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September 2009 Newsletter

>> FEATURE ARTICLE — VARIATIONS OF LOAN AGREEMENTS

If a Loan Agreement is Varied Without the Consent of the Guarantor it Cannot be Called a New Agreement to Avoid the Automatic Discharge of the Guarantee...

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Mr Silversmith and Mr Van Veizen were sued for \$240,000.00 plus interest of \$138,568.75 as guarantors of a loan by Valstar to P & G Pty Ltd under a mortgage executed on 12 March 2003.

Clause 6 of the mortgage provided that the mortgage should take effect as if it was entered into by the guarantors and that they would also be responsible to the lender. It was argued that this clause made the guarantors the same as lenders and therefore they did not have the protection that a guarantor would have. This argument failed because the Judges in the Court of Appeal held that it was not clear enough.

On 28 April 2004, the company executed a variation of the mortgage. This document was executed by the guarantors.

In September 2004, a second variation of mortgage was executed in the same form as the first variation.

In October 2004, Mr Silversmith and Mr Van Veizen resigned as directors of the company.

On 9 February 2005, the company executed a third variation of mortgage. This variation was not signed or agreed to by Mr Silversmith or Mr Van Veizen.

On 19 April 2005, a fourth variation was entered into. Mr Silversmith executed this fourth variation as secretary of the company. Mr Van Veizen did not sign this document at all. This variation increased the mortgage to \$390,000.00.

On 30 January 2006, the company executed a final variation of mortgage. This variation increased the principal sum to \$500,000.00 but was not signed by either Mr Silversmith or Mr Van Veizen.

The company defaulted in its obligations under the mortgage. The security property was sold but the proceeds were not sufficient to discharge the debt and Mr Silversmith and Mr Van Veizen were sued as guarantors.

In the proceedings, the company attempted to say that the variations that Mr Silversmith and Mr Van Veizen did not sign, were in fact new agreements and that they should be liable for the original \$240,000.00 plus interest.

The Judges of the Court of Appeal considered that the reasoning of the Judge in the District Court that one or more of the third, fourth and fifth variation substituted a fresh agreement for the original thereby discharging Mr Silversmith and Mr Van Veizen from their obligations was an incorrect analysis of the law. The Judges of the Court of Appeal pointed out that for a new agreement to be reached, all of the parties to the agreement would have to be joined in the agreement. However, the barrister who appeared before the Court of Appeal for the guarantor pointed out that a critical matter raised before the Judge was that if a variation to a loan contract is made without the consent of a guarantor, and the variation is harmful or prejudicial to the interests of the guarantor, that variation immediately discharges the guarantee. The obligation of the guarantor from that point is at an end.

The Judges of the Court of Appeal agreed and it was held that because the contract between the lender and the borrower had been varied without the consent of the guarantors, the guarantee had been discharged and neither Mr Silversmith nor Mr Van Veizen had any responsibility to make any payments under the guarantee.

>> INTRODUCTION TO FINANCE & BANKING LAW

Peter Jackson was asked to prepare an introduction to Finance & Banking Law for the website www.findingalawyer.com.au. Anyone wishing to receive a free copy of this introduction to Banking & Finance Law should contact Linda Dickson by email ldickson@jacksonlalic.com.au or by telephoning Linda on (02) 9262 1770.

>> LEGAL TERMS EXPLAINED

Legal Terms Explained...

Waiver

An intentional relinquishment of a right or interest. Waiver can describe an election or an estoppel, and the distinction must always be clear.

Election

To determine in favour of a course of action, a thing, or a place. The word is used in a variety of legal contexts:

Contract

An unequivocal act or clear words showing a choice between two inconsistent rights or remedies. Where a person has, with full knowledge, done an unequivocal act showing the choice of one of two inconsistent rights, he or she cannot afterwards pursue the other, inconsistent right. The purpose of election is to prevent a person taking up inconsistent positions. Examples of election include an election to rescind, affirm or terminate the performance of a contract, or the exercise of a right to terminate.

Criminal Law

A decision by a party to take a certain procedural step in the course of the prosecution of a criminal offence. For example an accused person may in some jurisdictions elect to have trial by a judge alone rather than trial by a jury. An accused and sometimes the prosecutor may elect to have matters dealt with summarily rather than on indictment and visa versa: for example (NSW) Criminal Procedure Act 1986 s 260. Depending on the offence, this election may be exercised by either the Crown or the accused, or the Crown only: (NSW) Criminal Procedure Act 1986 s 258.

Real Property

An equitable doctrine that applies to force someone taking a benefit under an instrument to accept or reject the instrument as a whole. The foundation of the equitable doctrine of election is that 'a person cannot accept and reject the same instrument'.

Succession

The decision a true owner must make where a testator is mistaken as to the ownership and purports to dispose of property to another person which he or she does not own. Where the true owner is also a beneficiary under the testator's Will, equity may put the owner to election to either refuse the gift and keep the subject property with compensation or to take the gift and transfer the property according to the Will. The true owner is not allowed to approbate and reprobate.

Estoppel

The doctrine designed to protect a party from the detriment which would flow from that party's change of position if the assumption or expectation that led to it were to be rendered groundless by another. Estoppel is recognised both at common law and in equity. The concept of unconscionability has unified and rationalised the various types of estoppel, which are no longer seen as a series of independent rules.

Forebearance To Sue

A promise not to sue. A forbearance to sue, whether in a court of law or some other forum for dispute resolution, is distinguishable from the giving up of a claim. A promise not to sue for a limited period is a valuable consideration where the substantive claim is one for which the other party is liable.

>> DISCLAIMER

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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> KYOTO PROTOCOL UPDATE

The Climate Change Action Fund...

The Federal Government has established a \$2.25 billion Climate Change Action Fund as part of its response to global warming.

The fund will assist small business, community organisations and low income households to invest in energy efficiency projects and in researching and implementing low emission technology.

\$130,000,000.00 will be available over five years so that business and community service organisations can be informed and helped to manage the financial impact of the government's policy to combat global warming. This money should be available in the second half of 2009.

\$1.4 billion will be available over five years for investment in energy efficiency and low emission technologies. This money is designed to provide incentives for business and community organisations to invest in low emission technology processes and products. These funds should also commence to be available in late 2009.

\$200,000,000.00 will be available to provide structural adjustment assistance where workers and communities are disproportionately impacted by the government's Carbon Pollution Reduction Scheme. This money will be expanded as necessary following the commencement of the fund.

\$500,000,000.00 will be available to assist areas of the coal sector.

The fund will provide welcome relief to industries, workers and regions that are excluded from assistance under the Carbon Pollution Reduction Scheme but will nevertheless be affected by the carbon price economy. Details of exactly how the fund will work are yet to be made available by the government.

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