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REAL PROPERTY CASES 2018

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE FROM JANUARY TO DECEMBER 2018

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TABLE OF CASES

2-6 First Ave Pty Ltd v Aquaemore Credit Equity Pty Ltd [2018] NSWSC 980

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 27 June 2018

> LAND LAW – caveats – removal of caveat – service of lapsing notice – caveator claims interest as purchaser under contract for sale of land – vendor terminates contract following alleged repudiation by purchaser – whether serious question to be tried as to existence of caveator's claimed interest – balance of convenience – caveator not able to proffer undertaking as to damages that has substance – Real Property Act 1900 (NSW), s 74K(2)

Facts:

The plaintiff was the purchaser of the relevant property and the defendant, who was exercising a mortgagee's power of sale, was the vendor.

The parties entered a contract on 5 March 2018 to purchase the relevant property for $10 million and the plaintiff paid a deposit of $650,000.00. Shortly thereafter, the plaintiff lodged a caveat.

Completion of the contract was stipulated as being 'four months after the Date of provision of documents in DWG format in accordance with Special Condition 49(d).'

Special Condition 49(d) provided that the defendant was required to use a portion of the deposit to pay outstanding architect fees for documents prepared in relation to a particular development application and the defendant was then required to provide to the plaintiff all documents relating to the development application to the plaintiff in 'DWG format'.

The defendant claimed that by about 27 March 2018 it had provided all documents required by Special Condition 49(d) such that the completion date had been set. The plaintiff contended that particular documents, specifically a survey report, existed in DWG format. The defendant contended that the survey report did not exist in DWG format. The plaintiff continued to make these contentions and on 31 May 2018 the defendant terminated the contract for repudiation.

The plaintiff sought orders pursuant to s 74K of the *Real Property Act 1900* (NSW) extending its caveat until the claim for repudiation between the plaintiff and defendant was determined. The plaintiff did not seek an order for specific performance of the contract, they sought orders that the contract remains on foot and that they termination of the contract was ineffective.

Decision

The court declined to extend the operation of the plaintiff's caveat.

Darke J found that, whilst the plaintiff's case was weak and that the plaintiff seemed to have taken an erroneous view on how Special Condition 49(d) operated, he nevertheless thought that there was a series question to be tried on the matter. This was decided on the basis that contractual repudiation is a serious matter, which is not something to be lightly found or inferred, especially where opposing parties were advancing differing interpretations of the same contract.

On whether the balance of convenience favoured the continuation of the operation of the caveat, Darke J found that it did not. In making this decision, his Honour found the plaintiff's concession that it was not in a position to proffer an undertaking as to damages of any substance and the lack of an offer from the plaintiff to provide the defendant with security for damages which the defendant may suffer determinative. His Honour found that there was a likelihood of substantial loss being suffered by the defendant if they were unable to sell the property or miss an opportunity to sell at a higher price – especially in light of the fact there was some evidence that the defendant had received an offer of $11 million for the property.

In relation to the fact the defendant had the benefit of the plaintiff's deposit his honour found that the losses against which a forfeited deposit might be put are not coextensive with the losses for which compensation may be recovered pursuant to an undertaking as to damages and a deposit cannot be related as a form of security for an undertaking as to damages.

In coming to this decision his Honour also considered the relative weakness of the plaintiff's case and the fact the continued operation of the caveat would make it practically difficult for the defendant to deal with the property.

His Honour ordered that the plaintiff pay the defendants costs.

Al Maha Pty Limited v Coplin [2018] NSWSC 1623

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 24 October 2018

> LAND LAW — Conveyancing — Options — Call options — Construction — Notice of exercise of option able to be given to grantor's conveyancer — Whether option validly exercised by notice given to conveyancer no longer retained by grantor at time of purported exercise

Facts

The case involved a dispute about whether an option to buy land was validly exercised.

By a Put and Call Option Agreement dated 16 October 2014 (the "Agreement"), the Defendant granted Al Maha Pty Ltd an option to purchase Mr Coplin's home for $2,200,000 (the "Option"). The Agreement attached the contract for sale of land which would become binding upon exercise of the Option (the "Contract").

The Agreement provided that one way the Option could be exercised was by Al Maha giving the requisite notice to Mr Coplin's "solicitor/conveyancer". The Contract identified Mr Coplin's "solicitor/conveyancer" as V J Tait & Associates, a conveyancing firm ("Ms Tait").

On 21 December 2017, Al Maha purported to exercise the Option by serving the necessary paperwork on Ms Tait's office. However, by that time Ms Tait was no longer retained by Mr Coplin.

Al Maha argued that, on the proper construction of the Agreement, it had validly exercised the Option because Ms Tait remained Mr Coplin's "solicitor/conveyancer" by reason of her being so described in the Contract. Mr Coplin, relying on a decision of Young J (as his Honour then was), submitted that those words in the Agreement referred to Mr Coplin's "solicitor/conveyancer" retained as such at the time when the Option was purportedly exercised. He therefore submitted that service on Ms Tait was not a valid exercise of the Option.

In considering how the relevant contractual provisions were to be construed, the parties agreed that *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor* (2015) 256 CLR 104 was apt to be considered:

> "46. The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> 47. In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in

the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

48. Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

49. However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.

50. Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

51. Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience"."

His Honour, in obiter also held that the question of when recourse can be had to what is sometimes referred to as the surrounding circumstances has been resolved in New South Wales by the decision of the Court of Appeal in *Cherry v Steele-Park* [2017] NSWCA 295 to the effect that there is no necessity for the Court to find ambiguity before regard may be had to surrounding circumstances.

Decision

The Court held that Al Maha's construction ought to be preferred for the following reasons:

- Under the Contract Ms Tait, as Mr Coplin's conveyancer, was the "Depositholder" (with specific duties as such) and remained the "Depositholder" under the Contract until Mr Coplin notified Al Maha otherwise;
- Exercise of the Option involved three steps which were intended to be able to be simultaneous, of which one was payment of the "Deposit" to the "Depositholder" (Ms Tait); and,

- It avoids the uncommercial result that by an uncommunicated and unilateral act (withdrawing his conveyancer's instructions), Mr Coplin could vitiate one of the means of exercising the Option for which Al Magha had bargained.

The result gave rise to a secondary issue, being Al Maha's application that costs owing to it by Mr Coplin under previous costs orders should be set off against the purchase price payable by Al Maha's nominee under the Contract.

The Court was satisfied that it is in the interests of the just, quick and cheap resolution of the costs issues between the parties for such a set off to be ordered.

The Court ordered that the Contract be specifically performed and that $235,000 be set off against the purchase price payable to Mr Coplin under the Contract.

Application under Part IV of the Trustee Act 1925 (NSW); ex parte Dominic Ziino [2018] NSWSC 1625

Coram: Adamson J

Court: Supreme Court of New South Wales

Date: 26 October 2018

REAL PROPERTY – co-ownership as joint tenants – one party contributed nothing to purchase of property – property sold by mortgagee and monies paid into court – appropriate relief to recognise equity of applicant – declaration that proceeds held on trust for the sole benefit of the applicant – order for payment out of court made

Facts

Dominic Ziino (the applicant) seeks orders and declarations that the balance of funds which were paid into court by Westpac Banking Corporation (Westpac), together with interest, be paid to him.

Westpac paid the funds into court in 2004 after it had sold a property, as mortgagee, of which the applicant and his co-owner, Julie Young were registered proprietors as joint tenants.

In about 2002 the applicant and Ms Young began a romantic relationship in the course of which the applicant stayed overnight with Ms Young at a home she rented in Beverly Hills where she lived with her two children from a previous relationship.

The applicant and Ms Young applied to Westpac for a loan to purchase a property at Narwee. In their loan application they described their relationship as “de facto”.

On 27 May 2003 the applicant and Ms Young each signed the application and verified that it was true. Westpac advanced $408,000, which enabled the applicant and Ms Young to purchase the property in Narwee. The applicant paid the deposit of $104,000, which amounted to 20% of the purchase price, the whole of the stamp duty of $18,500 and the legal fees of $1,700. Ms Young made no contribution to the purchase of the property.

From the time of settlement of the purchase of the property (being the date Westpac advanced the loan monies) the applicant made all the mortgage repayments. By late 2003, when the applicant had made five mortgage repayments (for each of the months of July to November 2003), he ascertained that Ms Young had no intention of making any contribution to the mortgage repayments.

In November 2003 the applicant approached Westpac and signed a voluntary surrender declaration as he was unable to continue to meet the mortgage repayments from his own salary. Ms Young eventually signed the voluntary surrender declaration on 2 January 2004. Westpac took vacant possession of the property on about 16 February 2004. Since that day, the applicant has had no further contact with Ms Young.

I am satisfied, on the basis of the applicant's uncontroverted evidence and the business records produced on subpoena by Westpac, that Ms Young did not make any financial contribution towards the purchase of the property.

The sale of the property settled on 4 June 2004. There was a surplus once the proceeds of sale had been applied to the costs of sale and to discharge the debt secured by the mortgage to Westpac.

On 21 October 2004, a conveyancing clerk employed by Henry Davis York, contacted the applicant and Ms Young to determine how to distribute the surplus.

When it became plain that the parties could not agree on how the money should be distributed, Westpac commenced proceedings by filing a summons pursuant to the Supreme Court Rules 1970 (NSW), Pt 70, rules 11 and 12 (which then applied), together with an affidavit of Ms Baran sworn 22 December 2004. Westpac paid the money into court pursuant to Part 4 of the *Trustee Act 1925* (NSW), thereby discharging its liability to the applicant and Ms Young.

On 15 December 2017 the Principal Registrar wrote to the applicant at an address provided to the Court by Westpac and informed him that the Court was holding funds from the sale of the property and that, because the funds had been held by the Court for a period of more than six years, the Court proposed to pay the money to Treasury NSW as unclaimed funds. The Principal Registrar also attempted to contact Ms Young but was unsuccessful.

On 28 March 2018 the applicant filed a notice of motion seeking orders that the monies paid into Court by Westpac be paid to him. MS Young could not be located to effect service.

On 26 July 2018, Button J ordered that 50% of the monies paid into Court be paid out to the applicant and directed that the balance was not to be paid out until further order of the Court.

On 5 October 2018 the applicant filed an amended notice of motion (service of which was dispensed with by the Registrar) in which he sought additional declaratory relief as to his entitlement to the balance of the monies paid into Court.

Consideration

The applicant argued that the balance of the funds ought be paid to him on the following two alternate bases:

- Ms Young ought be presumed to be dead and the applicant is entitled to the funds as the sole surviving joint tenant; and
- the applicant is, on equitable principles, entitled to the whole of the funds as Ms Young made no contribution to the purchase of the property.

The Court articulated the general principles to be considered.

A joint tenancy can be terminated in any one of four ways:

- death of one joint tenant (which results in the other owning the whole by survivorship);
- alienation by one joint tenant of his or her share (which destroys the unity of time) and converts the joint tenancy into a tenancy in common;

- mutual agreement between the parties; or
- an order of a court granting equitable relief.

A joint tenancy cannot be terminated by a unilateral declaration of intention: *Corin v Patton* (1990) 169 CLR 540; [1990] HCA 12. Only the first and last of the listed ways was considered by the Court.

As to (1), the applicant submitted that it should be presumed that Ms Young is dead on the basis of the presumption in *Axon v Axon* (1937) 59 CLR 395that once seven years have passed and a person has not been seen by the persons who would be expected to be contacted by that person (the propositus) the court can presume that the propositus is dead although not that he or she died at any particular time. This presumption operates even in cases where the propositus was a person who had deliberately cut him- or herself off from friends or was avoiding arrest: *Ross v NRMA Life* (1993) 7 ANZ Ins Cas 61-170.

As to (4), the applicant submitted that, as Ms Young had made no contribution to the property, he was entitled, in equity, to all of the proceeds which had been paid into court and that the court ought grant equitable relief accordingly.

The Court held that the applicant is entitled to equitable relief entitling him to the whole of the funds such that consideration of the presumption of death needn't be considered.

The Court held that when considering who owns property, equity has always had regard to intention and contribution.

Thus,

- where two people contribute equally to the purchase of a property which is in the name of one of them, the property will be held by the legal owner on trust for the persons who paid the purchase price in equal shares as tenants in common: *Calverley v Green* (1984) 155 CLR 242.
- when two people buy a property as joint tenants, but one contributes more than the other, the equitable presumption is that they hold the legal estate on trust for themselves as tenants in common in shares proportionate to their contributions: *Calverley v Green*(1984) 155 CLR 242*.*

The basic equitable presumption is that joint tenants hold the legal estate on trust in proportion to their contributions. This presumption may be displaced by the presumption of advancement or by presumed or actual intention. Thus, a married couple in a lifelong relationship might be presumed to intend that the property be enjoyed together during their joint lives and by the survivor on the death of the other.

Under s 58(3) of the *Real Property Act 1900* (NSW), the applicant and Ms Young, as registered proprietors, became entitled to the surplus proceeds subject to any adjustment for their respective equitable interests: *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269. When property held jointly is sold to a third party by a mortgagee or trustee, the mortgagee holds the proceeds of sale upon such trust as may be required to give effect to the rights of the co-owners: *Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd* [2008] NSWSC 839.

Decision

The Court held that in the instant case, there was no operative presumption of advancement. Although the applicant and Ms Young were in an intimate relationship, they were not married. Their plan to buy real property together was motivated by practical concerns about the relative cost of a mortgage as opposed to the cost of rent.

The relevant equitable presumption is, accordingly, the presumption that joint tenants hold the legal estate on trust in proportion to their contributions. The applicant has established that Ms Young made no contribution to the property.

In the circumstances the applicant was held to be entitled, in equity, to the whole of the funds paid into court. An order for payment out of the balance of the funds was made, together with declaratory relief to give effect to the equitable presumption.

ATB Morton Pty Ltd v Community Association DP270447 (No 2) [2018] NSWLEC 87

Coram: Robson J

Court: Land and Environment Court of New South Wales

Date: 7 June 2018

EASEMENTS – real property – application pursuant to s 40 of the Land and Environment Court Act to impose a carriageway easement pursuant to s 88K of the Conveyancing Act – whether easement reasonably necessary – whether the servient tenement can be adequately compensated for the grant of the easement – whether grant of easement in public interest

Facts

This case involved ATB Morton Pty Ltd **('the applicant')**, who was the holder of a development consent, applying for an easement pursuant to s 88K of the *Conveyancing Act 1919* (NSW) which would provide the applicant with a right of carriageway over an existing road. The existing road was on land owned by Community Association DP270447 **('the respondent')**. The development consent granted enabled the applicant to demolish the existing buildings on that land, which was located in Hexham, and erect four new buildings which included workshops, attached offices, a warehouse and an office building.

Decision

The Court granted an easement pursuant to s 88K of the *Conveyancing Act 1919* (NSW), and in doing so, set out a summary of the process a Court will undertake when considering s 88K. The first point to note is that the Land and Environment Court has jurisdiction pursuant to s 40 of the *Land and Environment Court Act 1979* (NSW), to determine applications where:

1. the Court has determined on appeal to grant or modify a development consent; or
2. where such an appeal is pending.

Section 88K provides that a Court may impose an easement over land where:

1. the easement is reasonably necessary for the effective use or development of the land which will have the benefit of the easement;
2. the use of the land having the benefit of the easement will not be inconsistent with the public interest;
3. the owner of the land to be burdened and each other person having an estate or interest in that land can be adequately compensated for any loss or other disadvantage that arises from imposition of the easement; and
4. all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

In relation to determining if the easement was reasonably necessary for the applicant to use the land which they wished to develop, the Court outlined the following principles adopted from *Rainbowforce Pty Limited v Skyton Holdings Pty Ltd* [2010] NSWLEC 2:

1. Reasonable necessity is a matter to be determined objectively having regard to the particular easement sought;
2. The necessity applies to either the effective use or the effective development of the land;
3. Reasonable necessity is determined having regard to whether the use or development of the land can be achieved without imposing the proposed easement;
4. Reasonable necessity is determined having regard to the effective use or development of the land itself;
5. However, reasonable necessity does not mean "absolute necessity" and if there are other methods which allow for the use or development of the land without the easement, it does not automatically mean the easement is not "reasonably necessary";
6. Reasonable necessity requires the use or development of the land with the easement must be substantially preferable to the use or development without the easement;
7. Reasonable necessity does not require there be no alternative land over which the easement could be imposed;
8. Reasonable necessity is determined in the context of the circumstances at the time of the hearing; and
9. Reasonable necessity is a standard which can be satisfied notwithstanding the fact a further action in addition to the obtaining of the easement may be required.

In determining if the granting of the easement is inconsistent with the public interest, the court concluded that where there is an existing development consent, that development consent is a ‘possibly decisive factor’ in illustrating that the granting of the easement would not be inconsistent with the public interest.

With regard to whether the respondent was adequately compensated, the respondent argued that the amenity impacts of the easement would not be adequately compensated by the applicant. The court rejected this argument on the simple basis that this was not, in and of itself, a reason for the easement to not be granted.

The respondent argued the applicant failed to take reasonable steps to obtain an easement because the easement which was the subject of the application differed substantially from what the applicant had previously sought. The court held that the terms of the easement which were the subject of the proceedings were not similar from that previously sought and rejected the respondent’s contention.

Accordingly, the court granted the easement to the applicant.

***Bartolomei v Uy* [2018] NSWSC 794**

Coram: Darke J

Court: Supreme Court of NSW

Date: 30 May 2018

> PRACTICE AND PROCEDURE – stay of proceedings in lower court – abuse of process – proceedings in lower court commenced shortly after proceedings commenced in Supreme Court – disputes essentially based on single set of underlying facts – whether continuation of lower court proceedings would be oppressive or vexatious

Facts

A dispute arose between the owners of 150 Carrington Road, Randwick ('**the plaintiffs**') and the owners of 148 Carrington Road, Randwick (**'the defendants'**) about a timber retaining wall built on the defendants' property.

The plaintiffs claimed the retaining wall started to fail and encroached on the plaintiffs' property and caused a nuisance. The plaintiffs sought orders that the defendant remove the encroaching parts of the wall, the defendant do all things necessary to bring the nuisance to an end, and the retaining wall was not a 'dividing fence within the meaning of the *Dividing Fences Act 1991* (NSW).

The plaintiffs sought to stay proceedings brought subsequently by the defendant in the Local Court on the basis that they were vexatious or oppressive, and thus an abuse of process. The plaintiff's submission was based upon the fact the defendants sought to litigate identical issues in the Local Court proceedings as the plaintiff's sought to argue in these proceedings. On that basis the plaintiff submitted that a stay of the Local Court proceedings was appropriate.

The defendants contended that the Local Court proceedings were properly brought, and that they have a reasonably arguable case that the *Dividing Fences Act* applies to the facts, and the issue before Darke J was whether the Supreme Court or the Local Court was the appropriate forum to resolve the issues between the parties. In that respect the defendants claimed that the small monetary amount and the nature of the matter being a fencing dispute made this matter appropriate for consideration by the Local Court. The defendants also disputed that the Local Court proceedings were not first in time as the fencing notices required to be served were served a month prior to the commencement of these proceedings which on the defendant's case made the Local Court proceedings first in time.

Decision

Darke J determined that, notwithstanding the notice requirements under the *Dividing Fences Act*, the proceedings in the Supreme Court were commenced first.

His Honour characterised the dispute as being whether the defendants were liable for the deformation of the retaining wall and the resulting encroachment upon the plaintiffs' property, and whether the *Dividing Fences Act* applies to the matter.

His Honour accepted the defendants had a reasonably arguable case that the Dividing Fences Act applies to the present fact situation, but was also of the view that there was a 'substantial prospect' that the statute would not apply. Given this was a question which had to be determined in the existing Supreme Court proceedings, His Honour did not think it reasonable for the defendants to commence the Local Court proceedings. His Honour thought the fact the two sets of proceedings were based on the same set of underlying facts and encompassed the same issues, it would be oppressive and vexatious for the Local Court proceedings to remain on foot.

His Honour did not think the relevant question was whether the Supreme Court or the Local Court is the appropriate jurisdiction to resolve the issues between the parties as if the *Dividing Fences Act* applied, neither court could resolve all issues. In the event the Dividing Fences Act was found to not apply, the defendants could then commence their proceedings in the Local Court.

Accordingly, the Local Court proceedings commenced by the defendants were stayed pending the determination of the Supreme Court proceedings, or further order of the Supreme Court.

Blythe v Blythe [2018] NSWSC 1310

Coram: Kunc J

Court: Supreme Court of NSW

Date: 23 August 2018

LAND LAW — Caveats — Caveatable interest — What constitutes a caveatable interest — Interest in proceeds of sale not an interest in land

Facts

The plaintiff, the mother of the defendant and two other parties; Michelle and Christopher. Christopher played no part in these proceedings.

The proceedings concerned what was the family home which, according to the evidence, is a substantial property on the waterfront at Yowie Bay (the "Property"). The Blythe family commenced living at the Property in 1967.

The Property was originally owned by the family company, Stuart Property Investments Pty Limited ("SPI"). The shares in that company were held by Jill's late husband, Harold (as to 270 shares), and Jill (as to 30 shares).

Harold died on 16 September 2005. He left his entire estate to Jill. Probate was granted on 8 February 2006. Harold's shares in SPI passed to Jill. By transfer made on 18 December 2007, SPI transferred the Property to Jill.

Jill's attempts to sell the Property since 2016 were the subject of considerable disputation, including earlier proceedings in this Court heard by Emmett AJA: *Blythe v Willis* [2018] NSWSC 131.

Most recently, a contract for sale of the Property was entered into on 28 June 2018. The completion date for that contract is 30 August 2018.

On 6 July 2018, Michelle lodged a caveat over the Property. The interest she claimed was "estate in fee simple by virtue of beneficial interest in trust … pursuant to a constructive or resulting trust arising from financial or nonfinancial contributions by the caveator, to the acquisition, conservation and/or improvement of the land".

On 19 July 2018 a lapsing notice was served on Michelle's solicitor. Michelle took no steps in relation to the lapsing notice.

On 8 August 2018, David lodged the caveat which is the subject of these proceedings (the "Caveat"). Again, the interest claimed was "estate in fee simple by virtue of beneficial interest in trust … pursuant to a constructive or resulting trust arising from financial or nonfinancial contributions by the caveator, to the acquisition, conservation and/or improvement of the land".

On 9 August 2018, Michelle's caveat lapsed.

After some correspondence between Jill's solicitors and David's solicitors, these proceedings were commenced on 15 August 2018.

Consideration

No submissions were ultimately advanced on behalf of David in support of the interest claimed in the Caveat beyond the Court being directed to David's evidence.

The plaintiff submitted that the evidence generally, was insufficient to support the interest claimed in the Caveat. The plaintiff submitted that, even if the Court were to take the evidence of David and Michelle at its highest, David had not demonstrated that there was a serious question to be tried that he had the interest claimed in the Caveat. The Court accepted those submissions:

First, all that David's evidence demonstrated was that he had undertaken voluntary effort in relation to the Property. It was submitted that a son simply undertaking voluntary effort to improve the family home could not, without more, give the son an interest in the family home.

Second, whatever it was that David had done in relation to the Property had been done when it was owned by SPI. Accordingly, there was no basis in the evidence for the suggestion that any equity (personal or otherwise) could attach against Jill, who became registered proprietor of the Property after Harold's death and after any of the work undertaken by David had allegedly been done.

Third, and again taking the evidence at its highest, what David and Michelle appeared to wish to assert was a family agreement of some kind, or a case in estoppel, in relation to 50 percent of the proceeds of sale of the Property. The Court found that there were two additional, immediate and fundamental difficulties insofar as the proceedings in support of the caveat concerned:

1. Jill would not be the correct defendant in proceedings of this nature; and

2. At its highest, it is a claim in relation to a 50 percent interest in the proceeds of the sale of the Property. A claim to the proceeds of sale in a property does not give rise to a caveatable interest in land and, in any event, is not the interest claimed in the Caveat.

Decision

The Court ordered that the caveat be withdrawn pursuant to section 74MA of the *Real Property Act*.

Blythe v Willis [2018] NSWSC 131

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 22 February 2018

REAL PROPERTY – torrens title – easements – rights of carriageway – slander on title

Facts

The plaintiff, Blythe, owned land that was a part of a large subdivision with another lot belonging to the defendant, Willis. The second defendant, Muzica purchased Willis' lot on the basis that he would be able to subdivide that land into two lots, allowing him to retain the portion that was on the water front and make use of an easement over Blythe's land **('the Waterfront Track')**, although this easement was not registered.

Blythe sold her lot to Townsend-Cryer for a sale price of $7,150,000. Further, Blythe allegedly withdrew her consent to Willis to make us of the land which was subject to the unregistered easement, but Muzica continued to make use of that land and advised Townsend-Cryer of his right to do so. This led Townsend-Cryer to rescind the contract on the basis that there was a latent defect by reason of Muzica's claim to have a right to travel over her lot. Ultimately Blythe terminated that contract and settled the matter separately with Townsend-Cryer. She then commenced an action against Muzica for 'slander on title' and trespass.

Slander on title involves the making of a false and malicious statement with reference to a person's title to some right of property which is disparaging of his or her title to that right of property.

Decision

His Honour considered three issues in this case:

- whether Muzica's statements that he had a right to use the Waterfront Track amounted to slander of title and entitle Blythe to damages;
- whether the alleged acts by Muzica constituted tress pass and the damaged accruing to Blythe, and
- if Muzica's application for a court-imposed easement pursuant to section 88K *Conveyancing Act 1919* should be granted.

In relation to whether Muzica's statements about using the Waterfront Track amounted to a slander on title, the Court found Muzica's claims were false and he had no genuine or rational basis to make the allegations that he had a right to use the Waterfront Track, and thus those statements amounted to a slander on title which led to Townsend-Cryer's attempted rescission of the contract with Blythe. Further, His Honour held that the false claims by Muzica were directed toward Townsend-Cryer not to purchase Blythe's land. It was also found that Muzica made the assertions relating to his right to use the Waterfront Track were directed to obtaining some concession from Blythe to use that land. It followed that this was considered sufficient to be considered malicious.

On the issue of assessing damages for slander on title, Emmett AJA found that Blythe and lost income after the non-completion of her contract with Townsend-Cryer, which was found to be the probable consequence of the contract with Townsend-Cryer not proceeding.

Emmett AJA also found that Muzica committed trespass against Blythe by making use of the Waterfront Track on the basis that it was a was an affront to the plaintiff's exclusive and quiet possession

Accordingly, Emmett AHA gave judgement for Blythe for interest on the money she borrowed, less the amount which was forfeited from Townsend-Cryer in relation to the claim for slander on title and the sum of $7,391.10 for trespass along with costs.

***Bonheur Holdings Pty Ltd v Mercia Financial Solutions Pty Ltd* [2018] NSWSC 1962**

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 December 2018

> LAND LAW – Caveats – Removal of caveat - application to remove caveat lodged by first defendant on plaintiff's property pursuant to s 74MA of the Real Property Act 1900 (NSW) – common ground there is serious question to be tried that first defendant has caveatable interest – balance of convenience – danger that plaintiff's registered mortgagee would commence recovery action if caveat not removed – director of plaintiff and his mother offered charge over jointly owned alternate property with adequate equity – no evidence of value of undertaking as to damages proffered by caveator

Facts

Bonheur Holdings Pty Ltd is the registered proprietor of land in Old South Head Road, Bellevue Hill on which it is constructing a residential development.

On 27 November 2018 the first defendant, Mercia Financial Solutions Pty Ltd, lodged a caveat on the title of the Bellevue Hill property claiming an interest said to arise from a "Mandate Agreement" made between Bonheur and Mercia on 13 June 2017.

Pursuant to the Mandate Agreement, Mercia agreed to provide "Services" (defined to include giving assistance to Bonheur in relation to its fund-raising activities) in consideration of which it would be paid a "Success Fee equal to 1.00% plus GST of the funds/loans raised".

National Australia Bank Ltd ("NAB") advanced Bonheur $12.8 million to fund the development at Bellevue Hill. Mercia claims that it procured that finance under the Mandate Agreement and is now entitled to a Success Fee of $118,800 (taking into account $22,000 already paid).

Clause 13.4(c) of the Mandate Agreement provided:

> "Our fees and expenses, together with interest at the rate prescribed by the rules of the Supreme Court of New South Wales, will create a caveatable and equitable interest and charge in the proposed security property/properties in which the Client has an interest or may at any time in the future acquire an interest in."

By summons filed on 6 December 2018 Bonheur sought an order pursuant to s 74MA of the *Real Property Act* that Mercia withdraw the caveat.

The applicant accepted that there was serious question to be tried as to whether Mercia has a caveatable interest in the Bellevue Hill property. Accordingly, the critical question to be determined by the Court was whether the balance of convenience favoured the making of an order that Mercia withdraw the caveat.

Decision

The Court concluded that the balance of convenience strongly favoured an order being made pursuant to s74MA of the Act. The reasons for this were as follows;

- On or about 21 November 2018, NAB gave Bonheur notice that it considered that events of default had occurred under Bonheur's mortgage to NAB and has threatened to take steps to exercise its rights under the mortgage if evidence of alternative finance was not to hand by 12 December 2018. This would, the Court accepted, result in irreparable damage to the development.
- Although Mercia gave the usual undertaking as to damages, it did not adduce any evidence of its financial position. Thus, the value of that undertaking is not known.
- One of the most forceful factors militating towards the making of an order pursuant to s74MA was the fact that Bonheur offered Mercia alternative security for its rights under the Mandate Agreement; namely, security in the form of a "Specific Security Deed" to be executed in Mercia's favour by a director of Bonheur. The directors of Bonheur were the registered proprietors of a residential property in Rozelle. The Deed was said to create a caveatable interest and the equity of the Rozelle Property far outstripped the potential claim available to Mercia.

Breen v Clough (No 2) **[2018] NSWSC 158**

Coram: Darke J

Court: Supreme Court of NSW

Date: 22 February 2018

> COSTS – departing from general rule that costs follow the event – plaintiffs partially successful at trial – plaintiffs unsuccessful on a substantial aspect of claim – whether that aspect of claim separable – whether various Calderbank offers were unreasonably rejected – whether plaintiffs obtained orders no less favourable than Offer of Compromise

Facts

This case related to a costs dispute between the parties following a judgment by Darke J on the substantive issues between the parties on 5 December 2017. On that day the Court ordered that the defendant undertake works at her expense in relation to an easement, pay damages of $6,000.00 to the plaintiff and provide the plaintiff with certain sets of keys.

The plaintiffs submitted that costs should follow the event and they were the successful parties in the substantive proceedings. They also submitted that some costs should be paid on an indemnity basis as the defendant unreasonably failed to accept Calderbank offers made on 23 February 2017 and 3 October 2017, and failed to accept an Offer of Compromise made on 15 May 2017.

The defendants contended that the plaintiffs should pay her costs on the basis that the limited relief obtained by the plaintiffs did not justify the costs incurred in the prosecution of their case. The defendants cited numerous "interlocutory defaults" in causing the proceedings to take longer than necessary, and the hearing was unnecessarily extended because the plaintiffs adduced a large amount of irrelevant evidence and advanced propositions that were immaterial.

Decision

Darke J found that, although the plaintiffs did not succeed on significant parties of their claim, their success was not 'insignificant or trifling'. Therefore, His Honour found that although the plaintiffs may have failed on significant aspects of their claim, they won the case.

His Honour noted that the rule that costs follows the event is qualified by the idea that costs should be paid in a way that is fair. His Honour noted that in performing this exercise, it was relevant to consider the entire case as a whole, including the manner in which the case was formulated, the nature of the evidence, and the manner in which the trial was conducted.

Darke J noted that the proceedings were commenced by way of summons in November 2014, and the plaintiff sought various injunctions and declarations. A statement of claim was filed one year later in November 2015 seeking more extensive relief, including several claims in nuisance, trespass and contract. His Honour found that the plaintiffs had partial success on their claim for nuisance based on the defendant's conduct of fencing works; but substantially failed on the remainder although those other aspects of the case was a focus of most of the adduced evidence and hearing time. This led His Honour to find that the aspect of the plaintiff's claim which related to nuisance between 2010 and 2014 necessitated a departure from the usual position that costs follow the event, but only in relation to that part of the case.

Otherwise, his Honour found that costs ought to follow the event in relation to the remainder of the claim. Further, his Honour was not persuaded that it was unreasonable for the plaintiffs to not accept the *Calderbank* offers made by the defendant on 21 September 2017and 6 October 2017 as the terms of the offers are not more favourable than what the plaintiffs were able to obtain from the Court. Similarly, his Honour was not persuaded that the defendant unreasonably failed to accept either of the *Calderbank* offers made by the plaintiffs and his Honour did not accept that the plaintiff's obtained orders no less favourable their than their Offer of Compromise dated 15 May 2017.

In determining the appropriate costs orders to make in this case, Darke J determined that it would not be just for the defendant to have to bear any of the plaintiffs' costs of the nuisance case which related to nuisance allegations between 2010 and 2014. Given that the plaintiffs were almost entirely unsuccessful in that part of the proceedings; his Honour found it appropriate to order that the plaintiffs pay the defendant's costs of the unsuccessful nuisance claim. His Honour ordered that the defendants pay the remainder of the plaintiff's costs in relation to the other aspects of the substantive proceedings.

Brown v Brown [2018] NSWSC 41

Coram: McDougall J

Court: Supreme Court of NSW

Date: 1 February 2018

> LAND LAW – Sale of property – Appointment of trustee for sale – ordinary approach to grant order where majority co-owner seeks it – no reason to not grant order – order granted

Facts

This case concerned an application by the plaintiffs pursuant to s 66G of the *Conveyancing Act 1919* (NSW) to have a trustee for sale appointed over a residential property located in Ingleside. The plaintiffs had two thirds of the interest in the subject property and the defendants a one third interest.

The reason for the application was due to the fact the plaintiffs had moved from the property, which at one stage was occupied by the plaintiffs and the defendant, and the defendant did not consent to the sale of the property. The proceeds of sale would be used for the care of the second plaintiff and provide accommodation to the first plaintiff would assist in such care.

Decision

His Honour indicated that where a majority co-owner seeks an order pursuant to s 66G of the *Conveyancing Act 1919* (NSW) the court will ordinarily make such an order unless there are equitable or other bars to making such an order.

In the present case, the defendant failed to appear notwithstanding the fact they were served and there was nothing in the evidence to dissuade the court from making the orders sought. Accordingly, McDougall J made the orders sought by the plaintiffs and, given the circumstances in this case and the inability of the parties to agree to a private sale, his Honour ordered that the defendant pay the plaintiff's costs on an indemnity basis with such costs being charged against the defendant's share of the sale proceeds.

Campbell v Hamilton & Ors [2018] NSWSC 806

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 4 June 2018

REAL PROPERTY – Easements – construction of agreement – plaintiff and defendants make agreement during a mediation – parties agree for consideration payable by the defendants to the plaintiff for the grant to the defendants of certain rights of access over the plaintiff's land – easement registered burdening the plaintiff's land – whether the mediation agreement grants an easement over plaintiff's land or whether it confers a mere personal right of access over the land to the defendants but not to the defendants' successors in title – whether the mediation agreement has been specifically performed and carried into effect through the recording of the easement on the Register – whether the recording of the easement on the Register over the plaintiff's land should now be cancelled.

Facts

Mr Campbell is the registered proprietor of a property in Ellesmere Road, Gymea Bay. The Hamiltons were at all relevant times the registered proprietors of another property in Ellesmere Road, Gymea Bay.

The Hamiltons, signed heads of agreement with Campbell at the conclusion of a mediation held on 17 November 2015 ("the 2015 Heads"). The mediation related to a claim the Hamiltons had made in the Equity Division of this Court under Conveyancing Act 1919, s 88K for the grant to them of an easement over Mr Campbell's land. The parties later took steps to perfect the 2015 Heads in a deed made between them on 14 November 2016 ("the 2016 Deed").

After the making of the November 2016 Deed, Lot 1153 was subdivided in March 2017 into two lots, being Folio Identifier 1150/1181245 ("Lot 1150"), and Folio Identifier 1151/1181245 ("Lot 1151"). The Hamiltons sold Lot 1151 but remained the registered proprietors of Lot 1150.

After the making of the November 2016 Deed, the third defendant, the Registrar General, registered an easement over the plaintiff's land under Real Property Act 1900 for the benefit of the Hamiltons' land. The Registrar General did not take an active role in the proceedings.

Mr Campbell sought orders to remove the notation of the easement from his Real Property Act title. The Hamiltons sought to maintain the easement on the Register. They argued that the 2016 Deed has been performed through the Registrar General's registration of the easement on Mr Campbell's title in accordance with what, they allege, were its terms.

Whether such relief ought to be ordered turned upon the meaning and effect of both the 2015 Heads and the 2016 Deed.

Applicable Legal Principles

The starting point in interpreting the 2016 Deed were the well-settled principles set out in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 ("Woodside") where the majority described the approach to the construction of a commercial contract in the following way:

> "The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating", unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

The principles were noted to have been further restated in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.

Campbell's case

Campbell's case turned on the proposition that there was only one real issue to be decided. That issue was whether, on the proper construction of the 2016 Deed, and particularly the Schedule B dealing, the easement granted by Mr Campbell to the Hamiltons was intended to be enforceable against Mr Campbell's successors in title.

Mr Campbell's central contention on the construction of the 2016 Deed was that the Schedule B dealing did not "clearly indicate" the land to which the benefit of the described easement was appurtenant, as was required by Conveyancing Act, s 88. As the parties were, when drafting the 2016 Deed, presumed to know the law and specifically Conveyancing Act, s 88 and that the non-compliance of the Schedule B dealing with Conveyancing Act, this was a strong indicator that the parties did not intend to create an easement over Lot 4. As a result, whatever the 2016 the deed did, it did not create an easement benefiting any land owned by the Hamiltons and burden any land owned by Mr Campbell.

In exploring the meaning of the words "clearly indicate" in Conveyancing Act, s 88 his Honour cited the judicially interpretation offered by Wootten J in *Papadopoulos v Goodwin* [1982] 1 NSWLR 413 ("Papadopoulos"):

> "In enacting this section the legislature has imposed a strict standard on draftsmen. The words "clearly indicate" suggest an intention to impose a higher standard than that the dominant tenement is capable of being ascertained by ordinary processes of construction, which processes include the use of extrinsic evidence to identify the dominant tenement when its identity does not clearly appear from the instrument: *Gale on Easements*.

His Honour found that there were three indicators consistently agree in pointing out which part of Lot 1153 is intended to be benefitted by the easement.

(1) the Lot markings "1150" and "1151" are clear;
(2) the "upper" and "lower" descriptions are clear; and
(3) the approximate square meterage of one of the lots as "1,000" is clear from, and is marked on, the Annexure C plan.

The Court noted that there was an imperfection in the other square meterage indication that arose by dint of a discrepancy. His Honour dealt with the discrepancy ultimately finding that it arose from a mistake. His Honour held that the overall consistency in the description of the part of Lot 1153 to be benefited is strong. Indeed, it was so strong that his Honour found it to wholly defeat at the outset Mr Campbell's principal argument – that the Schedule B dealing is non-compliant with Conveyancing Act, s 88(1).

Slattery J set out the history of mistakes in deeds and how a court saddled with such an issue could deal with such a mistake. His Honour referred to the application of the falsa demonstratio principle. This principle is the abbreviated form of a longer Latin maxim, falsa demonstratio non nocet cum de corpore constat. Translated it means "a false description does not vitiate, when there is no doubt which person is meant". The maxim is commonly expressed in the words falsa demonstratio non nocet but to do the maxim justice, it should be expressed in full: *Eastwood v Ashton* [1915] AC 900 at 914 (Lord Sumner).

For the maxim to be applied, there must be an adequate and sufficient description of the subject in the absence of the rejected words, and if the words sought to be rejected are themselves part of the essential description of the subject, the Court cannot apply the maxim: *Magee v Lavell* (1874) LR 9 CP 107.

Where there are conflicting descriptions, the Court must choose between them and the maxim does not assist in that choice. Citing Lord Parker in *Eastwood v Ashton* his Honour noted that "This maxim is useless until the court has made up its mind as to which of the two conflicting descriptions ought under the circumstances to be considered the true description. When this is done the false description may, of course, be discarded, and the maxim merely calls attention to this obvious result".

