PAUL FOLINO–GALLO
BARRISTER AT LAW

REAL PROPERTY CASES 2019

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2019

PAUL FOLINO - GALLO
BARRISTER-AT-LAW
THIRD FLOOR WENTWORTH CHAMBERS
180 PHILLIP ST SYDNEY NSW 2000
PH: 8915 2810
FAX: 8815 9585
EMAIL: PFOLINO-GALLO@WENTWORTHCHAMBERS.COM.AU

TABLE OF CASES

1. *Abdallah v Baygan* [2019] NSWSC 1507

2. *Aboriginal Housing Office v Blacklock* [2019] NSWCATAP 51

3. *ACN 601 158 507 Pty Ltd v Damodaran* [2019] NSWSC 647

4. *Affidavit under Part IV of the Trustee Act by Tenterfield Shire Council* [2019] NSWSC 894

5. *Almona Pty Ltd v Parklea Corporation Pty Ltd* [2019] NSWSC 1868

6. *Aquamore Credit Equity Pty Ltd v Bent* [2019] NSWSC 143

7. *Arcidiacono v The Owners – Strata Plan 61233* [2019] NSWCA 46

8. *Australian Unity Retirement Living Management Pty Ltd v Karimbla Properties (No. 10) Pty Limited* [2019] NSWSC 635

9. *Barkat v Roads and Maritime Services* [2019] NSWCA 240

10. *Bernhardt v Bernhardt* [2019] NSWSC 1632

11. *Boekeman v Aaron* [2019] NSWSC 990

12. *Botany Bay Apartments Pty Ltd v Badolato* [2019] NSWSC 296

13. *Braye v Tarnawskyj* [2019] NSWSC 277

14. *Campbell v Hamilton* [2019] NSWCA 22

15. *Capital Securities XVII Pty Ltd v Anna's Garden Pty Ltd* [2019] NSWSC 1256

16. *Capital Securities XVII Pty Ltd v Yusofzai (No 2)* [2019] NSWSC 501

17. *Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell* [2019] NSWCA 299

18. *Charub Pty Ltd v Triandafyllou* [2019] NSWSC 487

19. *Citigroup Pty Ltd (ACN 004 325 080) v Wernhard* [2019] NSWSC 132

20. *Cole v Raykir Holdings Pty Ltd* [2019] NSWSC 1017

21. *Cooper v King* [2019] NSWSC 86

22. *Coplin v Al Maha Pty Ltd* [2019] NSWCA 159

23. *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWSC 335

24. *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWCA 210

25. *Data Base Corporate Pty Ltd v Strike Australia Pty Ltd* [2019] NSWSC 271

26. *Day v Munday* [2019] NSWSC 452

27. *Dee Vine Group Pty Ltd v Palais Reception Centre Pty Ltd* [2019] NSWSC 1462

28. *Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd (Administrator Appointed) & Anor* [2019] NSWCA 312

29. *French v Bremner* [2019] NSWSC 1033

30. *G Capital Corporation Pty Ltd v Roads and Maritime Services* [2019] NSWCA 234

31. *Geurie Enterprises Pty Ltd v Pirrottina* [2019] NSWSC 1828

32. *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425

33. *Gordon v Lever (No 2)* [2019] NSWCA 275

34. *Groch v Knights* [2019] NSWSC 308

35. *Guirgis v JEA Developments Pty Limited* [2019] NSWSC 164

36. *Guo v The Owners - Strata Plan No. 70067* [2019] NSWCATAP 219

37. *Hacienda Caravan Park Pty Ltd v Dodge* [2019] NSWSC 1296

38. *Harker-Mortlock v Commonwealth Bank of Australia* [2019] NSWCA 56

39. *Henley v Bone* [2019] NSWSC 254

40. *Horswill v McClellan* [2019] NSWSC 557

41. *In the matter of AA Management Co Pty Limited* [2019] NSWSC 1443

42. *In the matter of Fearndale Holdings Pty Limited* [2019] NSWSC 645

43. *IPL Medical Pty Ltd v Charmen Pty Ltd* [2019] NSWSC 1824

44. *Jain v Amit Laundry Pty Ltd* [2019] NSWCA 20

45. *Jong v Advanced Dental Services Pty Ltd* [2019] NSWCA 318

46. *Kaji Australia Pty Ltd v Glover (No. 4)* [2019] NSWSC 1779

47. *Kannisto v Kannisto* [2019] NSWSC 245

48. *Khadivzad v The Owners – Strata Plan 53457* [2019] NSWSC 157

49. *Lawrence v Ciantar; Ciantar v Lawrence* [2019] NSWSC 464

50. *Levy v Close* [2019] NSWSC 1027

51. *Lincu v Registrar-General* [2019] NSWSC 568

52. *Lithgow State Mine Railway Ltd v City of Greater Lithgow Mining Museum Inc* [2019] NSWSC 1131

53. *LTDC Pty Ltd v Cashflow Finance Australia Pty Ltd* [2019] NSWSC 150

54. *Lukas v Browne* [2019] NSWSC 222

55. *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2019] NSWSC 1199

56. *Makary v Hamdan; Hamdan v Makary* [2019] NSWSC 460

57. *Mangano v Bullen* [2019] NSWSC 1704

58. *Mayrin DM Pty Ltd v Kaiyu Deng* [2019] NSWSC 1552

59. *Medi-Aid Centre Foundation Ltd v Joys Child Care Ltd (No 2)* [2019] NSWSC 1105

60. *Midcoast Petroleum Pty Ltd v Keldros Pty Ltd* [2019] NSWSC 970

61. *Myra May Worth by her tutor NSW Trustee and Guardian v Rodney Worth* [2019] NSWSC 122

62. *Myra May Worth by her tutor NSW Trustee and Guardian v Rodney Worth (No. 2)* [2019] NSWSC 244

63. *National Australia Bank Limited v Sayed* [2019] NSWSC 653

64. *National Australia Bank Ltd v Charlton; Charlton v The General Manager, NSW Rural Assistance Authority (No 4)* [2019] NSWSC 1477

65. *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231

66. *Nguyen v Nguyen* [2019] NSWSC 131

67. *Nicholas Arthur Stokes v Molly Harris Toyne* [2019] NSWSC 274

68. *NS Admin Pty Ltd v Singh* [2019] NSWCATAP 69

69. *Oak Capital Mortgage Fund Limited v Dlakic* [2019] NSWSC 1538

70. *Perry v Gao* [2019] NSWSC 1022

71. *Pham v Enterprise ICT Pty Ltd* [2019] NSWSC 1857

72. *Phung v Phung* [2019] NSWSC 117

73. *Private Mortgages Australia Pty Limited ACN 600 628 813 as trustee for the PMA Trust v Stever* [2019] NSWSC 462

74. *Rayner v Rayner (No 2)* [2019] NSWSC 819

75. *Realm Resources Ltd v Aurora Place Investments Pty Ltd* [2019] NSWSC 379

76. *Realtek Holdings Pty Ltd v Wetamast Pty Ltd* [2019] NSWSC 1869

77. *Reliance Financial Services Pty Ltd v Sunset 53 Pty Ltd* [2019] NSWSC 531

78. *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41

79. *Salloway Pty Ltd v Barlow* [2019] NSWSC 1234

80. *Scott v Ennis-Oakes* [2019] NSWSC 1257

81. *Sebie v Pham* [2019] NSWCA 184

82. *Sergio Andres Chocron v Mina Onkoud* [2019] NSWSC 1823

83. *Sik v The Owners – Strata Plan No 58961* [2019] NSWCATAP 63

84. *Singh v Khan* [2019] NSWCA 196

85. *Starr v George* [2019] NSWSC 60

86. *Sukkar v Sukkar* [2019] NSWSC 691

87. *Szeto v Situ (No 2)* [2019] NSWSC 1312

88. *The Owners - Strata Plan No 54026 v Phillipa Ternes* [2019] NSWSC 1579

89. *The Owners – Strata Plan No 61233 v Arcidiacono; The Owners – Strata Plan No 17719 v Arcidiacono* [2019] NSWSC 1307

90. *The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2019] NSWCA 89

91. *The Owners – Strata Plan No. 12289 v Donaldson* [2019] NSWCATAP 213

92. *Thomas v Registrar-General of New South Wales* [2019] NSWCA 198

93. *Vacation Club Ltd v A G G Properties Pty Ltd* [2019] NSWSC 1357

94. *Valverde v Inch* [2018] NSWSC 366

95. *Victorsen v Easy Living Holdings Pty Ltd* [2019] NSWSC 1721

96. *Winau Aust Pty Ltd v LCC Property Development Pty Ltd* [2019] NSWSC 499

97. *Xinfeng Australia International Investment Pty Ltd v GR Capital Group Pty Ltd* [2019] NSWSC 884

98. *Yapp v Pollak* [2019] NSWSC 449

Abdallah v Baygan

[2019] NSWSC 1507

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 4 November 2019

LAND LAW — Mortgages — equitable mortgage — judicial sale — default of loan agreement — no issue of principle

GUARANTEE AND INDEMNITY — Actions to enforce — no issue of principle

Facts

On 6 May 2019, Abdallah (**"the first plaintiff"**), Anderson (**"the second plaintiff"**) and Baygan (**"the first defendant"**) entered into a loan agreement. Under the agreement, the plaintiffs agreed to lend Baygan a sum of $600,000. This sum consisted of the amount of $400,000 loaned by the first plaintiff and $200,000 loaned by the second plaintiff.

The loans were repayable within12 months of 15 May 2019. The first defendant agreed to pay a loan fee of $9,000 per month on the $400,000 loan advance and $5,000 per month on the $200,000 loan advance commencing on 8 June 2019.

By a Guarantee and Indemnity, Ghabelzadeh (**"the second defendant"**) unconditionally guaranteed the due and punctual payment of all monies owing under the loan agreement.

On 6 May 2019, the second defendant granted a mortgage over a house she owned in Walker Avenue, St Ives, NSW (**"the Property"**), to secure her obligations under the Guarantee and Indemnity. The mortgage, although in registrable form, was unregistered.

The defendants defaulted on payment in respect of both loan amounts. On 27 June 2019, a default notice was served, in accordance with the loan agreement, on the first defendant. On 12 July 2019, a demand was served on the second defendant in accordance with the Guarantee and Indemnity.

On 5 August 2019, the plaintiffs commenced proceedings seeking judgment against the first and second defendants in the sum of $614,000, which was the amount then outstanding under the loan agreement, and an order for judicial sale of the property.

Decision

The Court found in favour of the plaintiffs. Rather than entering into a judgement for the amount claimed, the Court made a declaration that the plaintiffs held an equitable mortgage over the property at 21 Walker Avenue, St Ives and further ordered that the mortgage be specifically performed by way of judicial sale.

Aboriginal Housing Office v Blacklock

[2019] NSWCATAP 51

Coram: Higgins Senior Member, Robertson Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 11 March 2019

LEASES AND TENANCIES — residential tenancies — social housing — dismissal of application for termination of tenancy — whether Tribunal's reasons for dismissing application were adequate

Facts

The Aboriginal Housing Office (**"AHO"**) was the landlord and Blacklock was the tenant of a premises in Tamworth pursuant to a social housing tenancy agreement dated 12 April 2014.

On 10 April 2018, Police executed a search warrant at the premises and found an unregistered firearm, a small quantity of drugs and goods believed to have been stolen. Subsequently, an occupant of the premises, Ms Sampson, was charged with possession of an unregistered firearm, possession of a firearm while not authorised, and failure to safely store a firearm.

The AHO commenced proceedings in the Tribunal seeking an order for termination of the residential tenancy agreement pursuant to ss 91 and 187(1)(i) of the *Residential Tenancies Act 2010* (NSW) on the ground that the tenant or an occupier of the premises had intentionally or recklessly caused or permitted the use of the premises for an unlawful purpose.

The tenant asserted that she and the children who lived with her would suffer undue hardship within the meaning of s 154D(3)(b) of the RTA if the tenancy were terminated. The tenant further submitted that "the use of the premises was not sufficient to justify termination in that, while Ms Sampson had been reckless in relation to the firearm, the firearm was disabled, the offence was at the lower end of the spectrum of firearm offences, and the tenant was unaware of the existence of the firearm".

The Member accepted the tenant's submissions concluded that the tenant would suffer undue hardship if a termination order was made and that the facts of the matter did not warrant the making of a termination order.

AHO then sought to appeal the decision on the ground that the Member's reasons for its decision were inadequate. Specifically, the AHO contended that:

(1) The Tribunal member failed to disclose what consideration had been given to the conflicting evidence and submissions as to the characterisation of the nature of the unlawful use, the existence or otherwise of any unlawful uses and, in particular, the previous history of the tenants.

(2) In relation to "the question of undue hardship and the associated element of homelessness", it was unclear from the reasons "what relevant evidence was considered, what the material findings of fact were and how those critical findings of fact were determined"

Decision

The Appeals Panel held that the Member's reasons for determining that the tenant would suffer undue hardship if her tenancy were terminated, and for determining that the circumstances of the case did not warrant termination, were not adequate. The appeal was allowed.

Undue Hardship

The Panel found that the Member's reasoning for the finding that the tenant would suffer undue hardship failed to address the particular evidence relied upon by the tenant or consider the submissions of the AHO. The Member provided no reasons for accepting the tenant's submissions and rejecting those of the AHO.

Furthermore, while the Panel accepted that the Member determined that termination of the tenancy would likely result in the tenant experiencing hardship, it noted that the Member undertook no analysis of the question whether such hardship would constitute "undue hardship" in the circumstances.

Termination order

The Panel observed that when considering whether to make a termination order for a social housing tenancy agreement, the Tribunal is required to have regard to the five matters set out in s 154E(1). In the current case, the Panel found that the only reference in the Member's reasons to consideration of those matters was in paragraph [29] which merely stated that the Member had considered the matters set out at s 154E. Such was found to be insufficient by the Panel with it being necessary for the Member to identify in broad terms what evidence relevant to those matters had been taken into account.

ACN 601 158 507 Pty Ltd v Damodaran

[2019] NSWSC 647

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 4 June 2019

LAND LAW — caveats — whether caveatable interest arose under Loan Agreement — whether caveat is invalid for lack of description — extension of operation of caveat refused — leave to lodge fresh caveat pursuant to s 74O Real Property Act 1900 (NSW)

Facts

ACN 601 158 507 Pty Ltd (**"the plaintiff"**) entered into a loan agreement with Damodaran P Kumar Pty Ltd I.I.O.R & A.T.F for the Damodaran P Kumar Family Trust (**"the borrowers"**) for a loan of $60,000.00 (**"Loan Agreement"**). The borrowers defaulted on the payment on 4 December 2018 (**"Event of Default"**).

Damodaran (**"the defendant"**) was also party to the Loan Agreement as guarantor. The defendant was thus obliged to observe and perform the obligations of the borrowers under that agreement, including payment of any outstanding monies.

The defendant was also the registered proprietor of land, comprising folio identifier 4/348298 (**"the Property"**). On 11 December 2018, after the borrowers defaulted on payment, the plaintiff lodged caveat number AN922854 over the title of the Property (**"Caveat"**).

On 1 February 2019, the plaintiff commenced proceedings against the borrowers and the defendant in the Local Court of NSW seeking repayment of the outstanding loan amounts and interest. On 24 May 2019, the plaintiff obtained default judgment against the borrowers and the defendant in the amount of $70,751.90 inclusive of costs.

On 16 April 2019, the defendant caused a lapsing notice in respect of the Caveat to be served on the plaintiff. In response, the plaintiff commenced the current proceedings seeking orders to have the defendant's lapsing notice dismissed, the operation of the Caveat extended, and a declaration that the plaintiff has an equitable interest in the Property.

The issues for determination were:

(1) whether the plaintiff had a caveatable interest the Property pursuant to the terms of the Loan Agreement;

(2) if it did, whether it was appropriate to extend the operation of the Caveat; and

(3) whether the declaratory and other relief sought by the plaintiff should be granted.

Decision

Caveatable Interest

Henry J accepted the plaintiff's submission that it had a caveatable interest by way of a charge over the Property to secure outstanding monies under the Loan Agreement.

Relevantly, her Honour observed that under clause 24.5, the defendant, as guarantor, expressly charged his assets with the payment of all monies due under the Loan Agreement. The charge extended to land as clause 24.5 expressly referred to "all freehold and leasehold interests in land". Furthermore, under clause 24.11, the Loan Agreement explicitly identified "any real property owned by the Guarantor" as being charged with the payment of monies due following an Event of Default.

Taken together, clause 24.5 and 24.11 were found by her Honour to evince the intention that the property to be charged following an Event of Default was the real property owned by the defendant as at the date of the Loan Agreement.

Dismissal of Lapsing Notice

At the hearing, the plaintiff's counsel advised the Court that the plaintiff no longer sought to have the defendant's lapsing notice dismissed.

Extension of the Caveat

As a preliminary question, her Honour considered whether the terms of the caveat satisfy the requirements of the Real Property Act 1900 (NSW) (**"the RPA"**). Relevantly, s 74F of the RPA provides that caveats must specify, amongst other things, the prescribed particulars of the legal or equitable estate or interest to which the caveator claims to be entitled.

Her Honour found that the Caveat failed to adequately describe the nature of the interest claimed by the plaintiff in the Property as it simply identified the interest as being an "interest pursuant to a loan agreement and guarantee dated 16 October 2018".

As this defect could not be cured by amending the Caveat, her Honour was obliged to dismiss the plaintiff's application to extend the operation of the Caveat. That said, her Honour nonetheless made an order granting the plaintiff leave to lodge a further caveat pursuant to section 74O of the RPA.

Declaratory relief

Her Honour noted that before the Court can exercise its power to grant declaratory relief, it must be satisfied that the question to be resolved is real and not theoretical, and that there is a proper contradictor.

Here, her Honour found that while the defendant was a proper contradictor, it had not taken any steps in the proceedings. Accordingly, her Honour held that he was unable to grant the declaratory relief sought by the plaintiff. Her Honour went on to further hold that even if the Court had power to make a declaration in the circumstances of this case, such would not have been granted. This is because her Honour was of the view that the terms sought by the declaration did not adequately describe the nature of the interest claimed.

Affidavit under Part IV of the Trustee Act by Tenterfield Shire Council

[2019] NSWSC 894

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 16 July 2019

LAND LAW — property sold by Council under Ch 17 Pt 2 Div 5 of the Local Government Act 1993 (NSW) — net proceeds of sale paid into Court under Div 4 Pt 70 of Supreme Court Rules 1970 and Pt 4 of the Trustee Act 1925 (NSW) — entitlement to net proceeds of sale in Court

LAND LAW — whether at time of sale, the Property was owned solely by Lucille Walsh, solely by the estate of the late Jeanette Walsh, or jointly by the estate of Jeanette and Lucille as tenants in common — whether joint tenancy between Jeanette and Lucille had been severed — whether prior to the sale of the Property, Mr Sean Vicary had any interest in the Property as mortgagee

Facts

By a deed of conveyance dated 30 March 1973, the fee simple in a property situated in Tenterfield, New South Wales (**"the Property"**) was transferred to Jeanette Walsh and Lucille Walsh as joint tenants. Lucille was Jeanette's daughter.

Jeanette died in 2004 and Jack Walsh was granted letters of administration in respect of her estate. In 2012, Lucille died and Russell Templeton was granted letters of administration in respect of her estate.

On 6 June 2005, the Property was sold by Tenterfield Shire Council (**"the Council"**) by reason of non-payment of rates levied on the Property. On 28 November 2005, the proceeds of sale, after deduction of the amount of outstanding rates and costs, were paid into Court by the Council. This was in the sum of $73,298.69.

At issue was who was entitled to the net proceeds of sale. This turned on whether, at the time of the sale by the Council, the Property was owned solely by Lucille Walsh, solely by the estate of the late Jeanette Walsh, or jointly by the estate of Jeannette and Lucille as tenants in common. Lucille was Jeanette's daughter.

A secondary question in the proceedings was whether, prior to the sale of the Property by the Council, Mr Sean Vicary had any interest in the Property as mortgagee from Lucille.

Submissions

Mr Walsh asserted that he was entitled to the monies in Court on the basis that:

(1) For more than 12 years after the acquisition of the Property by Jeanette and Lucille, Jeanette took possession of and occupied the Property to the exclusion of Lucille. As a result, the title of Lucille, as joint tenant, became statute barred and was extinguished by the operation of the Limitation Act 1969 (NSW) (**"the Limitation Act**").

(2) Alternatively, by facsimile dated 25 February 1999, Lucille relinquished any and all claims to the Property (**"the Property Relinquishment Document"**).

(3) Alternatively, the Property Relinquishment Document had the effect of severing the jointure in equity.

Mr Templeton asserted that Lucille is the registered proprietor of an estate in fee simple in the Property, having acquired the legal fee simple by right of survivorship following Jeanette's death.

Decision

Emmett AJA found in favour of Mr Templeton and ordered that that the monies in Court be paid out to him in his capacity as Administrator of the estate of the late Lucille Walsh.

Limitation Act

Emmett AJA was not satisfied that Jeanette's occupation of the Property through tenants was without Lucille's consent. Rather, his Honour was of the view that Lucille was prepared to consent to Jeanette receiving the benefits arising from ownership of the Property during her lifetime. To do so is not in any way inconsistent with an intention to retain an interest in the Property as joint tenant, including the right of survivorship.

Accordingly, his Honour was not persuaded that Lucille's interest as joint tenant was extinguished by the operation of the Limitation Act.

Property Relinquishment Document

The question for determination was whether the Property Relinquishment Document was effective to achieve the extinguishment of Lucille's interest in the Property as joint tenant. His Honour found that the Property Relinquishment Document was ineffective pursuant to s 23B of the Conveyancing Act which required a deed in order to validly pass legal interest in the Property.

Severance in Equity

This issue for the Court was to determine whether the Property Relinquishment Document was capable of extinguishing Lucille's equitable interest even though, by reason of s 23B of, it did not have any effect in relation to her legal interest.

His Honour observed that on its face, the instrument was entirely voluntary on the part of Lucille, and thus does not enliven the jurisdiction of equity to enforce a promise. His Honour further observed that the instrument purports to deal with the whole of Lucille's interest in the

Property. As such, the Property Relinquishment Document is not capable of being construed as a disposition of an equitable interest.

