

## Simple Debt, Mortgages, The Limitation Act & Family Law, cont....

The Court referred to the decision in *Af Petersens and Af Petersens* which dealt with the circumstances of determining the likelihood of a parent pursuing a valid and enforceable debt from their child who was a party to the proceedings. The Judge said "In taking account of the 'obligations' of the parties, I must consider how pressing such an obligation is. It is fairly common in this Court to meet a situation where a parent has made a loan to a child which is in all respects legally enforceable, but which is not in fact enforced and would not really be expected to be enforced. It is no doubt an 'obligation' but if the obligation is not likely to have to be met, it should not be taken into account".

The Court noted there was little, if any, evidence of the mother ever making a demand for repayment and certainly not in written form. In later mortgage transactions, the husband had not disclosed to the banks the supposed mortgage to his mother as a liability. This, together with the lack of any other evidence from the husband concerning the likelihood of the mother's estate "chasing" him for the money, led to the Court not taking the mortgage into account as a debt of the parties.

**For further clarification on the Limitation Act or any Family Law matter, contact Riccarda Stock and our dedicated Family Law Team.**

## Our New Website

We are very happy to announce the launch of our new website at [www.solariandstock.com.au](http://www.solariandstock.com.au). We encourage you to visit the new site where you can now register for upcoming events, stay up-to-date with legal happenings via our articles and alerts page, and also see all our smiling faces. We have even taken to hassle out of paying your bill with our online payment facility. Browse around and let us know what you think!

## Christmas Closure

We wish to advise that our offices will be closed from 1pm Tuesday, 23 December and will re-open Monday, 5 January at 8.30am - refreshed and ready to tackle 2015 head on.

Michael Solari, Riccarda Stock and all staff would like to take this opportunity to thank you for your support in 2014 and wish you and your families a very safe and happy festive season, and a prosperous 2015. We look forward to working with you in the New Year.

These articles are for the benefit of our clients and business associates. The document is not intended to be a definitive analysis of legislation or professional advice. You should take advice before any course of action is pursued.

## Duty Of Care: Commercial Buildings

In a recent High Court case, the Court overturned a decision of the NSW Court of Appeal and found that the builder of a non-residential building did not owe a duty of care in negligence for financial loss arising from defects in common property to an Owners Corporation (Brookfield case).

In this case, serviced apartments were built by the builder under a Design and Construct Contract with a developer. The Owners Corporation was a subsequent owner of the land. The key points from the case were that the reason the Court did not impose a duty of care was that the parties to the original Contract, the builder and developer, were of equal bargaining power and had set out their relationship within the Contract between themselves. The Court found that, as a result of the terms of the Contract, no duty of care arose between the builder and the original developer and therefore no duty passed to the successive title owners such as the Owners Corporation.

The Court also noted that the subsequent owners of the individual apartments had rights against the original developer under their own Contracts (including any subsequent purchasers) for any defects or faults in the common areas.

The Court found that the Owners Corporation was not 'vulnerable' with a respect to economic loss arising from the defects in the common property caused by the builder's alleged lack of care. A person may be considered 'vulnerable' where the person is not a sophisticated commercial party or sophisticated investor.

Based on this High Court decision, builders need to be aware that if a subsequent owner of land is considered to be 'vulnerable' the builder may still owe that party a duty of care in negligence and be liable to reimburse the subsequent owner for the cost of repairing defective work.

**For further information on duty of care, or any commercial matter, please contact Michael Solari or Aly Morgan Greig of our Commercial Team.**

# SOLARI & STOCK

## LAWYERS

NEWSLETTER • NOVEMBER 2014

## Need Help After a Family Breakup?

### FREE FAMILY LAW INFORMATION SESSION

Riccarda Stock, a Law Society Accredited Specialist in Family Law, will share her 20 years experience and knowledge covering areas such as dividing assets, including superannuation and self managed super funds, protection from debt, children's arrangements, legal costs and how to minimise these and much more.

In addition you will receive a **COMPLIMENTARY VOUCHER FOR ½ HOUR FREE CONSULTATION** with one of our Family Law lawyers, completely obligation free.

DATE	Wednesday, 26 November 2014
TIME	6.30pm
WHERE	Level 2, 12 Central Road, Miranda NSW
	<i>Drinks &amp; supper will be provided</i>
RSVP	9540 4111 or <a href="mailto:admin@solariandstock.com.au">admin@solariandstock.com.au</a>

Seats are limited so make sure you RSVP early!

## Ensure your legal affairs are in order.

### FREE WILLS, POWERS OF ATTORNEY & GUARDIANSHIPS SEMINAR

Michael Solari, with over 32 years' experience as a solicitor, is presenting a free seminar on Wills, Powers of Attorney and Guardianships. He will address 10 key issues you need to consider in organising your financial affairs, ensuring your assets go to your chosen beneficiaries and addressing issues within your family. You will learn how to take unnecessary stress away from those closest to you.