The Court held that there were enough indicators in the 2016 Deed for the Court to infer that the correct area to be derived for the proposed Lot 1150 in the proposed subdivision is 3557m^2, not 3649m^2. Any reference to 3649m^2 in Annexure B, clause 1 could therefore be ignored as a mistake.

His Honour then approached the issue by determining the question as to whether the Hamiltons could have obtained a decree of specific performance of the 2016 Deed to give effect to the Schedule B dealing. His Honour found in the affirmative with the result that would have been something like the Amended Transfer Granting Easement itself.

In so finding, his Honour noted that specific performance will be available to a vendor unless the deficiency or misdescription is "in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract all": *Flight v Booth*

[1834] 1 Bing NC 370. If specific performance is sought at the suit of the purchaser, and the misdescription or deficiency is substantial but the purchaser is prepared to accept it, the vendor may be obliged to perform the contract, convey what he can, and compensate the purchaser for any remaining deficiency through adjusting compensation: *Mortlock v Buller* (1804) 10 Ves 292. In the instant case, the contract contains a further assurances clause (clause 14.1). It too may be specifically performed so as to vest in the purchaser what had been promised: *Daniels v Pynbland Pty Ltd (Nos 1 and 2)* (1985) 4 BPR 97,319 (Young J).

Hamiltons' Arguments

The Court then considered the arguments advanced by the Hamiltons, some of which further bolstered his Honour's construction of the case and its resolution.

> First, although Mr Campbell argued that the parties are presumed to know of Conveyancing Act, s 88 when they drafted the 2016 Deed the parties are also presumed to know all the relevant law, including the law with respect to further assurances and the adjustments possible when a decree of specific performance is made. The result of which would have been the same: the registration of something like the Amended Transfer Granting Easement.
>
> Secondly, the Hamiltons argued that by the use in the 2016 Deed of the term "easement", an expression that connotes the grant of an interest which runs with the land, the 2016 Deed indicated that something more than the conferral of a mere personal right was intended. Had the parties intended to confer a mere personal right on the Hamiltons, the language to express that result would not have been difficult to find. The 2016 Deed would not, in those circumstances, have needed even to use the word "easement" as it does. It was a fortiori that an elaborate attempt was made to create in the 2016 Deed a form of easement that was compliant with the Real Property Act. The proper construction of the 2016 Deed is that it aimed to produce a document that would comply with the requirements of registration rather than one that would not.
>
> Thirdly, the 2016 Deed, clause 2.3 contemplates that the Schedule B dealing would be registered. The Schedule B dealing refers to Real Property Act, s 31B – a provision that is only consistent with contemplated future registration by the Registrar General. Real Property Act, s 31B does not encompass mere personal rights, which would not be required to be registered.
>
> Fourthly, the 2015 Heads distinguishes between an easement (clause 2) and a mere licence or personal right (clause 8).
>
> Fifthly, the Hamiltons argued that recitals E and F of the 2016 Deed make clear that it was entered into in the context of a resolution of a claim made pursuant to Conveyancing Act, s 88K which contemplates the grant of an easement running with the land.

His Honour addressed additional arguments that did not bolster the Court's construction of the Deed.

The Orders sought by Mr Campbell were refused. On the ancillary issue as to whether Mr Campbell has a personal equity or in personam right against the Hamiltons such that the Court should exercise its discretion pursuant to Real Property Act, s 138(3)(b) depended on whether the Hamiltons had engaged in conduct which, in all the circumstances, was unconscionable: see St*ory v Advance Bank Australia Ltd* (1993) 31 NSWLR 722 at 738 to 741 (Mahoney JA). His Honour found that no such conduct was engaged in by the Hamiltons in the instant case.

Decision

The Court relevantly made declarations as follows:

(1) Declare that the Deed of Settlement and Release made between the plaintiff and the defendants and dated 14 November 2016 ("the 2016 Deed"), on its true construction, transfers the rights as set out in the Transfer Granting Easement registered number AM160015.

(2) Declare that on its true construction the 2016 Deed binds successors in title.

(3) Declare that Transfer Granting Easement registered number AM160015 is valid and enforceable.

Canal Aviv Pty Ltd v Roads and Maritime Services (NSW) [2018] NSWLEC 52

Coram: Moore J

Court: Land and Environment Court of NSW

Date: 24 May 2018

> COMPULSORY ACQUISITION - portion of landholding acquired for WestConnex project - agreement on value of acquired land - no agreement on impact on value of residue land - consideration of impacts on residue land - overall negative impact on residue land - extent of impact on value determined - compensation to be ordered
>
> COMPULSORY ACQUISITION - claim for stamp duty for replacement property - Fitzpatrick basis for considered and rejected - consideration of decision in SNS - SNS provides no alternative basis for claim - stamp duty claim rejected
>
> COMPULSORY ACQUISITION - claim for reimbursement for land tax - claim made as either part of market value or as a disturbance claim pursuant to s 59(1)(f) of the Land Acquisition (Just Terms Compensation) Act 1991 - neither statutory provision provides support for the claim - claim rejected

Facts

In February 2017, the RMS compulsorily acquired the land known as 1-3 Ricketty Street, Mascot **('the Property')** to develop the M5 WestConnex project. There was planned to be a residual portion of approximately 8,941 square metres.

Canal Aviv Pty Ltd **('the Applicant')** was the registered proprietor of the Property and intended to develop it to create a warehouse and self-storage facility. Given the RMS was to acquire a substantial portion of the Property, the Applicant decided to only re-develop the remaining part of the Property for self-storage facilities. The Applicant commenced these proceedings to challenge the Valuer General's determination of compensation.

The Applicant claimed that they were entitled to receive a reimbursement for the stamp duty that they would incur on the acquisition of a replacement property due to the fact the applicant was a developer which was in the business of land banking.

The RMS argued that the activities of the Applicant were not properly characterized as property development, but it was a development associated with the applicant's business of providing self-storage business.

The Applicant also sought to argue that it was entitled to recover any Land Tax imposed upon them for the period of time it did not own the land, citing sections 55(a) and 56(1) of the *Just Terms Act* as representing an element of market value and the observations in *Carlewie Pty Ltd v Roads and Maritime Services* [2017] NSWLEC 78 in which Sheahan J observed there "may have been a basis for the claim had there been evidence of a consistent practice in the market for an adjustment of Land Tax consistent with the amount claimed." In the present case the Applicant argued it had provided the requisite evidence by providing expert evidence that land tax was a common adjustment in the sale of commercial and industrial land, which was present in the purchase of the Property.

The RMS contended that while land tax was often adjusted in commercial and industrial sale contracts, it was an optional practice. Further, the RMS argued there was no legal basis under the *Just Terms Act* to claim or recover land tax.

Decision

In relation to the issue of stamp duty, Moore J found that the Applicant acquired the Property with the intention of developing for the purpose of an ongoing operation of a self-storage business. Moore J thought it reasonable to assume the Applicant may transfer ownership of the Property to another related entity – which would be different from developing the land with an intention of transferring the Property to an unrelated party. Accordingly, the Court did not accept the Applicant's claim for reimbursement of stamp duty.

On the issue of land tax, the Court found that the determination of the market value of a property pursuant to the *Just Terms Act* was distinct from the making of adjustments which follow from the market value – it is a part of the negotiation between parties which go to the calculation of the final transaction price but not the market value of the land. Therefore, Moore J decided that adjustment for land tax was not a part of the market valuation process, and thus not claimable under sections 55(a) and 56(1) of the *Just Terms Act*.

Accordingly, land tax is not claimable as part of market value under s55(a) and s56(1) of the *Just Terms Act* and nor is it claimable under s59(1)(f) of the *Just Terms Act*.

Cannuli v Cannuli [2018] NSWSC 937

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 18 June 2018

> PRACTICE AND PROCEDURE – application for summary dismissal – previous proceedings dismissed by consent – whether consent dismissal gives rise to issue estoppel – whether Civil Procedure Act 2005 (NSW) s 91 defeats a claim of issue estoppel – whether plaintiff's claims untenable

Facts

The Plaintiff was the executor of the estate of the late Caterina Cannuli. The plaintiff sought a declaration that a transfer of a property owned by Caterina Cannuli was unconscionable such that the relevant transaction should be set aside; a declaration that the sum of $150,000 payable to the first and third defendants pursuant to an agreement made on 9 May 2018 and noted by orders made on that day in this Court in earlier proceedings is subject to a charge in favour of the plaintiff; and damages and equitable compensation. The defendants were John Cannuli, Kirsten Tucker and Cannuli Investments Pty Limited **('the Defendants')**.

The Defendants argued raised arguments relating to *res judicata*, issue estoppel and *Anshun* estoppel arose as the Plaintiff sought to agitate issues which were dismissed by the Supreme Court in an earlier proceeding. Against this, the Plaintiff submitted that the Defendants had not satisfied the court as to why those principles applied to the instant case and that s 91 of the *Civil Procedure Act 2005* (NSW) meant the dismissal of the plaintiff's earlier application does not prevent those claims being advanced in the new proceedings.

The present proceedings related to a sale of a property located in Glenfield **('the Property')** by the deceased to a company called Cannuli Holdings Pty Limited in late 2010 for $750,000. The plaintiff alleged in the circumstances Cannuli Holdings Pty Limited held the property on trust for the Plaintiff.

Cannuli Holdings Pty Limited (which was also the trustee of the Cannuli Family Trust) was later wound up and, in 2015, title to the property was transferred to the third defendant (Cannuli Investments Pty Limited), which had been appointed as the new trustee of the family trust. The Property was then sold by a receiver for $2.4 million. Several claims arose on the net sale proceedings, which were all subject to various interlocutory claims for charges over the net sale proceedings; including by the deceased and two of the Defendants.

The various applications were heard before Leeming JA on 8 May 2018. Leeming JA made several orders by consent, including various releases were given, including by the Plaintiff as executor of the estate of Caterina Cannuli. However, the Plaintiff did not give any release to the Defendants.

In an *ex tempore* judgment Leeming JA indicated stated ' … the settlement that has been reached involves an obligation upon the liquidator to pay immediately to Accolade and Reliance the sum of $950,000 and the dismissal of the claim brought on behalf of the Estate of Ms Caterina Cannuli. … Of course the agreement between Accolade and Reliance [two other creditors] and the Estate of Caterina Cannuli is something between them and is of no direct interest to the liquidator. What is presently material, and in respect of which a direction is sought, is the obligation to pay $950,000 to Accolade and Reliance from assets held by Mr Smith as liquidator of Cannuli Holdings.'

In their submissions, the Defendants, emphasised that the subject matter of the earlier proceedings, including the interlocutory process filed by Caterina Cannuli, and the consent orders that involved the acceptance by the Plaintiff of $50,000 out of the proceeds of sale of the Property and the dismissal of that interlocutory process. It is contended that the present proceedings are an impermissible attempt to re-agitate matters that were finally determined in the earlier proceedings.

Decision

Darke J noted there were no cases relating to s 91 of the *Civil Procedure Act 2005* (NSW) which deal with whether s 91 applies to consent dismissals made pursuant to settlements of proceedings.

His Honour accepted that any decision relating to s 91 was required to have regard to the overriding purpose of litigation referred to in s 56 of the *Civil Procedure Act*. However, Darke J was not satisfied that the Plaintiff's claim relating to the proceeds of sale of the Property as it related to the Defendants was not unarguable or untenable.

His Honour also thought it relevant to analyse the circumstances in which the consent orders arose. His Honour noted that the Plaintiff proposed to adduce evidence to the effect that there were negotiations between the Plaintiff and the Defendants in relation to the consent orders. It was also relevant that the Plaintiff did not provide any releases to the Defendants.

Darke J also noted the facts raised in the Plaintiff's claim were not tried in the previous proceedings such that no questions of issue or *Anshun* estoppel arose. Therefore, the Defendant's application to dismiss the Plaintiff's claim on the basis of res judicata, issue estoppel and *Anshun* estoppel was itself dismissed.

Canny v Owners-Strata Plan No 4983 [2018] NSWSC 80

Coram: Rein J

Court: Supreme Court of NSW

Date: 2 February 2018

> EQUITY — whether the Development Consent issued in February 1969 by Sydney City Council permits the Plaintiffs, as owners of parking lots in the apartment complex Elizabeth Bay Gardens ("EBG") who do not reside in EBG, to park their vehicles in those parking lots - meaning of "occupants of the building" in the Development Consent – whether the approval by Council of the plan of subdivision for EBG in October 1970 permits the Plaintiffs to park their vehicles in the parking lots created by the Strata Plan – consideration of s 20 of the Conveyancing (Strata Titles) Act 1961 (NSW).

Facts

This case related to a property located in Elizabeth Bay being an apartment complex known as Elizabeth Bay Gardens ("**EBG**"). The original development consent made provision for 26 one-bedroom flats, 47 two-bedroom flats, 10 three-bedroom flats and 104 car spots for the occupants of the proposed building on the lower ground, ground and upper ground floors.

When EBG was completed in 1970, It was the subject of a development application to Sydney City Council and the Council issued a development consent **('the Consent')** under the *Local Government Act 1919* (NSW) which contained a description of the application, which included the following:

> *For use as twenty-six (26) one-bedroom flats, forty-seven (47) two-bedroom flats, and ten (10) three-bedroom flats on the first to fifteenth floors inclusive, in accordance with plans Nos 6805.SP8A, 6805.899A and 6805.SP10A* ***with provision for the free-parking of one hundred and four (104) cars by the occupants of the proposed building on the lower ground, ground and upper ground floors*** *and fifteen (15) cars by visitors at the rear of the site, subject to the following conditions: -*
>
> *(1) That the parking area for visitors' cars, including access driveways, shall be drained and paved with a bituminous or other approved material to the satisfaction of the Council's Officers.*
>
> *(2) That the parking spaces for visitors' cars shall be outlined in paint on the pavement.*

In December 2014 the Owners Corporation passed a resolution which, effectively, barred the leasing of or otherwise dealing with car spaces. The Owners Corporation then took steps to enforce this special by-law such as by installing surveillance cameras.

Rein J found that this change in by-laws (being 'special by-law 7') was introduced to preclude non-resident owners from parking their cars in their parking lots. The Owners Corporation contented that special by-law 7 was a valid by-law as it was an iteration of Model By-Law 21 in Schedule 2 of the *Strata Schemes Management Regulation 2010* (NSW). His Honour rejected this argument on the basis that the by-law does not state what the parking lot owners cannot do, nor did it make clear that Council indicated that it does not propose to take any action or that residential lot owners who own parking lots cannot park in the parking lots if they do not reside in the building.

His Honour then set out sections 28 and 29 of the County of Cumberland Planning Scheme Ordinance (**'the Ordinance'**), which relevantly provided that:

> *28(1) A building shall not without the consent of the responsible authority be erected or used in any zone for any purpose shown opposite that zone in the fourth column of the Table to clause 26.*
>
> *(2) A building shall not be erected or used in any zone for any purpose shown opposite that zone in the fifth column of the Table to clause 26.*
>
> *29(1) Land, included in a zone, whether forming the site of a building or not, shall not be used for any purpose for which a building in the same zone may not be erected or used.*

The relevance of the Ordinance is that it is the relevant source of the legislative requirements and restrictions at the relevant time and that any use permitted as at 1969/1970 will be continued by later planning schemes.

Ultimately, this case was reduced to three issues:

1. Whether the Consent permitted use of the allocated parking spaces by non-residents?

2. If the answer to (1) was no, whether the approval by the Council of the plan of subdivision for EBG, which contained both residential lots (78) and parking lots (87), permitted the use of the parking lots by owners of those lots, whether or not they also were resident in EBG?

3. If the answer to both (1) and (2) was no, should the Owners Corporation be granted injunctive relief to prevent the Plaintiffs from parking their cars in their respective lots.

Decision

<u>Issue 1: The Consent</u>

When he construed the Consent, Rein J was guided by the principles outlined in *Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd* [2017] NSWCA 263, at [158] (summarised below):

(1) the nature and extent of the approved development must be determined by construing the document of approval, including any plans or other documents which it incorporates, aided only by that evidence admissible in relation to construction which establishes, or helps to establish, the true meaning of the document as the unilateral act of the relevant authority, not the result of a bilateral transaction between the applicant and the Council;

(2) a development consent is to be construed according to its terms, having regard to its enduring nature. The enduring nature of a development consent encourages a fair but liberal reading of the rights it confers upon a landowner who may spend considerable money acting upon it and who is likely to wish to sell the land sooner or later;

(3) a development consent is to be construed not as a document drafted with legal expertise, but to achieve practical results; and

(4) as a general rule, a development consent, being a public document operating in rem for the benefit of third parties, should be construed without reference to extrinsic evidence other than to identify a thing or place referred to in it.

In construing the Consent Rein J noted that the words of the Consent distinguished between what is the use- i.e. as "flats", and what is to be provided for i.e. "provision for 104 cars for free parking for occupants of the building". His Honour also noted that use of the word 'free' could be interpreted as emphasizing that the parking spaces are not to be operated as a commercial car park, or could mean that those parking in the spaces are not to be charged for so doing. His Honour also noted that the phrase used is "by occupants of the proposed building", could be contrasted with "by residents of the proposed building" and that the words "occupants of the building" could be contrasted with the word "visitors."

The Owners Corporation contended that the meaning of "occupants of the building" meant occupants of the parking spaces on the basis that it would make more sense for the Council to require residents of the proposed building to have parking in the building than it would be for the Council to require species to be provided for people who are occupants of the car spaces and the words "with provision for" refer back to the flats enumerated in the first part of the clause. The Owners Corporation contended the Consent, in using "occupants of the building", means residents, not owners of the parking lots, and that cases on "occupant" which support the opposite conclusion are irrelevant.

The Plaintiff argued that the word "occupants" is used and not "residents" and "occupants" should be given its ordinary meaning. The Plaintiff also argued the Council would have had a real reason to grant consent to occupants of the parking lots to use those lots because parking in Elizabeth Bay was notoriously tight and the Council would have seen a benefit in the utilisation of car spaces for anyone living in the area and persons using parking spaces is a residential use, even if they do not live in the building in which the parking space is located. Further, the plaintiff cited the fact that the word 'occupant' was given a wide reading in the preceding case law and given the importance of the Consent, what might potentially be a condition or a term needs to be spelled out very precisely.

Rein J did not find any of these cases about the word 'occupant' of any assistance in determining what was meant by "occupants of the proposed building" as used in the Consent. His Honour decided that the reference to 'occupants' was intended to refer to people who would reside in the building and who were to be distinguished from visitors who did not. His Honour doubted the Council would have required the developer to provide parking for people who were not residents of the building, but rather were owners of the parking lot when the creation of those lots had not occurred and might never occur.

Approval of the Plan of Subdivision

In relation to the relevance of the effect of the approval by the Council and registration of the plan of subdivision for EBG, which included both 78 residential lots and 87 parking lots, the Plaintiffs argued that, if the Consent did not grant consent for non-resident owners the right to park in the spaces provided within the building, then the registration of the plan of subdivision did do so. The Owners Corporation contended the registration of the plan of subdivision says nothing about the use that can be made of the lots.

Rein J set out the events leading up to the approval of the relevant Strata Plan, noting *inter alia* that the developer applied for approval to build EBG described as a Block of Home Units with Parking Facilities, the Consent approved the development with 83 flats and provision for the free parking of 104 cars by occupants of the proposed building, the Council approved the Strata Plan which provided for residential lots (residential units) and parking lots ('car parking spaces') and there was no by-law precluding the use of parking lots by non-resident parking lot owners, and the Council approval and the Certificate issued do not refer to the nature of the lots (residential or parking) but the Strata Plan shows "1 level parking" and "3 level parking" within the footprint of the building and the small lots are shown as located in the basement.

The Plaintiff submitted that if a person has the right to possession of the car space, they occupy that car space by parking their car in it. The Owners Corporation did not offer an alternative view and agreed consent had been given to the parking lot owners to occupation. Instead, the Owners Corporation argued that the relevant inquiry was concerned with occupation of the land and not use and the approval of the strata plan did not involve any use of the land on which the building stands, and "it is the Consent that permitted the separate occupation of the flats and the accompanying car spaces".

His Honour accepted that an approval of a subdivision is not an approval of use. However, his Honour also noted that s 20(1) of the *Conveyancing (Strata Titles) Act 1961* (NSW) distinguished between subdivision for the purposes of a Strata Plan and subdivision of the normal kind to which provisions of the *Local Government Act apply*, and none of the cases cited by the Owners Corporation concern the present situation. His Honour found that the objective facts that arise from the material upon which Council was proceeding were that the Council approved a Strata Plan in which 87 of the lots were created for owners of those lots to park their vehicles.

Accordingly, his Honour did not accept the Owners Corporation's submission that no grant of any right to use the parking lots for parking can be implied from the approval of a Strata Plan for separate parking lots. Rein J found that, by approving a subdivision of the building which created 87 lots for the parking of cars, Council must be taken to have approved, thereby, the occupation of those lots for parking. The Council must have necessarily intended to resile from, or revoke, the requirement that car spaces created could only be used by residents of EBG, and must be taken to have accepted that whoever became the owner of a parking lot created by the Strata Plan approved by Council, whether a resident or not, could use the parking lot for its intended purpose. His Honour found that it followed that the Plaintiff was entitled to park their vehicles on their respective parking lots and that special by-law 7 was defective.

Injunctive Relief

Given the conclusions arrived at; Rein J did not think it necessary to consider injunctive relief. However, his Honour did note the question of whether injunctive relief should be granted is a matter of discretion and guidelines to the exercise of that discretion can be found in *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339. In the present case, there were a number of matters potentially relevant to the exercise of discretion if the Owners Corporation were successful, namely that the Council had taken no action in forty years to enforce the terms of the Consent, there was no awareness of the problem on the part of the purchasers of parking lots until 2014, the enforcement of the Consent benefits no one but the owners of the residential lots, injunctive relief may be more likely to lead to unused parking spaces in EBG than non-enforcement, and the effect of granting injunctive relief more generally and there did not appear to be any damage to the Owners Corporation if the injunctive relief was refused.

Capuano v Roads and Maritime Services [2018] NSWLEC 59

Coram: Robson J

Court: Land and Environment Court of NSW

Date: 23 April 2018

> COMPULSORY ACQUISITION – land valuation – subject property acquired for road project – dispute as to market value – application of the comparable sales method – whether comparable sales should be adjusted to account for public purpose

Facts

The applicant, Richard Capuano, owned the land known as 28 Campbell Street, St Peters (**'the subject property'**) which was compulsorily acquired by Roads and Maritime Services (**'RMS'**) pursuant to the *Roads Act 1993* (NSW) on 22 April 2016 as a part of the construction of "WestConnex".

The Valuer-General assessed, and the RMS offered to the applicant, compensation in the sum of $993,190 comprising $900,000 for market value of the land, $66,480 for disturbance, and $26,710 for solatium. The applicant objected to the amount of compensation and commenced proceedings on 24 August 2016 pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ('**the Act**').

The applicant sought compensation in the sum of $1,507,949.70 and an order that RMS pay his costs. Against this, the RMS contended the applicant be paid total compensation of $1,075,899.70. The only issue between the parties was the determination of market value pursuant to s 55(a) of the Act given the parties came to an agreement in relation to compensation in relation to disturbance and solatium.

The subject property had the following characteristics: an area of 107.5m² with a road frontage of 4.1 metres, zoned "IN2 Light Industrial", a two-storey, three-bedroom, semi-detached brick terrace dwelling, circa 1910, ('terrace') was located on the subject property and was occupied by the applicant, the terrace had a total gross building area of approximately 115.9m², comprising 107.3m² of enclosed area, and a veranda/balcony area of 8.6m², the ground floor of the terrace contained a living room, a lounge/family room, a small kitchen, a laundry, and an external toilet. The first floor contained three bedrooms, a bathroom, and a balcony, the subject property did not enjoy any rear lane access or off-street parking, the subject property was located approximately 20 to 30 metres north of the site known as the Alexandria Landfill site which was an approved landfill and recycling site, and the terrace and improvements were demolished before hearing.

The applicant obtained a valuation of market value for the subject property to be $1,360,000 whilst the RMS obtained a market valuation of $950,000.00 for the subject property. However, it was ultimately agreed between the valuers that the comparable sales method of valuation is the appropriate method for valuing the subject property.

Decision

Robson J stated it was generally accepted that, insofar as there are comparable properties available, being sales of properties sufficiently similar to the subject property as to allow a comparison to be made between them, the conventional valuation method is the comparable sales approach. The accepted methodology for the comparable sales approach requires four steps:

1. First, the valuer (which includes the Court acting as valuer on appeal) is to accumulate comparable properties and the sales which are to be treated as comparable sales need to be truly comparable.
2. Secondly, the valuer should analyse those comparable sales, which often involves converting the value of those sales into another measurement that can be easily compared.
3. Thirdly, the valuer should adjust those properties it considers comparable to create equivalence with the unimproved subject property.
4. Fourthly, the valuer should apply the comparable sales approach to determine a value of the subject property based on the adjusted values of the comparable properties.

The Court found that each of the valuers prepared detailed individual reports and prepare two joint reports. The applicant's valuer was criticised by the RMS because he adopted five separate valuation approaches which were described by the RMS' valuer as being "unusual" and "novel". The applicant's valuer abandoned three of the five valuation approaches employed, but relied upon his "Global Adjustment" and "Explicit Adjustment" approaches. Ultimately, Robson J found the significant difference between the parties' valuers arose from adjustments made by the applicant's valuer for "negative Public Purpose influence" and "4th bedroom capability".

In relation to the "negative Public Purpose" adjustment, the applicant argued that s 56(1)(a) of the Act mandated that in determining market value, any increase or decrease in the value of the subject property caused by the carrying out of the public purpose must be disregarded. In this instance the 'public purpose' was the construction of WestConnex. The applicant's valuer contended that this required significant adjustments to at least four of the comparable sales, on the basis that if this was not done, the negative effect of the public purpose on the value of the subject property in comparison to the comparable sales relied upon the valuers would not be "disregarded" contrary to s 56(1)(a). The applicant's valuer opined that the subject property was significantly negatively affected by the public purpose and on that basis made an adjustment of 25% to the value of the subject property. The RMS on the other hand considered both the positive and negative aspects of the public purpose and their valuer found no empirical evidence of any "dampening effect" of the public purpose.

Robson J accepted that, as a matter of principle, in order to fulfil the s 56(1)(a) test it is necessary to determine whether the common sale or any comparable sale needs to be adjusted to account for a negative effect on the value caused by the public purpose as contended by the applicant. In considering the material which was before the Court, Robson J stated it was apparent that there was a general upward movement in house prices in St Peters and whilst one of the comparator sales was 'hard up against' the public purpose, but did not find any compelling evidence that there has been a measurable effect of the scale opined by the applicant's expert. Robson J found that whilst it was clear that there were likely to be some negative impacts associated with the construction of WestConnex, there will also be some positive effects and accepted the applicant's submission that the RMS' valuer did not involve such a qualification.

Robson J therefore accepted, having regard to the fact of a comparable sale which was referred to in the expert evidence which fronted a multi-lane major highway and although there will be cycle-ways, amphitheatres, and the introduction of vegetation including trees, there is likely to be some effect of the public purpose on that property. Robson J accordingly thought an adjustment was appropriate, but did not consider the applicant's valuers inquires with selling agents in the area to be compelling, nor did Robson J think the existence of a subterranean stratum acquisition (5m below ground level) would have caused any concern to the market and there is no evidence to that effect.

Nevertheless, the Court did not accept the applicant's valuer's 25% adjustment to the price achieved by the common sale to arrive at the value of the subject property; Robson J increased the value of the subject property by 10% to reflect the "negative public purpose influence" to the subject property.

Robson J continued to analyse the adjustments made by the parties' valuers. Robson J noted the applicant's valuer made a further significant upward adjustment (varying from 10% to 22.5%) from the comparable sales on the basis the subject property could be reconfigured into a four-bedroom terrace, which was something that could not be added to the comparables. The RMS submitted that there was no evidentiary basis to support the making of the adjustment contended for by the applicant, namely that four-bedroom terraces attract a premium in value compared to two- or three-bedroom terraces.

Ultimately, Robson J did not find it justifiable to make an adjustment for any "adjustment for 4th bedroom capability", although Robson J did accept there was potential to add a fourth bedroom, it was not accepted there was a proper evidentiary basis and specifically no market evidence to support the making of such an adjustment and did not make that adjustment.

Robson J proceeded to make further adjustments, which were minor in nature, and whilst contested, not as controversial as the public purpose adjustment sought by the applicant. In sum, it was found that the adjustments to the common sale were : 10% for 'negative public purpose influence'; 0% for '4th bedroom capability'; -12.5% for 'land size/frontage/off-street parking'; 0% for 'building improvement, size and fabric'; -2.5% for 'condition/state of repair'; and 0% for 'ornate features', and adopted the experts' agreed adjustment for time/market movement of-6.07%, which meant the Court arrived at an adjusted sale price of $1,052,955, with a derived value of $1,000,307.

In light of the fact the common sale is the most comparable sale of the various sales relied upon by the parties valuers, Robson J found the appropriate calculation of market value of the subject property to be $1,000,000. Consequently, the Court ordered that compensation for market value pursuant to s 55(a) of the *Land Acquisition (Just Terms Compensation) Act*

1991 (NSW) was to be determined in the amount of $1,000,000, the parties calculate the final quantum of compensation taking into account the determined market value and the matters agreed between the parties and the respondent is to pay the applicant's costs as agreed or assessed.

Carbone v Mills [2018] NSWSC 496

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 April 2018

> LAND LAW – conveyancing – options – whether written call option agreement contains oral terms – construction of call option agreement – whether agreement subsequently varied – writing requirements
>
> EQUITY – remedies – rectification – whether parties had common intention as to duration of call option – whether intention not reflected in call option agreement due to common mistake
>
> EQUITY – remedies – estoppel – whether representations made as to duration of call option – whether parties conducted their relationship on basis of an assumption as to duration of call option

Facts

On or about 4 September 2012, the plaintiffs, Mr and Mrs Carbone entered an option agreement (**'the Option Agreement'**) with the defendant, Mr Mills. The subject matter of the Option Agreement was a rural property owned by the defendant known as Wolonga (**'the Property'**). The option was a call option to purchase the Property and it also provided the plaintiffs with certain rights of possession. The dispute surrounded whether the period within which it was open to the plaintiffs to exercise the Call Option expired on 4 September 2016 (as contended by the defendant) or 4 October 2016 (as contended by the plaintiffs). The plaintiffs failed to exercise the Call Option by 4 September 2016. The defendant served a Notice to Vacate upon the plaintiffs on 14 September 2016. On 28 September 2016 the plaintiffs served a Notice of Exercise of Call Option upon the defendant.

The plaintiffs raised the following arguments in support of their contention that they had validly exercised their option:

1. That the agreement contained oral terms, arising from conversations in August 2012, to the effect that the plaintiffs would have a four-year lease of the Property from when they took possession, and would have an option to purchase the Property throughout that four-year period;
2. That upon the true construction of the agreement, and in circumstances where the plaintiffs took possession of the Property on 4 October 2012, the plaintiffs had until 4 October 2016 to exercise the Call Option;
3. In the alternative, that the agreement should be rectified so that it reflects an intention that the Call Option would be able to be exercised during a four year period

commencing no later than when the plaintiffs took possession of the Property on the basis that the parties had a common intention to that effect, or on the basis that the defendant knew that the plaintiffs held such intention, but remained silent and thereby allowed the plaintiffs to enter into the Option Agreement under a mistake as to its effect;

4. In the further alternative, that the agreement was varied in about April 2013 to the effect that the Call Option would not lapse until 4 October 2016; and
5. In the further alternative, that the defendant is bound by either estoppel by representation or estoppel by convention, that preclude the defendant from asserting that the plaintiffs have not validly exercised the Call Option.

Therefore, the plaintiffs contended that they validly exercised the Call Option and the Court should make orders for specific performance of the contract for sale which thereby came into existence.

The Option Agreement

The Option Agreement was made between the defendant as Vendor and the plaintiffs as Purchase and was stated as being made “4th September 2012”. The Call Option Commencement Date was defined in cl 1.1(2), where second appearing, to mean the date of termination of the Other Option. Other Option was defined (in cl 24.1) as the option the defendant had granted to another party in respect of the Property. The Call Option Lapse Date was defined in cl 1.1(3) as the date that is 4 calendar years from the date of this Agreement. Clause 7.1 provided that if an Option was not exercised before 5pm on the relevant Option Lapse Date, that Option will lapse. Clause 8.1 provided that the Premium must be paid to the Vendor on or before 24 September 2012.

Clause 11 relevantly provided that the Purchaser (the plaintiffs) may have possession of the Property on the conditions contained in Schedule 4 from the later of the date they pay the Premium; or the date of the Option Agreement. If the Vendor (the defendant) was not able to provide possession of the Property at the date of the Option Agreement, the Vendor must do all reasonably required in an expeditious manner to give possession of the Property to the Purchaser as soon as reasonably practicable. Clause 15 provided an interest rate of 15% per annum was payable on all moneys payable under the Option Agreement if they were not paid on the due date.

Clause 20 relevantly provided that the Option Agreement was conditional on the entry into and completion of the sale contract for Taringa (**‘the Other Contract’**) and any default under the Other Contract would be deemed to be a default under the Option Agreement. Schedule 4 of the Option Agreement continued the terms upon which the plaintiffs could occupy the Property, and included a licence to the plaintiffs personally and that the defendant had the right to occupy the homestead on the Property for six months from the date of the Option Agreement.

Darke J found that entry into the sale contract for Taringa occurred on 4 September 2012, meaning the Option Agreement became unconditional in its operation from 4 September 2012, making 4 September 2012 the Call Option Commencement Date. The option premium which was required to be paid by 24 September 2012, was paid on 26 September 2012 and from that date the plaintiffs became entitled to possession of the Property.

Oral Terms

In relation to the plaintiff's argument that the written Option Agreement should be construed such that there was a "Call Option period" of 4 years running from the date the plaintiffs took possession of the Property the plaintiff argued that such a construction (notwithstanding that it refers to 4 calendar years "from the date of this Agreement") should be given to reflect the commercial objective to provide a 4 year Call Option period that would run concurrently with a lease of the Property. The defendant submitted it was clear from the words of the definition of Call Option Lapse Date, which referred to "the date of this Agreement", and the date of the making of the Agreement (4 September 2012), the Call Option was to lapse four years from that date.

In support of their argument the plaintiffs contended that certain conversations prior to 4 September 2012 favoured their interpretation of the Option Agreement, particularly that the defendant's lease of the Property was to be for the exact period of the option. However, Darke J noted that it had been some time since these conversations had taken place and that no particular witness had a particularly compelling testimony surrounding the content and import of discussions which occurred prior to 4 September 2012.

On balance His Honour preferred the evidence of the defendant and found that there were discussions about a four-year lease, there was discussions about a four-year option period, but there were no discussions that the two were to exactly coincide. On that basis his Honour rejected the plaintiff's contention that the Option Agreement contained oral terms to the effect that the plaintiffs would have a four-year lease of the Property commencing from when they took possession, and an option to purchase throughout that four-year term of the lease. His Honour further found that the defendant's argument that the Court should not find that the parties agreed to oral terms in addition to the apparently complete written agreement, particularly where the alleged oral terms are inconsistent with the terms of the later written agreement to be well founded.

Construction of the Option Agreement

The argument in relation to construction of the Option Agreement related to the time in which the plaintiffs had to exercise the Option. His Honour noted that the Option Agreement clearly stated the following:

1. The Call Option may be exercised by the Purchaser at any time from the Call Option Commencement Date to before 5:00pm on the Call Option Lapse Date.
2. The Call Option Commencement Date was 4 September 2012.
3. The Call Option Lapse Date was the date that is 4 calendar years from "the date of this Agreement". "Agreement" was defined as "this document, including any schedule or annexure to it". Therefore, "the date of this Agreement" was 4 September 2012 as it was the only date which appeared on the Option Agreement.
4. Accordingly, the Call Option Lapse Date was found to be 4 September 2016; and
5. The Call Option could be exercised by the plaintiffs in the period from 4 September 2012 to before 5:00pm on 4 September 2016.

The plaintiffs argued there was ambiguity in the definition of "Call Option Lapse Date" arising from the fact the Call Option was granted in consideration for payment of the Premium and the Premium was due by 24 September 2012 and possession of the Property was not required to be given until the latter of the date of the Option Agreement or the payment of the Premium.

His Honour rejected this argument on the basis that he saw no reason to depart from the clear meaning of the words in the Option Agreement. He noted that this construction did not undermine the evident commercial purpose of providing the plaintiffs with an option to purchase the Property together with certain rights of possession and that the reasonable businesspersons in the position of the plaintiffs and the defendant would have understood the expression "the date of this Agreement" to mean the date shown on its front page, namely, 4 September 2012.

Rectification

The plaintiffs argued for rectification of the Option Agreement on the basis that it was the parties' common intention, not written in the Option Agreement, that the Call Option could be exercised during a four-year period commencing on the latter of the Call Option Commencement Date, or when the plaintiffs took possession of the Property. In support of this argument, the plaintiffs relied upon the negotiations between the parties already countenanced by the Court.

His Honour noted the principles of rectification, namely that a common intention is a subjective intention and that the plaintiffs would require clear and convincing proof of that common intention with that common intention continue to exist up to the execution of Option Agreement.

Darke J did not think the evidence concerning the August 2012 prior to the parties entry into the Option Agreement established such a common intention; he found there to be no discussions to the effect that the option for purchase would exist throughout the duration of the lease, and there was no specific discussion about when the option period would commence or end. Accordingly, his Honour was unable to conclude that the parties held a common intention that the Call Option could be exercised during a four-year period commencing on the latter of the Call Option Commencement Date, or when the plaintiffs took possession of the Property. Therefore, the plaintiffs failed in their claim for rectification.

Variation of the Option Agreement

Darke J analysed lengthy conversations and exchanges of correspondence pursuant to which the plaintiffs alleged that in a conversation in April 2013 the defendant agreed that the Call Option would not lapse until 4 October 2016. Ultimately his Honour did not find that any such agreement was arrived at between the parties and the plaintiff's arguments failed accordingly. Further, his Honour noted that, as a matter of law, the Option Agreement was required to be amended in writing for such an amendment to be enforceable.

Estoppel

Given His Honour's findings in relation to the content and effect of the conversation between the parties in April 2013, his Honour also rejected any arguments of estoppel raised by the plaintiff.

Although his Honour did not think it strictly necessary, he considered the plaintiffs' arguments that the defendant is unable to rely on the interest clause, clause 15.1, to preclude the plaintiffs from exercising the Call Option. The defendants argued that when the plaintiffs sought to exercise the Call Option, they owed the defendant an amount of interest due to the late payment of the occupation fee the subject of the invoice issued on 4 April 2016.

The plaintiffs argued that the clause should be construed such that an exercise of the Call Option could be made effective by a subsequent payment of any outstanding interest. The plaintiffs further submitted the defendant is estopped from relying upon the failure to pay the outstanding interest as a reason to deny the validity of the plaintiffs' exercise of the Call Option. The plaintiffs contended the defendant represented, and the parties thereafter proceeded on the basis, that adjustments would be made at final settlement of the plaintiffs' purchase of the Property.

In construing clause 15.1, his Honour found that clause allows a purported exercise of the Call Option to be treated as effective once the amount of any outstanding interest is paid. An exercise of the Call Option at a time when there is interest outstanding is not effective "until and unless" such interest is paid. Once it is paid, the purported exercise of the Call Option is treated as effective. Therefore, given the plaintiffs owed interest to the defendant, the outstanding interest would have to have been paid before 5pm on the Call Option Lapse Date for any exercise of the Call Option to be effective.

The plaintiffs also argued that the defendant could not rely upon cl 15.1 because to do so would be contrary to the provisions of Division 4 of Part 8 of the *Conveyancing Act*, which are provisions concern options in leases. His Honour did not accept the plaintiff's argument in this regard as they proceeded on the flawed assumption that the plaintiffs are lessees under a lease granted to them by the defendant as lessor; the Option Agreement did not contain a grant by the defendant of a lease to the plaintiffs.

