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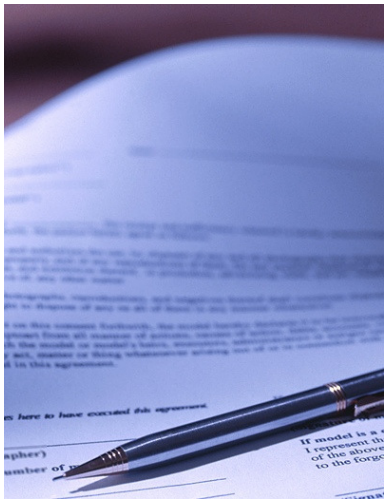
July 2008 Newsletter

>> ASSIGNMENT OF A CAUSE OF ACTION

Is The Assignment Of A Cause Of Action Always Valid…

It sometimes happens that when parties are involved in court proceedings and the company or individual gets into financial difficulty they consider assigning or transferring their right to sue to another so that they will not lose the benefit that they hope to gain from the litigation. These circumstances arose in the case of Tosich v Tasman Investment Management Limited [2008] FCA377(20 March 2008). In this case Mr. John Tosich assigned his rights to All Saints Investments Pty Limited. One of the insurers involved in the claim, Aon, claimed that the assignment was not valid.

The first hurdle that Mr Tosich had to face was the High Court decision in Poulton v Commonwealth [1952] HCA70 where, in relation to a claim in conversion the court said:



"…according to well established principle, the right was incapable of assignment either at law or in equity".

The English courts have taken a different view. In the case of Trendtex Trading Corporation v Credit Suisse [1982] AC679 the court said that in general the right to sue was assignable except if it was of a personal nature, such as defamation or a claim for personal injury.

Over the years there has been some move towards applying the English law in Australia. In the decision of Mr Tosich the Judge considered that the English position was now the established law in Australia.

It is fair to say though, on the question of what law should apply, he did not make a final decision. However, in the end, the Judge decided that the cause of action had not been validly assigned.

A party to litigation who sees some advantage in assigning a right to sue should take care before doing so to ensure, as best one can, that the assignment will be valid.

>> BEST WISHES

Best Wishes From a Friend and Client…

Peter, congratulations and best wishes on the new firm. I believe that you will provide an exemplary service for the benefit of your clients.
I am proud to be one of your new clients.
My sincere best wishes.
Philip Cox

>> SHORT CASE NOTE

Transferring a Mortgage Does Not Always Result in a Transfer of the Money Owing Under the Mortgage…

It will not always happen that when you assign or transfer a mortgage that the debt that is secured by the mortgage is also transferred or assigned.

The High Court decided that the debt must be set out in the mortgage document. It is not enough to have a loan document. When the mortgage is transferred, if the debt is not part of the mortgage, it will not necessarily be transferred with the mortgage.

If you are transferring a mortgage or accepting the transfer of a mortgage and expect the debt will be transferred at the same time great care should be taken to ensure that the documents achieve what is intended.

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

A Power Of Attorney Cannot Be Used For The Personal Benefit Of The Attorney…

Powers of attorney are often granted to make it easier for people to manage their affairs if they are elderly or ill.

It should be remembered by anyone who has been granted a power of attorney or who has been made an attorney that unless the language of the document is very clear the power cannot be used to confer a personal benefit on the attorney.

If a person uses a power of attorney to gain a personal benefit they can be sued for the recovery of the loss by the person who granted the power.

If a person who granted a power of attorney regrets having given the power and wishes to withdraw the document this can be done either with the consent of the person who was given the power or by order of the Supreme Court. The Supreme Court can terminate a power of attorney if the objects have been carried out, or if the objects of the power of attorney have become incapable of being carried out or if the power of attorney is otherwise exhausted.

Care should be taken when other granting power of attorney or being appointed as someone else's attorney.

>> SELECTING THE RIGHT COURT

New South Wales Courts … Selecting The Right Court…

In New South Wales, the civil courts are divided between the Local, District and Supreme Courts.

If the amount in question is less than $60,000.00, proceedings are commenced in the Local Court. Matters for $10,000.00 or less are dealt with in the Small Claims Division of the Local Court. Matters over $10,000.00 are dealt with in the General Division.

The Small Claims Division has simplified procedures to limit costs. In the General Division, more conventional court procedures apply.

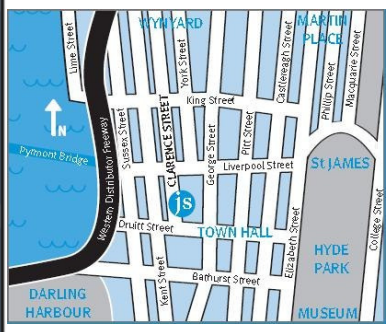
In the Local Court, the $60,000.00 limit can be extended to $72,000.00 with the consent of all parties.

The District Court has jurisdiction where the amount being argued about is between $60,000.00 and $750,000.00.

In addition to these courts, there are a number of specialist tribunals operated by the Department of Fair Trading, including the Consumer Claims Tribunal, the Residential Tenancy Tribunal, Retail Leases Tribunal and the Building Tribunal.

Each year approximately two hundred thousand actions are dealt with in New South Wales. The Supreme Court handles approximately twenty five thousand, the District Court five thousand and the Local Court one hundred and seventy thousand.

Of the one hundred and seventy thousand matters dealt with in the Local Court, only around 10% are defended.



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