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REAL PROPERTY CASES 2023

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2023

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TABLE OF CASES

1. *A Lloyd Babb Pty Ltd v Bexgrove Pty Ltd* [2023] NSWSC 1167 (27 September 2023) (Parker J)
2. *ACN 103 830 333 (formerly S.J. Holdings (Aust) Pty Ltd) v Property Options 1 Pty Ltd* [2023] NSWSC 938 (11 August 2023) (Robb J)
3. *Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd (No 2)* [2023] NSWSC 60 (09 February 2023) (Stevenson J)
4. *Ausbao (286 Sussex Street) Pty Ltd v The Registrar General of New South Wales* [2023] NSWCA 18 (17 February 2023) (Bell CJ, Beech-Jones and Mitchelmore JJA)
5. *C88 Project Pty Ltd (In Liquidation) (Controller Appointed) v The Occupier* [2023] NSWSC 135 (02 March 2023) (Davies J)
6. *Calokerinos, Executor of the Estate of the late George Sclavos v Aantcorp Pty Ltd* [2023] NSWSC 148 (27 February 2023) (Robb J)
7. *Chen v Cheung* [2023] NSWSC 331 (31 March 2023) (Hammerschlag CJ in Eq)
8. *Clough v Breen* (No. 3) [2023] NSWSC 752 (03 July 2023) (Slattery J)
9. *Coastal Services Centres Pty Ltd v United Petroleum Pty Ltd* [2023] NSWSC 1010 (23 August 2023) (Peden J)
10. *Cooper v McLennan* [2023] NSWSC 1385 (17 November 2023) (Henry J)
11. *Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd* [2023] NSWCA 256 (27 October 2023) (Payne and Stern JJA, Basten AJA)
12. *Croftstar Pty Ltd as trustee for the Croftstar Investment Trust v Norfeld Pty Ltd* [2023] NSWSC 143 (27 February 2023) (Robb J)
13. *Davis v Davis (No 2)* [2023] NSWSC 1563 (15 December 2023) (Elkaim AJ)
14. *Dogra v Dogra* [2023] NSWSC 1642 (21 December 2023) (Lindsay J)
15. *Doltone House Group Pty Ltd v Premium Services Australia (PSA) Pty Ltd* [2023] NSWSC 516 (18 May 2023) (Robb J)
16. *Felsch v Hetherington* [2023] NSWSC 1411 (20 November 2023) (Davies J)
17. *Fong v Douglas* [2023] NSWSC 1577 (14 December 2023) (Parker J)
18. *Hanave Pty Ltd v Nomad Sydney Pty Ltd (formerly Wine Nomad Pty Ltd)* [2023] NSWSC 265 (24 March 2023) (Chen J)
19. *Hawkes Menangle Pty Ltd v Brennan* [2023] NSWSC 1095 (08 September 2023) (Richmond J)

20. *Horizon Hotels Pty Ltd v Australian Secured & Managed Mortgages Pty Ltd* [2023] NSWCA 231 (28 September 2023) (Payne and Adamson JJA, Basten AJA)
21. *Huang v 18 Woodville Holding Pty Ltd; Tao v 18 Woodville Holding Pty Ltd* [2023] NSWCA 15 (15 February 2023) (Meagher and Kirk JJA, Griffiths AJA)
22. *I S McGeoch Pty Ltd v Sporting Shooters Association of Australia New South Wales Albury Branch Inc* [2023] NSWSC 369 (18 April 2023) (Basten AJ)
23. *In the matter of Sun Cable Pty Ltd (Administrators Appointed)* [2023] NSWSC 1037 (30 August 2023) (Williams J)
24. *ISPT Pty Ltd and AWPF Management No. 2 Pty Ltd v Cao and Zhao [2023] NSWSC 1115* (14 September 2023) (Nixon J)
25. *Kimberley Developments Pty Ltd v Bale* [2023] NSWCA 25 (22 February 2023) (Leeming and Kirk JJA, Griffiths AJA)
26. *Koprivnjak v Koprivnjak* [2023] NSWCA 2 (02 February 2023) (Leeming and Mitchelmore JJA, Griffiths AJA)
27. *Li v Tao* [2023] NSWCA 310 (15 December 2023) (Ward P, Mitchelmore and Kirk JJA)
28. *Menassa v Shi* (No 2) [2023] NSWSC 168 (01 March 2023) (Henry J)
29. *Morabito v Kingston Industries Pty Ltd* [2023] NSWSC 1020 (31 August 2023) (Peden J)
30. *Perkins v Carey* [2023] NSWSC 210 (14 March 2023) (Peden J)
31. *Perpetual Trustee Company Limited v Eastern Pursuits Pty Limited* [2023] NSWSC 813 (13 July 2023) (Peden J)
32. *Piety Developments Pty Ltd v Cumberland City Council (No 3)* [2023] NSWSC 1627 (19 December 2023) (Parker J)
33. *Potts v Potts* [2023] NSWSC 1344 (08 November 2023) (Elkaim AJ)
34. *Retirement Village Bargo Pty Ltd v Anwar* [2023] NSWSC 209 (14 March 2023) (Peden J)
35. *Romanos v Punjabi Fusion Group Pty Ltd* [2023] NSWSC 1119 (14 September 2023) (Schmidt AJ)
36. *Saipan Holdings Pty Ltd v City Gym Sydney Pty Ltd* [2023] NSWCA 55 (31 March 2023) (Ward P, Gleeson JA and Simpson AJA)
37. *Smart Dollars Tamworth Pty Ltd v Corpique No. 18 Pty Ltd* [2023] NSWSC 936 (09 August 2023) (Stevenson J)
38. *Smart v Smart* [2023] NSWSC 307 (31 March 2023) (Robb J)

39. *State of New South Wales v Carver* [2023] NSWSC 828 (14 July 2023) (Hammerschlag CJ in Eq)
40. *State of New South Wales v Hetherington* (No 2) [2023] NSWSC 670 (20 June 2023) (Davies J)
41. *Sydney Redevelopments 1 Pty Ltd v Chui* [2023] NSWSC 695 (21 June 2023) (Hammerschlag CJ in Eq)
42. *Synergy Scaffolding Holdings Pty Ltd v Goodman Funds Management Australia Limited as trustee for GAI1 RPF Subtrust of the Hayesbery* [2023] NSWSC 538 (22 May 2023) (Peden J)
43. *T & L Alexandria Pty Ltd v Sharvain Facades Pty Ltd* [2023] NSWSC 947 (14 August 2023) (Williams J)
44. *Teo v Twyford bht Cunningham* [2023] NSWSC 1470 (30 November 2023) (Henry J)
45. *The Owners - Strata Plan No 74232 v Teze*l [2023] NSWCA 35 (06 March 2023) (Gleeson, Mitchelmore and Kirk JJA)
46. *The Owners Strata Plan No 80877 v Lannock Capital 2 Pty Ltd* [2023] NSWSC 1401 (24 November 2023) (Peden J)
47. *The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)* [2023] NSWCA 291 (06 December 2023) (White and Kirk JJA, Griffiths AJA)
48. *Thynne v Sheringham* [2023] NSWCA 181 (09 August 2023) (Ward ACJ, Kirk JA and Basten AJA)
49. *Trafford-Jones as Trustee of the estate of Luke Robert Barber v Luke Robert Barber* [2023] NSWSC 1469 (29 November 2023) (Davies J)
50. *Walker Corporation Pty Ltd v The Owners Strata Plan No 61618* [2023] NSWCA 125 (05 June 2023) (Leeming, Mitchelmore and Kirk JJA)
51. *White Rock Wind Farm Pty Ltd v Dulhunty* [2023] NSWSC 1464 (30 November 2023) (Robb J)
52. *William Honner as Trustee for Sale of 8 Saiala Road, East Killara NSW 2071 v Chow* [2023] NSWSC 1346 (08 November 2023) (Davies J)
53. *Zhong v Shield Resources Pty Ltd* [2023] NSWSC 1611 (18 December 2023) (Fagan J)

A Lloyd Babb Pty Ltd v Bexgrove Pty Ltd [2023] NSWSC 1167

Coram: Parker J
Court: Supreme Court of New South Wales
Date: 27 September 2023

CIVIL PROCEDURE – interlocutory applications – payment of money into court – lease dispute – tenant alleges abatement of rent – tenant applies for order that it pay rent into court pending the determination of the proceedings – utility – power to make order – rule that interlocutory relief can only be granted in aid of final relief – application refused

LEASES AND TENANCIES – rent and outgoings – abatement – tenant put out of possession by landlord – failure to complete landlord's works allegedly breaches terms of lease – tenant does not go into occupation – alleged failure to give "exclusive possession" – construction of lease – whether tenant's entitlement to possession deferred - whether abatement rule applies

Facts

The plaintiff, A Lloyd Babb Pty Ltd ("**ALB**"), was the tenant under an unregistered lease of commercial premises owned by the defendant, Bexgrove Pty Ltd ("**Bexgrove**"). The lease, dated 9 November 2021 but effective from 1 October 2021, was for a five-year term with an option to renew for a further five years. The premises in question was a subdivided area on the first floor of a commercial unit, accessed via an internal staircase.

The lease stipulated that Bexgrove, at its own expense, was responsible for undertaking certain works to upgrade and provide access to the leased premises, referred to as the "Landlord's Works". These included the removal of an internal staircase, installation of a platform lift, and completion of common area finishes. ALB was to complete the remaining fit-out of the premises, referred to as the "Tenant's Works".

ALB paid rent at a discounted rate, in accordance with the lease, from October 2021 onwards. However, by May 2022, the Landlord's Works remained incomplete, despite ALB's contention that they should have been finished by 30 April 2022. In response, ALB sought various

declarations and other relief from the New South Wales Supreme Court, arguing that the delayed completion of the Landlord's Works constituted a breach of the lease. ALB requested restitution of rent and outgoings paid since May 2022, and sought an order for specific performance to compel the completion of the Landlord's Works.

Decision

The Court dismissed ALB's application for interim relief, finding that the application lacked utility and was not seriously arguable in relation to the final relief sought. ALB's broader claims for final relief were also called into question, with the Court expressing doubt about the seriousness of those claims.

The Court held that there was no express stipulation in the lease regarding the completion date for the Landlord's Works, and ALB had not been denied possession of the premises during the fit-out process. As a result, the Court rejected ALB's claim for rent abatement or restitution of rent and outgoings.

ACN 103 830 333 (formerly S.J. Holdings (Aust) Pty Ltd) v Property Options 1 Pty Ltd [2023] NSWSC 938

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 11 August 2023

MORTGAGES AND SECURITIES — mortgages — duties, rights and remedies of mortgagee — where mortgaged properties have been sold

CONTRACTS — remedies — liquidated damages — debt — where properties subject to mortgage have been sold and appropriate remedy is balance due under the deed of loan

LAND LAW — conveyancing — agreement to create or dispose of interest in land — oral agreement found in respect of one property and not in respect of the other

Facts

The proceedings concern a dispute involving two contracts of sale between the plaintiffs and the defendants over properties located in Wallerawang and Marulan. The first contract, entered into in 2012, involved the sale of land at Wallerawang by the first plaintiff, ACN 103 830 333 Pty Ltd (formerly S.J. Holdings (Aust) Pty Ltd), to Property Options 1 Pty Ltd ("**Property Options**"), owned and operated by its sole director, Lora Taha. The second contract, entered into in 2013, involved the sale of land at Marulan by the second and third plaintiffs, Sam Agostino and Jacqueline Pearce, to Property Options.

The plaintiffs sought an order to lodge a further caveat on the titles to these properties after Property Options served a lapsing notice. Additionally, the plaintiffs alleged breaches of obligations under the contracts, leading them to seek specific performance or damages. During the hearing, it was revealed that ANZ Banking Group Ltd had appointed an external controller over certain land at Marulan in November 2022, complicating the proceedings.

The defendants, represented by Ms Taha, failed to produce key financial documents necessary to substantiate their claims regarding payments made for the benefit of the plaintiffs. Consequently, the plaintiffs could not determine the amounts secured by other mortgages over the properties in question. The Court allowed the plaintiffs the opportunity to issue subpoenas to third parties to rectify the lack of evidence.

Decision

The Court provisionally ruled in favour of the plaintiffs, awarding judgment in the sum of $173,343.32 against Property Options as debtor and Ms Taha as guarantor. In principle, Mr Agostino and Ms Pearce were entitled to an order for specific performance requiring Property Options to re-transfer the Marulan property, subject to the repayment of amounts paid by the defendants. However, the Court expressed concerns about the registered mortgage over the Marulan property, which complicated the specific performance order.

Alternatively, Mr Agostino and Ms Pearce were entitled to damages, although the quantum remained undetermined due to a lack of evidence regarding the current value of the Marulan property. The Court dismissed the plaintiffs' claim for a charge over a property in Parramatta.

Given the outstanding issues and the need for further evidence, the Court invited the plaintiffs to advise how they intended to proceed. Costs were awarded to the plaintiffs in principle, but the parties were given an opportunity to make further submissions regarding the final orders and any specific cost applications.

Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd (No 2) [2023] NSWSC 60

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 9 February 2023

LEASES AND TENANCIES – Retail lease – where parties executed agreement for lease and lease for period of 10 years – where lease not registered – whether lease for 10 years nonetheless arose – effect of and proper construction of Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) and leasing principles of National Code of Conduct – proper construction of provisions in Small Business Commissioner Act 2013 (NSW) concerning admissibility of statements made at mediation – whether lessor entitled to terminate lease and enter possession – whether lessor elected to affirm lease – whether provision concerning recoupment of fitout costs a penalty – proper construction of guarantee – whether guarantors liable for obligations of lessee

Facts

Alamdo Holdings Pty Ltd ("**Alamdo**"), the landlord, leased its property in Castle Hill to Croc's Franchising Pty Ltd ("**Croc's**") under an agreement that included a Lease and an Incentive Deed. As part of this agreement, Alamdo contributed $250,000 towards Croc's fit-out of the premises. The Incentive Deed contained a clawback provision, which entitled Alamdo to a proportional refund of the fit-out contribution if the lease was terminated before the end of the initial term. Croc's defaulted on its rent payments between March and December 2020, leading Alamdo to terminate the lease in December 2020. Alamdo sought to recover a portion of the fit-out incentive through the clawback mechanism in the Incentive Deed.

Croc's challenged this attempt, arguing that the clawback provision amounted to a penalty, unenforceable under contract law. Specifically, Croc's contended that the provision did not reflect a genuine pre-estimate of Alamdo's losses but rather imposed an excessive punishment for the tenant's breach of the lease agreement.

Decision

Justice Stevenson of the New South Wales Supreme Court held that the clawback provision in the Incentive Deed was unenforceable. The Court applied the penalty doctrine, evaluating whether the clause served to protect Alamdo's legitimate commercial interests or if it went beyond this purpose, amounting to a penalty. Following the principles set out in *GWC Property Group Pty Ltd v Higginson* [2014] QSC 264, Justice Stevenson considered whether the clause was disproportionate to the legitimate interests of the landlord and whether it represented a genuine pre-estimate of damages.

The Court concluded that allowing Alamdo to recover a portion of the incentive, particularly as it retained ownership of the fit-out, would result in Alamdo receiving more compensation than if the lease had run its full term. The clawback provision was, therefore, considered punitive as it exceeded what was necessary to protect Alamdo's interests. As a result, the provision was deemed unenforceable, and Alamdo was not entitled to recoup the incentive payment.

Ausbao (286 Sussex Street) Pty Ltd v The Registrar General of New South Wales [2023] NSWCA 18

Coram: Bell CJ; Beech-Jones JA; Mitchelmore JA

Court: Supreme Court of New South Wales, Court of Appeal

Date: 17 February 2023

LAND LAW – Torrens title – compensation for loss of interest in land – Torrens assurance fund – circumstances in which compensation is not payable – where the loss or damage arises because of an error or miscalculation in the measurement of land – Real Property Act 1900 (NSW), s 129(2)(e) – where developer purchased land in the Sydney CBD for $55 million – where Deposited Plan referred to in the folios for four titles recorded total site area of the land as 1337.4m2 – where developer attributed considerable significance to the total site area in formulating the purchase price – developer subsequently discovered that true total site area of the land was 1255.9m2 – inaccurate statement of area in plan referred to in one of the folios caused by transposition errors by officers of the Registrar General in 1978 and 1995 – developer brought claim for compensation from the Torrens assurance fund – whether developer's loss arose because of an error or miscalculation in the measurement of land – whether "measurement" refers to the fact of an erroneous statement of the dimensions and area of land or merely an error in the process of determining the dimensions or area – where s 129(2)(e) was introduced for a remedial purpose – where Torrens register disclaims accuracy in respect of dimensions and areas of land – extent to which the loss or damage is a consequence of any act or omission by the claimant – Real Property Act 1900 (NSW), s 129(2)(a) – whether the Appellant's loss or damage was a consequence of its own act or omission – where the risk of an erroneous statement of area on Deposited Plan was real albeit rare – where potential adverse consequences of materialisation of that risk were severe for developer – whether s 129(2)(a) of the Real Property Act 1900 (NSW) establishes a regime for the apportionment of liability between claimant and Registrar General – s 129(2)(a) lacks reference to any process by which a court would undertake apportionment exercise – whether registration of Deposited Plan occurs in the execution or performance of Registrar General's functions or duties under the Real Property Act 1900 (NSW) – whether registration of Deposited Plan occurs in the operation of the Real Property Act 1900 (NSW) – where Registrar General is required to make

a record of a description of land in a folio of the Register – Real Property Act 1900 (NSW), s 32(1)(a)

WORDS AND PHRASES – "measurement" – Real Property Act 1900 (NSW), s 129(2)(e)

Facts

Ausbao (286 Sussex Street) Pty Ltd (the "**Appellant**"), a special purpose vehicle, acquired land at 286 Sussex Street, Sydney, for $55 million on 26 November 2013. The Appellant based its bid on the site area of 1,337.4 m², as recorded in the Deposited Plans referenced in four folios of the Torrens Register, and provided in an Information Memorandum by the vendor, which included a disclaimer regarding the verification of these figures. The Appellant did not independently verify the area, assuming the government records were infallible.