Conclusion

Therefore, Darke J did not accept the plaintiff's arguments that they had validly exercised the Call Option. His Honour concluded that the Call Option was not exercised before 5pm on the Call Option Lapse Date of 4 September 2016 meaning that the call option lapsed and the plaintiffs' attempt to exercise the Call Option on 28 September 2016 was ineffective and made declarations to that effect.

Additionally, his Honour ordered the plaintiffs to withdraw their caveat over the Property and gave judgment for possession of the Property against the plaintiffs, and leave to the defendant for the issue of a writ of possession.

Christopher Tasoulas v Vasiliki Tasoulas **[2018] NSWSC 861**

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 17 May 2018

> REAL PROPERTY– Where transfer of the Plaintiff's half-interest in a property was lodged with Land Titles in 1992 – Claim that Plaintiff never signed or agreed to the transfer of his half-interest in the property – Where Plaintiff lodged a caveat over the property asserting fraud – Whether impugned signature on the transfer was established not to be that of the Plaintiff – Onus of proof in relation to a claim of fraud – Reference to indefeasibility provisions of the Real Property Act .

Facts

The Plaintiff, Mr Christopher Tasoulas, is the son of the Defendant, Mrs Vasiliki Tasoulas. The subject of this dispute is a property at 74 Park Road Hunters Hill, New South Wales ("**the Property**").

The Property was purchased in July 1991 for $267,000.00 in the joint names of the Plaintiff and the Defendant. In 1992, a transfer dated 18 November 1991 transferring the Plaintiff's half interest in the Property was lodged with the Land Titles Office. Following lodgement of the transfer the Plaintiff ceased to be recorded as an owner of the Property and the Defendant has continued to be recorded as the sole owner of the Property.

The Plaintiff asserts that the signature that appears on the Transfer document is not his and that he never agreed to transfer his half interest in the Property to the Defendant. He maintained that he only became aware of the transfer in 2017 upon discovering a council rate notice from Hunters Hill Council.

The Defendant's case was that the transfer of the Plaintiff's half interest came about because he had (since July 1991) made no contributions to the mortgage repayments and in November 1991 she had a conversation where it was agreed that the Defendant would pay the Plaintiff $15,000 for his share of the Property.

Consideration

The principal issue in this case is whether the Plaintiff established to the requisite degree of proof that the Impugned Signature on the Transfer purporting to be his had been forged. Given that the Defendant had become the sole registered owner on title, she could be deprived of the full interest only if she became the sole registered owner by fraudulent conduct on her part, by forging the Plaintiff's signature on the Transfer and then lodging it with the Land Titles Office.

If the Plaintiff could not establish fraud by the registered holder or by someone with whom she is complicit, he could not overcome the indefeasibility provisions of the *Real Property Act 1900*:

see s 45(2) and *Breskvar v Wall* (1971) 126 CLR 376 and *Anderson v Anderson* [2017] NSWCA 131.

For fraud to be established, the Court must be satisfied on the balance of probabilities having regard to the seriousness of the allegation made: *Briginshaw v Briginshaw* (1938) 60 CLR 336.

That the Court can make its own comparison of handwriting is clearly recognised in *Regina v Doney* (2001) 126 A Crim R 271 and see *Jeans v Cleary* [2006] NSWSC 647 for a translation of that to the civil sphere.

Decision

His Honour found that on the balance of probabilities the Plaintiff did in fact sign the Transfer, that the Defendant paid $15,000 to the Plaintiff for his half interest in the Property and that the Plaintiff's case must therefore fail.

Community Association DP 270982 v Registrar-General for New South Wales [2018] NSWSC 225

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 27 February 2018

> LAND LAW — Community title — Community scheme — Termination of scheme — Whether all interested parties have "made an application" where only some are plaintiffs and others have consented — Community Land Development Act 1989, s 70(1)(c)

Facts

This case involved an application pursuant to s 70 of the Community Land Development Act *1989* (NSW) **('the Act')** for the termination of a community scheme in the Armidale area **('the Scheme')**.

The Scheme involves four lots: the first plaintiff was the registered proprietor of Lot 1 (the community property) and the second plaintiff is the only member of the first plaintiff and was the registered proprietor of Lots 2, 3 and 4 in the Scheme. All interested parties, including the mortgagee bank and the Registrar General (who was joined as a defendant) consented to the Scheme being terminated.

His Honour noted that s 70 of the Act allows for the termination of Schemes in the Supreme Court where the Court is satisfied that, *inter alia*, that 'the association of a community scheme, each proprietor of a lot within the community scheme and each registered mortgagee, chargee and covenant chargee of a lot within the community scheme have made an application to the Court to terminate the scheme' (s 70(1)(c) of the Act).

The question which was raised before his Honour was whether the present application could be dealt with under s 70(1)(c) given the words of the statute, "have made an application to the Court" when strictly construed may not involve the parties dissolving their relationship by consent.

Decision

His Honour found the present circumstances were able to be brought within s 70(1)(c) of the Act as the chapeau to s 70(1) requires the Court "to be satisfied" of the matter then set out in sub-section (c). The matter of which the Court has to be satisfied is the jurisdictional fact: that 'the association of a community scheme, each proprietor of a lot within the community scheme and each registered mortgagee, chargee and covenant chargee of a lot within the community scheme have made an application to the Court to terminate the scheme". The Court's discretion to make the order for termination is enlivened upon being satisfied of that fact.

In the present case, his Honour decided that to define "made an application" strictly and literally as requiring each interested party to be a plaintiff in the proceedings leads to an inconvenient, and potentially cumbersome and expensive, outcome in what should be a relatively simple and straightforward exercise. Accordingly, his Honour was of the view that the Court was able to be satisfied that all interested parties "have made an application" where some of those parties have indicated their consent to the application without necessarily themselves being joined as plaintiffs in the proceedings. In the present case, his Honour noted that on a strict reading of the Act the bank ought to be a plaintiff but it is not, but it nevertheless supports the application and consents to the orders sought. Accordingly, the Court was that, for the purposes of s 70(1)(c) of the Act, all requisite persons “have made an application to the Court to terminate” the Scheme.

His Honour then considered whether s 70(1)(b) of the Act, which enables the Court to dissolve a scheme when it is considered ‘impractical’ applied. His Honour noted that since the Scheme was created, the relevant land has been rezoned to enable a greater level of density be achieved on that land. When the Scheme was created, one of its purposes was to enable residential lots to be created and built upon in a size then not generally available in the area. The second plaintiff indicated she wished to develop the land to take advantage of the new zoning.

His Honour determined that what is considered ‘impracticable’ does not have to be totally impossible. Accordingly, he had no difficulty in finding the difficulty for the second plaintiff in developing the land subject to the Scheme to take advantage of the new zoning made the Scheme ‘impracticable’. Accordingly, Kunc J was satisfied the Court’s discretion to make orders to terminate the Scheme was enlivened under both sub-sections 70(1)(b) and (c).

In determining whether the Court should exercise its discretion to make the orders sought, his Honour found there was no prejudice in terminating the scheme, the interests of third parties who may have dealt with the first plaintiff was not in issue and that the Court ought not stand in the way of a consensual termination. Accordingly, Kunc J exercised his discretion to terminate the Scheme and make the orders sought by the plaintiffs.

Condon v Mehajer [2018] NSWSC 1637

Coram: McDougall J

Court: Supreme Court of New South Wales

Date: 26 October 2018

REAL PROPERTY – application to remove caveat – where caveat bad in law – where caveat lodged at the eleventh hour – where caveator is incarcerated – whether order should be made dispensing with service – whether caveat should be withdrawn – where no prejudice because net proceeds of sale to be held in trust pending further order – no question of principle.

Facts

The plaintiffs were the trustees of the bankrupt estate of Aysha Amelia Learmonth, formerly known as Aysha Amelia Mehajer. The first defendant was Mr Salim Mehajer, the former husband of Ms Learmonth. The second defendant was the trustee of the bankrupt estate of Mr Mehajer.

Pursuant to Court orders made in the Family Court, the marital property located in Lidcombe was sold at auction on 8 September 2018. The sale price was substantially more than the valuation that the parties had obtained. The purchases had served a notice to complete.

Mr Mehajer asserted that a company of which he purports to be the representative, known as Mehajer Vision Pty Ltd, has an equitable interest in the property. He lodged a caveat, which he asserted protect the equitable interest of Mehajer Vision.

The plaintiffs applied to the Court urgently to secure an order pursuant to section 74MA of the Real Property Act that the caveat be withdrawn. In so doing, the plaintiffs argued that unless such an order is made, the settlement cannot proceed. The corollary was that the purchasers would be entitled either to rescind or to claim damages for breach of contract. It is undesirable that the trustees should be exposed to those risks.

Section 74MA(2) requires the Court to be satisfied that the application has been served, in this case, on Mr Mehajer, unless the Court has made an order dispensing with service. The Court held that it was impractical to serve Mr Mehajer who was incarcerated in view of the time constraints under which the parties were labouring (namely the expiry of the notice to complete at 3pm that day).

Decision

In view of the facts and circumstances, His Honour dispensing with service, made orders pursuant to s74MA. His Honour made the orders on two bases:

- The first was that it was impossible to discern from Mr Mehajer's letter what is the precise nature of the interest that Mehajer Vision purportedly had.
- The second was that the caveat is defective in form.

His Honour noted that the caveator was Mr Mehajer himself. However, it seems from the letter, the "equitable interest" that the caveat claims to protect is not his interest. It is an interest of someone else (Mehajer Vision). The caveat does not make clear why it is that Mr Mehajer has any right to protect that interest on behalf of the asserted beneficiary.

His Honour found that even if one were to read the caveat together with the letter that difficulty is not assuaged.

Accordingly, His Honour found that the caveat was hopelessly defective because the estate or interest claimed is no more than an "equitable interest". Those words are capable of catching a wide variety of interests, ranging from an equitable interest under a contract for sale or an equitable interest under a trust, to lesser equitable interests such as an equitable charge. There are numerous decisions from the Supreme Court which have held that the mere description "equitable interest" is bad in law.

Although the caveat identifies an "instrument" that is said to give rise to the instrument, and facts in support, the matters that are set out gave no clue whatsoever as to how an equitable interest could arise. The facts refer to a construction project management contract.

Accordingly, His Honour ordered that the caveat be withdrawn pursuant to s74MA of the *Real Property Act*.

His Honour noted that it was a fortiori that if Mehajer Vision had some interest in the property that interest would be transmuted to an interest in the surplus fund once priorities had been paid; there being no suggestion that the trust fund would be paid out without giving Mehajer Vision whatever opportunity it seeks to press its claim.

Coshott v Crouch [2018] NSWSC 853

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 8 June 2018

> FEDERAL JURISDICTION – matter in which High Court has original jurisdiction – matters "arising under any laws made by Parliament" – proceedings under Bankruptcy Act 1966 – order for sale of property made by Federal Court under Conveyancing Act 1919 (NSW), s 66G as "picked up" by Judiciary Act 1903 (Cth), s 79(1) – further proceedings for consequential relief in Federal Court – subsequent claim against trustees for breach of trust in Supreme Court – whether in federal jurisdiction – whether a "special federal matter" for cross-vesting purposes

Facts

The defendants were appointed as trustees for sale over the property located in Bellevue Hill **('the Property')**. The plaintiff, Lilijana Coshott alleged breaches of trust by the defendants on the basis that the property was sold under value. Given the defendants were appointed pursuant to orders of the Federal Court over the share of the Property owned by the plaintiff's husband, who was a bankrupt, they sought that these proceedings be transferred to the Federal Court pursuant to the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW).

The defendants primary position was that the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) applied to these proceedings on the basis that it applies to State courts exercising federal jurisdiction and that these proceedings are in federal jurisdiction because the Court is exercising jurisdiction in a "special federal matter" for the purposes of s 6 of that Act and therefore the Court is required to transfer the proceedings to the Federal Court. Alternatively, they argued that the proceedings should be transferred under the general provision for transfer contained in s 5(1).

The plaintiff opposed the proposed transfer on the basis that the proceedings are in the State jurisdiction meaning the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) applies and, in any event, the proceedings do not meet the test for transfer set out in s 5(1) of that Act.

Decision

The defendants submitted that, even following the making of an order for the appointment of trustees for sale pursuant to s 66G, the Federal Court retained an ongoing role in "supervising the conduct of the statutory trust" which includes the power to alter the terms of the trust under s 66G(6) and to provide for indemnity and remuneration out of the assets of the trust.

The plaintiff submitted that her claim was distinct from the issues arising in the Federal Court as she was claiming her share of compensation attributable to a breach of trust, which was a matter between the plaintiff and defendants not being a general account for the trustees.

His Honour accepted the plaintiff's argument that there are significant differences between the s 66G aspect of the Federal Court matter and the claim made in these proceedings. His Honour found that an order under s 66G has substantive effects on the rights of the parties based upon the application of legal rules to the past conduct of, and dealings between, the parties as co-owners. Separate from this, the Plaintiff's claim against the plaintiffs focused on their conduct as trustees and depends upon the terms of the trust for sale making any past conduct of the plaintiff irrelevant.

Further, Parker J held that the power to make consequential orders is limited and cannot be used to vary the substantive orders; nor can it be used to do something inconsistent with, or beyond the scope of, those orders, which was the upshot of what the defendant's application. His Honour held the court which appoints the trustees for sale retains a supervisory role in the sense that that court can be approached for consequential orders and directions. But the source of the trustees' powers and obligations is the trust established by the court's order and those rights and obligations are cognisable by any court exercising equitable jurisdiction over trusts, not just the appointing court.

His Honour then considered the applicability of the *Judiciary Act 1903* (Cth) to the present proceedings, noting that s 66G does not contain a provision permitting an owner of the property subject to such an order to obtain again order for compensation against a trustee who sells at an undervalue. His Honour noted that the Property, trustees and seat of jurisdiction were all located in New South Wales, meaning the NSW Supreme Court had jurisdiction to entertain a claim for compensation even though the defendants were appointed by the Federal Court. Therefore, his Honour noted that the plaintiff's claim did not require a Commonwealth law for its enforcement or involve a defence arising under a Commonwealth law and nor was the trust property a right or benefit which owes its existence to federal law. Nevertheless, his Honour was of the view that the right or duty in question owed its existence to federal law as what was being enforced were the rights under a trust created by the exercise of federal jurisdiction under the *Judiciary Act*.

On that basis, his Honour found that the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) applied. His Honour then considered the defendant's argument that these proceedings involve a 'special federal matter', which was relevantly defined as being 'a matter which is within the original jurisdiction of the Federal Court by virtue of s 39B of the *Judiciary Act* 1903; being a matter in respect of which the Supreme Court of a state or territory would not, apart from this Act, have jurisdiction.' His Honour concluded that the present proceedings were not a "special federal matter" as he had already determined the NSW Supreme Court had jurisdiction to consider the matter.

Finally, Parker J considered s 5 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) which related to the general power to transfer proceedings. His Honour noted that there were three independent bases for transfer set out in sub-paragraphs (i), (ii), (iii) of paragraph s 5(1)(b) and sub-paragraphs (i) and (ii) require, among other things, that it be "more appropriate" for the proceedings to be determined by the Federal Court. On this point, his Honour concluded that the Federal Court was a no more appropriate forum for determination of the plaintiff's claim than the NSW Supreme Court. Further, his Honour did not think transferring the proceedings would be in the interests of justice as mandated by sub-paragraph (iii), which requires only that it be "in the interests of justice" for the proceedings to be transferred to the Federal Court.

His Honour dismissed the defendant's notice of motion.

CPPIB Credit Investments v Ren **[2018] NSWSC 1568**

Coram: McDougall J

Court: Supreme Court of New South Wales

Date: 18 October 2018

REAL PROPERTY – contract for the sale of land – whether vendor validly forfeited purchaser's deposit – whether purchaser validly terminated contract – whether vendor complied with warranties regarding entitlement to legal and beneficial title to property – correct construction of special conditions denies right of termination – whether vendor terminated the contract for convenience – inability to infer termination by mere routine communication – whether purchaser entitled to relief against forfeiture of deposit – forfeiture of deposit was due to the purchaser's own actions of non-compliance – no entitlement to relief.

Facts

On 10 April 2018, Ms Kong and Mr He entered into a contract for sale regarding a property in Warrawee, NSW (**Contract**). Pursuant to the Contract, Ms Kong sold the subject property to Mr He for $11.5 million. A deposit of $1.15 million was paid.

The circumstances surrounding the Contract were unusual. The Contract was signed by Ms Kong as sole vendor. On the certificate of title to the property, Ms Kong owned the property together with Mr Ren as joint tenants. The reason for this discrepancy was that Mr Ren and Ms Kong were previously married. As part of the divorce court orders were made for Mr Ren to transfer his interest in the property to Ms Kong.

The Contract contained a warranty that Ms Kong was solely entitled to the whole of the legal and beneficial title to the property. It also gave Ms Kong an additional two months to arrange settlement if there was any restriction or impediment to settlement resulting from the discrepancy between the certificate of title and the beneficial ownership.

In the intervening period between the divorce and exchange of contracts for the sale of land, Mr Ren was successfully sued by CPPIB in the sum of $US51.9M. CPPIB obtained a writ for levy of property. This occurred prior to the family law orders that were made on 22 November 2017. On 5 April 2018, the Court made a sequestration order against Mr Ren.

Resorting to the title of the property, the trustee in bankruptcy had formed the view that Mr Ren had an interest in the property as joint tenant. The trustee came to learn of the contract for sale of the property. He appears to have formed the view that Mr Ren had some beneficial interest in the property and that, by virtue of the sequestration order, that interest had vested in him as Mr Ren's trustee.

On 12 June 2018, Mr He's lawyers sent a notice of rescission to Ms Kong's lawyers. Ms Kong's lawyers disputed this notice and re-booked settlement. Eventually, there was a revised settlement date and all parties attended settlement except for Mr He's representatives. At settlement, Ms Kong had everything required to pass title to Mr He.

Following on from Mr He's failure to attend settlement, Ms Kong's lawyers served a notice on Mr He to complete the Contract. The notice stated that in default of settlement, Ms Kong 'will be entitled to terminate the contract'. Ms Kong subsequently terminated the Contract and kept the deposit.

Mr He brought the matter to court, arguing (amongst other things) that the Contract was validly terminated by Mr He, that Ms Kong was in breach of the Title Warranty and also that he was entitled to relief against the forfeiture of the deposit.

Questions for the Court:

1. did the purchaser of land under a contract for sale validly terminate that contract?
2. Did the vendor terminate the contract, in effect "for convenience"?
3. If the answer to each of the first two questions is "no", is the purchaser nonetheless entitled to relief against the forfeiture of his deposit?

Decision

The preliminary issue to be determined was whether there was a breach of the Title Warranty and whether Mr He had a right to terminate the Contract.

The court considered the Title Warranty in its contractual and factual context. When considering the terms of the Contract and the title search attached to it, it was plain that the parties knew that Ms Kong was not the sole registered proprietor. The Contract contained a regime for Ms Kong to overcome impediments and only entitled Mr He to rescind if two months had elapsed. Mr He's termination ignored this regime.

The Court cited the decision in *Bell v Scott*, that a vendor need not have good title at the time of sale, as long as good title can be procured and given at the time of completion. That is subject to the rule that where the vendor neither has title nor the power to compel anyone else to give it, the purchaser may rescind as soon as he or she finds that out. That principle is traced to the decision of Sir John Romilly MR in *Forrer v Nash*(1865) 55 ER 858. The entitlement to rescind is referred to as rescinding out of hand (or brevi manu).

However, that rule is not without qualification. As Finkelstein J recognised in *Valoutin Pty Ltd v Furst*, that if the right of rescission arises, it must be exercised, if it is to be exercised, as soon as the defect is discovered. It will be lost if the purchaser thereafter treats the contract as subsisting. Acting inconsistently with an exercise of the right to rescission will shut the door on rescinding out of hand at some later stage.

Mr He was aware of the defects in Ms Kong's title and the notice given by Mr He's lawyers was a call upon Ms Kong to make good her title (as opposed to a termination of the contract). The court ultimately found that Mr He's purported termination of the Contract was invalid.

The second issue was the forfeiture of the deposit.

The Court considered the nature of the deposit, the terms of the Contract regarding forfeiture of the deposit and the actual circumstances in which the deposit was forfeited.

In this case, Ms Kong, the outgoing mortgagee and the other relevant parties agreed to do what was required to enable settlement to occur and attended settlement with the documents required to transfer the property.

Furthermore, Ms Kong's subsequent notice to complete gave Mr He an opportunity to settle.

The Court reiterated that courts are not easily moved to return a deposit paid as an earnest for performance, and subsequently forfeited in accordance with the express terms of the contract. Relief is only provided where there is an unjust and inequitable consequence of forfeiture of a deposit.

Ultimately, it was found that Mr He was premature in rescinding the contract. He was required to comply with the relevant provisions in the Contract regarding termination and did not do so. Additionally, his actions were inconsistent with seeking the remedy of rescission. As a result of Mr He's failure to complete, Ms Kong suffered a substantial loss in respect of interest accrued on the loan secured by the mortgagee.

Accordingly, Ms Kong was entitled to the deposit paid and the interest accrued on the deposit.

***Croydon Park Apartments Pty Ltd v Wei* [2018] NSWSC 20**

Coram: Rothman J

Court: Supreme Court of NSW

Date: 31 January 2018

> APPEAL – appeal on question of law from NCAT by leave only – grounds untenable – leave refused; LANDLORD AND TENANT – relationship between Retirement Villages Act 1999 and Residential Tenancies Act 2010 discussed.

Facts

Croydon Park Apartments (‘**the Plaintiff**’) sought leave to appeal a decision of an Appeal Panel of the NSW Civil & Administrative Tribunal and sought that those orders and decision be set aside and in their place the reinstatement of the orders made by NCAT at first instance. This case related to service of an ordinary notice can terminate a periodic tenancy governed by the *Retirement Villages Act 1999*(“**the Act**”) if followed by a suit for termination and possession.

On 14 May 2015, the Plaintiff, who was the landlord for the premises at 12/1 Fabos Place, Croydon Park, gave the Wei (‘**the Defendant**’) who was the tenant a notice to vacate **(‘the Notice to Vacate’)**. On 16 May 2015, the Defendant replied advised that she would not give vacant possession.

On 18 August 2015, the Plaintiff served a Notice of Intention to Seek Termination on the defendant, purportedly pursuant to s 131(1) of the Act **(‘the Notice’)**.

On 20 August 2015, the Plaintiff sought an order for possession from NCAT on the basis that the Defendant breached an agreement between the parties. On 18 February 2016 NCAT made orders which terminated the Defendant’s occupancy and provide possession to the Plaintiff.

On 28 July 2016, an NCAT Appeal Panel quashed those orders. The Appeal Panel found that the Notice appeared to assume that there was a pre-existing breach of the terms of the tenancy agreement between the parties. It continued that if such a tenancy could only be determined pursuant the Act, it would be odd that protections provided for in the act could be rendered otiose by the device of serving the Notice to Vacate, which was then breached.

The Appeal Panel concluded that the Act left no room for the application of inconsistent contractual rights, reinforced by s 199 of the Act. Thus, the Appeal Panel concluded the Notice to Vacate, which purported to terminate the tenancy a contract, was invalid, unless it was served in accordance with the Act.

Decision

His Honour cited that the Plaintiff sought an appeal ‘presumably’ under the terms of s 83 of the *Civil and Administrative Tribunal Act 2013*, which provides, *inter alia*, that a party may appeal a decision of an Appeal Panel on a question of law. His Honour noted this provision grants a right to seek leave of a Court to appeal, meaning that section presupposes that something more than simply raising of a question of law is to be considered when granting leave.

Rothman J then considered the relevant sections of the Act, noting that the Act provided a tenant a 'residence right', being the right to occupy a residential premises, other than "a residential tenancy agreement in the form prescribed under the" Tenancy Act that is entered into under Div 5 of Pt 10 or that contains a term to the effect that the Act does not apply to the residential premises." His Honour further noted that Part 9 of the Act dealt with termination of residence contracts and specifically that s 139 of the Act provided that a person must not attempt to recover possession of a residential premises otherwise than in accordance with the Act or other law.

His Honour stated that the Plaintiff submitted there was a complicated relationship between the operation of the Tenancy Act and the Act, but his Honour found that contention to be unfounded. He did so on the basis that there was no exclusion of the terms of the Act under any agreement between the Plaintiff and Defendant, and the residential agreement was not one made under Div 5 of Pt 10 of the Act, meaning the rights of each of the parties are governed by the terms of the Act. Accordingly, any reliance by the Plaintiff on any provisions of the *Residential Tenancy Act 2010* was considered by his Honour to be misconceived.

His Honour also noted that s 134 of the Act permitted an order terminating a residence contract where there has been a breach of a periodic, residential tenancy agreement. However, his Honour noted that section only granted a right to apply to NCAT for an order terminating the residence contract in relation to a resident "who breaches any village contract" (which relevantly included a residence contract). Under that section NCAT is given a discretion as to whether an order terminating the residence contract will be made may only do so in circumstances that "justify termination of the contract".

The Plaintiff argued that the breach relied upon to terminate the residency contract was the Defendant's failure to provide vacant possession when proper notice was given. However, the residence agreement between the parties only required the Defendant to give vacant possession with "the Agreement terminates". However, the relevant residency contract could not terminate until an order is made by NCAT.

Rothman J ultimately concluded that the Plaintiff's appeal raised a question of law (although there was doubt on this point as the Plaintiff's case appeared to relate more to a question of mixed fact and law). However, his Honour refused to grant leave to the Plaintiff to appeal on the basis that the uncontested facts gave rise to only one conclusion, that the residential agreement is a residence contract and governed by the terms of the Act and the alleged "breach" upon which the Plaintiff relied would have rendered the Act inoperable. Further, there was no breach of the tenancy agreement between the parties. Accordingly, leave to appeal was refused.

Desane Properties Pty Ltd v New South Wales [2018] NSWSC 553

Coram: Hammershlag J

Court: Supreme Court of New South Wales

Date: 1 May 2018

> PUBLIC LAW – COMPULSORY ACQUISITION OF LAND – Land Acquisition (Just Terms) Compensation Act 1991, s 15 – Roads Act 1993, ss 177(1) and (2)(b) – validity of proposed acquisition notice –departure from Ministerially approved form – validity of approved form – requirement to state public purpose of acquisition – improper purpose – whether proposed acquisition notice issued for ulterior purpose; HELD proposed acquisition invalid for statutory non-compliance. If otherwise not invalid, it would be invalid because it was issued for improper purposes.

Facts

The RMS issued a Proposed Acquisition Notice (**'PAN'**) pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 ('**Just Terms Act**') to *Desane Properties Pty Ltd* ('**Desane**'). Desane was the registered proprietor of land located at 68-72 Lilyfield Road, Rozelle **('the Property')**. Under the PAN it was stated that if Desane and the RMS could not agree in relation to a sale of the Property within 90 days of issue, the RMS would seek a notice of compulsory acquisition.

In the years prior to the RMS' issuance of the PAN, Desane had lodged development applications to construct a 200 apartment building on the Property which also included retail space, commercial space and a 90 place childcare centre.

The proposed acquisition of the Property was in relation to the construction of the NSW State Government's WestConnex project, specifically Stage 3 of WestConnex. As at the time the PAN was issued in June 2017, that stage of WestConnex was only at a 'Concept Design' phase with no final design. However, in the Concept Design the purpose of the Property was to provide open space and parkland. The PAN offered Desane $21,489,259.00 to acquire the Property.

Desane objected to the validity of the PAN on the basis that the PAN did not accord with the *Just Terms Act*, the proposal upon which the PAN was based was not sufficiently certain and the proposal was 'improper' because it related to open space and green parkland and not a purpose in accordance with the Roads Act. It was also claimed that the RMS breached the Australian Consumer Law by misrepresenting that the Property was required for a public purpose when it was not required at that time.

Decision

Hammershalg J found that the PAN did not accord with the form approved in the *Just Terms Act* and was on that basis invalid. Further, in order to be considered valid, the PAN was required to disclose a 'public purpose' for which the land was being acquired. His Honour noted that the compulsory acquisition of private property required strict identification of a relevant and lawful public purpose. His Honour stated:

> ...there is a clear statutory necessary intendment or implication that when an owner of land is informed by an authority of State of its intention to take it, the notice will state the public purpose for which the land is proposed to be acquired. A prescription by regulation or approval by the Minister of a form which does not make provision for this, will, in a substantial way, not serve the purpose for which the power to prescribe or approve a form is conferred

His Honour found there was no public purpose disclosed in the PAN meaning it was of no legal effect.

His Honour also found that the reason provided by the RMS to acquire the land was improper. His Honour noted that s 177 of the Roads Act provides that the RMS can acquire 'land that forms part of, or adjoins or lies in the vicinity of, other land proposed to be acquired for the purpose of opening, widening or constructing a road or road work.' The RMS submitted that the Property was being acquired because it was situated within the vicinity of another parcel of land upon which the RMS proposed to build a road. Desane on the other hand adduced evidence which suggested the dominant purpose of the acquisition of the Property was to provide greenspace and park land.

His Honour was of the view that the proposed acquisition of the Property was to provide open space and green parkland rather than carrying out road works and did not find that that purpose to have a sufficient connection with the construction of a road to be permitted under the Roads Act. Further, his Honour believed that absent that purpose, the Property would not be subject to the PAN. Therefore, his Honour determined the PAN to be invalid on the basis that the proposed acquisition was improper.

DGF Property Holdings Pty Ltd v Di Federico [2018] NSWSC 344

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 23 March 2018

> REAL PROPERTY – vendor sought rescission of eight off the plan contracts – vendor applied under s 66ZL of the Conveyancing Act 1919 for orders permitting rescission in the absence of purchaser consent – whether right to rescind arose – whether vendor had lost right to rescind by failing to exercise right to rescind at an earlier time – whether court should exercise discretion to permit vendor to exercise contractual right to rescind – whether vendor satisfied the Court that making orders permitting rescission would be just and equitable in all the circumstances

Facts

DGF was a property developer who entered a number of off-the-plan sale contracts with various purchasers prior to the enactment of section 66ZL. Disputes with the previous owner of the property being developed meant that the development was not completed by the sunset date, which ostensibly entitled both parties to rescind the contract. However, s 66ZL of the *Conveyancing Act 1919* (NSW) applied retrospectively which necessitated them applying to the Court to obtain an order to rescind the contracts on the basis that it would be 'just and equitable' to rescind the contracts.

Decision

The purchasers argued the rescissions of their contracts would not be just and equitable on the basis that the developer would be able to capture a significant financial windfall, in the order of around $3.8 million. The purchasers also argued that the developer did not do everything in their power to resolve the disputes with the previous owner meant that they could not rely upon the delay to rescind the relevant contracts.

His Honour considered the following factors to be important considerations in determining whether it is just and equitable to order a rescission: the terms of the contract; whether the vendor acted in bad faith the reasons for the delay; the date on which the subject lots were to be created, whether those lots had increased in value and the impact on the purchasers. His Honour noted that the Court must consider not only the prejudice which may be suffered by the purchaser if a rescission was ordered, but also the prejudice which may accrue to the vendor if they were not allowed to rescind the contract. Therefore, any order making or refusion rescission would only be just and equitable of they were made on terms to be imposed by the Court.

In performing such an exercise, his Honour noted that in this case whilst the developer had not acted efficiently in determining their dispute with the previous owner of the property they did not act unreasonably. Further, Emmett AJA noted the developer's only source of funds were loans from its investors upon which were levied high interest rates. His Honour also considered that, whilst there had been an increase in the price of the properties and the delays were of detriment to most purchasers, the purchasers had the benefit of having more time to pay the price under their respective contracts.

His Honour also reasoned that the purchasers accepted some risk then they contracted that their contracts would be rescinded, and such risk was not on the basis that they had the added protection of s 66ZL as that provision had not been passed into law. Accordingly, his Honour found the purchasers had accepted the risk that, if the property values increased, they may lose the benefit of the increase if the plan was not registered by the sunset date and the developer rescinded the contracts. However, his Honour also found the purchasers were not informed of the possible risks that disputes between the developer and third parties could have on the completion of the development and its completion before the sunset date.

Ultimately, Emmett AJA ordered that it would be just and equitable for the developer to be able to rescind the purchasers' contracts on the undertaking that their lots be re-offered to them at a new price which was to be adjusted by an 'appropriate rate' which was to be agreed between the parties. That rate was to be referable to the losses borne by the purchasers and the developer.

Di Gregorio v Jersey Developments 27 Pty Ltd [2018] NSWSC 966

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 19 June 2018

> PRACTICE AND PROCEDURE – power to set aside judgment given in absence of party –judgment entered pursuant to terms of consent orders – consent orders provided for judgment to be entered for the amount of the plaintiffs' claim upon default in the making of payments – whether provision a penalty – whether there was an implied acknowledgment of existing debt – judgment set aside

Facts

The second defendant sought an order pursuant to rule 36.16(2)(b) of the UCPR to set aside a judgement for the sum of $754,700.61 entered against the defendants, in their absence, on 14 March 2018. The order was made in accordance with a consent order made on 24 May 2017 **('the Consent Order')**.

The Consent Order provided that the plaintiff and defendants agreed to settle the proceedings on the basis that the defendants agreed to pay the plaintiff, in total, $500,000 up until 1 August 2018. In the event this payment plan was adhered to, the proceedings would be dismissed, and in the event it was not the plaintiffs were at liberty to file an affidavit as to quantum and have judgement entered for a sum being $769,762.61 (plus interest and costs) less sums received pursuant to the Consent Orders.

The defendants did not comply with their obligations and only paid $15,000 to the plaintiff and the plaintiff entered judgement for an amount considered by the Consent Orders. The second defendant sought to argue that the Consent Orders were unenforceable as a penalty on the basis that it operated upon default of the obligations to make payments totalling $250,000 to impose a liability in a vastly greater amount. It was submitted that this is not a case where there was a debt owed to the plaintiffs or any acknowledgment of the existence of a debt. Accordingly, it was not a case where a creditor agrees to accept a lesser sum in full discharge of a debt upon certain conditions, but stipulates that if the conditions are not met, the creditor will be entitled to recover the whole amount of the debt

Decision

His Honour noted that the law of penalties distinguishes between a forbearance in relation to an existing debt and promises which compel performance and that the Consent Orders were designed to compel performance of obligations and was thus prima facie a penalty. His Honour did not think it to be a genuine pre-estimate of liquidated damages for any loss that would be suffered by the plaintiffs by reason of any breaches of the defendant's payment obligations. Accordingly, his Honour found that, subject to there being an implied acknowledgement by the defendants that the amount referred to in the Consent Orders was a debt owed to the plaintiff, it would be a penalty.

In relation to whether there was an acknowledgement by the defendants of there being a debt owing, it was noted that the Consent Orders sought to settle a defended claim for damages. Accordingly, there was no debt which was either implicitly or explicitly acknowledged.

Therefore, Darke J concluded that the judgement entered on 14 March 2018 be set aside with costs.

***Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd (Admin Appt) & Anor* [2018] NSWSC 1895**

Coram: Black J

Court: Supreme Court of New South Wales

Date: 10 December 2018

> REAL PROPERTY – requirements of s 129 of the Conveyancing Act 1919 (NSW) – where lease required lessee to obtain all relevant development consents or approvals for specified use of land – where lessor issued notice to remedy breach of lease – where lessor issued notice of termination of lease 14 days after notice to remedy breach was issued – whether time given to remedy breach of lease was reasonable in the circumstances – whether requirements of s 129 of the Conveyancing Act have been satisfied.

Facts

An Agreement to Lease was made on or about 19 December 2016 between Fearndale, Drama Unit and the Messrs Harpley ("Agreement to Lease"). The Agreement contemplated that Fearndale would terminate the existing lease of a third party, Epic Mining Pty Ltd ("Epic"), over the land and within two months, grant Drama Unit a lease, and recorded that Fearndale and Drama Unit had agreed that the Messrs Harpley would be given rights of residence on the land.

Clause 2(a) of the Agreement to Lease recorded that the parties were then unable to enter a lease of the land because Fearndale did not have possession of it and that they had entered an agreement "in the expectation that possession will be available by the commencement date of the lease".

Clause 2(b) required Fearndale to "do all things required to obtain possession of the demised premises" by the commencement date.

Fearndale ultimately did not obtain possession by that date, but did obtain possession subsequently.

By a further deed dated 4 May 2017, several parties, including Fearndale, the Messrs Harpley and Drama Unit, recited that the Messrs Harpley had sold the land to Fearndale, inter alia, upon an express agreement that Fearndale acknowledged, agreed and granted to them the right to occupy the residential premises erected upon the land together with the curtilage around the land, which right of occupation was for life and was recognised in cl 32 of a registered lease with Epic, which was then conducting mining operations on the land, which was imported into that deed as though it was set out in full.

That document also recited that Epic had acknowledged that right of occupation and that Drama Unit proposed to take a lease of the land if Epic's lease was brought to an end, and that Drama Unit also acknowledged and accepted the Messrs Harpley's right of occupation with the effect that the land which was the subject of the right of occupation was excluded from the land leased by Drama Unit on the same terms as set out in cl 32 of Epic's lease.

A secured creditor of Fearndale ("CCF") subsequently appointed receivers and managers to Fearndale in September 2017 and then also appointed, in its capacity as a secured creditor, voluntary administrators to Fearndale in March 2018. Those voluntary administrators were subsequently replaced by the present voluntary administrator, Mr Cook. In June 2018, Epic acknowledged that its lease of the land had been terminated.

On 29 June 2018, before Drama Unit took possession of the land, Fearndale, then under the control of its voluntary administrator, served notices to remedy several breaches of the lease on Drama Unit, including a notice to remedy a breach of the requirement under cl 7.3(4)(b) of the lease that Drama Unit, at its cost and prior to entering into the lease, obtain and comply with the consents and approvals of any authority which may be necessary or appropriate for its business. That notice was directed to a requirement to obtain those consents and approvals prior to the entry into the lease and, in that respect, properly reflected the requirements of that clause. Drama Unit had not obtained any authority to conduct mining operations on the land under the *Mining Act* 1992 (NSW) before it entered into the lease. That notice allowed Drama Unit 14 days to remedy that breach.

Subsequently, on 13 July 2018, Fearndale served two notices of termination of the lease;

- the first for non-payment of rent; and
- the second on the basis that Drama Unit had not, at its own cost and prior to the entry into the lease, obtained the relevant consents or approval of any authority which may be necessary or appropriate for the business, within the time to remedy set out in the earlier notice.

Only the notice of termination based on the failure to obtain those approvals and consents was relied upon by Ferndale at trial. On 16 July 2018, Fearndale served further termination notices in substantially the same terms.

Consideration

Whether the lease is valid and enforceable

Drama Unit sought a declaration that the lease was valid and enforceable. His Honour was not prepared to make a declaration in so wide a form where a voluntary administrator had been appointed to Fearndale noting the widesweeping and possibly unforeseen consequences such a declaration could have in the ongoing administration of the company.

His Honour was instead minded to determine the specific issues that were raised in these proceedings. Such an approach would bind Fearndale and Drama Unit without foreclosing the possibility that other issues might arise from further investigations that might ultimately need to be determined.

First, a question arises as to the correct version of the lease, where there are two versions which are identical other than for the first page. In view of the evidence, His Honour found that the first version of the lease was executed by Drama Unit. The corollary of this finding was that the first version was the correct version of the lease.

A second issue, was whether Fearndale validly terminated the lease in July 2018, after giving the notice to remedy the alleged breach of it. Drama Unit submits that that notice was invalid for several reasons, by reference to the terms of the lease and s 129 of the *Conveyancing Act* 1919 (NSW).

Decision

His Honour found that Drama Unit succeeded in arguing that the notice of termination was invalid on only one of the several grounds it advanced.

His Honour commenced his analysis by approaching the question of construction of the relevant clauses of the Lease by reference to well-established principles of construction. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 at [40], a unanimous High Court observed that:

> "This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." [Citations omitted]

That approach was confirmed in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 306 ALR 25:

> "[T]his court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'." [citations omitted]

The High Court also reviewed the principles of construction in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 325 ALR 188. His Honour commenced by giving primacy to the language used by the parties noting that the Court may also have regard to objective surrounding circumstances. I have drawn on my judgment in *Vanguard Financial Planners Pty Ltd v Ale* [2018] NSWSC 314 for this summary of these principles.