Almona Pty Ltd v Parklea Corporation Pty Ltd

[2019] NSWSC 1868

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 20 December 2019

MORTGAGES AND SECURITIES — Mortgages — Duties, rights and remedies of mortgagee — Power of sale — Mortgagee's duty to exercise power of sale in good faith — Consideration of whether the duty is fiduciary in nature — Whether the mortgagor's interests have been 'sacrificed' — Whether the duty extends beyond the achievement of a fair price — Relevance of collateral purposes of the mortgagee, if any — Mortgagee not obliged to act as if mortgagor had a right of first refusal — Whether mortgagee obliged to provide payout figure to mortgagor — Reasonableness of mortgagee's refusal to provide complex payout figure in circumstances of mortgagor's many prior failed attempts at redemption

MORTGAGES AND SECURITIES — Mortgages — Duties, rights and remedies of mortgagee — Power of sale — Mortgagee's duty to exercise power of sale in good faith — Consideration of alleged breaches of mortgagee's duty of good faith — Where breaches alleged relate to entry into contract for sale, terms of contract for sale, performance of contract for sale, variation of contract for sale, failure to investigate proposed transaction for redemption by mortgagor, providing finance to purchaser, misrepresentation to mortgagor of terms of contract for sale — In circumstances where the mortgagor was at no time ready willing and able to redeem the mortgage — Breach of duty only found in relation to words and conduct of mortgagee which resulted in the mortgagor losing the chance to obtain $4.25 million by the payment of the higher of two purchase prices in the contract for sale

MORTGAGES AND SECURITIES — Mortgages — Duties, rights and remedies of mortgagor — Equity of redemption — Consideration of the equity of redemption in the context of Torrens system land — Consideration of when the equity subsists, is suspended, or is extinguished — Requirements for redemption by mortgagor — Equity of redemption suspended during period in which contract for sale is on foot — Where completion of contract for sale is subject to a condition subsequent

LAND LAW — Torrens title — Exceptions to indefeasibility — Fraud — Allegations of fraud of mortgagee — Concepts of statutory fraud and breach of equitable duty of good faith distinguished — Where fraud case put on materially similar factual basis as breach of good faith case — No basis for finding of fraud or relevant dishonesty except as to the words and conduct of mortgagee which resulted in the mortgagor losing the chance to obtain $4.25 million by the payment of the higher of two purchase prices in the contract for sale — In circumstances where it would not be proper for the Court to speculate and treat a ground for suspicion regarding the joint venture negotiations as a proper basis for a finding of fraud

LAND LAW — Torrens title — Exceptions to indefeasibility — Fraud — Whether purchaser a party to mortgagee's fraud — Purchaser's participation in the failure of the mortgagee to inform the mortgagor of the chance to obtain an extra $4.25 million such that purchaser was relevantly a participant in fraud of mortgagee

CONTRACTS — Misleading conduct under s 18 of the ACL and s 12DA of the ASIC Act — Misleading or deceptive conduct — Silence — Circumstances in which silence can constitute misleading or deceptive conduct — Misleading or deceptive conduct found because the mortgagee had a general duty to exercise the power of sale in good faith, which imposed a positive duty to inform the mortgagor of the extra $4.25 million — Whether purchaser has accessorial liability for involvement in such conduct

CONTRACTS — Unconscionable conduct under statute — Failure of mortgagee to inform mortgagor of extra $4.25 million was unconscionable in the relevant sense, because in this respect the mortgagor was vulnerable and good conscience required disclosure — Purchaser a person involved in such conduct for reasons equivalent to finding of participation in mortgagee's fraud

LAND LAW — Torrens title — Indefeasibility of title — Indefeasibility of third defendant's title to two registered mortgages — Indefeasibility accepted, as the relevant fraudulent conduct did not actually cause the purchaser to become the registered proprietor of the land — Where likely that other entities would have been required to have been joined as parties — Consideration of whether third defendant was a bona fide purchaser for valuable consideration — In circumstances where mortgages held on trust for another party

MORTGAGES AND SECURITIES — Mortgages — Duties, rights and remedies of mortgagee — Power of sale — Burden of proof — Whether burden of proof in relation to the duty of good faith shifts onto the mortgagee exercising the power of sale in circumstances where the mortgagee has an interest in selling to the purchaser — Where the issues in the case before the Court changed substantially after the time at which the defendants were in a practical position to change their forensic strategy

ESTOPPEL — Issue and Anshun estoppel — Where no real curial contest and no definition of issues in the first proceedings — Rejection of submission that it was unreasonable for the plaintiff not to have introduced claims in first proceedings because, although the basis for the claims was unknown, it may have been discovered had the plaintiff called upon a notice to produce — Sufficient to decide that the plaintiff is not estopped from pursuing the claims upon which it has succeeded

CIVIL PROCEDURE — Pleadings — Fraud — Specific and particular allegations — Requirement for fraud to be pleaded and particularised — Reject plaintiff's fraud, collusion and breach claims to the extent that such claims were not pleaded, or were otherwise introduced too late during the hearing

MORTGAGES AND SECURITIES — Mortgages — Duties, rights and remedies of mortgagee — Appointment of a receiver — Whether knowledge of agent imputed to principal — In circumstances where receivers were not under any duty to inform mortgagor about the terms of the contract for sale — Where defence held not to be available on the pleadings in any case

EQUITY — Equitable remedies — Equitable interests in property — Nature of equitable interests — Consideration of appropriate remedy in relation to $4.25 million, including whether the breach or fraud should give rise to a proprietary right

EQUITY — Defences — Laches and acquiescence — Consideration of laches defence, but held inappropriate at this stage in the circumstances to exhaustively examine

Facts

Up until 22 March 2016, Almona Pty Ltd (**"Almona"**), was the registered proprietor of land situated at Sunnyholt Road and Old Windsor Road, Parklea NSW (**"the Land"**). The Land was the site of an enterprise called the Parklea Markets (**"the Markets**"). Part of the Land was used as the residence of Almona's director, Mr Con Constantine (**"the Residence"**).

Under a contract for sale made on 13 January 2016 (**"the Contract**"), the Land was sold by the second defendant, Secured Asset Portfolio III Ltd (**"SAP"**) to the first defendant, Parklea Corporation Pty Ltd (**"Parklea"**). The power of sale arose under a registered mortgage and a general security deed granted by Almona to SAP.

An unusual feature of the Contract was that it provided for alternative prices to be paid by Parklea. The price was $85,350,000 on the basis that Mr Constantine had vacated his possession of the Residence, and $81,100,000 if vacant possession was not given on completion. Almona was not informed of the alternative prices, and as a result, Mr Constantine did not give vacant possession. The Contract was thus varied to specify only a price of $81,100,000, and the Contract was completed on that basis. According to Almona, it lost the opportunity to receive an additional $4,250,000 as a result of the sale of the Land.

Parklea's obligation to pay the purchase price under the Contract was substantially financed through Lord Business Holdings VI Ltd (**"Lord VI"**). The securities granted by Parklea to secure its obligations to Lord VI were issued to a professional, independent security trustee, who is the third defendant in these proceedings, PT Ltd (**"PT"**).

Following completion, Parklea became the registered proprietor of the titles that constitute the Land, and the real property mortgages granted by Parklea to PT were also registered against the titles.

Almona's Claim

Almona commenced proceedings seeking orders setting aside the transfer of the Land to Parklea, notwithstanding that Parklea had become the registered proprietor of the Land and, ordinarily, Parklea's title would be indefeasible.

In order to undermine the indefeasibility of Parklea's title to the Land, Almona was required to establish that Parklea became registered proprietor by its own fraud, or the fraud of SAP as vendor to which Parklea was a party.

Almona initially based its claim that SAP and Parklea had engaged in fraud by alleging that, in exercising its mortgagee's power of sale, SAP had breached its duty to act in good faith towards Almona. Almona alleged that SAP's conduct so deliberately sacrificed Almona's interest in the Land that it could properly be characterised as fraudulent.

Almona initially accepted that the sale process that led to the Contract being made between SAP and Parklea was a proper one, and Almona based its case of fraudulent conduct by SAP in which Parklea participated on the steps taken by SAP and Parklea in the performance and completion of the Contract.

Almona made a number of complaints, but the primary one was that Almona had informed SAP that it had negotiated a potential agreement with a third party that may have enabled it to raise the funds necessary to repay the debt that it owed to SAP so that it could redeem the mortgage. Almona requested SAP to provide it with a payout figure, and to give Almona time for the due diligence process required to take place, so that Almona could enter into the funding agreement with the third party SAP responded by making the Contract unconditional and, with the cooperation of Parklea, accelerated the completion of the Contract for the purpose of denying Almona the opportunity to redeem the mortgage.

Although Almona accepted that the contract price was in accordance with the market value of the Land, by reason of disclosures that occurred during the course of the proceedings, Almona later sought to widen its fraud claim against SAP and Parklea to claim that those companies had acted fraudulently by undertaking joint venture negotiations during the sale process that led to Lord VI funding the purchase of the Land by Parklea and Lord VIII obtaining the right to acquire 80% of the shares in Parklea by means of the call option. The joint venture negotiations were coincident with Wesco reducing its offer to acquire the Land by $13,000,000, so that the offer made by Dyldam that led to the Contract being made with Parklea was the highest offer. It was ultimately discovered that Mr Merhi, through his Visy companies, acquired a 20% interest in Parklea at the time the Contract was completed.

Separately, Almona claimed that the completion by SAP and Parklea of the Contract for a price of $81,100,000, without giving Almona the opportunity to arrange for Mr Constantine to vacate the Residence, and so increase the price payable by $4,250,000, as well as the making of a variation to the Contract to remove any trace of the higher price, was fraudulent conduct by SAP and Parklea.

His Honour noted that even if Almona succeeded in establishing that the transfer to Parklea should be set aside and Parklea ordered to retransfer the Land to Almona, Almona faced the difficulty that PT was on no view party to any fraudulent conduct by SAP and Parklea. To get an effective remedy, it was necessary for Almona to challenge the indefeasibility of the mortgages granted by Parklea to PT. Almona sought to do that by making legal arguments as to why PT's title to the mortgages does not take priority over Almona's title to the Land.

Legal Principles

After dealing with aspects of the pleadings and the availability of a number of inferences having regard to the principles enunciated in Blatch v Archer and Jones v Dunkel, his Honour turned to the legal principles that underpinned the claim.

the focus of the mortgagee’s duty to act in good faith has been expressed in terms of not sacrificing the mortgagor’s interest in the market value of the security property: for example “Was then the failure to secure a proper price…were their efforts so obviously perfunctory as to warrant the conclusion that they cared for nothing beyond the repayment of their own claim?” and “…not caring whether its fair and proper value was obtained or not” (*Pendlebury* at 695 per Barton J and 702 per Isaacs J respectively); "…to obtain a fair price" (*Latec* at 273 per Kitto J); "…recklessly, not caring whether the price obtained was in the circumstances a proper price or not" (*Forsyth v Blundell* (1973) 129 CLR 477; [1973] HCA 20 (*Forsyth*) at 506 per Mason J); and "…not entitled to sacrifice the interest of the mortgagor in the surplus of the proceeds of the sale" and "…by requiring the taking of reasonable steps to obtain its market value" (*Commercial and General Acceptance Ltd v Nixon* (1981) 152 CLR 491; [1981] HCA 70 at 494 per Gibbs CJ and 525 per Brennan J respectively).

If the purpose of the exercise of the power of sale is to recover the money secured, the sale will not be improper merely because the mortgagee has an additional collateral purpose and the Court will not enquire into the mortgagee's subjective motive: *Nash v Eads* (1880) 25 Sol Jo 95 per Sir George Jessel MR, and *Belton v Bass, Ratcliffe and Gretton Ltd* [1922] 2 Ch 449 at 465, 466 per Russell J.

Robb J held that courts have been averse to construing contracts that are subject to conditions subsequent, and where it is within the power of the parties to satisfy the condition by their own actions, in a manner that gives the parties an option as to whether or not they will take the reasonable steps necessary to satisfy the condition. To so construe the contract would have the effect of making it optional at the election of the parties. Consequently, in appropriate cases, the Court will imply an obligation upon a party whose actions may satisfy the condition, or upon both parties if their actions are relevant to the satisfaction of the condition, to take reasonable steps to do so.

His Honour also held that once it is established that the price in the Contract is a proper one, and that the interest acquired by PAG through the other vehicles has not led to any diminution in the amount received by Almona following the sale of the Land, no obligation of good faith was imposed upon SAP to provide any information to Almona concerning that interest.

In considering Almona's fraud case against SAP, Robb J noted the decision of Anderson v Anderson (20174) 94 NSSWLR 591:

> There was no dispute that, in order to establish fraud within the meaning of s 42 of the *Real Property Act*, it was necessary to establish fraud in the sense of moral turpitude which was brought home to the registered proprietor. "'Fraud' in s 42(1) means 'actual fraud, moral turpitude'": *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [192]. Moreover, such fraud by persons from whom a registered proprietor claims "does not affect [the registered proprietor] unless knowledge of it is brought home to him or his agents": *Assets Company Ltd v Mere Roihi* [1905] AC 176 at 210; *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425; [2015] HCA 2 at [32].

Decision

Robb J found that Almona had substantially succeeded against both SAP and Parklea on the issues that arose out of the inclusion of the Occupation Condition in the original Contract and the circumstances that led to the Contract being completed for a price that was $4.25 million less than the price that would have been paid had the Occupation Condition been disclosed to Almona.

However, his Honour also found Almona to have failed in its claim against SAP and Parklea to obtain relief setting aside the transfer of the Land on the ground that it was obtained by the fraudulent conduct of SAP and Parklea.

His Honour further held that PT's title to the PT Mortgages obtained by their registration to have been indefeasible.

Aquamore Credit Equity Pty Ltd v Bent

[2019] NSWSC 143

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 20 February 2019

LAND LAW — possession of land — writ of possession — where stayed on an ex parte basis — where applicant failed to disclose he was party to a deed with judgment creditor prohibiting stay being sought — application by judgment creditor for discharge of stay

Facts

Prior to the present proceedings, Nicholas Arthur Bent (**"the defendant"**) made an ex parte application for a stay of execution of a writ of possession. Davies J granted the stay until Friday 22 February 2019.

Aquamore Credit Equity Pty Ltd (**"the plaintiff"**) now seeks to have the matter relisted on the basis of a Deed of Forbearance entered into by the parties. Specifically, the deed was in relation to the payment of the judgment sum and provided that the defendant acknowledged the amount which was owing to the plaintiff in an amount of approximately $3.4 million.

Under the deed, the defendant was to pay the plaintiff $150,000 upon execution of the deed, and thereafter repay refinance moneys amounting to $3 million by the 21 December 2018 or to effect a bona fide and arm's length sale of the land. Failure to do so would constitute a fresh default event.

Relevantly, cl 3 of the deed provided that in the event of a fresh default, the defendant would not take any step to frustrate or delay the lender in exercising any of its rights. It further provided that the that the lender may proceed with its enforcement including execution of the writ of possession by the Sheriff and that the debtors would not seek a stay of the execution of the said writ of possession.

Decision

His Honour held that information relating to the Deed of Forbearance should have been provided to him by the defendant when making its ex parte application. As the deed expressly prevented a stay from being sought by the defendants, his Honour discharged the order previously made staying the writ.

Arcidiacono v The Owners – Strata Plan 61233

[2019] NSWCA 46

Coram: Basten AJ, White AJ

Court: New South Wales Court of Appeal

Date: 14 March 2019

LAND LAW — Easements — Whether easements created by conveyances in 1839 bind present-day registered proprietors

CIVIL PROCEDURE — Court administration — Court powers — Whether successor in title can reopen ex parte proceedings in which orders were made that affect property succeeded

Facts

This case concerns two sets of proceedings made against Arcidiacono (**"the applicants"**). The first was brought by The Owners - Strata Plan No. 61233 (**"the first respondent"**), the registered proprietor of a property at 71 York Street, Sydney. The proceeding concerned a 12 foot wide passageway owned by the applicants. The first respondent sought a declaration that it held the benefit of various easements over the passageway and claimed that such easements were omitted from the register when the passageway was brought under the provisions of the Real Property Act 1900 (NSW).

The second proceeding was brought by The Owners - Strata Plan No. 17719 (**"the second respondent"**), the registered proprietor of land at 104 Clarence Street, Sydney. The proceeding also concerned the existence of easements over a passageway; specifically, an eight foot wide passageway which was also owned by the applicants.

The applicants sought leave to file a cross-claim in proceedings commenced by both the first and second respondents. Specifically, the applicants sought:

(1) A declaration that the easements created in 1839 in favour of the owners of 71 York Street were not enforceable against the applicants; and

(2) An order setting aside the 2003 Supreme Court order which created easements for the benefit of 65-69 York Street pursuant to s 88 Conveyancing Act 1919 (NSW)

The primary judge dismissed this application. The applicants sought to appeal this decision.

Decision

The Court found in favour of the first and second respondent, and dismissed the appeal.

The Court held that when the applicants acquired the passageways, they could not properly be described as bona fide purchasers without notice of the easements This is because the applicants' solicitors were sent numerous documents which expressly referred to the existence of the easements, and the applicants were also parties to the proceedings in 2003.

The Court further upheld the decision of the primary judge to not reopen the 2003 proceedings. While the then owner of the passageways was not a party to the 2003 proceedings, the Court nonetheless found that it was not open to the applicants to seek to set aside the orders. This is because the applicants did not succeed to the right of the former owner to have the ex parte orders set aside.

Australian Unity Retirement Living Management Pty Ltd v

Karimbla Properties (No. 10) Pty Limited

[2019] NSWSC 635

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 31 May 2019

REAL PROPERTY — easements — land owned by the fourth plaintiff and land owned by first defendant share a common boundary — a shared driveway runs along the common boundary with each adjoining owner having an easement over the other's land — vehicles and people accessing the first defendant's land are claimed to be causing substantial interference with the easement benefiting the fourth plaintiff and excessive user of the easement benefiting the first defendant — whether substantial interference with the easement benefiting the fourth plaintiff and excessive user of the easement benefiting the first defendant has occurred — if so, what relief is appropriate

Facts

Australian Unity Aurora Pty Ltd (**"Australian Unity Aurora"**) is the fourth plaintiff in these proceedings and is the registered proprietor of the property located at 32 Flood Street, Bondi (**"the 32 Flood Street Property"**). The first plaintiff, Australian Unity Retirement Living Management Pty Ltd (**"Australian Unity Management"**), operated a retirement village at the 32 Flood Street Property.

Karimbla Properties (No. 10) Pty Limited (**"Karimbla"**) is the registered proprietor of the properties located at 34 and 36 Flood Street, Bondi (**"the Karimbla Land"**). Karimbla conducts several activities on the Karimbla Land, including a school for children, a rabbinical school, a synagogue and a community kitchen. The kitchen operation requires regular vehicular access for food deliveries, and the delivery and collection of rubbish bins.

The properties on 32 Flood Street and 34 Flood Street share a common boundary. Along that common boundary runs a shared driveway that enters Flood Street and provides access to Karimbla's land and Australian Unity Aurora's land. Part of the shared driveway is owned by Karimbla, and the other part is owned by Australian Unity Aurora. Both Karimbla and Australia Unity Aurora enjoy an easement over the part of the driveway that they do not own. Some of the driveway owned by Australian Unity Aurora has no easement over it.

The relevant terms of the rights of carriageway benefiting the Karimbla land are:

> "The owner of the lot burdened grants to the owner of the lot benefited the right to go, pass and repass through that part of the land burdened shown on the plan as 'Right of Carriageway' 2.5 wide with or without motor vehicles…The owner of the lot benefited

> must, in exercising its rights under this easement, cause as little inconvenience as practicable to the owner for the time being of the lot burdened."

Australian Unity Aurora commenced proceedings against Karimbla alleged that Karimbla is excessively using the driveway easement in its favour and substantially interfering with the driveway easement in Australian Unity Aurora's favour. It sought relief restraining the alleged excessive use and substantial interference.

Specifically, Australian Unity Aurora alleged that there had been substantial or excessive use of the right of way by reason of:

(1) the defendants parking or leaving vehicles on the driveway;

(2) the defendants authorising and inviting vehicles to stop and remain on the driveway to load and unload supplies for the community kitchen;

(3) the defendants leaving or causing waste bins to be left out on the driveway; and

(4) the defendants authorising pre-school, primary and secondary school children to be on the shared driveway unaccompanied by an adult.

The plaintiffs claim equitable injunctive relief to restrain what they say is excessive user of Easement A and substantial interference with Easement B. Such relief is discretionary. The defendants advance two main arguments that discretionary relief should either not be granted or should only be granted upon terms because of the plaintiffs' conduct. Those arguments are based on the plaintiffs' own alleged substantial interference in Karimbla's enjoyment of Easement A and the plaintiffs' alleged delay.

Decision

Slattery J held that all types of vehicular activity by agents or invitees of the defendants, and at times pedestrian activity, have both (1) substantially obstructed Australian Unity Aurora's exercise of its easement rights, and (2) excessively burdened Australian Unity Aurora's exercise of its ownership rights.

The continuous and excessive conduct of the defendants in their use of the driveway has also interfered with the use and enjoyment of Lot 2 constituting an actionable nuisance: see *Hargrave v Goldman* (1963) 110 CLR 40 at 59; [1964] ALR 377 and *Trewin v Felton* (2007) 13 BPR 24,579; [2007] NSWSC 851.

His Honour highlighted that the activities by the defendants have rendered the shared driveway extremely unsafe, thereby impairing the safety and convenience of the retirement village residents.

The Court noted that the extent that a party seeks equitable relief, its own conduct can be taken into account to determine if relief should be denied to them or only granted on terms. And when terms are to be formulated the following principles apply.

- A party seeking equity must do equity. This doctrine is frequently applied: *Tidd v Lister* (1852) 10 Hare 140, at 153; 68 ER 872, *Chillingworth v Chambers* [1896] 1 Ch 685, *Forsyth v Blundell* (1973) 129 CLR 477, at 504 and *Stefanetto v Forestry Commission of New South Wales* [1975] 1 NSWLR 332. This means that a party seeking equity must be prepared to submit in that suit to any direction which a court of equity may find it proper to give: *Langman v Handover* (1929) 43 CLR 334, at 351; [1930] ALR 197.

- The Court cannot impose arbitrary terms upon the grant of relief that are not justified by the defendant's existing legal or equitable rights: *Hanson v Keating* (1844) 4 Hare 1, at 6; (1844) 67 ER 537, at 539. The same idea has pithily been put this way: "the maxim requires the plaintiff to do equity, not justice": JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th ed, 2015, LexisNexis Butterworths), at 77

- Those who come into equity must do so "with clean hands": *Nelson v Nelson* (1995) 184 CLR 538, at 550; (1995) 132 ALR 133; [1995] HCA 25. The two maxims are related. The maxim "they who seek equity must do equity" looks to a plaintiff's future conduct and the "clean hands" requirement looks to a plaintiff's past conduct: *Black Uhlans Inc v New South Wales Crime Commission* (2002) 12 BPR 22,421, at 22,428; [2002] NSWSC 1060.

The Court granted relief on carefully moulded conditions.

An argument advanced by the defendants was that the plaintiffs had delayed before bringing the proceedings. The Court noted that delay of itself may be a ground for refusing final injunctive relief: *Carlton and United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd* (1987) 76 ALR 633. Further, if a plaintiff's delay in bringing legal proceedings would make it practically unjust to grant injunctive relief, either because the delay constitutes conduct equivalent to a waiver of the plaintiff's rights or because the delay has caused the defendant or a third party to materially alter their position during the period, then injunctive relief may be refused: see *Lindsay Petroleum Co v Hurd, Farewell & Kemp* (1874) LR5PC 221, at 239-240, per Lord Selborne LC, cited with approval by the High Court in *Turner v General Motors (Aust) Pty Ltd* (1929) 42 CLR 352, at 366 per Isaacs J; (1929) 3 ALJR 239. The Court held that the delay in this case was not gross and did not preclude the plaintiff from relief.

The Court ordered that the instrument registered on 27 April 2006 pursuant to s 88B of the Conveyancing Act 1919 in respect of Deposited Plan 1094020 be rectified by, on its second page, replacing the words "Right of Carriageway 2.5m wide" with "Right of Carriageway Variable Width". The Court also restrained the defendants from using part of the Fourth Plaintiff's property that is not subject of the easement.

Barkat v Roads and Maritime Services

[2019] NSWCA 240

Coram: Leeming JA, Emmett AJA, Simpson AJA

Court: New South Wales Court of Appeal

Date: 11 October 2019

LAND LAW — Compulsory acquisition of land — Compensation — Objection to amount of compensation

APPEALS — Right of appeal conferred by s 57 of the Land and Environment Court Act 1979 (NSW) limited to questions of law — Whether adjustments made by primary judge when considering comparable sale constitute errors of law — Whether primary judge erred in concluding acquisition of appellants' land was for a purpose intrinsically connected with the draft Parramatta Road Urban Transformation Strategy (PRUTS) — Whether primary judge erred in disregarding prospect of rezoning the appellants' land apart from the draft PRUTS

APPEALS — General principles — Admission of fresh evidence

Facts

Mr Mark Barkat and Ms Rubina Barkat (**"Mr & Mrs Barkat"**) were the registered proprietors of an estate in fee simple in land situated in Underwood Road, Homebush (**"the Underwood Land"**). On 18 December 2015, the Underwood Land was acquired by RMS under the *Roads Act 1993* (NSW) (**"the Roads Act"**) for the purposes of the West Connex Project. On 7 January 2016, the Valuer-General determined that the amount of compensation to be paid for the compulsory acquisition was $3,095,590, being $2,900,000 for market value and $195,590 for disturbance.

Mr & Mrs Barkat rejected the offer and, on 5 April 2016, commenced Class 3 proceedings in the Land and Environment Court of New South Wales objecting to the amount offered by RMS. The primary judge determined that RMS pay compensation to Mr & Mrs Barkat $4,300,000, representing the property's market value, and $332,684.95 for disturbance.

Mr & Mrs Barkat now seek to appeal from the orders made by the primary judge on the following grounds:

(1) The Court failed to take account various factors or wrongly applied various factors in making adjustments. As such, its comparison of the sale of the Ismay Avenue Land to the hypothetical sale of the Underwood Land was flawed.