The Appellant later discovered that the area of Lot 1, as indicated in Deposited Plan 657427, was misstated by 85.7 m² due to transposition errors by the Registrar General's officers, who failed to account for a portion of the land previously resumed for road widening. Following this discovery, the Appellant sought compensation from the Torrens Assurance Fund, alleging loss or damage as per section 129 of the *Real Property Act 1900* (NSW) ("**RP Act**"), based on two grounds: an act or omission by the Registrar General and an error in the Register regarding the land.

The primary judge accepted the basis of the claim but ultimately dismissed it, citing section 129(2) of the RP Act, which excludes compensation for losses resulting from the claimant's own omissions or from errors in land measurement. On appeal, the Appellant contested this dismissal.

Decision

The New South Wales Court of Appeal upheld the primary judge's decision, dismissing the appeal with costs. The Court affirmed that the Appellant's failure to verify the land area was a material cause of its loss, particularly given the sophistication of the Appellant as a commercial property developer. The Court clarified that section 129(2)(a) does not allow for the apportionment of liability between the claimant and the Registrar General, meaning that any act or omission by the claimant that materially contributed to the loss precludes compensation.

The Court found that the Appellant's loss arose from an “error or miscalculation in the measurement” of the land as defined in section 129(2)(e), establishing that the erroneous area statement constituted a relevant misdescription within the Register. The Court concluded that the Registrar General's inclusion of the erroneous area was executed in the performance of their duties under the RP Act, thus engaging the statutory framework governing the Fund's compensation.

Ultimately, the Court noted that Ausbao, having failed to take reasonable care to verify the accuracy of the land dimensions, was the author of its own loss. Consequently, there was no liability for compensation against the Torrens Assurance Fund, nor was there liability attributed to Ausbao's solicitors, as the scope of their engagement did not extend to verifying the land area.

C88 Project Pty Ltd (In Liquidation) (Controller Appointed) v The Occupier [2023] NSWSC 135

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 2 March 2023

CIVIL PROCEDURE – parties – commencement of proceedings without naming a defendant – proceedings for possession of land – where plaintiff is registered proprietor – where unidentified person in occupation

LAND LAW – possession of land – where possession sought by registered proprietor against unidentified squatter

Facts

The plaintiff, C88 Project Pty Ltd, is the owner of unit 412 located at 2 Thallon Street, Carlingford, and is currently in liquidation. The proceedings were initiated on 17 August 2022 by the liquidator of the plaintiff, as it was revealed during 2022 that the premises were occupied by an individual identified only as "Tom". Conflicting information regarding Tom's status emerged; it was suggested that he might be an employee or subcontractor of Best Metal Pty Limited ("**Best Metal**"), a company allegedly owed substantial sums by Dyldam Developments Pty Limited. Best Metal's solicitors contended that possession of the premises had been granted by a director of C88 Project Pty Ltd, yet Best Metal did not seek to be joined as a defendant in the proceedings. Due to the inability of the liquidator to ascertain the occupier's identity, the defendant was designated as "The Occupier of the Premises".

On 25 August 2022, a statement of claim and a notice to the occupier were served by placing them in the mailbox of unit 412. The building is secured with intercom access, which prevented the process server from entering. Subsequently, no response was received when the intercom for unit 412 was activated.

As no defence was filed, the plaintiff sought a default judgment; however, the matter was referred to the Court because no properly identified defendant had been named.

On 24 February 2023, the Court granted leave nunc pro tunc for the plaintiff to commence proceedings without identifying the occupier. Following the granting of leave, an SMS was sent to Tom's known mobile number, informing him of the proceedings and the prior service of the statement of claim. Despite the notification, the occupier failed to appear at the hearing.

Decision

The Court therefore concluded that the occupier had no lawful right to occupy the premises and that the liquidator, representing the registered proprietor, held an immediate right to possession of the land. The Court consequently ordered the following:

1. Dispensation of any procedural provisions that would preclude judgment in favour of the plaintiff in the absence of a named defendant.
2. Judgment granted for the plaintiff for possession of unit 412.
3. Permission for the plaintiff to issue a writ of possession to enforce the judgment.

Additionally, the plaintiff did not seek an order for costs, and the Court decided that no costs order was necessary in these circumstances.

Calokerinos, Executor of the Estate of the late George Sclavos v Aantcorp Pty Ltd [2023] NSWSC 148

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 27 February 2023

CONTEMPT — civil contempt — breach of orders — where plaintiff alleged breach of freezing orders due to winding up of defendant company — where notice of motion dismissed

CONVEYANCING — where plaintiff alleged fraudulent conveyance with intention to defraud creditors — where plaintiff sought declaration share transfer void pursuant to s 37A of the Conveyancing Act 1919 (NSW)

COSTS — party/party — exceptions to general rule that costs follow the event — where plaintiff was initially justified in bringing claim — where costs order subsequently made in favour of defendant in related proceedings — where defendant company was deregistered — where plaintiff continuing these proceedings following judgment in related proceedings was unreasonable

Facts

The proceedings in this case stemmed from ongoing litigation concerning the estate of the late George Sclavos, whose executor, Cleopatra Sclavos Calokerinos, sought to recover funds allegedly misappropriated by Okan Yesilhat and his associates. Following Sclavos' death on 13 August 2013, Ms Calokerinos discovered that Okan Yesilhat had obtained substantial funds from Sclavos, which she contended were either loans or unauthorised withdrawals made posthumously.

The legal history includes a series of judgments, beginning with a primary ruling by Justice Slattery on 9 June 2017, which largely favoured Ms Calokerinos. However, not all disputes were resolved, leading to the current proceedings initiated on 20 October 2017. Ms Calokerinos aimed to invalidate the transfer of shares in ABT between the Yesilhat brothers and Aantcorp

Pty Ltd, asserting these transactions were intended to defraud creditors and thus voidable under s 37A of the *Conveyancing Act 1919* (NSW). As the case progressed, Okan Yesilhat became bankrupt, and ABT was ordered to be wound up, leaving only Aantcorp, Mr Nguyen, and Gokan Yesilhat as defendants.

Decision

On 23 February 2022, the Court dismissed the proceedings, alongside the associated motions from both plaintiffs and defendants. The Court reserved its decision on costs, which ultimately reflected the complexities of the case and the voluntary abandonment of claims by Ms Calokerinos. The Court noted that her decision to dismiss the proceedings indicated a recognition of the low prospects of success, influenced by legal advice regarding the potential financial implications of continuing the litigation.

Consequently, the Court ordered Ms Calokerinos to pay the costs of the first and second defendants on an indemnity basis from 10 May 2018, while retaining a no-costs order for the period prior to that date, thus ensuring that each party bore their own costs up until then. The Court emphasised that the dismissal of proceedings without merit hearing did not afford Ms Calokerinos the same relief as in previous analogous cases, reinforcing the need for careful assessment of the merits and costs implications in future litigation.

Chen v Cheung [2023] NSWSC 331

Coram: Hammerschlag CJ

Court: Supreme Court of New South Wales

Date: 31 March 2023

REAL PROPERTY — co-ownership — statutory trust for sale — appointment of trustees — no issue of principle

Facts

The plaintiff, by summons filed on 2 November 2022, sought orders under section 66G of the *Conveyancing Act 1919* (NSW) for the appointment of trustees to sell a co-owned strata title property located at Unit C 203/2 Livingstone Avenue, Pymble, New South Wales. The defendant consented to the sale of the property but opposed the appointment of trustees, suggesting that the parties could instruct their solicitors to manage the conveyancing process. It was noted that the defendant had already initiated steps to market the property, with an auction scheduled in two weeks.

Decision

The court held that the discretion to order the sale of co-owned property is limited and rests with the opposing co-owner to demonstrate why such an order should not be granted. In this case, the defendant failed to provide any valid reasons against the sale, and the disagreement over the method of sale was sufficient justification for the court to grant the order.

Consequently, the court appointed solicitors Mario Di Lizio and Wen Qing Chen as trustees for the property, vesting the property in them subject to existing encumbrances. The court ordered that the property be sold, with the proceeds distributed first for necessary expenses, followed by the payment of the plaintiff's costs, and then split equally between the parties. The trustees were granted the liberty to seek further directions from the court as needed.

Clough v Breen & Anor (No. 3) [2023] NSWSC 752

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 4 May 2023

REAL PROPERTY – EASEMENTS – dispute in relation to the use of various easements for the use of an inclinator, the supply of services, giving rights-of-way, and other related easements between the plaintiff and the defendants – Court resolves minor incidental dispute about invoices relating to the operation of a joint sinking fund that was ordered by the Court to be established by the parties – dispute is causing aggravation to the parties – the parties request reasons for orders.

Facts

This case represents the third judgment in ongoing proceedings between the parties, following two prior judgments delivered by Slattery J in 2022. On 4 May 2023, the Court made orders regarding the administration of a Sinking Fund established by interlocutory orders dated 1 August 2022. During a directions hearing on 28 April 2023, supplementary evidence was presented concerning disputes over three specific invoices, despite the parties having largely agreed on the remaining payments from the Sinking Fund. The disputed invoices were as follows: Inclined Lift Services invoice no. 10607 for $163.90, Applied Locksmith invoice no. 5364 for $220, and an NRMA Excess of $1,000 related to an insurance claim for Lift invoices.

Decision

The Court addressed each invoice in turn, determining the appropriate allocation of costs.

For the Inclined Lift Services invoice, the Court found that Ms Clough was responsible for the payment, as the charges arose from compliance with a court order. In relation to the Applied Locksmith invoice, the Court ruled that the costs should be borne by Mr Breen due to the hostility between the parties, which justified Ms Clough's decision to replace the locks.

Lastly, the Court permitted Ms Clough to deduct $500 from the Sinking Fund to cover half of the NRMA excess incurred from an insurance claim, ruling that incidental damage to the inclinator should be equally shared, and rejecting Mr Breen's claim that the damage was solely caused by a third party. No separate costs order was made regarding this dispute. The Court issued final directions concerning the payment obligations of Mr Breen and Ms Dillon to the Sinking Fund.

Coastal Services Centres Pty Ltd v United Petroleum Pty Ltd [2023] NSWSC 1010

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 23 August 2023

LEASES AND TENANCIES — Renewals and options — Exercise of option — Lessee in breach of obligations — Whether Lessor issued a valid noticed under s 133E of the Conveyancing Act 1919 (NSW) — Whether Lessee entitled to relief under s 133F of the Conveyancing Act 1919 (NSW)

LEASES AND TENANCIES — Repairs, maintenance and alterations — Damage to premises — Whether Lessor acted in good faith in considering repair to damaged premises was "impracticable or undesirable" — Whether Lessor entitled to terminate lease — Whether right to terminate unavailable by reason of waiver or estoppel

Facts

The case concerns a dispute arising from a lease agreement between United Petroleum Pty Ltd ("**United**") and Coastal Services Centres Pty Ltd ("**Coastal**"). United had occupied a portion of a property located approximately 77 km north of Newcastle, New South Wales (the "**Property**"), since 2006, initially operating a petrol service centre. A significant fire on 31 July 2018 destroyed the main building on the premises, which was a scaled replica of Uluru, forcing United to suspend its operations temporarily. Subsequently, United resumed trading in December 2018 from a demountable structure.

On 20 June 2019, Coastal acquired the Property from Whitehorn Estates Pty Ltd, inheriting all rights and obligations under the existing lease executed on 7 November 2018, which provided United with three options to renew the lease for five-year periods. Following the acquisition, Coastal aimed to redevelop the site, including the damaged building, and communicated these intentions to United. The lease contained a rent abatement clause, which stipulated that rent could be reduced if the property was damaged or rendered unusable. However, from June 2019,

United unilaterally paid only 44% of the rack rate rent without Coastal's consent, while Coastal invoiced 75% of the rack rate.

In November 2019, Coastal initiated legal proceedings in the Local Court to recover unpaid rent and enforce compliance with lease conditions. On 25 March 2021, United exercised its first option to renew the lease, but Coastal subsequently served a notice of breach alleging non-compliance with the lease's opening hours clause. A complex series of notices and cross-claims ensued, leading to the proceedings under consideration.

Decision

The court concluded that Mr Roberts, in issuing the Notice of Consideration, undertook a genuine and rational assessment regarding the impracticality or undesirability of rebuilding the ulruru replica. The court found no merit in the criticisms levied against Mr Roberts' evidence, noting that the required analysis for exercising the right under clause 8.2.3 did not necessitate mathematical precision or an exhaustive consideration of all potential factors. It held that Mr Roberts' approach was sufficiently rational, based on his knowledge of construction costs and the prevailing market conditions, particularly given the disruptions caused by the COVID-19 pandemic.

The court further determined that United was indeed in breach of the Lease when it sought to exercise the option, substantiated by the consent orders that reflected an underpayment of rent. Consequently, the court ruled that the Prescribed Notice complied with the necessary legal provisions and was valid. As a result, the court granted relief to United under section 133F of the *Conveyancing Act 1919* (NSW), allowing the Lease to remain effective, and declared that it was renewed for an additional five-year term commencing 1 July 2021. Additionally, the cross-claimant was ordered to pay the cross-defendant's costs of the proceedings, either as agreed or assessed.

Cooper v McLennan [2023] NSWSC 1385

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 17 November 2023

LAND LAW — adverse possession — rural Torrens title land — where plaintiff registered proprietor seeks declarations in response to defendant's application for possessory title — where defendant claims possession of lots by he and his family since September 1996 — whether plaintiff consented to defendant and family using the lots for grazing cattle — whether defendant's acts establish factual possession — whether intention to possess where defendant believed he and his family owned the lots — whether plaintiff's acts broke chain of possession — found that defendant and family in adverse possession for more than 12 years — extinction of title of plaintiff registered proprietor if Limitation Act 1969 (NSW) had applied

Facts

This matter revolves around three small parcels of rural land situated in Nymboida, New South Wales, known as Lots 1, 2, and 3 in Deposited Plan 127352. The plaintiff, John Cooper, is the registered proprietor of these Lots, while the defendant, Tony McLennan, owns adjacent properties known as Wards Creek and Sunnyside. The proceedings were initiated by the plaintiff in response to the defendant's application to the Registrar General under section 45D(1) of the *Real Property Act 190*0 (NSW), seeking to be recorded as the proprietor of the Lots. The defendant claims possessory title based on his family's alleged continuous possession since September 1996, following their acquisition of the Wards Creek property. The plaintiff contests this, asserting that he consented to the defendant's family using the Lots for grazing cattle since 1996, and argues that the defendant has not established the requisite possession to claim title under the law.

The evidence presented included affidavits from both parties and cross-examinations. Disputes arose regarding the nature of conversations that took place in 1996, 2008, and 2010, as well as the extent of the plaintiff's use of the Lots. The court noted that the Lots were rural grassed pastures, largely unfenced, with access provided by old post and wire fencing along Armidale

Road. The defendant's application for possessory title hinges on the assertion that the plaintiff's title had been extinguished by adverse possession.

Decision

The court dismissed the plaintiff's application for declaratory relief, ruling that the defendant had established possessory title to the Lots. It found that the plaintiff had not provided credible evidence of consent regarding the use of the Lots for grazing. The court determined that the defendant and his family had used the Lots since September 1996 under the belief that they were the rightful owners, rather than with the plaintiff's permission. The court further rejected the plaintiff's argument that conversations in 2008 implied consent to the defendant's continued use of the land, concluding that these discussions represented competing claims to ownership rather than an agreement.

Consequently, the court ruled that the time required for adverse possession had indeed elapsed, and that the defendant's application to be registered as the proprietor of the Lots could proceed. The plaintiff was ordered to withdraw his caveat preventing this registration and was also liable for the defendant's costs in the proceedings.

Croc's Franchising Pty Ltd v Alamdo Holdings Pty Ltd [2023] NSWCA 256

Coram: Payne JA; Stern JA; Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 27 October 2023

LEASES AND TENANCIES – retail lease –executed agreement for lease and lease for period of 10 years – whether lessor entitled to terminate lease – whether termination prohibited by COVID-19 pandemic regulation – whether lessor elected to waive certain grounds for terminating lease – where lease not registered – whether parties bound by contractual force of agreement for lease – proper construction of guarantee – whether guarantors liable for obligations of lessee – where tenant's entitlement to damage not sufficiently litigated – whether appropriate for appeal court to determine entitlement to damages

STATUTORY INTERPRETATION – subordinate legislation – schedule to regulation – application of principles of statutory interpretation – schedule replaced by second version – schedule containing blanket prohibition on terminating lease during "prescribed period" – separate provisions permitting termination subject to conditions – whether specific exceptions prevailed over general prohibition – coherent reading in light of extrinsic materials

EVIDENCE -– privileges – settlement negotiations – privilege under Small Business Commissioner Act 2013 (NSW) s 19 over discussions during mediation – whether privilege waived by party's conduct and communications

Facts

The respondent, Alamdo Holdings Pty Ltd, owned a property where Croc's Franchising Pty Ltd ("**Croc's**") operated a children's play centre franchise. In 2017, the parties entered into an Agreement for Lease and a ten-year lease in registrable form; however, due to Alamdo's failure to register the lease, Croc's interest was limited to a tenancy at will. Croc's franchisee began occupying the premises in June 2018.

In March 2020, as a result of the COVID-19 pandemic, Croc's fell into rental arrears. Despite discussions regarding rent relief, Croc's did not accept Alamdo's offer of a 50% rent waiver and

a 24-month deferral of the balance. Croc's maintained that it was entitled to rent relief proportionate to its franchisee's business downturn under the National Code of Conduct for commercial tenancies.

The *Conveyancing (General) Regulation 2018* (NSW) (the First and Second COVID Regulations) included provisions that protected commercial tenants who qualified as "impacted lessees." This designation was contingent upon eligibility for Jobkeeper benefits. On 1 October 2020, Croc's made a partial rent payment, but no further payments were made thereafter. Alamdo took possession of the premises on 3 December 2020, purporting to terminate the lease and seeking damages for unpaid rent. Croc's cross-claimed, asserting that Alamdo's termination was unlawful under the Second COVID Regulation.

At first instance, the primary judge concluded that Alamdo was entitled to terminate the lease as Croc's was not an "impacted lessee" due to ineligibility for Jobkeeper benefits at the time of termination. Additionally, the judge found that clauses 5 and 6 of the Second COVID Regulation provided pathways for a landlord to act despite the prohibition in clause 4, which prevented lease termination for non-payment of rent during the prescribed period.