Drama Unit argued that there was no breach of cl 7.3(4)(b) of the lease which is found under a heading "No Warranty As to Use" and the clause did not impose any obligation on Drama Unit. Fearndale argued that that clause, in effect, created an obligation at the point of entry into the lease, that Drama Unit had secured a particular position before entering into that lease, namely that it was compliant with the relevant Laws and Requirements and had obtained and complied with the relevant consents and approvals.

His Honour found that, on its proper construction, cl 7.3(4)(b) did impose the specified obligations on Drama Unit, which attach at the point the contract comes into existence, to have done the specified things before it was formed; namely, to have complied with those Laws and Requirements and obtained those consents and approval before the lease took effect, or otherwise Drama Unit would be in breach of the lease at the moment it took effect.

His Honour dispensed with a number of arguments relating to the operation of the clause.

Drama Unit argued, and His Honour accepted, that s 129 of the *Conveyancing Act* required that a relevant notice identify the breach with particularity and, by reference to the case law, fairly inform the lessee what is required to remedy it.

That section provides that a right of re-entry or forfeiture under a proviso or stipulation in a lease, for breach of a covenant, condition or agreement in a lease, is not enforceable by action or otherwise unless and until the lessor serves a notice with specified contents, and the lessee "fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy" and provide compensation, where required, to the satisfaction of the lessor.

The requirements of such a notice include that it specify the particular breach complained of and, if the breach is capable of remedy, require the lessee to remedy the breach.

His Honour accepted that the relevant breach was capable of remedy, and the notice must require a lessee to remedy the breach, as it did. This was so because, even if the relevant authorities had not been obtained prior to obtaining the lease, then they could be obtained at a later stage and Fearndale could be compensated for any loss which it had suffered.

The object of a notice under s 129 of the *Conveyancing Act* is to bring to the lessee's attention to matters which have not been complied with and to allow it the opportunity to remedy the breach: *Ex Parte Dally-Watkins; Re Wilson* (1955) 72 WN (NSW) 454 at 456; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268; *Casquash Pty Ltd v NSW Squash Ltd (No 2)* [2012] NSWSC 522.

In *Macquarie International Health Clinic Pty Ltd*, Handley JA observed that such a notice should alert the lessee "to the particular breaches on which the lessor proposes to rely and what the lessor requires in order to bring about a position where termination would not occur". His Honour also observed (at [323]) that such a notice must:

> "describe the particular acts or omissions constituting the alleged breach; and the notice must indicate the acts of the tenant which the landlord would consider sufficient for the lease to continue, and upon completion of which the landlord would abandon its claim to forfeit. The standard of particulars or degree of specificity depends upon the circumstances, including the nature of the covenant alleged to be breached, the tenant's actual or constructive knowledge, and whether the landlord claims reasonable compensation."

His Honour held that the notice complied with the requirements to identify the breach with particularity by adopting terms that had a plain and clear meaning under the *Mining Act*.

In particular, the notice of breach of covenant indicated that Fearndale required Drama Unit to remedy the relevant breach by on or before 8pm, 13 July 2018 by obtaining an “in force authorisation” under the *Mining Act*. The term “in force” has a clear meaning under the *Mining Act*. The term “authorisation” is also defined in the *Mining Act*, as including specific matters. His Honour held that it was not for Fearndale to later advise what steps were necessary for Drama Unit to procure authorisation and the particular form of authorisation that was required under the Act.

Drama Unit further submitted that the 14 days’ notice given under the notice to remedy was not “reasonable time” for it to remedy the breach. Section 129 of the *Conveyancing Act* provides that the right of re-entry or forfeiture is not enforceable unless, relevantly, the lessee fails within a reasonable time to remedy the breach.

Here, that period is defined by events, being the period of about 14 days between the issue of notice to remedy the breach and the termination of the lease, or that period plus an additional three days in respect of the second notice to remedy their relevant breaches.

Black J had regard to the discussion of the concept of reasonable time in this context, in *Casquash Pty Ltd v NSW Squash Ltd (No 2)*. The question of what is a reasonable time will depend on the relevant circumstances. Given the absence of urgency, His Honour held that the time given to Drama Unit to cure the breach was not reasonable in the circumstances. His Honour noted that;

- there was nothing in the circumstances that required so short a time, at least when Drama Unit had not, so far as the evidence went, carried through any threat to enter into occupation of the land; and
- where the voluntary administrator’s own evidence is that he had properly taken steps to secure the land.

Although vacant possession of the land would undoubtedly assist a sale of the land, there was no suggestion that such a sale was imminent, or required so short a period to be allowed to remedy the breach.

By contrast with the position in *Casquash Pty Ltd v NSW Squash Ltd (No 2)* the instant case was not one where it could be concluded that Drama Unit would not or could not remedy the breach relied on, had a longer period been allowed for it to do so.

It seems to me that the requirements of s 129 of the *Conveyancing Act* have therefore not been satisfied and, as at the date of the termination notice, Drama Unit had not failed within a reasonable time to remedy the breach, because the termination occurred, or purportedly occurred, before it had been allowed a reasonable time to do so. The right of re-entry or forfeiture is therefore not enforceable by Fearndale for the purposes of s 129 of the *Conveyancing Act*, and the termination of the lease is ineffective on that basis alone.

Black J noted that there would be nothing to prevent the voluntary administrator from issuing a further notice that allows a reasonable time to cure the breach, and that time would no doubt have to be judged in circumstances that Drama Unit has had ample notice of the need for the relevant authorisations, not least through these proceedings.

Drama Unit's claims to a mandatory injunction or specific performance

Given the gist of the judgment, Black J declined to address a number of arguments advanced by Drama Unit. Further, the Court refused to order a mandatory injunction or specific performance on a number of bases. The principles of relief against forfeiture were not apt to be considered given the factual findings made by His Honour.

His Honour ordered for the application for any order for possession in favour of Drama Unit ought to be stood over pending steps that were to be taken to determine outstanding rent payable by Drama Unit.

Given that the termination was invalid, the Court held that Fearndale's cross claim that sought to have caveats lodged by Drama Unit withdrawn should be dismissed.

Eager v North Sydney Retirement Trust [2018] NSWCATAP 50

Coram: P Durack SC, A Boxall

Court: New South Wales Civil and Administrative Tribunal Appeal Panel

Date: 28 February 2018

> APPEAL – summary dismissal – leave to appeal - provision of audited accounts and proposed annual budgets complying with the Retirement Villages Act 1999 – new evidence

Facts

Eager, the Appellant, brought an appeal from an NCAT decision which summarily dismissed a substantial amount of his claim. In an application lodged on 29 June 2016, the Appellant sought orders that the Respondent provide, pursuant to the *Retirement Villages Act 1999* **('the Act')**, audited accounts to the Respondent for the James Milson Retirement Village **('the Retirement Village')** where the Applicant was a resident, an annual budget for the Retirement Village for the years ending 30 June 2016 and 30 June 2017. The Appellant claimed that the documents sought be provided in compliance with Part 7 of the Act. The Appellant's complaint was that the documents sought were provided at the relevant times, but they were not in compliance with the Act.

NCAT, at first instance, dismissed the Appellant's claim on the basis that the accounts sought, subject to minor variations, complied with the Act. NCAT also found that the non-disclosure of a particular charge created by s 182B of the Act in the 2015 annual accounts was of little more than historic interest given that the financial year had long since passed and any charges would have changed. NCAT also rejected the Appellants claims in relation to the proposal annual budgets for the years ended 30 June 2016 and 30 June 2017) because the submission was based upon misunderstandings that s 112 of the Act dealt with "approved" annual budgets and that the budgets needed to reflect the actual increase in recurrent charges for the forthcoming year to which the operator was contractually entitled.

Against this, the Appellant advanced three grounds of appeal: the first being that NCAT at first instance erred in law in failing to apply s 114(8)(b) and ss 104(1)(a) and 105 of the Act and in failing to decide that proposed annual budgets for each of 2015-16 and 2016-17 financial years (the subject of Orders 3 and 4) had not become "approved annual budgets"; second that NCAT at first instance erred in law in deciding nothing would be served by looking further into the request for 2016 and 2017 annual statements; and third that the Tribunal erred in law in comparing the layout of the proposed annual budget for 2015-6 with the format of the annual accounts for the 2014-5 financial year.

Decision

The Appellant required leave to appeal given the summary dismissal of his claims was an 'interlocutory decision'. The Appeal Panel stated that it is ordinarily appropriate to grant leave to appeal only in matters that involve: an issue of principle; questions of public importance; a reasonably clear injustice going beyond merely what is arguable; a factual error that was unreasonably arrived at and clearly mistaken; or the Tribunal undertook a fact finding process in such an unorthodox manner that it was likely to produce an unfair result.

The Appeal Tribunal concluded that it was not clear that the claim made by the Appellant concerning the non-disclosure of the charge in the audited accounts raised no real question to be tried because it lacked utility and NCAT ought not have summarily dismissed this claim and the dismissal amounted to an injustice. Further, the Appeal Panel found that NCAT at first instance erred in dismissing the claim on the ground of utility and concluded that

The Appeal Panel did not draw the same conclusions about the Appellant's claims in respect of the proposed annual budgets. The substance of the Appellant's argument was that the proposed annual budgets did not comply with s 112 of the Act and the associated Regulation 17 because it could be demonstrated that a correct calculation of the increase in recurrent charges payable by residents in the forthcoming year, in accordance with the fixed formula in the village contracts, would reveal a different figure than that set out in the budget. The Appellant therefore claimed that the notices accompanying the proposed budgets, which were required to be given, incorrectly stated that the recurrent charges had been increased in accordance with the fixed formula and that, accordingly, the residents were taken to have consented to the expenditure.

The Appeal Panel stated that the statutory requirements concerning recurrent charges do not and could not require the figure for those charges to reflect the actual figures that the operate will receive because it is a prediction.

In relation to a fourth ground of appeal, the Appellant relied upon new evidence which arose following NCAT's initial decision, with that new evidence being a part of a letter from the village operator's solicitors regarding reconciliation of recurrent charges and an agreement relating to a settlement of a part of the Appellant's claim. The Appeal Panel stated that there was a 'considerable degree of mystery' about the new evidence relating to deferred management fees and that the new evidence shed some light on that issue. Accordingly, leave was granted to the Appellant to appeal against the dismissal of his claim that audited accounts prepared in accordance with the Act be provided to the Respondent as there was a triable issue to be determined.

EB 9 & 10 Pty Ltd v The Owners SP 934 **[2018] NSWSC 464**

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 12 April 2018

> LAND LAW — Strata title — Common property — Whether owners corporation could develop common property in a way which would impede owner's reasonable access to lot used as car space — Strata Schemes Development Act 2015 (NSW) s 28 — Strata Schemes Management Act 2015 (NSW) ss 106 and 153
>
> LAND LAW — Declarations — Utility — Whether sufficiently defined dispute

Facts

EB 9 &10 Pty Ltd **('the plaintiff'),** was the registered proprietor of Lot 89, a car space, in an apartment block comprising a strata plan in which the defendant was the owners corporation. Lot 89's southern boundary divided it from an area of common property ('**the Area'**). To use Lot 89, a driver had to use a part of the Area.

The defendant wished to use the Area and build a wall parallel to the boundary of Lot 89 **('the Building Proposal').** There was a second proposal which involved building a garden on the Area with a distance of 300 mm between the boundary of Lot 89 and the proposed garden **('the Garden Proposal')**.

The plaintiff sought a declaration that they were entitled to access the Area for the purposes of parking vehicles in its Lot 89 being a car park space in Strata Plan 934 and a declaration that the defendant was not entitled to restrict or impede the plaintiff's access to and use of its Lot 89. The plaintiff argued that pursuant to s 28 of the *Strata Schemes Development Act 2015* (NSW) (the "*Development Act*"), the common property of a strata scheme is managed by an owners corporation for the benefit of the lot owners, who are seen as equitable tenants in common in the property. Further, the plaintiff argued that given an owners corporation can be compared to a trustee, it follows that the owners corporation holds the common property for the benefit of all owners and cannot derogate from its fiduciary duties by acting in any way contrary to its role as agent or trustee or fiduciary, for example, by excluding the plaintiff from the Area. The plaintiff also asserted that lot owners have "implied rights" over the common property to use it in an appropriate way and that the owners corporation cannot use its power of management and control to override the property right that a lot owner has in the common property. Finally, the plaintiff argued the fundamental use of common property is to provide access to lots and the right of reasonable use cannot be taken away.

The defendant argued each of the Building Proposal and the Garden Proposal represented an impermissible incursion on the plaintiff's right of access over the Area to get a car into and out of Lot 89. The defendant submitted the declarations should not be made for three reasons: there was no controversy to be quelled and, if such a controversy did arise, the plaintiff would have ample opportunity to assert its rights before NCAT; the plaintiff was not entitled to any such declarations because it was not entitled to assert a right of a particular kind over a particular piece of common property; and the Court ought not make bare declarations which would simply become invitations to return to Court to argue about their application.

Decision

His Honour accepted the plaintiff's submission that it is inherent in the Management Act that the purpose of common property is to provide access to their lots. His Honour also stated, in considering the utility of the declarations sought by the plaintiffs, that there was a sufficient controversy to be quelled between the parties, or at least would quell a future dispute. Kunc J cited the future prosecution of the Building Proposal or Garden Proposal as being that controversy.

In any event, his Honour was not persuaded by the submissions put by the defendant. First, his Honour concluded that, in relation to the submissions that the Court should take into account that when a specific proposal was to be acted upon by the defendant, the plaintiff would have the 'full panoply of rights' afforded to it in NCAT, that NCAT does not have the power to make declarations. In relation to the defendant's submission that the declarations sought by the plaintiff could not be made because they would fetter other rights conferred on the defendant under the *Management Act*, such as to sell or lease the Area, Kunc J stated that submission demonstrated the utility of the relief sought by the plaintiff. Also, his Honour did not accept that the proposed declarations were an impermissible claim by the plaintiff to a particular right to a particular part of the common property. His Honour instead thought the declarations were the legal expression of the prohibition on the other co-owners from excluding a co-owner from a part of the common property which co-owner must use to gain access to its lot. Finally, his Honour stated that there is no absolute bar to the Court making a "mere" declaration of rights.

Finally, his Honour had to grapple with the terms of the declaration, the extent to which reasonable access to Lot 89 requires use of the Area and second, how that should be reflected in the terms of any declaration. Ultimately his Honour decided that plaintiff's rights must be determined by reference to the intended purpose of Lot 89 as a car space only and accordingly, it is appropriate to protect the plaintiff's entitlement to use the Area to be able to park a car in Lot 89 by a declaration which refers to a strip that intrudes 870 millimetres into the Area for the entire length of the boundary between the Area and Lot 89. The reason for this was to prefer the simplicity and certainty of such delineation over the doubt

***Edwards v Lisker Pty Ltd* [2018] NSWSC 81**

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 8 February 2018

> COSTS – application for extension of operation of caveat – application made following service of lapsing notice by first defendant – order for extension made by consent – whether appropriate to order first defendant to pay plaintiff's costs.

Facts

On 18 May 2017 the plaintiff entered into a contract with the second defendant to purchase an "off the plan" unit in Manly. On 9 August 2017 the plaintiff lodged a caveat on the title to the relevant land. The first defendant held a registered mortgage over the land.

On 3 October 2017 the first defendant served a lapsing notice upon the plaintiff in relation to the plaintiff's caveat.

The plaintiff commenced proceedings by Summons on 27 October 2017. The plaintiff sought interlocutory relief including an order extending the operation of the caveat, and final relief including an order for specific performance of the purchase contract.

The Court made orders by consent on 27 October 2017 extending the operation of the caveat until further order. The proceedings were adjourned to 8 December 2017. On that occasion, the Court was informed that the proceedings had resolved, save for the question of costs.

The plaintiff sought an order that the first defendant pay his costs of the application to extend the caveat. It was submitted that the plaintiff was forced by the first defendant's conduct, in serving the lapsing notice, to commence the proceedings in order to protect his equitable interest in the land. It was further submitted that the lapsing notice was issued "prematurely and without any proper basis".

The first defendant submitted that there should be no order as to costs as there was no adjudication on the merits, and the first defendant did not act unreasonably. The first defendant principally relied on the following factors:

1. that both the first defendant and the second defendant consented to the extension of the caveat prior to the commencement of the proceedings;

2. that a further caveat could have been lodged with the consent of the second defendant, as envisaged by s 74O(2)(b) of the *Real Property Act 1900* (NSW); and

3. that the plaintiff's contract for purchase had been superseded by a later contract entered into by the plaintiff and others with the second defendant, so the plaintiff could have lodged a caveat based on that contract which would have the same effect as the first caveat.

The first defendant submitted that had the plaintiff lodged a further caveat, or a caveat based on the later contract, the proceedings would not have been necessary.

In reply, the plaintiff submitted that the proceedings remained necessary in circumstances where the second defendant declined (on 27 October 2017) to give its consent to a further caveat. Further, it was submitted that lodging a caveat based on the later contract would do nothing to protect the plaintiff's interest under the earlier contract, which interest would exist for so long as the later contract remained incomplete.

Decision

The caveat was lodged prior to entry into the later contract. The making of that contract did not detract from the interest the subject of the caveat. His Honour found that at the time of the service of the lapsing notice there was not a sound basis to challenge the interest asserted by the plaintiff in his caveat.

The effect of service of the lapsing notice was that unless the plaintiff obtained an order of the Court extending the operation of the caveat, it would lapse on 31 October 2017. Lodgement of a further caveat with the consent of the second defendant was an alternative to the obtaining of a Court order, but that consent was not forthcoming.

It was noted by the Court that the first defendant had effectively indicated its consent on 23 October 2017 when it sought to withdraw the lapsing notice. However, the first defendant was advised by Land Registry Services that lapsing notices cannot be withdrawn. Accordingly, the plaintiff was still required to obtain an order from the Court so as to maintain the protection afforded by his caveat.

Darke J held that the institution of proceedings for that purpose was therefore well justified in the circumstances. It would not be reasonable to expect the plaintiff to allow the caveat to lapse, even allowing that there was a prospect that the plaintiff's interest would fall away if the later contract proceeded to completion. Neither would it be reasonable to expect the plaintiff to rely instead on a caveat based on that later contract, even allowing that the existence of such a caveat might afford some practical protection of the plaintiff's position.

Accordingly, the Court's view was that it was appropriate, in exercising the Court's discretion under s 98 of the *Civil Procedure Act 2005* (NSW), to order that the first defendant pay the plaintiff's costs of his application to extend the operation of the caveat. Even though there has been no determination on the merits in relation to the plaintiff's claim, the evidence (including of the first defendant's attempt to withdraw the lapsing notice) indicates that the plaintiff's claim was substantial (see s 74K(2) of the *Real Property Act*). There is no suggestion of a need for the caveat to be withdrawn on balance of convenience grounds. It seems to me that it was unreasonable of the first defendant to attempt, when it did, to have the caveat lapse, and such conduct effectively brought about the need to seek an order from the Court.

The Court ordered that the plaintiff's costs of his application to extend the operation of the caveat be paid by the first defendant. The Court further ordered that the first defendant pay the plaintiff's costs of the application.

Eddy Gross v Graham Leslie Greer & Anor [2018] NSWSC 1572

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 17 October 2018

REAL PROPERTY - easements – right of carriageway – where land is subdivided but the deposited plans are not updated to reflect the benefit and burden of the right of carriageway in respect of the newly created lots – whether one of the newly created lots is entitled to the benefit of a right of carriageway – whether there is an easement pursuant to the requirements of s 88(1) of the Conveyancing Act 1919 (NSW) – whether extrinsic evidence is relevant to construing the instrument said to give rise to the easement – whether the transfer of a small portion of neighbouring land, which had the benefit of the easement, created an easement in favour of the transferee – whether there was an equitable easement – proprietary estoppel.

Facts

This case involved adjoining properties in Coffs Harbour – one known as Lot 21 (also known as 266 Shepherd's Lane) and the other known as Lot 63 (also known as 266A Shepherd's Lane). Eddy Gross, owns Lot 21 and Mr and Mrs Greer own Lot 63. The Plaintiff purchased Lot 21 in 2002 and the Defendants purchased Lot 63 in 2006.

Gross claimed that Lot 63 was burdened and Lot 21 benefited by an easement approximately 20 metres wide being a Right of Carriageway. The contention advanced by Gross was that without such a right, he was not able to access Lot 21 other than by dint of favours granted to him by owners of Lot 20 that adjoined his property to the east. The Greers resisted this claim.

Argument

Gross pointed to the fact that the ROC referred to in DP239525 and M243988 has never been released, varied or modified by any subsequent DP or memorandum. He also pointed out that if an easement is registered on the servient title, it is indefeasible.

Reliance was placed on the decisions of *Gallagher v Rainbow & Ors* (1994) 179 CLR 624 ("*Gallagher*") and *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528 ("*Westfield*").

Section 88(1) of the *Conveyancing Act* requires that the instrument creating the easement must clearly indicate:

1. the land benefited;
2. the land burdened; and
3. the persons whose consent is required to release, vary, or modify the easement.

In dealing with whether reference in an instrument to another document which did comply with s 88(1) was sufficient, His Honour proceeded on the basis that reference to another identified DP or memorandum of dealing which clearly indicates the land benefited and land burdened, in accordance with s 88(1) of the *Conveyancing Act*, is sufficient.

Even when adopting that approach, however, the difficulty for Gross was that, Lots 21 and 63 are not mentioned in either the DP or the memorandum of dealing creating the ROC because, at the time of the lodgement, those Lots had not been created. Neither DP239525 nor any of the other DPs provide that Lot 62 (or Lot 63) is burdened with an easement in favour of Lot 61 (or Lot 21).

What was left uncertain was whether Lot 21 was to benefit from the ROC. His Honour cited *Gale on Easements*:

> "The dominant tenement must exist and must be identified before there can be a grant, or a contract for the grant, of an easement sufficient to create an interest in land binding successors in title to the servient land."

The Easement did not comply with section 88(1) of the Conveyancing Act 1919. The extrinsic material sought to be relied upon in construing the relevant instrument was inadmissible. In order for a new benefit and burden to be granted and imposed, a new instrument creating an easement between the two new lots was required.

Gross argued that, by dint of a transfer in title, he was granted the Right to use the ROC and to do so from any point in his property. His Honour found that there is no instrument which records the benefiting of Lot 21 by the ROC or the burdening of Lot 63 as a consequence of the transfer, with the consequence that the transfer (if it was an instrument creating an easement in favour of Lot 21) similarly did not meet the requirements of s 88(1) of the *Conveyancing Act*. Section 51 of the Real Property Act did not assist because the previous owner of Lot 21 did not have the benefit of an easement and accordingly the assignment did not create such an interest in the Plaintiff or pass with the land.

Gross argued that, if he did not have the benefit of the ROC by reason of the Register that the Court should find that the Greers were estopped from asserting that Gross could not use the ROC because he had been doing so since 2006.

His Honour held that the estoppel claim must fail for the following reasons;

1. Gross gave no evidence that it was the Greers' representation or silence that led him to believe that he had a right to use the ROC.
2. Gross gave no evidence of having purchased Lot 21 or having expended money on Lot 21 or the ROC because he was led to believe, or encouraged, by the Greers that Lot 21 had the benefit of the ROC.

3. Gross failed to establish that, between 2006 and 2017, the Greers knew that their own rights in relation to the ROC were inconsistent with the rights claimed by the Gross.

Decision

His Honour held that Gross had failed to establish a right to use the Right of Carriageway.

Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd [2018] NSWSC 528

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 24 May 2018

LAND LAW - Conveyancing - Contract for sale - defendant/vendor alleges contract novated from second plaintiff (the original purchaser) to first plaintiff (the alleged new purchaser) - novation contested by plaintiffs - Notice of Termination issued by vendor to the first plaintiff - whether termination effective - first plaintiff initially sought declaration that the contract for sale was on foot and specific performance claim for a declaration and specific performance later abandoned - plaintiffs seek return of deposit in the alternative - cross claim by vendor seeking to retain deposit - whether vendor entitled to retain deposit under *Conveyancing Act 1919*, s 55(2A).

Facts

On 18 March 2016 the defendant, Park Cho Pty Ltd ("Park Cho"), contracted as vendor to sell commercial real estate, a motel and restaurant, on the Pacific Highway at Belmont ("The Belmont property") to the second plaintiff, Mr De Fu Zhang ("Mr Zhang") as purchaser. The contract for sale provided for the payment of consideration of $3,088,000 and a 10% deposit of $308,800.

Park Cho claims that this contract for sale was novated to the first plaintiff, Fu Tian Fortune Pty Ltd ("Fortune"), which then assumed the obligations under it as purchaser. Fortune disputes that a novation occurred and says that Mr Zhang remains the purchaser.

On 31 May 2016 Park Cho gave Fortune a form of Notice of Termination, which purported to terminate the contract, alleging default by Fortune in failing to complete the contract for sale. The Notice of Termination also declared that Park Cho would retain the deposit paid under the contract.

After Park Cho's purported termination of the contract, Fortune and Mr Zhang commenced these proceedings against Park Cho in July 2017 seeking a declaration that the contract for sale remained on foot and seeking its specific performance. Park Cho defended the claim for specific performance on the basis that it had lawfully terminated the contract for sale. Park Cho cross claimed, seeking a declaration it had lawfully terminated the contract and that it was now entitled to retain the deposit.

Park Cho decided to resell the Belmont property before trial. The proceedings were ultimately reduced to a contest as to:

- who was the purchaser (which turned upon whether the contract for sale had been novated);
- whether the purchaser had breached the contract for sale by not completing and was liable in damages to the vendor;
- and whether Park Cho was entitled to retain the deposit, or whether Fortune was entitled to its return.

Legal Principles

Relief against forfeiture and s55(2A) of the Conveyancing Act

The principal bases upon which the plaintiffs, Fortune and Mr Zhang, sought return of the deposit were *Conveyancing Act 1919*, s 55(2A) and the principles of relief against forfeiture.

The Court noted *Conveyancing Act*, s 55(2A) jurisdiction has statutory rather than purely equitable origins. But its discretionary character in relation to the return of deposits makes s 55(2A) at least akin to the grant of equitable relief against forfeiture. The jurisdiction is wider than jurisdiction that might be exercised only if unconscionable conduct is established: courts are obliged to consider generally the conduct of the parties, especially the applicant, the gravity of the matters in question, and the amounts at stake: *Schindler v Pigault* (1975) 30 P & CR 328 ("*Schindler v Pigault*") at 336 – 337.

The following propositions of law about Conveyancing Act, s 55(2A) can be stated thusly;

- The subsection confers a wide discretion upon the Court
- The subsection was designed to provide relief to a purchaser against an unjust and inequitable consequence of forfeiture of the deposit
- The vendor who forfeits the deposit in strict enforcement of the vendor's legal rights is not to be deprived of it under the subsection unless it is unjust and inequitable to permit the vendor to retain the deposit.
- The second part of the subsection are not limited to cases where the person claiming the return of the deposit would have a discretionary defence to a suit for specific performance. The existence of such a defence is a material consideration.
- It is important to consider the vendor has validly forfeited the deposit at law but the court may nevertheless order the return of the deposit.

Where a purchaser is otherwise entitled at general law to relief against the forfeiture of the deposit, *Conveyancing Act*, s 55(2A) is not applicable: *Saunders v Leonardi* (1976) 1 BPR 97,042; [1976] ACLD 755. An order under *Conveyancing Act*, s 55(2A) may be less advantageous to the purchaser than if the purchaser succeeded at general law. For example, in the exercise of the statutory discretion, terms as to costs, or other terms, can be imposed upon the successful purchaser: *Schindler v Pigault*.

A claim for relief against forfeiture calls attention to the forfeiture and how it occurred, its effects on the propriety of allowing it to stand, as distinct from the stipulation for forfeiture itself. The classic bases for equity's intervention to relieve against forfeiture are fraud, accident, mistake and surprise.

Novation

The plaintiffs alleged that Park Cho issued its 4 May 2016 Notice to Complete and its 31 May 2016 Notice of Termination to the wrong party, Fortune. The contract for sale as exchanged on 18 March 2016 named Mr Zhang as the purchaser. The plaintiffs contend that the identity of the purchaser never changed.

But Park Cho contends that by a process that satisfied all the requirements for a novation, Park Cho, Mr Zhang and Fortune all agreed before 4 May 2016 to substitute Fortune as the purchaser in place of Mr Zhang.

It was accepted on all sides that no formal document discharged Mr Zhang from his liability as purchaser under the contract for sale, discharged the old contract for sale, and remade a contract for sale as between Park Cho and Fortune. But the issue for trial rather was whether given the mutual conduct of the parties the Court should infer that a novation occurred. Park Cho contended that the inference of a novation should be drawn in all the circumstances and Fortune and Mr Zhang contended that it should not.

Park Cho was incapable of succeeding in the proceedings without succeeding on this issue.

Reliance was placed on correspondence and communications between the parties. Insofar as the correspondence is concerned, the emails sent *inter partes* made plain;

1. That a previous conversation had occurred between the solicitors in which some agreement about the substitution of Fortune in place of Mr Zhang had occurred; and
2. That the vendor, Park Cho, consented to the substitution.

The Court considered the relatively well settled principles that, for a novation to be effective it would be necessary for it to be clearly mutually agreed and understood between Mr Zhang, Fortune and Park Cho that:

1. Mr Zhang was no longer liable on the original contract for sale, which was wholly discharged in relation to him; and
2. Upon that discharge a new contract for sale was brought into existence and enforceable between Park Cho and Fortune.

There were too many uncertainties as at 5 April 2016 to infer that novation had taken place. Questions as to whether there were enduring guarantees or indeed whether the incoming purchaser was capable of completing remained live.

Park Cho therefore relied upon later conduct, which, it argued, markedly strengthened the inference of a novation. From 5 April 2016 right through until the commencement of proceedings, all parties conducted themselves on the basis that Fortune, not Mr Zhang, was the purchaser. Despite this, the parties never expressly dealt with the question of whether Mr Zhang was released from his previous obligations.

Park Cho issued a Notice to Complete on 4 May 2016 to Fortune and not to Mr Zhang. As the notice to complete was not complied with, Park Cho gave a Notice of Termination to Fortune and not to Mr Zhang on 31 May 2016.

Applicable Legal Principles – Novation

Park Cho submitted that the contract for sale was novated to Fortune. A novation is a transaction by which all parties to a contract agree that a new contract is substituted for one that has already been made: *Olsson v Dyson* (1969) 120 CLR 365; [1969] HCA 3 at 368 per Windeyer J.

The effect of a novation is to discharge the original contract between two parties (the continuing party and the outgoing party) and to substitute it with a new contract between the continuing party and a new party (the incoming party). The incoming party must perform the contractual obligations, bear the contractual liabilities and is entitled the contractual benefits (under the new contract) that were formerly the province of the outgoing party under the original contract. Put simply, the rights, obligations and liabilities of the outgoing party are extinguished and the rights, obligations and liabilities of the incoming party are substituted in their place.

The authorities (see *Vickery v Woods* (1952) 85 CLR 336) clearly establish that the crux of novation is intention. Novation requires the consent of the parties in order for it to be valid (i.e. it is by way of tripartite agreement). Such intention may be express or, importantly for the instant case, may be implied from the circumstances: *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473.

In *Fightvision* the Court dealt with the question of whether there had been a novation and applied the well-known statement of Sir Garfield Barwick in *Upper Hunter County Council v Australian Chilling and Freezing Co Pty* (1968) 118 CLR 429that in relation to contractual intention

> "no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements".

The Court in *Fightvision* (at 493) concluded that there was no basis for disturbing the trial Judge's conclusion that a novation had occurred, a conclusion which his Honour had arrived at by reference to, *inter alia*, the content of conversations between the parties and the "overwhelmingly consistent pattern of conduct" in which they had engaged.

In *McMahon v National Foods Milk Ltd* (2009) 25 VR 251; [2009] VSCA 153 Nettle JA (with whom Neave and Dodds-Streeton JJA agreed) said at [77]:

> "As a matter of law, however, there is nothing to preclude a court from inferring the existence of a contract from the acts of the parties, as well as or in the absence of words, and so from the totality of the dealings between the parties. Hence, as matter of law, there is nothing to preclude inferring the existence of a contract of novation from conduct such as, for example, the conduct of a creditor in apparently accepting the liability of a new debtor in substitution for the old. And as was pointed out by the New South Wales Court of Appeal in Fightvision Pty Ltd v Onisforou; Tszyu v Fightvision Pty Ltd, the principle that no narrow or pedantic approach is warranted when searching for contractual intention in commercial arrangements applies equally when searching for an intention to novate.'"

In applying these principles, the Court found that the overwhelmingly consistent pattern of conduct between these parties supported the inference that a novation had occurred without further conditions and that all parties were content to treat Fortune and not Mr Zhang as the purchaser.

Park Cho's Notices to Complete and Notice of Termination were given to the correct party, Fortune. Park Cho therefore was found not to have failed at the threshold in maintaining its entitlement to the deposit. If it could establish that it validly terminated the contract, it had a prima facie entitlement to the deposit.

The question then became whether that prima facie legal position is displaced by the operation of *Conveyancing Act*, s 55(2A).

Breach of Contract and Damages

Fortune did not complete the novated contract on 19 May 2016, as was required by the Notice to Complete, so Park Cho issued its Notice of Termination on 31 May 2016. The issuing of the Notice to Complete was in accordance with the contract; it made time of the essence and would have entitled Park Cho to terminate the contract for sale, if there were no other impediment to the issue of the Notice to Complete or to terminate. Whether there was any impediment to the issuing of a Notice to Complete or to termination is dealt with later in this section, where the Court concludes there was no such impediment.

But Fortune's failure to complete was also a breach of the novated contract. As a result of this breach Park Cho suffered loss and damage.

Thus, by reason of Fortune's breach of contract in failing to settle in accordance with the Notice to Complete, it is agreed that Park Cho has suffered damages of $100,000.

Termination by a party in breach

Fortune argued that at the time the Notice to Complete was issued Park Cho was in breach of contract for failing to answer one of Fortune's requisitions, which was said to be a requisition on title. Fortune also argued that Park Cho was not ready, willing and able to perform the contract for sale because it could not convey the title it had contracted to convey, so that it was disabled from issuing the Notice to Complete.

The two contentions were considered.

If a party who has elected to terminate performance of a contract was, at the relevant time, itself in breach of contract or was not ready, willing and able to perform contractual obligations itself, that does not necessarily operate to impede the effectiveness of the election to terminate. In deciding whether a breach of contract or absence of readiness, or willingness precluded termination, regard may be had to the term of the contract which is alleged to have been breached and all relevant circumstances including the nature of the breach and the extent to which the party in question was allegedly not ready and willing to perform.

If the promisee, the party electing to terminate, is only in breach of warranty, the breach will not preclude termination unless it amounts to repudiation. But if the promisee is in breach of the condition then generally speaking that will prevent termination. Whether or not the breach of an intermediate term will prevent termination will depend on whether the breach was sufficiently serious.

The Court found that Fortune's allegations either fail to establish that there was any breach by reason of Park Cho's failure to answer requisitions and even if there were such a failure, it would, at best, amount to a breach of warranty rather than a breach of condition and in no way precludes Park Cho from electing to terminate the contract.

Fortune also raised Park Cho's readiness and willingness to perform the contract as preventing it from terminating. Fortune argued that the title that Park Cho was proposing to deliver under the contract would always have been defective, such that Park Cho was not ready, willing and able to perform the contract according to its terms. But as the further analysis below shows that contention also failed.

Failure to adequately respond to requisitions

The plaintiffs initially raised issues about Park Cho's lack of adequate response to requisitions. The relevant requisition pressed pertained to the quality of the land or the use to which the land has been put. It was not a true requisition as to title. And, therefore, the vendor was not required by the terms of the contract for sale to respond to it.

The Courted noted that the difference between the two types of requisition was explained in an article by CJ Rossiter that had been referred to with approval by Ward J (as her Honour then was) in *HG & R Securities Pty Limited v Sayer* [2009] NSWSC 427 at [106] as follows:

> "**A requisition on title where the purchaser is reasonably seeking information from the vendor in relation to a defect in title, which, if shown to exist, is of so serious a nature as to justify the purchaser terminating the contract**
>
> (19) Requisitions on title falling into this category relate to defects in title which, if proved, are of so serious a nature as to deprive the purchaser of the substance of the bargain. Accordingly, if the vendor fails to supply information which the purchaser bona fide requests in order to establish whether such a defect in title exists, the purchaser is entitled to infer that the vendor is either unwilling or unable to perform the substance of the bargain. If the vendor's refusal is persistent and contumacious, the purchaser may be able to terminate on the ground that the vendor has committed an anticipatory breach of contract. In any case, the purchaser is entitled to serve upon the vendor a notice to perform the obligation to answer requisitions or, in some circumstances, a notice to complete the contract as a whole.
>
> **A requisition on title where the purchaser is seeking information from the vendor in relation to a defect in title, which, if shown to exist, is not of so serious a nature as to justify the purchaser terminating the contract**
>
> (20) Since the defect in title if proved to exist would not be such as to deprive the purchaser of the benefit of the substance of the bargain, the purchaser's remedy for breach of the vendor's promise to answer valid requisitions is similarly limited to the remedies outlined in (2) above, namely, to seeking an order for specific performance of the vendor's promise to answer and/or claiming damages for breach.
>
> **A requisition on title where the purchaser is seeking information from the vendor in relation to the quality of the property or the state or quality of the improvements or the use to which the land has been put**

> (21) As a general principle, the vendor makes no warranty about the quality of the property sold nor the state or quality of the improvements erected upon the property. The rule in relation to the sale of real estate is still caveat emptor. That being so, a defect in quality of the subject matter of the sale, however serious such a defect may be, cannot deprive the purchaser of the substance or indeed, any part of the bargain. Therefore, it would seem to follow that, notwithstanding the obligation of the vendor to answer, the purchaser's remedy is limited in the same way as that discussed in (2) and (4) above, namely, to seeking an order for specific performance of the vendor's promise to answer or to claiming damages for breach. The vendor's default in answering does not ground either a notice to perform the obligation or a notice to complete the contract, since the vendor's default and failure to remedy the default cannot lead to an inference of repudiation."

The Court held that any requisition concerning performance of the respective obligations pursuant to the lease is a requisition as to quality (as distinct from requisitions as to title). It falls typically into this class, as it related to facts relating to the quality of the property sold which affects its value but where the purchaser obtains the appropriate title: *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 97,635. Non-response to such a requisition only gives a right of damages (and possibly only nominal damages) for breach of the obligation to reply. It cannot provide any ground to resist the Notice to Complete.

It was a fortiori that the contract for sale provided a complete and efficient mechanism for rent and other rights to be adjusted between the parties at and after settlement.

Is Park Cho Entitled to Retain the Deposit?

The Court then considered the grounds on which Fortune challenged Park Cho's entitlement to keep the deposit. Fortune advanced several species of alleged conduct to enliven the Court's *Conveyancing Act*, s 55(2A) jurisdiction and its jurisdiction to relieve against forfeiture.

To attempt to make out its *Conveyancing Act*, s 55(2A) case Fortune also relied upon the two matters which it deployed to contend that Park Cho was disabled from terminating the contract, namely an alleged breach of contract due to a failure to reply to requisitions and Park Cho's alleged lack of readiness, willingness and ability to perform the contract by reason of Park Cho proposing to convey on settlement what was an allegedly defective title.

But both of these contentions failed to establish either a breach of contract or an inability to convey a proper title.

The Court turned to the remaining matters which were posited as possible grounds for *Conveyancing Act*, s 55(2A) relief, or relief against forfeiture. Those grounds were founded upon alleged misrepresentations. The Court found none of the grounds raised any persuasive reason why the Court should exercise its s 55(2A) jurisdiction or to relieve against forfeiture.

Decision

There was no basis to order the return of the deposit either under *Conveyancing Act*, s 55(2A) or by way of relief against forfeiture.

Section 55(2A) of the *Conveyancing Act* provided no avenue of relief to the plaintiffs because no special or exceptional circumstances are made out to warrant the exercise of that statutory jurisdiction. It would not be unjust or inequitable for the vendor to retain the deposit.