(2) The Court erred in disregarding the prospect that the Underwood Land may have been rezoned from R3 - medium density residential to R4 - high density residential, where there was no evidence for the finding that the potential for R4 zoning was caused by the proposal to carry out the West Connex Project; and

(3) The primary judge erred in disregarding the prospect that at the date of acquisition the Underwood Land may have been rezoned to R4 independent of the public purpose.

Decision

The Court dismissed the appeal.

Adjustments

The Court noted that the adjustments made by the primary judge were based on a joint report by Messrs Lunney and Ellis of 4 November 2017 (the experts for both parties). As such, the Court found it necessary to consider Mr & Mrs Barkat's claims against the comments contained in the joint report.

Area of Land: The Court found there was no appealable error by the primary judge as the joint report had relevantly taken into account the difference in land size between the Underwood Land and the Ismay Avenue Land in its calculation of the dollar rate per square metre. Accordingly, no adjustment was necessary.

Size of Land: The Court rejected Mr & Mrs Barkat's submission that an adjustment for the size of the land should be made based on the concept that smaller lots tend to generate a higher dollar rate per square metre than larger parcels. This was because such material was not before the primary judge and there is no basis for permitting it to be adduced as evidence before this Court.

Amalgamation of Land: Mr & Mrs Barkat contend that it was unreasonable for the primary judge to apply such a minimal adjustment for the amalgamation of the parcels of the Underwood Land. However, the Court noted that the primary judge had in fact expressly adopted the evidence of Mr Ellis who was the expert for Mr & Mrs Barkat. In light of this, the Court found there not be no reason why Mr & Mrs Barkat should not be held to the case conducted on their behalf by senior counsel before the primary judge. There was no appealable error

Flood Affectation: Mr & Mrs Barkat contend it was unreasonable for his Honour to have applied a negative adjustment by reason of flood affectation of the Underwood Land in circumstances where, they assert, there was no evidence before his Honour to indicate that the Ismay Avenue Land was free of flood affectation. The Court rejected this on the basis it was common ground that the Underwood Land was burdened by numerous constraints, including that it was affected by a high hazard floodway. By Contrast, the Ismay Avenue Land was affected by a low hazard floodway in an area of the front yard.

Potential for high density R4 development

Relevantly, Section 56(1)(a) of the Just Terms Act requires that any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired must be disregarded.

Accordingly, there was no error on the part of the primary judge in basing its valuation on R3 as opposed to R4 zoning. This was because there was an inextricable nexus between the WestConnex Project and urban development stimulus relevant to the location of the Underwood Land.

Rezone to R4 independent of the public purpose

Mr & Mrs Barkat's contention that there is potential for the Underwood Land to be rezoned to R4 in 2021 was rejected by the Court on the basis that the possibility of rezoning in the future would not have influenced the price that might be paid under the hypothetical transaction that the primary judge was required to consider.

Bernhardt v Bernhardt

[2019] NSWSC 1632

Coram: Adamson J

Court: Supreme Court of New South Wales

Date: 21 November 2019

LAND LAW — Torrens title — Indefeasibility of title — registered proprietor entitled to possession

LAND LAW — Conveyancing — Requirements of writing — Creation or disposition of interest in land — defendant a bare licensee

Facts

Barbara Bernhardt (**"the plaintiff"**) is the registered proprietor of a property at Forster (**"the Property"**). While she no longer lives in the Property, one of her daughters, Kim Bernhardt (**"the defendant"**), currently resides at the Property. This is notwithstanding several requests by the plaintiff and her solicitors that she vacate the Property.

On 10 May 2019, the plaintiff commenced proceedings to obtain vacant possession of the Property so that it can be sold to meet various expenses she has incurred, including for her present accommodation at an aged care facility.

The defendant filed a defence on 7 June 2019 in which she alleged that there was a private oral agreement between herself and the plaintiff concerning the Property as a consequence of which she disputed the plaintiff's claim for possession.

Decision

Adamson J held that the defendant failed to raise an arguable defence to the plaintiff's claim. His Honour rejected the defendant's submission that the March 2017 Will by which the plaintiff agreed to leave her whole estate to the defendant constituted written evidence of the oral statements. Her Honour noted that a testator is free to change his or her will at any time before death as long as the testator has testamentary capacity.

Her Honour went on to further observe that an oral agreement is incapable of having the effect for which the defendant contended as s 23C of the *Conveyancing Act 1919* (NSW) requires instruments which create an interest in land to be in writing.

Rather, the defendant's interest in the Property may only be characterised as an interest at will pursuant to s 23D of the Conveyancing Act. Accordingly, any right to possession which the defendant may have had amounted to no more than a bare licence, which has been terminated by reasonable notice.

Her Honour thus found that the plaintiff was entitled to a judgment for possession. As the plaintiff had a right to immediate possession, she was entitled to have a writ of possession forthwith.

Boekeman v Aaron

[2019] NSWSC 990

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 7 August 2019

LAND LAW — easements — substantial interference with rights under easements — where plaintiff and defendant are lot owners in a strata scheme — where right of footway in favour of lot owners exists over part of the defendant's car park space — where right of footway provides access to gas and water meters — where car park space protected by lockable garage door which can be opened by an electronic remote control device — where defendant provided such device to the plaintiff — where plaintiff returned such device — whether lockable garage door is a real substantial interference with plaintiff's entitlement to use right of footway — no substantial interference established

Facts

Ross Boekeman (**"the plaintiff"**) is the owner of Lot 1 in Strata Plan 58150. Jennifer Aaron (**"the defendant"**) is the owner of Lot 6 in Strata Plan 58150.

The strata scheme consists of eight lots and common property located throughout a 4-level building located in William Street, Leichhardt. Included in the scheme is a basement car park which provides each lot with their allocated space, with the remainder being common property.

Specifically, the plaintiff claims that his rights under the right of footway that burdens Lot 6 have been infringed. See *Powell v Langdon* (1944) 45 SR (NSW) 136; *Keefe v Amor* [1965] 1 QB 334 at 347; *Prospect County Council v Cross* (1990) 21 NSWLR 601.

In essence, he claims that his use of the easement has been, and continues to be, obstructed by a mechanical garage door that has been installed across the western half of the entrance to the Lot 6 parking area. The door, when closed, prevents access to the right of way. The principal purpose of the right of way is to provide access to four gas meters and four water meters, and associated shut-off valves or taps. These meters are referrable to Lots 1, 2, 6 and 7.

From 2010, the plaintiff was in possession of a remote-control device for the garage door which had been provided to him by the defendant. However, in 2016, the plaintiff returned the remote-control device to the defendant as he did not think that the existing arrangement was satisfactory.

The plaintiff contends that the garage door constitutes an obstruction that amounts to a real substantial interference with the right of footway and is seeking injunctive relief to prevent the defendant from having any locked door across the right of footway.

Decision

His Honour commenced with a brief review of authorities dealing with alleged infringement of easements by the placing of gates.

In *Denton v Phillpot* (1990) NSW Conv R 55-453 Young J (as his Honour then was) stated (at 59,030):

Jackson on The Law of Easements and Profits at p 155, makes the observation that, "Even the locking of a gate is not necessarily a substantial interference……However, the courts will easily find that locked gates and similar objects do amount to actionable disturbance of rights of way." This proposition is correct, but it must be made clear that the cases show that ordinarily if there is a good reason for having a gate, such as the reasonable interests of security, and the dominant owner is given a key to the gate, then courts have not been over-anxious to find that there has been a substantial interference.

In *Trewin v Felton* (2007) 13 BPR 24,579; [2007] NSWSC 851 Brereton J (as his Honour then was), after reviewing the authorities in this area, stated at [81]:

As has been seen, generally speaking, a servient owner may erect a gate across a right of way, provided that it is not a substantial obstruction and is left unlocked [*Pettey v Parsons; Gohl v Hender; Powell v Langdon*, 139; *Deanshaw v Marshall*]. In *Johnstone v Holdway* [1963] 1 QB 601, the servient owner erected a gate with a spiked chain and combination lock to exclude members of the public, but offered the dominant owner the combination for the lock. The dominant owner's suit for a mandatory injunction to remove the spiked chain failed, the Court of Appeal holding that there was no substantial interference with the right of way: the dominant owner had the means of access through the gate.

His Honour noted that the facts of this specific case suggest that the essential purpose of the easement is access to those meters and associated valves or taps rather than a "*ius spatiandi*"

Darke J was not satisfied that the plaintiff had been prevented from exercising, or significantly delayed or hindered in the exercise of, the right of access conferred by the easement.

His Honour dealt with the submission that the plaintiff's rights under the eaement ought not be dependent upon another party or that party's mechanical or electronic devices. His Honour noted that the servient owner retains all the rights of an owner save that those rights cannot be exercised in a manner inconsistent with the rights conferred upon the dominant owner by the terms of the grant (see *Keefe v Amor* (supra) at 347; *Zenere v Leate* (1980) 1 BPR 97,029 at 9,304).

His Honour noted that the defendant has always been ready to facilitate access to the right of way when required, and further observed that access to the easement would only be required on relatively infrequent occasions.

Botany Bay Apartments Pty Ltd v Badolato

[2019] NSWSC 296

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 26 March 2019

LAND LAW — conveyancing — two contracts for sale — off-the-plan purchase — alleged representations by the plaintiff vendor's agent as to the size of the properties — defendant purchaser paid part of the deposits upon exchange and the balance was due upon expiration of the cooling off period — where the balance was not paid by that date and thereafter — purchaser repudiated the contracts — vendor seeks payment of the balance of the deposits — whether the vendor is entitled to recover the deposit — judgment for the vendor

LAND LAW — conveyancing — deposit — discretionary power to order relief against forfeiture of a deposit under s 55(2A)Conveyancing Act 1919 (NSW) — whether power can be exercised in favour of the purchaser where the vendor is suing to recover deposit and purchaser does not cross-claim — power extends to such a situation to avoid circuity of action — factors relevant to the exercise of the discretion — where the purchaser was an experienced buyer with a significant property portfolio — in the absence of a finding as to a misrepresentation or some other unconscionable conduct no basis for the exercise of discretion

CONSUMER LAW — misleading or deceptive conduct — whether the vendor breached ss 18 and/or 30 of the Australian Consumer Law — whether the vendor made a representation as to the size of the properties — vendor denied making such a representation — assessment of the relative credibility of representor and representee — fallibility of human memory — reliance upon contemporaneous documents to resolve dispute — where the contemporaneous documents pointed strongly to the representation not being made — where, in any event, the purchaser was on notice within the cooling off period that no such representation was being made — claim unsuccessful

CONSUMER LAW — unconscionability — where the purchaser alleged that the vendor was aware of new plans affecting the size of the properties — where such knowledge was purported to have been acquired during the cooling off period — whether the vendor indeed had such knowledge — paucity of evidence in support — purchaser under no special disadvantage — claim unsuccessful

CONSUMER LAW — harassment and coercion under s 50 Australian Consumer Law — unsuccessful settlement conference after the commencement of proceedings — purchaser given three options including continuing with court proceedings — whether this amounted to coercion — meaning of coercion — no negation of choice or freedom to act — claim entirely misconceived

Facts

On 12 March 2018, Botany Bay Apartments Pty Ltd (**"Vendor"**) and Badolato (**"Purchaser"**) entered into two contracts for the sale and purchase of units G03 and 204 in a proposed development at 71-91 in Euston Road, Alexandria. The deposit payable under each contract was $95,000 and was payable in two amounts. The first amount of $2,375 in each case was payable on the date of exchange.

The parties acted on the basis that the balance of $92,625 in each contract was payable on or before 5pm on 26 March 2018 (the expiry of the cooling-off period).

In each case the purchaser paid the amount of $2,375. On 26 March 2018 the purchaser requested an extension of the cooling-off period to pay the balance in each case. The vendor agreed to extend the time for payment of the balance to 5pm on 27 March 2018.

The purchaser failed and refused to pay the balance of the deposit on each contract by 5pm on 27 March 2018 and thereafter. On 29 March 2018, pursuant to clause 2.5 of the contracts, the vendor terminated each contract.

The vendor commenced proceedings alleging breach of contract on the part of the purchaser. In its defence, the purchaser alleges the vendor, through its agent Mr Skaf, engaged in misleading or deceptive conduct by representing that the internal size of the apartments being purchased would be increased by 8.5m2 when amended plans were put to the council. In the alternative, the purchaser alleged that the vendor had engaged in unconscionable conduct, or that he was coerced by the vendor into purchasing the two properties.

Decision

Davies J found in favour of the vendor.

Misleading or deceptive conduct

His Honour concluded, on the evidence, that Mr Skaf did not represent to the purchaser that if the building was extended by one metre he would receive an additional 8.5m2 area in the apartments he bought. Indeed, the purchaser was put on notice that no representation was being made about the increase in size of the apartments by an email dated 21 March 2018. In the email, the vendor made plain that it could not guarantee the apartment size, and that if there was an increase in size it would be a bonus to the buyer.

Unconscionable conduct

His Honour rejected the purchaser's submission that there had been unconscionable conduct by the vendor in staying silent about what the new plan showed in relation to the size of the apartments purchased. This was because the purchaser failed to identify any evidence capable of showing that the vendor had knowledge of the plans prior to the expiration of the cooling-off period.

It was further noted that to the extent that any other form of unconscionability is alleged, the evidence does not disclose that the purchaser was in a position of special disadvantage. Rather, he was an experienced property investor, with a diploma in conveyancing, who had purchased units off the plan on a number of occasions previously.

Coercion

His Honour was not persuaded that the vendor had coerced the purchaser into purchasing the two properties without that extra area, or to defend the plaintiff's claim in court. This was because in the present case, the purchaser was prima facie liable to pay the balance of the deposits. Given his failure to do so, the proceedings commenced by the vendor were neither vexatious, frivolous, baseless or an abuse of process.

Davies J opined that coercion involves force or compulsion or threats of force or compulsion negating choice or freedom to act: *Hodges v Webb* [1920] 2 Ch 70 at 85-87; *Australian Securities and Investment Commission v Accounts Control Management Services Pty Ltd* [2012] FCA 1164 at [16]. The coercion need not be "undue": *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472 at [59]-[62], but cf. *Australian Competition and Consumer Commission v McCaskey* (2000) 104 FCR 8. However, coercion is a much stronger word than harassment: *Maritime Union* at [61].

It was also noted that the commencement of proceedings that are not vexatious, frivolous, baseless or an abuse of process cannot amount to coercion: *Campbell v Metway Leasing Ltd* (1998) ATPR 41-630 at p 40917; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2006] FCA 1427; (2006) 236 ALR 665 at [75]. It must follow that a refusal by a plaintiff to negotiate after commencement of legitimate proceedings cannot amount to coercion. A fortiori, if a defendant is given a number of options, it cannot be said that there is a negation of choice or freedom to act.

His Honour held that this aspect of the claim was misconceived.

Section 55(2A) of the *Conveyancing Act*

The plaintiff accepted that a number of cases provided support for the applicability of the sub-section where a vendor was suing to recover the balance of the deposit, so as to avoid circuity of action.

In *Socratous v Koo* (1993) 6 BPR 97,448; [1994] ANZ ConvR 208; (1993) NSW ConvR 55-685 McClelland CJ in Eq said (at p 13,228):

> I have already made reference to s 55(2A) of the *Conveyancing Act 1919*. In terms, that provision only operates where a deposit has in fact been paid. But it may assume relevance in an action to recover an unpaid deposit or in a claim for damages for breach of an obligation to pay a deposit. In the former class of case, it would in my view be open to a purchaser sued for the amount of a deposit to raise as a defence a contention to the effect that if the deposit were to be paid the circumstances are such that the court would order its repayment to the purchaser on an application under s 55(2A). Such a defence would be available to avoid circuity of action. In the latter class of case, into which the claim for damages in the present proceedings falls, it would be open to a purchaser to rebut the proposition that the amount of the unpaid deposit should be included as an element in the damages suffered by the vendor, by raising a contention to the effect that if the deposit had been paid, and had been subsequently forfeited to the vendor, the court would nevertheless have ordered its repayment to the purchaser on an application under s 55(2A).

In *Kylsilver* Hamilton J said at [13]:

> It is submitted that that discretion cannot be exercised at all (at least in respect of the excesses over $1,000 per contract) as the deposits were not in fact paid. The plaintiff bases this argument on the words of the section. However, it concedes that the contrary was decided by McLelland CJ in Eq in *Socratous v Koo* (1993) NSW ConvR 55-685; and see Peter Butt, The Standard Contract for Sale of Land in New South Wales (2nd Ed, 1998) ("Butt") [9.105]. It says that I should not follow McLelland CJ in Eq's decision. However, in my respectful view, his Honour's decision was correct, for the reasons he gave, and I propose to follow it.

His Honour was satisfied that the defendant brought himself within s 55(2A) to make the claim under that section.

His Honour then turned to the exercise of the exercise of the discretion. His Honour cited Darke J's decision in *Sydney Developments Pty Limited v Perry Properties Pty Limited* [2016] NSWSC 515 where his Honour said at [52]-[53]:

> [52] It is not necessary to demonstrate special or exceptional circumstances in order to justify an exercise of the discretion under s 55(2A) (see *Harkins v Butcher* [2002] NSWCA 237; (2002) 55 NSWLR 558 at [77]; *Havyn Pty Limited v Webster* (supra) at [149]). However, a proper approach to the discretion must appreciate the legal context of the established nature of a deposit as an earnest of performance in conveyancing transactions (see *Havyn Pty Limited v Webster* (supra) at [150]-[151]).
>
> [53] As Santow JA stated in *Havyn Pty Limited v Webster* (supra) at [155]:
>
> For these reasons, I do not consider that there is anything controversial in the submission of the vendor that the grounds in support of an application to repay the deposit must be sufficient to warrant a departure from holding the purchaser to its obligations under the contract. Indeed, this goes to the "justice and equity" of the case, drawing on the observations of Street CJ in Eq in *Lucas & Tait*. That conclusion must be correct, if the notions of justice and equity conditioning the discretion are to have some meaning drawn from the purpose of a deposit and the circumstances in which it is forfeited. The purchaser must therefore do more than merely show that the deposit has been forfeited, and that it will thus result in a 'windfall' to the vendor as will usually be the case. The Court should not take an approach to ordering the return of deposits under s55(2A) which weakens the proper function of a deposit in providing a sanction so that purchasers treat the making and completing of contracts with due seriousness: *Wilson v Kingsgate Mining Industries* [1973] 2 NSWLR 713 at 735, *Fraser v L O'Malley & Sons Pty Ltd* [1975] 2 BPR 9133 at 9139-40. In so saying, I am not to be understood as putting a gloss upon the plain words of s55(2A), but merely highlighting the critical importance of a judge exercising the wide discretion according to its plainly beneficial purpose to consider 'justice' and 'fairness' in their proper context.

His Honour held that, in the absence of a misrepresentation or some other unconscionable conduct by the plaintiff, no basis was demonstrated for the defendant to be relieved of his obligation to pay the balance of the deposits by reason of s 55(2A) of the *Conveyancing Act*.

Braye v Tarnawskyj

[2019] NSWSC 277

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 19 March 2019

LAND LAW — possessory title — claim made over area of land between two residential lots — qualified title — claimed land subject to right of way benefitting plaintiff's adjoining property — where the plaintiff and his tenants used parts of the claimed land for parking, storage and a garden — where the plaintiff undertook paving works on parts of claimed land — whether acts exceed those authorised by right of way — whether acts sufficient acts of possession showing an intention to exclude all others — where acts not done on a pathway area — possessory title established over part of the claimed land

Facts

This case concerns a claim for possessory title over a small parcel of adjoining land (**"the claimed land"**) which lies between the property at 7 Brien Street and the property at 5 Brien Street.

Dr Braye is the registered proprietor of the 7 Brien Street, The Junction. Dr Braye acquired the property in December 1986.

A right of way, granted in 1902, exists over the claimed land for the benefit of the 7 Brien Street property. The registered proprietor of the claimed land is Mary King who died in 1906. The first defendant, Ms Gloria Tarnawskyj, is the administrator of Mary King's estate.

The second defendant, Mr Simon Ward, is the registered proprietor of the 5 Brien Street property. He acquired the property in July 2015. On 22 May 2017, Mr Ward entered into a contract with Ms Tarnawskyj to purchase the claimed land for a price of $50,000. The contract has not been completed.

Dr Braye is seeking to assert possessory title over the claimed land on the basis of adverse possession. He contends that from the time he acquired 7 Brien Street in December 1986, he and his tenants have used the claimed land in ways not authorised by the right of way. Specifically, he claims he has used the space for parking cars, storing goods and maintaining a garden upon it. Moreover, he claims he has engaged in the concreting and later pebblecreting of the surface, the installation and use of pipes beneath the surface, and the payment of water rates.

Decision

His Honour commenced the analysis by reviewing the relevant authorities starting with the judgment of Slade J in *Powell v McFarlane* (1979) 38 P&CR 452:

> It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:
>
> (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": *West Bank Estates Ltd. v. Arthur*, *per* Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.
>
> …
>
> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.
>
> (4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires

> a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.
>
> The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.

In *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; [2002] UKHL 30 noted that the notion of adverse possession as found in the statutes of limitation was concerned with possession in the ordinary sense of the word. His Lordship stated (at [35]-[36]):

> From 1833 onwards, therefore, old notions of adverse possession, disseisin or ouster from possession should not have formed part of judicial decisions. From 1833 onwards the only question was whether the squatter had been in possession in the ordinary sense of the word. That is still the law, as Slade J rightly said…
>
> Many of the difficulties with these sections which I will have to consider are due to a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said that he has to "oust" the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with any present or future use by the true owner. In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.

In relation to the question of intention to possess, Lord Browne-Wilkinson said (at [42]):

> …Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession

> also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title.

His Honour also referred to the statement of Bowen CJ in Eq in *Mulcahy v Curramore Pty Ltd* [1974] 2 NSWLR 464 at 475, where his Honour 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'."

In the present case, one of the circumstances which needs to be considered is the existence of the right of way over the claimed land in favour of the owner, tenants and occupiers of 7 Brien Street. The plaintiff accepted that the exercise of rights pursuant to the right of way could not support an adverse possession claim (see *Weber v Ankin* [2008] NSWSC 106 at [98]). However, the plaintiff submitted that the acts it relied upon were not authorised by the right of way. In relation to parking, reference was made to *Laris v Lin (No 2)* (2016) 18 BPR 35,917; [2016] NSWSC 560 at [118] where Slattery J stated:

> The legal principles in relation to parking on rights of carriageway are well established. In the absence of an implied term, a right of carriageway which authorises passing and re-passing to and from the dominant property does not authorise parking on the site of the easement except such parking as is necessarily a part of passing and re-passing to and from the dominant property: *Trewin v Felton* [2007] NSWSC 1370 (at [52]) per Brereton J. The owner of the dominant tenement of a right of carriageway ordinarily has the right to halt, to load and unload and to stop momentarily to set down or pick up passengers but this must be a *de minimis* use and no more: *Bulstrode v Lambert* [1953] 1 WLR 1064 at 1070. An easement of way does not normally entitle the dominant owner to park on the way: *Butler v Muddle* (1995) 6 BPR 13,984 per Young J. There may be some circumstances where the Court will decide otherwise, such as where there are parking bays mapped out in the plan by which the easement was granted but the issue is whether a right of parking is reasonably necessary for the effective and reasonable exercise and enjoyment of the rights that are expressly granted: *Butler v Muddle* (at 13,987).

His Honour held that whilst a person with the benefit of a right of way may have an ancillary right to lay paving on the easement area, that is only to the extent that it is reasonably necessary for the enjoyment of the right of way (see *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646-7; *Butler v Muddle* (1995) 6 BPR 97,532 at 4; *Owners of Strata Plan 48754 v Anderson* (1999) 9 BPR 17,119; [1999] NSWSC 580 at [27]-[30]; *Zenere v Leate*

(1980) 1 BPR 97,029 at 9305, cited with approval in *Hare v van Brugge* (2013) 84 NSWLR 41; [2013] NSWCA 74 at [29]).

