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August 2009 Newsletter

>> A WARNING ON POWER OF ATTORNEY

Elderly Parents Lose Their Home Because of the Behaviour of Their Son……

Mr Siahos aged 88 and Mrs Siahos aged 71 transferred a one third share of their property at Putney to their son Peter in February 2005. In August 2005 they each gave him a Power of Attorney that had no restrictions.

Using the Power of Attorney, Peter borrowed $704,000.00. $510,892.43 was paid to GE Mortgage Solutions to discharge a prior mortgage and the balance, except for $12,000.00 was paid to the ANZ bank for Peter's benefit.

In about August 2006 Peter told his mother that the house had to be sold because he had borrowed money and could not repay it. Mrs Siahos went to see a solicitor in October 2006 and was shown a number of documents. Mrs Siahos said she had never seen the transfer before and never agreed to transfer part of her property to her son. She said that the signatures were not the signatures of herself and her husband.

In relation to the mortgage Mrs Siahos told her solicitor that she had not given Peter the approval to mortgage the house. She did not know what a Power of Attorney was until it was explained to her by the solicitor in 2006.

Mrs Siahos said that the certificate of advice was not signed by her and could not have been because she and her husband were in Greece at the time.

Mr and Mrs Siahos claimed that the Powers of Attorney that Peter used to mortgage their property were obtained by fraud or they were induced to execute documents under Peter's influence. They claimed the bank, JP Morgan Trust Australia Limited, recklessly neglected making enquiries in respect of any undue influence.

The Judge found that the bank never knew or should have known or suspected that Peter was acting fraudulently or without his parents approval. The bank found against Mr and Mrs Siahos and ordered that they give possession of their property to the bank for it to be sold to pay the debt.

>> GUARANTEEING SOMEONE ELSE'S BORROWINGS

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 New South Wales 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.

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.
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>> CHANGE OF LOAN CONDITIONS

If A Bank Changes the Conditions of a Loan After the Loan Terms Have Been Agreed it May be an Unjust Contract and the Court May Step in to Correct the Unfairness....

Mr Bellairs had identified a nursery business opportunity in the Lismore area and approached Suncorp Metway for finance. Because he could not manage the purchase on his own he introduced Mr Pike into the business.

In July 2003 Mr Bellairs spoke to Mr Poole at the bank and in the conversation stressed that he would need an interest only loan, because of the likely cash flow of the business.

On 8 August 2003 Mr Bellairs and Mr Pike completed the application for $535,000.00 to finance the purchase.

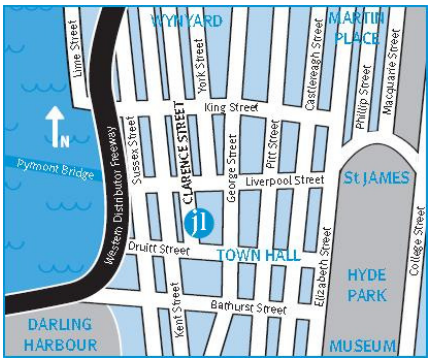
On 29 August 2003, Suncorp was supplied with a cash flow analysis of the nursery. In early September the loan was approved. The offer of finance on 8 September 2003, required that a valuation be obtained and that the value be not less than $675,000.00 on the nursery property. The borrowers were never informed that the valuation was to be confined to the land and building with no reference to the business.

Having obtained finance, the contract for the sale of the property and the contract for the sale of the business were executed on 11 September 2003.

On 15 September 2003 the borrowers executed the offer of finance dated 8 September.

On 19 September the bank realised there was a shortfall in security after receiving the valuations. Arrangements were made for the borrowers to make additional repayments of $2,740.00 per month to remedy this problem. Inevitably the requirement to pay this extra money caused problems for the borrowers and they fell into default.

Mr Bellairs and Mr Pike took the matter to Court and ultimately the Judge found that the contract was unjust because it was entered into on a certain basis and the bank changed the terms after the contracts had been exchanged. The Judge held that the imposition of the condition relating to the reduction of principal was unjust and that there should be a remedy. The Judge found that the additional requirement of the bank was not necessary to protect its legitimate interests. The Judge held that the lower rate of interest should be paid for the entire period of the loan up until judgment. The Judge stayed the Writ of Possession for six months from the date of judgment to give the borrowers an opportunity to pay out the Suncorp debt.



Jackson Lalic Lawyers
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
Sydney 1230.

>> STREET ART

Jackson Lalic commissioned street artists PLOY and DEKA to paint two of the office doors and the connecting panel as one street art work. An image of the work appears on the Jackson Lalic website as part of the art collection. Anyone wishing to have a more careful look at the work is welcome to view it when next at the offices of Jackson Lalic.

>> LEGISLATION UPDATE

New Legislation Update

The Residential Tenancies Amendment (Mortgagee Repossessions) Bill 2009 has been passed. This Act will require a mortgagee who has an order for possession that excludes any tenant, to give that tenant at least thirty days notice to vacate the premises before the mortgagee can take possession.

The Act provides that the former tenant who has given notice to vacate may withhold or recoup any rent for the period in which they are holding over after termination of the residential tenancies agreement.

These are important protections for a tenant in times when lenders are more often taking possession of properties.