All the grounds the plaintiffs/purchasers advanced to suggest unconscionable conduct, injustice, or inequity on the part of the vendor failed. No alleged misrepresentations about the sale are made out. The purchaser obtained a legal lease, or at least the kind of lease estate for which the purchaser contracted. The vendor's agent did not misrepresent the quality of the tenancy at the Belmont property. The vendor adequately responded to requisition 3 and was not in breach of contract such as might prevent the vendor or from issuing a Notice to Complete or Notice of Termination.

Nor was relief against forfeiture available to the plaintiffs. The plaintiffs did not establish any fraud, accident, mistake, or surprise such as would permit them to take advantage of the equitable doctrine of relief against forfeiture. Even if unconscionable conduct were itself basis for enlivening this equitable jurisdiction – and that is not established – no such conduct was made out.

Gentile v Gentile [2018] NSWSC 574

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 26 April 2018

> LAND LAW – co-ownership – appointment of trustees for sale – deed entered into between co-owners – whether on true construction of deed first and second plaintiffs hold interests in the nature of life interests – whether first and second plaintiffs entitled to receive out of net proceeds of sale only the value of their life interests

Facts

The plaintiffs sought orders appointing a trustees for sale pursuant to s 66G of the *Conveyancing Act 1919* (NSW) in relation to a property in Henry Street, Waverley **('the Property')**. The first and second plaintiffs were the parents of the third plaintiff and defendant and all parties were the registered proprietors of a one-quarter share in the property. The joint tenancy was severed in around late December 2017 or early January 2018.

The defendant filed a Cross-Summons pursuant to which an order was sought that the net proceeds of sale be applied in a manner with what the defendant claimed was in accordance with the true construction of a deed entered into between the parties relating to the Property entered on 11 October 1984 **('the Deed')**. The defendant claims according to the Deed if all parties were alive and the Property was sold, the parents are entitled to receive out of the net proceeds of sale the present value of their right to live rent-free in the Property until the last of them dies, and the third plaintiff and the defendant are entitled to each receive half of the remaining balance of the net proceeds of sale.

Decision

His Honour noted that three of the four co-owners wished for the Property to be sold and the issue with the dissenting co-owner related not to the sale, but to the allocation of the proceeds of sale. Accordingly, his Honour was disposed to appointing the trustees for sale.

On the day of the hearing, the defendant sought to file an Amended Cross-Summons which sought to, effectively, claim fraud against the plaintiffs. Ultimately the parties and his Honour agreed that leave should be granted for the Amended Cross-Summons to be filed, but the issues raised therein considered at a later time so the hearing could proceed.

His Honour reviewed the terms of the Deed. The first clause provided that whilst both parents were alive, the Property was not to be sold unless agreed to in writing by the parents. The second clause provided that if one parent died, the written consent was required of the surviving parent would be required before the Property was sold. The third clause related to situations where both parents had died whilst the fourth clause stated that a parent's consent would not be required for the sale of the Property where that parent remarried or entered a de facto relationship. The fifth clause related to enforcement of the Deed whilst the sixth clause contained negative covenants not to take any action not contemplated by the terms of the Deed.

In construing those terms, his Honour rejected the defendant's argument that the Deed was a mere exercise of estate planning given the first two clauses expressly contemplate the property being sold before both parents had died. His Honour further found that those clauses meant the Deed did not contain any restruction against any sale of the Property over the objection of any party and rejected the defendant's argument on that basis.

Having regard to the terms of the Deed his Honour rejected the defendant's argument that if the Property was sold whilst all four parties were alive, the first and second plaintiffs are entitled to receive jointly out of the net proceeds of sale the present value of their right to live in the property rent-free until the last of them dies, with the third plaintiff and the defendant being entitled to each receive half of the remaining balance of the net proceeds of sale. His Honour noted that the Deed recited that all of the parties purchased as joint tenants and did not contain any language that any party would have an interest in the Property less than a fee simple and the Deed did not expressly provide for any life interest. Accordingly, his Honour rejected the defendant's argument the parents had a life interest in the Property.

Parker J accordingly dismissed the Amended Cross-Summons so far as it did not relate to allegations of fraud, and appointed trustees for sale of the Property.

Gilles v Salem [2018] NSWSC 506

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 April 2018

COSTS – order sought against non-parties – whether proceedings necessary due to conduct of respondents – respondents caused lapsing notice to be served in relation to plaintiffs' caveat – whether respondents acted reasonably

Facts

The Plaintiffs sought a costs order pursuant to s 98 of the *Civil Procedure Act 2005* (NSW) that the respondents, who were not parties to the relevant proceedings, pay the plaintiffs' costs of the proceedings

In 2012 and 2013 Taha Salem (**'the Defendant'**), was the recipient of legal services provided by the plaintiffs pursuant to a costs agreement dated 18 May 2012. The plaintiffs claim that the fees for those services have never been paid. The plaintiffs lodged caveat over a property in Prestons ("**the Property**") in September 2015 in which the defendant owned a half share as a tenant in common. The other tenants in common were the Defendant's daughter and son in law (**'the Respondents'**).

On 3 February 2016 a lapsing notice in respect of the caveat was served on the Plaintiffs, with that lapsing notice being procured by the Respondents. On 19 February 2016 the plaintiffs commenced the proceedings. On 23 February 2016 the Court extended the operation of the original caveat until 1 March 2016 pursuant to s 74K of the *Real Property Act 1900* (NSW).

On 29 April 2016 orders were made to the effect that, pursuant to the costs agreement dated 18 May 2012, the defendant had charged his interest in the property in favour of the Plaintiffs. On 8 July 2016 the Defendant was ordered to pay the Plaintiffs' costs of the proceedings in respect of the period 2 March 2016 to 8 April 2016 inclusive. The Plaintiffs now seek to recover their remaining costs from the Respondents.

Decision

His Honour noted **s** 98(1)(b) of the *Civil Procedure Act* conferred a broad discretion on the Court to determine by whom, to whom, and to what extent costs are to be paid and that a non-party's connection to the proceedings is central to the inquiry whether a non-party costs order should be made. There must be a causal connection between the actions of the non-party and the occasion for ordering costs.

His Honour found that the Defendant only granted the plaintiffs an interest over his half share of the Property and there was a lack of clarity from the inclusion of the respondents in the identification of the registered proprietor. In these circumstances, the respondents contend that the original caveat claimed an interest over their share of the Property. His Honour found that, even though the interest claimed in that caveat was described as an interest granted by the Defendant, the description did not in its terms specify that only the Defendant's property was the subject of the interest claimed in the caveat. Taken together, these facts indicate that the original caveat was expressed so as to interfere with the Respondents' interest in the property. In those circumstances, his Honour concluded, it was appropriate for the Respondents to serve a lapsing notice in respect of the caveat. It was for those reasons as well that the Plaintiffs' application for costs against the Respondents was dismissed.

Darke J then proceeded to award the Respondents the costs of the motion on an indemnity basis because the need to commence proceedings was a consequence of the way the plaintiffs had drafted the original caveat and it was 'plainly not a case where it would be appropriate for the Court to make a costs order against the non-party respondents.

Global Sources Australia Pty Ltd v REN Australia Management Pty Ltd [2018] NSWSC 975

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 27 June 2018

> LEASES AND TENANCIES – leases – option to renew lease – alleged breach of lease by lessee –prescribed notice under s 133E of Conveyancing Act not served – lessee seeks specific performance of obligation to grant new lease – lessor complains of continuing breaches by lessee – discretion to grant or withhold specific performance – specific performance granted

Facts

The proceedings concern a lease of certain premises in McEvoy Street, Alexandria. The property is owned by the defendant. In December 2015 the defendant ("REN") granted a lease to the plaintiff ("Global") for a two-year term commencing on 20 January 2016 and terminating on 20 January 2018. The lease contains four options to renew, each for a further term of two years.

A dispute arose between the parties concerning the validity of the exercise by Global of the first option to renew. Global exercised the option on about 21 July 2017. There is no dispute that this was done in accordance with the requirements of the lease. REN claimed, however, that Global was not entitled to the grant of a new lease because it had committed breaches of the lease. REN initially asserted only that the rent was often not paid on time. Later, REN asserted that Global was in breach of cl 16 of the lease, essentially because it used the premises for retailing which is not an approved use or lawful purpose.

The lease provides in cll 7.1 and 7.4 that the entitlement to the grant of a new lease is conditional upon Global punctually paying all of the rent and complying with all the terms and conditions of the lease. Those are provisions of the kind referred to in s 133E(1)(b) of the *Conveyancing Act 1919* (NSW). Nevertheless, REN did not serve any prescribed notice pursuant to s 133E of the *Conveyancing Act*. Accordingly, breaches of those provisions do not preclude the entitlement of Global to the grant of the new lease (see s 133E(2)).

In these circumstances, REN accepted that Global has not, by reason of any breaches, lost its right to the grant of the new lease. However, REN maintains that breaches of the lease by Global, in particular breaches of cll 16 and 30 arising from the manner in which Global uses the premises, should result in the withholding of orders for specific performance of the contractual obligation of REN to grant the new lease (see *Sydney West Area Health Service v Taracek* (2008) 73 NSWLR 68; *Kyrollos 4M Pty Ltd v Bassal* [2018] NSWSC 833). A suggestion that Global has impermissibly assigned the lease or sub-let the premises was ultimately not pressed.

The parties were also in dispute on the question whether REN was obliged to provide its consent to the making of a development application by Global for approval of retailing at the premises. REN subsequently conceded in the trial that it was obliged to provide its consent to the making of a development application by Global to obtain any approval necessary for the carrying on of its business.

The only issue left for determination was ultimately whether orders for specific performance of the contractual obligation of REN to grant a new lease should be made, or whether specific performance should be withheld on discretionary grounds due to breaches of the lease by Global.

Global has for many years operated a business that sells Christmas products. The business operates from a number of locations, or stores, including the Alexandria property leased from REN. All of the stores use the brand “Christmas World”.

The stores are generally open for sales to the general public in the period from October to the first or second week of January. The Alexandria property also opens in July each year to cater for the Christmas in July trade. The Alexandria premises are also used as a warehouse to store goods to be sold from the various stores, and to take excess stock from the other stores.

Global commenced its occupation of the Alexandria property in 2011. It entered into a lease with REN for a 12-month term commencing on 20 July 2011 and ending on 19 July 2012. Under that lease, the premises were only to be used as “warehouse, wholesale & retail”. The lease contained an option to renew for a further term of 1 year. Clause 10 of the lease obliged Global to obtain all necessary consents that may be required from local government or other authorities to carry on their proposed business at the premises. In Schedule A to the lease, the parties agreed that Global “may undertake an application process for D.A. Approval from Sydney City Council to operate from the premises for their own business retail purposes.”

On 17 April 2018 the Council sent to REN a Notice of Intention to Give an Order to cease using the premises as a retail store without prior development consent. The notice came to the attention of REN on about 26 April 2018, and shortly thereafter to the attention of Global.

Global took steps towards the making of a development application.

The Court was informed that the application was to be for a mixed-use development to comprise a warehouse and shops. It is evident that Global and its consultants have been in contact with the Council concerning the application. Global has obtained the agreement of the Council to allow until 30 June 2018 for the lodgement of the application in response to the Council’s Notice of Intention to Give an Order.

Decision

The Court found that Global validly exercised the option in the lease for a further two-year term commencing on 21 January 2018 (see cl 7.6.1). REN thus became contractually obliged to grant a new lease to Global on the terms stipulated in cl 7.6.2 of the lease. As stated by Bryson AJ in *Sydney West Area Health Service v Staracek*, whilst there is always a discretionary element in a decision to grant or withhold specific performance, the claim for specific performance of an entitlement to a new lease term is a very strong one.

The Court held that throughout the currency of the lease Global was in breach of cl 16.1.1 in that it did not obtain all approvals required by the proper authorities to carry on “the proposed business”. I take that expression to mean the business intended by Global, at the time of commencement of the lease, to be conducted at the premises. That business involved the selling of items by retail during at least four months of each year. However, there was no existing approval to use the premises in that way as a Shop.

Notwithstanding the discussion prior to entry into the lease about a development application, REN did not raise any complaint about Global’s use of the premises until December 2017. Further, REN did not serve any notices under s 133E of the *Conveyancing Act* after Global exercised the option on about 21 July 2017. In these circumstances, the significance that might otherwise attach to Global’s breaches of the lease is in my view greatly diminished.

The Court held that specific performance ought to be granted.

The Court made a declaration as to the validity of the exercise of the option and ordered that REN forthwith execute such documents and do all such things as are necessary to grant a new lease to Global.

The Court made an order that REN grant consent to the Development Application.

There does not seem to be any reason why costs should not follow the event. Accordingly, the Court will also order that REN pay Global’s costs of the proceedings.

Golden Goal Pty Limited v Dapto Bowling Club Limited (in liq) [2018] NSWSC 1431

Coram: Black J

Court: Supreme Court of New South Wales

Date: 18 September 2018

> REAL PROPERTY – caveats – application to extend operation of caveat under s 74K of the Real Property Act 1900 (NSW) – where lessee lodged a caveat claiming equitable interest in land arising from lease – where liquidator of lessor disclaimed lease – where no application for leave to set aside the disclaimer had to date been made – whether seriously arguable case for proprietary interest arising from the lease.
>
> REAL PROPERTY – caveats – application to lodge further caveat under s 74O of the Real Property Act 1900 (NSW) – where lease granted lessee contractual rights – whether unconscionable that lessee will be left to prove for debt in the lessor's liquidation – whether seriously arguable case that lessee has a proprietary interest in the land.

Facts

By Summons filed on 12 September 2018, Golden Goal Proprietary Limited ("GGPL"), sought a range of relief.

The primary issue to be determined for the purpose of the application was whether, pending any declaration of trust, or an order setting aside a disclaimer by the liquidator of DBC, over the current lease by DBC to GGPL, and on the usual undertaking as to damages, an order should be granted under s 74K of the *Real Property Act* 1900 (NSW) that the operation of an existing caveat over the property be extended until further order of the Court. An order was alternatively sought under s 74O of the *Real Property Act* granting leave to GGPL to lodge a further caveat, and I will refer below to the form in which that further caveat was expressed.

An Interlocutory Process was also provided to the Court, but not today filed, seeking an order under s 568E(2) of the *Corporations Act* that GGPL have leave to make an application under s 568E(1) of the *Act*, and seeking an order under s 568E(1) of the *Act* that a disclaimer served by DBC's liquidator on 23 July 2018 be set aside. The need for such leave arises because s 568E(1) is conditioned on the grant of leave of the Court, where a person seeks to set aside a disclaimer after it has taken effect, and the relevant disclaimer would here have taken effect from 23 July 2018.

Evidence and background facts

In about 2013, GGPL and DBC entered an Agreement for Lease by which DBC agreed to grant three leases to GGPL with respect to land situated at Dapto, New South Wales. A first lease was executed in about October 2013 by both parties, for the period 2014–2019, and there is evidence that GGPL undertook substantial works in constructing soccer fields on the leased land and also in doing work on an adjoining house. It appears that second and third leases for the periods 2019–2024 and 2024–2029 were subsequently executed, at least by GGPL, although the forms of those leases in evidence were not executed by DBC.

On 19 October 2017, DBC was placed in voluntary administration. On 10 April 2018, GGPL lodged a caveat which claimed an equitable interest in the land arising from the existing first lease, as follows:

> “The caveator claims an equitable interest in the land in respect of the interest of [DBC] only as lessee under an unregistered lease pursuant to the Lease executed by [DBC] on 11 October 2013.”

On 23 July 2018, DBC passed into a creditors’ voluntary liquidation, and GGPL accepts that it received notice that the liquidator disclaimed the first lease on which it had relied in its caveat. No application to set aside the disclaimer was brought at that time.

On 23 August 2018, a lapsing notice was served on GGPL's present solicitors in respect of the existing caveat, and these proceedings were brought by GGPL.

Whether the caveat should be extended in its present form

In order to establish that the operation of the caveat should be extended, GGPL bears the onus of showing that it has a seriously arguable case for final relief in the nature of the caveatable interest claimed and that the balance of convenience favours retention over removal of the caveat: *Martyn v Glennan* [1979] 2 NSWLR 234; *Morkaya v Parkinson* [2010] NSWSC 596. The caveat should be ordered to be withdrawn unless an interlocutory injunction would be granted to protect the interest claimed in it: *Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd* [2011] NSWCA 39 at [20].

GGPL accepted that a liquidator has the ability to disclaim a lease without leave, although it did not go so far as to accept, in terms, that the effect of that disclaimer is to bring about the termination of the lease: *Willmott Growers Group Inc v Willmott Forests Ltd (recs and mgrs apptd) (in liq)* (2013) 251 CLR 592. The Court held that the consequence of the disclaimer was that the lease is terminated.

The Court held that if GGPL;

- files its application for leave to set aside the disclaimer,
- is in future also successful in obtaining that leave, and
- is in future also successful in setting aside the disclaimer,

then at that point the disclaimer would no longer have effect in terminating the lease, and GGPL would at that future point have a leasehold interest in the property.

However, that cannot assist GGPL in this application, because a caveat cannot now be supported by an interest which does not now exist, but which in future might exist if several things in future occur in GGPL's favour.

Accordingly, there is no seriously arguable case that GGPL has a proprietary interest in the form claimed in the existing caveat, namely an equitable interest arising from the existing lease.

Whether leave should be granted to lodge further caveat

GGPL argued in the alternative that there was a sufficient interest capable of supporting a caveat. This was formulated in GGPL's submissions as follows:

> "[GGPL] claims an interest in the land arising from it having utilized approximately $500,000 to effect capital structures and improvements to the land. The value of such interest being either the costs of the improvements or the value of the improvements as may be determined and as such creating an equitable interest by (constructive trust) and/or charge and/or giving rise to a Proprietary Estoppel or such equity as may be necessary to avoid unconscionable retention of the value/benefit of the improvements."

The Court found that, for the purposes of the application, GGPL established at least a seriously arguable question that it incurred significant expenditures on the basis of the Agreement for Lease, and in anticipation that it would be granted a first lease over the premises, as occurred, and a second and third lease which have not yet been granted.

GGPL also submitted that a disclaimer of the first lease would not extinguish any other legal or equitable rights that GGPL may have outside of the lease. GGPL put the alternative basis of the interest claimed as arising from principles of proprietary estoppel although it referred to *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 also deals with the circumstances in which a promissory estoppel would be established.

GGPL submitted that DBC's conduct created an expectation that it would obtain an interest in DBC's land, and GGPL altered its position in that respect, and "as such", equity recognises a proprietary interest in the land.

GGPL also referred to a suggested "windfall" obtained by DBC, on the assumption, which may not be established by the evidence, that the particular form of improvements that were made to the land would ultimately be of value to DBC on a sale of the land. GGPL submitted that, assuming unconscionability is established, then that may be remedied by creating a charge over DBC's property to the extent of the benefit conferred on DBC, by constituting a trust in relation to a portion of the property or the proceeds, or by fashioning a remedy to suit the circumstances.

GGPL also referred to other examples where a plaintiff has incurred expenditure which results in improvements to a defendant's lands in the expectation of continued occupation, and to the circumstances in which equity may grant relief in that respect, and refers to the decision of McLelland J in *Morris v Morris* [1982] 1 NSWLR 61, and to the subsequent application of those principles by Pembroke J in *Pennie v Pennie* [2010] NSWSC 565 at [43].

The Court, in accepting the relatively low standard that it is necessary to establish a seriously arguable case, found that a seriously arguable case was not established in this instance. The principles on which GGPL rely turn on the unconscionability of the conduct of DBC, such that the Court should intervene, by way of equitable relief, to prevent that unconscionable conduct.

The Court found that there were serious difficulties that beleaguered the way that GGPL puts its claim to an equitable proprietary interest in the land.

Notwithstanding the disclaimer, GGPL nevertheless has a potential right of contractual damages. That right may include, a claim for reliance damages of the kind identified in *McRae v Commonwealth Disposals Commission* [1951] HCA 79; (1951) 84 CLR 377, being the expenditures made on the basis of the contractual promise contained in cl 1 of the Agreement for Lease.

Where GGPL had contracted with DBC that it would do certain works, in exchange for certain contractual rights, namely the right to the grant three leases over a term, and where a contractual right of damages exists for the partial breach of that obligation, then there is no seriously arguable case that equity would intervene, because there is nothing unconscionable about GGPL being left to the rights that it has bargained for or to contractual damages for the breach of it.

The court recognised the disadvantage of GGPL having to prove in the insolvency but nevertheless held that there is nothing unconscionable about GGPL, as a party with a claim in contractual damages, being left to prove in the same manner as other creditors in the liquidation.

In the circumstances, GGPL's claim to establish unconscionability or an estoppel, rather than to be left to its claim to contractual damages, is so weak that it could not be described as seriously arguable.

The court noted that insofar as the claims couched as constructive trust claims His Honour found no basis on which that relief would be seriously arguable where estoppel is not, particularly where its effect would be to prefer GGPL’s interests to those of DBC’s other creditors. It would be a fortiori that the Court would unlikely find that the declaration of a constructive trust at some time would be sufficient interest to support a caveat.

The Court was therefore not satisfied that a basis has been established either to sustain the caveat in its original form, where the lease has been disclaimed, or to permit lodgement of a caveat in the alternative form, based on a claim for unconscionability which did not appear to be seriously arguable.

Gorczynski v Hale [2018] NSWSC 675

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 3 May 2018

LAND LAW – Caveats – Application for extension of caveat

Facts

This case related to an application to extend the operation of a caveat pursuant to s 74K(2) of the *Real Property Act 1900* (NSW) until the final determination of a substantive proceedings before the Common Law Division or until further order of the Court.

The applicant, Gorczynski **('the Applicant')** lodged a caveat against over land in Brighton-Le-Sands (**'the Property'**) pursuant to which Hale and Meyer **('the Defendants')** were the registered proprietors as they were the executors of the estate of the late William Osmo. In the relevant caveat the Applicant particularised the interest which were sought in the caveat as being 'an interest at law or in equity over the estate of William Osmo, which estate includes the subject land'.

The Applicant had commenced a negligence claim against the company of William Osmo in May 2006. At that time the defendant company was insolvent, but the Applicant obtained a default judgement against it. That claim was subject to several claims, including against insurers, and several appeals. In 2010, the Applicant suffered a nervous breakdown which precluded him from advancing those proceedings.

Nevertheless, the Applicant received advice that he may have a claim against Mr and Mrs Osmo personally and was seeking leave to amend his claim in the 2006 proceedings to include claims for fraud and breaches of directors' duties by Mr Osmo. At the time of hearing, an amended notice of motion seeking orders for discovery were to be heard on 27 June 2018.

The Defendants indicated their intention to distribute the estate of the late William Osmo, and that was apparently what motivated the Applicant to lodge the caveat. As stated, the Applicant claimed that their caveatable interest was "an interest at law or in equity over the estate of William Osmo". It failed to specify the nature and extent of that claimed interest.

Decision

Her Honour noted that s 74K(2) of the *Real Property Act* provides that a caveat may be extended where it is satisfied that the prospective claim has or may have substance, make an order extending the operation of the caveat for such period as is specified in the order or until further order of the court or may make such other orders as it thinks fit. If the court is not so satisfied it will dismiss the application.

The Applicant submitted the caveatable interest arose as the Property was acquired by using proceeds obtained by Mr Osmo out of his company which were acquired by way of fraud. That fraud is said to have arisen by reference to the fact that it had been asserted that the company was about to be insolvent and would be wound up whereas it still has not been wound up as at the date of the hearing. The Applicant also claimed Mr Osmo as director will be liable for the debts of the company on the basis that it was trading as insolvent and he would have been liable for those debts, meaning the claim was against his estate. The Defendants claimed that the Applicant had not disclosed a caveatable interest in the caveat and nor could it.

Her Honour concluded that the Applicant had not established that there was a series question to be tried and that a caveatable interest did not arise. She found that the description of the claim in the caveat was defective in form in failing to specify the nature and extent of the interest claimed. She was not satisfied that the Applicant established a claim against Mr Osmo's estate based on the liability of Mr Osmo, as a former director of the company. Accordingly, her Honour found the question on the balance of convenience did not arise.

Her Honour dismissed the application with costs.

Groch v Knights [2018] NSWSC 1365

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 6 September 2018

> LAND LAW – Conveyancing Act 1919 (NSW), s 66G – application for appointment of trustees for sale – discretionary considerations – hardship or unfairness not a basis to refuse application
>
> LAND LAW – Conveyancing Act 1919 (NSW), s 66G – application for appointment of trustees for sale – power to appoint trustees for sale before question of accounting between co-owners is determined – power under general law or s 66G(6) to determine incidental questions of the beneficiaries' entitlements following order for sale

Facts

The proceedings were commenced as an application under the *Conveyancing Act* 1919 (NSW), s 66G, for the appointment of trustees for the sale of a property at Kyogle in northern New South Wales.

The plaintiff, Larissa Jane Groch, and the defendant, Keith Charles Knights, are the registered proprietors of the property as joint tenants in equal shares. They acquired the property in around March 2011. It is a 40-hectare rural block with a timber building on it.

Mr Knights and Ms Groch were previously in a relationship. After it ended, Ms Groch moved to Victoria.

The issues for determination are whether to make the order under s 66G and, if so, what share of the proceeds the parties are entitled to.

The Evidence

The Court found that the parties lived together in rental accommodation in Brisbane for part of 2007 until sometime in 2008. For reasons not explained by the evidence, the relationship broke down in 2008 following which Ms Groch moved to Western Australia where she worked as a teacher, living there until 2012. Despite the breakdown, the parties remained in contact with one another from 2008 until 2011 and, sometime in late 2010 or early 2011, Ms Groch and Mr Knights rekindled their relationship.

Mr Knights gave evidence of the events around the time of the acquisition of the property. Mr Knights first intimated his intention to buy the property to Ms Groch when they were both at a festival in Ballarat in Victoria in 2011. Mr Knights said that Ms Groch gave him an ultimatum that if she could not be a joint owner of the property, she would sabotage the business venture they were involved in. In light of this threat, Mr Knights allowed her to be joint owner of the property. Again, in the absence of Ms Groch's account and cross-examination of Mr Knights on the issue, it is not possible to make any factual findings as to whether what Mr Knights said is true.

On the evidence before the Court, it remained uncertain as to whether Mr Knights made any improvements or repairs to the Property as claimed in his evience.

Appointment of trustees for sale

Mr Knights resisted an order being made for the sale of the property under s 66G. The basis of the resistance was distilled to two propositions;

- Firstly, Mr Knights resisted the Court making the order on grounds that it would be unfair for this Court to sell the property at a time which is unsuitable to him. Mr Knights asserted that the sale of the property at this point will frustrate ventures on which he has been working since the property was acquired.
- Mr Knights' second contention was that Ms Groch was acting wrongfully in bringing the application. He said that she was taking advantage of his vulnerability when he is detained in gaol.

The principles on which the Court acts in exercising its power under s 66G are well established, including authority of the Court of Appeal. Those principles were summarised by White J (as his Honour then was) in *Tory v Tory* [2007] NSWSC 1078 at [42] and by Ward CJ in Eq in *Myers v Clark* [2018] NSWSC 1029 at [81]-[91].

The law takes the view that, in general, a co-owner is entitled to use the s 66G procedure to realise his or her interest in a co-owned property irrespective of the wishes of the other co-owner. A plaintiff in an application of this sort is thus entitled to an order virtually as of right. An order will not be made if that would contravene a legal obligation recognised by law, such as a contractual or fiduciary obligation, or an obligation arising by estoppel. But otherwise, hardship or unfairness, in the sense that the sale will disadvantage the other co-owner, is not a basis for refusing the application.

Applying these principles, His Honour found that Mr Knights' first argument must be rejected.

As to Mr Knights' second argument, the Court accepted that his being in gaol has made it hard for him to respond to Ms Groch's application. However found this to be of no moment.

The Court therefore found that the plaintiff had established her entitlement to have trustees appointed to sell the property. However there remained some difficulties in respect of what was to occur upon the sale of the Property.

His Honour noted that the effect of an order under s 66G is to change the nature of the parties' interest in the property. The property is transferred out of the names of the co-owners and vested in the trustees. A trust is thereby constituted: *Application of Richard Albarran; Harb v Harb* (2010) 17 BPR 33,295; [2010] NSWSC 1251 at [16]-[20]. The parties' rights as co-owners of the property are replaced by rights as beneficiaries under that trust.

Usually, the beneficiaries' interests in a trust are defined when the trust is first constituted and continue for the life of the trust (subject to any power of amendment which may be reserved by the trust instrument). There might be thought to be a difficulty with making a s 66G order if, at the time the order is made and the trust for sale is established, the financial contributions of the parties, and hence their respective shares of the proceeds of the sale, are unknown. The definition of the term "statutory trust for sale" makes the parties' ultimate entitlements "subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners". In effect, those words build into the terms of the trust a power to determine incidental questions of entitlement after having made an order for sale.

Certain equitable doctrines allow for the Court to make an order determining entitlement to relief at a general level, with further directions made as necessary to carry the order into effect. An example is an order for specific performance, which may be followed by directions and other interlocutory orders to carry it into effect: *Caird Seven Pty Ltd v Attia* (2016) 92 NSWLR 457; [2016] NSWSC 1452 at [17]. In *Coshott v Crouch* [2018] NSWSC 853 I suggested that a s 66G order could be seen as another order of this type (at [36]-[38], [45]). The making of directions to determine claims by the parties for allowances in their favour fits comfortably within such a scheme.

If I am wrong in thinking that a power to give such directions is "built in" to the standard form definition, then the Court may be able, by subsequent order under s 66G(6) to vary the parties' entitlements, at least before the proceeds of the property are distributed by the trustees. As Hamilton J pointed out in *Dobrijevich v Burge* (2001) 10 BPR 19,525; [2001] NSWSC 1176 at [3], the power of variation under s 66G(6) is not expressed to be limited in point of time.

His Honour noted that there may be allowances to be made for;

- improvements to the property allegedly effected by Mr Knights;
- sole occupation of the property by Mr Knights for part of the time since 2011;
- allegedly disproportionate contributions to the mortgage repayments made by Ms Groch;
- allegedly disproportionate contributions to rates made by Ms Groch.

His Honour then referred to three Court of Appeal authorities that expressly dealt with the allowances referred to above. *Forgeard v Shanahan* (1994) 35 NSWLR 206 arose out of an application under s 66G. *Ryan v Dries* (2002) 10 BPR 19,497; [2002] NSWCA 3 arose out of a resulting trust claim. *Callow v Rupchev* (2009) 14 BPR 27,533 concerned the entitlement to the proceeds of property that had been sold.

Improvements

It is well established that improvements and lasting repairs made to a property by one co-owner may give rise to a right to an allowance out of the sale of the property in an application under s 66G. In *Forgeard v Shanahan* Meagher JA said (at 223):

> If a co-owner, in occupation effects improvements on the co-owned property he may claim an allowance for any improvements in value effected by him. Such an allowance may be claimed in an action for partition. The allowance is not a reimbursement of the amount expended, but an allowance in respect of the amount by which the value of the property has been increased, not exceeding the amount expended, the “value” to be ascertained at the commencement of the action. …Thus, in summary, a tenant who effects repairs, is entitled to an allowance for the lesser of the value of the enhancement of the property and the cost of effecting the repairs.

Meagher JA referred (at 224) to an exception to the rule that the allowance is based on value created rather than the cost, in a case where the other co-owner is entitled to an account of rents or profits received from the property and those rents or profits have been used to finance the repairs or improvements. But because there is no evidence that the community enterprise generated any profits in the present case, it is unlikely this exception would apply.

Occupation fee

If one co-owner excludes the other from the property, that co-owner may be required to make an allowance in favour of the excluded co-owner by way of occupation fee. The traditional view was that where there is no ouster (actual or constructive) or exclusion there was no entitlement to an occupation fee. There was, however, a recognised exception where the co-owner in possession claimed an allowance for repairs or improvements. In *Forgeard v Shanahan* Meagher JA said (at 223):

> …if the owner in occupation clams an allowance in respect of improvements effected by him, equity will permit such an allowance only on terms that he is accountable for an occupation fee – this is an example of he who comes to equity having to do equity: see *Teasdale v Sanderson* (1864) 33 Beav 534; 55 ER 476.

But in *Callow v Rupchev* the Court of Appeal adopted a more expansive view, recognising what the Court described as a "new" ground for recovery that is not dependent on forceful ouster or constructive denial of title. The Court held (at [71]) that an occupation fee is available on this ground where:

> …it is unreasonable to expect co-owners to continue to live under the same roof after a domestic relationship has collapsed, and one party moves out.

The Court continued, addressing whether it is appropriate to charge this kind of occupation fee where the co-owner in occupation temporarily leaves the property (at [71]):

> …when the premises later become vacant for an extended period the party who initially remained may not be obtaining any financial benefit, or the same level of financial benefit from the property. If neither co-owner is using the property for residence or storage it may not be appropriate or equitable for either to be charged with an "occupation rent" unless a proper basis for this is established.

The Court continued (at [74]):

> Because, absent ouster, the basis for setting off a notional occupation fee is the unreasonableness of requiring the joint owners to reside together, it would be necessary, in a case where the party claiming contribution has vacated the premises for a period, for the other party to demonstrate affirmatively that it was unreasonable to expect him or her to return to the premises during that period.

This "new" principle might be available in this case, depending on the nature of the relationship between the parties.

The Court therefore held that even if Mr Knights were entitled to an allowance for improvements to the property it would be open to Ms Groch to set an occupation fee off against any such entitlement. But even if such an allowance is appropriate, whether on the traditional view or the "new" principle in *Callow*, there is no evidence before the Court that would allow a proper occupation fee for the property to be quantified.

Mortgage repayments and rates

In *Forgeard v Shanahan*, Meagher JA said (at 224):

> Apart from questions of improvements and occupation fees, which arise from the relationship of co-owners, it will also often happen that co-owners are joint debtors (for example, on a mortgage, or because rates are levied on the property). If one co-owner pays such a debt in full he is entitled to require the other co-owner to contribute a

> rateable amount; at least that is the prima facie position. In this regard the parties' rights arise from the equitable doctrine of contribution, not from the law of property (see Gibbs CJ in *Muschinski v Dodds* (1985) 160 CLR 583 at 596-597), that is, they would apply in the case of all joint debts even if the debtors owned no property.

But Hodgson JA in *Ryan v Dries* said that Meagher JA's analysis was obiter and expressed some qualifications to it. He responded to what Meagher JA said about mortgage repayments as follows (at [71]):

> …once an occupier is required to do equity because he or she is seeking equity, there is no reason to distinguish between improvements or repairs effected to the property on the one hand, and the reduction of a charge on the property through mortgage repayments on the other.

This aspect of *Ryan v Dries* would support a set-off of Ms Groch's mortgage contributions against any entitlement Mr Knights might have by way of allowance for improvements (after deduction of any occupation fee).

The Court considered that it was prudent to give due regard to these considerations prior to the sale. This was so because, among the responsibilities of the trustees for sale will be the preparation of a tax return or returns for the trust. The cost base of the property will need to be worked out by the trustees in order to lodge the return and discharge their respective obligations pursuant to the terms of the statutory trust.

Accordingly, His Honour made the order for the appointment of statutory trustees (noting that it would take some time to have the property sell) and left open the possibility for parties to address the Court in respect of the matters raised within the terms of the judgment.

Gupta v Fordham Laboratories Pty Ltd [2018] NSWSC 551

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 1 May 2018

> LEASES AND TENANCIES – Exercise of option – Whether agreement for lease arising out of exercise of option had been abandoned – Held no abandonment – Discretionary considerations relevant to a specific performance order – Held specific performance of the agreement for lease should be ordered – Cross-claim for alleged breaches of option lease

Facts

Mr Gupta (**Tenant**) brought proceedings against Fordham Laboratories Pty Ltd (**Landlord**) seeking, amongst other things, injunctive relief to restrain the Landlord from treating particular letters as valid notices to terminate his tenancy for breaches of the lease and from taking any steps to re-enter the premises or to forfeit the Tenant's leasehold interest in the premises. The Tenant also sought specific performance of the equitable lease the Tenant claims came into existence in respect of the premises.

The difficulties between the parties were manifest, commencing prior to the entry of the lease and prevailing up to the time of the trial. These included:

- Prior to entering into the lease the Tenant paid a deposit which he considered would be used on account of rent or other monies once the lease commenced, however, the Landlord considered the deposit was a payment so the Landlord would not lease the premises to another. Her Honour geld that this deposit was in fact to "qualify" the Tenant.

- The Landlord, in a letter dated May 2010, expressed the view that the dealings in relation to the proposed lease had been excessively protracted.

- The practice from time to time by the Tenant to make payments by direct deposit in lump sums without any reference or description; and

- The Landlord applied to the Department of Fair Trading for a security bond to be paid out to the Landlord in 2011, the monies so drawn down were not then treated by the Landlord as discharging the rent arrears (it was just being held by the Landlord). Ward CJ held the release of the security bond discharged the then rent arrears and in the absence of an express obligation to reinstate the security bond if called upon by the Landlord, considered that the Tenant was not in breach of lease by failing to make any payment to reinstate the security deposit.

The dispute about the option lease, concerned whether the Landlord had validly terminated the Tenant's lease of the premises and was therefore entitled to vacant possession or whether the Tenant was entitled to specific performance of an equitable lease that came into existence following the exercise by him in March 2015 of an option to renew the lease that he then held.

The Landlord acknowledged that there was a valid exercise of option by the Tenant in March 2015. The Landlord also accepted that if there is a renewed equitable lease on foot, then the circumstances in which the Landlord could terminate was limited.

The Landlord's principal argument was that in the course of negotiations the Tenant abandoned or relinquished his rights under the option lease with the consequence that the Tenant was thereafter occupying the premises on no more than a monthly tenancy and the Landlord was entitled and, in fact had, validly exercised its right to terminate that monthly tenancy by giving sufficient written notice.

Pursuant to the terms of the lease, the first option to renew was required to be exercised between 29 December 2014 and 29 March 2015. Within that time period, on 12 March 2015, the Tenant exercised the option by email to the Landlord. At that time the Tenant was not in arrears nor had any alleged breach notice been issued.

Mr Gupta argued that on 1 July 2015, Mr Gupta became the beneficiary of both an equitable lease on the terms set out in cl 4.6 of the Lease and a common law tenancy at will pursuant to s 127 of the *Conveyancing Act* (referring to *Palermo Seafoods Pty Ltd v Lunapas Pty Ltd* [2014] NSWSC 792 and *Pozetu Pty Ltd v Alexander James Pty Ltd* [2016] NSWCA 208 at [53]). Mr Gupta disputes the proposition that he abandoned his rights under the option lease.

Exercise of the Lease

Her Honour noted that an option to renew a lease is a right to call for a new lease (*Gerraty v McGavin* (1914) 18 CLR 152 at 163; [1914] HCA 23), the terms of which are to be determined by reference to the terms of the option (see *Quadling v Robinson* (1976) 137 CLR 192 per Gibbs J at 201; [1976] HCA 31); nor that an option to renew a lease creates an equitable interest to a new term and that, where a new lease is not in fact executed after the proper exercise of an option to renew, then the parties are regarded as having an enforceable agreement for lease between them (citing *Re Eastdoro Pty Ltd* [1989] 2 Qd R 182 at 184). The nub of the dispute between the parties is as to whether there has been an abandonment of the option lease by dint of the negotiations.

The Negotiations

The Landlord suggested (via various letters dated March 2015 to June 2015), that a "fresh lease" be entered into due to the terms that were being negotiated being substantially different to that of the option lease that the Tenant was entitled to following the exercise of his option. The terms the Tenant sought to be re-negotiated were changes to the permitted use; to exclude contributions to outgoings; to allow for a sublet area; and proposed a further 2 five-year renewal options.

The Landlord argued it was at this point that it was open to the Tenant to either accept the offer of a fresh lease on different terms or to insist upon the execution of the Option Lease, but the Tenant continued negotiations as to the terms of a fresh lease. The Landlord's position was that the new terms, that were the subject of the negotiations, were not consistent with the Tenant's exercise of his option and the Tenant had therefore relinquished his right to the Option Lease.