Decision

On appeal, the Court of Appeal, allowed Croc's appeal, holding that Croc's was indeed an "impacted lessee" under the relevant COVID Regulation. The court determined that eligibility for Jobkeeper benefits could be established if the business met the decline in turnover test at any point before the end of the relevant fortnight, not strictly at the time of application.

The court further interpreted the Second COVID Regulation's clause 4 as imposing a blanket prohibition on lease termination during the prescribed period. Clauses 5 and 6 were found to apply beyond this period, thus preventing Alamdo from lawfully terminating the lease on 3 December 2020. In dissent, Justice Basten posited that clauses 4, 5, and 6 should be read as a coherent package, allowing for exceptions within the prescribed period.

The Court remitted the case to the Equity Division to assess what damages, if any, Croc's should receive in light of Alamdo's unlawful termination of the lease.

Croftstar Pty Ltd as trustee for The Croftstar Investment Trust v Norfeld Pty Ltd [2023] NSWSC 143

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 27 February 2023

LAND LAW — conveyancing — contract for sale — completion — where the plaintiff seeks orders requiring the defendant to perform its obligations under a deed — where the plaintiff seeks declaration that it has paid a deposit for the purchase of real property

Facts

Croftstar Pty Ltd ("**Croftstar**") commenced proceedings against Norfeld Pty Ltd seeking enforcement of a Deed dated 27 May 2020. The Deed, which settled earlier proceedings between the parties, stipulated that Norfeld would sell certain property at Silverwater to Croftstar for $8,800,000 exclusive of GST. Croftstar had already paid a deposit of $880,000. The Deed set a settlement date of no later than 28 May 2022. Despite Croftstar's readiness to complete the purchase, Norfeld refused to settle, raising various unsubstantiated allegations of fraud, tax evasion, and judicial misconduct. Croftstar sought declaratory relief and specific performance of the Deed.

Decision

The Court found in favour of Croftstar, holding that this was a clear case for enforcing the Deed. The judge rejected Norfeld's allegations as scandalous and entirely unsubstantiated. The Court ordered Norfeld to transfer the property to Croftstar within 28 days, failing which the Registrar was directed to execute the necessary documents. The Court awarded costs to Croftstar, with the quantum and basis (ordinary or indemnity) to be determined following further submissions. The Court also indicated its willingness to allow Croftstar to set off its costs against the balance of the purchase price, subject to a gross sum costs assessment.

Davis v Davis (No 2) [2023] NSWSC 1563

Coram: Elkaim AJ

Court: Supreme Court of New South Wales

Date: 15 December 2023

LAND LAW – Torrens title – Exceptions to indefeasibility – Estates and Interests recorded in folio – where the plaintiff and the defendant entered into a deed transferring a property from the defendant to the plaintiff, subject to a life interest in the property which gave the defendant a "right to reside" – whether the deed gave a right of exclusive possession to the plaintiff – where the plaintiff and the defendant had been in a close personal relationship as defined in the Property (Relationships) Act 1984 (NSW) – whether the plaintiff is entitled to an adjustment under s 20 due to monetary and non-monetary contributions to the defendant's wellbeing and the property.

Facts

This dispute involved a father (the defendant) and daughter (the plaintiff) regarding the ownership and rights over a family property located at 42 [address redacted], New South Wales ("**No 42**"). The plaintiff had loaned the defendant $9,000 in 1986 to assist in purchasing No 42 after the defendant's divorce, and they entered into a deed in 2005. This deed acknowledged the plaintiff's financial contributions and caregiving efforts towards the defendant, leading to the transfer of ownership of No 42 to the plaintiff. However, the deed also granted the defendant a life estate, allowing him to reside in the property for life. The dispute arose after the defendant moved out of the property in 2019 following an altercation with the plaintiff's son, Blake, who had returned to live at No 42. The defendant sought exclusive possession of the property, while the plaintiff argued that she was entitled to retain ownership under the deed.

Decision

The court examined the 2005 deed to determine whether it granted the defendant exclusive possession or merely a personal right to reside. The court held that while a life estate typically includes exclusive possession, the specific terms of the deed indicated only a personal right of residence, as it did not confer a broader right to rent or manage the property. The deed's

language, particularly the absence of a clause granting the defendant exclusive control, and the plaintiff's ongoing financial responsibilities for maintaining the property, supported this conclusion. Therefore, the court rejected the defendant's claim to exclusive possession, upholding the plaintiff's right to remain in the property.

Dogra v Dogra [2023] NSWSC 1642

Coram: Lindsay J

Court: Supreme Court of New South Wales

Date: 21 December 2023

REAL PROPERTY – Claim to beneficial entitlement to land registered under the Real Property Act 1900 NSW – Claimant asserts registered proprietors bound by personal equities – Claimant relies upon allegations of promissory estoppel, proprietary estoppel, common intention constructive trust, remedial trust, resulting trust, equitable lien – Factual basis not established – Claim dismissed

Facts

The plaintiff, Aruna Dogra, claimed a beneficial interest in her son Kapil Dogra and his ex-wife Mamta Dogra's former matrimonial home in Hurstville. Aruna argued that her contributions to the acquisition of their prior property in Kogarah entitled her to a one-third share in the Hurstville property under principles of estoppel, constructive trust, and equitable lien. Kapil supported his mother's claim, while Mamta denied any arrangement or conversations acknowledging Aruna's ownership interest. Aruna's case relied on oral agreements and financial contributions, allegedly substantiated by family members and a friend, whereas Mamta contended that the properties were co-owned solely by herself and Kapil, as reflected in legal documents.

Decision

The Court rejected Aruna's claim, finding that her evidence, along with that of her witnesses, lacked credibility. The absence of contemporaneous documentation, conflicting financial records, and Kapil's control over financial transactions undermined the reliability of their narrative. The Court accepted Mamta's testimony, which denied any arrangement conferring a beneficial interest on Aruna. It held that no agreement or representation existed that granted Aruna a proprietary interest in either the Kogarah or Hurstville properties. Aruna's contributions were deemed to reflect familial support rather than a pursuit of property ownership, and her claims were ultimately dismissed.

Doltone House Group Pty Ltd v Premium Services Australia (PSA) Pty Ltd [2023] NSWSC 516

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 18 May 2023

LEASES AND TENANCIES — rent and outgoings — failure to pay — where lease terminated for breach of essential term and plaintiff entitled to recover damages from lessee

LEASES AND TENANCIES — repairs, maintenance and alterations — damage to premises — where defendant undertook unauthorised works — no issue of principle

Facts

The first plaintiff, Doltone House Group Pty Ltd ("**Dolton House**"), was the owner of a property located at Belgrave Esplanade, Sylvania Waters, which had been leased to the first defendant, Premium Services Australia (PSA) Pty Ltd ("**PSA**"), for five years starting on 9 August 2021. The second defendant, Mohamed Ahmed Hammoud, was the sole director and secretary of PSA and had personally guaranteed PSA's obligations under the lease.

PSA breached the lease by failing to pay the agreed rent, having only paid $64,000 from August 2021 to April 2022, despite the annual rent being set at $96,000 plus GST. Consequently, the lease was terminated by Doltone House on 22 June 2022 due to non-payment. Furthermore, PSA had undertaken unauthorised and substandard alterations to the property without the necessary approvals or the plaintiff's consent. These unauthorised works caused significant damage to the property.

Prior to the hearing, PSA had been placed in liquidation, and the second defendant was facing bankruptcy proceedings. Although the defendants' solicitor sought to vacate the hearing on grounds of the second defendant's psychological and medical conditions, the Court found that the defendants had repeatedly failed to comply with their obligations to defend the claim and did not permit a further delay.

Decision

The Court ruled in favour of the first plaintiff, Doltone House, awarding damages and costs against both defendants. The Court found that PSA had breached the lease by failing to pay rent and by conducting unauthorised and substandard works on the property. The Court also held the second defendant personally liable under the guarantee for the breaches of PSA.

Damages were awarded in the total sum of $459,708.90. This included $225,930 for the costs of rectifying the unauthorised works, $20,000 in unpaid rent up to the termination date, $1,052.50 in interest on unpaid rent, and further damages for unpaid rent covering the period from termination until August 2024. The Court acknowledged that Doltone House had acted diligently in attempting to re-let the property but had been unsuccessful due to regulatory difficulties.

In addition, the defendants were ordered to pay the plaintiff's legal costs on an indemnity basis, along with interest at 6% per annum. The Court granted the second defendant a 21-day stay of execution on the judgment and the opportunity to apply for the orders to be vacated, should he be able to present further evidence of his incapacity to defend.

Felsch v Hetherington [2023] NSWSC 1411

Coram: Davies J
Court: Supreme Court of New South Wales
Date: 20 November 2023

LAND LAW – possession of land – where plaintiffs are executors – where one beneficiary in the will has remained in possession – where defendant has not appeared – claim for possession and mesne profits – default judgment given for possession

Facts

The case concerns a dispute over possession of land located at 48 Bogan Street, Parkes, NSW. The plaintiffs, who are executors of the will of the late Valerie Nancy Hetherington, sought possession of the land in order to administer her estate. Mrs Hetherington passed away on 7 June 2010, leaving a will dated 22 November 1996. In the will, the entire estate was bequeathed to her three children, who include both the plaintiffs and the defendant.

Since Mrs Hetherington's death, the defendant has been in actual occupation of the property. The plaintiffs successfully registered the property in their names via a transmission application on 6 August 2014. Notices to vacate were served on the defendant on 11 March 2019 and 22 June 2021, but the defendant failed to comply with both.

The plaintiffs initiated proceedings on 18 May 2023, seeking possession of the property as well as mesne profits due to the defendant's continued occupation. The defendant did not file a notice of appearance or defence after the statement of claim was served. As a result, the plaintiffs filed a notice of motion on 7 September 2023, seeking default judgment for possession of the property and a postponement of the claim for mesne profits to a later date.

Decision

Justice Davies granted the plaintiffs' request for default judgment for possession of the property at 48 Bogan Street, Parkes, noting that the defendant had been given notice of prior hearings but failed to appear on any occasion. The court held that rule 16.8 of the *Uniform Civil*

Procedure Rules 2005 (NSW) permits default judgment on one claim, even if other claims remain unresolved.

Accordingly, the following orders were made:

1. Judgment for the plaintiffs, granting possession of the land described as Lots 2 & 4 Deposited Plan 14117, 48 Bogan Street, Parkes NSW.
2. Leave to the plaintiffs to issue a writ of possession.
3. The remaining claim for mesne profits was adjourned for further directions on 9 February 2024 before Davies J.
4. Liberty to apply on two days' notice.

These orders reflect the plaintiffs' entitlement to possession and defer further deliberation on the issue of mesne profits.

Fong v Douglas [2023] NSWSC 1577

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 14 December 2023

LAND LAW – conveyancing – options – call options – deed providing for mutual grant of put and call options – deed signed by grantor of call option only – whether bilateral execution required for effectiveness – whether signed deed delivered by grantor – whether contractual right of rescission established

Facts

This case pertains to the ownership of a unit, specifically unit D3.23, in a development at Schofields, western Sydney. The claim involves the enforcement of a call option allegedly granted over the unit as part of a staged development known as "Frangipani". The developer, Mr Andrew Hrsto, operates through a corporate entity, Schofields 88 (No 1) Pty Limited ("**S88**"), and employs a financing method involving off-the-plan sales structured as a loan agreement coupled with a put and call option agreement.

The plaintiffs, Sandra Fong and her son Maurice Pakhoon Wong, were introduced to the development by Mr Troy Pestano Douglas, who had previous dealings with Mr Hrsto. In March 2020, they agreed to "purchase" a unit in a different stage of the development for approximately $400,000, with the understanding that this constituted a significant discount on the unit's eventual sale price. However, unbeknownst to the plaintiffs, the agreements for this transaction were never executed by S88.

Subsequently, Mr Douglas proposed to switch the plaintiffs' purchase to unit D3.23 in the Frangipani stage, offering them an additional sum of $20,000. Mr Douglas facilitated this switch through a series of agreements, including a loan agreement where he acted as the borrower and a deed of inducement and nomination, which required him to nominate the plaintiffs as purchasers. Despite these agreements, crucial documentation was not executed correctly, and funds intended for the purchase were instead transferred to Mr Douglas.

Over the course of several months, communication regarding the plaintiffs' purchase became increasingly problematic, culminating in Mr Douglas attempting to exercise the option for unit D3.23 in favour of his own company rather than the plaintiffs.

Decision

The Court found that Mr Douglas' claim for specific enforcement of the Option Contract failed, as the Option Deed was deemed unenforceable at law. The judgment highlighted that formal steps were not adequately taken to manifest S88's intention to adopt the Option Deed as binding. The Court emphasised the lack of proper execution and the absence of a valid contractual relationship between the plaintiffs and S88.

The judgment further noted that Mr Douglas' attempts to exercise the option in favour of his company instead of the plaintiffs contradicted the agreements made. As a result, the claim for damages or specific performance was denied. The Court ruled that the costs of the cross-claim should follow the event, with the proceedings adjourned for further directions regarding the outstanding claims by the plaintiffs against Mr Douglas.

The final orders of the Court included the dismissal of the second cross-claim, reserving costs for determination at a later date, and adjourning the proceedings for further directions on 15 December 2023.

Hanave Pty Ltd v Nomad Sydney Pty Ltd (formerly Wine Nomad Pty Ltd) **[2023] NSWSC 265**

Coram: Chen J

Court: Supreme Court of New South Wales

Date: 24 March 2023

LEASES AND TENANCIES – Retail leases – Valuation – market rent – whether expert rental valuation report complied with the terms of the Retail Leases Act 1994 (NSW)

LEASES AND TENANCIES – Retail leases – license – whether the licensed area, being a disused lift shaft, loading dock and roof area, constituted a 'retail shop lease'

APPEALS – from Civil and Administrative Appeals Tribunal only "on a question of law"

Facts

The Supreme Court of New South Wales adjudicated a rental dispute involving Hanave Pty Ltd and Nomad Sydney Pty Ltd, formerly known as Wine Nomad Pty Ltd. The underlying issue pertained to a retail lease agreement for a duration of 12 years that commenced on 14 July 2012, featuring annual rent escalations of 4% and a rent review every four years. During the rent review in 2020, disputes arose regarding the tenant's entitlement to a rent review, the validity of the valuation provided, and the tenant's claim for a refund of certain license fees. The case represents a pivotal examination of the standard of review applicable to valuers under the *Retail Leases Act 1994* (NSW).

Decision

The Court confirmed the necessity for any valuation of "current market rent" to be conducted on an "effective rent" basis, as specified in section 31(1)(a) of the *Retail Leases Act*. This entails that the valuer must consider the following factors: the specific terms and conditions of the lease; the rent expected for similar premises if unoccupied; the gross rent, minus the landlord's outgoings; and any typical incentives offered to prospective tenants of unoccupied retail spaces.

Importantly, the valuation must exclude any goodwill associated with the tenant's occupation or the value of fixtures.

The Court established that for a valuation to be binding under the Act, it must be documented in writing and accompanied by comprehensive reasons elucidating how the aforementioned factors influenced the valuer's final determination. The judgment underscores that mere acknowledgment of these factors is inadequate; the absence of any considered factor will lead to a presumption of non-consideration by the valuer.

Hawkes Menangle Pty Ltd v Brennan [2023] NSWSC 1095

Coram: Richmond J

Court: Supreme Court of New South Wales

Date: 8 September 2023

LAND LAW — conveyancing — contract for sale — validity of notice to complete

LAND LAW — conveyancing — contract for sale — agreement to vary

Facts

The case involves a dispute over a contract for the sale of land situated at Menangle, New South Wales, which was executed on 8 December 2020 between the plaintiff, Hawkes Menangle Pty Ltd (as trustee for the Menangle Unit Trust), and the defendants, Mr Brennan and Mr Holdsworth. The plaintiff sought specific performance of the contract after the defendants purported to terminate it, claiming a breach due to non-completion by the specified date. The primary contention revolved around the validity of a notice to complete served on 8 June 2022, with the plaintiff asserting that the completion date was 9 June 2022 and that the notice was therefore invalid. The defendants maintained that the contract had been validly terminated as the completion date had been modified to 8 June 2022.

Decision

The Court ruled that the completion date of the contract was indeed 9 June 2022, based on the interpretation of the contract's terms. The Court found no intention from either party to vary the completion date, concluding that any purported agreement to do so was merely an error by the vendors' solicitor, not a binding amendment.

Consequently, the notice to complete served on 9 June 2022 was deemed invalid as it was served before the agreed completion time, which negated the defendants' subsequent termination notice. The Court upheld the validity of the contract, allowing the plaintiff's claim for specific performance and ruling that the defendants were liable for the plaintiff's costs.

Horizon Hotels Pty Ltd v Australian Secured & Managed Mortgages Pty Ltd **[2023] NSWCA 231**

Coram: Payne JA; Adamson JA; Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 28 September 2023

CONTRACT – interpretation – entitlement to fees under an introducer mandate agreement – whether loan offer complied with interest rate requirement – offer contained "standard rate" and "concessional rate" – standard rate so described to avoid penalty – intention that standard rate be within prescribed range – fees not payable for non-compliant offer

ESTOPPEL – common assumption – fee entitlement crystallised only with offer of loan secured by unregistered second mortgage and caveat – claimant estopped from obtaining fees where offer non-compliant with fee assumption

REAL PROPERTY – caveats – equitable charges – where introducer mandate agreement and loan offer grant equitable charges over the land to secure the payment of fees – whether equitable charges extended to judgment debt

Facts

Horizon Hotels Pty Ltd (the appellant) entered into an Introducer Mandate Agreement (the "**Agreement**") with Craig Steven Highmore ("**Highmore**"), the second respondent, for the purpose of obtaining a finance offer from Australian Secured & Managed Mortgages Pty Ltd ("**ASMM**"), the first respondent. The Agreement stipulated that Highmore's fees would be contingent upon the offer featuring an interest rate not exceeding 10% above 2% per calendar month. Additionally, the security for the financing was to be an unregistered second mortgage, which would be protected by a caveat.

On 26 August 2021, ASMM provided a letter of offer, which Horizon Hotels accepted; however, no loan was ultimately granted. Highmore and ASMM claimed that Horizon Hotels was liable for certain fees as specified in the Agreement, as well as for expenses incurred by

ASMM. They lodged caveats over Horizon Hotels' property located in Potts Point and initiated proceedings in the Equity Division, seeking both an extension of the caveats and the payment of fees amounting to $55,600. The trial judge extended the caveats and ordered the payment, prompting Horizon Hotels to seek leave to appeal.

