit made his gambling worse and this lead into depression and other problems.

Mr Politarhis suffered a work accident in 1992 and claimed compensation. The Judge in the Westpac case pointed out that Mr Politarhis had claimed that he suffered depression because of his work accident.

In relation to the credit union Mr Politarhis claimed that a policy of restricting withdrawal to $2000 a day was breached and this meant he had access to credit against the policy of the Credit Union. In the end the Judge found there was no such policy.

Mr Politarhis' claim was that the Credit Union and Westpac owed him a duty to exercise care to avoid causing or exacerbating his compulsive gambling, depression, paranoia and other psychological states.

It is important to note that the Judge did not rule out the possibility of this kind of claim but highlighted the problems that anyone making such a claim would have. The starting point is to decide whether or not it was reasonably foreseeable that the harm would arise in the circumstances.

cont. on page 2 >>

>> KYOTO UPDATE

Australia takes early steps to be part of the Kyoto Protocol Community...

Australia's ratification of the Kyoto Protocol obliges the country to achieve 108% reduction in the 1990 levels of carbon emissions between 2008 and 2012.

The National Greenhouse & Energy Reporting Act 2007 requires companies that do not have a holding company incorporated in Australia to report on their group's emission of greenhouse gasses.

Starting 1 July 2008 the corporations affected by this Act are required to register and report if their emissions reach particular levels. Registration must take place by 31 August and reporting by 31 October following the financial year in which they exceed the threshold set out in the legislation.

Corporations that do not comply will be fined and Chief Executive Officers in some cases will be also liable.

Any business involved in an activity that causes carbon emissions should be aware of changes that are occurring in the Australian regulatory landscape and obligations that are being imposed on them.

The articles contained in this newsletter are in the nature of general comment only. The articles are neither intended nor should be taken to be, advice in respect of any particular matter. Advice should be sought in relation to particular circumstances.

We welcome feedback about the newsletter items and if you wish to comment please do so at **info@jacksonlalic.com.au**

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>> CREDIT CRUNCH

Queensland Response to the Credit Crunch…

The Queensland government has amended their Property Law Act to extend the duty of the mortgagee exercising its power of sale to take reasonable care to ensure that the property is sold at market value in situations where the property is sold by a receiver or by a mortgagee as attorney for the mortgagor.

The amendment to the Act sets out what must be done to comply with the legislation. The mortgagee must adequately advertise the sale, obtain reliable evidence of the property's value, maintain the property and undertake reasonable repairs, and sell the property by auction unless it is appropriate to sell it in another way.

It is an offence not to follow the stated steps.

The new legislation covers mortgages over land of a consumer credit nature.

We are yet to see if New South Wales and the other States follow Queensland's lead.

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<< cont. from page 1.

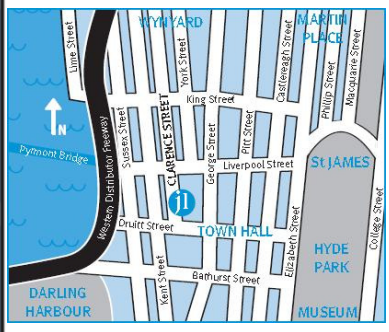
The Judge pointed out that the relationship between the parties would have to be looked at very carefully, the existence of any vulnerability to psychiatric illness which the plaintiff may have and any knowledge by the defendant of that vulnerability. To make such a claim it is necessary to prove that the party is suffering from a psychiatric illness. It is not enough to have emotional distress.

In the case of Mr Politarhis the Judge accepted that he may be suffering an illness. Mr Politarhis had another serious hurdle to overcome. Because he claimed that he suffered financial loss he was required to establish the circumstances in which a duty of care to avoid causing financial loss arises. Such a duty has been found to exist when the courts are satisfied about a number of things; these include:

- That the defendant should have the interest of the plaintiff in mind before pursuing or failing to pursue a course of action that would cause harm.
- That the Court would look at the ability or lack of ability of the plaintiff to protect himself or herself from harm by the defendant, any reliance by the plaintiff on the defendant the control or absence of it, exercised by the defendant, whether or not the parties stand in a contractual relationship by which the plaintiff may protect himself or herself from negligent conduct of the defendant, and the extent to which the imposition of the duty may impact upon both the plaintiff and the defendant.

After examining all of the evidence His Honour found that the gambling habit of Mr Politarhis was well established before the Credit Union or Westpac provided credit. This meant that his claim that providing credit caused the illness must fail. His Honour concluded that no duty existed. He said it would be unrealistic to conclude the Credit Union was under a duty to monitor the way in which members conducted their accounts. His Honour made the same finding in relation to Westpac.

The bank succeeded in obtaining an Order for Possession and the sale of the home of Mr and Mrs Politarhis. The credit union had already been paid out from money received from the bank.



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