A secondary question that arose is whether the alleged acts of possession, at least some of which were done on only parts of the claimed land, support a conclusion that the whole of the claimed land was possessed adversely to the documentary owner. The Privy Council decision of *Higgs v Nassauvian Ltd* [1975] AC 464 supported of the proposition that it was clearly settled that acts of possession done on parts of a tract of land to which a possessory title is sought may be evidence of possession of the whole. However, this rule was not applicable to a question of undefined and disputed boundary. *Clark v. Elphinstone* (1880) 6 App.Cas. 164, 170-171; *West Bank Estates Ltd. v. Arthur* [1967] 1 A.C. 665.

Whether or not acts of possession done on parts of an area establish title to the whole area must be a matter of degree.

Darke J found in favour of Dr Braye and found that he had successfully established a possessory title in respect of part of the claimed land. Specifically, he found Dr Braye to have successfully established the existence of factual possession and an intention to possess for a period of at least 12 years over all of the claimed land.

The reasons for his findings are summarised as follows:

(1) From December 1986, Dr Braye's tenants, with his authority and permission, have made use of the claimed land for carparking and storage. These activities were not authorised by the terms of the right of way, and could not be said to fall within the scope of any ancillary rights conferred by the easement.

(2) On three occasions since 1986, Dr Braye has undertaken substantial works on the surface of the driveway area. A concrete surface was initially installed. That surface was replaced in 1993 with a pebblecrete surface. Finally, a new and more extensive concrete surface was installed in 2017. These are acts that go beyond what is authorised by the right of way.

(3) Dr Braye's tenants also maintained the garden area that formed part of the claimed land for more than 22 years. These were acts of a possessory nature, of a type an occupying owner might be expected to carry out in that area of the claimed land.

Campbell v Hamilton

[2019] NSWCA 22

Coram: Beazley P, Gleeson JA, White JA

Court: New South Wales Court of Appeal

Date: 25 February 2019

LAND LAW — Easements — Whether appellant granted easement that bound his successors in title — Whether instrument granting easement 'clearly indicates' the land to which easement is appurtenant for the purpose of s 88(1) of the Conveyancing Act 1919 (NSW)

LAND LAW — Easements — Construction of deed providing for grant of easement — Extrinsic evidence — Whether extrinsic evidence not admissible to construe a registered instrument granting easement can be used to construe deed

CONTRACTS — Remedies — Specific performance — Whether appellant agreed to grant easement — Meaning of 'easement'

Facts

On 14 November 2016, by a Deed of Settlement and Release (**"the Deed"**), Mr Campbell agreed to grant an easement for services and carriageway over a part of his land for the benefit of the respondents (**"the Hamiltons"**). Specifically, the Deed provided that upon execution of the Deed, Mr Campbell was to give the Hamiltons a signed Transfer Granting Easement for services and carriageway of three (3) metres in width from the eastern boundary of Lot 4. The Transfer Granting Easement in the form signed by Mr Campbell was successfully lodged by the Hamiltons for registration.

While Mr Campbell accepted that the rights he granted endure for the benefit of the Hamiltons' successors in title, he denied that they bind his successors in title. He contended that this is because the instrument creating the easement did not clearly indicate the land to which the easement was appurtenant and is thus unenforceable against his successors in title by reason of s 88(1)(a) of the Conveyancing Act 1919 (NSW).

At first instance, the primary judge held that the Transfer Granting Easement did comply with s 88(1)(a) of the Conveyancing Act. The primary judge further held that in any event if it did not, the Hamiltons would nonetheless be entitled to a decree of specific performance to require the execution of an instrument in a form that did clearly identify the part of the land which had the benefit of the easement so as to bind Mr Campbell's successors in title.

Mr Campbell sought to appeal that decision.

Decision

The Court dismissed the appeal and upheld the decision of the primary judge.

It was held that the Transfer Granting Easement did clearly indicate the land to which the benefit of the easement was appurtenant. That land was clearly identified as the lower part of Lot 1153 that was shown as Lot 1150 in the plan of proposed subdivision that was annexed to the instrument.

The Court further held that even if the instrument failed to comply with s88 of the Conveyancing Act, Mr Campbell would still not have been entitled to the relief he sought. This is because on a proper construction of the Deed, the Court found that it was clear that the parties' intentions, as objectively indicated, was that the easement to be created should enure both for the benefit of the Hamiltons and their successors in title, and should bind both Mr Campbell and his successors in title.

Capital Securities XVII Pty Ltd v Anna's Garden Pty Ltd

[2019] NSWSC 1256

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 23 September 2019

Facts

Anna's Garden Pty Ltd (**"the first defendant"**) entered into a contract to buy five parcels of land in Queensland at a price of $3.3 million. The first defendant is a company owned by Ms Shujuan Xue (**"the second defendant"**). As the first defendant required finance of approximately $2,000,000 to proceed with the contract, the second defendant took steps to obtain an appropriate loan.

The second defendant sought to enter into a loan agreement with the plaintiff and was initially advised that preliminary approval had been given for a loan of $1,815,000. However, once a formal valuation of the properties was obtained, the plaintiff reduced the amount that it would agree to lend to the first defendant to a limit of $1,110,000. That was not a sufficient amount to enable the first defendant to complete the contract. Consequently, the first defendant decided not to proceed with the loan.

The plaintiff claims to be entitled to the debt and the charge securing it under a Letter of Offer dated 1 September wherein the first defendant was the borrower and the second defendant was guarantor. The plaintiff also seeks a declaration that the amount of $70,152.41, together with interest thereon, is secured by an equitable charge over the property at 24 Barcoo Island, Sylvania Waters, which is registered in the name of the second defendant.

The current proceedings relate to a caveat lodged by the plaintiff against the title to the Sylvania Waters property. Specifically, the plaintiff is seeking interlocutory relief to extend the operation of caveat until further order.

His Honour noted that there was no disagreement between the parties that the principles to be applied in deciding whether the caveat should be further extended are as stated by Slattery J in *Peters v Lithgow Forge Pty Ltd* [2010] NSWSC 283 at [35]-[36], as follows:

> [35] The test which must be applied at this stage is similar to that that applies to an interlocutory injunction. The burden that the first and second defendants bear on this application is the burden of showing that in substance there is not a serious question to be tried on the issue of the existence of an equitable interest in the property. The power to extend operation of the caveat under s 74K(2) *Real Property Act* depends upon the court's satisfaction that "the caveator's claim has or may have substance". This had been described as "not a very demanding test": *Dowdle v Inverell SC* (1999) ANZ ConvR 429; (1998) 9 BPR 17,349 per Bryson J at 17,350. The test may be

> satisfied if the caveator can show an arguable case for final relief even though establishing the claim may not be without difficulties: *Queanbeyan Leagues Club v Poldune Pty Ltd* (1996) 7 BPR 15,078.
>
> [36] It is not the role of the court to decide these questions finally now. It is undesirable for judges on interlocutory applications of this kind to give an opinion about a final view of the issues in the proceedings. I will limit myself accordingly to deciding whether or not there is a serious question to be tried.

The defendants put a number of arguments as to why the plaintiff has not satisfied the legal test for the extension of its caveat. These include:

(1) The party to the Letter of Offer was not the plaintiff, but was another related company called Prime Capital Securities Administration Pty Ltd.

(2) On its proper construction, clause 18 did not create a charge over the second defendant's property, and could only create a charge over the property of the first defendant, being the borrower.

Decision

His Honour held that the plaintiff was entitled to the continuing extension of the caveat.

While his Honour did acknowledge that the Letter of Offer described the business name of the offeror in the footer as “Prime Capital”, his Honour noted that all the plaintiff was required to prove was that there was a reasonably arguable case that it was entitled to enforce the charge that the caveat was lodged to protect. His Honour thus found clause 3 in Section 5.0 of the Letter of Offer to be decisive at this interlocutory stage. Relevantly, it provided that references to “we” or “us” means Prime Capital Securities Pty Ltd “and/or” the plaintiff. As such, his Honour held that such a term leaves it open to the plaintiff to prove at a final hearing that it was the party who incurred the costs and entitlements under the Letter of Offer.

Robb J rejected the defendants’ submission that clause 18 cannot be construed as creating a charge over the second defendant’s property. This is because clause 18 of the Letter of Offer is clearly drawn in terms that include each Guarantor charging its property. It read: “you and each Guarantor charge all present and after acquired property in favour of us in respect of monies payable under these terms.”

Capital Securities XVII Pty Ltd v Yusofzai (No 2)

[2019] NSWSC 501

Coram: Walton J

Court: Supreme Court of New South Wales

Date: 3 May 2019

CIVIL PROCEDURE — adjournment application — granted

Facts

Zhara Yusofzai, the first defendant, and Zia Yusofzai, the second defendant, are shareholders of Y Corp Developments Pty Ltd (**"Ycorp"**). They are also the registered owners of 9 Beazley Street Ryde (**"the property"**).

The defendants approached Capital Securities XVII Pty Ltd (**"the plaintiff"**) in December 2017 to refinance an existing commercial loan Ycorp had with another lender, which was a consolidation of business debts. Pursuant to a loan, a security and guarantee deed dated 22 December 2017 (**"the Deed"**), the plaintiff lent Ycorp $1,120,000 in exchange for a mortgage over the property. The defendants also agreed to be guarantors for the loan.

The defendants failed to pay the amounts payable to the plaintiff under the loan. On 11 May 2018, the plaintiff sent the defendants a notice demanding payment of $76,938.46 to remedy their default under the Deed. The defendants failed to comply with the notice of demand.

On 20 June 2018, the plaintiff sent the defendants a letter terminating the Deed and demanded payment for the full amount of the loan being $1,212,463.90, or possession of the property. The defendants have not paid the monies due in response to these demands and remain in possession of the property.

On 25 June 2018, the plaintiff filed a statement of claim seeking possession of the property.

On 14 August 2018, the defendants filed a defence alleging that the loan and mortgage upon which the possession proceedings were based were unjust and/or unconscionable and thus void.

However, from 14 August 2018, the defendants failed to comply with any direction. This is notwithstanding five directions hearings, which set out timetables for the filing of evidence and mediation.

By an amended notice of motion filed on 27 February 2019, the plaintiff thus sought to have the first and second defendants' defence struck out and for judgment to be entered for the plaintiff. However, when the matter was called, counsel for the first and second defendants sought that the motion be adjourned.

Decision

Walton J granted the adjournment sought by the first and second defendants for the following reasons:

(1) The personal circumstances of the defendants' solicitor, Mr Khosh, provided substantial explanation for their failure to comply with directions. Specifically, his Honour pointed to evidence given by Mr Khosh that he and his partner were involved in an incident that resulted in their hospitalisation.

(2) The prejudice falling upon the first and second defendants if the adjournment application was refused (and the amended motion upheld) is high as the property in question is the family home.

(3) Prejudice to the plaintiff is limited given that the adjournment sought is a relatively short one. Furthermore, there were conditions attached to the adjournment which have the effect of ensuring that the proceedings will move forward with certainty and stability lest they be struck out.

Carolyn Deigan as executrix for the estate of the late

James Boyd Lockrey v Bernard James Fussell

[2019] NSWCA 299

Coram: Bathurst CJ, Macfarlan JA, White JA

Court: New South Wales Court of Appeal

Date: 10 December 2019

SUCCESSION — executors and administrators — rights, powers and duties — executrix exercised deceased's right to rescind contract for sale of land before obtaining probate — consideration of ss 44 and 61 of the Probate and Administration Act 1898 (NSW) — whether rescission valid when given — whether rescission retrospectively validated on obtaining probate

LAND LAW — conveyancing — contract for sale — rescission — construction of clause providing right to rescind — whether right available only to surviving party to contract — whether solicitor named in contract able to exercise right notwithstanding vendor's death

LAND LAW — conveyancing — contract for sale — breach — five-year completion period — where neither party took steps to complete — whether contract breached — where purchaser subsequently attempted to bring about completion — whether estate took advantage of its own wrong in serving second rescission notice

Facts

On 10 May 2012, Mr James Lockrey as vendor and Mr Bernard Fussell as purchaser entered into a contract for the sale of a property in Camellia (**"the property"**). The purchase price was $1,700,000 and the deposit payable was $50,000. The completion date was five years after the contract date, being 10 May 2017.

Relevantly, the contract included a special condition 33.2 that provided that:

> " … should either party prior to completion … die … then in the case of the vendor or the purchaser, either party may rescind this contract by notice in writing forwarded to the solicitor for the other party and this contract shall be at an end and the provisions of clause 19 shall apply."

On 1 October 2013 Mr Lockrey made his last will. He appointed his solicitor, Ms Carolyn Deigan, to be the sole executrix of his will and left his residuary estate to his wife, or if she did not survive him for 30 days, then to his daughters in equal shares.

While completion was due to take place on 10 May 2017, neither Mr Lockrey nor Mr Fussell sought to make arrangements to enable completion to take place on that day. Mr Lockrey later died on 12 May 2017.

The subsequent dealings between the parties are as follows:

- On 16 May 2017 the solicitors acting for Mr Fussell, Etienne Lawyers, wrote to Ms Deigan of CLS Legal asking when settlement could be booked.
- On 18 May 2017 CLS Legal served on Etienne Lawyers a notice of rescission.
- Mr Fussell did not accept the validity of the notice of rescission and on 1 June 2017, Etienne Lawyers served on Ms Deigan a notice to complete. Specifically, Etienne Lawyers contended that special condition 33.2 of the contract only allowed rescission by the surviving party and did not permit the “vendor's successor” to rescind the contract in the event of the vendor's death.
- On 21 September 2017 probate of Mr Lockrey's will was granted to Ms Deigan. She received the original of the grant (without all attachments) on 29 September 2017.
- On 16 October 2017 CLS Legal served a second notice of rescission.

Supreme Court proceedings

At first instance, the primary judge found in favour of Mr Fussel.

While the primary judge held that on its true construction, cl 33.2 permitted rescission of the contract on behalf of Mr Lockrey's estate following his death, the May notice of recission was found to be ineffective, This was because Ms Deigan had not yet obtained probate and thus had no authority to issue the May notice of rescission on behalf of Mr Lockrey's estate. Accordingly, the primary judge held that Mr Fussell was entitled to specific performance of the Contract.

Ms Deigan, as executrix for Mr Lockery’s estate, now seeks to appeal this decision.

The issues in the Appeal were whether:

(i) on its proper construction, cl 33.2 could be invoked (a) only by the surviving party to the contract or (b) by either party or their legal personal representatives, and if the latter, whether the notice served by the vendor’s solicitor named in the contract was effective notwithstanding the solicitor’s lack of authority, or whether the notice could only be given by the legal personal representative (“the construction ground”);

(ii) the vendor was in breach at the moment it failed to complete by the date for completion or alternatively by the time notice of the second rescission was given and if so whether this precluded Ms Deigan from relying on the second rescission (“the breach ground”); and

(iii) ss 44 and 61 of the Probate and Administration Act rendered invalid the first rescission because the appellant, although named in the will as executrix, had not obtained probate at the time of her exercising the right to rescind, and if so, whether the subsequent grant of probate “related back” so as to retrospectively validate the rescission (“the Probate and Administration Act ground”).

Decision

The Court allowed the appeal and declared that the contract for sale of land between the late James Boyd Lockrey and the respondent was effectively rescinded no later than 16 October 2017.

The Court held that Clause 33.2 expressly provided that in the case of the vendor dying, “either party” (i.e. including the vendor) may rescind. There was no basis for the argument that the right of rescission was only available to the surviving party to the contract. The right extended, on Mr Lockrey’s death, to his legal personal representative:

Owing to the death of Mr Lockrey and on the assumption that Ms Deigan’s failure to obtain probate at the time precluded her from rescinding, there was no “party” capable of giving a notice of rescission. *Coplin v Al Maha Pty Ltd* [2019] NSWCA 159

The real question, insofar as the first rescission is concerned, is therefore whether Ms Deigan in her capacity as executrix had authority to rescind notwithstanding her not having obtained probate.

The Court rejected the primary judge’s finding that Ms Deigan could not, before grant of probate, exercise the right of rescission on behalf of and for the benefit of the estate, and if she did so, her action was not retrospectively validated on the grant of probate.

Neither party took steps to complete the contract on the date for completion. The Court of Appeal held that the primary judge was correct in deciding that in circumstances where the appellant made no attempt to proceed to completion, the vendor was not in breach by his reciprocal inaction. *Amaya v Everest Property Holdings Pty Ltd; Firmstone v Everest Property Holdings Pty Ltd; Sarkar and Islam v Everest Property Holdings Pty Ltd* [2010] NSWCA 315.

Although the respondent took steps to book a settlement and served a notice to complete, he did not take the all steps required on his part that were necessary for completion either by Ms Deigan as executrix or by anyone who obtained a limited grant of administration.

The Court of Appeal held that the title of the NSW Trustee is a bare legal title that carries with it no active duties or powers of management or administration. The executor is the beneficial owner of the assets of the estate and is entitled to possession of the trust assets. The executor has authority, derived from the will, to deal with the trust assets before the grant of probate.

Even if it were not valid when notice was given, the first rescission would have been retrospectively validated on the grant of probate.

Charub Pty Ltd v Triandafyllou

[2019] NSWSC 487

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 3 May 2019

LAND LAW — possession of land — application for summary judgment — mortgage given by the defendants as guarantors of a loan agreement — default of loan and mortgage obligations by defendants — whether defendants entitled to redeem the mortgage — whether an intention to sell the property is an offer of redemption — assignment of mortgage — no notice of assignment given — transfer of mortgage registered — no notice of assignment necessary to perfect assignment — ss 51 and 52 Real Property Act — whether a requirement of plaintiff to plead service of s 57(2)(b) notice — whether summary judgment should be granted — defendants' defences disclose no defence to the claim for possession — summary judgment given

Facts

On 11 May 2018, Pacific 8 Pty Ltd (**"Pacific"**) and Spartan Sport Services Pty Ltd (**"Spartan"**) entered into a loan agreement. Under this agreement, Pacific lent Spartan the sum of $1,125,000.00. Chris and Sevasti Triandafyllou (**"the first and second defendants"**) guaranteed Spartan's obligations and provided a registered mortgage over 5A Clareville Avenue, San Souci (**"the Sans Souci property"**) by way of security.

The loan agreement and mortgage were relevantly executed by Haralabos Triandafyllou (**"Third Defendant"**) who was the sole director and company secretary of Spartan. He executed the agreement on behalf of himself and pursuant to the powers of attorney given by the first and second defendants.

On 7 June 2018, Pacific transferred its interest in the loan agreement and mortgage to Charub Pty Ltd (**"the plaintiff"**) by a Deed of Assignment. On 13 June 2018, the transfer of the mortgage from Pacific to the plaintiff was registered in the NSW Land Registry Services. However, no notice of the assignment was given to Spartan or to the defendants.

On 11 November 2018 Spartan failed to repay the principal and thereby became in default of the loan agreement and the mortgage. The plaintiff now seeks summary judgment for possession of the San Souci Property, or that the defences filed by the defendants be struck out.

In their defence, the first and second defendants plead that they had no knowledge of the agreement with Pacific, that they at no time agreed to provide any guarantee, indemnity or security by way of registered mortgage, and at no time executed any of the documents.

The third defendant pleads three substantive defences:

(1) He was not notified of the assignment and he asserts that s 12 of the Conveyancing Act 1919 (NSW) has not been complied with;

(2) Spartan is attempting to refinance the loan, that the refinance is expected to settle in the near future, and that Spartan would be ready, willing and able to repay the principal; and

(3) The plaintiff is not entitled to relief as it has not pleaded the requirement to issue a s 57(2)(b) notice under the Real Property Act 1900 (NSW).

Decision

Davies J found in favour of the plaintiff and entered judgement for possession of the whole of the San Souci Property.

Defence of the First and Second Defendant

His Honour found that although those defendants may have had no knowledge of the loan agreement and mortgage they had expressly authorised the third defendant to enter into the loan and mortgage arrangements by giving him powers of attorney.

Defence of the Third Defendant

With respect to the lack of notice of the assignment, his Honour found such did not render the assignment invalid as it had been perfected by way of registration. *Nemeth v Reachcord Pty Ltd* (1998) 9 BPR 97729; *Property Builders Pty Limited v Adelaide Bank Limited* [2011] NSWCA 266; *Gilmour v Pyramid Building Society (In Liq)* (1995) 6 BPR 97,531.

His Honour further held that Spartan's attempts to refinance the loan were incapable of providing an adequate defence. This is because the plaintiff was entitled to the repayment of its loan in November 2018. As such, the failures on the defendants' part to repay the loan whether by way of refinancing or sale of the property, means that the matter should be brought to a head as soon as possible to enable the plaintiff to take expeditious steps to recover what is owing to it. This is particularly so as the amount now outstanding is $1,314,964.62 on a loan of $1.125 million.

As to the defence that the plaintiff did not plead the requirement to issue a s 57(2)(b) notice, his Honour noted that the service of a s 57(2)(b) notice is not a pre-condition to the bringing of proceedings seeking possession for mortgage default. *Suncorp-Metway Limited v Nam Property Holdings Pty Limited* [2010] NSWSC 1078; (2010) 16 BPR 30,859 at [40]; *Commonwealth Bank of Australia v ACES Sogutlu Holdings Pty Ltd* [2013] NSWSC 1184 at [37].

His Honour ordered judgment for possession in favour of the plaintiff.

Citigroup Pty Ltd (ACN 004 325 080) v Wernhard

[2019] NSWSC 132

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 1 March 2019

REAL PROPERTY — equitable mortgage — discharge of mortgages — three properties owned by the defendants — defendants enter into loan agreement with plaintiff bank for a line of credit — loan agreement secured by three mortgages over the three properties — defendants request plaintiff to discharge one mortgage, so one of the properties can be sold — plaintiff delivers a Discharge of Mortgage for that property to the defendants — plaintiff also mistakenly delivers to the defendants the two other Discharges of Mortgages — defendants register all three Discharges of Mortgages — one of the properties is sold by the defendants without the plaintiff's knowledge or consent — whether the plaintiff is entitled to equitable relief to have the mortgage reinstated over the remaining property owned by the defendants

Facts

Citigroup Pty Ltd ("**Citigroup"**) loaned money to Mr Guy Davey Wernhard and Mrs Eunice Maree Wernhard (together **"the Wernhards"**). As security, Citigroup took first registered cross-collateralized mortgages over each of three properties owned by the Wernhards: an investment property in Raymond Terrace, another investment property in South Tamworth and their residence in Watanobbi.

In 2012, the Wernhards wished to sell the Raymond Terrace property. Citigroup agreed, provided that the proceeds of its sale were applied to reduce the Wernhards' loan. The sale went ahead. Citigroup's lawyers attended the July 2012 conveyancing transaction following the sale.

While Citigroup had instructed its lawyers to discharge its mortgage over the Raymond Terrace property but to leave the other two mortgages in place to secure the outstanding loans, Citigroup's lawyers made a mistake. Contrary to instructions, the lawyers handed over to the Wernhards' solicitor the Certificates of Title for all three properties, together with their Mortgages and Discharges of Mortgage in registrable form.

Citigroup failed to notice this error for over 4 years. In September 2016, Citigroup finally demanded reinstatement of its security. But by then, only the Watanobbi property was left as in May 2013, the Wernhards had sold the then-unencumbered South Tamworth property, without telling Citigroup.

Citigroup contended, and the Wernhards contested, that the Wernhards knew or had reason to know of its mistake. Citigroup claimed it would be unconscionable for the Wernhards now to assert unencumbered title to the Watanobbi property and sought reinstatement of its mortgage over that remaining property.

Decision

His Honour commenced by noting that the starting point is the Register. The Register is conclusive as to the nature and order of all the interests in the land, *Real Property Act 1900,* ss 41 and 42 being central to the concept of indefeasibility of title: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22.

To establish a right to equitable relief for unilateral mistake, a plaintiff must establish that the other party knew or had reason to know of the mistake in question: *Taylor v Johnson* (1983) 151 CLR 422; [1983] HCA 5 and *Tutt v Doyle* (1997) 42 NSWLR 10.

It is not necessary for the new registered proprietor to be aware of the mistake at the moment of the transaction involving the mistake. It is sufficient that by the time the registered proprietor later comes to deal with the property, that the registered proprietor is aware of the mistake, such that it would be unconscionable to assert an unencumbered title to the property

The jurisdiction to relieve for mistake, in any circumstances where it would be unconscientious for a person to avail themselves of the legal advantage they have obtained through the mistake is broad.