Decision

The Court of Appeal granted leave to appeal and subsequently allowed the appeal, thereby overturning the trial court's judgment. The Court found that Highmore's entitlement to fees was fundamentally dependent on compliance with the specified interest rate condition within the Agreement. It noted that the letter of offer contained an interest rate that exceeded the stipulated maximum, thus failing to meet this essential condition.

The Court clarified that although the letter offered a lower "concessional rate" based on prepaid interest, this was not a requirement of the Agreement. The terminology used in the offer was deemed insufficient to alter the necessity for adherence to the specified conditions.

Furthermore, the Court held that Highmore was estopped from claiming his fees due to the absence of an offer that conformed to the Agreement's security requirement of an unregistered second mortgage. The Court agreed that due to the non-compliance with essential conditions of the agreement, being the stated interest rate and the type of security interest, the letter of offer procured by Highmore did not entitle him to the payment of fees. Consequently, the Court concluded that the trial judge's order for payment was unwarranted, resulting in the dismissal of Highmore's claims.

Huang v 18 Woodville Holding Pty Ltd; Tao v 18 Woodville Holding Pty Ltd [2023] NSWCA 15

Coram: Meagher JA; Kirk JA; Griffiths AJA

Court: Supreme Court of New South Wales, Court of Appeal

Date: 15 February 2023

LAND LAW — Torrens title — Exceptions to indefeasibility — Unregistered tenancy — Whether s 42(1)(d) of the Real Property Act 1900 (NSW) can apply with respect to the interest of a tenant at will

Facts

In this case, the appellants in both proceedings had paid the purchase price and taken possession of two apartments in a strata plan development. However, they had not received the transfer of the fee simple for these properties. The appellants in the second proceedings claimed a similar position to that of the appellants in the first proceedings. Both sets of appellants initiated proceedings in the Supreme Court, seeking specific performance of the contracts for sale concerning the apartments.

The central issue in both cases was whether 18 Woodville Holding Pty Ltd ("**18 Woodville**"), the registered mortgagee, had the right to take possession of the apartments in exercise of its power of sale. This determination hinged on whether 18 Woodville's registered interest was paramount to the unregistered interests held by the appellants. The appellants argued that the fraud exception in section 42(1)(d) of the *Real Property Act 1900* (NSW) (the "**Act**") applied in their favour.

The primary judge ruled in favour of 18 Woodville, asserting that its registered interest was indefeasible and that the appellants could not invoke the fraud exception, as they were considered tenants at will at the time of registration.

Decision

The Court of Appeal dismissed the appeals in both proceedings. The Court held that a tenancy at will must be distinguished from a tenancy for a fixed term, concluding that the exception to indefeasibility under section 42(1)(d) of the Act does not apply to purchasers in possession who are classified as tenants at will.

This interpretation was confirmed by the Court's analysis of the language and legislative history of the provision, which supports a narrower construction than that found in equivalent legislation in Victoria. Consequently, as the appellants held their interests in the apartments under a tenancy at will, the Court found that the exception did not apply. Therefore, 18 Woodville's registered interest remained paramount, and the appellants' claims to the contrary were dismissed, solidifying the mortgagee's right to take possession of the properties.

I S McGeoch Pty Ltd v Sporting Shooters Association of Australia New South Wales Albury Branch Inc [2023] NSWSC 369

Coram: Basten AJ

Court: Supreme Court of New South Wales

Date: 18 April 2023

LEASES AND TENANCIES – breach – termination – lease of land to club carrying out shooting activities –clause in the lease agreement required affiliation with specific association listed in cl 97 of the Firearms Regulation – whether change in affiliation to a different association constituted breach of the lease

LEASES AND TENANCIES – breach – waiver, affirmation, election – notice of intention to terminate if breach not remedied – whether election not to require remedying of breach – whether right to terminate waived through conduct – whether acceptance of rent during notice period affirmed lease

Facts

The plaintiff, I S McGeoch Pty Ltd, owned a parcel of land located near Albury, New South Wales. On 1 July 2017, the plaintiff leased the land to the Albury Wodonga Clay Target Club Inc (the "**Club**") for a term of 10 years, primarily for the purpose of conducting clay target shooting. Under the lease, the Club was required to maintain affiliation with the Australian Clay Target Association Inc ("**ACTA**"), a condition tied to its approval under cl 97 of the *Firearms Regulation 2017* (NSW) (the "**Firearms Regulation**"). This affiliation was essential for conducting shooting activities on the property.

In 2019, the Club changed its name and affiliation to the Sporting Shooters Association of Australia New South Wales ("**SSAA**"), another association listed under the Firearms Regulation. However, the plaintiff viewed this shift in affiliation as a breach of the lease terms, which specifically required the Club to remain affiliated with ACTA. After issuing a notice to rectify the breach, the plaintiff sought to terminate the lease in 2021.

The Club contested the termination, arguing that the lease was not breached because SSAA was also an approved organisation under the Firearms Regulation. The Club also contended that the plaintiff had affirmed the lease's continued operation through its conduct, including accepting rental payments and negotiating for alternative arrangements, such as purchasing the land or entering a new lease.

Decision

The Court held that the change in affiliation from ACTA to SSAA constituted a breach of the lease. The language of the lease clearly stipulated that the Club was required to maintain its affiliation with ACTA, and the Court rejected the argument that the condition could be read down to permit affiliation with any other approved organisation under the Firearms Regulation. The breach of this condition provided valid grounds for termination.

Further, the Court found that the plaintiff had not affirmed the lease through its conduct. The ongoing negotiations between the parties and the plaintiff's willingness to explore other options did not amount to a waiver of the breach or an affirmation of the lease's continued validity. Additionally, while the plaintiff had accepted rental payments, these were not construed as a waiver, as the plaintiff had explicitly reserved its rights in relation to the breach.

Accordingly, the Court ruled in favour of the plaintiff, declaring that the lease had been validly terminated and granting a judgment for possession of the land. The plaintiff was also granted leave to issue a writ of possession 30 days after the entry of the orders. The defendant was ordered to pay the plaintiff's costs for the proceedings.

In the matter of Sun Cable Pty Ltd (Administrators Appointed) [2023] NSWSC 1037

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 30 August 2023

CIVIL PROCEDURE — Stay of proceedings — Contractual dispute resolution process culminating in expert determination — Where proceedings commenced by plaintiffs after defendant issued notice of dispute invoking contractual process — Whether Court should exercise discretion to stay proceedings

LEASES AND TENANCIES — Assignment and subletting — Consent — Where defendant granted options to plaintiff to enter into long-term leases and easements over defendant's pastoral leasehold land — Where each option deed precluded the plaintiff from assigning its rights or novating its obligations under the deed unless (i) the plaintiff gives the defendant all information requested by the defendant that is reasonably required to determine whether the proposed assignee, of the party in control of the proposed assignee, is able to satisfy the grantee's obligations "under this Deed"; and (ii) the defendant approves the assignee in writing (which approval must not be unreasonably withheld or delayed) — Where plaintiff sought defendant's approval to assign option deeds to assignee – Whether plaintiff had failed to provide to the defendant information that it was obliged by that clause to provide — Whether defendant unreasonably withheld or delayed its approval of the proposed assignee — Whether defendant obliged to approve the proposed assignee and execute deeds of assignment and novation

Facts

Sun Cable Pty Ltd ("**Sun Cable**"), an entity involved in the development of a large solar energy infrastructure project known as the AAPowerLink Project, was engaged in legal proceedings against Consolidated Pastoral Company Pty Ltd ("**CPC**"), the pastoral leaseholder of land in the Northern Territory. CPC had granted Sun Cable options to enter into long-term sub-leases and easements over the land, as well as access to the land for feasibility investigations.

Sun Cable's assets, including its rights under the options, were sold to Helietta Holdings 1 Pty Ltd. Under the sale agreement, these options had to be assigned and novated to the buyer by 31 August 2023. CPC did not approve the proposed assignment and novation, which prompted Sun Cable to seek judicial intervention. Specifically, Sun Cable applied for declarations that CPC had unreasonably withheld its consent to the assignment and novation, and for an order compelling CPC to execute the necessary deeds. CPC, in response, sought a stay or dismissal of the proceedings, arguing that Sun Cable had not complied with the alternative dispute resolution process set out in their agreement.

Decision

Justice Williams ruled in favour of Sun Cable, determining that CPC had unreasonably delayed and withheld its consent to the proposed assignment and novation. The Court found that CPC's reasons for withholding consent were not objectively justified, as required under the relevant contract. Justice Williams outlined that unreasonable withholding or delay occurs when consent is refused for reasons unrelated to the contractual relationship, or for the purpose of gaining a collateral advantage. Furthermore, any unreasonable delay in providing consent may amount to a refusal, particularly where no valid reasons are provided.

Her Honour also dismissed CPC's application for a stay, ruling that it would be unjust to deprive Sun Cable of judicial determination in these circumstances. Although parties are generally expected to adhere to agreed ADR procedures, the Court held that Sun Cable's right to a judicial resolution should not be denied, particularly as CPC's refusal of consent had caused a pressing urgency. Accordingly, the Court granted Sun Cable's request for specific performance, requiring CPC to execute the deeds of assignment and novation by the end date of 31 August 2023.

ISPT Pty Ltd and AWPF Management No. 2 Pty Ltd v Cao and Zhao [2023] NSWSC 1115

Coram: Nixon J

Court: Supreme Court of New South Wales

Date: 14 September 2023

REAL PROPERTY – COMMERCIAL LEASES – lease of restaurant for three-year term – public health orders imposed from March 2020 onwards in response to COVID-19 pandemic prohibited or restricted dining on premises – tenant closed restaurant when restrictions first imposed and ceased paying rent – claim against guarantors for unpaid rent and damages – whether discharge by frustration – whether a lease is capable of being frustrated – no binding precedent to the effect that the doctrine of frustration is incapable of applying to a lease – whether the public health orders rendered the leasehold estate unusable and unsaleable – whether essential term regarding the opening of the premises for business became incapable of performance – whether frustration can be established by radical change in the nature of tenant's business – no finding made as to whether tenant's business had been rendered unviable by the public health orders – held that lease not frustrated

REAL PROPERTY – COMMERCIAL LEASES – claim for unpaid rent and outgoings up to the date of termination – claim for loss of future rent – whether Plaintiffs had taken reasonable steps to mitigate loss – held that failure to mitigate not established – whether Plaintiffs entitled to costs of making good the premises – whether tenant was obliged to remove fixtures and fittings – held that claim for costs of making good the premises not established

Facts

ISPT Pty Ltd and AWPF Management No. 2 Pty Ltd (the "**Landlord**") leased two commercial premises at World Square Shopping Centre to Beijing Roast Duck Sydney Pty Ltd (the "**Tenant**") for a three-year term commencing on 1 October 2019. Due to the COVID-19 pandemic, public health orders were issued in New South Wales, including the *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW) on 23 March 2020, which

impacted businesses. The Tenant closed its restaurant on 23 March 2020 and chose not to reopen, despite being permitted to operate as a takeaway business under the restrictions.

The Tenant subsequently defaulted on rent payments from January to March 2020 and remained in arrears. The Landlord sought to recover unpaid rent and damages for breach of the lease. In response, the Tenant argued that the lease had been frustrated by the COVID-19 lockdown restrictions, rendering the premises unusable for its intended purpose as a licensed restaurant.

Decision

Justice Nixon rejected the Tenant's argument and held that the lease had not been frustrated. The doctrine of frustration, which applies when an unforeseen event renders the performance of a contract impossible or radically different, was not satisfied in this case. The court emphasised that while the lease could not be used for on-site dining, the premises could still have been used for takeaway services, which was a permitted purpose under the lease.

Additionally, the court found that the lockdown period of just over two months was insignificant in the context of a three-year lease, and the Tenant had not demonstrated that the leasehold interest was unsaleable, as no efforts were made to assign the lease. The court ruled that the lease's terms, which recognised the potential for restrictions on the Tenant's use of the premises, allocated this risk to the Tenant. As such, the Landlord was entitled to recover the unpaid rent and other losses arising from the Tenant's breach of the lease.

Kimberley Developments Pty Ltd v Bale [2023] NSWCA 25

Coram: Leeming JA; Kirk JA; Griffiths AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 22 February 2023

APPEAL – challenge to factual findings – transfer of land – where defendants contended that consideration provided by $302,000 in banknotes – no documentary records available – whether primary judge erred in finding defendants' case not established

PLEADINGS – vendor executed joint venture agreement with sole director and shareholder of purchaser – no shares issued to purchaser in accordance with agreement – plaintiff sued for breach of contract – no challenge to finding by primary judge that joint venture agreement not contractual – primary judge found that purchaser represented to vendor that the land would be developed in accordance with joint venture agreement – no case based on misrepresentation pleaded – whether open to primary judge to make findings based on unpleaded case – unpleaded case was opened and cross-examined upon without objection – parties to be taken to have litigated unpleaded case

EQUITY – unconscionable conduct – special disadvantage – whether primary judge erred in finding defendants unconscientiously exploited special disadvantage known to them – orders in nature of rescission – need to bring to account payment made by one defendant whose claim was compromised prior to trial

Facts

The case arose from a transfer of land in Forest Lodge, Sydney, in 2011. Mr Michel Schein transferred the land to Kimberley Developments Pty Ltd ("**Kimberley Developments**"), whose sole director and shareholder at the time was Mr Albert Darwiche, for a stated consideration of $590,000. The transaction included the discharge of a mortgage on the property by Super Start Batteries Pty Ltd, a company associated with Kimberley Developments. A formal joint venture agreement, executed on the same day as the transfer,

provided that Schein would receive 60% of the Class B shares in Kimberley Developments; however, these shares were never issued.

Additionally, key documents such as an agreement for the sale of land and a settlement sheet were missing. Following Schein's death, his daughter, Françoise Bale, acting as the executrix of his estate, commenced proceedings to set aside the transfer, alleging that the remaining consideration, purported to be $302,000 in banknotes, had not been paid. The appellants claimed the cash had been handed over, but no receipt or banking records were produced to support this.

Decision

The New South Wales Court of Appeal upheld the decision of the primary judge, rejecting the appeal brought by Kimberley Developments, Mr Albert Darwiche, and other parties involved. The Court found that, while the case upon which Françoise Bale succeeded was not explicitly pleaded, the parties had expanded the issues during the trial, allowing the matter to be addressed. It was determined that Bale had established a sufficient case for the burden of proof to shift to the appellants to demonstrate that $302,000 had been paid. The primary judge's finding that the appellants failed to discharge this burden was upheld, and the Court concluded that the cash was never paid.

Furthermore, the Court found that Mr Michel Schein, having transferred the property without independent legal advice and in the absence of the usual incidents of a conveyance, was operating under a special disadvantage. This disadvantage was unconscionably exploited by Darwiche, rendering the transfer liable to rescission in equity. As such, the appeal was dismissed.

Koprivnjak v Koprivnjak [2023] NSWCA 2

Coram: Leeming JA; Mitchelmore JA; Griffiths AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 2 February 2023

EQUITY – Trusts and trustees – Resulting trusts – Purchase money trusts – Presumption of advancement

EQUITY – Trusts and trustees – Constructive trusts – Common intention

Facts

A dispute arose between John Koprivnjak (the appellant) and his daughter, Natalie Koprivnjak (the respondent), regarding the beneficial ownership of a property purchased by Natalie in Shoal Bay, New South Wales, in 2011 for $300,000. John had contributed $15,000 towards the deposit and transferred $60,000 from his company, Titles Strata Management Pty Ltd ("**TSM**"), into Natalie's account to assist with the purchase. Natalie took out a loan secured by a mortgage with the National Australia Bank to cover the balance.

Following the purchase, John continued to contribute financially, paying for renovations and property maintenance. He also caused TSM to make monthly payments of $1,400 to Natalie, which she used to pay the mortgage. The property was sold in 2020 during Family Court proceedings, and a dispute arose over the proceeds. John claimed a 25% interest in the property through a resulting trust due to his contribution to the purchase price and sought to establish a common intention constructive trust for the remaining 75%, based on his financial assistance with the mortgage and renovations. Alternatively, John sought to enforce the terms of a mortgage executed between himself and Natalie, which referenced an advance of $75,000.

At first instance, the trial judge rejected John's trust claims, accepting Natalie's assertion that the $75,000 was a loan, not an interest in the property. The judge also found that John failed to rebut the presumption of advancement, which applies to familial relationships, concluding that the loan should be repaid to John but that Natalie was otherwise entitled to the proceeds of the

property sale. John appealed the decision, introducing new documentary evidence, including a rental agreement and insurance documents bearing his name.

Decision

The New South Wales Court of Appeal dismissed John's appeal with costs. The Court, comprising Griffiths AJA, Leeming JA, and Mitchelmore JA, found that the additional documents presented on appeal were of limited probative value. The rental agreement, which was prepared a year after the property's purchase, merely listed John as a contact person but did not indicate an ownership interest. Similarly, the insurance documents, which listed John's name, were discounted as they reflected the use of his name for a premium discount rather than an indication of beneficial ownership.

The Court held that the presumption of advancement applied to the familial relationship between John and Natalie and had not been successfully rebutted. John's reliance on text messages exchanged with Natalie several years after the purchase was also unsuccessful, as the messages were ambiguous and made during a period of family conflict. The Court affirmed that evidence of the parties' intentions at the time of the property's purchase was crucial, and much of John's evidence lacked contemporaneity. Accordingly, the appeal was dismissed, and Natalie retained ownership of the property's sale proceeds, subject to repayment of the $75,000 loan to John.