On 1 September 2016, the Landlord's solicitor wrote to the Tenant's solicitor noting that the Tenant's rental arrears had not been brought up to date over a period in excess of 14 days and referred to a conversation between their respective clients to the effect that the Landlord would not grant a new lease of the premises stating *"as you know, the previous lease, the option never having been exercised, terminated on 29 June 2015 and your client has remained in occupation pursuant to a monthly tenancy"*. By letter dated 26 September 2016, the Tenant's solicitor wrote to the Landlord's solicitor denying that the Tenant had relinquished or forfeited the option and denied that the Option was never exercised.

The Landlord argued that negotiations for a new lease contemplated a lease on significantly different terms to that propounded for under the option lease but also on the fact that those negotiations involved persistent delay by the Tenant and that during the period September 2015 to March 2016, the Landlord continued to assert through its solicitors that the Tenant was occupying the premises pursuant to a monthly tenancy and at no point did the Tenant contest that position until September 2016.

The Landlord submitted that the Tenant abandoned or relinquished his rights under the option lease around 21 March 2016 when there was no substantive communication from the Tenant after that date. The Landlord argued that whether the contract formed from the exercise of the option had been abandoned may be inferred from the acts and conduct of the parties. The Landlord argued that the inference of abandonment should be drawn from the length of time which had been allowed to elapse, during which neither party had attempted to perform.

Therefore, the Landlord argued that at the time of the service of notices terminating the tenancy, the Tenant's occupation was only as a monthly tenant.

Ward CJ held that during the period from March 2015 to September 2016 both parties were negotiating for different lease terms than those provided for under the lease itself on the exercise of that option but is not inconsistent with the Tenant relying on his entitlements to the option lease. Her Honour noted that there is nothing to stop the parties agreeing to vary or add to the term of the lease for which the option clause in the lease provided.

The fact that the parties sought to do so did not evince an unequivocal abandonment by the Tenant of the rights and obligations under the option lease. Ward CJ noted in the case of *Fitzgerald v Masters* (1956) 95 CLR 420; [1956] HCA 53, Fullagar J said *"that the inference of abandonment will be drawn where an "inordinate" length of time has been allowed to elapse during which neither party has attempted to perform or called on the other to perform"*.

Ward CJ noted that in the present case the lapse of time was some 18 months and during that time the parties were still in contemplation of a further lease as they were still attempting to negotiate the terms of the new lease.

Decision

It was held that the Tenant, by engaging in negotiations with the view of varying terms to be entered into pursuant to the exercise of the option, did not abandon his entitlement to take a lease on the terms of the option lease. Separately, her Honour found that, at the time of issue of the notices of termination, he occupied the premises on the terms of an equitable lease arising as a consequence of the exercise of the option.

***Hills Central Pty Limited v Anthony Gerard Hagerty & Catherine Elizabeth Hagerty t/a the Executors of the Estate of the late Gladys Delores Hagerty* [2018] NSWSC 789**

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 31 May 2018

> REAL PROPERTY - option deed - option over real property - option exercised - whether requirements for exercise of option met - option deed required the completion date for the contract for sale of land provided with the notice of exercise of option "to be specified on the front page of the contract" and for it to "be the date 192 days from the date of the contract", except in certain defined circumstances - the plaintiff's covering letter with the exercise of option enclosing the necessary documents requested the insertion of a completion date of 192 days from the date of the contract - the requested date was not the correct completion date, as calculated according to the proper construction of the applicable clause in the option deed - what are the requirements for the valid exercise of the option under the option deed - whether the option was validly exercised in accordance with the option deed.

Facts

On 5 August 2014, Catherine Hagerty, as the attorney for her parents Mr Anthony Hagerty and Mrs Gladys Hagerty ('**the Hagertys**'), executed an option deed ('**the Option Deed**') granting an option in favour of Castle Hill Property Developments Pty Limited ('**Castle Hill**') over a residential property in Old Castle Hill Road, Castle Hill ('**the Property**').

The issue between the parties was whether Hills Central failed validly to exercise the option because Hills Central, as Nominee, did not insert a Completion Date of 42 days from the date of exercise of the option on the front sheet of the Contract; and whether Hills Central's request in the 3 August 2017 covering letter for the Notice of Exercise of Option that the Grantor, by then the executors, enter a Completion Date of 192 days.

The Option Deed provided that the benefit of the option may be assigned and the option may be exercised by the Hagertys, their estate, assignee or it could be exercised by a nominee appointed by the Hagertys. The Option Deed annexed a form of contract for the purchase of the Property **('the Contract')**. The only parts of the front page of the Contract which were complete were the names of the Vendors and description of the Property, with the completion date, purchase price and identity of the purchaser being left blank.

Mr Hagerty died in September 2014 whilst Mrs Hagerty died in January 2015, meaning that the executors of Mrs Hargerty's estate were the defendants to these proceedings as the Property passed to Mrs Hagerty as she held it with her husband as a joint tenant. As at the date of the proceedings, Mr and Mrs Hagerty remained on title as it had not yet been transmitted to the executors. Castle Hill exercised its right to appoint a nominee and served a nomination notices on the solicitor for the grantor on 2 August 2016 nominating Hills Central as its nominee. The effectiveness of the nomination was not in issue.

The Option Deed provided that the option was to be exercised between 4 August 2014 and 4pm on 4 August 2016. It could be exercised by delivering a written notice of exercise, two copies of the Contract duly exercised by the Grantee, a cheque for the balance of the 10% deposit in favour of the stakeholder named on the Contract. In the event the benefit of the Option was to be assigned, such notice and contracts were to be served on and signed by the assignee and the assignee would be purchaser under the Contract. Further, it was provided that where the option is exercised on behalf of a nominee, there shall be delivered a nomination form signed by the person entitled to make the nomination and the nominee shall be the purchaser under the Contract. Upon the exercise of the option, the parties bound by the Option would immediately become the purchaser and vendor pursuant to the Contract.

To exercise the option by a nominee, the Option Deed provided that the written notice of the exercise of the option was to be signed by the nominee, two copies of the Contract were to be signed by the nominee naming the nominee as purchaser and specifying the purchase price and deposit, the nomination and a cheque for the balance of the 10% deposit be served by the nominee.

Further, grantee, or the grantee's assignee or nominee, was permitted to extend the period during which the option may be exercised by one year to 4 August 2017, which could be effected by the payment of an Option Extension Fee of $9,808 before 4 August 2016. Caste Hill's nomination notice served on 2 August 2016, nominating Hills Central as its nominee, also enclosed a cheque for $9,808 for the Option Extension Fee. This automatically extended the date for the exercise of the option to what the Option Deed defined as the Extended Option Exercise Date to 4 August 2017.

The grantor, or their assignee, had the ability to extend the option and specify a new Option Exercise Date, provided that it was not exercised in the first 12 months of the grant of the option and 30 days' notice was given to the grantee. This could enable to grantor to shorten the time in which the option could be exercised. However, if the grantor served such a notice, the front page of the Contract would require the completion date to be 192 days from the date of the Contract, not 42 days which it would otherwise have been. No grantor's notice was served, meaning the completion date for the Contract was to be 42 days from the date of the Contract.

Hills Central purported to exercise the option on 4 August 2017, under the Option Deed. That day through its solicitor it delivered four documents to the Grantor's solicitor. The option fee was made out in favour of 'Frank Legal Pty Limited Trust Account' being the trust account for the grantor's solicitors. Hill Central did so based on a conversation with the grantor's solicitors.

The four documents then delivered to Frank Legal were: a formal written Notice of Exercise of Option dated 3 August 2017, addressed to the executors and executed by, or on behalf of, Hills Central; two copies of the Contract, executed on behalf Hills Central, naming Hills Central as the purchaser, and specifying the purchase price as $1,961,520 and the deposit as $196,152. Hills Central did not specify a completion date on the front page of the two copies of the Contract; a further nomination notice signed by the grantee, Castle Hill, appointing Hills Central as nominee under the Option Deed dated 3 August 2017; and a cheque for $196,152, being the balance of the 10% Deposit. The solicitor for the executors claimed that the option "was not exercised in accordance with the Deed of Option and as such the option has now lapsed".

Hills Central claimed a declaration that it had validly exercised the option under the Option Deed on 4 April 2017 and an order that the Option Deed be specifically performed, including by exchanging the Contract.

Decision

The issues raised in this case were: whether Hills Central failed validly to exercise the option because Hills Central did not insert a completion date of 42 days from the date of exercise of the option on the front sheet of the Contract; and whether Hills Central's request in the 3 August 2017 covering letter for the Notice of Exercise of Option that the Grantor, by then the executors, enter a Completion Date of 192 days.

Hills Central argued that the option was validly exercised as it had complied with the Option Deed by inserting their name as purchaser, specifying the purchase price, paying the deposit and by delivering to the solicitors for the executor a nomination notice, notice of exercise of option, two copies of the contract and the deposit cheque and that the Option Deed, when properly construed, did not require Hills Central to specify a Completion Date on the front page of the contracts to validly exercise the option. They also argued that the circumstances evince an intention to exercise the option

Further, Hills Central contended, in response to the executors contend: that a combination of Option Deed clauses 2 and 9 require Hills Central to specify a completion date on the front page of the Contract before Notice of Exercise of Option; that Hills Central's failure to do so and its request to insert the an incorrect completion date in the covering letter to the Notice of Exercise of Option in substance amounted to a counter-offer to the executors, which they chose not to accept.

After considering the relevant legal principals relating to the exercise of options, and noting the Option Deed was a commercial agreement which should be construed to mean what reasonable commercial parties in their position can be taken together to have meant, his Honour analysed the terms of the Option Deed. In doing so, his Honour accepted the submissions of Hills Central and their construction of the Option Deed.

In doing this, his Honour note that there was no express requirement in the option exercise clause to nominate a completion date and there is no linkage with any obligation outlined in clause 9 to do so. Slattery J rejected the executors' arguments that it was a fundamental obligation to completion the completion date on the contract and instead found that the only obligation in this respect was for the nominee to sign the contract; it was not for the nominee to prepare it as that was an obligation on the grantee.

Further, his Honour found that the language used in clause 9, which related to specifying the completion date on the Contract, was materially different form that used in clause 2 which related to the exercise of the option. The difference was that clause 2 operated at the moment of the exercise of the option whereas clause 9 does not refer to the exercise of the option and prescribes a choice of completion dates. His Honour stated that clause 2 was an 'essential integer' to the creation of a binding contract whereas clause 9 is not so specific and was indicative of an open contract for the sale of land.

The third reason why Slattery J found for Hills Central was because clause 9's operations do not depend upon the acts of the parties – it is automatic upon the grantor extending the option. His Honour also cited the fact the parties were immediately bound by clause 2.2 which related to the exercise of the option, to be vendor and purchaser pursuant to the Contract.

Given the forgoing, Slattery J rejected the executor's argument that Hills Central's request that an 'incorrect' date be placed on the Contract amount to a counter-offer. Accordingly, the Court concluded that the nominee, Hills Central, was not required to specify the completion date on the front page of the Contract in order to validly exercise the option. His Honour made the declarations sought by Hills Central.

Holmes v Evans [2018] NSWSC 260

Coram: Rothman J

Court: Supreme Court of New South Wales

Date: 2 March 2018

> POSSESSION – plaintiff proves ownership and entitlement to possession – plaintiff and defendant originally married – no order of the Court disturbing plaintiff's ownership – no resulting trust or factual circumstance that might arguably give rise to a resulting trust – possession ordered – leave to execute writ of possession granted – mesne profits ordered from date on which vacant possession was due to be given, in accordance with the demand made

Facts

Natalie Anne Holmes, the plaintiff, sought summary judgment for possession of the property located at 44 Arthur Street, Wellington ('**the Property**') as well as a writ of possession for the Property and summary judgement for a claim of mesne profits of $12,350 calculated by reference to the weekly rental value of the Property from 17 June 2016 to 2 March 2018.

The plaintiff and the defendant were once married but have been divorced since 2 February 2015 with no order moving the title of the Property from the name of the plaintiff. The Defendant was in occupation of the Property and refused to provide vacant possession after significant correspondence pursuant to which the Plaintiff sought vacant possession.

The Defendant had provided to the Court a letter to the effect that he would not be in attendance at the hearing and would accept the judgment of the Court.

Decision

His Honour found the Plaintiff was the registered proprietor of the Property and there was no subsisting agreement as to occupation of the Property. The plaintiff had made many requests for the Plaintiff to leave the Property to no avail. His Honour did not find any resulting trust in favour of the defendant and agreed with the decision of McLelland J in *Hammon v O'Brien* (1995) BPR 97,331 that mesne profits be awarded for the period from which possession was demanded until possession is recovered. Accordingly, judgment was entered for the Plaintiff for possession of the Property, a writ of possession of the Property be issued, and judgment for the plaintiff for $13,350.

Huang v Ceylan [2018] NSWSC 306

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 13 March 2018

> CONTRACTS – Conveyancing Act – s 52A(2) – statutory warranties – disclosure of relevant "matter" – where defendant sold plaintiffs a three-bedroom apartment when development consent only permitted two-bedroom apartments – where plaintiffs rescinded contract upon discovery that apartment did not comply with development consent – whether defendant in breach of contract – whether rescission by plaintiffs valid – whether plaintiffs validly forfeited deposit – whether failure to disclose breach of development consent constitutes breach of statutory warranty – breach of development consent is "relevant matter" due to state of building – defendant in breach of contract – plaintiffs validly rescinded contract – deposit not forfeited by plaintiffs – plaintiffs entitled to return of deposit

Facts

The Mr Huang and Ms Chen (respectively, the 'First Plaintiff' and the 'Second Plaintiff') were husband and wife and were the purchases of a property pursuant to a contract dated 26 August 2016. The Defendant, Pelin Ceylan, was the vendor.

The relevant property has three bedrooms and was advertised on that basis in July 2016, although the building consent provided that the relevant property have two bedrooms. The purchase price under the contract was $900,000.00 with a deposit of $90,000.00. On 26 September 2016 the Plaintiffs served a notice rescinding the contract on the basis that an internal wall which created the third bedroom was illegal. The Defendant did not accept that the notice and served a notice to complete on the Plaintiffs, which was not complied with. The Defendant purported to forfeit the Plaintiffs' deposit, and gave formal notice of termination of the contract.

The Plaintiffs claimed that the Defendant breached the vendor warranties in Sch 3 Part 1 cl 1(d) of the *Conveyancing (Sale of Land) Regulations 2010* (NSW) **('the Regulations')**, specifically that there is no matter in relation to any building or structure that would justify the making of a demolition order. On this basis, the Plaintiffs claimed that they were entitled to rescind the contract. The Defendant disputed that would follow and that there was no breach. Further, the Plaintiffs claimed that, if their right to rescind arose, their notice of rescission was effective to do so. This was not disputed. Alternatively, the Plaintiffs sought the return of their deposit.

Decision

The Defendant submitted that clause 2.52 of the vendor warranties meant the wall extension did not change the configuration of any room by removal of an existing wall, partition or other means as nothing has been removed and the configuration of the media room remains unchanged.

His Honour did not accept this submission, noting that clause 2.52 deals with relevant development standards, but cl 1.15 provides that a particular development is only exempt if it is a "specified development" *and* it complies with the relevant "development standards" for such a development. Accordingly, His Honour found that the alteration of the Property did not comply with the did not comply with clause 2.51. It involved the construction of a new wall (containing a doorway), rather than the replacement or alteration of an existing one. His Honour also found that the alteration did not comply with cl 2.52. Therefore, it was open for a council to make an order to remove the wall and reinstate the apartment in accordance with council's plan. Accordingly, his Honour upheld the argument for the purchasers and conclude that there was a breach of the statutory warranty. The purchasers are entitled to succeed on this ground.

Accordingly, his Honour did not have to consider whether the deposit be returned to the Plaintiffs in accordance with s 55(2A) of the *Conveyancing Act*. His Honour declared that the Plaintiffs were entitled to rescind the contract on the basis of breach by the vendor of the statutory warranty set out in Sch 3 Part 1 cl 1(d) of the *Conveyancing (Sale of Land) Regulations* 2010. The purchasers are thus entitled to a refund of their deposit.

Ideal Business Centres Pty Ltd v Violin Holdings Pty Ltd atf The Violin Investment Trust [2018] NSWSC 1249

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 19 February 2019

> LAND LAW — Torrens title — Exceptions to indefeasibility — Acknowledgement of unregistered interest — Whether incoming purchaser bound at law or in equity to observe and give effect to unregistered lease

Facts

These proceedings concern whether a purchaser of commercial premises is bound at law or in equity to honour the terms of an unregistered lease for part of those premises.

The plaintiff, Ideal Business Centres Pty Ltd ("IBC") was one of several lessees of commercial premises at Mascot (the "Premises").

The second defendant, Jordana Pty Ltd ("Jordana") was the registered proprietor of the Premises pursuant to the *Real Property Act 1900* (NSW) (the "RP Act").

IBC's lease was unregistered. The first defendant, Violin Holdings Pty Ltd as trustee for The Violin Investment Trust ("Violin") purchased the Premises.

There was no doubt that Violin was aware of the unregistered mortgage. A standard form contact for sale of the Premises included special conditions under the heading "Tenancies" which began with clause 49.1: "The purchaser acknowledges that the purchaser takes title to the property subject to the unregistered lease(s) (Leases) attached to this contract." IBC's lease was attached.

On the second business day after completion of the sale of the Premises, Violin required IBC to vacate IBC's part of the Premises on the basis that Violin was not bound by IBC's lease because it was unregistered, with the consequence that IBC was in occupation as a tenant at will only.

In these proceedings, IBC alleged Violin was bound to honour IBC's lease. If that allegation was not made out, IBC claimed, in the alternative, damages from Jordana for breach of IBC's lease by reason of the sale of the Premises to Violin.

The Court concluded that Violin was bound to honour the terms of IBC's lease for two reasons.

First, because that is the effect of clause 49.1 on its proper construction. The "acknowledgement" in that clause was not merely a recognition of the existence of IBC's lease. It was an agreement to observe and give effect to IBC's rights under IBC's lease.

This was particularly so where the relevant clause (clause 49.1 (and the balance of clause 49 which is part of the context)) contained a great deal more than a mere acknowledgement of the existence of an unregistered lease. What is acknowledged is not only the fact of the "leases", but "that the purchaser takes title to the property subject to the unregistered leases". The language of taking title to something, subject to another interest, bespeaks a significant legal consequence. Furthermore, it connotes an ongoing state of affairs.

Secondly, IBC had the benefit of an *in personam* equity against Violin which overcame what would otherwise be Violin's indefeasible title to the Premises pursuant to s 42 of the RP Act. This second conclusion was an application of the decision of the High Court in *Bahr v Nicolay* (No 2) (1988) 164 CLR 604; [1988] HCA 16 ("*Bahr*").

Kunc J, cited Austin J's summary of the effect of the judgments in *Bahr* (emphases added):

> "103 For present purposes, what emerges from the judgments is that:
>
> (i) an unregistered interest may be asserted against the registered proprietor if there was fraud at the time of transfer or registration, under the fraud exception to s 42;
>
> (ii) if the registered proprietor subsequently engages in unconscionable conduct intended to deny or defeat the unregistered interest, the holder of the unregistered interest may obtain relief against the registered proprietor, either because the registered proprietor's conduct comes within the fraud exception to s 42, or because the conduct creates an equity which the holder of the unregistered interest may assert against the registered proprietor;
>
> *(iii) but such an equity will not be created merely because the registered proprietor asserts his registered title after acquiring it with notice of the unregistered interest, the additional ingredient being some form of acknowledgement of the unregistered interest, or an agreement or undertaking to act in accordance with it, from which the registered proprietor later resiles*."

This part of Austin J's judgment in *Heggies* was considered by Young CJ in Eq (as his Honour then was) in *The Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* (2007) 64 ACSR 31.

> "[112] Despite the fact that the cases I have recently digested may not all be entirely consistent one with another, it seems to me, with respect, that Austin J was correct in *Heggies* at [103] (quoted earlier) when he said that the additional factor to be superadded to notice to constitute fraud (or alternatively to create a personal equity) was "some form of acknowledgment of the unregistered interest, or an agreement or undertaking to act in accordance with it, from which the registered proprietor later resiles".
>
> …
>
> [114] One must be a little careful with this word "acknowledgment". Acknowledgment in this type of case means more that the realisation that a right exists. It connotes the case where a person not only recognises that a right exists, but also undertakes to

> respect that right. However, it does not appear necessary that the undertaking need be known to the person whose right is in question at the time when it is made."

His Honour adopted the approach of Young CJ in Eq (as his Honour then was), that is, that Austin J's reference to "an agreement or undertaking" was just another way of describing the "form of acknowledgment of the unregistered interest"

Violin submitted that the deletion of a clause, namely the deletion of a clause which provided that "the purchaser must comply with any obligation to the tenant under the lease, to the extent that the obligation is disclosed in this contract, and is to be complied with after completion" was a matter which the Court could take into account as a clear indication of the parties' mutual intention that clause 49 was not to have the effect of binding Violin to IBC's Lease: *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 91 ALJR 486; [2017] HCA 12 at 502 [73], and *Ginger Development Enterprises Pty Ltd v Crown Developments Australia Pty Ltd* [2003] NSWCA 296.

The force of that submission was held to have been diminished significantly by the fact that clause 49 purported to recast the Sale contract provision in relation to tenancies.

His Honour cited *The Interpretation of Contracts in Australia* by Sir K Lewison and D Hughes in which the learned authors wrote:

> "At best, the consideration of deleted words may negative the implication of a term in the form of the deleted words. Even in the cases where the fact of deletion is admissible as an aid to interpretation, there is a great difference between a case where a draft is amended and effectively re-cast. It is one thing to say that the deletion of a term which provides for "X" is suggestive that the parties were agreeing on "not X'; it is altogether a different thing where the structure of the daft is changed so that one provision is replaced by another provision. Further, where the first provision contains a number of ingredients, some assisting one party and some assisting the other, and that provision is removed, it by no means follows that the parties intended to agree the converse of each of the ingredients in the earlier provision."

Kunc J then cited Professor Carter in *The Construction of Commercial Contracts*:

> "Generally, the modern cases have distinguished between negotiated and standard form documents, and taken the view that deletions can be taken into account in relation to the latter but not the former."

However, in his discussion of deletions in standard form documents, Professor Carter concludes at [14-32] that:

> "There remains the problem of what to make of the deletion (or insertion). It is simplistic to say that the deletion — or any other amendment — must be significant. There are various reasons why the deletion might have been made, including that the parties misconstrued the standard form. Without the benefit of evidence of why the deletion occurred it is difficult to know what inference should be drawn. However, such evidence would usually relate to the parties' intention or their negotiations."

In the instant case, there was no evidence before the Court that spoke to the reason why clause 49 was recast in the manner it had been. Accordingly, the Court found itself ill placed to draw any conclusion about what the change said about the parties intentions about the meaning of clause 49.

It was on these bases that IBC succeeded against Violin and therefore had no claim against Jordana.

Interim Finance Pty Ltd v Bright Beginnings Learning Centre Glendenning Pty Ltd [2018] NSWSC 36

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 2 February 2018

> CONTRACTS – construction and interpretation – claim for fees payable if short-term loan transaction did not proceed as a result of specified occurrence(s)
>
> CONTRACTS – termination – alleged repudiation of contract

Facts

The plaintiff, Interim Finance Pty Ltd ("**Interim Finance"**) was the provider of short term finance to customers. The defendant, Bright Beginnings Learning Centre Glendenning Pty Ltd (**'Bright Beginnings'**) was a childcare provider who required short term finance. A letter of offer dated 22 June 2016 was sent from Interim Finance to Bright Beginnings (**'the Letter of Offer'**) pursuant to which a loan for $450,000 was offered to Bright Beginnings. Bright Beginnings signed it so as Interim Finance could draw up the loan agreement.

Part I of the Letter of Offer outlined, amongst other things, Interim Finance's rights to withdraw from or amend providing the loan if at any point it came to their attention any item or issue which changes their decision to provide the loan. Further, it provided that Interim Finance was not required to provide any reason for any decision to withdraw or amend the Letter of Offer, nor would Bright Beginnings be entitled to make any claim, demand or order against Interim Finance for any loss or damage which may be suffered as a result of such a withdrawal or amendment.

Further, Part I also set out Bright Beginnings' financial obligations in the event the Letter of Offer was signed and Interim Finance prepared loan documents, but the loan failed to succeed due to one of the following occurrences: Bright Beginnings not electing to continue with the loan; Bright Beginnings being unable to satisfy Interim Finance's requirements for whatever reason; or Interim Finance discovered or was made aware of any item or issue which changed its mind about providing the loan amount **('the Occurrences')**.

If the Occurrences happened, Bright Beginnings would be liable to pay to Interim Finance the following fees: a loan application fee, the legal costs and disbursements for preparation of loan documents; and an administration fee of $1,650.00 (**'the Fees'**). The Fees became due and payable within 5 days of Interim Finance producing an invoice and if that invoice was not paid, Part I included a charging clause pursuant to which Interim Finance took an equitable interest over the property held by Bright Beginnings, being a property in Guildford (**'the Property'**), by registering a caveat.

On 28 June 2016 a loan agreement was sent to Bright Beginnings (**'the Loan Agreement'**). Bright Beginnings indicated to Interim Finance on 4 July 2016 that a solicitor was retained to review the Loan Agreement and make amendments. On 5 July 2016 Interim Finance claimed they received a telephone call from a broker seeking a larger amount that that offered to Bright Beginnings and as a consequence, Interim Finance became concerned that Bright Beginnings was 'shopping around' for finance. On 8 July 2016, Interim Finance raised those concerns, to which Bright Beginnings replied that they were waiting on amendments to the loan agreement from Interim Finance's solicitor. Bright Beginnings also asked if Interim Finance was willing to substitute securities in the loan documents for another property, which Interim Finance rejected.

On 8 July 2016, Interim Finance sent Bright Beginnings an email detailing their attempted contact with Bright Beginnings for the signed loan agreement to which they received no response. Accordingly, Interim Finance assumed that Bright Beginnings did not wish to proceed with the loan and invoiced Bright Beginnings for fees amounting to $8,100 with the due date for the payment of such fees being 15 July 2016. Instructions were also given on 8 July 2016 to lodge a caveat over the property. Also on 8 July 2016 Bright Beginnings' solicitor requested the Loan Agreement for signing which was subsequently rejected by Interim Finance via email shortly thereafter on the same day.

On 12 July 2016 Bright Beginnings in a telephone conversation with Interim Finance requested to proceed with the loan and noted Interim Finance's rejection on the basis Interim Finance was uncomfortable proceeding due to inconsistencies in communication. Subsequently, on 9 September 2016, a lapsing notice on the caveat over the Property was filed by Bright Beginnings.

Decision

Her Honour did not find Bright Beginnings was liable for the Fees to Interim Finance. Her Honour was of the view that attempts to negotiate amendments to loan agreements, especially the negotiation of security terms, was not an election to discontinue with an agreement as alleged by Interim Finance. Further, Ward CJ in Eq was unconvinced that Bright Beginnings did not comply with timing requirements set out by Interim Finance as Interim Finance failed to set out specific times by which the Loan Agreement was to be finalised. Further, her Honour was of the view that Interim Finance was not aware of any item or issue which would have changed the decision to provide Bright Beginnings with a loan because the communications made prior to Interim Finance's email dated 8 July 2016 were not the basis on which the invoice for fees was predicated. Her Honour found those communications were simply a finance broker seeking a higher loan amount and a solicitor asking for alternative security, which were standard negotiating points and did not amount to items or issues to which Interim Financing were made aware.

In relation to Interim Finance's argument that they were entitled to immediately lodge a caveat held by Bright Beginnings equitable interest in the Property, her Honour determined that the right to lodge a caveat did not arise until five days after the invoice for fees was produced.

Accordingly, her Honour dismissed Interim Finance's summons, declared that they did not have a caveatable interest in the Property and they take all steps to remove the caveat registered over the Property. Her Honour reserved the question of costs, which would be determined on the papers.

***International Computer Network Pty Ltd v Talon Construction Group Pty Ltd* [2018] NSWSC 120**

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 15 February 2018

> REAL PROPERTY – easement – alleged nuisance and obstruction of easement – proceedings commenced in 2018 to remove obstructions and abate nuisance – proceedings commenced in 2017 between same parties and one other party had settled, although settlement had not been fully performed – parties now in dispute about issues that had arisen after the settlement of the 2017 proceedings.

Facts

International Computer Network Pty Limited, the Plaintiff owned land referred to as 'Lot 704' in Wollongong. Lumos International Pty Limited ('**Lumos**') owned the adjacent Lot 703 whilst the Defendant, Talon Construction Pty Limited, was close to completing a multi storey residential building with approximately 25 apartments on lot 703.

When these proceedings first came before the Court, the Plaintiff claimed the Defendant interfered with the right of way to Lot 704 by leaving skip bins and other rubbish in the right of way. It became apparent to the Court there were earlier proceedings between the parties (numbered 2017/00135633) (**"the 2017 proceedings"**). In the 2017 proceedings, the Plaintiff was also the plaintiff and Lumos the first defendant and the Defendant the second defendant. The subject matter of the 2017 proceedings was to prevent Lumos and the Defendant from causing trespass to, nuisance to and interference with Lot 704 in various ways, including obstructing Lot 704's easement. Darke J made comprehensive orders which appeared to have solved the trespass, easement obstruction and nuisance problems.

There was a subsequent mediation of certain issues which arose in the 2017 proceedings, which led to an apparently binding Heads of Agreement between the parties. The Heads of Agreement apparently provided: for Lumos and the Defendant to make good certain damage to Lot 704 and to Lot 704's easement over Lot 703 and to repair the consequences of nuisance and trespass damage to buildings on Lot 704; for Lumos to convey to the Plaintiff the part of Lot 703 currently burdened by the right of way for the benefit of Lot 704, with the Plaintiff bearing all costs and expenses of the conveyance; for the Plaintiff and Defendant to continue the existing access arrangements for the right of way; for the Plaintiff to pay to the defendants $15,000 each upon completion of these various steps by 1 December 2017; all to be followed by dismissal of the 2017 proceedings.

His Honour found that four new disputes now appear to have emerged between the parties: an encroachment issue; a fire escape issue; a sewer issue; and a completion issue. He proceeded to summarise each issue.

Decision

In light of the fact new issues apparently emerged since the 2017 proceedings, his Honour made directions that the parties to attempt to reach agreement on these issues and, if not, to state their position to the Court so the Court can give final directions for a hearing to resolve them.

James & Ors v James **[2018] NSWSC 316**

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 16 March 2018

REAL PROPERTY - trustees for sale - after appointment of trustees for sale under Conveyancing Act 1919 s 66G - trustees for sale apply for writ for possession of the subject property - defendant resists issue of writ on grounds of hardship to her, on health grounds and the need to repair and preserve the property - issue of whether and when the subject property should be inspected to preserve evidence for claims that may be made as between the plaintiffs and the defendant after the sale of the subject property.

Facts

This case related to an application for a writ of possession. The Plaintiffs were three brothers and co-owners as tenants in common of a residential property located in Clovelly **('the Property')** which was once occupied by their late mother. The Defendant was the sister of the Plaintiffs and was also a co-owner as a tenant in common in the Property. The Defendant was in occupation of the Property and the Plaintiffs wished to sell it.

In September 2017 Emmett AJA of the NSW Supreme Court made orders pursuant to s 66G of the *Conveyancing Act 1919* (NSW) (**'the Act'**) that trustees for sale to sell the Property be appointed. His Honour also made orders for possession which required the Defendant to vacate the Property within 28 days of a request made by the trustees for sale, provided that such request was not made before 20 January 2018.

In these proceedings, the Defendant opposed the application by the trustees for sale for the issue of a writ of possession after the trustees for sale gave notice after 20 January 2018 and the Defendant failed to vacate the Property and as at the time of the hearing remained living in it.

The Defendant was a bankrupt, and her trustee in bankruptcy was represented in the proceedings. The Defendant contended that the writ of possession ought not be made for three reasons: (1) she had no money and nowhere to go; (2) she needed to do repair and restoration work to the Property; and (3) her condition of anxiety would be aggravated.

Decision

In relation to the first of these arguments, Slattery J found that the Defendant had the benefit of over six months since Emmett AJA made his orders to find alternate accommodation and a six-week delay between the writ being issued and executed. Further, his Honour indicated that the Defendant did not indicate how her present lack of financial resources would improve if she were granted further delay in the execution of a writ.

In relation to the second argument, relating to repairs and restoration of the Property, his Honour referred to the evidence the Defendant provided pursuant to which she claimed she had worked to repair and improve the Property. His Honour noted that recovery of such expenditure was now a matter for the Defendant's trustee in bankruptcy. Further, any future repair to the Property prior to sale was the responsibility of the trustees for sale.

In relation to the third argument, relating to the Defendant's anxiety condition, his Honour noted that the report provided by the Defendant was from June 2016 and was sufficiently out of date to that it did not give a very reliable picture as to her current mental state. Accordingly, his Honour found that nothing provided by the Defendant indicated that medical or psychological circumstances warranted delay in the issue of a writ for possession. Accordingly, an order to issue a writ of possession was made.

Slattery J declined to make a costs order and reserved the question of costs with that matter to be determined by the Court at a later time if the parties could not settle the issue between themselves.

Karimbla Properties v Council of the City of Sydney (No 2) [2018] NSWLEC 3

Coram: Sheahan J

Court: Land and Environment Court of New South Wales

Date: 29 January 2018

> COSTS: Whether costs and interest are recoverable by the Applicants following the principal judgment

Facts

Sheahan J delivered a judgement in this matter on 26 June 2017 and invited the parties to "negotiate, and, hopefully, agree upon, Short Minutes of Order" ('**SMO**') to implement his Honour's findings. The parties were unable to agree on appropriate SMO's and a further hearing was held on 19 October 2017 to deal with outstanding issues. Those three issues were: a stay of the proceedings pending a planned appeal by the respondent councils ('**the Respondents**'), the Applicants' claim for interest and costs.

In relation to the stay sought by the Respondents, the Applicants agreed with North Sydney Council (one of the Respondents) on the form of an undertaking relating to the payment of certain sums paid by the Council pursuant to the orders of the Land and Environment Court in two separate proceedings. Given Sydney City Council and Bayside Council now agreed to the same form of undertaking, there was no requirement for a stay.

On the issue of costs, North Sydney Council and the Applicants agreed that the Council would pay the Applicants' costs on an ordinary basis. This was not agreed to by the remainder of the Respondents and was an issue in these proceedings.

On the issue of interest, the Applicants claimed for interest on any repayment to them of money paid to the Respondents on account of rates levied based upon Sheahan J's findings. All Respondents disputed this claim

Decision

His Honour cited the provisions relevant to this decision as being Rule 3.7 of the Land and Environment Court's Rules and s 100 of the *Civil Procedure Act 2005*. His Honour noted that Rule 3.7 provides that a Court is not to make an order for the payment of costs in Class 3 proceedings unless the making of the order is fair and reasonable in the circumstances and that, in determining whether the making of an order is fair and reasonable, the Court considers, *inter alia*, the determination of the issue before the Court. His Honour noted that the Court retains a discretion to make an order.

His Honour noted that, amongst the findings in his original judgement, he concluded that the Applicants were entirely successful in their arguments. He also found that the Applicants made genuine attempts to resolve the proceedings in which they were ultimately successful. On that basis Sheahan J found that a costs order should be made in favour of the Applicants.

On the issue of interest, the Applicants argued that the proceedings were for the recovery of money, thus enlivening s 100 and that the cause of action which arose was due to the change of use of the subject land to residential accommodation had occurred and that since a refund was ordered by the Court, the requirements of s 100 are met.

Sydney City Council and Bayside Council submitted that, until further orders of the Court were made, there is no requirement of the adjustment of rates and such a requirement will only be enlivened once the Court makes such an order for adjustment. In any event, those Councils argued that the Local Government Act does not contemplate the repayment of rates, so there can be no breach and thus no cause of action.

The Court noted the decision of the decision of *Wilpinjong Coal Pty Limited v Mid-Western Regional Council; Ulan Coal Mines Limited v Mid-Western Regional Council*, which addressed the true nature of proceedings brought under s 526 of the Local Government Act. In that decision to Court noted that proceedings brought under s 526 were not a cause of action but akin to a merits review of a council's decision. Accordingly, Sheahan J concluded that this precluded the Applicants from claiming interest pursuant to s 100 of the Civil Procedure Act.

Accordingly, his Honour concluded that the Applicants were entitled to their costs of the proceedings, but not to interest, and the parties should formulate the SMO sought by the Court in the primary judgment and address the issue of costs. His Honour determined that each party should pay its own costs of the 19 October hearing.

McDonald v Ellis [2018] NSWSC 278

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 7 March 2018

> LAND LAW – Co-ownership – statutory trust for sale – whether proceedings should be adjourned to allow co-owner time to obtain taxation rulings – costs – whether costs of respective co-owners should be paid out of proceeds of sale

Facts

The plaintiff was the owner of a quarter share in a property in Baden Street, Coogee ("the Property"). The first defendant was the owner of a half share in the Property, and the second defendant was the owner of the remaining quarter share. The co-owners are siblings who inherited their shares in the Property from their late grandfather's estate.

By a Summons filed on 18 July 2017 the plaintiff sought the appointment of Perpetual Trustee Company Limited as a trustee for sale of the Property pursuant to s 66G of the *Conveyancing Act 1919* (NSW). The second defendant did not oppose the orders sought by the plaintiff.

On 18 September 2017 the first defendant filed a Cross Summons in which an order for partition was sought.

The proposed orders contended for by the plaintiff provide for the appointment of Perpetual Trustee Company Ltd as trustee of the Property upon the statutory trust for sale under Division 6 of Part 4 of the *Conveyancing Act*, and ancillary matters. The plaintiff also proposed an order that specifically allows the first defendant to bid at any auction of the Property.

The orders were not opposed by the second defendant, and the first defendant has not suggested that any other form of orders would be more appropriate.

The point of contention as between the first defendant and the plaintiff arose from the submission made by the first defendant that the matter should be adjourned to 26 April 2018 to allow him to obtain private taxation rulings from the Australian Taxation Office and Revenue NSW. The first defendant proposes to obtain a ruling from the Australian Taxation Office as to whether the appointment of a trustee for sale would trigger a capital gains tax event, and a ruling from Revenue NSW as to any transfer duty consequences of a trustee sale.

Decision

His Honour held that it would not be appropriate to adjourn the proceedings. The plaintiff sought the consent of her co-owners to a sale more than 9 months ago, and the proceedings themselves had been on foot for more than 7 months. The Court held that the first defendant had more than adequate time to seek any private taxation rulings. There was also evidence that the plaintiff, who is 67 years of age, desired the sale in order to alleviate some financial difficulties she was facing.

Moreover, His Honour found that even if the appointment of a trustee for sale brought about some disadvantageous taxation consequences for the co-owners that would not afford a good reason to decline the plaintiff's application.

The discretion to refuse relief under s 66G is a limited one (see *Ross v Ross* (2010) 15 BPR 28,945; [2010] NSWCA 301 at [36], cited in *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [40]). The discretion is generally not exercised unless on settled principles it would be inequitable to allow the application (see *Tory v Tory* [2007] NSWSC 1078 at [42], cited in *Ferella v Official Trustee in Bankruptcy* (supra) at [38]).

The mere existence of disadvantageous taxation consequences would not make it inequitable for one of the co-owners to apply for the appointment of trustees for sale. There is of course no general jurisdiction to refuse s 66G relief on the basis of hardship or unfairness (see *Ferella v Official Trustee in Bankruptcy* (supra) at [36]-[37]).

The plaintiff sought an order that her costs of the Summons be paid out of the net proceeds of sale prior to any distribution amongst the co-owners. His Honour held this to be appropriate and in accordance with established principles in relation to s 66G proceedings (see *Kardos v Sarbutt (No 2)* [2006] NSWCA 206 at [28]). The second defendant sought a similar order in respect of her costs, and the Court found it appropriate to so order.

His Honour referred to the principles as to costs in s66G applications noting that, depending upon the particular circumstances, it may be appropriate for such a co-owner to have their costs paid out of the proceeds of sale (see, for example, *Meszaros v Meszaros* [2017] NSWSC 1193). His Honour found that the overall conduct of the first defendant amounted to unreasonable opposition sufficient to warrant a departure from the usual position that the costs be paid out of the proceeds of sale.

