

SPEED.VALUE.QUALITY.COMMITMENT

May 2009 Newsletter

>> BEWARE DEPOSIT BOND CONDITIONS

A Deposit Bond Does Not Always Secure The Deposit For A Vendor...

When purchasing property, if the purchaser does not have the ready cash, often a deposit bond is purchased to secure the deposit on behalf of the purchaser for the benefit of the vendor.

This is an agreement that promises if a demand is made, the deposit will be paid to the vendor of the property. Such a demand is usually made if a contract to purchase real estate is terminated and no cash deposit has been lodged with the agent.

In the case *Reliance Development (NSW) Pty Ltd v Lumley General Insurance Limited* such a deposit bond was purchased and dated 22 June 2006.

One of the conditions in the bond was that it only operated between 22 June 2006 and 22 September 2006.

One other condition was that when demanding payment, the original deposit bond must be presented with a copy of a Notice of Termination or Notice of Rescission of the contract for sale.

On Friday 15 September 2006, the solicitors for Reliance wrote to the insurance company making a claim on the deposit bond. Their letter said that they enclose the documents that were required to be sent under the agreement.

When the letter was received at the insurance company, although the letter was read the enclosures were not. The officer decided to wait until the originals were received.

The original letter and the original enclosure were received on 25 September 2006.

When the enclosures were looked at, it was discovered that the Notice of Termination that was delivered was not the correct one. It was a notice terminating another contract altogether.

The insurance company refused to pay the money because the conditions of the bond had not been complied with.

The court agreed and said that strict compliance of the conditions was required.

The facts of this case highlight again the care that should be taken when entering into any transaction that involves the payment of money or giving of property. Because of the mistake that was made, there was no doubt, much more stressful litigation.

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 If you would like to receive our newsletter electronically please go to www.jacksonlalic.com.au and enter your details on the subscribe to an e newsletter page.

>> IMPLIED TERMS

When is a term implied in a contract....

An implied contract term is a term in the contract that is not expressly agreed between the parties.

Five conditions must be satisfied before a term is implied in a contract:-

- it must be reasonable and equitable
- it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- it must be so obvious it goes without saying;
- it must be capable of clear expression;
- it must not contradict the express terms of the contract.



>> CREDITORS TRUST FUND

When a company gets into financial difficulty the directors often enter into a Deed of Company Arrangement. Once this happens, on all correspondence, accounts, invoices and other official documents, the words 'Subject to Deed of Company Arrangement' must appear. This sometimes causes difficulty for companies.

If a Creditors Trust Fund is established, there is no longer an obligation to put those words on the correspondence or any other document.

A Creditors Trust Fund is created when some or all of the company's obligations to creditors under the Deed of Company Arrangement are transferred to a Trust. Those creditors then become beneficiaries of the Trust. The ASIC guidelines issued in May 2005, indicate that the Deed of Company Arrangement is then at an end and the words 'Subject to Deed of Company Arrangement' need not appear on any company document.

Advice should be sought before entering into such an arrangement because there are considerations relating to trust and tax law. However, if problems are caused to a company because of the words 'Subject to Deed of Company Arrangement' appearing on the correspondence, those problems might be alleviated by entering into such a Creditors Trust Fund.

>> WATER ACCESS LICENSES

Water access licences under the Water Management Act 2000 have the following special features:-

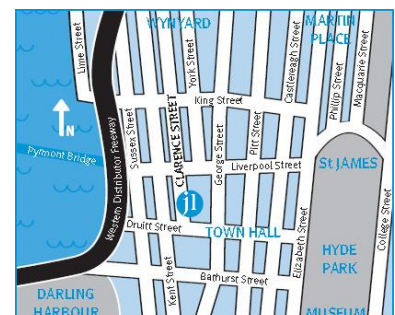
- they provide a clearly defined right to access water, separate from land ownership
- are issued with a certificate of title
- can be independently traded, mortgaged and leased
- are granted in perpetuity meaning that they do not have to be renewed
- entitle the holder to extract a share of the available water
- are issued separately from the approvals to construct water supply works and the approvals to use the water
- are listed on the Water Access Licence Register administered by the Department of Lands, which provides an up to date record of all licences and any transactions against those licences
- are tied to the rules of a water sharing plan

Immediately a water sharing plan commences, existing water act licences are converted to water access licences.



Peter and David enjoy a close relationship with Australia's art fraternity, which is reflected in the significant collection of Australian sculptures and paintings exhibited in their Sydney office.

The two works featured here by **Wendy Sharpe** are titled **Death In Venice I** and **Death In Venice II**.



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