Li v Tao [2023] NSWCA 310

Coram: Ward P; Mitchelmore JA; Kirk JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 15 December 2023

EQUITY — General principles and maxims — Conveyancing — Statute of Frauds — Part performance — High threshold for part performance — Equivocal factors for part performance — Many equivocal acts do not add up to an unequivocal act

EQUITY — Equitable interests in property — Property disputes — Assertion of legal ownership by trustee — Trusts and trustees — Evidence of trust — Where evidence of oral declaration of trust inadmissible under s 23C of the Conveyancing Act 1919 (NSW) — Doctrine in Rochefoucauld v Boustead — Doctrine not limited to where was a conditional assignment or written evidence prevented by fraud — Doctrine not limited to where property was assigned by claimant — Doctrine does not involve weighing up merits of conduct of parties

APPEALS — From finding of fact — Credibility of witnesses — Challenge to credibility finding not made out

Facts

The appellant, Ms Cheryl Li, and the respondent, Mr Zhiyong (Tommy) Tao, were in a relationship during which, in 2015, a house in St Ives, Sydney, was purchased and registered solely in Ms Li's name. Following their separation in 2018, Mr Tao asserted that Ms Li held the property on trust for him pursuant to an express trust, based on an oral agreement between them. Ms Li contested this claim, citing the writing requirements stipulated in s 23C of the *Conveyancing Act 1919* (NSW). However, the primary judge ruled in favour of Mr Tao, finding that an oral agreement did indeed establish such a trust, and further held that Ms Li could not rely on s 23C due to the doctrine of part performance.

Ms Li appealed on four grounds. The first ground concerned whether the primary judge erred in assessing Mr Tao's credibility. The second involved the question of whether an express trust

was properly declared. The third ground related to whether the doctrine of part performance applied, and the fourth, raised in Mr Tao's notice of contention, addressed whether his beneficial interest could be recognised under the doctrine in *Rochefoucauld v Boustead* [1897] 1 Ch 196, notwithstanding s 23C.

Decision

The Court of Appeal (Kirk JA, with Ward P and Mitchelmore JA concurring) dismissed Ms Li's appeal.

On the first and second grounds, the Court found that the determination of the trust was factual and influenced by the primary judge's impressions of the witnesses' credibility. It held that such findings could only be overturned if they were "glaringly improbable" or "contrary to compelling inferences," which Ms Li failed to demonstrate. Consequently, the challenge to the existence of the trust also failed, as it hinged on the credibility of the evidence presented.

On the third ground, the Court ruled that the doctrine of part performance did not apply. It noted that to invoke this doctrine, the acts performed must be unequivocally referable to the alleged agreement. In this case, none of the acts identified by the primary judge were unequivocally referable to the trust agreement, either individually or collectively.

On the fourth ground, the Court found that the requirements of the doctrine in *Rochefoucauld v Boustead* were satisfied. It held that Mr Tao and Ms Li had agreed that the property would be held in trust for Mr Tao, and that Ms Li could not rely on s 23C to deny the trust. The Court rejected Ms Li's argument that the doctrine should be narrowly applied and concluded that no extension of legal doctrine was required, as the case fell squarely within the established principles of *Rochefoucauld v Boustead.*

Menassa v Shi (No 2) [2023] NSWSC 168

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 1 March 2023

REAL PROPERTY — easements — costs — final orders — whether departure from ordinary rule under s 88K(5) Conveyancing Act 1919 (NSW) warranted — application for indemnity costs by defendants refused — where defendants object to proposed final orders — no issue of principle

Facts

The plaintiff had previously been granted an easement to drain water over the defendants' property under section 88K of the *Conveyancing Act 1919* (NSW). Following this, the Court addressed the final orders, including the registration of the easement, the form of the proposed orders, and the issue of costs. The plaintiff proposed orders requiring the easement to be registered within 21 days and agreed to pay the defendants' costs, limited to those recoverable by a litigant in person. The defendants objected to aspects of these orders and sought an indemnity costs order, arguing that the plaintiff's conduct was unreasonable.

Decision

The Court rejected the defendants' application for indemnity costs, finding that the plaintiff's conduct did not meet the threshold for unreasonableness necessary to justify such an order. The Court noted that while the plaintiff could have acted more promptly in identifying issues related to an On-Site Detention ("**OSD**") tank, this did not amount to misconduct warranting indemnity costs. Further, the defendants' arguments about the OSD tank and other matters had been addressed in the earlier judgment.

The Court ordered that the plaintiff pay the defendants' costs on an ordinary basis, as stipulated under section 88K(5) of the *Conveyancing Act 1919*. The easement was finalised, and the plaintiff was directed to register it and compensate the defendants with $26,500.

Morabito v Kingston Industries Pty Ltd [2023] NSWSC 1020

Coram: Peden J
Court: Supreme Court of New South Wales
Date: 31 August 2023

LEASES AND TENANCIES — Use of premises — Permitted use — Whether Tenant breached permitted use — Whether breach of make good obligation — Whether damage to concrete flooring was caused by defective construction of concrete or fair wear and tear

Facts

The plaintiff, Ms Morabito (the "**Landlord"**), leased an industrial warehouse and carpark in Prestons, New South Wales, to the defendant, Kingston Industries Pty Ltd (the "**Tenant"**), for the permitted use of "Plant Hire / Distribution". The lease commenced on 16 August 2010 and was extended multiple times, with the Tenant vacating the premises on 15 December 2017. Following a pre-vacation inspection in July 2017, the Landlord claimed that the Tenant's use of heavy machinery—specifically, steel-tracked equipment—had damaged the concrete flooring of the warehouse and carpark. Consequently, the Landlord sought $344,000.00 in make-good costs and $294,416.73 in lost rent for the 17-month period the premises remained vacant. The lease included standard maintenance and repair obligations, excluding liability for damage caused by the Landlord's negligence, matters beyond the Tenant's control, or fair wear and tear.

The Tenant denied liability, contending that the damage arose from construction deficiencies in the concrete, which were beyond their control. The Tenant also argued that the Landlord had failed to mitigate losses by delaying repairs and rejecting prospective tenants.

Decision

The Court dismissed all claims by the Landlord. On the issue of permitted use, the Court rejected the Landlord's argument that moving steel-tracked machinery on the concrete without protective measures fell outside the lease's scope. The Court found that the term "Plant Hire / Distribution" unambiguously covered the Tenant's use of heavy machinery, including steel-tracked equipment, and extrinsic evidence, such as industry guidelines, was unnecessary for interpreting the lease.

Regarding make-good obligations, the Court ruled that the damage to the concrete flooring was not the Tenant's responsibility. The Tenant successfully demonstrated that the concrete was defectively constructed and insufficient for the intended industrial use, falling within the exceptions to the Tenant's repair obligations for matters outside their control. The Court accepted engineering evidence indicating that the concrete's deficiencies were due to the Landlord's failure to provide appropriate specifications during its construction.

Finally, the Court addressed the claim for lost rent, concluding that the Landlord had failed to mitigate its losses by not repairing the premises and rejecting viable tenants. Prospective tenants had expressed interest in leasing the property despite the damaged floor, and the Court found that the Landlord could have repaired the concrete within six weeks, thereby reducing the vacancy period. Consequently, the Landlord was not entitled to lost rent.

Perkins v Carey [2023] NSWSC 210

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 14 March 2023

LAND LAW — Co-ownership — Statutory trust for sale — Where co-owners are mother and adult son holding as tenants in common in equal shares — Whether son holds 50% on a purchase money resulting trust for mother — Where mother diagnosed with Alzheimer's Disease and did not give evidence — Held that mother did intend to gift 50% of Property

EQUITY — Trusts and trustees — Resulting trusts — Presumption of resulting trust — Presumption of advancement — Where presumptions are not decisive — Where evidence did not establish that mother intended son to hold 50% of property on trust — Where the appropriate orders are mother and son each are entitled to 50%

Facts

The plaintiff, a mother, and the defendant, her son, were registered co-owners of an industrial warehouse in Western Sydney as tenants in common in equal shares. The property was purchased in 2010, with the mother borrowing the funds and paying the entire purchase price. The son operated a business on the property until approximately 2012, after which the business became non-viable. From 2017 onwards, the property was leased, and the son received all rental income without providing any share to the mother.

In 2022, the mother, suffering from Alzheimer's and represented in the proceedings, sought orders from the Court. She requested a declaration that her son held his 50% share of the property on a resulting trust for her, as she had financed the entire purchase. Additionally, she sought the appointment of trustees to sell the property under s 66G of the *Conveyancing Act 1919* (NSW), and the return of 50% of the rental income collected by the defendant from 2017 to 2022.

The son contended that the mother had purchased the property as a gift for him, based on their personal history, including the unequal distribution of their father's estate. He further asserted that the mother had gifted him the rental income for the relevant period. The mother's mental capacity at the time of these alleged decisions was also called into question due to her suffering from Alzheimer's, as letters and documents presented as evidence were deemed unreliable.

Decision

The Court ruled in favour of the defendant on the issue of the property ownership. It held that the presumption of advancement applied, as the mother had likely intended to assist her son by making him a 50% owner of the property. The evidence presented was insufficient to establish a resulting trust in favour of the mother, and speculative arguments regarding the intent behind the property purchase were rejected.

However, the Court found that the mother had not intended to gift the rental income to the son. Given her financial difficulties and the various requests made for her share of the rent, the Court concluded that the son was required to account for 50% of the rental income received between 2017 and 2022.

The Court also appointed trustees under s 66G to sell the property, dismissing the son's objections. With respect to costs, the Court ordered that 50% of the mother's costs be paid from the sale proceeds of the property, given her partial success in reclaiming rental income but failure to establish the resulting trust.

Perpetual Trustee Company Limited v Eastern Pursuits Pty Limited [2023] NSWSC 813

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 13 July 2023

LEASES AND TENANCIES — Rent and outgoings — Failure to pay — Where lessee under commercial lease operated hotel and nightclub — Where operation of hotel affected by COVID-19 pandemic — Where COVID-19 regulations required landlords and lessees to negotiate in good faith — Whether landlord and lessee negotiated in good faith — Where lessee did not pay any rent at all — Where landlord made several offers and concessions — Where landlord negotiated in good faith — Where rental arrears recoverable

CONSUMER LAW — Where landlord had contractual right to purchase lessee's liquor licence — Where lessee claims to avoid rental arrears by sale to prospective purchaser — Whether there was a common intention that landlord would not purchase licence — Whether landlord's failure to acknowledge a common intention constitutes misleading and deceptive conduct — Whether landlord's failure to acknowledge a common intention is unconscionable conduct — Whether landlord's failure to acknowledge a common intention gives rise to a common intention constructive trust or estoppel — Where no common intention established — Where common intention inconsistent with the express terms of the lease agreement — Where no obligation on landlord to clarify its intention under the contract — Where lessee did not otherwise seek rectification

Facts

The plaintiff, Perpetual Trustee Company Ltd ("**Perpetual**"), sought to recover rent arrears and unpaid expenses from the lessee, Eastern Pursuits Pty Ltd ("**Eastern**"), stemming from the commercial lease of premises in Bondi Junction. Eastern operated a hotel and nightclub on the premises until it ceased trading in 2020 due to the COVID-19 pandemic. The arrears accrued from March 2020 to June 2021, totalling $2,104,111.70 after calling on a bank guarantee of $388,000. Eastern defended approximately $1.2 million of the claim, asserting that Perpetual

was barred from recovering that amount due to its failure to comply with pandemic-related regulations, particularly the COVID-19 Leasing Principles introduced under the *Conveyancing (General) Regulation 2018* (NSW).

Eastern also cross-claimed for relief under the *Australian Consumer Law* ("**ACL**"), alleging that Perpetual's conduct regarding Eastern's liquor and gaming licences impaired its ability to sell the business. Eastern claimed it lost a potential buyer in 2017 due to Perpetual's refusal to provide an acknowledgment of licence-related terms, which purportedly led to the buyer abandoning the sale.

Decision

The court rejected Eastern's defence and cross-claim. In relation to the COVID-19 regulations, it was held that there was insufficient evidence to prove that Perpetual failed to engage in good faith negotiations, as required by the pandemic leasing regime. The court found that both parties failed to demonstrate bad faith or a breach of their negotiation obligations under the National Cabinet Mandatory Code of Conduct for SME commercial leases during COVID-19.

As for Eastern's claims under the ACL, the court determined that Eastern had not established that Perpetual's actions caused the loss of the potential sale of the business. Eastern failed to prove that Perpetual's conduct was misleading or unconscionable, or that it directly resulted in the buyer's decision to withdraw from the sale. Therefore, the court dismissed Eastern's cross-claim and granted judgment in favour of Perpetual for the outstanding rent and expenses.

Piety Developments Pty Ltd v Cumberland City Council (No 3) [2023] NSWSC 1627

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 19 December 2023

CONTRACTS – formation – acceptance of offer – communication of acceptance – local council enters negotiations with unsuccessful applicants in tender process for sale of council owned land – council invites submission of applicants' best and final offer – council passed resolution accepting one applicant's offer – notice of motion to rescind resolution given shortly after – unsigned minutes published on council website – no correspondence sent by Council to offeror – minutes later confirmed – communication of acceptance not established

LAND LAW – conveyancing – requirements of writing – Conveyancing Act s 54A – written offer of contract to purchase land from local council – council accepts offer in resolution at council meeting – resolution recorded in minutes signed at later meeting by mayor as chairperson – whether note or memorandum "of" contract – whether mayor "thereunto" lawfully authorised

Facts

Piety Developments Pty Ltd ("**PD**") sought specific performance of an alleged contract for the sale and redevelopment of land in Lidcombe, Sydney, owned by Cumberland City Council (the "**Council**"). PD claimed that the Council's resolution to "accept" PD's offer on 3 November 2021 constituted a binding contract. The offer involved a payment of $2.25 million and the construction of parking facilities valued at $9.75 million as part of PD's redevelopment proposal.

The Council's acceptance of the offer was controversial and passed by a narrow margin on the Mayor's casting vote. Following the Council's meeting, dissident councillors lodged a rescission motion, preventing further steps toward the contract's execution. PD subsequently initiated urgent proceedings in February 2022, securing an injunction preventing the rescission

motion from being considered. The Council contended that no binding contract existed and raised the defence that the land in question was “community land”, meaning it could not legally be sold.

Decision

The court rejected the Council's argument that the land’s classification as “community land” barred its sale, as previously determined in a separate judgment (*Piety Developments Pty Ltd v Cumberland City Council* [2023] NSWSC 480).

Further, in the Court's assessment of whether a binding and enforceable contract had arisen from the Council's resolution, it was found that the Council's acceptance of PD's offer, though approved by resolution, did not result in a concluded contract due to the rescission motion and the lack of executed documentation. Therefore, PD’s claim for specific performance was dismissed. However, the injunction preventing the Council from proceeding with the rescission motion remained in place pending further proceedings.

Potts v Potts [2023] NSWSC 1344

Coram: Elkaim AJ

Court: Supreme Court of New South Wales

Date: 8 November 2023

REAL PROPERTY – declaration sought for transfer of legal ownership of property to first plaintiff – property purchased with money held on trust for first plaintiff – trust created by siblings to protect first plaintiff from his gambling habits – beneficial ownership of the property – issue arising from prospective sale of the property

Facts

This matter centres on a dispute between siblings regarding the equitable ownership of a property located at 91 Fernbank Creek, Port Macquarie. The plaintiffs, David and Susan Potts, and the defendants, Janette and Rowena Potts, are siblings. David, despite not being a registered owner of the property, claimed that he held an equitable interest, having contributed to both the initial deposit and the repayment of loans used to finance the purchase.

Following the death of their father in 2007, the siblings inherited equal shares in a farming property, which was later sold. Additionally, in 2011, their paternal aunt, Mrs Minna Joan Robinson, passed away, leaving a substantial estate valued at over $1 million to Susan and Janette. However, the siblings agreed to divide the estate equally. David's share was placed in a trust account, managed by Rowena, to prevent its dissipation due to David's gambling addiction.

The property at 91 Fernbank Creek was purchased in 2013, with contributions from the trust account, the proceeds of the family farm, and a loan that David repaid in full. In 2021, tensions arose between the siblings, leading to the present proceedings in which David sought a declaration recognising his equitable ownership of the property. David and Susan argued that his share of the inheritance was unqualified and held on trust solely for his benefit, while Janette and Rowena contended that the funds remained the property of the sisters, to be used for David's benefit during his lifetime.

Decision

The Court found in favour of David, concluding that the arrangement concerning the trust account and the purchase of the property was a mechanism intended to protect David from his gambling habits, rather than to diminish his ownership interest. The Court applied the equitable presumption that where a person provides funds for the purchase of a property, which is then registered in another's name, the property is presumed to be held in trust for the person who provided the funds. Given that David had paid all amounts associated with the acquisition, maintenance, and loans on the property, the court declared that the defendants held the property in trust for him.

David was ordered to indemnify his sisters for any outstanding loan amounts and potential capital gains tax liabilities that might arise if the property were sold. The defendants were also ordered to pay the plaintiffs' costs.

Retirement Village Bargo Pty Ltd v Anwar [2023] NSWSC 209

Coram: Peden J
Court: Supreme Court of New South Wales
Date: 14 March 2023

LAND LAW — Conveyancing — Contract for sale — Rescission — Where purchaser issued s 66L notice — Whether land substantially damaged — Whether damage rendered land materially different from that which purchaser contracted to buy — Where materials deposited on land by a stranger to the contract may or may not have contained asbestos — Where vendor's cleaning up the land resulted in removal of topsoil

LAND LAW — Conveyancing — Contract for sale — Deposit — Where rescission valid — Whether vendor entitled to retain deposit — Whether clause requiring a further "deposit" upon termination constituted a penalty

EQUITY — Equitable remedies — Orders for judicial sale out of court — Whether court should exercise discretion for sale — Where no evidence of hardship and that the sale would prejudice the existing owner

Facts

The purchaser, Retirement Village Bargo Pty Ltd ("**RVB**"), entered into a contract to buy a 45-acre rural property in Bargo from the vendor, Mr Boyke Anwar, for $2.32 million. The land, primarily used for farming and residential purposes, had areas affected by existing waste, which included fallen trees, car parts, and a dilapidated shed. Although the vendor did not include a contractual obligation to clear this waste, he gave an oral undertaking that he would continue efforts to remove it.

After the exchange of contracts in May 2018, RVB discovered that, while attempting to clean the property, further waste had been added, including asbestos, through illegal dumping by third parties. The vendor's attempts to rectify this resulted in the replacement of some of the original rubbish with additional waste materials. In September 2019, RVB conducted a pre-

settlement inspection and noted the additional rubbish and the presence of asbestos. The purchaser subsequently rescinded the contract under section 66L of the C*onveyancing Act 1919* (NSW) on the grounds that the property had been "substantially damaged" prior to completion.

