

SPEED.VALUE.QUALITY.COMMITMENT

September 2008 Newsletter

>> FEATURE ARTICLE — IDENTITY THEFT

Money borrowed on a fraudulently obtained certificate of title can create problems for the owner of the land and sometimes the finance company who lends money on the basis of the fraud ...

Identity theft is becoming increasingly common. Sometimes identity theft includes fraudulently obtaining a replacement certificate of title for real estate. The impersonator then uses the replacement certificate of title to borrow money, offering the land in the certificate of title as security.

This is what occurred in the case of Mr Printy v Provident Capital Limited.

In March 1986, Mr Printy purchased land at Canoe-lands, Sydney. After purchasing the land he moved to live in the United States of America.

In November 1999, a person fraudulently obtained a replacement certificate of title for the property. Using the replacement certificate of title, the fraudster borrowed money and offered the land in the certificate of title as security.



The Deed of Loan and mortgage security were signed by the fraudster with Provident Capital Limited on 7 April 2004. The mortgage was registered at the Land Titles Office under the Real Property Act.

The amount of the loan was set out in the Deed of Loan but was not stated in the mortgage.

The fraudster defaulted on his loan obligations and eventually, Provident Capital Limited sold the property under their rights in the mortgage.

In November 2005, Mr Printy discovered what had happened and commenced Supreme Court proceedings

against Provident Capital Limited and the Registrar General.

The proceedings against Provident Capital Limited were to recover the proceeds of the sale of the property that were taken in repayment of the debt secured by the mortgage.

The claim against the Registrar General was under the Torrens Assurance Fund. This fund is designed to protect members of the public where there is fraud. Provident Capital Limited argued that the Loan Agreement and the mortgage should be read as one document in the transaction and the debt outlined in the Loan Agreement should be repayable on the sale of the property when Provident Capital Limited exercised its right to sell the property because the loan had not been repaid.

Mr Printy argued that he was not a party to the fraud and obtained no benefit from it. He said that because no document was executed by him or with his authority, Provident Capital Limited was not entitled to payment of money from him under the loan document or the mortgage. Any claim that Provident Capital Limited had to the money could only be made because the mortgage was registered.

If the mortgage contains a promise to repay the debt, and the debt is clearly set out, registration of a mortgage even if fraudulently obtained, will mean that the finance company or bank can recover the debt when the property is sold after a default.

The Court looked at section 57 of the Real Property Act which deals with a finance company's right to sell property. The entitlement arises if there is a default in the observance of any covenant in the mortgage or there is a default occurring in the payment in accordance with the terms of the mortgage, of money, the payment of which is secured by the mortgage. The Court found that in the case of Mr Printy, because the debt was not set out in the mortgage, the finance company had no right to exercise its power of sale and therefore was obliged to pay back to Mr Printy, the money that it recovered after it sold the property.

jackson lalic

LAWYERS

>> REMOVAL OF THE TRUSTEE

Trusts have become common in Australian business life. It often happens that people do not understand why they have a trust or even remember that they have one at all. They think of the business structures as something left to lawyers and accountants. The matter is only thought about when there is a problem. This is what happened in Western Australia with the Elovalis family. The business had a trust that was set up in the 1970's and when family relationships soured, there was a wish to remove the trustees of the trust.

The lower court Judge thought that he had to decide whether or not the trustee had committed some misconduct. The Court of Appeal explained that this was the wrong test. The main consideration was the welfare of the beneficiaries. If, for example, a trustee was in a weak financial position and would be subject to particularly strong temptation to misapply the trust fund, the Court may remove him from his office of trustee.

A lack of confidence in the trustee's ability to further administer the trust or where a trustee had a conflict of interest are sufficient reasons to justify his removal without the necessity of establishing misconduct.

>> NEW STAFF MEMBER

In late August Jackson Lalic advertised a position for a Law Clerk to help with our increasing workload. William Susanto who lives in Perth and was visiting his family in Indonesia at the time immediately applied. Because of the impressive application we invited him to an interview which he attended within a few days.

William started work at Jackson Lalic on 1 September 2008. William completed his Bachelor of Laws and Bachelor of Commerce in December 2007. In early 2008 he completed the Graduate Diploma of Legal Studies at the College of Law in New South Wales.

We are pleased to have William as part of our team and feel sure that his intelligence and energy will be of great benefit to our clients.



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>> RYAN KIM

Thanks And Praise For The Work Of Ryan Kim...

I write to record my heartfelt appreciation for the hard work and good performance that you demonstrated during the hearing on 12 to 14 February 2008.

Best regards
Poh Kiat - Singapore

>> ART PRIZE

As part of its continuing support to the rural community Jackson Lalic Lawyers is donating a cash prize of \$400 for youth art prizes for the 2008 Lightning Ridge Arts & Crafts Council Inc Annual Spring Exhibition...

Yvon Gatineau will represent Jackson Lalic Lawyers as a judge of the various prizes on Thursday 25 September 2008 and present all of the prizes on the evening of Friday 26 September 2008.

Jackson Lalic Lawyers congratulate all of the winners in the Annual Spring Exhibition.

>> 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.

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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