His Honour noted that a registered proprietor's indefeasible title is subject only to an *in personam* claim against the registered proprietor: *Breskvar v Wall* (1971) 126 CLR 376 at 384-5. The personal equity asserted against the registered proprietor may arise from the conduct of the registered proprietor both before and after registration: *Bahr & Anor v Nicolay & Ors* (No 2) (1988) 164 CLR 604 at 638; [1988] HCA 16.

In the instant case, the acting against conscience founds the personal equity. For the Wernhards to treat the properties as unencumbered was inconsistent with good conscience. In *Dixon v Barton* [2011] NSWSC 1525 ("*Dixon*"), Ward J (as her Honour then was) observed that the binding of a registered proprietor's conscience, due to a mistaken discharge of mortgage, may arise after the event exhibiting the mistake.

The grant of relief for mistake, where there is an unconscientious reliance upon legal rights, was referred to in *Stern v Macarthur* (1988) 165 CLR 489; [1988] HCA 51 in terms that include the concept of "misadventure", as part of the idea of mistake.

His Honour observed that in order to establish a right to equitable relief for unilateral mistake, a plaintiff must establish that the other party knew or had reason to know of the mistake in question.

His Honour found that for the Wernhards to treat the Watanobbi property as unencumbered to be unconscionable. Indeed, the Wernhards had dealt with the South Tamworth property as though it was unencumbered, to the point of selling it free of any mortgage. This was notwithstanding the fact that they were aware of Citigroup's mistake when they so dealt with the South Tamworth property. As such, his Honour found there to be a strong indication that unless relief is given here, the Wernhards could deal with the Watanobbi property equally inconsistently with Citigroup's rights.

Slattery J found Citigroup was entitled to equitable relief on the basis of unilateral mistake and declared the Watanobbi property as being subject to an equitable mortgage in favour of the plaintiff in priority to any other subsisting equitable interest.

His Honour noted that Citigroup to seek equity it must do equity. *Tidd v Lister* (1852) 10 Hare 140, at 152; 68 ER 872, *Chillingworth v Chambers* [1896] 1 Ch 685, *Forsyth v Blundell* (1973) 129 CLR 477, at 504 and *Stefanetto v Forestry Commission of New South Wales* [1975] 1 NSWLR 332. To that end, it was open for the court to impose additional conditions upon which relief would be granted. That power is not unfettered, the Court is confined in the exercise of its discretion to imposing terms that the defendant could have enforced in a suit instituted for that purpose. This protects against the Court imposing arbitrary terms upon the grant of relief that are not justified by the defendant's existing legal or equitable rights: *Hanson v Keating* (1844) 4 Hare 1 at 6; (1844) 67 ER 537 at 539.

The Court ordered that Citigroup's relief would be granted on terms. The Wernhards were ordered to have the benefit of an accounting of all charges upon, and all amounts credited to, their mortgage account with Citigroup, as a term of the grant of equitable relief in this case.

Cole v Raykir Holdings Pty Ltd
[2019] NSWSC 1017

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 13 August 2019

LAND LAW — contract for the sale of land — termination for breach of an essential term or for repudiation — where vendors issued notice to complete giving the purchaser 14 days to complete — where parties agreed to extend the time for completion under the notice to complete — where purchaser intimated it could not complete by extended date for completion — where purchaser failed to complete by extended date for completion — vendors terminated contract — whether notice to complete effective to make time of the essence — whether extension effective to make the newly appointed time of the essence — time for completion under extended date held to be of the essence — purchaser held to have breached contract in an essential respect and to have repudiated the contract — contract validly terminated by vendors

LAND LAW — contract for the sale of land — deposit — penalty doctrine — deposit payable by two instalments each of 5% of the purchase price — where first instalment paid on contract date — where second instalment payable 'on or prior to the completion' of the contract — whether second instalment is in the nature of a deposit — held that second instalment not in the nature of a deposit

GUARANTEE AND INDEMNITY — guarantee — construction — guarantee of the purchaser's obligations under contract for the sale of land — guarantor agrees to be personally liable for performance of purchaser's obligations 'under this Contract' — where purchaser liable under liquidated damages clause upon termination of contract — whether obligation under liquidated damages clause is an obligation 'under this Contract' — guarantor held to be liable for amount of liquidated damages

Facts

The plaintiffs, Mitchell and Katherine Cole (**"the vendors"**), and the first defendant, Raykir Holdings Pty Ltd (**"the purchaser"**), entered into contract for the sale of land in respect of a property in Kissing Point Road, South Turramurra, The second defendant, Ekaterina Charonova, was a party to the contract as a guarantor in respect of the purchaser's obligations. She was the sole director and secretary of the purchaser when the contract was made.

The price was stated to be $2,830,000, with a deposit of $283,000, leaving a balance of $2,547,000. Although, only $141,500 was paid on exchange by way of deposit.

The plaintiffs claimed to have terminated the contract by notice given on 27 August 2018 following the failure of the defendant to complete the purchase by 24 August 2018. The plaintiffs contended that on 20 July 2018 they served a valid Notice to Complete which called for completion by 3 August 2018, and that on 2 August 2018 an agreement was reached to extend the Notice to Complete to 24 August 2018.

The defendants argued that the purported termination of the contract by the plaintiffs was a wrongful repudiation of the contract, and that the first defendant accepted the repudiation and terminated the contract on 20 November 2018. Specifically, the defendants contended that the plaintiff's Notice to Complete dated 20 July 2018 was invalid by reason of Additional Condition 36 which relevantly provides that:

> *36.1 If completion does not occur on before 3:30pm on the due date as a result of the breach or default by a party hereto ('defaulting party'), then the other party ('the innocent party') may:*
>
> *(a) at any time serve on the defaulting party a notice requiring completion of this contract on a specified date not being less than 14 days ('Notice Period') after the date of service of the notice; and*
>
> *(b) make time of the essence for compliance with the notice.*
>
> *36.2 The parties agree that the Notice Period is a reasonable and sufficient period to make time of the essence for compliance with the notice.*
>
> *36.3 For the purpose of calculating the Notice Period:*
>
> *(a) the Notice Period commences at midnight on the day on which the notice is served; and*
>
> *(b) a reference to a day means the period of time commencing at midnight and ending 24 hours later*

The defendants argued that, as the Notice to Complete was invalid and ineffective, an agreement to extend the Notice to Complete would itself be ineffective to make time of the essence. This is because the conduct of the plaintiffs, in negotiating the extension of time, was inconsistent with maintaining that time was of the essence and thus amounted to a waiver in that regard.

Decision

Darke J entered into judgment in favour of the plaintiffs against both the first defendant and the second defendant for $458,500.00.

Validity of the Notice to Complete

His Honour upheld the validity of the Notice to Complete. It was held that Additional Condition 36.1 did not require the period of time to be calculated “from” the day upon which the Notice to Complete is served. Rather, Additional Condition 36.3 operates so that a day (such as 20 July 2018) is taken to commence at 12:00am and extend for 24 hours thereafter.

On that basis, his Honour held that the Notice Period for the purposes of Additional Condition 36.1 commenced at 12am on 20 July 2018. As such, the Notice Period given accorded with the requirements of Additional Condition 36.

Waiver of time of the essence

His Honour held that the agreement to extend the date for completion to 24 August 2018 did not constitute a fresh notice. Rather, the existing Notice to Complete was treated as altered to that extent. So altered, the Notice to Complete was to be read as requiring completion by 3:00pm on 24 August 2018, with time being of the essence.

Darke J distinguished this case from the arrangements referred to in *Tabbouch v Devlin* (2008) 14 BPR 98,338; [2008] NSWSC 600 at [32]-[34]. Darke J referred to *Manufacturers House Pty Ltd v Ashington No 147 Pty Ltd* (2005) 12 BPR 98,224; [2005] NSWSC 767 as affording an example of parties agreeing, in the course of solicitors’ correspondence, to several extensions.

In so doing, his Honour rejected the defendant’s the submission that the plaintiffs, in negotiating the agreement, acted in a manner inconsistent with maintaining that time remained of the essence.

Validity of Termination

Darke J upheld the validity of the plaintiff’s termination. It was held that termination was expressly based upon the failure of the first defendant to comply with the Notice to Complete which, by agreement, was treated as requiring completion by 3:00pm on 24 August 2018.

Liability of the Second Defendant

The Court held that the failure of the first defendant to perform the essential obligation to complete by 24 August 2018 would thereby cause the second defendant to breach the contract of guarantee. The damage flowing from the breach of the guarantee would thus be the same as the damage flowing from the first defendant's breach

Darkje J observed that the first defendant's breach entitled the plaintiffs to terminate the contract and sue for damages, including loss of bargain damages. Accordingly, his Honour found that the second defendant would also be liable for loss of bargain damages, being the difference between the contract price and the value of the property at the date of termination less the amount of the forfeited deposit.

As the sale price of $2.23 million was achieved upon the resale of the property on 15 April 2019, this constituted $600,000 less than the contract price. The defendants had already paid $141,500 as a deposit. Thus, damages were assessed as $458,500.

Cooper v King

[2019] NSWSC 86

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 18 February 2019

LAND LAW — conveyancing — contract for sale — deposit — whether to order relief against forfeiture under Conveyancing Act 1919 (NSW), s 55(2A)

CONRACTS — misrepresentation — elements — whether sellers' agent made misrepresentations to buyer — whether buyer relied on any such representations

Facts

On 4 May 2017 Kersey and Yasmin Cooper (**"the vendors"**) and the first defendant, Victoria King (**"the purchaser"**) entered in a contract the sale of land and improvements situated on Glencoe Street, Sutherland, NSW (**"the Sutherland Property"**). The Contract names Greg Gilbert Real Estate as the agent of the vendors (**"the agent"**)

The contract provided for a price of $1,080,000 and a deposit of $108,000. One half of the deposit was paid when the Contract was entered into, by two cheques for $27,000, one of which was drawn by the purchaser and the other of which was drawn by Christina King, the purchaser's sister.

There was no dispute that the purchaser failed to complete in accordance with the Contract and that the vendors gave notice of termination based upon repudiation by the purchaser. The vendors now seek the following:

(1) a declaration that the Contract has been validly terminated;

(2) a declaration that the deposit monies of $54,000 paid by the purchaser have been forfeited; and

(3) an order for judgment against the purchaser in the sum of $54,000, for the unpaid part of the deposit.

Whether or not the vendors were entitled to such relief turned on whether the purchaser was successful in her cross-claim wherein she alleges that she was induced to enter into the Contract by misrepresentations made by the vendors' agent. These include representations that:

(1) the lower level accommodation was lawfully habitable;

(2) the lower level accommodation was DA approved for use as accommodation;

(3) the Sutherland Property could be used as a dual occupancy;

(4) the Sutherland Property was DA approved for use as a dual occupancy;

(5) the landing outside the kitchen was DA approved for use as a laundry;

(6) the lower level accommodation could be separately rented from the upper level accommodation;

(7) the lower level accommodation was DA approved for separate rental from the upper level accommodation;

(8) the lower level accommodation could be rented for $350 per week;

(9) the total rent able to be achieved for the Sutherland Property was $1100 per week.

Specifically, the purchaser alleges that representations (1) – (7) were made in public advertisements for sale of the Sutherland Property and representations (8) – (9) were made orally by Ms Sarah Street of the agent on 28 April 2017

Decision

Emmett AJA found in favour of the vendors and granted the relief sought.

Public Advertisements

His Honour dismissed the purchaser's claim in relation to the alleged misrepresentations made in public advertisements. This was because the purchaser had expressly acknowledged in the Contract that she:

- did not rely on any warranty or representation made by the vendors or any person on behalf of the vendors; and
- relied on her own inspections, knowledge and inquiries

Oral Statements by Ms Street

His Honour also rejected the purchaser's claim that Ms Street, as agent for the vendors, made misrepresentations. His Honour did not find the purchaser's evidence compelling and, to the extent that it was inconsistent with the evidence of Ms Street, his Honour preferred Ms Street's evidence. This was because in cross-examination, the purchaser was argumentative, asked questions and made observations that were unresponsive to questions put to her.

More specifically, when given the opportunity to give evidence of everything she could recall about alleged conversations with Ms Street, she was only able to provide a vague and imprecise account.

Accordingly, the $54,000 deposit was forfeited and judgment was entered in favour of the purchaser for an additional $54,000.

Coplin v Al Maha Pty Ltd

[2019] NSWCA 159

Coram: Macfarlan JA, Leeming JA, Payne JA

Court: New South Wales Court of Appeal

Date: 2 July 2019

LAND LAW — conveyancing — options — call options — construction — notice of exercise of option able to be given to grantor's conveyancer — whether option validly exercised — whether notice to grantee required that conveyancer no longer retained by grantor — whether requirement that conveyancer be retained at the time of the exercise of the option

Facts

On 16 October 2014, the first respondent Al Maha Pty Ltd (**"grantee"**) and Mr Coplin (**"grantor"**) entered into a deed styled "Put and Call Option Agreement" (**"Option Deed"**) in relation to a property in St Leonards. The second respondent, Ms Bechara, was the nominated purchaser to the Option Deed.

The Option Deed provided that the grantee could exercise the option by giving the requisite notice to the grantor's "solicitor/conveyancer". While the Option Deed did not define "solicitor/conveyancer", "V.J Tait & Associates" was recorded as being the grantor's "solicitor/conveyancer" in the draft contract for sale annexed to the Option Deed (**"Annexure E"**). Indeed, Ms Tait was the grantor's licensed conveyancer for the purposes of the preparation and execution of the Option Deed.

On 14 May 2015, the grantor commenced proceedings against the first respondent in the Supreme Court seeking to set aside the Option Deed on a number of grounds. Mr Berman of E Berman & Co was the appellant's solicitor for the purposes of those proceedings.

On 12 April 2016, in order to avoid the option expiring according to its terms before the proceedings were resolved, the parties entered into a Deed of Variation of the Option Deed (**"Deed of Variation"**) to extend the option exercise period to a date that was 30 calendar days after judgment being handed down in the proceedings and any appeal therefrom.

At first instance, Lindsay J in the Equity Division declared the Option Deed invalid under s 7 of the *Contracts Review Act 1980* (NSW). On 11 December 2017, the NSW Court of Appeal allowed an appeal from that decision and set aside Lindsay J's orders.

Following this decision on 21 December 2017, the grantee's solicitors purported to exercise the option by delivering to Ms Tait a notice of exercise of the call option, a notice nominating the second respondent, Ms Bechara, as purchaser, a contract dated 21 December 2017 signed by Ms Bechara as nominee, and a cheque payable to Ms Tait, being payment of the balance of the deposit.

In response, Ms Tait advised that she was no longer acting on behalf of the grantor and had no instructions to accept service of any documents. Ms Tait returned the documents to the grantee's solicitors.

Supreme Court Proceedings

On 6 February 2018, the grantee commenced proceedings in the Equity Division seeking declarations that the option granted by the Option Deed had been validly exercised and that there was a binding and enforceable contract between the grantee and Ms Bechara, as the lawful nominee of the first respondent, for the sale of the property in St Leonards. Consequent orders for specific performance were also sought.

The principal issue before the primary judge was whether the option was validly exercised in accordance with clause 3 of the Option Deed and the notice requirements in clause 28 of the Option Deed. Specifically, the primary judge characterised the issues as directed at whether Ms Tait answered the defined description of "solicitor/conveyancer" contained in the Option Deed and the annexed draft contract for sale.

Relevantly, clause 3 provided that in order for the Grantee to exercise the Call Option it must during the Call Option Exercise Period:

> 3.2 (a) give to the Grantor the Notice of Exercise of Call Option signed by the Grantee and dated the same date that the Call Option is exercised;
>
> 3.2 (b) give to the Grantor one copy of the Contract signed by the Grantee and dated the same date as the Notice of Exercise of Call Option; and
>
> 3.2 (c) pay the Deposit in accordance with the Contract.

Clause 28 further provided that notice must be in writing, addressed to the other party or their solicitor/conveyancer and be delivered.

The primary judge held that it did not matter that Ms Tait was not actually retained by the appellant at the relevant time and found in favour of the grantee. The construction adopted by the primary judge avoided what his Honour said was an uncommercial result, that by an uncommunicated and unilateral act (withdrawing instructions to his conveyancer), the appellant could vitiate one of the means of exercising the option.

The grantor now seeks to appeal this decision. Among other claims, the grantor seeks to appeal on the following grounds:

(1) Ms Tait was not the "solicitor/conveyancer" under the Option Deed;

(2) The primary judge erred in failing to find that the deposit was not paid in accordance with the contract; and

(3) The primary judge erred in ordering the resulting contract for sale of land be specifically performed as Ms Bechara was not ready, willing and able to perform the contract

Decision

The Court of Appeal dismissed the appeal.

The Court rejected the grantor's construction that Ms Tait was not the "solicitor/conveyancer" under the Option Deed. Rather, the Court held the reference in clause 28 of the Option Deed to "solicitor/conveyancer" should be construed consistently with the definition of the same term in Annexure E. This permits the two documents, each a part of the same Option Deed, to be read harmoniously throughout with internal coherence.

Indeed, the Court further observed that this construction affords a commercial outcome by ensuring that neither party can frustrate the counter-party's exercise of an option by changing the identity of the named "solicitor/conveyancer" and not notifying the relevant counter-party.

The Court rejected the grantor's submission that because Ms Tait lacked the requisite authority from the grantor to accept the cheque, the deposit was not paid in accordance with the contract.

The Court pointed to clause 2.4 of the draft contract for sale of land which provided that "[t]he purchaser can pay any of the deposit only by unconditionally giving … a cheque to the depositholder." In view of this, the Court held that the grantee had "paid" the deposit in accordance with the draft contract for sale of land by unconditionally giving the cheque to the "Depositholder" (being Ms Tait) on 21 December 2017. The Court further noted that Ms Tait's subsequent actions did not undo the payment by the grantee.

While the Court observed that there was no oral evidence given by Ms Bechara, the second respondent, about her financial position and subjective desire to obtain the property, it nonetheless held that an inference could be drawn that Ms Bechara was ready willing and able to perform her obligations under the contract. Specifically, the Court pointed to the efforts and expense undertaken by the respondents to uphold the Option Deed, the fact that the grantee promptly sought specific performance, and the efforts and expense involved in that undertaking.

The Court also dealt with the notice of motion filed by the appellant that sought to raise a new ground not taken at trial. It is fundamental that a party seeking to advance for the first time on appeal a new ground not taken at trial will be precluded from doing so if the new ground could possibly have been met by calling evidence at the hearing or if, had the ground been raised below, the respondent might have conducted the case differently at trial: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

It was not suggested that the new points could not have been met by further evidence at trial, and the Court held that the appellants new case could have been met by calling evidence or cross-examining witnesses the respondents chose not to cross examine. The Court held that the new issues could not be raised for the first time on appeal. The notice of motion was therefore dismissed.

Darzi Group Pty Ltd v Nolde Pty Ltd

[2019] NSWSC 335

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 29 March 2019

CONTRACTS — formation — agreement — intention to make concluded bargain — formal lease not executed or exchanged — where heads of agreement signed, tenant already in possession and parties negotiating the terms of a formal lease through solicitors — held no intent to be bound in the absence of a formal executed lease

LEASES AND TENANCIES — formal requirements — agreements for lease — creation of relationship by payment of rent — retail and commercial tenancies legislation — Conveyancing Act s 127 — Retail Leases Act ss 3, 8, 16, 18

Facts

In October 2014 Mr Koorey, on behalf of Nolde Pty Ltd (**"Nolde"**), placed an advertisement on "seek.com.au" advertising the sale or lease of the restaurant business at the Dorsal Hotel. Mr Darzi of Darzi Group Pty Ltd (**"Darzi"**) contacted Mr Koorey and expressed his interest. Following this, Mr Darzi and Mr Koorey signed two copies of the Heads of Agreement.

On 20 October 2014, Darzi commenced occupation of the restaurant premises, following which it carried out some renovations and fit-out works. In late November or early December 2014, the restaurant commenced operating.

Darzi had anticipated that the formal lease agreement would reflect the terms set out in the Heads of Agreement. However, the lease drafted by Nolde contained terms which were starkly different. As a result, Darzi and Nolde engaged in extensive negotiations over the course of two years. Eventually, the parties reached an agreement on the terms of the lease in a document referred to as the 15 June Lease Document.

Darzi signed the 15 June Lease Document and returned it to Nolde for execution. However, Nolde did not sign the document, but rather, attempted to renegotiate its terms further. Darzi went on to commence proceedings seeking to enforce the lease on the terms of the 15 June Lease Document. At issue was whether or not a binding lease had come into effect after Darzi had signed and returned the 15 June Lease Document to Nolde.

Decision

Henry J noted that there was a difference between the Court rejecting a witness' evidence and a finding that the witness lied. *Smith v NSW Bar Association* (1992) 176 CLR 256

Her Honour noted that to determine whether a binding lease or agreement for lease exists in the terms of the 15 June lease document, the Court must ascertain the objective common intention of the parties having regard to the language used by the parties, their conduct and the surrounding circumstances known to the parties: *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.

Her Honour noted that in commercial lease and conveyancing transactions, where the parties are acting through solicitors, there is a presumption that there will be no binding agreement until formal execution and exchange of counterparts of the documents takes place. While this presumption may be displaced if there is evidence that the parties had a common intention that the agreement informally reached between them should be immediately binding, such was not the case here. Rather, the correspondence showed that negotiations between the parties centred around trying to agree the terms to be included in a formal lease document which was to be executed and exchanged in accordance with usual practice.

In the circumstances, the 15 June Lease Document did not constitute a binding lease.

Darzi Group Pty Ltd v Nolde Pty Ltd

[2019] NSWCA 210

Coram: Bathurst CJ, Basten JA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 30 August 2019

LEASES AND TENANCIES — whether the parties entered into a binding and enforceable agreement for lease of the Premises in the terms of the 15 June Document — significance to be attached to the Heads of Agreement as constituting a binding document — whether language used in correspondence of 27 and 31 May 2016 signifies that a reasonable person in the position of the parties would understand the communication as giving rise to a binding and enforceable contract — significance of marking correspondence as 'without prejudice'

APPEAL — whether it was unnecessary to determine whether the Heads of Agreement were binding — whether the parties did not intended to replace the Heads of Agreement and be bound by the 15 June Document until execution and exchange of a formal lease document — whether the law of part performance applied to the question of whether the parties intended to be bound by the 15 June Document — whether the parties conducted themselves in a manner consistent with the 15 June Document, a monthly tenancy or a statutory lease under the Retail Leases Act 1994 (NSW).

Facts

This case follows on from the case of *Darzi Group Pty Ltd v Nolde Pty Ltd* [2019] NSWSC 335 discussed above. Specifically, it concerns an appeal brought by Darzi Group Pty Ltd (**"Darzi"**) in regards to the primary judge's determination that there was no binding agreement for lease in the terms claimed by Darzi.

Decision

One of the key factors the Court took into account was the fact that the parties were already in a binding legal relationship arising from the execution of the Heads of Agreement and the creation of a statutory lease by force of the *Retail Leases Act 1994* (NSW).

The Court found there to be no reason to assume that the parties did not intend to be bound by an executory contract that would be completed by the execution and registration of a formal lease instrument. It was worthy of note that the lease had already been entered into. *Pavlovic v Universal Music Australia Pty Limited (2015)* 90 NSWLR 605.

There is no particular presumption in the case of agreements for lease to the effect that such agreements are not binding until a formal exchange of agreements has taken place. Such presumptions are to be discouraged. *Eccles v Bryant and Pollock* [1948] 1 Ch 93 at 99; *Sindel* *v Georgiou* (1984) 154 CLR 661 at 667-668; [1984] HCA 58; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95.

The Court found that the use of the phrases "without prejudice" and "without prejudice as to costs" does not undermine the conclusion that the correspondence evinced an intention to be legally bound once consensus on the terms was reached.

The Court also found that the time at which it is necessary for a court to determine whether parties have entered into a legally binding and enforceable contract is the time when the contract is said to have been made. The conduct of the parties after a contract is said to have been made cannot change the fact of whether or not there was a contract: *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 reaffirmed in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 applied.

The Court allowed the appeal and held that the primary judge erred in concluding that there was no binding and enforceable agreement between the parties. The Court further held that Darzi was entitled to a declaration that there was a binding and enforceable agreement with Nolde on the terms contained in the 15 June Lease Document.