Decision

The Court found in favour of the purchaser, holding that the illegal dumping of waste, particularly asbestos, constituted substantial damage under section 66L of the *Conveyancing Act 1919*. The Court determined that this damage significantly altered the property's condition, rendering it materially different from what the purchaser had initially contracted to buy. The Court noted that the presence of hazardous waste, including asbestos, compromised the property's farming and residential uses and would have affected future development opportunities.

The Court also rejected the vendor's argument that RVB's rescission amounted to repudiation, concluding that RVB had acted within its statutory rights. The vendor's claim for liquidated damages under Special Condition 12 of the contract was deemed a penalty, as the amount claimed was disproportionate to the vendor's legitimate interests, especially given that the property was resold for a higher price. The purchaser was entitled to a refund of all monies paid, and the court ordered a judicial sale to secure payment.

Romanos v Punjabi Fusion Group Pty Ltd [2023] NSWSC 1119

Coram: Schmidt AJ

Court: Supreme Court of New South Wales

Date: 14 September 2023

LEASES AND TENANCIES — where plaintiff seeks possession of premises used as restaurant, unpaid rent and other orders — where parties' previous dispute settled by heads of agreement and consent orders made by NCAT which contemplated defendant vacating premises — where defendant remains in possession — where defendant brought further proceedings before NCAT seeking to have consent orders set aside — NCAT proceedings dismissed

CIVIL PROCEDURE — notice of motion — where plaintiff seeks leave to amend statement of claim to seek equitable relief in the alternative — Civil Procedure Act 2005 (NSW), s 64 — requirements of justice — leave granted

CIVIL PROCEDURE — notice of motion — whether to transfer proceedings to NCAT — jurisdiction and powers of NCAT — operation of Retail Leases Act 1994 (NSW), ss 75, 76 — effect of whether heads of agreement binding on NCAT's jurisdiction — NCAT cannot grant alternative equitable relief sought — leave refused and motion dismissed

Facts

The plaintiff, Mr Romanos, owned premises in Harris Park where the defendant, Punjabi Fusion Group Pty Ltd ("**Punjabi**"), operated a restaurant. Punjabi, represented by its sole director and secretary Ms Luthra, initially commenced proceedings in the New South Wales Civil and Administrative Tribunal ("**NCAT**") in 2021, seeking COVID-19 rental relief and other orders against Romanos. Romanos cross-claimed, seeking unpaid rent and rectification of defective works. The parties settled in 2022, agreeing that Punjabi would pay Romanos $72,750 and vacate the premises by April 2023, following a short-term lease provided by Romanos. The settlement also contemplated a possible sale of Punjabi's business, with

Romanos agreeing to grant a five-year lease to the purchaser, subject to his approval, which would not be unreasonably withheld.

Despite the settlement, Romanos later refused to grant the lease to the prospective purchaser, leading to the rescission of the purchase agreement. Punjabi remained in possession of the premises and brought further proceedings in NCAT in 2023, claiming that Romanos had repudiated the settlement agreement. However, NCAT dismissed Punjabi's application due to a lack of jurisdiction, finding that there was no lease between the parties, and that the matters had already been settled.

Subsequently, Romanos initiated proceedings in the Supreme Court of New South Wales, seeking possession of the property, damages for unpaid rent, and interest. Punjabi, in turn, sought to have the matter transferred to NCAT, asserting that the settlement agreement constituted a lease to which the *Retail Leases Act 1994* (NSW) (the "**Act**") applied. Romanos also sought to amend his statement of claim to seek equitable relief.

Decision

The Court held that Romanos should be granted leave to amend his statement of claim, ruling that the amendment was necessary to address the real issues between the parties and ensure the proceedings progressed effectively. The Court also found that the dispute was not a "retail tenancy dispute" as defined under the Act, as the core issue pertained to the ongoing occupation of the premises by Punjabi and the consequences of the earlier settlement agreement, rather than the obligations of a lease. Therefore, Punjabi's motion to transfer the proceedings to NCAT was dismissed.

The Court further noted that the Act did not preclude the Supreme Court from dealing with the matter, and that no mediation was required under section 68 of the Act. Consequently, the proceedings would remain in the Supreme Court, and Romanos was permitted to file an amended statement of claim to address deficiencies and pursue equitable relief.

Saipan Holdings Pty Ltd v City Gym Sydney Pty Ltd [2023] NSWCA 55

Coram: Ward P; Gleeson JA; Simpson AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 31 March 2023

LEASES AND TENANCIES – Repairs, maintenance and alterations – Obligation to make good including repairs to leaking roof – whether the contractual obligation to repair required the replacement of the roof – whether the meaning of the terms of the contract were construed objectively by the primary judge – whether appellants were prevented from performing their make good obligation by reason of the respondent's refusal to grant access

Facts

The first appellant, Saipan Holdings Pty Ltd, owned a property in Darlinghurst, where the respondent, City Gym Sydney Pty Ltd, operated a gym under a licence agreement initiated in 2017. In 2018, water began leaking from the ceiling of the property into the gym, and a severe hailstorm subsequently damaged the roof. Discussions ensued regarding repairs to the roof and the terms of a potential lease. In 2019, Mr Perry, a roofer, inspected the roof and recommended its complete replacement due to extensive hail damage.

Instead of entering a lease with the first appellant, the respondent entered into a sub-lease with the second appellant at the first appellant's request. The first appellant consented to the sub-lease and agreed to be bound by its terms. The sub-lease contained a clause (item 22) obliging the second appellant (as sub-lessor) to rectify the leaking roof and make the premises watertight, potentially through an insurance claim. The clause also provided for both parties to share the costs equally if the insurance claim did not cover the repairs.

In 2020, the first appellant engaged a contractor to repair the roof. However, the respondent refused access to the contractor, contending that the proposed works did not conform to the sub-lease's requirements, as it believed a full roof replacement was necessary. The appellants disagreed, maintaining that less extensive repairs would be sufficient. The dispute led to the

respondent commencing legal proceedings, claiming that the appellants had breached their obligations regarding the roof.

The primary judge found that item 22 of the sub-lease obligated the sub-lessor (the second appellant) to rectify the roof in line with an insurance claim, which the judge inferred was for the replacement of the entire roof. The judge concluded that the respondent's refusal to allow the contractor access was not unreasonable, as the works proposed by the appellants did not meet the requirements of item 22.

Decision

The Court of Appeal (Ward P, Gleeson JA, and Simpson AJA) upheld the primary judge's decision. The Court confirmed that item 22 required the leaking roof to be rectified, with "rectified" interpreted as meaning "effected", implying the full replacement of the roof, as supported by the report by Mr Perry. The Court acknowledged that the primary judge permissibly inferred that the insurance claim contemplated by the parties involved full roof replacement.

The Court also rejected the appellants' argument that they were prevented from fulfilling their obligations by the respondent's refusal of access. The proposed repairs at the time were inadequate, as confirmed by expert evidence, which justified the respondent's refusal to grant access. Consequently, the appeal was dismissed.

Smart Dollars Tamworth Pty Ltd v Corpique No. 18 Pty Ltd [2023] NSWSC 936

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 9 August 2023

LEASES AND TENANCIES – default and termination – relief against forfeiture – where orders made allowing tenant to repossession on undertakings – where undertakings breached – lessor entitled to repossession

Facts

The plaintiff, Smart Dollars Tamworth Pty Ltd, leased a motel, the Almond Inn, in Tamworth, under a lease initially entered into with a third party before being assigned to the plaintiff. The defendant, Corpique No. 18 Pty Ltd, served a breach notice under section 129 of the *Conveyancing Act 2019* (NSW) on 21 March 2021, citing various breaches of the lease. The defendant took possession of the premises on 29 June 2021.

The plaintiff sought relief against forfeiture and commenced proceedings on 16 July 2021. By consent, the lessee was allowed to re-enter possession under certain undertakings, including appointing an independent expert to determine necessary repair works and paying the expert's costs. Despite agreements, including engaging a specific builder (Waycott Builders) to perform the repairs as per the expert's scope of works, the plaintiff failed to engage the builder by the agreed deadline of 16 June 2023. The plaintiff attributed the delay to the limited availability of tradespeople in Tamworth and a disagreement over the quoted costs, which the plaintiff found excessive.

Decision

The Court ruled in favour of the defendant, Corpique No. 18 Pty Ltd. The Court found that the plaintiff had not complied with its obligations despite the considerable delay and its consent to the repair process in May 2023. The explanation provided by the plaintiff's representative, Ms Bingqin Liu, was deemed insufficient. As a result, the court ordered the defendant to be granted

interim relief, allowing it to resume possession of the premises. Additionally, the court ordered the plaintiff to pay the defendant's costs associated with the motion of 28 July 2023.

Smart v Smart [2023] NSWSC 307

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 31 March 2023

CONTRACTS — formation — agreement — intention to make concluded bargain — whether agreement signed at conclusion of mediation was immediately binding — where term of agreement required parties to enter into subsequent deed — application of Masters v Cameron (1954) 91 CLR 353; [1954] HCA 72 — where agreement sufficiently certain to be enforceable and intended to be immediately binding on parties — where specific performance ordered

LAND LAW — conveyancing — requirements of writing — agreement to create or dispose of interest in land — where term of agreement required parties to apportion payment for real property after obtaining independent accounting and taxation advice — Duties Act 1997 (NSW), s 274 — where identification of real property sufficiently certain that composite price for interest in real property, trust and partnership property met requirements of s 54A of Conveyancing Act 1919

PARTNERSHIPS AND JOINT VENTURES — partnership property — identification — property purchased with partnership money

Facts

The primary issue in this matter was whether the New South Wales Supreme Court should enforce a document entitled "Terms of Agreement", executed during mediation on 9 December 2020 among the members of the Smart family: Joyce Smart and her sons Robert, Michael, and David Smart. Following the death of Lawrence Glendon Smart, Joyce's husband and the boys' father, in 2015, the family engaged in various businesses, including a partnership and a family trust. Lawrence's will divided his estate equally among the four parties. However, disputes arose regarding the ownership and management of the family's assets, including farmland, a butcher shop, and water access licences, leading to mediation. The plaintiffs—Joyce, Robert,

and Michael—sought specific performance of the Terms of Agreement after David refused to sign a subsequent deed of settlement.

The Terms of Agreement addressed various interests and properties, including a partnership named “LG & JJ Smart & Sons” and a trust known as the Smart Family Trust. Following Lawrence's death, David did not participate in the family's business operations or receive income from them, resulting in his claim for compensation for his interests. Despite the mediation session resulting in the Terms of Agreement, subsequent disagreements regarding the apportionment of payments led to the initiation of these proceedings.

Decision

The Court ruled that the Terms of Agreement constituted a valid and binding contract. Justice Robb determined that specific performance should be granted, as the agreement was enforceable despite the lack of consensus on the apportionment of payments among the parties. Consequently, the Court dismissed David's cross-claim, asserting that the plaintiffs had not established that David retained a partnership interest following Lawrence's death.

The ruling reaffirmed that the ongoing business operated by Joyce, Robert, and Michael did not include David as a partner, thereby negating his claims to joint ownership of the properties acquired after Lawrence's passing.

State of New South Wales v Carver [2023] NSWSC 828

Coram: Hammerschlag CJ

Court: Supreme Court of New South Wales

Date: 14 July 2023

REAL PROPERTY – Crown Land – Permissive Occupancy – Crown Land Management Act 2016 (NSW), s 13.1 – Crown Lands Act 1989 (NSW), ss 170(1)(d), 170(5)(b)(1) – Crown Lands (Continued Tenures) Act 1989 (NSW), s 11 – Limitation Act 1969 (NSW), ss 27, 38, 65 – claim by Crown for possession of Crown land upon which is constructed a residence which is, and has been, occupied by the defendant for 25 years – defence by defendant to claim by the Crown for possession of Crown land that the claim is statute barred on the basis that the land has been in adverse possession for over 30 years – claim by the defendant that the cottage on the land, which has been occupied by him, is a chattel owned by him which cannot be removed because it is Heritage Listed – where land was subject to a Permissive Occupancy – where defendant claims that prior occupiers were in adverse possession in respect of which he has the benefit – HELD – defendant's claim to adverse possession is unmaintainable against the Crown by reason of s 13.1 of the 2016 Act – neither the defendant's predecessors, nor the defendant, were in adverse possession – building not a chattel but a fixture – order for possession made

Facts

The plaintiff in this case is the Crown in right of the State of New South Wales. The first defendant, Mr Carver, a solicitor with 45 years of experience in conveyancing, has occupied a cottage on Crown land in Illawong since 1996. The Crown seeks possession of the land, asserting its rights as the owner. Mr Carver's defence rests on two primary arguments: firstly, that the Crown's claim is statute-barred due to his alleged adverse possession of the land for over 30 years, and secondly, that the cottage, which he claims is Heritage Listed, is a chattel owned by him, thus exempting it from removal. The cottage, referred to as Cottage H, was constructed in the 1930s and is situated partially on a Crown Reserve. The Crown had previously granted a Permissive Occupancy ("**PO**") for the cottage, originally issued in 1935

to Mr Price, with subsequent amendments indicating it should be terminated upon the death of the occupant, allowing for no transfers except to a surviving spouse.

Mr Carver contends that prior occupants were in adverse possession and that he inherited this status. However, the Crown maintains that neither he nor his predecessors have established adverse possession due to the legislative stipulations of the *Crown Land Management Act 2016* (NSW) (the "**Act**"). The case also explores the historical context of the cottage's occupancy, including the ongoing acceptance of rent by the Crown from previous occupants despite the Crown's assertion that they were unauthorised occupants.

Decision

The Court held that Mr Carver's claims of adverse possession were untenable against the Crown based on section 13.1 of the Act, which precludes establishing title against the Crown for land that remains subject to a PO. The court found that the PO was never formally terminated prior to 2009, and Mr Carver failed to prove that it had ended. Consequently, his arguments concerning the cottage being a chattel were dismissed, as the Court determined that it constituted a fixture affixed to the land, and thus, the Crown retained its rights to the property. The judgment also highlighted that Mr Carver's attempts to claim equitable estoppel were unfounded due to a lack of evidential support.

Ultimately, the Court ruled in favour of the Crown, granting possession of the land and the cottage, thereby reaffirming the legal principles governing Crown land and the conditions under which adverse possession claims may be made.

State of New South Wales v Hetherington (No 2) [2023] NSWSC 670

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 20 June 2023

LAND LAW – possession of land – unlawful occupation of plaintiff's land by defendants and others – where no amended defence filed despite leave being granted – where evidence adduced of the plaintiff's ownership and right to possession – summary judgment given

Facts

The plaintiff, the State of New South Wales, sought possession of land known as the Wollumbin Scout Camp, located at Cudgeon. The defendants, who were self-represented, filed a defence contesting the plaintiff's ownership of the land, asserting that the land belonged to the Githabul First Nations people and that they, the defendants, were merely "protectors and guardians" of the land on behalf of the Githabul people. The defendants claimed the land had been abandoned by the plaintiff and requested further time to gather evidence. Despite having the opportunity to file a legally recognised defence, they submitted documents that did not constitute a valid defence under the law. Additionally, the defendants failed to appear at any of the court hearings.

Decision

The Court ruled in favour of the State of New South Wales, granting it possession of the land. The Court found that the defendants' claims did not establish any legally recognised defence against the plaintiff's ownership and right to possess the land. The defendants did not claim any personal legal rights to the land but rather relied on the assertion of Githabul ownership, which the court deemed insufficient. The Court also noted that no adverse possession claim was available, and the defendants' documents failed to raise any valid legal issues. As a result, the Court entered judgment under rule 13.1 of the *Uniform Civil Procedure Rules 2005* (NSW), granting the plaintiff possession of the land and leave to issue a writ of enforcement.

Sydney Redevelopments 1 Pty Ltd v Chui [2023] NSWSC 695

Coram: Hammerschlag CJ

Court: Supreme Court of New South Wales

Date: 21 June 2023

REAL PROPERTY – EASEMENTS – Conveyancing Act 1919 (NSW) s 88K – plaintiff owns property on which it has commenced development of a 308 room hotel which includes a commercial component – defendants own adjoining property – plaintiff requires access to airspace for crane swing and to the defendants' property for the erection of a hoarding, installation of jump form and erection of scaffolding – plaintiff requires an easement over the defendants' property to execute the development – plaintiff has sought to engage with defendants who have not participated in the process – orders were made for substituted service which have been complied with – HELD: the easement sought is not inconsistent with the public interest, that the defendants can be adequately compensated and that the plaintiff has made all reasonable attempts to obtain the easement – there should be an easement and the plaintiff must pay the defendants compensation

Facts

The plaintiff, Sydney Redevelopments 1 Pty Ltd, sought an easement under section 88K of the *Conveyancing Act 1919* (NSW) (the "**Act**") to facilitate the development of a 34-storey hotel at 373-375 Pitt Street, Sydney. The defendants, Mr and Mrs Chui, owned the adjoining property at 371 Pitt Street, over which the plaintiff sought the easement. The easement was necessary for crane swing, hoarding, jump form, and scaffolding required for the plaintiff's construction. Despite the plaintiff's efforts to negotiate access rights, the defendants, through their solicitor, refused to engage in the process. Consequently, the plaintiff sought the Court's intervention under section 88K of the Act to impose the easement.

Decision

The Court granted the plaintiff's application for an easement under section 88K of the Act. The Court determined that the easement was necessary for the plaintiff's development, finding that the defendants would not be significantly affected, as their property was not undergoing

development. The Court also concluded that the easement was in the public interest, and the defendants could be adequately compensated. Compensation of $63,942 was awarded to the defendants, calculated based on a three-year easement period. The Court imposed the easement and allowed the defendants liberty to apply for variation regarding compensation within 14 days.

