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November 2009 Newsletter

>> FORGED MORTGAGE DOCUMENT

If a Mortgage Document is Forged Will the Registration of the Mortgage Give Protection to the Mortgagee/ Lender....

Under the Torrens System of registration of mortgages, registration is the key factor that will give protection to the person who holds the registered document.

What is the position if the mortgage is forged?...

This problem was examined in a recent decision Perpetual Trustees Victoria Limited v English and Anor. In this case the husband had forged his wife's signature on the mortgage. He defaulted on the loan and later went bankrupt. The financier attempted to gain possession of the property to recover its money. It claimed that registration protected it even though there was forgery of the wife's name who was a part owner.

The Court held that if the debt was referred to in the mortgage or was referred to in a document that was incorporated into the mortgage indefeasibility, or protection from registration, would mean that the debt could be recovered. In the case of English the debt was not referred to in the mortgage nor was the loan agreement incorporated into the mortgage. The court held that the financier could not recover under the registered mortgage.

>> LEGAL TERMS EXPLAINED

What is a Penalty?

A clause in a contract that provides for payment of a sum of money that is not a genuine pre-estimate of the loss or damage likely to be suffered in the event of a breach of a contract, or is exorbitant or unreasonable in all of the circumstances of a contract, will be a penalty. Penalties are not enforceable and cannot be recovered.

It may also be possible to claim that a clause amounts to a penalty and is unenforceable if in all of the circumstances of the contract, there is evidence of oppression or other unconscionable use of bargaining power.

Each case must be looked at separately because the Courts sometimes decide that such clauses do not amount to a penalty. In Yarra Capital Group Pty Ltd v Sklash Pty Ltd, both parties were money lenders providing loans and funds for high risk, short term and high interest rate loans. Sklash loaned money under a number of short term (two month) loans to Yarra Capital to enable Yarra Capital to make short term loans to its customers. There was one fee charged for each Sklash loan and, if there was no default in the repayment of the loan, that was the only fee Sklash would receive. If a loan was not repaid on the due date, Yarra Capital was required to pay an additional fee of $328.50 per day for each day that loan remained unpaid. Yarra Capital defaulted and Sklash sued for the outstanding loan amounts plus the default fees.

Yarra Capital claimed that the default fees were a penalty and therefore should not be enforceable.
The Victorian Supreme Court held that the additional fee payable under the default clause was not so out of proportion to the loss that the lender, Sklash, may suffer as a result of the borrowers default in repaying the loans on time. Yarra Capital's challenge to the clause failed and Sklash was entitled to recover the daily fee.

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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>> FEDERAL GOVERNMENT'S TREATMENT OF WATER RIGHTS

The Federal Government's Treatment of Water Rights Causes Concern and Distress in Rural Australia. An attempt to win compensation for acquisition in the Courts fails.

Over recent years there have been a number of court cases about the validity of Water Sharing Plans. The latest, Arnold v The Minister Administering the Water Management Act 2000, relates to the Lower Murray Ground Water Source 2006. The Court case was a class action of 108 farmers seeking compensation for water that they say had been compulsorily acquired. The action failed on all fronts.

The Court of Appeal held that none of the statutory provisions or agreements relied on by the applicants could be characterised as a law or regulation of trade or commerce. Therefore they could not seek the protection of the Australian Constitution.

The Court did not accept the arguments of the applicants that any of the laws or regulations relied on by them related to acquisition of property. Therefore, there was no requirement to provide compensation for the acquisition of property.

The action arose because the entitlement of the farmers to extract ground water had been significantly reduced following the implementing of the water sharing plan for the Lower Murray Ground Water Source 2006. The farmers challenged the validity of the scheme and sought damages.

The Court case highlights the difficulties that farmers face if they wish to challenge water sharing plans or claim that a reduction in water entitlements pursuant to the Water Management Act constitutes an acquisition of property on unjust terms that should be compensated.

>> LGT VENTURE PHILANTHROPY PROGRAM

Jackson Lalic is Proud to Support the LGT Venture Philanthropy Program...

The LGT Venture Philanthropy Foundation was founded in 2007 by initiative and funds of the Princely Family of Liechtenstein. Its mission is to raise the sustainable quality of life for the less advantaged people especially in the developing world. Applying a venture philanthropy approach, LGT Venture Philanthropy supports both organisations with financial, social and intellectual capital. LGT Venture Philanthropy makes use of grants, loans and equity investments. Any generated profit is channelled back into the fund and will be used for additional investments.

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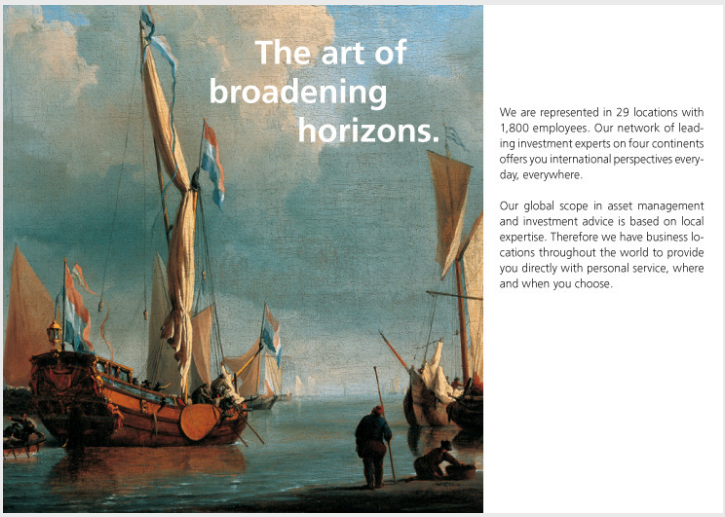

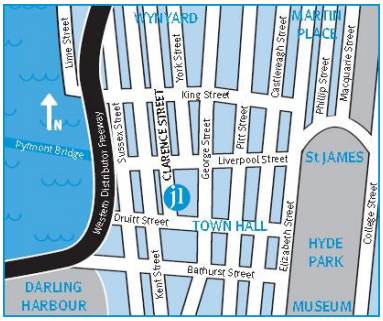

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