Data Base Corporate Pty Ltd v Strike Australia Pty Ltd

[2019] NSWSC 271

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 26 March 2019

LAND LAW — leases — rent — provision for review of rent — appointment of valuer to determine market rent for a sub-lease of premises located at King Street Wharf, Sydney — valuer required to have regard to certain market rents of 'comparable premises in the vicinity of the Premises' — where valuer had regard to rents for premises not in the vicinity of the Premises — valuer's determination not carried out in accordance with the terms of the sub-lease — declaration made that determination is not binding

Facts

Strike Australia Pty Ltd (**"Lessee"**) and Data Base Corporate Pty Ltd **("Lessor"**) entered into a sublease of the premises at King Street Wharf, Sydney (**"the Premises"**). The sublease was entered into on 20 March 2007 ran for 10 years, commencing on 24 August 2007, with two five year options to renew.

On 9 February 2017 the Lessee exercised its first option to renew. A rent review was to occur at the commencement of the further term which, in the absence of agreement, was to be determined by an independent valuer. With there being no agreement, a valuer was nominated and the valuation was completed on 24 August 2017.

Relevantly, cl 4.5(c)(ii) of the sublease provided that the valuer must "have regard to … market rents … for comparable premises in the vicinity of the Premises …". Following this, the valuer had regard to rents in the King Street Wharf complex, retail rents for basements in the Sydney CBD and identified four properties which he said provided "the best guide" to the market rent for the premises. Of these four properties, two were remote from King Street Wharf, one being at Macquarie Park and the other being at Bondi Beach.

Dispute arose between the parties as to whether the valuation had been undertaken in accordance with the requirements of the sublease. The Lessor contended that the Macquarie Park and Bondi properties did not qualify for consideration because they were not "in the vicinity of" the Premises, and thus, the valuer had not undertaken the valuation task in accordance with cl 4.5(c)(ii) of the sublease.

During argument, the Court was referred to the well-known decision of the Court of Appeal in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314. In that case, a lessee challenged the binding nature of a rental valuation on the basis that the valuer had made an error concerning the area of the demised premises. The lessee was successful at first instance. However, on appeal, Mahoney JA and Priestley JA, in separate judgments, were not satisfied that any error had been established by the lessee. On the other hand, McHugh JA came to the conclusion (at 330-1) that the valuer had erred in principle in determining the rental value. His Honour thus turned to consider the question whether the mistake was one which "invalidated" the valuation. After an extensive review of the authorities, McHugh JA stated (at 335-6):

> In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied…

The issue was further considered by the Court of Appeal (in the context of a contract embodied in articles of association) in *Holt v Cox* (1997) 23 ACSR 590. Mason P (with whom Priestley JA agreed) stated (at 597):

A close reading of McHugh JA's judgment in *Legal & General* indicates that his Honour was not propounding the view that a valuation will stand regardless of error. Rather he was making the point that mistake is not itself a ground of vitiation: see also *Wamo Pty Ltd v Jewel Food Stores Pty Ltd* (1983) ANZ Conv R 50.

Thoise judgments were considered in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305.

The plurality in *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367 held:

> The parties accepted that the question depended upon whether the determination was made in accordance with the contract: *Legal & General Life* at 336. As Nettle JA pointed out in *AGL Victoria* at [44], in one sense, this test is conclusionary. The question of whether the determination is open to review rather depends on whether or not the expert has carried out the task which he or she was contractually required to undertake: *AGL Victoria* at [51]; *Holt v Cox* [1997] NSWSC 144; (1997) 23 ACSR 590 at 596-597; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; 244 CLR 305 at [26]-[27]. If the expert in fact carried out that task, the fact that he made errors or took irrelevant matters into account would not render the determination challengeable.

Decision

It was stipulated in paragraph 4.7 of the First Schedule to the sub-lease that the determination of the Market Rent under paragraph 4 was final and binding on both parties.

As McHugh JA stated, by so referring the decision to an expert, the parties agreed to accept the honest and impartial decision of the expert, and be bound by it.

While Darke J noted that the parties had agreed to be bound by the independent valuer's determination of the Market Rent, he also observed that consideration must be had for whether the decision was made in accordance with the terms of the contract.

If it is found that the decision was not made in accordance with the contract, properly construed, it is then open to review the decision on the ground that it is erroneous. The enquiry self-evidently involves questions of construction and interpretation of the contract. Where, as here, the contract is a written commercial contract, such questions are to be approached in accordance with the well-established principles that have been stated in cases such as *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [46]-[52]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 at [16]).

It was plain that the selection of market rents for the purposes of paragraph 4.5(c)(ii) is thus an exercise that is only partly comprised of discretion, judgment or opinion (see *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* (supra) at [54]).

The question whether particular premises are “in the vicinity of the Premises” within the meaning of paragraph 4.5(c)(ii) is a mixed question of fact and law. As stated by Bathurst CJ in *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (supra) at [76]-[78], there is no reason why parties to a contract cannot leave such a question to be determined by a contractually appointed expert, such that even an erroneous answer is immune from review by the Court. Of course, whether that is so in any particular case ultimately depends upon the presumed intention of the parties.

His Honour found that the valuer had erroneously included rents for premises which were not “in the vicinity of the Premises” within the meaning of cl 4.5(c)(ii).

As such, his Honour found in favour of the Lessor and held that the determination of the Market Rent was not binding upon the parties to the sub-lease.

Day v Munday

[2019] NSWSC 452

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 23 April 2019

LAND LAW — Caveats — Caveatable interest — No arguable case for an interest in land

Facts

In 2004 Mrs Munday became the registered proprietor of a property in Goulburn (the **"Goulburn Property"**).

In 2005, Mr and Mrs Munday entered into a tenancy agreement with their son Mr Day. Under the agreement, Mr Day agreed to lease a property in Kambah (the **"Kambah Property"**) to his parents for a term concluding on 31 December 2015. Mr and Mrs Munday continued in occupation of the Kambah Property after that term had expired.

On 16 June 2016, Mr Day filed an application with the ACT Civil and Administrative Tribunal for a termination and possession order evicting his parents from the Kambah Property. On 17 October 2017, the Tribunal granted Mr Day the orders sought.

Following Mr Munday's death on 1 November 2018, Mr Day filed three applications with the Tribunal seeking damages from Mrs Munday and Mr Munday's estate for alleged breaches of the Tenancy Agreement.

On 14 December 2018, Mrs Munday exchanged contracts to sell the Goulburn Property to a third party. Settlement of that transaction was to take place on 14 March 2019.

On 21 February 2019 the Tribunal made ex parte orders in two of Mr Day's applications against his mother and late father's estate to pay $48,198 to Mr Day. However, these orders were later set aside in April 2019.

On 28 February 2019 Mr Day lodged a caveat over the Goulbourn Property. Mr Day alleged that in late 2014 or early 2015, Mrs Munday "made an undertaking" to give him the Goulburn Property as a form of compensation for the "many years of subsidising their living". Mrs Munday denies this submission.

Mr Day now seeks to extend the operation of the caveat.

Decision

His Honour observed that Mr Day's case was defective insofar as it only sought orders for the extension of the Caveat. His Honour explained that as a caveat is in the nature of an injunction, the Court will not make orders for the extension of a caveat unless that extension is sought in aid of final relief. Indeed, in this case, there is no final relief sought by Mr Day.

That said, his Honour nonetheless turned to consider whether there is an arguable case that Mr Day has a caveatable interest of some kind in the Goulbourn Property.

His Honour noted that this was a case similar to that considered by Darke J in *Woodsman Pty Limited v Jozic* [2018] NSWSC 1311. In that case his Honour held that recourse could not be had to s 74L of the *Real Property Act 1900* (NSW) in circumstances where the caveat simply failed to disclose any caveatable interest.

Kunc J also re-iterated that A claim for family provision does not give rise to a caveatable interest: *Stojanovski v Stojanovski* [2013] NSWSC 1491 at [31] per Slattery J.

Kunc J did not express a view on any alternative case that was available to Mr Day, however found that any such claim was markedly different from that asserted in the Caveat.

Dee Vine Group Pty Ltd v Palais Reception Centre Pty Ltd

[2019] NSWSC 1462

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 23 October 2019

EQUITY — Equitable remedies — Relief against forfeiture — Leases

Facts

Palais Reception Centre Pty Ltd (**"Sublessor"**) and Dee Vine Group Pty Ltd (**"Sublessee"**) entered into a Sub-Lease over the Albert Palais in Leichhart (**the "Premises"**). The Sub-Lease is expressed to commence on 7 August 2017 and terminate on 5 August 2023, with an option to renew for a further three year term.

Dispute arose between the parties in regards to a number of alleged breaches on the part of the Sublessee. These included:

(1) The Sublessee's failure to provide a Bank Guarantee in the sum of $160,000.00 on or before 12 months after the commencement date of the Sub-Lease;

(2) The Sublessee's failure to obtain the consent of Palais Reception to assign the Sub-Lease;

(3) The Sublessee's use of the Premises as a night club venue or other than as a reception centre;

(4) The loud and excessive music and noise generated and emanating from the Premises resulting in numerous complaints; and

(5) The Sublessee's failure remove all trade waste, garbage and refuse from the Premises resulting in numerous complaints.

On 22 September 2019, the Sublessor served the Sublessee a Notice of Determination of Lease and further purported to re-enter into possession of the Premises for non-payment of rent. The Sublessee commenced proceedings seeking an order restraining the Sublessor from evicting or locking out the Sublessee, or otherwise re-entering the Premises.

Decision

Kunc J was satisfied that the Court should exercise its discretion to grant relief against forfeiture, albeit on terms.

His Honour set out a number of principles that were apt to be considered.

A lessee's obligation is to be familiar the terms of the its lease and to make sure that they are complied with [see *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562, per Hope J at 97,145]

The statutory power is co-extensive with the inherent power of the Court [*Hillam v Leduva Pty Limited* [2010] NSWSC 1360 at [67];

The granting of relief against forfeiture is not 'as of right' but requires the Court to exercise its discretion in favour of the lessee [see Pioneer Quarries ibid];

Accordingly, a successful applicant must satisfy the usual equitable maxims: 'he who seeks equity must do equity' and an applicant must 'come with clean hands' [*Riviera Holdings Pty Ltd V Fingal Glen Pty Ltd* [2013] SASC 77 at [17]; *Wilkinson v S & S Gikas Pty Ltd* [2006] NSWSC 1314 at [30]];

The right to forfeit for non-payment of is in substance security for payment of the rent [*Pioneer Quarries v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562; *Dee-Tech Pty Limited v Neddam Holdings Pty Limited (No 2)* [2009] NSWSC 1355 at [125];

Where the only event of default is failure to pay rent, the Court will ordinarily grant relief against forfeiture upon payment of rent, costs and interest and there is no reason to believe that the tenant will not meet his or her future obligations to pay rent [*Pioneer Quarries; Dee-Tech* at [126]; Commercial Tenancy Law (LexisNexis, 4th Ed) at [19.2]]

Once a lessor has all that the right of re-entry was bargained for (ie security for payment of rent), it would require special or exceptional circumstances for the Court to decline relief. It has been described as 'a heavy burden on the lessor as to why equitable relief should not be granted' [*Hace Corp v F Hannan* (1995) 7 BPR 14,326 at 14,329];

For the Court to decline relief it must not be unconscionable or inequitable for the landlord to insist on strict compliance with its strict legal rights;

The conduct of the lessee may be such that it would not be unconscionable or inequitable to decline relief against forfeiture. This may occur where the bargain to be protected goes beyond non-payment of rent and the lessee is in breach of other covenants. A lessor may point to non-monetary breaches of covenants the subject of a notice under s.129 which have not been remedied and which would otherwise warrant termination of the lease;

The inquiry into whether it would not be unconscionable or inequitable for the landlord to insist on strict compliance with its strict legal rights has been variously described:

whether the tenant has demonstrated an unwillingness to honour its obligations under the lease and where the lessees future compliance with the lease appears unlikely [*Shiloh Spinners Limited v Harding* [1973] AC 691 at 725-6 per Lord Wilberforce] , or in real doubt [*Elevation (NSW) Pty Ltd v The Uniting Church* [2014] NSWSC 331 at [13], or where "*… the tenant's attitude to the lease must be such that no reasonable landlord could expect the tenant to honour its obligations.*" [see *Courtney Creche v Okko's Fine Art and Custom Framing* (unreported NSWSC per Young J as His Honour was, 22 June 1995)];

whether the lessee's conduct was wilful [*International Business College v Alphacrucis College Ltd* [2009] NSWSC 1088 at [39]], and did not arise from ignorance or inadvertence [Dee Tech at [127]. In the former case, relief will only be granted in exceptional cases [*Allsvelte Pty Ltd v Cassegrain Wines Pty Limited* [2015] NSWSC 1370 at [105]];

whether the forfeiture results in some windfall or other disproportionate outcome [*International Business College* at [39];

whether the lessor caused or contributed to the breach [*Dee Tech* at [131]]; and

the gravity of the breach and the damage to the lessor and loss to the lessee [*Allsvelte* at [104]].”

Having regard to the judgment of Hodgson JA as to the requirements for a valid notice under s 129 of the CA in *Macquarie International Health Clinic Pty Limited v Sydney South West Area Health Service* [2010] NSWCA 268 his Honour held the particulars of breach lacked specificity.

It was submitted by the defendant that a proper understanding of the authorities, where (as here) a landlord relied on a proven monetary default, the Court was entitled to look at any other aspect of the lessee’s conduct in exercising its discretion to relieve against forfeiture. At the very least, the Court was entitled to look at matters which fell within the description of “exceptional circumstances” The plaintiff alleged that the Court was confined to the matters which were the subject of a notice under s129 of the Conveyancing Act.

Relying upon the decision of White J in *Dee Tech Pty Ltd v Neddam Holdings Pty Ltd* [2012] NSWSC 251 his Honour held that, in the case of forfeiture of leases it is settled that as a general rule in deciding whether relief against forfeiture should be given, the court should have regard only to those breaches which could warrant forfeiture of the lease.

Accordingly, his Honour held that relief against forfeiture ought to be granted on terms for the following reasons:

(1) The Sublessee’s monetary breach for non-payment of rent has since been cured.

(2) The Court is satisfied that the Sublessee will ensure that no further events of the dance party or night club type will be held at the Premises.

(3) As the issues of noise and rubbish mostly related to events which the Sublessee has now agreed not to hold, the Court is satisfied that future breaches in relation to excess noise or the failure to remove excess rubbish, are highly unlikely to recur.

(4) The Sublessor has a guarantee equivalent to two years' rent for the Premises. Such constitutes considerable degree of protection against the consequences of any future breach by the Sublessee.

(5) There would be significant inconvenience caused to those third parties who already have weddings and other functions booked at the Premises.

Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd (Administrator Appointed) & Anor

[2019] NSWCA 312

Coram: Meagher JA, Brereton JA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 17 December 2019

LEASES AND TENANCIES — eviction by landlord — suspension of obligation to pay rent — characteristics of eviction — whether common law rule displaced by lease contract — whether covenants other than for rent suspended during eviction

LEASES AND TENANCIES — construction of lease contract — where contract imposed obligations to obtain, maintain, comply with and provide the landlord copies of consents or approvals necessary or appropriate for mining business — time for compliance with obligations — no question of principle

LEASES AND TENANCIES — termination of lease by landlord — termination notices — s 129 Conveyancing Act — whether notices required to specify reasonable time in which to remedy breach

Facts

This case concerns an Agreement to Lease dated 19 December 2016 between Fearndale Holdings Pty Ltd (**"the Landlord"**) and Drama Unit Pty Ltd (**"the Tenant"**). The Agreement was in respect of a property situated in Luddenham, New South Wales (**"the Premises"**).

Under cl 3, the term of the Lease was to be 14 years commencing on 23 March 2017. However, an arrangement was made whereby the Lease was not to become operative and the Tenant was not to enter into possession of the Premises until an earlier lease of the Premises to Epic Mining Pty Ltd (**"Epic"**) had been terminated.

The lease with Epic was terminated on 25 June 2018. As such, the Tenant was entitled to possession of the Premises from at least 1 July 2018 and accepted that the first rent payment was due on that date.

However, when the land became available for occupation, the Landlord was in administration under Pt 5.3A of the *Corporations Act 2001* (Cth). Mr Cook was appointed administrator in May 2018 and has since maintained that the Tenant is not entitled to possession because it has not complied with its obligations under the Lease.

Specifically, Mr Cook alleged that the Tenant had breached clause cl 7.3(4) of the lease which provided that:

(a) the Tenant is deemed to have accepted this Lease with full knowledge of and subject to any prohibitions or restrictions on the use of the Premises under any Law or Requirement;

(b) prior to entering into this Lease, the Tenant must obtain and comply with all the Laws and Requirements and obtain and comply with the consents or approvals of any authority which may be necessary or appropriate for the Tenant's business;

(c) must not by any act or omission cause or permit any consent [or] approval referred to in clause 7.3(4)(b) to lapse or be revoked; and

(d) must provide a copy of any consent or approval to the Landlord prior to occupation of the Premises.

On 29 June 2018 the Landlord served notices requiring the Tenant to remedy the alleged breaches. On the same day the solicitors for the Tenant advised that their client proposed to take possession of the land on 1 July 2018 and enclosed a bank cheque for $28,000 representing the first month's rent. That cheque was later returned, and on 3 July 2018 the Landlord’s solicitors advised the solicitors for the Tenant that Mr Cook had made no determination as to the validity or otherwise of the claimed lease.

The Landlord later issued the Tenant with a termination notice on 16 July 2018. The notice was held to be invalid by Black J in earlier proceedings on the basis that the Tenant had not been given a reasonable time to remedy the alleged breach.

On 29 January 2019, the Landlord issued four further breach notices for non-rent defaults.

On 22 March 2019 the Landlord issued six notices of termination:

- a notice for the failure to pay rent for the period from 25 June 2018 to 22 March 2019;
- a notice for the failure to pay outgoings “on and from” 25 June 2018 to 12 February 2019; and
- a notice for each of the four non-rent breaches.

Supreme Court Proceedings

At first instance, the primary judge declared that the Landlord had validly and effectively terminated the Lease and directed the entry of judgment for the Landlord against the Tenant in the sum of $341,890.72 for Rent and $34,157.10 for Outgoings.

The Tenant sought to appeal this decision.

Decision

The issues in the appeal were:

- Whether the landlord was entitled to recover rent and outgoings where it had refused to give possession of leased premises to the tenant.
- Whether the tenant was in breach of the lease for failing to hold the consents and authorities in January 2019, and to provide copies of them to the landlord.

- Whether notices under *Conveyancing Act 1919* (NSW), s 129(1) must specify the reasonable time within which the tenant must remedy the asserted breach.

The Court found in favour of the Tenant and allowed the appeal in part.

The Court observed that the obligation to pay rent was suspended from 25 June 2018 to 22 March 2019 because the Landlord had wrongly refused to give possession of the Premises to the Tenant during the whole of that period. As such, judgment in favour of the Landlord for the sum of $341,890.72 was set aside. *Booker Industries Pty Limited v Wilson Parking (Qld) Pty Limited* (1982) 149 CLR 600; [1982] HCA 53 discussed; *Dawson v Dyer* (1833) 5 B & Ad 584; 110 ER 906; *Edge v Boileau* (1885) 16 QBD 117; *David Jones Ltd v Leventhal* (1927) 40 CLR 357; [1927] HCA 53

With respect to outgoings, the Court held that the Landlord's unlawful "eviction" of the Tenant did not suspend its obligation to pay outgoings. Accordingly, the judgment for $34,157.10 should be upheld. *Morrison v Chadwick* (1849) 7 CB 266; 137 ER 107; *Matthey v Curling* [1922] 2 AC 180

The Court further found that there was no breach of cl 7.3(4)(d) in circumstances where the Tenant never went into "occupation of the Premises", and did not hold either of the consents or approvals relied on as not produced in breach of para (d). The Court thus held that there was no default under cl 15.1 in relation to cl 7.3(4)(d) which entitled the Landlord to terminate the lease.

That said, the Court did find the Tenant to have breached of cl 7.3(4)(b) in the respects specified in the relevant breach notices served on 29 January 2019. Those breach notices were valid and the Tenant failed within a reasonable time to remedy those breaches. *Glebe Administration Board v Tasker* [1964] NSWR 1307; *Hovan's Hotels Pty Ltd v Cherry* (Supreme Court (NSW), Bryson J, 14 March 1994, unrep); *Dogan and Another v Morton* (1935) 35 SR (NSW) 142

Thus, the Court held that the Landlord was entitled to terminate the lease on that basis.

French v Bremner

[2019] NSWSC 1033

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 15 August 2019

EVIDENCE — Hearsay — Exceptions — First-hand hearsay exceptions — Evidence Act 1995 (NSW), s 63 — application to tender draft affidavit where witness refused to answer questions — adequacy of s 67 notice — whether document 'marked' by witness where witness amended draft affidavit and returned by email — whether representation 'made' by attaching draft affidavit to email — whether evidence should be excluded under s 135

CONTRACTS — Formation — whether one party agreed to 'buy' other party's mortgage — whether party breached agreement by failure to indemnify other party against mortgagee's claim for funds owing

CONTRACTS — Formation — alleged agreement by one party to undertake European joint venture to exploit a second party's magnetic coupling invention — incompleteness — parties had not reached concluded agreement on terms of licensing of intellectual property or identity of shareholders — parties to alleged agreement not correctly joined to proceedings

CONTRACTS — Formation — whether one party agreed for a second party to manage and maintain certain properties acquired with the first party's funds

EQUITY — Trusts and trustees — Resulting trusts — whether one party entitled to resulting trusts over properties registered in second party's name where first party advanced substantial portion of purchase price — presumption of resulting trust rebutted

LAND LAW — Co-ownership — Statutory trust for sale — Appointment of trustees — jurisdiction of Supreme Court of New South Wales — appointment of trustees for sale pursuant to Property Law Act 1958 (Vic), Part IV

Facts

Andrew Boyd French (**"Mr French"**) was an inventor who undertook a number of business ventures. The first venture concerned an invention developed by Mr French which was a type of magnetic coupling technology. The second venture concerned the retention, and potential development, of land which Mr French owned in Port Stephens. The third venture involved the acquisition and improvement of a number of rural properties in Victoria.

Mr French engaged in various business activities in partnership with Christopher Piers Julian Bremner (**"Dr Bremner"**). These may be summarised as follows:

- In 2001, Dr Bremner provided a long-term loan of $335,000 to Mr French for the further development of his invention.
- In 2007, Dr Bremner advanced further large sums to Mr French to fund the development of the magnetic coupling technology. The total advanced (including the original loan of $335,000) was more than $3 million.
- Dr Bremner also financed the purchase of the properties in Victoria. Ultimately eight parcels of land were purchased for about $4 million. Two of the parcels were registered in Dr Bremner's name as sole proprietor. One was registered in Mr French's defact to partner's name as sole proprietor (**"Ms Bakey"**). The other five parcels were registered in the names of Mr French and Dr Bremner as tenants in common in equal shares.
- In 2009, Dr Bremner took over the management of the debt on the Port Stephens land, which Mr French had mortgaged to a financier, Provident Capital Limited (**"Provident"**) as security for a $2 million loan. His eventual outlay was $1.1 million.
- In 2009, Mr French and Dr Bremner agreed to send an acquaintance of Mr French's, Radu Iliuta (**"Mr Iliuta"**), to France to work on commercialising the magnetic coupling invention in Europe.
- Steps were taken in 2010 to set up a company in France involving Mr French, Dr Bremner and Mr Iliuta to carry on the European operations, but this was never finalised.
- Mr French came to believe that Dr Bremner and Mr Iliuta were stealing his invention. As such, he made attempts to commercialise the magnetic coupling technology himself but these came to nothing. His patents over his invention have since expired.
- In July 2012 Dr Bremner ceased making the interest payments on the Provident mortgage. Mr French was unable to repay the debt to Provident and the property was sold.

The issues before the Court arose from cross-claims between Mr French and Dr Bremner. Specifically, Mr French pursued a claim for damages for breach of three separate agreements.

(1) The first alleged agreement concerned the Provident mortgage. Mr French alleges that Dr Bremner agreed to assume responsibility to discharge the mortgage debt. Mr French alleges that Dr Bremner's failure to indemnify him against Provident's claim was a breach of this agreement, and claims damages representing the value of the judgment entered against him in Provident's favour being $3.32 million.

