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January 2011 Newsletter

>> FORGED LOAN DOCUMENTS AND COMPENSATION

When a Loan Agreement and Mortgage is Forged can the Victim argue that the Documents are Unjust Credit Documents under the Consumer Credit Code ...

Readers of this newsletter will remember the unfortunate case of Mrs Van den Heuvel.

Mr Van den Heuvel forged his wife's signature on a loan agreement and mortgage so that he could borrow money from Perpetual Trustees Ltd. The court ordered that there was a registered mortgage that secured the debt to Perpetual.

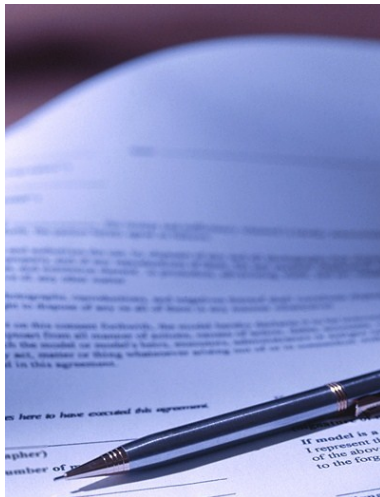
The judge who first heard the case held that the unjust credit contract provisions of Consumer Credit Code did not apply in this case because Mrs Van den Heuvel was not a mortgagee under the general law because of the forgery. Once again the matter went to the Court of Appeal and three judges discussed all of the arguments.

Justice Hodgson found that the mortgage was excluded from the Code because Mr Van den Heuvel had signed a certificate stating that the loan was for business purposes. Once that certificate is signed, the unjust contract provisions of the Code do not apply.

Justice Basten held that the wife should be entitled to rely on the provisions in the Code because she was at risk of losing her interest in the home that was security under the mortgage.

Justice Young held that the Consumer Credit Code did not apply. He said that it is only people who enter into mortgages who can rely on the provisions and not someone who becomes a mortgagor only because of the operation of the Real Property Act following registration of the mortgage.

The majority conclusion was that Mrs Van den Heuvel could not seek assistance under the Consumer Credit Code. She was left with compensation from the Registrar General. The courts decision of this issue will be discussed in a later newsletter item.



>> LEGAL TERMS EXPLAINED

Termination

A contract can be terminated if one party repudiates. Following the recent High Court decision in *Koompahtoo*, the Australian position changed.

After that decision, a breach of a contract term will be repudiatory if it is an essential term or if it is so serious that it may be said to go to the root of the contract. If such a breach occurs, the innocent party may then terminate the contract.

A contract term goes 'to the root of the contract' if it is sufficiently serious that they 'indicate that the contract will not be performed substantially according to its requirements'.

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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>> POWER OF ATTORNEY

What Compensation Should be One of a Forged Mortgage Fee of Registrar General?...

This is the third newsletter item about the decision in the New South Wales Court of Appeal in the case of Mrs Van den Heuvel.

Mrs Van den Heuvel was the victim of her husband's fraud. He forged a loan agreement and mortgage to borrow money from Perpetual Trustees Ltd.

The Court found that there was a registered mortgage over the land and Perpetual were in a position to recover the money. The Court also found that Mrs Van den Heuvel could not rely on the unjust credit provisions of the Consumer Credit Code. The remaining issue was compensation which Mrs Van den Heuvel should receive from the Registrar General.

The judge that first heard the case found for Mrs Van den Heuvel and held that her damage was the difference between the value of the unencumbered one-half share and the net sum she would receive after the payment of the mortgage. The Registrar General appealed to the New South Wales Court of Appeal. The Registrar General argued that there was no liability for Mrs Van den Heuvel because she should not have been held liable to Perpetual Ltd.

The judges of the Court of Appeal held that the Registrar General was liable to compensate Mrs Van den Heuvel for her loss. They however, varied the order that was made by the judge. They said that what was required was a comparison of her position that the mortgage was not registered with what her position was as a result of registration.

Mrs Van den Heuvel was regarded as having a one-half beneficial interest in the property. Her loss is the difference in the value of that interest and the sum she will receive after payment of Perpetual's mortgage. The judges of the New South Wales Court of Appeal indicated that it was a matter for the discretion of a single judge of the Supreme Court, whether in future proceedings Mrs Van den Heuvel should be allowed to lead further evidence that her beneficial interest was greater than one-half.

At the time of writing this newsletter, the decision on the compensation payable to Mrs Van den Heuvel had not been handed down.

>> A PROMISE IS A PROMISE

A Promise Made in Family Law Proceedings Might Later be Enforced ...

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During Family Court proceedings, Michael Fiertag promised to leave a property to his wife in his Will, she agreed to forego a payment of \$50,000.00 from him provided he built a garage on the property. Orders were made by the Family Court and noted that the agreement was made.

Before his death, Mr Fiertag changed his Will and left his former wife Mrs Susan Simpson Cook nothing. She sued the executor of the estate and the New South Wales Court of Appeal upheld her claim to the property and ordered that it be transferred to her.

It is important to remember that parties may be bound to promises made.



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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 Post Office Sydney 1230.