McFarland v Gertos [2018]

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 30 October 2018

LAND LAW – possessory title – registered proprietor of land died intestate in 1947 – no grant of administration – defendant takes possession of property in 1998 – defendant has since acted as landlord of the land – in 2017 defendant makes application to Registrar-General to become registered proprietor – descendants of registered proprietor seek declaration that defendant is not entitled to obtain possessory title to land – title of registered proprietor would be extinguished by the Limitation Act 1969 (NSW) if it applied to the land – defendant entitled to obtain possessory title

Facts

These proceedings concern a property at 6 Malleny Street, Ashbury. The property is land under the provisions of the Real Property Act 1900 (NSW). The title reference is Folio Identifier 55A/316317. The registered proprietor of the fee simple is Henry Thompson Downie. Mr Downie died in 1947, apparently without leaving a will. No representative has since been appointed in respect of the deceased estate. That is, there has been no grant of administration.

At the time of Mr Downie's death the property was subject to a tenancy in favour of a Mrs Grimes. There is evidence that she was what is commonly referred to as a "protected tenant", who periodically paid the small amount of rent to a real estate agent in Canterbury, and later Hurlstone Park, known as Ford Real Estate. Mrs Grimes remained in occupation of the property until shortly prior to her death in April 1998. After her death the property remained vacant for a time.

Mr Bill Gertos, the first defendant, claims that he took possession of the property in about late 1998 and has maintained possession ever since. He contends that his possession has been adverse to the true owner throughout.

In 2017, Mr Gertos made an application under s 45D(1) of the Real Property Act to the Registrar-General (the second defendant) to be recorded in the Register as the proprietor of the fee simple in the land. An application under s 45D is a means whereby a person in adverse possession of land under the Real Property Act can in certain circumstances supplant a registered proprietor. In October 2017, the Registrar-General gave notice of its intention to grant the application made by Mr Gertos.

The instant proceedings were brought by the daughter and two grandchildren of Mr Downie.

Amongst the final relief sought by the plaintiffs was a declaration to the effect that they were the beneficial owners of the property. An order for possession was also sought. By their Amended Summons filed on 22 March 2018, a declaration was sought to the effect that Mr Gertos is not entitled to be registered on the title to the property. This declaration was the only substantive claim pressed at the hearing.

The plaintiffs accepted that they were not bringing their claim on behalf of the estate of Mr Downie. It was stated that the relief was sought on the basis that they were persons entitled to take on intestacy and thus had a chose in action to see that the estate was duly administered (see *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 at 312-314). The Court was informed that the plaintiffs had made an application for a grant, but the application was "currently subject to requisitions". It was not suggested that a grant was imminent.

Mr Gertos submitted that the plaintiffs lacked standing to seek the declaration about his entitlement to be registered on the title. Mr Gertos submitted that in any event the evidence shows that he has been in adverse possession of the property since about late 1998 and any claim to recover the land from him would be barred pursuant to the relevant provisions of the Limitation Act 1969 (NSW) ("the Act").

Mr Gertos gave evidence that he happened upon the unoccupied premises, spent money on improvements, obtained legal advice and then tenanted the property. Mr Gertos also says that he commenced to pay all the outgoings for the property including Council rates, water levies and charges, and land tax. Mr Gertos deposed that by 2014 the property was in need of further substantial repairs, and that he spent about $108,000 accordingly. This expenditure was evidenced to a large degree by invoices, and also the testimony of Ms Alha, who has worked for Mr Gertos since about 2006, and whose responsibilities include management of the property.

In early 2017, Mr Gertos made his application under s 45D of the Real Property Act. The Registrar-General made various enquiries, and issued a number of requisitions to Mr Gertos for further information, before giving notice in October 2017 of an intention to grant the application.

Decision

The terms of the declaration sought by the plaintiffs are directed to whether Mr Gertos is entitled to be registered as the proprietor of the land. In the course of the hearing Darke J raised some misgivings about whether the Court ought to determine that matter.

However, as both parties indicated that it was open to the Court to do so, and urged the Court to proceed accordingly, His Honour determined this aspect of the matter.

In essence, Mr Gertos contends that he is entitled to become the registered proprietor of the land because the title of Mr Downie would have been extinguished in accordance with s 45D(1)(b). In *Refina Pty Ltd v Binnie* [2010] NSWCA 192 Young JA stated that:

> …the effect of s 45C is that under s 45D(1)(b) one looks to see whether, hypothetically, the title of the proprietor would have been extinguished by the statutes of limitation had those statutes applied to the land (ie had the land been Old System land). If that enquiry returns a positive result then one of the factors which may induce the Registrar-General to issue a title has been satisfied.
>
> To my mind the provisions of the Limitation Act with respect to extinguishment of title to land have no greater effect on Torrens land than as stated in the previous paragraph.

The Court held that the relevant enquiry is whether the title of the registered proprietor of the fee simple (Mr Downie) would have been extinguished by the operation of the provisions of the Act had those provisions applied to the land.

His Honour had regard to Division 3 of Part 2 of the Real Property Act. His Honour found that, in the present case, Mr Downie had title to the fee simple in the 6 Malleny Street property. However, prior to his death he had no right to possession of the land against Mrs Grimes, who was in possession under her tenancy. Mr Downie had no cause of action to recover the land against her.

Upon the death of Mr Downie in 1947, his interest in the property became part of his estate, and by the operation of s 61 of the Wills Probate and Administration Act 1898 (NSW) was deemed to be vested in the Public Trustee. That state of affairs has continued as no grant of probate or administration has been made in respect of the estate. There has not been any passing and vesting of the estate to and in any legal personal representative of the estate (see Probate and Administration Act 1898 (NSW), s 44).

Mrs Grimes' tenancy came to an end when she died in April 1998. Mr Gertos claims that he took possession later in 1998 and has maintained his possession without interruption, and adversely to the documentary owner, ever since. I will deal first with that claim.

There was no real dispute as to the principles applicable to a claim based on adverse possession. The law is neatly summarised in the well-known statement of Bowen CJ in Eq in *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464 at 475. His Honour there stated:

> Possession which will cause time to run under the Act is possession which is open, not secret; peaceful, not by force; and adverse, not by consent of the true owner. Lord Shaw of Dunfermline, giving the opinion of the Privy Council in Kirby v. Cowderoy, discussed the nature and incidents of adverse possession. Adopting earlier judicial observations, he said: "Possession 'must be considered in every case with reference to the peculiar circumstances … the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession'."

The plaintiffs submitted that the evidence did not show that Mr Gertos was relevantly in adverse possession. It was submitted that Mr Gertos did not possess the property in an open manner. It was put that insofar as he occupied the property he did so only for the purpose of obtaining rental income from it, and this was not sufficient to amount to a taking of factual possession. The plaintiffs also submitted that in these circumstances clear evidence was required in order to show the requisite intention to possess, yet the evidence did not reach that standard. s.

The submissions made on behalf of Mr Gertos emphasised the following aspects of his evidence. First, that in 1998 he concluded that the property was not occupied, and after carrying out an inspection, decided to take possession of it himself. Secondly, that he thereafter took steps to secure the property, had the locks changed, and had some works carried out to make the property habitable. Thirdly, that he then set about renting the property to tenants through an agent appointed for that purpose. Fourthly, that over the years that followed the property was let by him, on a more or less continuous basis, to a series of tenants. Fifthly, that he undertook the payment of the rates and charges, and land tax, in respect of the property, and further made payments for insurance and maintenance. Sixthly, that he expended more than $100,000 in 2014 in effecting substantial works at the property. Seventhly, that the income and expenses in relation to the property were included within his taxation returns throughout. And lastly, that his entitlement to assert a possessory title was disclosed in the course of his Family Court proceedings.

It was submitted by Mr Gertos that the evidence demonstrated both factual possession and an intention to possess from about late 1998. It was put that the actions of Mr Gertos in respect of the property were unequivocal in that it was made clear that he was using the land as an owner would, and in such a way as to exclude the world at large including the documentary title holder.

Having considered the totality of the evidence, viewed in the light of the character of the property being a single dwelling suburban block, His Honour was satisfied that since about late 1998 Mr Gertos has been in factual possession of the land with the intention of possessing the land. In essence, Mr Gertos succeeded in taking and maintaining physical custody of the land, to the exclusion of all others, and he has assumed the position of a landlord. His Honour did not accept the submission that he did not actually take possession because he only occupied the property for the limited purpose of obtaining rental income. The Court held that the actions taken by Mr Gertos (in particular his engagement of a managing agent to arrange leases, and entry into leases as the landlord) clearly signify an intention to possess the property to the exclusion of all others, including the registered title holder. His actions are not equivocal in that respect.

The actions of Mr Gertos in paying rates and taxes levied upon the land further reinforce the conclusion that he has taken possession with the intention of possessing the land to the exclusion of all others (see South Maitland Railways Pty Ltd v Satellite Centres Australia Pty Ltd [2009] NSWSC 716 at [19]). So, too, do his actions in having extensive repairs carried out.

Mr Gertos' possession of the land was therefore characterised as open, not secret; peaceful, not by force; and adverse, not by consent of the true owner. It has continued without interruption to the present day.

His Honour found that s 31 of the Act operates in the situation (as at the time of Mr Downie's death, the property was tenanted). Mr Downie's fee simple estate was an estate or interest in reversion for the purposes of s 31(a). That fee simple estate became a present estate or interest upon the termination of Mrs Grimes' tenancy, which occurred upon her death. As no person was thereafter in possession of the land by virtue of Mr Downie's fee simple estate, s 31(b) is satisfied. It follows that by reason of s 31 of the Act, the cause of action to recover the fee simple estate accrued on the date on which the estate became a present estate or interest, namely 19 April 1998.

However, the accrual of the cause of action is postponed by s 38(1) until the date on which the land is first in adverse possession. As Mr Gertos went into possession in about late 1998, and his possession was adverse possession for the purposes of s 38 (see s 38(4)(a)), the cause of action accrued at that time.

It then becomes necessary to consider the operation of s 27(2). Section 27(2) relevantly provides that an action on a cause of action to recover land is not maintainable if brought more than 12 years after the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.

The plaintiffs submitted that if a legal personal representative was now appointed for Mr Downie's estate, that person could bring and maintain the cause of action to recover the land from Mr Gertos because the cause of action first accrues to the legal personal representative when the grant of representation is made. That submission was rejected by His Honour.

His Honour Held that the claim brought by McFarland was the assertion of a proprietary right on behalf of a deceased estate, not merely a personal right held by the person bringing the action. The action must, of course, be brought by a person who has the requisite standing to bring an action on behalf of the estate. Standing is ordinarily obtained through a grant of probate or administration, although in rare cases standing might be derived from a representative order (see *Hewitt v Gardner* [2009] NSWSC 705).

If the interest of a deceased registered proprietor would pass on intestacy, s 29 of the Act would apply if the deceased died whilst in possession by virtue of the interest, and no one who is entitled to the land (including a legal personal representative) is subsequently in possession. In that situation a cause of action to recover the land accrues on the date of death. That is so even though a legal personal representative will not then have been appointed, and indeed might never be appointed.

The cause of action therefore accrued when Mr Gertos took possession. Time then commenced to run for the purposes of a limitation period. Subject to obtaining the requisite standing, it was from that time open to a person, acting on behalf of the estate, to bring the cause of action to recover the land from Mr Gertos. In that sense the cause of action can be regarded as having accrued to such a person for the purposes of s 27(2) of the Act.

His Honour further noted that acceptance of the plaintiffs' submissions would create considerable uncertainty in the operation of the Act insofar as it concerns actions to recover land held by a deceased registered proprietor. If a registered proprietor was deceased but no legal personal representative had been appointed the potential would exist for a cause of action in favour of a legal personal representative to arise at an indefinite time in the future and there would be no certainty that the cause of action would ever arise. This result would be contrary to one of the evident purposes of the provisions of the Act, namely, that where land remains in adverse possession for a defined period the title holder will be barred from seeking recovery of the land and the title will be extinguished.

His Honour equally rejected the submission grounded in s52 of the Real Property Act that the running of the limitation period is suspended because the deceased registered proprietor, by reason of his death, is a person under a disability within the meaning of s 52 of the Act

Accordingly, His Honour found that s 45D(1)(b) of the Real Property Act is satisfied.

In the circumstances, His Honour saw no impediment standing in the way of the Registrar-General proceeding to grant Mr Gertos' application under s 45D.

Scudooda Pty Ltd v K&E Property Pty Ltd [2018] NSWSC 1397

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 11 September 2018

LAND LAW – leases – option to renew validly exercised – party purchasing freehold estate following exercise of option to renew contained in registered lease bound by unregistered renewed lease – agreement of purchaser of freehold estate to take interest subject to leasehold estate gives rise to a personal equity in lessee against purchaser – construction of lease – lease does not contain an obligation on either lessor or lessee to pay for electricity – lessee free to arrange its own electricity supply for which it is liable to pay – lessee not entitled to reimbursement of cost of electricity – lessee not entitled to withhold payments of rent – non-payment of rent amounted to breach of an essential term of the lease and a repudiation of lease – lessor entitled to possession

Facts

1. The plaintiff is the lessee under registered lease. The leased premises are commonly referred to as Shop 3, 50-54 York Street, Sydney.
2. The lessors sold and then transferred the land to the defendant on 22 September 2015.
3. The defendant became registered as the proprietor of the fee simple.
4. The lease was for a five-year term ending on 9 September 2014, with two options to renew each for further terms of five years. The plaintiff, which claimed to have validly exercised the first option to renew in March 2014, remained in occupation of the land. It operated a restaurant and bar from the premises. It seems to be accepted that the lease and presumably any renewed lease is a retail lease within the meaning of the *Retail Leases Act 1994* (NSW).
5. The plaintiff made a claim for specific performance of the agreement to grant a new lease. The plaintiff further claimed that upon the true construction of the lease, and the renewed lease to which it claims to be entitled, the cost of electricity supplied to the premises is a liability that falls upon the lessor. The plaintiff has nonetheless met the cost of the electricity from about the time it went into occupation in late 2009.
6. In November 2016 the plaintiff sought reimbursement from the defendant in respect of some of the amounts it had paid for electricity. The defendant denied that the plaintiff was entitled to reimbursement. Since December 2016 the plaintiff has declined to pay

rent to the defendant, on the basis that it is entitled to set off the amount paid for electricity against its liability for rent.

7. The defendant disputed that the plaintiff is entitled to a grant of specific performance. The defendant further takes issue with the contention that upon the true construction of the lease or any renewed lease the cost of electricity supplied to the premises is a liability that falls upon the lessor.

8. The defendant argued that if it is incorrect on the question of construction the lease should be rectified.

9. The defendant further submitted that it has validly terminated any rights the plaintiff had to occupation of the premises, such that it is entitled to orders for possession.

10. Finally, the defendant sought to recover arrears of rent (or alternatively mesne profits) from the plaintiff and from Mr Martin O'Sullivan who gave a guarantee and indemnity in respect of the plaintiff's obligations under the lease.

Decision

Exercise of the Option

His Honour found that on about 11 March 2014, the Plaintiff validly exercised the first option to renew the lease. The fact that the Plaintiff paid increased rents did not sit well with any proposition that it was holding over. Nevertheless, the plaintiff and the then lessors did not proceed to execute a new lease in accordance with the option to renew, or have any new lease registered.

The purchaser was on notice of the plaintiff's interest

When the defendant entered into its contract to purchase the land it was plainly on notice of registered lease AF215730 and of the fact that the plaintiff had exercised the first option to renew. The defendant was also aware that a form of lease for the term 10 September 2014 to 9 September 2019 had been prepared but not yet executed by the plaintiff. In these circumstances, and leaving aside for the moment the effect of the *Real Property Act 1900* (NSW), the defendant was in the position of a purchaser with notice of the plaintiff's equitable interest in the land that arose from its exercise of the option to renew. The defendant would thus acquire its interest in the land subject to the plaintiff's equitable interest. The effect of the *Real Property Act* does not produce a different result. When the defendant became the registered proprietor it held its interest subject to the interests comprised in the registered lease, which include the plaintiff's interest under the option to renew (see *Mercantile Credits*

Ltd v The Shell Company of Australia Ltd (1976) 136 CLR 326 at 338-9, 345 and 351-2; *Tenstat Pty Ltd v Permanent Trustee Australia Ltd* (1992) 28 NSWLR 625 at 629).

In the alternative, upon consideration of the particular the terms upon which the defendant contracted to acquire its interest in the land, a personal equity would have arisen that would preclude the defendant from claiming its interest free of the plaintiff's interest (see *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 615-6, 638-9 and 653; see also the recent decision of Kunc J in *Ideal Business Centres Pty Ltd v Violin Holdings Pty Ltd* [2018] NSWSC 1249).

The defendant agreed with the former owners that it would acquire its title subject to existing tenancies, in particular the plaintiff's tenancy that derives from the registered lease, and further agreed that following completion it would comply with all obligations owed to the tenant. Recognition of the continued enforceability of the plaintiff's rights was one of the assumptions underlying the agreement by which the defendant was able to obtain its title.

For the above reasons, his Honour found that, upon completion of its contract for sale and even after becoming the registered proprietor of the land, the defendant was bound by the plaintiff's equitable interest that arose from the plaintiff's exercise of the option to renew for the further five year term. It was not open to the defendant to treat the plaintiff as merely holding over following the expiry of the term on 9 September 2014. The notice of termination of the plaintiff's tenancy given by the defendant in December 2016 was thus ineffective. The plaintiff continued in occupation on the basis of a specifically enforceable contractual right to the grant of a new lease.

Electricity Charges

His Honour found, as a matter of contractual interpretation that, notwithstanding that the issue of electricity remained ungoverned, the parties should not be taken to have had the intention that the landlord pay for the electricity. Accordingly, the Plaintiff's claim for reimbursement for the payment of electricity must fail. Darke J found that it was not enough to refer to a "heads of agreement" in construing the contract or making a claim for rectification, what was required was evidence establishing that the common intention existed up to the time of execution of the instrument itself. (see *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85)

In view of his Honour's findings on the issue of electricity charges, together with the plaintiff's non-payment of rent on the basis of set off in relation to said charges, the Court found that the Plaintiff was liable to the defendant for rental arrears.

The Court found that the Plaintiff was not entitled to withhold payments of rent. The non-payment of rent amounted to a breach of an essential term of the lease and a repudiation of the lease that the Defendant was entitled to accept. As the Defendant terminated the lease validly on 12 February 2018 it was now entitled to possession of the Premises.

The Trust Company (Australia) Ltd v NextDC Ltd [2018] NSWSC 736

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 23 May 2018

Equity – interlocutory injunction – mandatory injunction – access to leased property for landlord's valuer – issues as to construction of lease – factual issues as to grounds of tenant's refusal and purpose of access – balance of convenience – no sufficient urgency

Facts

The dispute in these proceedings concerned a landlord's access to three commercial buildings which are let out under leases.

Each of the three buildings functions as a "data centre". A data centre is a facility which houses network, data storage and communications infrastructure. The buildings are located in Port Melbourne, Victoria; Macquarie Park, New South Wales; and Malaga, Western Australia.

The buildings are assets of a unit trust known as the Asia Pacific Data Centre Trust. APDC was constituted of the custodian of the trust assets, the trust's responsible entity and the trust's investment manager.

The defendant ("NextDC") is the tenant and operates the data centres.

The leases for the three buildings were in identical terms. Each lease is for a term of fifteen years with three options of ten, ten and five years. Accordingly, the potential maximum length of the leases was forty years. The Port Melbourne lease commenced in December 2012; the Macquarie Park lease in May 2013 and the Malaga lease in November 2013.

There was a dispute between the parties that seems to have arisen by dint of a proposed takeover of APDC by NextDC. The complexities of the transaction needn't be considered for the purpose of this summary, however, a loan facility was to be provided by Bankwest to finance a capital distribution. A valuer was appointed and commissioned by APDC to value the premises.

APDC then sought NextDC's permission for Mr Duguid to visit the premises for the purposes of his valuations but that was refused.

In December 2017, NextDC, which remained a minority unit holder, announced it proposed to convene an extraordinary general meeting of security holders in APDC for the purposes of winding it up. A few days after NextDC's announcement, APDC announced that it proposed to seek to sell the properties to third parties.

NextDC contended that the proposed sale of the properties brings into play a right of first refusal that it has under the leases. NextDC also contended that a seventy-five per cent majority of security holders would be required to approve 360 Capital's plan to increase APDC's borrowings and make a capital distribution, and that 360 Capital and its associates would not be entitled to vote on that resolution. No meeting had yet been held at the time of this hearing.

Following the decision by APDC to sell the properties, a marketing campaign was carried out to obtain expressions of interest. On the strength of the response to that campaign, the value of the properties was increased from $213 million to $280 million in APDC's published accounts for the half year ended 31 December 2017.

On 6 April 2018, as part of its financial reporting surveillance program, the Australian Securities & Investments Commission ("ASIC") wrote to APDC. The letter queried the valuation increase and sought information supporting the increased valuation. On 1 May APDC provided the letter to its solicitors, who on 2 May wrote to the solicitors for NextDC, relying on the letter as an additional basis for inspection of the premises by a valuer. The instant proceedings had in the meantime been commenced on 18 April.

In refusing access, NextDC relied on cl 12.4 of the lease, which provided that access to the premises were restricted by dint of the Premises containing infrastructure and equipment which is commercially sensitive and critical to the tenant's business. Accordingly, the Landlord was precluded from entry or access without the prior written agreement from the Tenant. The Tenant was obliged to so provide agreement where access is required in order for the Landlord to comply with its obligations contained in the Lease; or a notice received by the Landlord from any Authority or in respect of any Law.

The lease also provided for the landlord's access for the following;

- Inspection by Landlord (to inspect the condition of the premises)
- To effect works
- Viewing, with the purpose of showing prospective purchasers or tenants through the premises.

APDC relied upon clause 8.2. The purpose of the valuer's visit to the premises is said to be that he wishes to view their condition for the purpose of his valuation. APDC advanced, at hearing, four grounds on which it says that a valuation is necessary:

- in accordance with Bankwest's instructions, for the purpose of refinancing;
- to comply with APDC's obligations to prepare a financial report for the year ended 30 June 2018;
- to comply with the obligation imposed on the responsible entity by s601FC(1)(j) to value scheme property at regular intervals;
- to "recommence" the process of sale of the properties.

An order requiring NextDC to permit the valuer access to the premises would be a final order. An order in that form is in fact sought by APDC by way of final relief in the Amended Summons. His Honour held that the substance of the matter cannot be altered by the simple expedient of inserting the phrase "in the nature of an interlocutory injunction" to qualify the order sought.

Once the inspection took place, APDC would obtain the benefit of the valuer's valuation, and even if APDC were to fail on a final hearing, the valuation could not be undone. No doubt

NextDC would be entitled to enforce the undertaking as to damages but no damages could likely be recovered.

The principles which govern the grant of interlocutory mandatory injunctions are the same as those which govern interlocutory injunctions generally, in that the Court must consider the strength of the applicant's prima facie case and measure that against the balance of convenience. But in a case such as this where the grant of an interlocutory mandatory injunction would have irreversible consequences that must be taken into account in assessing the balance of convenience: *Ocean Dynamics Charter Pty Ltd v Hamilton Island Enterprises Ltd* [2015] FCA 460.

APDC contended that cl 12.4 could be read in such a way that there is no need for the landlord's written consent outside the circumstances specified in sub-paragraphs (a) and (b). In such a situation, it was argued, the tenant is limited to imposing conditions on access which are reasonable having regard to the fact that the infrastructure is commercially sensitive and critical to the tenant's business.

NextDC contended that cl 12.4 conferred an absolute right on NextDC to refuse access except in the circumstances specified in sub-paragraphs (a) and (b).

Parker J formed the view that both of these positions may be too extreme. His Honor expressed some difficulty in understanding the construction advanced by counsel for APDC at a textual level. His Honour equally rejected NextDC's case that there existed an unfettered right to refuse access except in the circumstances specified in sub-paragraphs (a) and (b). If there has to be an implication, an implication that outside the circumstances in sub-paragraphs (a) and (b) consent should not be unreasonably withheld would sit much more comfortably with the general rule that commercial contracts, including commercial leases, contain duties of good faith and fair dealing (*Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369).

His Honour found that there would need to be quite extraordinary factors in APDC's favour on the balance of convenience to justify the Court in determining the construction and factual issues for interlocutory purposes. Those factors were not present in the instant case.

His Honour accepted that there was no prejudice to NextDC from the proposed inspection by the valuer. His Honour found, however, that APDC failed to discharge its onus in this application to justify the extraordinary step the Court is asked to take in its favour and this could not be achieved simply by pointing to a lack of prejudice. His Honour found that the real prejudice to NextDC would be to deprive it of the entitlement that it claims to have to prevent the valuer from entering the premises. This would be lost if the injunction is granted and the matters raised by APDC failed to outweighthat prejudice.

The application was therefore refused.

The Trust Company (Australia) Ltd in its capacity as custodian of The Asia Pacific Data Centre Trust v NEXTDC Limited [2018] NSWSC 1361

Coram: Hammershlag J

Court: Supreme Court of New South Wales

Date: 4 September 2018

> EQUITY – declaratory orders – landlord and tenant –dispute concerning rights under leases of the landlord to access premises – where landlord seeks declarations as to the meaning and effect of clauses in the leases but there is no extant controversy about access – availability of declaratory relief – hypothetical dispute; HELD – declaratory relief inappropriate and refused

Facts

The proceedings involved a contest between a landlord and a tenant concerning the landlord's rights under provisions of leases between them, to have access to the premises.

In the express terms of the lease, it made plain that access to the premises were restricted by dint of the Premises containing infrastructure and equipment which is commercially sensitive and critical to the tenant's business. Accordingly, the Landlord was precluded from entry or access without the prior written agreement from the Tenant. The Tenant was obliged to so provide agreement where access is required in order for the Landlord to comply with its obligations contained in the Lease; or a notice received by the Landlord from any Authority or in respect of any Law.

The lease also provided for the landlord's access for the following;

- Inspection by Landlord (to inspect the condition of the premises)
- To effect works
- Viewing, with the purpose of showing prospective purchasers or tenants through the premises.

From 28 November 2017, the Landlord commenced seeking access to the premises. The parties took different positions on the proper construction and operation of the provisions of the leases. T

The plaintiffs advanced four grounds as to why a valuation was necessary:

- for the purposes of refinancing,
- to prepare a financial report for the year ended 30 June 2018,
- to comply with the obligation imposed on a responsible entity by s 601FC(1)(j) of the *Corporations Act 2001* (Cth) to value scheme property at regular intervals, and
- to recommence the process of sale of the properties.

At other times, it was contended by the Landlord in correspondence between the parties that access by a valuer was necessary to assess any offer by a prospective purchaser, to make an offer to the Tenant as part of a first right of refusal (for which the lease provides) and to re-finance debts.

On 9 August 2018, the Landlord made a request for access to the leased premises pursuant to cl 8.2(a), amongst other things, to assess whether the Tenant has kept the premises in good repair.

On 14 August 2018, the Tenant's lawyers wrote to the Landlord's lawyers that without prejudice to their client's rights under, and position in respect of, the leases, their client was prepared to allow a representative of the Landlord accompanied by valuers to access the premises.

Access was given (without incident, according to the Tenant) to the Macquarie Park premises on 15 August 2018, to the Port Melbourne premises on 17 August 2018 and to the Malaga premises on 20 August 2018.

In a letter dated 20 August 2018, from the Tenant's lawyers to the Landlord's lawyers, the Tenant took the position that, where it had received a proper notice under cl 8.2(a), it was prepared to provide access. It did not consider that there was any continuing dispute between them. The Tenant's position is that the question of whether it permits access to the premises is to be considered on a case by case basis and in response to specific requests from the Landlord.

Despite having had access, the Landlord nevertheless pressed on for declaratory relief.

When the hearing commenced before me on 27 August 2018, the Landlord, with leave, filed in Court a Second Further Amended Summons seeking a raft of declarations

Decision

The Court held that it would be inappropriate for the Court to make such declarations.

This was so because they are purely theoretical and they are inutile. They seek to declare the meaning and operation of cll 8.2(a), 12.2 and 12.4 (read with other provisions of the leases) in a vacuum, without reference to any actual factual circumstance let alone any prevailing one.

Making them will produce no foreseeable consequences for the parties. No breach of any provision of the leases by the Tenant is alleged. No assessment of the quality of the Tenant's conduct (or the Landlord's conduct for that matter), in the context of their legal relationship, is called for. To make them would not resolve or quell any dispute about access because there is no extant request for access to the premises and no denial of any request. The Landlord may never again properly ask for access and, if it does, the Tenant may give it. It is not a matter simply of the Court declining to exercise discretion to make declaratory orders. To do so here would not be directed to the determination of a particular legal controversy: *University of New South Wales v Moorehouse* (1975) 133 CLR 1 at 10, 24; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, 596; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [52]; *Ian Huntly Philip v JPM Developments Pty Ltd* [2015] NSWSC 495 at [8].

Separately, by the proposed declarations, the plaintiffs' seek, impermissibly, a legal advisory opinion: *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334 at [47]-[49].

The Court permitted, with both parties consenting, the amendment of the Summons to include new declarations. There was a point of contention in respect of a third declaration. His Honour held that the new incarnation of the proposed declaratory relief failed to remedy the difficulties identified in the declarations which were abandoned. That is, they were too are hypothetical, academic, inutile and seek a legal advisory opinion.

Accordingly, His Honour held that the declarations in the form sought cannot properly be made, it would be inappropriate for the Court to embark upon a determination of whether the implied terms, to which they are directed, are to be implied.

The proceedings were therefore dismissed.

The Woodsman Pty Ltd v Jozic [2018] NSWSC 1311

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 16 August 2018

LAND LAW – caveats – where the nature of the claimed interest is uncertain on its face – deficiency in caveat cannot be overcome by s 74L of the Real Property Act 1900 (NSW) or by orders permitting the amendment of the caveat – inappropriate to grant leave to lodge a further caveat under s 74O of the Real Property Act 1900 (NSW) where the interest to be claimed in a fresh caveat would not be in respect of the same estate, interest or right

Facts

The plaintiff sought an order under s 74K of the *Real Property Act 1900* (NSW) extending the operation of a caveat it had lodged against the titles to two properties owned by the defendant.

In the alternative, an order was sought pursuant to s 74O of the *Real Property Act* for leave to lodge a further caveat. The proceedings were initiated following the service of a lapsing notice in respect of the caveat.

The caveat (AM308028) was lodged against the titles to lot 1 in Strata Plan 35144 and lot 2 in Strata Plan 35144. Those titles are also affected by a registered mortgage in favour of Perpetual Corporate Trust Ltd.

In Schedule 1 of the caveat the particulars of the estate or interest claimed were expressed as: "The whole of the Registered Proprietors interest in the land". The claimed interest is said to arise by virtue of a General Security Agreement made between the plaintiff and the defendant and said to be dated 31/09/15. The date is obviously an error.

The Court found that, prima facie, the plaintiff was the chargee under a charge granted by the defendant that extends over the two properties. Accordingly, the plaintiff would have an interest in land sufficient to sustain a caveat by which such interest is claimed.

However, no such interest is sought to be claimed in the present caveat.

The estate or interest claimed is the whole of the registered proprietor's interest in the land. The claim is plainly not an adequate description of the claim the evidence suggests that the plaintiff may have, namely, a claim to be a chargee under an equitable charge.

The plaintiff sought to overcome this difficulty by resort to s 74L of the *Real Property Act* which provides:

> If in any legal proceedings a question arises as to the validity of a caveat lodged under a provision of this Part, the court shall disregard any failure of the caveator to comply strictly with the requirements of this Part, and of any regulations or conveyancing rules made for the purposes of this Part, with respect to the form of the caveat.

The plaintiff referred to some authorities where s 74L was held to operate so as to overcome defects in the form of a caveat, including *Allen Taylor & Co Pty Ltd v Harrison* [2010] NSWSC 1021 at [19] to [23] and *Warner v Andrews* [2011] NSWSC 956 at [9].

In particular, reliance was placed on the statement made by Santow J in *Windella (NSW) Pty Ltd v Hughes* (1999) 49 NSWLR 158 at 162 to the effect that the Court has the power to overlook any deficiency in the drafting of a caveat provided that the caveator possesses a caveatable interest and even though the interest is not specified at all.

However, in *Hanson Construction Materials Pty Ltd v Vimwise Civil Engineering Pty Ltd* [2005] NSWSC 880, Campbell J referred to the view expressed by Santow J and said:

> If by that view, his Honour intended to hold that the existence of a caveatable interest which is not disclosed on the face of the document can support the validity of the caveat, that view is not one with which I agree.

In *Multi-Span Constructions No 1 Pty Ltd v 14 Portland Street Pty Ltd* [2001] NSWSC 696 at [130] Barrett J came to a similar view. His Honour went on to say:

> It is true that, in proceedings for the extension of a caveat's operation, any defect in the form of the caveat will be disregarded under s 74L. But that does not mean that some wholly new substratum can be substituted by reference to some estate or interest simply not contemplated by the caveat, whatever its deficiency of form may be.
>
> I respectfully agree with that view, and would add that I would not regard an expression of enormous generality, like "equitable interest" as one which "contemplates" some specific type of interest, such as an equitable charge, which is claimed.

Shortly thereafter, Brereton J considered the matter in *Circuit Finance Pty Ltd v Crown and Gleeson Securities Pty Ltd* [2005] NSWSC 997 at [17] to [27] by reference to the provisions of the Act and the Real Property Regulation concerning the requirements for caveats. His Honour stated (at [21]):

> These provisions, taken together, make clear that the characterisation and description of the nature of the estate, interest or right claimed by a caveator is more than a mere formal requirement of the provisions of the Act relating to caveats, but goes to the heart and substance of the operation of those provisions. Without the estate, interest or right claimed being described, neither the Registrar General nor a person reading the caveat can know, for purposes of s 74H(1)(b), whether a dealing would affect the estate claimed. Nor can the Court know, for purposes of s 74K(2), whether the caveator's claim has, or may have, substance.

In the instant case, His Honour found that the nature of the claimed interest was uncertain on its face. That deficiency cannot be overlooked by resort to s 74L. Neither can it be overcome by orders permitting the amendment of the caveat (see *Depsun Pty Ltd v Tahore Holdings Pty Ltd* (1990) 5 BPR 11,314; *Ron Medich Properties Pty Ltd v McGurk* [2010] NSWSC 552 at [9]).

Decision

It followed that the caveat was incurably deficient, and even though the plaintiff may have had a caveatable interest, it would not be appropriate to make an order that the operation of this caveat be extended.

His Honour held that it was also not appropriate in these circumstances to grant leave to the plaintiff under section 74O of the *Real Property Act* to lodge a further caveat. Even if a fresh caveat claiming an interest under an equitable charge based on the General Security Agreement of 31 August 2015 could be said to be one purporting to be based on the same facts, it would not be a caveat in respect of the same estate, interest or right noting that there was no estate or interest properly identified on the face of the caveat (see *FTFS Holdings Pty Ltd v Business Acquisitions Australia Pty Ltd* [2006] NSWSC 846).

Accordingly, the plaintiff's application was dismissed.

Thomas v Registrar-General of NSW **[2018] NSWSC 1517**

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 10 October 2018

LAND LAW – Torrens system – claim for compensation from Assurance Fund – claimant had interest as equitable mortgagee – caveat lodged – caveat withdrawn following lodgement of fraudulent withdrawal of caveat form – transfer of title to new registered proprietor – claimant alleges that loss was suffered as a result of dealings because claimant forced to sell another property – claimant fails to establish that dealings were a cause of need to sell property – no entitlement to compensation under s 129 of Real Property Act 1900 (NSW)

Facts

Sharen Thomas, made a claim against the Registrar-General for payment of compensation from the Torrens Assurance Fund pursuant to s 129 of the *Real Property Act 1900* (NSW) ("the Act").

The plaintiff claimed to have suffered loss or damage as a result of the operation of the Act in respect of certain land in Terrigal. The plaintiff claimed that she and her now deceased partner (Mr George Pincham) held an estate or interest in the land by virtue of an agreement made in June 2003 with the registered proprietors of the land, Messrs Sengoz and Masri.

Under the agreement, $230,000 was advanced by the plaintiff and her partner to be secured by way of a second mortgage. No second mortgage was registered, but the plaintiff and her partner lodged a caveat against the title to the property to protect their interest. In August 2005 the property became the subject of a three lot strata plan of subdivision, namely Strata Plan 75435.

The plaintiff alleges that in November 2005 a caveat she and her partner had lodged was removed from the title to Lot 1 in SP 75435 following the lodgement of a fraudulent Withdrawal of Caveat form. The removal of the caveat facilitated the registration of a transfer of Lot 1 in SP 75435 to a new registered proprietor. The plaintiff claims to have suffered loss as a result, including loss said to have been sustained because the plaintiff and her partner were forced to sell a home they jointly owned in East Hills.

The plaintiff commenced proceedings against her legal advisors who acted for them in relation to the transaction involving the advance of $230,000 to Sengoz and Masri. That claim involved consequential losses in respect of the East Hills property to which she was a registered proprietor. Those proceedings were settled with the legal advisors paying the plaintiff the sum of $450,000.00

The plaintiff, in the instant proceedings, sought to recover compensation from the Torrens Assurance Fund for the loss of the East Hills property. The claim is brought pursuant to ss 120 and 129 of the Act. The plaintiff contended that this loss was suffered as a result of the operation of the Act in respect of the Terrigal land, and was loss that arises from fraud (see s 120(1)(a)). The plaintiff further contended that the loss arises from either:

1. an act or omission of the Registrar-General in relation to the land within the meaning of s 129(1)(a); or

2. being deprived of an estate or interest in the land as a consequence of fraud within the meaning of s 129(1)(e).

The relevant act or omission of the Registrar-General is alleged to be the conduct involved in acting upon the fraudulent Withdrawal of Caveat form so as to cause the withdrawal of the caveat that had been lodged by the plaintiff and her partner over the title to the Terrigal property.

It was submitted that once the caveat had been withdrawn, the plaintiff and her partner "lost all chance of recovering their funds, which in turn led to the loss of their home".

It was submitted that whilst the payment of settlement funds must be taken into account to reduce the compensation payable to the plaintiff, it did not bar the claim for compensation. The plaintiff contended that this is because the scope of compensation under s 129(1) is not constrained in the way compensation pursuant to a professional indemnity policy is; rather, compensation under s 129(1) extends more broadly to any loss or damage that arises from an act or omission of the Registrar-General.

The plaintiff's claim for compensation is calculated on the basis that the East Hills property was worth about $1 million. The plaintiff accepts that the $450,000 received in compensation from Mr Wehbe must be deducted. The plaintiff also accepted that an amount representing the mortgage debt on the East Hills property would also need to be brought to account.

The Registrar-General submitted that the plaintiff's claim must fail for a number of reasons. The principal arguments raised were:

1. that the plaintiff and her partner did not acquire any interest in the Terrigal property as part of the agreement made in June 2003;

2. that the loss in respect of which compensation from the Torrens Assurance Fund is claimed is not compensable under s 129(1) of the Act because it concerns land that was not the subject of the fraudulent dealing, or any relevant operation of the Act;

3. that in any case the claimed loss was not relevantly caused by, or was too remote from, the fraudulent removal of the caveat over Lot 1 in SP 75435 and the subsequent transfer of that property to a new registered proprietor;

4. that compensation is not payable in relation to the claimed loss because the loss arose from the negligence of a solicitor (Mr Wehbe) and was compensable under an indemnity given by a professional indemnity insurer, and thus fell within s 129(2)(b); and

5. that the plaintiff has failed to establish on the evidence the quantum of the loss sustained.

Decision

The plaintiff brought her claim on the basis that she was a person who has suffered loss or damage as a result of the operation of the Act in respect of any land. The operation of the Act from which loss or damage is said to result concerned the withdrawal of caveat AB303816 in respect of Lot 1 in SP 75435 and the registration of the transfer of Lot 1 in SP 75435 to Heidelberg Investments Pty Ltd.

The plaintiff contended that the effect of those dealings was to deprive the plaintiff and her partner of an interest in Lot 1 in SP 75435, and ultimately bring about the need to sell their East Hills property.

A threshold issue arose as to whether the plaintiff or her partner obtained any interest in the Terrigal land from their June 2003 agreement with Messrs Sengoz and Masri. The Registrar-General referred to the terms of the Statement of Claim in which it was alleged that the plaintiff and her partner were entitled to an interest in the Terrigal land by virtue of an agreement "stated to be between the parties dated 13th June 2003".