Synergy Scaffolding Holdings Pty Ltd v Goodman Funds Management Australia Limited as trustee for GAI1 RPF Subtrust of the Hayesbery [2023] NSWSC 538

Coram: Peden J
Court: Supreme Court of New South Wales
Date: 22 May 2023

LEASES AND TENANCIES — Default and termination — Relief against forfeiture — Forfeiture of a lease — Where plaintiffs are sublessees — Where sublessees sought to stay forfeiture on terms that new lease be granted — Whether sublessees entitled to relief if head lessee repudiated head lease — Whether s 130 of the Conveyancing Act 1919 (NSW) is available where head lessee relies on common law rights — Where head lessee repudiated contract and s 130 not available

CONTRACTS — Termination — Repudiation of contract — Whether head lessee repudiated lease with head lessor — Where head lessee entered voluntary administration and administrators did not seek to exercise property rights — Whether the issue of a s 443B notice and an attached letter amounted to repudiation — Where repudiation established other than by reference to s 443B notice

LEASES AND TENANCIES — Relief against forfeiture — Conditions under new lease to be granted to a sublessee — Broad discretion to be exercised as to appropriate terms according to the circumstances — Whether sublessee should be required to pay head lessee's rental arrears — Whether sublessee should be required to rectify a stormwater basin — Whether a bank guarantee should be given and for what duration — Whether lease should be on a "triple net" or "net" basis

Facts

The plaintiffs, Synergy Scaffolding Holdings Pty Ltd ("**Synergy**") and MRL Technologies Pty Ltd ("**MRL**"), were sublessees of a commercial warehouse property located on Heathcote Road, Moorebank, New South Wales. The first defendant, Goodman Funds Management

Australia Limited ("**Goodman**"), was the trustee of the GAI1 RPF Subtrust, which held the beneficial ownership of the property. The second defendant, The Trust Company Limited, held the legal title as custodian for the Subtrust.

The head lease over the property was initially granted to Ovato Print Pty Ltd and later transferred to Ovato Limited ("**Ovato**"). In July 2022, Ovato entered voluntary administration. Subsequently, on 18 August 2022, Ovato's administrators issued a notice under section 443B of the *Corporations Act 2001* (Cth) to Goodman, indicating that they would no longer exercise rights under the head lease and would cease occupying the property. On 19 August 2022, Goodman accepted the repudiation of the head lease and terminated it, which resulted in the termination of the plaintiffs' subleases.

Despite the termination, the plaintiffs remained in possession of the property under a court-issued consent order dated 28 October 2022. The plaintiffs sought relief against forfeiture under section 130 of the *Conveyancing Act 1919* (NSW), requesting that the Court stay Goodman's enforcement of its forfeiture rights and that new leases be formulated and executed in their favour. Goodman resisted this relief, arguing that section 130 did not apply to the situation as they had terminated the head lease based on repudiation, not by exercising a right of re-entry or forfeiture.

Decision

The Court ruled in favour of Goodman, dismissing the plaintiffs' summons for relief under section 130 of the *Conveyancing Act 1919* (NSW). The Court held that section 130 provides statutory relief against forfeiture only when a lessor enforces a right of re-entry or forfeiture. In this case, Goodman had terminated the head lease based on Ovato's repudiation, which is a common law right, rather than exercising a right of re-entry or forfeiture. Consequently, section 130 was not enlivened, and the plaintiffs were not entitled to relief.

The Court also considered the plaintiffs' submission that certain works conducted by Goodman on the property constituted an attempt to exercise a right of re-entry. However, it found that these works—such as landscaping and fire services maintenance—were minor and did not amount to an attempt at re-entry or forfeiture. Therefore, the Court ruled that Goodman had not engaged in any conduct that would invoke section 130.

Lastly, the Court explored potential conditions that could be imposed should section 130 apply, including payment of rental arrears and security requirements. However, these considerations were ultimately unnecessary due to the dismissal of the plaintiffs' application.

T & L Alexandria Pty Ltd v Sharvain Facades Pty Ltd [2023] NSWSC 947

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 14 August 2023

CONTRACTS — interpretation — commercial lease — implied requirement that landlord's right to demand payment of outgoings be exercised within a reasonable time — legal meaning of reasonable time — reasonable time as a question of fact

CONSUMER LAW — misleading or deceptive conduct — no question of principle

LEASES AND TENANCIES — repudiation — where tenant terminated commercial lease after landlord asserted and threatened to exercise right to terminate lease by re-entry if tenant failed to pay sum demanded by landlord and its predecessor in title in respect of outgoings payable by tenant under previous, expired leases — whether landlord's conduct demonstrated willingness to perform the lease only in a manner substantially inconsistent with landlord's obligations — where landlord claimed that tenant repudiated lease by giving notice of termination, vacating the premises and ceasing to pay rent — held that lease was repudiated by landlord and validly terminated by tenant — tenant's loss of bargain damages not proved — tenant's termination for landlord's repudiation discharged parties from performance of executory obligations, including tenant's make good obligations

LEASES AND TENANCIES — fixtures and fittings — tenant's fixtures — no question of principle

Facts

The case involves a dispute between T & L Alexandria Pty Ltd ("**TLA**") and Sharvain Facades Pty Ltd ("**Sharvain**") concerning a series of leases for premises located at 119-133 McEvoy Street, Alexandria, New South Wales. Sharvain occupied Units 6 and 7 from February 2006 until 29 August 2019, under leases initially held by T & L Reich Investments Pty Ltd ("**TLR**")

and later assigned to TLA. The most recent lease, commencing on 1 March 2019, stipulated that Sharvain was responsible for paying 100% of outgoings.

Disputes arose when TLA sought to recover $310,847.00 in past outgoings in July 2019, which Sharvain contested. Following a series of communications, Sharvain terminated the 2019 lease on 29 August 2019. TLA and TLR subsequently filed claims against Sharvain for the outstanding amounts and damages resulting from the alleged repudiation of the lease, while Sharvain counterclaimed for loss of bargain damages and asserted misleading conduct during the negotiation of the 2019 lease.

Decision

The Court determined that TLA and TLR were not entitled to recover the claimed outgoings due to the improper construction of the relevant lease clauses. It ruled that the demands for payment issued by TLA were invalid, as they had not been made within a reasonable timeframe after the necessary information regarding actual outgoings was available. Additionally, the Court found that Sharvain had validly terminated the 2019 lease after accepting TLA's repudiation of the lease. Consequently, while Sharvain's claim for a declaration of valid termination was upheld, its claims for damages were not substantiated. The court concluded that Sharvain was entitled to remove any fixtures and that both parties were discharged from their obligations under the lease. The claims of misleading conduct by Sharvain were also dismissed, as the evidence did not support the allegations against TLA.

Teo & Anor v Twyford bht Cunningham [2023] NSWSC 1470

Coram: Henry J
Court: Supreme Court of New South Wales
Date: 30 November 2023

LAND LAW — Conveyancing — Contract for sale — Where defendant vendor purported to rescind on basis of mental illness — Where right to rescind if party dies, becomes bankrupt or mentally ill — Whether definition of "mentally ill" under Mental Health Act 2007 (NSW) is incorporated in contract — Whether defendant became mentally ill after exchange of contracts — Whether defendant's mental illness impeded him from carrying out contractual obligations to enliven clause — Whether defendant contrived mental illness to enliven clause

Facts

On 15 February 2021, the plaintiffs, Carolyn Teo and Raven Gibb-Kalvin Spirit, entered into a contract with the defendant, David Twyford, for the sale of land in Tanja, New South Wales. Before the contract's completion, the defendant served a notice to rescind the contract, citing that he was deemed a mentally ill person under the *Mental Health Act 2007 (NSW)* and relying on clause 34 of the contract. This clause allowed either party to rescind the contract if a party became mentally ill before completion.

Following the rescission notice, the plaintiffs lodged a caveat and informed the defendant of their intention to seek specific performance of the contract. Subsequently, in March 2021, the plaintiffs issued a Notice to Complete. An inquiry conducted by the Mental Health Review Tribunal determined that the defendant was indeed a mentally ill person under section 35 of the *Mental Health Act 2007*. Despite this, the plaintiffs initiated proceedings seeking to enforce the contract.

Decision

The Court dismissed the plaintiffs' claim, ruling in favour of the defendant and ultimately agreeing that defendant was indeed a mentally ill person under section 35 of the *Mental Health*

Act 2007, having been diagnosed with and treated for a serious mental illness since his admission to the Mental Health Unit of South East Regional Hospital on 25 February 2021.

Accordingly, Justice Henry ordered that the plaintiffs' deposit be returned, and their caveat be removed if it remains on title. Costs were awarded to the defendant on an ordinary basis.

The Owners - Strata Plan No 74232 v Tezel [2023] NSWCA 35

Coram: Gleeson JA; Mitchelmore JA; Kirk JA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 6 March 2023

LAND LAW – strata title – owners corporation –maintenance and repair of common property – breach of obligation to maintain and repair common property – where unit affected by water leakage – where respondent lot owner unsuccessfully attempted to rent out unit in 2016 – action for recovery of loss of rent from owners corporation pursuant to s 106(5) of the Strata Schemes Management Act 2015 (NSW) – whether action was time barred by s 106(6) of the Act

STATUTORY INTERPRETATION – limitation of action – where claim made on 6 November 2020 for loss of rent pursuant to s 106(5) of Strata Schemes Management Act 2015 (NSW) – whether claim was time barred by s 106(6) of that Act – whether respondent first became aware of the loss in 2016 or on 6 November 2018 – whether "the loss" in s 106(6) refers to the kind or type of loss that the lot owner is entitled to recover under s 106(5) or the particular loss that she is seeking to recover

APPEALS – cross-appeal under s 83 of the Civil and Administrative Tribunal Act 2013 (NSW) – where appeal with leave limited to a question of law – whether grounds of cross-appeal raised questions of law

Facts

The dispute arose over whether a claim for loss of rent by a lot owner in a strata scheme was time-barred under section 106(6) of the *Strata Schemes Management Act 2015* (NSW) ("**SSM Act**"). The respondent, Ms. Tezel, owned a unit in a Bondi Beach strata scheme. In 2013, she observed water ingress into her unit and subsequently vacated the premises, removing the carpet that same year. In 2016, Ms. Tezel attempted unsuccessfully to lease the unit, and it has remained unoccupied since then.

On 6 November 2020, Ms. Tezel initiated proceedings against the owners corporation in the New South Wales Civil and Administrative Tribunal ("**NCAT**"), seeking to recover loss of rent

from 6 November 2018 under section 106(5) of the SSM Act. She argued that the loss was not reasonably foreseeable before that date. The Tribunal dismissed her claim, finding that it was time-barred under section 106(6) as the two-year limitation period commenced when she first became aware of the rental loss in 2016. However, Ms. Tezel appealed this decision to the NCAT Appeal Panel, which overturned the Tribunal's decision, holding that the action was not out of time.

The owners corporation then appealed to the New South Wales Court of Appeal, contending that the Appeal Panel erred in its interpretation of the term "loss" under section 106(6), arguing that the limitation period should have begun when Ms. Tezel first became aware of the rental loss in 2016. Additionally, Ms. Tezel sought leave to cross-appeal, raising issues regarding damages and costs.

Decision

The New South Wales Court of Appeal allowed the appeal, concluding that Ms. Tezel's claim for loss of rent was time-barred under section 106(6) of the SSM Act. The Court held that the two-year limitation period commences when the lot owner "first becomes aware of the loss", which in this case occurred in 2016 when Ms. Tezel became aware of the loss of rent. The Court clarified that the phrase "first becomes aware of the loss" refers to the time when the lot owner is first aware of the general kind or type of loss, they are entitled to recover under section 106(5) of the SSM Act, rather than the specific or particular loss. There is no requirement that the loss be reasonably foreseeable, nor does the phrase imply a rolling accrual of loss that resets each day the breach continues.

The Court further noted that the short limitation period imposed by section 106(6) aims to ensure that lot owners act promptly in initiating proceedings, especially where the responsibility for remedying the loss falls upon fellow lot owners through the owners corporation. This approach guards against the prejudicial impact that delays might have on the ability to address and recover losses.

The Court also declined to grant leave for Ms. Tezel's cross-appeal, as the grounds did not raise legal questions warranting further consideration. The decision underscores the necessity for lot owners to promptly pursue claims for losses arising from the failure of an owners corporation to maintain common property, with the Court emphasising the need to act within the statutory two-year timeframe.

The Owners – Strata Plan No 80877 v Lannock Capital 2 Pty Ltd [2023] NSWSC 1401

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 24 November 2023

LAND LAW — Strata title — Termination of strata scheme — Where termination orders sought not unanimous — Where there are existing debts owed by owners corporation to an unsecured lender — Whether registered mortgagees ought be paid first from proceeds of sale if termination orders made — Whether collective sale pursuant to Part 10 of the Strata Schemes Development Act is more appropriate in the circumstances

Facts

This case, widely known as the 'Mascot Towers' case, involves the application by the owners corporation of the Mascot Towers to terminate the strata scheme under section 136 of the *Strata Schemes Development Act 2015* (NSW) ("**SSD Act**"). Mascot Towers, a building complex in Mascot, Sydney, was completed in 2009, but structural defects emerged between 2011 and 2018. During a routine inspection in April 2019, severe structural defects were identified, leading to an evacuation order issued by Fire and Rescue NSW on 14 June 2019 due to the risk of building collapse. Since then, the owners corporation has faced the challenge of addressing these defects and the concerns of lot owners who have been unable to occupy their properties.

To fund the building's rectification, the owners corporation entered into two loans with Lannock Capital 2 Pty Ltd, amounting to $10 million and $22.5 million respectively. The projected costs of rectifying the building had increased from an initial $33.8 million to $45 million. The owners corporation sought an order from the Supreme Court to terminate the strata scheme, arguing that it was insolvent and unable to pay its debts. This would allow the appointment of a liquidator to sell the building and potentially relieve the lot owners from their obligations to contribute further towards the owners corporation's debts. However, the application was not unanimously supported by all lot owners, and Lannock, along with other stakeholders including banks with registered mortgages over approximately 110 units,

submitted that their current secured interests over individual lots be preserved following any termination.

Decision

Justice Peden declined to issue the termination order sought by the owners corporation. Her Honour found that the owners corporation was not insolvent, as it retained the ability to raise levies from lot owners to meet its financial obligations. There was no evidence that the owners corporation was unable to pay its debts, thereby undermining the claim of insolvency. Justice Peden highlighted that, under strata law, lot owners ultimately remain responsible for the debts of the owners corporation, even in cases of significant financial hardship.

A key factor in the decision was the insufficient information provided to lot owners regarding the actual costs of rectification. Although initial estimates had suggested costs up to $50 million, the parties' experts agreed that the costs would more likely amount to around $21.5 million. This discrepancy, coupled with a lack of clarity regarding the ongoing liability of lot owners to pay debts even if the strata scheme were terminated, raised concerns for the Court.

Her Honour further distinguished this case from precedents where termination orders had been granted. In those cases, the termination was sought with a clear and specific purpose, such as redevelopment, and had the support of all lot owners. By contrast, in this instance, there was no consensus among the lot owners, and the termination was not tied to a determinate benefit or outcome. Justice Peden suggested that a collective sale, which would likely yield a higher sale price (potentially around $100 million), could be a more appropriate solution, providing greater protections for lot owners.

In addition, Justice Peden ruled that the rights of registered mortgagees, such as the banks involved, would take priority over unsecured creditors like Lannock in the event of any property sale, consistent with the principle of indefeasibility of registered interests under the *Real Property Act 1900* (NSW). The Court also rejected the argument that the owners corporation's right to collect outstanding levies from incoming lot owners or mortgagees elevated Lannock's claim over those of secured creditors.

The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq) [2023] NSWCA 291

Coram: White JA; Kirk JA; Griffiths AJA

Court: Supreme Court of New South Wales

Date: 6 December 2023

CONTRACTS – Rectification – Common intention – Proof of common intention – Proof by inference – Where appellant and respondent executed Sole Agency Agreement for marketing and sale of units in residential development – Where appellant as selling agent entitled under Agreement to "Commission" upon sale of units – Where "Commission" as defined in Agreement limited to commission payable on certain units in development – Where appellant asserts common intention that "Commission" should have extended to commission accrued prior to execution of Agreement – Where directors and managers of respondent not called to give evidence on intention as at execution of Agreement – Whether uncontradicted evidence of sole director of appellant amounts to clear and convincing proof of common intention by inference – Relief in nature of rectification denied

REAL PROPERTY – Caveats – Caveatable interests – Grant of caveatable interest – Where appellant asserts caveatable interest in nature of equitable charge entitling it to judicial sale of units in development – Where Sole Agency Agreement confers right on appellant to compel sale of specified units at fixed price to itself or others and offset outstanding commission against purchase price – Where Agreement authorises appellant to lodge caveats in order to protect its entitlement to Commission – Whether grant of right to compel sale constitutes express grant of equitable charge – Whether grant of right to lodge caveats constitutes implied grant of equitable charge – Appellant held impliedly to have been granted equitable charge over units in development

AGENCY – Property, stock and business agents – Restrictions on real estate agent obtaining beneficial interest in property – Where appellant as real estate agent asserts rights as equitable chargee under Sole Agency Agreement – Where appellant had not obtained client's consent in writing in form approved by Secretary prior to execution of Agreement – Where interpretation clause in Agreement purports to sever any term or provision of agreement repugnant or contrary

to any law – Whether appellant obtained beneficial interest in property in contravention of Property and Stock Agents Act 2002 (NSW) s 49(1) – Whether interpretation clause accordingly severs clauses of Agreement that impliedly grant equitable charge to appellant – Held that clauses impliedly granting equitable charge to appellant not severed from Agreement

Facts

The New South Wales Court of Appeal dealt with a dispute between The Property Investors Alliance Pty Ltd ("**PIA**"), a real estate agent, and C88 Project Pty Ltd ("**C88**"), a company incorporated by Dyldam Developments Pty Ltd for the purpose of developing residential units. The dispute centred on a sole agency agreement related to the marketing and sale of residential units in The Somerset development at Carlingford.

Under the sole agency agreement, PIA acted as a selling agent for the residential units developed by C88, which in turn was required to pay commission to PIA for these sales. The agreement included a provision allowing PIA to lodge caveats over units if C88 failed to pay its commissions. Clause 1.1(g) specifically confined the term "Commission" to apply only to commissions for sales made after the signing of the sole agency agreement, excluding any commissions earned from prior agreements.

Before this agreement, the parties had entered into other agency agreements for the same development, leading to C88 owing PIA a significant sum in unpaid commissions from earlier sales. PIA sought rectification of Clause 1.1(g), arguing that the parties shared a common intention that the sole agency agreement would secure all commissions owed, including those from previous agreements. PIA's sole director, Mr Wang, provided evidence of conversations with Mr Fayad, a director of C88, which PIA argued demonstrated this common intention. C88, which was in liquidation at the time of the appeal, did not call any witnesses, including Mr Fayad, to testify on this issue.

