



## Festive and holiday season reminder

In the rush up to Christmas with all of the extra commitments and pressure at this time of year be diligent and maintain your risk management practices. This is when you most need them.

Keep track of dates and deadlines, particularly if the office will be closed over the holiday season. It is at this time of year that conditional contract deadlines can slip by and suddenly the contract is unconditional. Clients will be as busy as you and forget to ring and tell you about their finance. Make sure your client understands the effect of the 'subject to finance' clause before the time expires.

Don't let the clients pressure you into taking shortcuts. They will be insisting you prepare their contract or their vendor statement or their section 52 statement yesterday. Take the time to proofread your work or have someone else do it. Don't forget to give them a letter warning about the risks of using a short form vendor's statement or entering into risky agreements.

If you are pressured to distribute estates before Christmas double check the cheques are going to the right people for the right amounts. Warn executors in writing of the risks of distributing within 6 months. If you are calling in estate assets make sure you have those instructions in writing.

Many staff will take extended holidays after Christmas. Do you know what needs to be attended to over that time — are there any settlements due or deadlines looming? Are the remaining junior staff going to be adequately supervised and supported?

This season brings with it ample room for mistakes each year, so take steps now to ensure you and your clients have a Happy New Year.

## Litigation solicitors take heed!

Litigation practitioners should take heed of the Court of Appeal's recent comments that the court is a publicly funded resource and there is an obligation upon practitioners to assist the court in utilising its scarce resources in the most efficient manner.

The warning can be found in the case of *A Team Diamond Headquarters Pty Ltd and Artusa v Main Road Property Group Pty Ltd and ors* [2009] VSCA 208. The case was an appeal from a costs order following an application for an interlocutory injunction. The application for injunction was to prevent the plaintiffs' solicitors and counsel from continuing to act in the proceeding. Before the application was heard a further application was made to join the plaintiffs' solicitors to the proceeding as a defendant to the counterclaim. Both applications were heard together, but the interlocutory injunction took up the majority of the 7 hearing days. The application for joinder was granted and the application for an injunction was dismissed as unnecessary because once the plaintiff's solicitors were joined to the proceeding they would cease to act. Costs of the injunction application were ordered to be paid by the applicant.

The Court of Appeal agreed with the costs decision and said that a *'reasonable litigant in the position of the applicants should have realised that there was every likelihood that upon the success of the joinder application the need to obtain injunctions against either the solicitors or counsel would be obviated'*.

The Court doubted whether the applicants' solicitors gave *'any sufficient consideration in preparing and presenting their case as to how they might best assist the Court in the use of its limited resources...Practitioners must ensure that the course chosen in the interests of the client is compatible with this overarching duty. It is a responsibility which should be at the forefront of every practitioner's considerations throughout the pre-trial and trial process. Without such assistance from the legal profession, the courts are unlikely to succeed in their endeavour to administer justice in a timely and efficient manner.'*



## LPLC Annual Review

The LPLC's 2008-2009 Annual Review is now available on our website at [www.lplc.com.au/Performance.html](http://www.lplc.com.au/Performance.html).



## Risk management seminars for 2010

LPLC will be running its Country Risk Management programme in April and May 2010. The programme will consist of three one hour sessions. At this stage we anticipate going to the following centres:

- Ballarat, Bendigo, Shepparton, Wangaratta, Traralgon, Mt Eliza, Warrnambool, Mildura.

We will require a minimum registration of 20 participants for each centre. If your country region is not mentioned but you think you could gather 20 participants we will be happy to come to you. Email Heather Hibberd at [heather@lplc.com.au](mailto:heather@lplc.com.au)

The 2010 city Risk Management Intensive will be held on the following dates

- Tuesday 3 August,
- Tuesday 10 August and
- Wednesday 18 August 2010

So put those dates in your diary now.

## Documentation of lease incentives

A practice appears to have grown up in Victoria in which landlords require lease incentives, such as rent free periods or fit-out cost, to be documented outside the lease document. Solicitors for both landlords and tenants should give their clients clear advice about risks inherent in this practice.

Treatment of incentives outside the lease has potential for causing mischief and the following scenarios come to mind:

- A purchaser of the property agrees to pay a price based on the apparent or 'face' rent rather than the real or 'effective' rent.
- A mortgagee of the freehold makes an advance against the security of the property which is based on the face rent rather than the effective rent.
- A mortgagee of the freehold consents to a lease on the basis of the face rent.

### Solicitors acting for landlords

Solicitors acting for a landlord who are asked to document a lease incentive, other than by including an appropriate treatment in the lease, should advise their client that the incentive treatment should be included in the lease.

Doing so will prevent a third party, without knowledge of the incentive, being misled as to the true terms of the lease. The advice should be confirmed in writing.

Where the landlord client has declined to document the incentive in the lease, the solicitor should advise the client in writing that the incentive must be disclosed to any third party, such as a purchaser or mortgagee or their valuers, who might otherwise be misled as to the effective rent payable under the lease if they rely on the lease document alone.

### Solicitors acting for tenants

Solicitors acting for a tenant who is asked to agree to the lease incentives being documented outside the lease document should advise the client of the risk that:

- The mortgagee may not be told about the 'lease incentive side arrangement' and if the mortgagee took possession of the property it would be difficult to insist that the side arrangement be honoured;
- Any purchaser of the property may not be told about the side arrangement and again could argue that it is not required to honour the arrangement.

This advice should be confirmed in writing.

## WHY RISK MANAGEMENT?

Minimising your risk is the best way to contain the cost of your insurance.

## LEGAL PRACTITIONERS' LIABILITY COMMITTEE

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