DATE	Wednesday, 19 November 2014
TIME	6.30pm
WHERE	Level 2, 12 Central Road, Miranda NSW
	<i>Drinks &amp; supper will be provided</i>
RSVP	9540 4111 or <a href="mailto:admin@solariandstock.com.au">admin@solariandstock.com.au</a>

## Appointing an Executor

Often there is an obvious person to appoint as the Executor of your Will. For example, if you have a current spouse and that person is to receive all of the assets in your estate, then they are usually the person who should be appointed as the Executor.

However it is more complicated where, for example, the estate is to be held in trust for the benefit of children until they turn the designated age under the Will. The person who is appointed as Executor has a continuing responsibility for potentially many years to come. They are the person who, upon all of the assets being collected, becomes the Trustee of the estate. That person has to

manage those assets for the benefit of the beneficiaries, including investing those assets to generate an income and grow the capital value of those assets for the benefit of the beneficiaries. They also are responsible for managing distributions to the beneficiaries or their guardians until the beneficiaries are entitled to the assets outright.

When considering an Executor who may be in charge of an estate in those circumstances, you need to consider the Executor's skills, relationship to the beneficiaries and their potential guardians, and any particular issues which may arise in relation to the beneficiaries and/or their guardians.

*(continued on page 2)*

Our team of experienced lawyers can provide you with expert legal advice for all your legal needs including:

- Property Law & Conveyancing
- Leases
- Mortgages
- Sale & Purchase of Businesses
- Business & Commercial Law
- Employment Law

- Franchising
- Building Contracts & Disputes
- Environmental & Local Government Law
- Family Law & De Facto Law
- Litigation – all Courts
- Debt Recovery

- Wills, Estate Planning & Powers of Attorney
- Deceased Estates & Disputes
- Criminal Law
- Defamation
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# SOLARI & STOCK

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## Appointing an Executor, cont....

Another crucial factor, and one which is not common knowledge, is that in the event that you appoint a person as your sole Executor and once they have become the Executor they pass away, then their Executor becomes the Executor of your Will. Therefore where you have appointed someone who you trust to execute the duties of the Executor in the manner in which you would like them to be dealt with, you also need to consider who is likely to be the person who would be appointed as the Executor of your Executor's estate. If, for example, it is your Executor's spouse, then you may not be particularly comfortable with that person having the responsibilities of the Executor and Trustee under your Will and particularly the management of potentially significant assets for the benefit of your children.

In the event that you appoint two or more persons as Executors and one of those Executors passes away, then the survivor/s of those Executors becomes the Executor of your Will and the Executor of your deceased Executor's Will has no involvement in your estate.

Other issues which can complicate the appointment of the appropriate person is where, for example, you are in a second marriage and you make provision in your Will for your spouse to be entitled to continue to live in your home until your second spouse's passing and then your interest in the home passes to your children from your first marriage. In those circumstances, obviously your second spouse is not an appropriate person to be the Executor of your Will as your estate will continue beyond the date of your spouse's passing. In those circumstances it may also not be appropriate for your children to be the Executors as there could be a potential conflict of interest between them in acting as Executors with them having an interest in being able to have the home available for realisation and distribution to themselves at an earlier point in time where, for example, the spouse's entitlement to live in the home is conditional upon the spouse keeping the property in good condition and repair.

These are a couple of common examples of issues which need to be considered in whom to appoint as the Executor.

## Team Spotlight - Wills & Estates

At Solari & Stock Lawyers, our approach in advising clients in preparing their Wills is by firstly looking at the estate, the manner in which our client wishes to dispose of their estate, providing advice and guidance as to who may be the appropriate persons to appoint as Executors, and highlighting any potential issues which can arise as a result of a potential candidate's appointment as Executor.

Contact Michael Solari and our experience Wills & Estates Team for further information.



Michael Solari

## Swimming Pool Compliance Reminder

This is a reminder that Swimming Pool Compliance Certificates in respect of selling and leasing of properties will be required from 29 April 2015.

### Sale Properties

On and from 29 April 2015, all properties with a swimming pool or spa pool that are sold must have a valid Certificate of Compliance. This Certificate is to be annexed to the contract at the time of exchange. Should this certificate not be annexed, and if exchange occurs on or after 29 April 2015, a purchaser will have an automatic right to rescind the contract within 14 days of the date of exchange, even if the contract is exchanged with a s66w certificate or pursuant to an auction.

A Compliance Certificate will only be valid for a period of three years from the date of its issue. This Certificate can be issued by Council or by an accredited private certifier.

If the pool was constructed in the last three years, an Occupation Certificate issued by Council or an accredited private certifier will also be accepted as proof that the pool is compliant.

### Leased Properties

On and from 29 April 2015, all properties with a swimming pool or spa pool that are to be leased must have a valid Certificate of Compliance. This Certificate is to be annexed to the lease at the time the lease is entered into.

What is a swimming pool or spa pool?