(2) The second alleged agreement concerned the exploitation of the magnetic coupling invention. Mr French alleged that Dr Bremner agreed to the incorporation in France of a company to exploit the invention in Europe. Mr French alleges that Dr Bremner breached this agreement by refusing to proceed with the incorporation of the company and then going into business with Mr Iliuta to the exclusion of Mr French. Mr French claims damages on the footing that he lost the profits he would have made from successful exploitation of the technology. The damages are put at more than $39 million.

(3) The third alleged agreement concerned the Victorian properties. Mr French alleges that Dr Bremner agreed to allow Mr French to manage and maintain the properties and to contribute towards the expenses incurred by Mr French in doing so. The amount claimed by Mr French under this alleged agreement was $128,000.

In Dr Bremner's cross-claim, he sought repayment from Mr French of monies he provided to Mr French or paid to third parties allegedly at the request of Mr French. Dr Bremner argued that these payments were loans which are now repayable. The amount claimed is $3.15 million.

Dr Bremner also made a counter claim against Mr French over the Victorian properties. Dr Bremner claims that, having provided the funds for the purchase of the properties, he is entitled to a resulting trust over the properties to the extent that they are registered in the name of Mr French or Ms Bakey.

Decision

Mr French’s Cross-claim

Parker J dismissed Mr French's cross-claim. His Honour rejected the claim that Dr Bremner was contractually obliged to discharge, or indemnify him against, the liability under the Provident mortgage. Rather, his Honour held that while Dr Bremner had stepped in and staved off action by Provident, the debt remained unfinished business which would eventually have to be dealt with by Mr French.

Mr French's claim of a ‘joint venture’ contract to exploit his magnetic coupling technology through a company incorporated in France was also rejected by his Honour. This was because his Honour was also unsatisfied that the parties had even reached a final agreement, with there being numerous issues such as shareholding and patents which remained unresolved between the parties.

Mr French's claim for reimbursement of expenses based on the alleged property management contract was also found to fail. This was because while Dr Bremner funded the earlier purchases of the properties, there was no element of bargain for Mr French had nothing to bargain with. His Honour further noted that Mr French had failed to establish an entitlement to damages for breach of that alleged contract. Moreover, Mr French has failed to establish an entitlement to damages for breach of that alleged contract.

Dr Bremner’s Cross-claim

In relation to Dr Bremner’s cross-claim, his Honour held Dr Bremner to be entitled to judgment against Mr French in the sum of $3,148,718, together with interest. His Honour held that it was clear that $3.15 million was paid by Dr Bremner by way of loan to Mr French, and that the debt was still outstanding.

As for Dr Bremner's resulting trust claims over the property registered in Ms Bakey's name, and to the half share of the other five Victorian properties, registered in Mr French's name, his Honour found these claims failed. To this, his Honour pointed to direct evidence that Dr Bremner expressly wanted for the Corringle Beach Homestead parcel to be registered in Ms Bakey's name, essentially as a gift to her. His Honour also pointed to evidence that revealed an agreement to acquire the other five Victorian properties on a 50/50 basis. His Honour found Dr Bremner to be entitled to an order appointing trustees for sale of the five jointly owned properties.

G Capital Corporation Pty Ltd v Roads and Maritime Services

[2019] NSWCA 234

Coram: Meagher JA, Brereton JA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 17 December 2019

LAND LAW — compulsory acquisition of land — compensation — where applicants entered into contracts for sale of relevant land — where land compulsorily acquired before settlement of those contracts — where applicants objected to amount of compensation for market value — where applicants' primary compensation claim for unpaid purchase price as loss attributable to disturbance under Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 59(1)(f) — where questions directed to whether applicants entitled to any compensation for that loss determined separately — whether there was 'actual use of land' by applicants

Facts

On 9 February 2018, the three adjacent properties in Parramatta Road, Annandale were compulsorily acquired by for the purposes of the WestConnex Stage 3 M4/M5 Link project.

When acquired, each property was the subject of a contract for sale exchanged on 28 June 2016 which provided for settlement two years later on 28 June 2018. The total consideration payable under the three contracts was $56.5 million.

On 22 June 2018, the Valuer General determined the market value of the three properties at the acquisition date to be $33.1 million, and the amount of compensation to be offered to each applicant as:

(1) G Capital Corporation - $14.2 million as compensation for market value and $675,942 as compensation for loss attributable to disturbance;

(2) Gertos Holdings - $4.985 million as compensation for market value and $269,492 as compensation for loss attributable to disturbance;

(3) Marsden Developments - $6 million as compensation for market value and $348,142 as compensation for loss attributable to disturbance.

The applicants objected to these amounts, maintaining that the market value of their land on the date of acquisition was not relevant to the determination of the compensation to which each was entitled under the Just Terms Act. Their primary claims related to the amount of the unpaid purchase price due under the contracts for sale, in each case as a "loss attributable to disturbance."

The applicants applied to have the question of whether each was entitled to compensation decided separately and before any other issues in its proceedings. The Court acceded to that application and ordered that the following questions be determined separately:

(1) Whether there was any 'actual use of land' by any of the Applicants that would entitle any of them to any compensation under s 59(1)(f) of the Just Terms Act?

(2) Whether, on the basis of the contracts of sale of the Properties, the compensation to be paid to the Applicants in respect of their interests in land acquired is to be confined to calculation of compensation having regard only to matters arising under s 55(d) and s 59(1)(f) of the Just Terms Act?"

The primary judge answered each of these questions in the negative. The applicants sought leave to appeal from those orders.

Decision

The Court dismissed the appeal.

The applicants alleged that their "actual use of the land" included that they:

(a) were leasing and receiving rental income from the land;

(b) holding the land pending any investment opportunities;

(c) were spending money on the land;

(d) were employing staff to inspect and go onto the land for maintenance purposes as part of the leasehold responsibility to tenants;

(e) had rights of access to and responsibilities for the state of common areas and building maintenance;

(f) had rights and obligations under the contracts of sale of the properties pending settlement in June 2018.

However, the Court observed that the "actual use" of land to which s 59(1)(f) refers is the use by the dispossessed owner at the time of the compulsory acquisition, and not a use of the land by the acquiring authority. The Court further observed that the reference to "actual" use emphasises that the use must exist in fact at the time of acquisition, rather than be a proposed future or potential use.

In view of this, the Court held that the actual uses contended for by the applicants in paras (a) to (d) fail to describe an actual use or enjoyment of the land or any area of it by the applicants themselves. This is because the applicants did not themselves occupy the land or conduct any business activities on or from it. As to paras (e) and (f), the Court held these to describe in general terms rights or responsibilities of the applicants under the leases or contracts for sale. Neither described any use of the acquired land or any area of it by the applicants. *Roads & Traffic Authority of New South Wales v Peak* [2007] NSWCA 66; *Brock v Roads and Maritime Services (formerly Roads and Traffic Authority of NSW)* [2012] NSWCA 404; (2012) 191 LGERA 267; *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA

7; (2016) 212 LGERA 307; *Roads and Traffic Authority of New South Wales v McDonald* (2010) 79 NSWLR 155.

Accordingly, the Court upheld the primary judge’s finding that there was no “actual use of the land” by any of the applicants that could entitle them to compensation under s 59(1)(f). The Court found that it necessarily followed that the second question should also be answered in the negative.

Geurie Enterprises Pty Ltd v Pirrottina

[2019] NSWSC 1828

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 19 December 2019

LAND LAW — easements — where defendant has benefit of rights of carriageway over plaintiffs' land — rural land — gate maintained at entrance to easement from public road — gate kept in a closed but not locked position — where plaintiffs run cattle on their land — where plaintiffs harvest timber on their land — where defendant locked gate for a period — where timber harvesting interrupted — where defendant commonly leaves gate open after traversing gateway — where cattle escape onto public road through open gateway — defendant's conduct held to amount to nuisance — injunctive relief granted — damages awarded in respect of pecuniary loss and time spent retrieving escaped cattle

TORTS — nuisance — private nuisance — where defendant has benefit of rights of carriageway over plaintiffs' land — rural land — gate maintained at entrance to easement from public road — gate kept in a closed but not locked position — where plaintiffs run cattle on their land — where plaintiffs harvest timber on their land — where defendant locked gate for a period — where timber harvesting interrupted — where defendant commonly leaves gate open after traversing gateway — where cattle escape onto public road through open gateway — defendant's conduct held to amount to nuisance — injunctive relief granted — damages awarded in respect of pecuniary loss and time spent retrieving escaped cattle

TORTS — trespass to land — where defendant found to have gone onto plaintiffs' land to take water from creek — injunctive relief granted

Facts

Geurie Enterprises Pty Ltd (**"the first plaintiff"**) and Mr Darrell Tuting (**"the second plaintiff"**) are co-owners of a property in Sextonville, being Lot 13 in Deposited Plan 1075546 (**"Lot 13"**). The second plaintiff is also the owner of an adjoining property, being Lot 1 in Deposited Plan 552342 (**"Lot 1"**).

Mr Carmelo Pirrottina is the owner of Lot 14 in Deposited Plan 1075546 (**"Lot 14"**). Lot 14 is a block that is landlocked by the surrounding Lot 13. However, Lot 14 has the benefit of easements in the nature of rights of way over both Lot 13 and Lot 1 which enable access between Lot 14 and Sextonville Road.

Dispute arose between the parties in relation to two issues.

The first concerns the manner in which the defendant exercised his rights under the easement over Lot 1, in particular in relation to steel gates which the second plaintiff maintained in a closed but not locked position across the right of way at the Sextonville Road entrance to the lot. It was alleged that the defendant routinely leaves the gates open after passing through the gateway, with the consequence that cattle grazing on Lot 1 escape onto Sextonville Road. It was contended by the plaintiffs that the defendant's conduct amounted to unreasonable use of the easement, and thereby a nuisance.

The second issue concerned the conduct of the defendant in taking water from the watercourse that forms a natural boundary between Lots 1 and 13, known as Doubtful Creek. The plaintiffs contended that the defendant went on to Lot 1 to take water from the creek and the defendant was guilty of trespassing.

Decision

Darke J found in favour of the plaintiffs in respect of both the nuisance and trespass claims. Injunctive relief was thus granted to restrain future occurrences of such conduct. In addition, the defendant was found liable to the second plaintiff in damages for nuisance in a total amount of $30,000.

Nuisance Claim

His Honour found the defendant’s conduct in relation to the easement over Lot 1 to be unreasonable, and thereby constituted a nuisance. In particular, his Honour noted that the defendant’s actions in commonly leaving open the gate at the Sextonville Road entrance after passing through the gateway, amounts to an actionable nuisance.

His Honour further observed that the maintenance of a gate by the second plaintiff was a reasonable use of Lot 1 in circumstances where cattle grazing on that lot or Lot 31 might otherwise escape onto Sextonville Road. The defendant's conduct was thus found to unreasonably interfere with that use and enjoyment of the land, and further cause actual injury to the second plaintiff.

Trespass Claim

His Honour observed that there was no dispute that the defendant had taken water from Doubtful Creek on numerous occasions. The question for determination was thus whether the defendant was on Lot 1 at the time.

His Honour preferred the evidence of the second plaintiff in respect of the boundary of Lot 1. It was noted that the defendant was likely wrong about the boundary between Lot 1 and that this was partly the result of inaccurate information provided to the defendant by the local Council. As such, his Honour held that the defendant did in fact trespass upon the second plaintiff’s land.

Glenquarry Park Investments Pty Ltd v Hegyesi

[2019] NSWSC 425

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 16 April 2019

LAND LAW — Strata title — Common property — Maintenance and repair of common property — Strata Schemes Management Act 1996 (NSW) ss 62, 65A — whether proposed works present repairs, replacement or renewal, or amount to improvements under the Act — construction and operation of ss 62, 65A — appeal from decision of New South Wales Civil and Administrative Tribunal

Facts

This case concerns a strata title property at Point Piper in eastern Sydney. The property contains six strata lots. The first, second, and third plaintiffs own three of them. Between them (**"the majority owners"**), the lots they own carry fifty-two per cent of the voting rights in the strata scheme. The majority owners are thus able to pass an ordinary resolution, but not a special resolution. The first and fourth defendant (**"the minority owners"**) have the ability to block a special resolution.

For more than a decade, the majority owners have wished to have the property refurbished at a cost of several million dollars. This has been opposed by the minority owners. The minority owners acknowledge that some building work is desirable, but have opposed the majority owners' plan.

In 2016, a series of Strata Corporation resolutions were passed by the majority owners over the opposition of the minority owners. The resolutions purported to authorise the Strata Corporation to undertake extensive building works. The resolutions did not attract a sufficient majority to pass as special resolutions but passed as ordinary resolutions. A resolution was also passed for the lot owners to pay a special levy, totalling about $1.9 million, to fund the works.

Tribunal Proceedings

The first defendant, Ms Hegyesi, made an application to the NSW Civil and Administrative Tribunal challenging the 2016 resolutions.

Relevantly, section 62 of the *Strata Schemes Management Act 1996* (NSW) (**"SSMA"**) covers repairs to, and replacement and renewal of, common property. Section 65A further provides for the improvement of common property, but requires that the relevant works be approved by special resolution. The principal question for the Tribunal was thus whether the works proposed by the majority owners were covered by s 62 (in which case no special resolution was necessary) or by s 65A (in which case the necessary special resolution had not been obtained).

The Tribunal found in favour of the first defendant. Specifically, the Tribunal upheld Ms Hegyesi's contention that the disputed works required a special resolution under s 65A of the SSMA and made orders restraining the Strata Corporation from carrying out the works in the relevant resolutions without a special resolution of the Strata Corporation. The Tribunal further ordered that, on or before August 2019, the Strata Corporation replace or repair certain specified parts of the common property.

The majority owners sought to appeal this decision.

Decision

With respect to the majority owners' challenge to the Tribunal's decision that the disputed works required a special resolution because of SSMA, s 65A, Parker J found this claim to fail.

Notably, his Honour observed that the purpose of s 65A was to protect minority owners in a building from having the costs of enhancement imposed on them by the majority. ‘

This is to be distinguished from s 62(2) which is limited by a concept of reasonable necessity. Accordingly, his Honour found the disputed works to be more extensive than reasonable necessary, thus falling within the s65A category and requiring approval by special resolution. *Stolfa v Owners Strata Plan 4366 and Ors* [2009] NSWSC 589; *Stolfa v Hempton* (2010) 15 BPR 28,253; [2010] NSWCA 218.

His Honour held that there is a need for allowing a degree of latitude to an owners’ corporation in deciding what and when should be replaced. Maintenance is not necessarily confined to responding to a breakdown; the term usually also includes preventative maintenance, that is, replacing something which has reached the end of its service life before it fails: *Hamilton v National Coal Board* [1960] AC 633 at 647; *Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd* (1989) 18 NSWLR 33 at 40 per Young J.

The majority owners' challenge to the order directing the Strata Corporation to repair certain parts of the common property also suceeded. His Honour observed that the Tribunal is not entitled to order an owners' corporation to do things just because the Tribunal considers it desirable to do so. Rather, it is only where the Strata Corporation has not complied with its obligations under s 62 that the Tribunal may make an order to do what is necessary to comply with that obligation. In the present case, the Tribunal did not ask itself what needed to be done so as to order to achieve a minimal compliance with s 62(1) and then frame orders accordingly. As such, his Honour found there to be no proper statutory foundation for the orders.

Gordon v Lever (No 2)

[2019] NSWCA 275

Coram: Bell P, Payne JA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 13 November 2019

REAL PROPERTY — Conveyancing Act 1919 s 88K — Easements — 'Reasonably necessary' — where terms imposed on and limiting re use said to be uncertain in their practical operation — where terms in effect required use of alternative means of access in circumstances that were not readily capable of being assessed — where terms in substance required an alternative access route to be used in particular circumstances but where that alternative route would involve traversing property in breach of Crown Land Management Act 2016

Facts

The parties are neighbouring farmers in Kyogle, New South Wales. The dominant tenement is occupied and farmed by the Gordons' daughter, Jodie Louise Dunn (**"Mrs Dunn"**), and her family. For many years, this property was accessed from Summerland Way and through land owned by the Levers. This was until a bridge passing over the Levers' property and forming part of the access route to the relevant Lots belonging to the Gordons (**"the Lever Bridge"**) was washed away in or about December 2015.

After the Lever Bridge was washed away, the only means of accessing the Gordons' land was by crossing the Richmond River over a ford that had principally been used by cattle to pass from one side of the river to the other. This means of access does not involve the Gordons, Mrs Dunn or her family passing over land owned by the Levers. However, at certain times of the year, it is either not possible or not safe to cross the Richmond River at the ford. Such access also constituted trespass onto Crown land.

In view of this, the Gordons made an application for an easement to be created over the Levers' land following the route previously used until the washing away of the Lever Bridge in December 2015. To be effective, any such easement would require the construction of a new bridge and this would be wholly on (but provide little practical benefit to) the Levers' land.

Supreme Court Proceedings

At first instance, the primary judge made a declaration that an easement over the Levers' land was reasonably necessary, but only when the Richmond River was impassable. The terms of the easement included that:

- The easement could be used by emergency vehicles at any time.

- The easement could be used by pedestrians and other vehicles:
    - during times in which the water level at the Richmond River crossing (option 4) is 300mm or more above the bed surface level at that location; or
    - if either the approach or exit track at the Richmond River crossing (option 4) is damaged by flooding of the Richmond River to such an extent that it is not reasonably and safely passable by a 2 wheel-drive vehicle, for a period of 14 days following the occurrence of that damage.

The Gordons challenged the primary judge's orders relating to the terms governing the use of the easement. Specifically, the Gordons took issue with the limitations imposed by the primary judge in relation to the use of the easement.

Decision

The Court allowed the appeal, finding the limitations imposed by the primary judge to be invalid for the following reasons:

- It was an error to restrict the easement as to time in circumstances where the Court considered that the easement was “reasonably necessary” within the meaning of s88K of the Conveyancing Act at all times.
- It was an error to impose restrictions on usage of the easement which were not practicably workable in all of the circumstances of the case.
- Access to land should not require an assessment to be made by the entrant of the height of a river at a particular point as it is unlikely that one would be able to make a reliable assessment at all times;
- There was evidence that in times of flood or high waters, the gravel road along the river which needed to be followed for about 120m before reaching the ford, may be damaged and require repair;
- The standard set by the primary judge pertaining to damage of the approach or exit track, unreasonably required the user to:
    - make an assessment of the condition of the 120m approach or exit track before knowing whether he or she was entitled to use the easement; and
    - assumedly know when such damage occurred.

Groch v Knights

[2019] NSWSC 308

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 20 March 2019

LAND LAW — Conveyancing Act 1919 (NSW), s 66G — orders consequent on appointment of trustees for sale — costs and disbursements

LAND LAW — co-ownership — incidents — accounting between co-owners — orders for adjustment and apportionment of proceeds consequent on sale of property

Facts

Larissa Jane Groch and Keith Charles Knights were the registered proprietors of a property in Kyogle NSW (**"the Property"**) as joint tenants in equal shares. They acquired the Property in around March 2011. Mr Knights and Ms Groch were previously in a relationship. After it ended, Ms Groch moved to Victoria. Mr Knights continued to live, intermittently, at the Property.

At a previous hearing, Parker J was required to consider whether an order under s 66G of the Conveyancing Act 1919 (NSW) should be made. His Honour answered this in the affirmative and appointed Ken and Daniel Whitely as trustees for the sale of the Property. The sale of the property was completed in January 2019. While the original contract price was $227,000, there was a reduction of the price by $10,000 before settlement.

The current proceedings concern how the remaining sale proceeds should be divided. The parties made the following claims:

(1) Mr Knights sought an adjustment in his favour for money spent on improvements to the land.

(2) Ms Groch sought an adjustment in her favour for having made all of the mortgage repayments while Mr Knights was in gaol.

(3) Ms Groch further sought that the $10,000 reduction in the purchase price be attributed wholly to Mr Knights. Ms Groch claimed that Mr Knights had organised to remove certain fixtures from the Property including solar panels, an inverter and batteries and had in doing so, left the Property "trashed". In order to ensure the sale proceeded, a $10,000 reduction was negotiated.

Decision

Improvements to Land

His Honour rejected Mr Knights' claim for adjustments to be made for improvements to land. This was because Mr Knights had failed to provide satisfactory evidence that he had undertaken the alleged improvements at his own cost. Nor did he provide the Court with evidence as to how much of the sale price was attributable to the improvements.

Mortgage Payments

As Ms Groch's claim was not disputed by Mr Knights, his honour made an allowance in Ms Groch's favour in the sum of $9,400.

Reduction in Purchase Price

With respect to the $10,000 reduction in the purchase price, his Honour was not satisfied on the evidence that Mr Knights should bear responsibility for the entire $10,000.

Guirgis v JEA Developments Pty Limited

[2019] NSWSC 164

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 26 February 2019

LAND LAW — Caveats — Formal requirements — Obligations of licensed conveyancer who certifies electronically lodged caveat — Failure to make any proper inquiries to ascertain whether caveator had an interest in the subject land — Whether Court should of its own motion refer licensed conveyancer to Secretary, NSW Fair Trading for consideration of disciplinary action

Facts

Mr Guirgis brought proceedings seeking orders under ss 74MA and 74P of the *Real Property Act* 1900 (NSW) for the removal of a caveat and for compensation against the defendant. The sole director, secretary and shareholder of the defendant is Mr Guirgis' wife, Mrs Guirgis. The caveat had been prepared, certified and lodged electronically on behalf of the defendant over Mr Guirgis' land (**the "Property"**) by a licenced conveyancer (**the "Conveyancer"**).

At first the hearing, it quickly became apparent that the defendant did not have a caveatable interest in the Property and that at all times Mrs Guirgis had understood that to be the case. The defendant was ordered to remove the caveat and pay Mr Guirgis' costs of the application.

Evidence was also given which caused Kunc J to form a prima facie view that the Conveyancer had acted either with a reckless disregard for her obligations in relation to the caveat or had failed to meet the standard of care to be expected of a reasonably competent conveyancer in the preparation of the caveat. The Conveyancer was thus directed to appear before Court to explain why the papers should not be referred to NSW Fair Trading.

Decision

Kunc J was satisfied that it was highly unlikely that the Conveyancer would repeat such conduct in relation to a caveat and determined that it was unnecessary for the Court to take any further action in relation to the matter. This was because the Conveyancer apologised without reservation and acknowledged to the Court that there had been a complete departure from appropriate standards. The Conveyancer also undertook to do further study in relation to the electronic filing of caveats as part of her annual professional development.

Guo v The Owners - Strata Plan No. 70067

[2019] NSWCATAP 219

Coram: Curtin Senior Member and Thode Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 30 August 2019

LAND LAW — strata title — common property — maintenance and repair of common property — long-standing defects and delays — functions of owners corporation — alleged breach of statutory obligation for maintenance and repair — recent compulsory appointment of strata manager by tribunal — commencement of work and planning for further work — discretion not to make orders

Facts

The respondent is the body corporate consisting of the owners of the 44 lots in a strata scheme (**the "Scheme"**) located in Homebush, NSW. The appellant is a part owner of lot 37 in the Scheme.

Both parties were in agreement that common property was in need of extensive, complex and costly remedial work. However, dispute arose between the parties in relation to the nature and scope of that work, delays in commencing that work and its cost.

On 27 August 2018, the appellant filed an application to the NSW Civil and Administrative Tribunal seeking orders pursuant to s 232 of the *Strata Schemes Management Act 2015* (NSW) (**"SSMA"**) to the effect that the respondent:

(1) rectify, in accordance with the Building Code of Australia, certain building compliance issues identified in a report by Mr Qusai El-Jurf; and

(2) rectify, in accordance with the Building Code of Australia, the building defects that directly affect Lot 37 as identified in the report of Demlakian Remedial and Strata Pty Ltd

Prior to the initial hearing, the Tribunal appointed Premier Strata Management Pty Ltd (**"Premier"**) as the compulsory strata manager of the Scheme. In doing so, the Tribunal effectively removed responsibility for undertaking the necessary remedial building work from the owners corporation and its officers and placed that responsibility in the hands of Premier.