It was pointed out that the Deed signed at that time by the plaintiff and her partner was not signed by either Mr Sengoz or Mr Masri, and thus no interest in land could have been created (see s 23C(1)(a) of the *Conveyancing Act 1919* (NSW)).

His Honour read the pleading as referring more generally to the investment transaction that settled on 13 June 2003. That transaction involved the execution by all parties of the agreement dated 20 May 2003. Clauses 2 and 3 of that agreement, read together, contained an agreement on the part of Messrs Sengoz and Masri to grant a registered second mortgage over the Terrigal property to secure the amount of $230,000 that was to be invested by the plaintiff and her partner. On that basis, the plaintiff and her partner acquired an interest in the Terrigal property, as equitable mortgagees, arising from an enforceable agreement to grant a mortgage over the property. That interest was sufficient to form the basis of a caveat over the title to the Terrigal property (and later over the titles to the three lots in SP 75435).

The two caveats that were subsequently lodged by the plaintiff and her partner were defective in that the nature of the estate or interest claimed was not specified. However, Darke J found that nothing turned on that deficiency. The fact remains that in November 2005 the plaintiff and her partner had an interest in the three lots in SP 75435, and had the benefit of a caveat against the title to those lots.

As a result of the withdrawal of caveat AB303816 in respect of Lot 1 in SP 75435, and the registration of the transfer of that lot to Heidelberg Investments Pty Ltd which obtained the benefit of indefeasibility of title under the Act, the plaintiff and her partner lost that interest in Lot 1 in SP 75435.

Accordingly, loss or damage sustained as a result of those dealings constitutes loss or damage suffered as a result of the operation of the Act in respect of Lot 1 in SP 75435. Moreover, such loss or damage could be regarded as arising from:

1. acts or omissions of the Registrar-General in the exercise or performance of his functions or duties under the Act, within the meaning of s 129(1)(a); or

2. the plaintiff and her partner being deprived of an estate or interest in Lot 1 in SP 75435, within the meaning of s 129(1)(e),

and is thus capable of falling within s 129(1) of the Act.

His Honour then moved to the question as to the extent to which loss or damage has, for the purposes of s 129(1) of the Act, resulted from the operation of the Act in respect of Lot 1 in SP 75435. This requires an assessment of the evidence before the Court, and the application of the principles of causation that have been developed in other contexts, including the principles set forth by the High Court in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 (see *Chandra v Perpetual Trustees Victoria Limited* [2008] NSWSC 178 at [17]-[18]; *Kirkland v Quinross Pty Ltd* [2008] NSWSC 286 at [70]).

His Honour found that although it had been established that the plaintiff had suffered loss, there was little evidence before the Court concerning the value of that interest. It was not known how much each of the lots was then worth, although it could be inferred that Lot 1 had a value in the vicinity of the $1.43 million apparently paid by Heidelberg Investments Pty Ltd.

That is, it is not known whether there was any "equity" available which could have been applied towards a repayment of the amount outstanding to the plaintiff and her partner.

The plaintiff deposed that there was "no way" she and her partner would have agreed to the withdrawal of their caveat "without receiving our money". His Honour noted that that may be accepted. It may also be accepted that had the caveat not been withdrawn, the plaintiff and her partner would have been in a position to negotiate with Messrs Sengoz and Masri if the latter had wished to pursue a dealing that was hindered by the caveat. Again, however, there was a paucity of evidence that would allow an assessment of the likelihood that in those circumstances the plaintiff and her partner would have been able to obtain a repayment of some or all of the amount outstanding.

Whether the plaintiff and her partner would have been able to extract a repayment from Messrs Sengoz and Masri, had the caveat remained on the title, was a matter of speculation. It may well have been the case that they were powerless to stop a sale of Lot 1 in SP 75435 which involved the payment of all of the proceeds of sale to the registered mortgagee.

It was not possible, on the evidence before the Court, to undertake a rational assessment of the value of the lost interest in Lot 1 in SP 75435, or the likelihood of receipt of a payment (or the likely amount of a payment) had the caveat remained in operation.

His Honour therefore found that the evidentiary basis for the proposition that the loss of the East Hills property naturally arose as a consequence of the Act was lacking. Simply put, the plaintiff did not establish that had the dealings with Lot 1 in SP 75435 not occurred, she and her partner would likely have received a payment from Messrs Sengoz and Masri which could have been applied in reduction of the debt secured on the East Hills property.

In the circumstances, it could not be concluded that had the withdrawal of the caveat and the transfer of Lot 1 in SP 75435 not occurred, the plaintiff and her partner would have been able to service the debt on the East Hills property such that it would not have become necessary to sell it.

There was thus no basis to claim an entitlement to compensation under s 129(1) for the loss of the East Hills property. Neither was there any basis to claim compensation for any loss incurred upon the sale. There was in any event no satisfactory evidence that the property was in fact sold for less than its true value.

Accordingly, the plaintiff's claim failed.

Twelve Walker Street Pty Ltd v Lee (No 2) [2018] NSWSC 273

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 6 March 2018

> COSTS – application for imposition of an easement – ordinary rule that applicant pays costs of proceedings – whether departure from ordinary rule warranted due to defendants' failure on a threshold question and their conduct of defence

Facts

These proceedings concerned an application by the plaintiffs for orders pursuant to s 88K of the *Conveyancing Act 1919* (NSW) imposing an easement for rock anchors over the defendants' land in Rhodes.

On 20 December 2017 the Court made orders to that effect, and further ordered that the plaintiffs pay the defendants' costs of the proceedings (see *Twelve Walker Street Pty Ltd v Lee* [2017] NSWSC 1807 at [125]).

On 22 December 2017 the plaintiffs, relying upon Uniform Civil Procedure Rules 2005 (NSW) r 36.16(3A), filed a Notice of Motion seeking to vary the costs order. The plaintiffs thereby sought an order that the defendants pay the plaintiffs' costs of the proceedings.

The plaintiffs accepted that the starting point is s 88K(5) of the *Conveyancing Act* which provides that the costs of proceedings under the section are payable by the applicant, subject to any order of the Court to the contrary. The plaintiffs submitted that an order to the contrary should be made, essentially for the following three reasons:

1. the defendants failed on a threshold question, being whether what was sought by the plaintiffs was in truth an easement for the purposes of s 88K of the *Conveyancing Act*;

2. the defendants failed to comply with various procedural directions made by the Court, resulting in delays to conclaves of experts and prejudice to the plaintiffs' case; and

3. the defendants sought to rely upon evidence that was unnecessary and "obstructive".

Both parties accepted that the relevant principles were summarised in *McGrath v Mestousis (No 2)* [2018] NSWSC 32:

> It is well established that an order to the contrary as envisaged by s 88K(5) may be made where the defendant has engaged in unreasonable conduct, including conduct that has made the proceedings more expensive (see 117 York Street Pty Ltd v Proprietors of Strata Plan No 16123 (1998) 43 NSWLR 504 at 523; Mitchell v Boutagy [2001] NSWSC 1045 at [60]; Khattar v Wiese [2005] NSWSC 1014 at [77]).

> In considering the reasonableness of the defendant's conduct, it is necessary to bear in mind that the conduct occurred in response to an application which, if successful, would result in the creation of an interest in the defendant's property. It has been held that s 88K bears a confiscatory nature (see, for example, Khattar v Wiese (supra) at [27]). Moreover, even though appropriate compensation is generally required to be paid, an application under s 88K is not analogous to a claim for damages (see Shi v Abi-K Pty Ltd (2014) 87 NSWLR 568; [2014] NSWCA 293 at [98]). Accordingly, it is inappropriate to employ that analogy to determine whether it was unreasonable for a defendant to a s 88K application to fail to accept a Calderbank offer (see Shi v Abi-K Pty Ltd (supra) at [97]-[98]).
>
> In *Shi v Abi-K Pty Ltd* (supra) Basten JA (with whom Barrett and Ward JJA agreed) went on to state (at [98]):
>
> The ordinary rule, that the applicant pay the costs of any proceeding, reflects the fact that an applicant for such an order has no right to the grant of an easement over the property of another. Further, the rule that the applicant pay the costs relates to proceedings which could only be brought after all reasonable attempts had been made (presumably by seeking agreement) but have been unsuccessful. The statutory scheme is not consistent with the proposition that an applicant can obtain a right to costs by offering more than the compensation ultimately ordered to be paid as a condition of the easement. The property owner is entitled to refuse to consent to the easement, thereby requiring the applicant to satisfy a court as to the various preconditions, including questions of the public interest, and that the grant of the easement is reasonably necessary in the sense provided by the section. Unless it has done more than reject reasonable offers of compensation, the property owner should not be put at risk of an adverse costs order in those circumstances.

The Court noted that this was not a case in which the defendant rejected any reasonable offer for compensation. Rather, the argument lies in the submission that the defendants failed on the question whether what was sought by the plaintiffs was in truth an easement for the purposes of s 88K of the *Conveyancing Act*.

Further, it is not inaccurate to describe the question as a threshold one. Had it been answered favourably to the defendants no further questions concerning the operation of s 88K would have arisen. His Honour found that the question was properly to be regarded as one to be answered as part of the plaintiffs' application under the section. The raising of this issue should not be treated as a special case, even though such a question does not commonly arise in cases under s 88K. Moreover, the defendants did not in my opinion act unreasonably in raising the question, and in any event it was essentially a legal question which should not have significantly contributed to the incurring of costs.

In respect of contentions that criticised the defendant's conduct of the proceedings, His Honour noted that whilst it was regrettable that the Court's directions were not complied with in a timely manner, the defendants' defaults must be viewed in the context in which they occurred.

This context includes the Court allocating relatively early hearing dates (at the urging of the plaintiffs) in light of the nature of the case. The defendants managed to serve a considerable amount of evidence (largely expert in nature) within a fairly short period. His Honour was not inclined to find that the Defendnats acted unreasonably or that the plaintiffs were significantly prejudiced by any delay.

I am also not satisfied that the defendants sought to rely upon evidence that was unnecessary or "obstructive". The defendants, who were responding to an application for the imposition of an interest over their land, were entitled to test the plaintiffs' case.

Accordingly, Darke J found that the matters advanced by the plaintiffs, even when viewed together, did not warrant the making of an order to the contrary of the usual position identified in s 88K(5) of the *Conveyancing Act*.

Walker v Australian Forestry Holdings Pty Ltd [2018] NSWSC 1535

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 12 October 2018

> LAND LAW — Caveats — Application to lodge a further caveat in respect of the same estate, interest or right and purporting to be based on the same facts as earlier caveat which was ordered by the Court to be withdrawn – Application refused with costs

Facts

In the substantive proceedings, the Walkers seek to recover the amount of $100,000 (plus interest and costs) allegedly payable under one or more contracts for the sale of property in Braidwood (the Braidwood property), which property was for some time the site of a commercial pine plantation. (The proceedings were transferred to this Court because a claim for rectification of the relevant contract(s) was contemplated.)

The respective interlocutory applications are: first, the Walkers' application, by amended notice of motion filed on 7 May 2018, seeking leave pursuant to s 74O of the Real Property Act 1900 (NSW) (the Real Property Act) to lodge a further caveat over the land comprising the Braidwood property claiming the same estate or interest as that set out in an earlier caveat (AK239679W) which was withdrawn on 3 May 2018

Background

The first plaintiff (Mr Walker) was, as at December 2012, the sole registered proprietor of three lots forming part of the Braidwood property. He and the second plaintiff (Mrs Walker) were, as at that time, jointly the registered proprietors of the other two lots forming part of the Braidwood property.

It is not disputed that two contracts for the sale of the land comprising the Braidwood property were exchanged on 21 December 2012 (one in relation to the lots solely owned by Mr Walker and one in relation to the lots owned jointly by the Walkers).

The purchaser named on the December contracts was Australian Forestry Corporation Pty Ltd "AFC". This is an entity related to AFH.

The debate between the parties surrounds the inclusion of a special condition in relation to Mr Walker being paid a consultancy payment. The proceedings and caveat involve the non-payment of that sum which is the subject of the Walkers' claim in the substantive proceedings.

The Walkers contend that AFH granted them a mortgage to secure the debt of $100,000 over the said properties. The mortgage has been stamped but has not been registered on the titles comprising the security under the mortgage. It contains handwritten annotations adding Mrs

Walker as a named mortgagee and does not appear to have been signed by Mrs Walker (see CB 14).

It is not disputed that, on settlement of the sales on 4 March 2013, sums totalling the balance of the aggregate purchase price were paid by AFH; and that no consultancy payment of $100,000 has ever been paid to Mr Walker. The Walkers characterise the sum of $100,000 as being the "balance of the purchase price" and contend that it was due by 4 March 2014; and that that debt was "effectively" a loan from the Walkers to AFH, secured by the mortgage.

Proceedings

In 2015, the Walkers commenced proceedings in the District Court to recover the sum of $100,000 plus interest and costs (proceedings no 2015/00274395).

In about May 2016, a lapsing notice was served in relation to caveat AK239679W. On 2 June 2016, the Walkers commenced these proceedings seeking an order for the extension of the operation of that caveat. On 6 June 2016, Darke J made an order extending the operation of that caveat until further order of the Court.

On 16 August 2016, AFH filed a notice of motion seeking, among other things, that the order extending the caveat be vacated. That application was heard by Darke J on 19 August 2016 and was unsuccessful.

On 11 October 2016, AFH filed another notice of motion seeking that the caveat be withdrawn on such terms and conditions as the Court deemed appropriate. (The Walkers note that this notice of motion did not refer to the correct caveat, although it is not apparent that anything turns on this.) On 13 October 2016, Darke J granted AFH leave to file that notice of motion and listed it for hearing on 21 October 2016.

Relevantly, on that date, consent orders were made by his Honour in the following terms:

1. Upon the payment into Court of $180,000 by the defendant, the plaintiffs provide a withdrawal of caveat no AK239678W [sic; should clearly be AK239679W] to the defendant;

2. The payment in order 1 is security for judgment and for the Plaintiff's [sic] costs in proceedings currently in the District of NSW [sic] the subject of case number 2015/00274395;

3. No order as to costs.

On or about 1 May 2018, AFH paid into this Court the sum of $180,000.

Prior to the payment of that amount into Court, AFH's solicitor had written to the Walkers' solicitor on 24 April 2018, advising that AFH would be paying $180,000 into Court and requesting confirmation that the Walkers would then provide an executed withdrawal of caveat.

On 2 May 2018, Ward CJ in Eq, ordered that pursuant to s 74MA of the Real Property Act, that caveat AK239679W be withdrawn.

In the instant case, the Walkers sought leave pursuant to s 74O(2) of the Real Property Act to lodge another caveat in respect of the same estate and interest as the caveat that Her Honour had ordered be withdrawn. The basis for the making of that was that since the making of the consent orders in October 2016, the payment into court of the sum of $180,000 does not cover the moneys that may be found owing to the Walkers by AFH and are secured by the mortgage.

AFH submitted that it was in reliance on the October 2016 consent orders that it applied for and took out the loan of $700,000 and that lawyers representing the lender have advised that the lodgement of a further caveat by the Walkers would be considered by the lender as another party having an interest in the properties, which would be an event of default under the loan; and such a default would cause great prejudice to AFH.

Relevant legal principles

There was no dispute as to the applicable legal principles on an application brought under s 74O(2) of the Real Property Act for leave to lodge a further caveat where a previous caveat claiming the same estate, interest or right has lapsed or been withdrawn.

The court must be satisfied that the claim to be entitled to lodge the caveat has or may have substance (Schibaia v Elias [2013] NSWSC 1485 at [47] per McDougall J) and approaches the application in a manner similar to that which it would undertake had the caveator applied for an interlocutory injunction to protect the interest (see S*ummit Acceptance Pty Ltd v Wild* [2011] NSWSC 659 at [17] per White J, as his Honour then was; *Xabregas v St George Bank Ltd* [2017] NSWSC 200 at [59]; 18 BPR 36,885 per Darke J). However, additional discretionary considerations then arise (*Summit Acceptance Pty Ltd v Wild* (at [17])).

In *De Meyrick v Dimitriou* [2011] NSWSC 1291, Brereton J, as his Honour then was, said (at [5]-[6]):

> Pursuant to a notice of motion filed on 30 September 2011, the plaintiff now moves primarily for leave pursuant to s 74O to lodge a further caveat, in substantially the same form as the lapsed caveat. On such an application, considerations similar to those relevant to applications for interlocutory injunctions apply [Fitzgibbons v Shaftsbury [2011] NSWSC 525, (at [3])]. Primarily, they are whether the proposed further caveat has or may have substance; and considerations pertaining to the balance of convenience [Warner v Andrews [2011] NSWSC 956 (at [5] and [10])]. A determination that the caveat has or may have substance is a necessary but not sufficient condition for the caveat to be extended (s 74K), or for leave to be granted to lodge a fresh caveat (s 74O): the Court retains a discretion to order that the caveat not be extended, be withdrawn, or to refuse leave to lodge a fresh caveat if the balance of convenience favours such a course.

In addition, on an application under s 74O, it will be relevant to understand the circumstances in which the earlier caveat lapsed, including whether permitting a new caveat to be lodged would cause detriment in those circumstances. This overlaps with the balance of convenience.

The caveator thus bears the onus of demonstrating that there is a serious question to be tried in the sense that there is a probability, sufficient in the circumstances to justify leave, that it is presently entitled to the interest claimed in the caveat (see Summit Acceptance Pty Ltd v Wild at [17]; Warner v Andrews [2011] NSWSC 956 at [5], [10] per Brereton J; Beecham Group

Laboratories Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618 at 622; [1968] HCA 1 per Kitto, Taylor, Menzies and Owen JJ).

If the caveator can successfully demonstrate this, it must then show that the injury it would likely suffer, if leave to lodge the caveat were to be refused, outweighs the injury that the registered proprietor would suffer if leave were to be granted (De Meyrick v Dimitriou at [5]). The "convenience" of the registered proprietor in being able to deal with the land must be balanced, among other things, against the "inconvenience" of the caveator's claim losing priority to any interest which might be created by the registered proprietor (Redman Construction Pty Ltd v Tarnap Pty Ltd [2005] NSWSC 1011 at [31]; 12 BPR 23,395 per Brereton J).

Decision

Is there a serious question to be tried

Although a caveator must do more than satisfy the court that its claim is not frivolous, such a standard provides a "relatively low" threshold (see Swansson v Pratt [2002] NSWSC 583 at [25]; 20 ACLC 1594, per Palmer J) and that test will generally be met unless there is no real or sensible prospect that the plaintiff is presently entitled to the interest it claims (Beecham Group Laboratories Ltd v Bristol Laboratories Pty Ltd at 622-623).

Her Honour accepted that the Walkers have established a serious question to be tried as to their entitlement to the interest for which they contend.

Balance of convenience

Her Honour noted that the strength of a plaintiff's case is not considered in isolation from the balance of convenience and will often be an important factor to be to be weighed in the balance (see *Samsung Electronics Company Ltd v Apple Inc* (2011) 217 FCR 238). Hence, a strong case for final relief may warrant leave to lodge a further caveat even if the balance of convenience may, in other respects, barely favour the caveator. Conversely, a weaker case for final relief may support granting leave if the balance of convenience clearly weighs in favour of the caveator (*Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1323 at [2] per Brereton J).

The strength of the caveator's case must be viewed in the light of the opportunity to secure evidentiary material and the extent of the material produced at that point in the proceedings (*De Mestre v AD Hunter Pty Ltd* (1952) 77 WN (NSW) 143 at 145 per Hardie AJ). In *Hanson Construction Minerals Pty Ltd v Roberts* (2016) 93 NSWLR 1:

… [D]epending on the strength or weakness of the caveator's case and other considerations material to the balance of convenience, it will not necessarily be 'rare' for an order to be made for the withdrawal of a caveat, even if there is a potentially adverse impact on the caveator's claimed priority.

AFH's submissions on balance of convenience

In its submissions, AFH argues that three matters are relevant to the assessment of the balance of convenience: the strength of the Walkers' prima facie case; the circumstances in which the third Walker caveat was lapsed (or, strictly speaking, withdrawn); and the prejudice which would be suffered by AFH if a further caveat were to be permitted to be lodged.

As to the first, AFH argued:

- "a great deal of suspicion and confusion surrounding the execution of documents on 4 March 2013". AFH accepted that the determination of that issue will be dependent on the expert evidence relating to the documents, together with the cross-examination of witnesses and the assessment of the credibility of those witnesses in the proceedings.
- AFH also argued that the Walkers' case is beset by other problems, namely, their claim that Mr Walker was never obliged to perform any services in relation to the consultancy but rather, that the "consultancy" referred to in the special conditions was simply a device to reduce the price of the property for stamp duty purposes referring in this regard to what was said in *Holdcroft v Market Garden Produce Pty Ltd* [2001] 2 Qd R 381.

As to the second matter, AFH emphasised that the Walkers were at the relevant times aware of the pendency of the October 2016 orders, yet the Walkers did nothing to have those orders varied or set aside.

As to the third of those matters (the question of prejudice), AFH submitted that a further caveat would be an event of default under the terms of the loan facility documents and that a default would be "ruinous" to AFH.

The Walkers' argued:

- There is prima facie a security interest in the properties sufficient to support the lodgement of a caveat by them.
- As to the circumstances in which the previous caveat came to be withdrawn, the October 2016 consent orders do not prevent them from seeking leave to lodge another caveat and that this should not be implied.
- As to the final argument advanced by AFH as to the ruinous effect of allowing a subsequent caveat to be lodged,
    - the mortgage is already in existence and is an estate or interest affecting the properties
    - there is no evidence of what specific provision in the loan agreement AFH relies on to assert that another caveat could trigger a default
    - there is already a breach of the contract of sale agreement with Mr Walker by reason of the entry into the loan agreement without his consent; and hence a breach of the representation and warranty by the borrower contained in the loan agreement
- Whether the lender elects to do no further business with AFH is a matter of conjecture and irrelevant to the motion.
- AFH provided no evidence of what irreversible detrimental effect on its operations a further caveat may have .

The Walkers submitted that the balance of convenience lies in granting them leave to lodge another caveat on the basis that the existing payment into Court of $180,000 is not sufficient to cover the principal, interest and costs to be incurred by them and that, without another caveat.

Her Honour found that the factor that weighed against the grant of leave to lodge a further caveat is the potential prejudice to the financing that AFH put in place in order to be in a position to make the payment into Court that was required for the caveat to be withdrawn in accordance with the consent orders put in place by Darke J.

AFH's submissions as to the balance of convenience were not limited to the possibility of AFH being placed in breach of its agreements with the lender. Rather, AFH's submission in relation to the balance of convenience encompassed the risks associated with the withdrawal of funding by the financier and other commercial consequences.

As to the Walker's submission as to the potential for them to be faced with a judgment against an impecunious defendant and that AFH is intending to proceed with the sale of properties in the development, in essence that was an argument for a security for costs application and not particularly persuasive in view of the history of the matter.

Additionally Her Honour noted that the Walkers had their opportunity to preserve the caveat when the issue first arose before Darke J; they chose to agree to a consensual regime that did not provide for supplementation of the amount paid into Court; and, had there not been delay in the conduct of the proceedings (delay to which at the very least they have contributed in the apparent lack of co-operation in confirming what are the actual documents – original or otherwise – on which they intend to rely), the proceedings might have well been disposed of with far more expedition and less cost.

Balancing all the above considerations, Her Honour was of the view that leave should not be granted for the lodgement of a further caveat by the Walkers over the Braidwood property and accordingly, that application was dismissed with costs.

Waterwood Hotel Management Pty Ltd v KOP International Pty Ltd [2018] NSWSC 102

Coram: Pembroke J

Court: Supreme Court of New South Wales

Date: 14 February 2018

CONTRACT – ineffective and unenforceable – no claim for damages available – wrong party – no allegation of mistake – no claim for rectification
ESTOPPEL – by deed – recital patently untrue – does not prevent proof of true facts

Facts

This is a claim arising out of a contract. The protagonists involved in the making of the contract were a wealthy non-English speaking Chinese woman (Mrs Xu) and a young, inexperienced Chinese/Australian accountant (Mr Lye). The latter was undertaking the acquisition of a business for himself for the first time. Although their interests were opposed, Mrs Xu and Mr Lye were both assisted and advised by a pair of business and legal advisers who operated out of the same office.

The Hotel

The subject matter of the dispute is a hotel at Newport on Sydney's northern beaches – not the iconic 'Newport Arms' rather it was the 'Newport Mirage'.

In 2014, Mrs Xu decided to purchase this hotel. She owned and controlled two companies as sole director and shareholder – KOP International Pty Ltd (the first defendant), which was the trustee of the KOP Investment Trust, and Moot Hotel Management Pty Ltd (the second defendant), which she caused to be registered in late March 2014. On 4 April 2014, KOP entered into a contract for the purchase of the land on which the hotel stood. The purchase price was $8.55 million and the vendor was Bayfield Hotels Wharf Pty Ltd. On the same day, Moot entered into a contract for the purchase of the hotel business. The purchase price was $950,000 and the vendor was a different Bayfield entity – Bayfield Hotels Mirage Pty Ltd.

Involvement of Mr Lye

Mr Lye became involved with the business of the hotel in about November 2014. Mr Lye provided book-keeping services, was given access to Moot's banking arrangements and permitted to make payments on its behalf, subject to Mrs Xu's approval. And he was rapidly entrusted with a range of management responsibilities.

Matters proceeded so quickly that by January 2015, Mr Lye had discussed and agreed in principle to a proposal that from 1 March, he take over for a period the management of the hotel business.

On 9 January, Mr Lye caused Waterwood Hotel Management Pty Ltd (the plaintiff) to be registered. On the same date, he entered into a costs disclosure agreement on behalf of Waterwood with Joseph Ho's firm 'Onward Legal'. The agreement described the scope of work as 'Acting on your behalf generally in the lease of the hotel known as Newport Mirage'. On 13 January, Waterwood paid $15,000 as a part deposit towards the proposed transaction.

Agreement

The principal document in dispute was described as a 'Hotel Lease Agreement'. Mrs Xu and Mr Lye executed it on 5 March on behalf of KOP and Waterwood respectively. The document was prepared by a solicitor acting for both parties. It recited that the parties had agreed to the 'lease of the business' of the Newport Mirage Hotel. This is an unusual and unorthodox legal concept: *Harrington v Harrington Services Pty Ltd (in liq)* [2002] NSWSC 859. But if possible, the parties' agreement should be given effect.

The initial term of the 'lease' was five years and the 'rent' payable by Waterwood was $550,000 per annum. The document contained many provisions normally found in a lease of land, which were inappropriate or awkward in what was intended to be some sort of agreement for the transfer of the management rights of the business. By its terms, the agreement was incapable of performance and ineffective to achieve the objective that appears to have been intended.

Nature of Relationship

A significant element of the legal and commercial relationship embodied in the hotel lease and supplementary agreement was one of trust. Mrs Xu, through her companies KOP and Moot, retained ownership of the 'hotel' – the hotel land through KOP and the hotel business through Moot. Mr Lye was to be a custodian, for a term, of the business. The contract 'established a relation between the parties intended to subsist for a period, and it involved some degree of mutual confidence and required a continual co-operation': *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 378 (Dixon J).

Operation of the Business

Between 5 March and 5 June 2015, Mr Lye operated the business of the hotel using the bank account of Moot. The revenue was banked into Moot's account and the expenses, including salaries and wages, consultants' fees and supplier invoices were paid from Moot's bank account. It is not apparent that Waterwood expended any of its own funds. I would not expect that it did, although it is unnecessary at this stage to make a finding.

The parties were in a stand-off. Mrs Xu's confidence and trust in Mr Lye had dissipated. She was angry about the non-payment of tax and the incurring of interest. Mr Lye was obstinate. A heated discussion took place on 5 June. Mrs Xu insisted on payment of the outstanding tax liabilities but had not agreed on the final adjustment sum. She said that Mr Lye demanded that she leave the premises, telling her that 'This is my hotel, and you are no longer welcome'. In fact, it was not Mr Lye's hotel and he had no express entitlement under the Hotel Lease or the supplementary agreement or otherwise to exclude Mrs Xu.

Termination

Understandably in the circumstances, Mrs Xu terminated the hotel lease agreement as it had been amended by the supplementary agreement. The notice of termination relied expressly on Clause 15(a) of the hotel lease agreement and Clause 14 of the supplementary agreement. The former refers to Waterwood's obligation to comply with 'essential terms of this lease'. In retrospect, it appears likely that other grounds may have been available to justify the termination: *Shepherd v Felt & Textiles of Australia Ltd* at 359.

A central concern of Mrs Xu was Mr Lye's cavalier attitude to the late payment of Moot's taxation liabilities. She signed another document dated 9 June 2015, that stated, among other things:

Due to your company and your company's legal person … disregard of the warning letters issued by the Australian Taxation Office, our company's reputation has been greatly damaged. Your company did not comply with the agreement, the contract fee were in arrears (rent) for a few months, along with some other issues.

Decision

The Plaintiff (the company run by Mr Lye) claimed for damages for breach of contract; or compensation for damages resulting from misrepresentation; or restitution for monies had and received.

In addition, during addresses, the plaintiff's counsel contended that the defendants were bound by an estoppel by deed. This was said to be based on Recital A in the hotel lease agreement, which stated that 'The lessor is the owner of the business'.

There was objection to this on the ground that no such claim was pleaded and that it was bound to fail in any event. The Court rejected reliance upon the estoppel on the basis that this aspect of the claim was not pleaded and would have failed, if allowed. The position in equity has always been that a party will not necessarily be prevented by an estoppel from proving the true facts in relation to a patently untrue statement appearing in the recitals to a deed: *Kettle v Greer* [1938] AC 156 at 171; *Berry v Wong* [2000] NSWSC 1002.

Pembroke J found that the representation case and the broader estoppel claim must also fail. His Honour was not satisfied that Mrs Xu ever, in fact, made any representation as alleged by the Plaintiff other than that KOP was the owner of the hotel land. In addition, there was no reasonable reliance by Mr Lye on any supposed representations. His Honour found that Mr Lye understood that the hotel lease agreement governed the parties' legal relationship.

His Honour found that there was no sound basis for finding that KOP was the agent of Moot in relation to the 'lease' transaction or that it held the hotel land on a resulting or implied trust for the purpose of the hotel lease agreement. The facts and circumstances indicate ignorance and confusion but they do not lead to an inference that the parties implicitly intended a relationship of agency between KOP and Moot for the benefit of Waterwood; let alone that KOP held real property on an undocumented trust, as agent for Moot, and for the benefit of Waterwood.

For those reasons, the Court found that the plaintiff's claims based on contract, representation and estoppel could not be sustained.

Furthermore, for the reasons that I have explained, even if the hotel lease agreement were valid and enforceable, its termination by KOP was justified in the circumstances that prevailed in early June 2015.

There was a concession by the Defendant that the Plaintiff ought to be repaid sums advanced by it in satisfaction of some of the Defendant's liabilities. Accordingly, his Honour ordered that this aspect of the claim be referred

Zelic v Barisic [2018] NSWSC 1346

Coram: Harrison J

Court: Supreme Court of New South Wales

Date: 4 September 2018

> LAND LAW – caveats – application by registered proprietor for an order that a caveat be withdrawn – where registered proprietor seeks to refinance a mortgage and raise a further $200,000 to fund the cost of these proceedings – where caveator's interest would be irrevocably diminished if the caveat were to be withdrawn

Facts

The plaintiff is the registered proprietor of a residential property in Botany. He bought it in 1971 with his wife. In 1994, the plaintiff became the sole owner. Since about 1996, the defendants, who are his daughter and son-in-law respectively, have lived there. They remain in occupation. The plaintiff commenced these proceedings seeking to recover possession of the property.

The defendants filed a cross-claim in which they alleged that the plaintiff held the whole of the property upon trust for them. The defendants contended that in 1996 the plaintiff promised that the property would be transferred to them if they fixed the property up and looked after the plaintiff. The defendants further contend that, acting in reliance upon that promise, they moved into the property but otherwise altered their position to their detriment in that they stopped looking for a home of their own and in addition expended very considerable time and resources repairing and improving the property which was in a state of disrepair. The cross-claimants also say that they cared for the plaintiff by cooking his meals, clothing him, washing his clothes, transporting him, providing him with money, looking after his physical well-being, attending to his taxation affairs and paying his tax, and providing him with company. His daughter says that she forwent taking up employment in order to do these things.

The defendants allege that it was an express term of the agreement that the plaintiff would transfer the property to them in return for their promise to fix it up and look after him.

In their written submissions, the defendants indicated that they sought proprietary relief in the form of a constructive trust over either the entire property or to such degree as reflects the value of their contributions to its improvement, and/or an order for the transfer of the fee simple to them. That relief was said to rest on alternative grounds:

1. promises of a testamentary character creating an estoppel by encouragement: *Sidhu v Van Dyke* (2014) 251 CLR 505; [2014] HCA 19 at [58]; *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10 at [3]–[6]; *Pascoe v Turner* [1979] 1 WLR 431 at 439.

2. a testamentary contract to leave identified property by will: *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483; [2010] NSWCA 84 at [31].

The proceedings came before the Court on the plaintiff's application under s 74MA of the *Real Property Act 1900* to require the defendants to withdraw a caveat lodged by them claiming an equitable interest in the property. It was conceded that the validity or otherwise of any caveatable interest is coextensive with the defendant's prospects of success in the proceedings.

Legal Principles

The plaintiff maintained that his legal interest as the registered proprietor of the property should prevail over the as yet unestablished or unproven claim by the defendants. It was conceded by the plaintiff that there is a serious question to be tried as to whether the defendants have an equitable interest in the property. The existence of that interest is contested.

The court cited with approval, Brereton J's analysis of the principles governing the withdrawal of caveats in *Buchanan v Crown & Gleeson Business Finance Pty Ltd* (2006) 13 BPR 24,513. Those principles may be distilled thusly;

a. Where there is a seriously arguable or undisputable caveatable interest, the Court retains a discretion, based on the balance of convenience, as to whether it will maintain the caveat or require its withdrawal. The circumstance that a caveator has a caveatable interest is not conclusive that the caveat will not be removed. The Court will order the withdrawal even of an indisputably valid caveat where the balance of convenience favours that course. An instance of this is to be found in *Australian Property & Management Pty Ltd v Devefi Pty Ltd* (1997) 7 BPR 15,255, and reference was made to it in *Esther Investments Pty Ltd v Wilson International Pty Ltd* [1982] ANZ ConvR 647.

b. One circumstance in which such a course will be taken is where the party applying for removal of the caveat has an interest in the land superior to that of the caveator, and especially where that party is being prevented by the caveat from a legitimate exercise of its rights. Thus a caveat by an unregistered second mortgagee will be removed if it is preventing the registered first mortgagee from exercising its power of sale with a clear title [see, for example, *Kerabee Park Pty Ltd v Daley* [1978] 2 NSWLR 222].

c. A valid caveat may also be removed by the Court if it prevents the registered proprietor from the legitimate exercise of a right in respect of the land, including a proper sale or refinance (as was suggested in *Esther Investments v Wilson International*). Again, this usually occurs where the registered proprietor can point to other interests in the land superior to that of the caveator - such as a first mortgagee where the caveator is a subsequent encumbrance.

d. A highly relevant consideration is whether the removal of the caveat will derogate from the caveator's claim. There is great force in the submission made by Mr Bransgrove that if the removal of the caveat would have the practical effect of deferring the priority of the caveator's equitable mortgage, its removal ought not be countenanced. That view is supported by authority which indicates that it is a rare case where a valid caveat will be removed for reasons of the balance of convenience.

Thus in *Custom Credit Corp Ltd v Ravi Nominees Pty Ltd* (1992) 8 WAR 42, Owen J said (at 50):

> 'However, it seems to me interlocutory removal of a caveat where an arguable case as to the existence of a caveatable interest has been demonstrated would be unusual. It is important to bear in mind the nature and purpose of a caveat under the Torrens system. By its very nature the caveatable interest must be a proprietary interest in the land. The purpose of the caveat is to restrain the registered proprietor from dealing with the land in a way which will defeat or derogate from the incidents attaching to that proprietary interest until the respective rights of the parties have been honoured (if there is agreement) or to determine if there is disagreement. In many cases, removal of the caveat will have the effect of destroying for all practical purposes, the benefit of the proprietary interest. For example, a creditor, having a specific security interest in land will rank as an unsecured creditor once the property, the subject of the specific security, no longer exists. This will often be the result of removal of a caveat which permits the registered proprietor to sell the property free from any practical obligation to recount to the secured creditor for the proceeds of sale.'
>
> [12] In my view, similar considerations are relevant, if the priority of the caveator's interest will be adversely affected by the removal of the caveat, even if the caveator will retain some interest in the land. A critical question on the present application, then, is whether removal of the caveat will derogate from the caveator's claim and priority."

Brereton J offered remarks to similar effect in *Tadrous v Tadrous* [2009] NSWSC 407 as follows:

> "[8] Thus, where the registered proprietor wishes to refinance an existing first mortgage, there may be a strong case on the balance of convenience to permit it to do so, at least where that course will not prejudice or derogate from the caveator's claim. But it is always a highly relevant consideration whether the removal of the caveat will derogate from the caveator's claim, and it is a rare case indeed, if there is any, where a valid caveat will be removed for reasons of balance of convenience, if to do so would have an adverse effect on the priority of the caveator's claim [*Custom Credit Corp Ltd v Ravi Nominees Pty Ltd* (1992) 8 WAR 42 (Owen J); *Buchanan v Crown & Gleeson* [10]; *Oceanview v Balaz*, [11]. If the

> priority of the caveator's interest would be adversely affected by the removal of the caveat, it is at least ordinarily inappropriate to remove the caveat having regard to considerations of the balance of convenience [*Custom Credit v Ravi*, 50; *Buchanan v Crown & Gleeson*, [11]; *Oceanview v Balaz*, [11]. At least, ordinarily speaking, if the removal of the caveat would have the practical effect of deferring the priority of the caveator's equitable interest, its removal ought not be countenanced. One reason for this is that to do so is practically to prefer unsecured rights over the proprietary rights of the caveator."

Finally, in *Hanson Construction Materials Pty Ltd v Roberts* (2016) 93 NSWLR 1 Brereton J said:

> "[78] In some circumstances, an application by a registered proprietor for the removal of a caveat is unlikely to succeed. If the nature and extent of the caveator's interest is undisputed and removal of the caveat will clearly destroy the caveator's interest, it is fair to say that it would be very unusual for the application to be granted. An example of such a case is where the caveator has an equitable charge to secure repayment of a loan and the practical effect of removing the caveat would be to render the charge worthless. But as the Court in *Moondancer* observed, to say that in these circumstances it would be unusual – perhaps extremely unusual – to order the withdrawal of the caveat, is not to elevate 'unusual' into a legal test that must be satisfied before an order can be made. To do so imposes unwarranted constraints on the discretion conferred on the Court by s 74MA of the *Real Property Act*.
>
> [79] The authorities also recognise that the strength of the caveator's claim to an interest in land may be significant in assessing the balance of convenience. This is consistent with the well-established principle that the apparent strength of each party's case is a material factor in assessing the balance of convenience on an application for an interim injunction. It follows that a registered proprietor seeking an order for the removal of a caveat to permit the refinancing of a mortgage loan, may have a stronger case if there is real doubt as to whether the interest claimed by the caveator is valid and enforceable." [Citations omitted]

The balance of convenience will rarely favour removal of a caveat if doing so would have the effect of destroying the benefit of the caveator's interest. In the instant case, however, the defendants' interest in the property would in all practical likelihood be irrevocably diminished to the extent of the plaintiff's proposed secured borrowings against it. The Court accepted that the removal of the caveat will diminish the value of the defendants' interest and that the deficiency will not be recoverable.

Decision

His Honour found that an order that the caveat be removed would be tantamount to requiring the defendants, if they are successful, to fund the plaintiff's own claim and his opposition to theirs.

The Court was not satisfied that an unwarranted interference with the plaintiff's rights as the legal owner of the property is caused in the circumstances of this case by the maintenance of the defendants' caveat.

This led to His Honour refusing to make an order pursuant to s74MA of the *Real Property Act*.