Decision

The New South Wales Court of Appeal addressed the legal principles relevant to rectification of contracts on the grounds of common mistake, emphasising the requirement for clear and convincing evidence of a shared intention that a contract does not correctly record. The majority, comprising Justice Kirk and Acting Justice Griffiths, dismissed PIA's appeal

concerning the rectification claim, finding that PIA had not met the "heavy onus" of proving the existence of a common intention to include commissions for prior sales in the scope of Clause 1.1(g). The appeal was upheld on other grounds.

The majority reasoned that clear and compelling proof of common intention must demonstrate both the substance and detail of what the parties mutually intended, as well as how the contractual terms diverged from that intention. They determined that the evidence presented, including Mr Wang's testimony regarding conversations with Mr Fayad, did not suffice to prove that both parties intended for the sole agency agreement to cover commissions from previous sales. The Court further highlighted that even though a *Jones v Dunkel* inference could be drawn from C88's failure to call witnesses, such inferences do not bridge evidentiary gaps regarding the parties' intentions.

Justice White dissented on the rectification issue, arguing that the parties' intention to achieve a particular legal effect could be inferred from the long-standing commercial relationship between PIA and C88. He suggested that the absence of evidence from C88's management warranted a stronger adverse inference, supporting PIA's claim of a shared intention. However, the majority's view prevailed, and the appeal was ultimately dismissed with respect to the claim for rectification.

Thynne v Sheringham [2023] NSWCA 181

Coram: Ward ACJ; Kirk JA; Basten AJA
Court: Supreme Court of New South Wales, Court of Appeal
Date: 9 August 2023

EQUITY – trusts and trustees – mutual wills – memorandum of wishes – agreement that surviving spouse would leave property or proceeds of sale to sons of testator – power to expend proceeds for own needs – nature of trust arising at time of testator's death – floating obligation that crystallises on repudiation of agreement

REAL PROPERTY – caveats – property acquired under will – owner subject to equitable obligation to leave property in accordance with agreement with testator – power to sell and expend proceeds of sale – whether the intended beneficiary under the agreement has a caveatable interest in the land

Facts

The dispute arose from the will of Mr. Thynne's father, who died in 2011. The father left most of his assets, including a property in Darling Point, Sydney (the "**Property**"), to his second wife, Ms. Sheringham. Prior to his death, the testator and Ms. Sheringham had an agreement that, upon Ms. Sheringham's death, she would leave the Property or any remaining proceeds of its sale to Mr. Thynne and his half-brother in equal shares. This arrangement was documented in a Memorandum of Wishes. Mr. Thynne argued that this agreement created a constructive trust in his favour and lodged a caveat on the title of the Property to prevent any dealings with it. The primary judge ordered the withdrawal of the caveat. Mr. Thynne sought leave to appeal this decision, arguing that the agreement provided him with a legal or equitable interest in the Property that was sufficient to support the caveat.

Decision

The New South Wales Court of Appeal granted leave to appeal but ultimately dismissed the appeal. The Court considered whether the agreement between the testator and Ms. Sheringham created a "floating obligation", as discussed in *Birmingham v Renfrew* (1937), which could give

rise to a caveatable interest in the Property. The Court held that while such a "floating obligation" constrains the absolute ownership otherwise vested in the survivor (in this case, Ms. Sheringham), it does not crystallise into a proprietary interest until the survivor's death. Therefore, the agreement did not grant Mr. Thynne a present proprietary interest capable of supporting a caveat on the Property.

The Court affirmed the primary judge's conclusion that, although Mr. Thynne may have a basis for seeking equitable relief if Ms. Sheringham disposed of the Property contrary to the agreement, this did not amount to an existing trust or a caveatable interest during her lifetime. The equitable obligation imposed by the agreement allowed Ms. Sheringham to use the Property or its proceeds for her own maintenance, acknowledging that the Property's value could be exhausted before her death. Thus, the Court found no error in the primary judge's orders to withdraw the caveat, as the conditions for establishing a breach of trust or fiduciary duty that might support a proprietary claim were not met.

Trafford-Jones as Trustee of the estate of Luke Robert Barber v Luke Robert Barber [2023] NSWSC 1469

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 29 November 2023

LAND LAW – possession of land – possession sought by bankruptcy trustee from bankrupt – where defence relied on alleged breaches of obligations of trustee – no defence to claim for possession – defence struck-out – judgment for possession

Facts

This matter involves a claim for possession of a property located at 5 Faull Street, Parkes. The plaintiff, Trafford-Jones, initially acted as the bankruptcy trustee for Luke Robert Barber, the defendant, who had presented a debtor's petition on 15 July 2013. Upon Barber's bankruptcy, the property vested in the trustee as per the *Bankruptcy Act 1966* (Cth). Though Barber was discharged from bankruptcy on 16 July 2016, the property remained vested in the Official Trustee until 15 July 2022. The trustee then extended this period until 15 July 2025. On 4 July 2023, Trafford-Jones became the registered proprietor of the property in his capacity as the trustee.

In the course of these proceedings, Barber raised several objections regarding the trustee's conduct, including claims of unreasonable demands for payment and lack of opportunity to repurchase the property. On 24 August 2023, the Federal Court substituted Gavin David King as the trustee of Barber's estate, and King subsequently became the registered proprietor of the property. King sought to strike out the defence filed by Barber and obtain a judgment for possession of the land.

Decision

The Court found that the defendant's defence failed to present a valid challenge to the claim for possession of the land. The defence largely focused on grievances related to the trustee's conduct during Barber's bankruptcy rather than addressing the trustee's legal entitlement to

possession as the registered proprietor. The Court emphasised that under the *Bankruptcy Act 1966* (Cth), the property in question had vested in the trustee, giving the trustee the right to possession. Furthermore, the Court noted that no jurisdiction existed to adjudicate complaints about the trustee's conduct under the *Bankruptcy Act 1966* (Cth).

Additionally, the Court declined the defendant's request for an adjournment to negotiate further with the new trustee, concluding that such negotiations could occur before the execution of any writ of possession. The Court also considered a letter from the defendant's mother, Kim Paul, who raised issues of personal hardship due to her residence at the property. However, the Court determined that her concerns did not establish any legal right or defence to prevent the plaintiff's claim for possession.

The Court ordered that Trafford-Jones be removed as the plaintiff and substituted by Gavin David King. The defence was struck out, and judgment was granted in favour of the plaintiff for possession of the property, with a delay in execution until 31 January 2024 to allow time for potential negotiations. Additionally, the defendant was ordered to pay the plaintiff’s costs.

Walker Corporation Pty Ltd v The Owners – Strata Plan No 61618 [2023] NSWCA 125

Coram: Leeming JA; Mitchelmore JA; Kirk JA

Court: Supreme Court of New South Wales, Court of Appeal

Date: 5 June 2023

LAND LAW — Strata title — Strata managing agent – where three owner corporations of Finger Wharf development at Woolloomooloo passed resolutions terminating appointment of strata managing agent and appointing new one – where strata managing agent is different to managing agent appointed for Wharf as a whole by building management committee as a result – where clause of strata management statement ("SMS") required owners' corporations to "appoint and retain" the same strata managing agent as the building management committee appoints as strata manager for Wharf as a whole – whether clause of SMS inconsistent with Strata Schemes Management Act 2015 (NSW), not authorised by Strata Schemes Development Act 2015 (NSW) or uncertain

Facts

This matter concerns a dispute over the management of the Finger Wharf development in Woolloomooloo, Sydney. The development comprises eight stratum lots, seven of which have been subdivided into separate strata title schemes. Walker Corporation Pty Ltd, the applicant, owns lots within two of these schemes. The management of the development is governed by a Strata Management Statement ("**SMS**"), which includes clause 8.11 requiring that all constituent owners corporations appoint and retain the same strata managing agent as that appointed by the Building Management Committee ("**BMC**").

In late May and early June 2022, three of the owners corporations replaced their existing strata managing agent, McCormacks NSW Pty Ltd, with Strata Choice Pty Ltd, acting independently of the BMC's appointment. Walker Corporation contended that these actions contravened clause 8.11 of the SMS. In response, the owners corporations argued that clause 8.11 was invalid, as it conflicted with the *Strata Schemes Management Act 2015* (NSW) ("**SSMA**") and

the *Strata Schemes Development Act* 2015 (NSW) ("**SSDA**"), which govern strata scheme management in New South Wales.

Decision

The Court of Appeal upheld the decision of the primary judge, dismissing the appeal by Walker Corporation. The Court found that clause 8.11 of the SMS was inconsistent with the SSMA, specifically with the right of each owners corporation to appoint a strata managing agent of its choosing and to terminate that agent's services if necessary. As such, the clause was rendered void under section 105(5) of the SSDA, which stipulates that a strata management statement has no effect to the extent that it is inconsistent with other legislation.

The Court emphasised that the SSMA provides for the owners corporation to exercise its powers independently, particularly in matters concerning the appointment and termination of a strata managing agent. The Court ruled that the statutory framework does not allow for an SMS to override this autonomy. Consequently, the BMC's role in the appointment process under clause 8.11 could not displace the statutory rights of the owners corporations. Thus, the appeal was dismissed with costs, affirming that the owners corporations retain the authority to manage their strata schemes, even where a conflicting SMS clause exists.

White Rock Wind Farm Pty Ltd v Dulhunty [2023] NSWSC 1464

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 30 November 2023

LEASES AND TENANCIES – assignment and subletting – consent – where defendants entered into lease agreements with plaintiff to enable it to construct and operate a wind farm on their land – where second and third defendants granted options to plaintiff to acquire a separate lot that would be subdivided for the construction of an electricity substation – where second, third and fifth defendants granted options to plaintiff to acquire easements over their land and over an access road for the erection of a high voltage electricity transmission line – where all options expired without having been exercised by plaintiff – where plaintiff sought defendants' consent to grant a non-exclusive access licence under the lease agreements to an electricity transmission network operator – where defendants did not consent to the grant of the proposed non-exclusive access licence – whether defendants unreasonably withheld consent – whether the legal relationship between the parties changed when the plaintiff allowed all of its options to expire – whether it was reasonable for the defendants to require the electricity transmission network operator to accept the grant of an access easement along an access road and to require the plaintiff to pay an additional consideration for the grant

EQUITY – equitable remedies – specific performance – cross-claim by first and second defendants against plaintiff – where defendants and plaintiff entered into a deed of release to compromise disputes which arose during the course of the construction of the wind farm – where the deed of release provided that, inter alia, the plaintiff is to undertake a survey and create an easement to accommodate the realignment of a right of way to allow for access tracks to cross the boundaries of land owned by the defendants – where the deed of release further provided, inter alia, that the plaintiff is to remediate damage to parts of the land owned by the defendants in accordance with various "punch lists" – whether the Court should order specific performance of the creation of an easement to accommodate the realignment of a right of way – whether the Court should order specific performance of the completion of remediation items in the "punch lists" which remain outstanding or incomplete

Facts

This case revolves around disputes between White Rock Wind Farm Pty Ltd ("**White Rock**") and the landowners, Mr. Dulhunty and Mr. Wood, regarding the terms and obligations under a series of leases and agreements pertaining to the development of a wind farm. Central to the dispute is clause 8.5 of the Leases, which requires the landowners to act reasonably when withholding consent for any proposed access licence. White Rock contended that it was unreasonable for the landowners to refuse consent for the proposed Licence Deed with TransGrid unless additional compensation was paid, arguing that prior agreements only entailed consideration for specific operations and excluded the demand for compensation for the access easement.

The case also involved a cross-claim for specific performance related to an agreement dated 23 December 2015, which aimed to establish an easement for access tracks. The landowners sought enforcement of this agreement, asserting their rights to use the new access road and that White Rock had not fulfilled its obligations in a timely manner. Furthermore, the court examined a claim for damages related to the breach of contract under the Deed of Release, particularly focusing on the sale of land terms that White Rock allegedly failed to meet.

Decision

The court dismissed White Rock's claims in prayers 1 and 3 of its summons, concluding that the landowners' refusal to grant consent was reasonable given the circumstances and agreements in place. The court found that the landowners retained their ability to negotiate additional consideration, as their initial agreement did not imply a waiver of this right, particularly in light of the reasonable expectations surrounding the access road.

On the cross-claim for specific performance regarding the easement agreement, the court ruled in favour of the landowners, affirming their entitlement to enforceable rights over the new access road. The court mandated that White Rock perform its obligations under the 23 December 2015 agreement, with specific terms to ensure compliance.

However, the court declined to grant specific performance related to the 'punch list' items, referred to in prayer 6 of the cross-claim, indicating that the lack of detailed pleadings hindered a clear understanding of the claims. Instead, it directed the parties to pursue alternative dispute

resolution mechanisms as outlined in the leases, given the complexities of enforcing obligations requiring detailed supervision.

The court dismissed Mr. Wood’s claim for damages resulting from White Rock's failure to complete obligations under clause 6 of the Deed of Release, as he did not provide sufficient evidence to substantiate the claim.

Ultimately, the court ordered the dismissal of several claims while granting specific performance for the easement agreement and reinforcing the need for alternative dispute resolution for ongoing disputes concerning the punch lists. Costs were awarded to the defendants concerning the summons and cross claims, with further orders contingent upon the parties' agreement or subsequent submissions regarding final orders.

William Honner as Trustee for Sale of 8 Saiala Road, East Killara NSW 2071 v Chow [2023] NSWSC 1346

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 8 November 2023

LAND LAW – possession of land – entitlement of trustees appointed pursuant to s 66G of the Conveyancing Act 1919 – where defence by other former registered proprietor discloses no defence to claim for possession - application by occupier claiming to have expended money on property – no interest shown to be joined as a defendant to possession proceedings – application dismissed – defence struck out

Facts

The plaintiffs are trustees for sale appointed under section 66G of the *Conveyancing Act 1919* (NSW) following orders from the Court on 22 November 2022. These orders were sought by the trustees in bankruptcy of the defendant's husband, who co-owned the land in question with the defendant, Pui Ling Chow. The defendant remains in occupation of the property located at 8 Saiala Road, East Killara. Substituted service of the proceedings was ordered, and a Notice to Occupier was served in compliance with the *Uniform Civil Procedure Rules 2005* (NSW). The defendant's daughter, Joyce Hoi Zee Au, a solicitor, sought to join the proceedings as a defendant through a notice of motion filed on 2 November 2023, claiming an interest in the property. However, her application was filed beyond the stipulated timeframe for responses following the service of the Notice to Occupier.

Decision

The court dismissed Joyce Hoi Zee Au's notice of motion to join the proceedings, noting her failure to establish any legitimate interest in the land itself, as any rights she might have had were converted into a claim on the proceeds of the sale under section 66G of the *Conveyancing Act 1919* (NSW). The defence filed by the defendant on 27 September 2023 was deemed inadequate, lacking a substantive basis to deny the plaintiffs' claim for possession. Consequently, the court granted judgment in favour of the plaintiffs for possession of the

property and permitted the issuance of a writ of possession, to be executed no earlier than 31 January 2024. The defendant was ordered to pay the plaintiffs' costs, as was Ms Au for her unsuccessful application.

Zhong v Shield Resources Pty Ltd [2023] NSWSC 1611

Coram: Fagan J

Court: Supreme Court of New South Wales

Date: 18 December 2023

CONTRACT — breach — total failure of consideration — agreement for loan of a specified amount — whether entire contract — whether obligations of borrower under agreement unenforceable where part only of loan amount advanced

REAL PROPERTY — whether contract contained agreement of a registered proprietor and that a caveat may be lodged — whether implied creation of a caveatable interest in land

INSURANCE — rectification — loan agreement — whether mutual intention of parties creates a separate charge over real property

GUARANTEE AND INDEMNITY — circumstances in which surety discharged — where creditor advanced less than the full amount to be loaned under the agreement that was guaranteed — whether the principle of Ankar Pty Ltd v National Westminster Finance applied — onus on principal creditor to prove that change of lending arrangement with borrower was not detrimental to guarantor

Facts

The plaintiff, a businessman residing in China, advanced a loan of $1,151,645.06 to the first defendant, Shield Resources Pty Ltd ("**Shield Resources**"), on 21 September 2018, intending for the loan to support the company's operations in Australia for a duration of 12 months. The loan was governed by a deed executed on 18 September 2018, which included the plaintiff as the lender, Shield Resources as the borrower, and the second defendant, Ms Ying Guan, as the guarantor, who was married to the third defendant, Mr Feng Ye (the company's sole director at the time). The plaintiff initiated proceedings on 27 March 2020 seeking recovery of the loan amount and accrued interest from Shield Resources, along with a charge over real property

allegedly provided by Ms Guan as security for the company's debt, and damages against Mr Ye for misleading and deceptive conduct relating to the loan transaction.

As the case progressed, Shield Resources was represented legally until 21 November 2023, when the court permitted its former solicitors to cease representation. The court advised the current directors, including Mr Ye, that a new solicitor must be retained, or a director could appear on behalf of the company following proper procedures. Shield Resources did not comply, failing to appoint a new representative or file the necessary documentation. Meanwhile, the second and third defendants were represented by counsel.

The loan deed specified a principal sum of AUD $2,000,000, with provisions for the lender to have a caveatable interest in Ms Guan's property at 49 Waterhouse Avenue, St Ives. However, the property was subsequently sold, and the plaintiff claimed a declaration of charge over the proceeds. The plaintiff also sought rectification of the deed to clarify the terms of the security provided by the second defendant.

Decision

The Court found in favour of the second defendant, Ms Guan, stating that the plaintiff's claims against her were unsuccessful. The deed of loan did not explicitly establish a charge over Ms Guan's property, as the relevant clause contained promises only from the borrower, Shield Resources, and lacked language that would confer a charge. Consequently, the Court ruled that the absence of a clear charge in the deed meant that there were no grounds for rectification as sought by the plaintiff. Additionally, the court acknowledged that if a charge had been implied, Ms Guan could be discharged from her obligation due to a material change in the loan transaction that occurred without her consent, namely, the advance of only $1.15 million instead of the agreed $2 million.

The plaintiff’s claims for damages against Mr Ye for misleading conduct also failed, as the court concluded there was insufficient evidence to support such allegations. As a result, judgment was entered in favour of the third defendant, as well as the second defendant, with the plaintiff's claims dismissed.

Further, the Court ordered judgment for the plaintiff against the first defendant for $1,151,645.06 plus interest. The plaintiff was ordered to pay the costs of the second and third defendants, while the first defendant was ordered to pay the plaintiff's costs.