A swimming pool is defined by law as an excavation, structure or vessel:

- that is capable of being filled with water to a depth greater than 300 millimetres, and
- that is solely or principally used, or that is designed, manufactured or adapted to be solely or principally used, for the purpose of swimming, wading, paddling or any other human aquatic activity, and includes a spa pool, but does not include a spa bath or anything that is situated within a bathroom.

A spa pool is defined by law as any excavation, structure or vessel in the nature of a spa pool, flotation tank, tub or the like.

### Penalties

Penalties for having a non-compliant pool can be up to an amount of \$5,500, with on the spot fines of \$550 also able to be issued.

For further information about your swimming pool compliance, contact Johnathan Neofytou or Michael Marney of our Conveyancing Team.



Johnathan Neofytou

## Simple Debts, Mortgages, The Limitation Act & Family Law

Often in our practice a question arises as to whether an old debt of a certain type is recoverable or not. This article is a general overview of that question and how the Family Courts deal with this issue. I will start with what the Courts call "simple debts".

The often quoted case is *Olgivie v Adams*, a decision of Fullagar J Victorian Supreme Court [1981] Vic RP 92. The facts were that the Plaintiff sued the Defendants (who were the Executors of the Estate of the deceased debtor) for \$31,600 lent to the debtor in April 1957. The money was loaned to the debtor on terms that she would be liable to repay the "said sum if and when a demand for such repayment was made and not otherwise". In other words, a payable on demand loan.

In 1972, after the debtor's death, written demands were made on the Executors requiring repayment by a certain date. They failed to comply. Proceedings were commenced. The main issue in the matter was whether the limitation period had expired. The loan limitation, being a simple contract, was six years.

The Plaintiff's argument was that the six year limitation period did not begin to run until the demands were made on the Defendants. His Honour disagreed. He said that in respect of most of these "demand" loans, the money became repayable as soon as it was loaned and not when a demand was made. His Honour did say that the parties can expressly contract out of that situation however more needs to be said in the contract than "the money is repayable on demand" to achieve that. The end result was that the Plaintiff lost because the limitation period commenced in April of 1957 and therefore it expired in April 1963.

A different result occurred in a Family Court decision of *Masoud & Masoud*. The brief facts were that the wife received a loan from her parents in 2000. It was \$800,000 – a substantial amount of money. The husband had two counter arguments, the first being that it was a gift and if that failed he said it was outside the six year limitation period.

In this case, there was a written contract which stipulated that the debt must be paid "one month after written demand". The Court held that a determination of whether the limitation period had expired depends on a construction of the contract in question, which was one of the things that the Judge said in *Olgivie v Adams*. The Court then examined the construction of the contract and held that because of the "one month after written demand" clause, the limitation period commenced one month from the date of that demand and not from the date of the loan.

It is essential to therefore check the wording carefully before deciding when the limitation period starts - at the time the loan is advanced (*Olgivie v Adams*) or whether, because of the documents construction, at a different time, as in *Masoud*.

It gets more interesting when we look at the question of mortgages. In *Gleeson and Gleeson*, the Court looked at the question of mortgages and limitation periods. The Plaintiff transferred a property to the Defendant who was one of her sons. It was transferred in September 1980 and a month later she took out a mortgage, which was registered under the Real Property Act for \$24,000 plus interest. The mortgage provided the date for payment of principal plus any outstanding interest was 30 June 1985. The full amount was unpaid and in 2000 (15 years later) she commenced proceedings for a) possession of the property based on the mortgage and b) judgment for an amount calculated as the principal and interest due under the mortgage.



The defence was Section 42 of the Limitation Act which sets out a 12 year limitation period on mortgages for the recovery of possession or judgment for the principal sum.

On the face of it, the limitation period expired on 30 June 1997. There is however an exception for mortgages registered under the Real Property Act in Section 40 of the Limitation Act. It states that the Limitation Act does not affect a registered mortgagee's rights to make an application for possession. Therefore the 12 year limitation period only applies to an unregistered mortgage and claims for money owed under the mortgage (principal and interest). There is no limitation as to time for a possession application pursuant to a Real Property Act registered mortgage due to the effect of s40.

In respect of the claim for the principal sum owed under the mortgage, there was a "confirmation" argument as well. The Defendant had been making some payments from before June 1997 (when the 12 year period expired) through to 2001. His Honour found that each time a payment was made the 12 year limitation period was extended because the defendant was acknowledging owing the principal by making payments. Thus, the Plaintiff was able to recover both possession of the land and a judgment for the \$24,000 principal. The claim for interest however was statute barred because of the six year limitation period that specifically applies to interest on mortgages (s43 of the Act).

There are, however, some additional principles that may apply in Family Law.

An example is the case of *Jacobs and Schaeffer* [2009] FamCA920. In that matter the husband claimed that a debt of the parties was a mortgage executed in favour of his mother for \$485,000 in 1996. The wife claimed no knowledge of that mortgage. The Court looked at the limitation question and found that the mortgage was enforceable by the mother's Executors, she having passed away in 2006. No persuasive evidence was led by the husband as to the likelihood of that mortgage ever being enforced.

(continued on page 4)