The appellant opposed that course and sought orders that work identified in two expert reports be undertaken by the respondent. The Tribunal dismissed the appellant's application, preferring to give the strata manager further time to attend to necessary work.

The appellant now seeks to appeal this decision on the following grounds:

(1) denial of procedural fairness;

(2) the Tribunal's decision was not fair and equitable;

(3) the Tribunal mistook facts and/or failed to take into account material considerations;

(4) there is significant new evidence now available that was not reasonably available at the time of the hearing; and

(5) the decision was against the weight of evidence.

Decision

The Appeals Panel dismissed the appeal.

Ground 1

The appellant alleged that he was denied procedural fairness in two respects. First, three of the five folders of material filed were not admitted into evidence. Second, he was denied an opportunity to respond to two late written submissions served by the respondent.

The Appeals Panel observed that the three folders contained material relating to the history of the issues and that such was not given significant weight by the Tribunal in its reasons. Moreover, the Tribunal and appellant had proceeded on the basis that the appellant would direct the Tribunal to any documents in the five folders which he wanted to be considered. Given this, the appellant could not now contend that he was denied procedural fairness.

The Appeals Panel further held that there was no denial of procedural fairness in allowing the respondent to submit its written submissions. This was because the first submission contained information already known to the appellant and thus caused no prejudice. Further, the second set of submissions which sought to raise a new defence were in fact rejected by the Tribunal.

Ground 2

The appellant's submissions in relation to Ground 1 were also his submissions in relation to Ground 2. Accordingly, the Appeals Panel relied on the same reasons given in relation to Ground 1 to dismiss this ground of appeal.

Ground 3

While the Appeals Panel accepted that there was some factual basis for the appellant's complaints, it found that to the extent necessary, the relevant matters were taken into account by the Tribunal. The Panel observed that what the Tribunal focussed on was not the history of the issues but what was the best course of action to remedy the situation.

Ground 4

The appellant submitted that by reason of the admission of the respondent's late written submissions, he was unable to tender a "report" which contained new submissions and various emails, photos and other documents. The Appeals Panel rejected this argument on the basis that it did not find there to have been a denial of procedural fairness in allowing the late submissions to be made.

Ground 5

In contending that the decision was against the weight of evidence, the appellant relied upon the submissions made on the other grounds. For the reasons given in relation to the other grounds, the Appeals Panel rejected this ground of appeal.

Hacienda Caravan Park Pty Ltd v Dodge

[2019] NSWSC 1296

Coram: McCallum J

Court: Supreme Court of New South Wales

Date: 15 October 2019

LEASES AND TENANCIES — residential communities — where defendant purchased demountable home located on site within caravan park owned by plaintiff — absence of written site agreement — lengthy period of permanent residence and acceptance of rent — whether the Appeal Panel of the Civil and Administrative Tribunal erred in holding that the parties had entered into a site agreement within the meaning of the transitional provisions of the Residential (Land Lease) Communities Act

Facts

Hacienda is the owner and operator of a caravan park and camping ground known as the Tweed River Hacienda Holiday Park (**"the Park"**).

In early 2010, Mr Dodge purchased a demountable home which was located on site 201 in the Park. Mr Dodge and his wife intended to reside permanently on site 201 in accordance with a residential site agreement under the *Residential Parks Act 1998* (NSW). However, when Mr Dodge asked for a written residential site agreement, he was given a form of agreement which described the dwelling as a holiday van and purported to impose terms preventing permanent occupation of the site. Mr Dodge refused to sign that agreement.

The form of agreement Hacienda had provided was an "occupation agreement" under the *Holiday Parks (Long-term Casual Occupation) Act 2002* (NSW). Under such an agreement, Mr Dodge would not have been entitled to occupy the site for more than 28 continuous nights without Hacienda's prior permission or for more than 180 nights each year. Further, Hacienda would have been less restricted in its right to terminate the agreement.

While Mr Dodge asked to speak to the "owner" of the Park on numerous occasions, he was not given any response. As a result, no written agreement was ever entered into. In the meantime, however, and over the many years that followed, Mr Dodge and his wife continuously occupied the demountable home on site 201. They have not sought permission to occupy it for more than 28 continuous nights and have not been asked to vacate the Park or remove the home.

In 2015, reforms to the statutory scheme governing residential communities were enacted. With effect from 1 November 2015, the Residential Parks Act was repealed and replaced by the *Residential (Land Lease) Communities Act 2013* (NSW). The transitional provisions of the Act contemplated that an agreement entered into under the repealed Residential Parks Act would remain valid after the commencement of the new Act without the need to sign a new agreement.

While Mr Dodge never obtained an agreement in writing under the repealed legislation, he nonetheless contended that he had a binding agreement with Hacienda that fell within the terms of the transitional provisions.

In 2017, Mr Dodge applied to the Civil and Administrative Tribunal for an order under s 26(4) of the *Residential (Land Lease) Communities Act* requiring Hacienda to enter into a written site agreement in the prescribed standard form. The application was successful.

Hacienda appealed to the Appeal Panel of the Tribunal. The appeal was dismissed. By this appeal, Hacienda seeks an order setting aside the decisions of the Appeal Panel and the Tribunal, an order dismissing the proceedings before the Tribunal and a declaration the effect of which would be to uphold Hacienda's contention that its agreement with Mr Dodge is an occupation agreement under the *Holiday Parks (Long-term Casual Occupation) Act.*

Decision

McCallum J dismissed the appeal.

Her Honour upheld the decision of the Appeal Panel in finding that there was a binding residential site agreement between the parties. In the present case, rent had been accepted over a period of eight years and that there had been no request for Mr Dodge and his wife to vacate the premises or remove the dwelling.

Harker-Mortlock v Commonwealth Bank of Australia

[2019] NSWCA 56

Coram: Macfarlan JA, Meagher JA, Brereton JA

Court: New South Wales Court of Appeal

Date: 27 March 2019

REAL PROPERTY — mortgages — where bank relies on liquidation of company to enforce possessory interest under mortgages — whether liquidation of company an event of default — whether repayment of bills matured loan account secured by mortgages — whether appointment of new trustee replaces the borrower in loan documents

GUARANTEE AND INDEMNITY — where parties have agreed to maximum amount that the guarantor can be called to pay on demand — whether award of interest under Civil Procedure Act 2005 (NSW), s 100 contrary to agreed maximum

Facts

On 10 November 2008, a discretionary trust was created by a deed of settlement over two rural properties. Mr Harker-Mortlock is a beneficiary under the trust and until it went into liquidation on 29 October 2012, iInvest Pty Ltd (**"iInvest"**) was the trustee. JHM Pty Ltd (**"JHM"**) was later appointed as trustee by Mr Harker-Mortlock on the same day. However, that deed of appointment was not registered until 1 February 2019.

In April 2013, CBA brought proceedings for possession of the two rural properties against iInvest, the registered proprietor and mortgagor of those properties, and a judgment against Mr Harker-Mortlock, the guarantor of the moneys secured by those mortgages. There followed in November 2013 and October 2014 lengthy interlocutory applications concerning the cross-claims which Mr Harker-Mortlock sought to bring against the CBA on behalf of iInvest, by way of set-off or otherwise in defence of its claims.

At first instance, the primary judge found in favour of CBA and dismissed the cross-claims advanced by Mr Harker-Mortlock. In the present case, Mr Harker-Mortlock seeks to appeal this decision.

Decision

The Court dismissed the appeal and found in favour of CBA.

The Court upheld the primary judge's finding that iInvest went into liquidation on 29 October 2012, and that this was an event of default entitling the CBA to claim possession under each of the mortgages. While JHM was said to have been appointed as trustee on 29 October 2012, such was not registered until 1 February 2019. As such, iInvest remained the registered proprietor of the properties and never ceased to be the Borrower and Security Provider under the loan.

The Court further upheld the primary judge’s finding that judgment be entered against Mr Harker-Mortlock for $4,492,545. Relevantly, the amount which Mr Harker-Mortlock could be called to pay under the guarantee was limited to the “Maximum Amount and the bank's enforcement expenses”. However, the Court dismissed the appellant’s submission that no interest should have been awarded where that award took the money judgment above the agreed Maximum Amount. This was because the guarantor's obligation was to pay on demand any amount that the borrower does not pay when due and also to indemnify the CBA by paying on demand, the amount of any loss suffered by the CBA because of the borrower's failure to pay. This necessarily included any interest which had accrued.

Henley v Bone

[2019] NSWSC 254

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 18 March 2019

EQUITY — trusts and trustees — resulting trusts — presumption of advancement — whether son held property on trust for mother — where son received benefit of first home owner's grant and stamp duty concession

Facts

The issue for determination in these proceedings was whether the late Gregory Henley (**"Gregory"**), who died intestate between 3 and 13 March 2017, held the fee simple in a property situated at Ballina (**"the Property"**) on trust for his mother, the plaintiff, Anita Henley (**"Anita"**). The defendants in the proceedings are the only two children of Gregory.

In this case, Anita had paid the 10% deposit on the purchase of the Property in 2011 on exchange of contracts and then paid the balance of the purchase price of $525,000 on completion. However, the contract for sale was in the name of her son, Gregory, exclusively and accordingly Gregory went on to become the registered owner of the property on completion. Anita did not have any contact with the seller, conveyancer or agent, carrying out the purchase through Gregory alone.

While Gregory did not contribute anything to the purchase price, he received the benefit of the first home buyer's grant and stamp duty concession upon purchase. Gregory lived in the property for 6 months following completion in order to satisfy the first home buyer grant conditions and then vacated the property. Anita then moved into the property after this time.

Anita now seeks a declaration that Gregory held the Property on a resulting trust for her as she contributed the whole of the purchase price and that it was not an asset of Gregory's estate.

Decision

Emmett AJA found in favour of the defendants finding that Gregory did not hold the Property on trust for Anita.

His Honour pointed to the fact that all negotiations regarding the Property were undertaken by Gregory, and further to the fact that his applications under the Grant Act and Duties Act indicate that Gregory intended to be the sole beneficial owner of the Property. His Honour held that Gregory had only agreed to allow his mother to treat the property as her own and to reside in the property.

His Honour further observed that it was improbable that a businesswoman such as Anita would invest more than $500,000 in the purchase of a property without taking some steps to obtain confirmation from the conveyancers acting on the purchase that she had acquired title to the Property. She made no effort, for example, to obtain at least a copy of the certificate of title.

Horswill v McClellan

[2019] NSWSC 557

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 16 May 2019

LAND LAW — contract for sale of land — claim for specific performance — doctrine of part performance — plaintiffs and defendants own adjoining properties — plaintiffs entered into oral agreement with defendants to purchase part of the defendants' property — requisite boundary adjustment to be effected by means of two separate subdivisions — where the parties completed the first subdivision but first defendant refused to proceed with the second subdivision — whether sufficient acts of part performance — sufficient acts of part performance established — specific performance granted

Facts

The plaintiffs and the defendants are the respective owners of two adjoining properties in West Portland Road, Sackville.

The plaintiffs, Mr and Mrs Horswill, seek orders for specific performance of an oral agreement to purchase a portion of the defendants' property. While the plaintiffs accept that the agreement is not enforceable by reason of the operation of s 54A of the *Conveyancing Act 1919* (NSW), they seek to rely on the doctrine of part performance in advancing their case.

Specifically, the plaintiffs argued that they had taken the steps required to effect the boundary adjustment and had covered all associated expenses. Among other things, this involved engaging a surveyor, Citisurv Pty Ltd, to prepare a plan of subdivision and assist with preparation of an application to the Council.

Decision

Darke J found in favour of the plaintiffs and characterised the acts relied upon by the plaintiffs as being unequivocally, and in their own nature, referable to some agreement whereby the plaintiffs would acquire a portion of the defendants' land.

While there had not yet been a transfer of ownership, the acts, so far as they went, effected an alteration of the titles to the land held by the respective owners. The very nature of these dealings between the parties was thus taken by his Honour to indicate that the parties are "in the midst of an uncompleted contract for the sale or other disposition of land."

In the matter of AA Management Co Pty Limited

[2019] NSWSC 1443

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 24 October 2019

CORPORATIONS — Winding up — Statutory demand — Application to set aside demand because of genuine dispute — Dispute involving family companies — Prior proceedings settled by Deed of Settlement — Deed provided for payment of sum by sunset date to defendant from proceeds of sale of real property — 'Best endeavours' clause — Property not sold — Demands served on eight family companies — Recovery proceedings simultaneously commenced against individual family members — Whether genuine dispute as to construction of Deed — Whether deed voidable or rescindable for misleading and deceptive conduct or misrepresentation — Genuine dispute made out — Demands set aside

Facts

This case concerns an application under section 459G of the *Corporations Act 2001* (Cth) (**"the Act"**) by eight companies to set aside statutory demands served by the defendant, Gabriel Apostolakis. Each of the companies is a family company of the Apostolakis family in which Constantine and Mary are parents and Gabriel, Andrew and Emmanuel are their sons.

The issuance of a statutory demand arose out of a Deed of Settlement entered into by Con, Mary, Gabriel, Andrew, Emmanuel. The companies, trusts and individuals, other than Gabriel, that were parties to the Deed were described in the Deed as the "Consortium". Pursuant to clause 1, the Consortium jointly agreed to pay Gabriel $950,000 as follows:

(a) $850,000 by way of electronic funds transfer to an account nominated by Gabriel;

(b) $50,000 to Gabriel as reimbursement for credit card expenses incurred on behalf of various members of the Consortium; and

(c) $50,000 by way of repayment of a debt of $50,000 owing to Mariam Apostolakis and assigned by her to Gabriel,"

together with the transfer of title in a Mercedes Benz car. If the Kogarah Bay property sold for more than $3 million, then Gabriel would also receive 50% of the excess of the price above $3 million.

The Deed further included a best endeavours provision in clause 33 which provided that: "where a party is required to perform an obligation in this Deed, then unless the context requires otherwise, the party must use its best endeavours to perform that obligation"

The issue before the Court was whether there is a genuine dispute as to the existence of the debt within the meaning of section 459H of the *Corporations Act.*

Decision

As to the genuine dispute relied upon in this case, the plaintiffs submitted that while the Deed provided that the payment of $950,000 was to be made by 31 March 2019, clause 33 provided that where a party was required to perform an obligation under the Deed then, the party must use its best endeavours to perform that obligation.

Accordingly, the plaintiffs submitted that the obligation on them was to use their best endeavours to make the payment of $950,000 by 31 March 2019. By Contrast, Gabriel submitted that, read objectively and in context, the only available construction of the Deed is that the plaintiffs were obliged to pay him $950,000 by 31 March 2019.

Rees J found that where there are clearly arguable alternatives as to the meaning of a term and related questions of construction, this of itself gives rise to a genuine dispute within section 459H(1)(a) of the *Corporations Act.* Her Honour thus made an order setting aside the statutory demand.

In the matter of Fearndale Holdings Pty Limited

[2019] NSWSC 645

Coram: Black J

Court: Supreme Court of New South Wales

Date: 4 June 2019

LEASES AND TENANCIES — 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 later issued notice of termination of lease — whether time given to remedy breach of lease was reasonable — whether lease was validly terminated

Facts

Fearndale Holdings Pty Ltd (**"Fearndale"**) owns land at Luddenham, New South Wales, which contains a quarry from which clay and shale can be mined. On or about 23 March 2017, Drama Unit Pty Ltd (**"Drama Unit"**) and Fearndale entered into a lease over that land (**"Lease"**)

Relevantly, clause 7.3(4)(a) of the Lease provided that Drama Unit was deemed to have accepted the Lease with full knowledge and subject to any prohibitions or restrictions on the use of the relevant premises under any Law or Requirement.

Clause 7.3(4)(b) further provided that Drama Unit was required, at its own cost and prior to the commencement of the Lease, to obtain and comply with the consents and approvals of any authority which may be necessary or appropriate for its business.

Clause 7.3(4)(c) in turn required that Drama Unit must not, by any act or omission, cause or permit any consent or approval to lapse or be revoked, and clause 7.3(4)(d) required Drama Unit to provide a copy of any consent or approval to Fearndale prior to the occupation of the premises.

On 29 June 2018, Fearndale served notices to remedy several breaches of the Lease on Drama Unit. This included a notice to remedy a breach of the requirement under cl 7.3(4)(b).

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 obtained the relevant consents or approvals of any authority which may be necessary or appropriate for the business.

Drama Unit then brought proceedings seeking a range of relief in respect of these notices of termination. In these proceedings, it was held that Fearndale had not effectively terminated the Lease as a reasonable time to remedy the alleged breach had not elapsed prior to the purported termination of the Lease.

Following this judgement, by letter dated 21 December 2018, Fearndale again required Drama Unit to pay rent, and also outgoings due under the Lease. Those amounts were not paid by Drama Unit.

On 29 January 2019, Fearndale issued further notices of breach of the Lease to Drama Unit These notices were all directed at a failure to comply with cl 7.3(4) of the Lease and involved:

- A failure to obtain an authorisation pursuant to the *Mining Act 1992* (NSW) in respect of the business of mining of clay/shale on the land.
- A failure to obtain a current licence pursuant to the *Protection of the Environment Operations Act* 1997 (NSW) in respect of "land-based extractive activity", waste disposal or waste storage in respect of the land.
- A failure to provide an in force authorisation as provided under the Mining Act; and
- A failure to provide a copy of a current licence under the PEOA to Fearndale

On 12 February 2019, Fearndale made a further demand for rent and outgoings by Drama Unit, which again were not paid.

On 22 March 2019, Fearndale issued further notices of termination of the Lease to Drama Unit and commenced these proceedings seeking relief. Specifically, Fearndale sought:

- A declaration that Fearndale had validly and effectively terminated the Lease; and
- Judgment against Drama Unit in the amounts of $341,890.72 for rent due and payable under the Lease and of $34,157.10 for outgoings due and payable under the Lease.

Decision

Black J found in favour of Fearndale and granted the relief sought.

His Honour rejected Drama Unit's submission that a notice under s 129 of the Conveyancing Act must specify the "reasonable time" after service of a notice to remedy a breach of a lease. This is because s 129(1) of the Conveyancing Act requires that a reasonable time to have in fact elapsed after delivery of the notice and prior to termination of the relevant lease. In this instance, Drama Unit did not contest the fact that a reasonable time had in fact elapsed, nor could it have done so given the period of time on which it has been on notice of the relevant breaches.

In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA the Court held:

> "… the above authorities clearly indicate that a notice under s 129 must not only allege breach, but must also 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. To use the example of Lord Buckmaster LC, where

> there are several options open to a tenant to waterproof a leaking ceiling, then that choice is at the tenant's discretion. Thus s 129 is, in my opinion, directed at allowing the tenant to bring about (within a reasonable time) a state of affairs under which the landlord would not pursue forfeiture."

In *Hovan's Hotels Pty Ltd v Cherry* (Unreported, Supreme Court of New South Wales, 14 March 1994), Bryson J observed that:

> "Neither s129 nor the form in Schedule VI of the Conveyancing Act 1919 requires the time during which a breach must be remedied to be stated in the notice. No particular consequences flow, in my opinion, if a time is in fact specified, or if there is a miscalculation in the time so that something is required to be done within 14 days but less than 14 days are given. What a notice must contain is prescribed by para(a), para(b) and para(c) of subs 129(1), and the matters prescribed do not include any statement of the time for compliance. Similarly, the body of the notice in Schedule VI does not include any statement of the time required."

The Court therefore rejected the submission that the notices of termination of the Lease for non-monetary defaults issued on 29 January 2019 were invalid for not specifying the particular time that constituted a reasonable time to remedy the breach.

His Honour further rejected the contention that Drama Unit's ability to use the land for incidental purposes displaced the requirement for consents and approvals for mining. His Honour observed that on a proper construction of the Lease, cl 7.3(4)(b) required that Drama Unit obtain and comply with the consents or approvals of any authority which may be necessary or appropriate for Drama Unit's "business" *prior* to entry into the Lease.

Drama Unit's suggestion that Fearndale had waived the requirement for payment of rent, by its administrator's return of Drama Unit's tender of a cheque in payment of one month's rent in June 2018, was likewise dismissed by his Honour. Drama Unit failed to show an intention on the administrator's part to permanently release Drama Unit from its obligation to pay rent. His Honour further noted that Fearndale at least made clear from December 2018 that it required the payment of that rent, which Drama Unit did not then pay.

IPL Medical Pty Ltd v Charmen Pty Ltd

[2019] NSWSC 1824

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 18 December 2019

LANDLORD AND TENANT — construction of leases — extent of tenant's obligation to repair damage to premises — construction and operation of provisions requiring tenant to pay outgoings — whether amounts charged by the landlord to the tenant were incurred for capital or structural works — entitlement of tenant to return of a bank guarantee provided to landlord as security for tenant's obligations — entitlement of tenant to damages for landlord wrongfully making demand under the bank guarantee

Facts

Charmen Pty Ltd (**"the Lessor"**) owns a four-story building which stands at 263 George Street Sydney (**"the Building"**). IPL Medical Pty Ltd (**"the Lessee"**) is a tenant of the Building and operates a cosmetic surgery medical practice.

On 13 December 2007, the parties entered into an Agreement for Lease which contemplated the entry into two formal leases, one covering the ground floor and one covering the remainder of the space to be let. The Agreement for Lease was superseded by two ten-year leases, each commencing on 1 July 2008, entered into on 29 February 2008. The leases contained extension options which were not exercised. They terminated on 30 June 2018 and IPL vacated the Building.

Relevantly, clause 5 of the Lease required the Lessee to provide a security deposit for the due and punctual observance and performance of its obligations. The Lessee duly established a bank guarantee with the Commonwealth Bank of Australia.

On 4 July 2013, the Lessor called on the bank guarantee to effect payment to it of $18,254 for fees paid by it to its own architects to supervise a fit-out. The Lessee disputes that the Lessor was entitled to claim this amount.

The Lessor took additional sums from the bank guarantee for a number of claims which the Lessee disputes. This included $181,965 to repair the facade; $4950 to establish fire services compliance; $6610 for lift services; and $4500 for repairs to automatic entry doors.

The Lessee further contends that it had been overcharged in outgoings. Specifically, the Lessee submits that the base year figure provided by the Lessor was an understatement by $2770. Accordingly, that for each year of the lease, the increase in outgoings claimed by the Lessor was excessive to this extent. Over ten years, this yielded $27,700.

Decision

Hammerschlag J found in favour of the Lessee.

His Honour found that the Lessor wrongly demanded and received $18,254 under the bank guarantee as it had no contractual entitlement to be paid fees charged by its own architects. His Honour further ordered the Lessor deliver up to the Lessee, the remainder of the bank guarantee. His Honour observed that the Lease had not been on foot for some 18 months and the Lessee had vacated the Building. Further, his Honour found no evidence indicating that the Lessee had in any way breached its obligations under the Lease.

His Honour also found that the Lessor had wrongly demanded and received sums under the bank guarantee for claims relating to the façade, fire service compliance, lift services and repairs to automatic entry doors. This was because the Lessee had already undertaken the necessary repairs in relation to the façade, with the Lessor's claim being that of an unreasonable owner. With respect to the fire services, lift services and automatic entry door repairs, the Lessor failed to provide any evidence of its entitlement to the sums claimed.

In respect of the overpayment of outgoings, his Honour observed that the base year figure was understated by $1698, which, over ten years, would reflect an overpayment by IPL of $16,980. The Lessee was found to be entitled to this amount.

Jain v Amit Laundry Pty Ltd

[2019] NSWCA 20

Coram: Bathurst CJ, Beazley P, White JA

Court: New South Wales Court of Appeal

Date: 19 February 2019

EQUITY — Trusts and trustees — Resulting trusts — Purchase money trusts — whether evidence of common intention as to allocation of beneficial interests rebutted presumption of resulting trust

EQUITY — Trusts and trustees — Resulting trusts — Purchase money trusts — presumption of resulting trust — whether mortgage repayments affect beneficial interests as between contributors — whether parties intended to acquire property burdened by mortgage or unburdened of all encumbrances — common intention

EQUITY — Trusts and trustees — Resulting trusts — where use of beneficial interest is subject to personal obligation or another beneficial interest — meaning of phrase 'immediate and unconditional'

LAND LAW — Co-ownership — Rights between co-owners — right to possession

Facts

The appellant, Rajil Jain, is the sole registered proprietor of a property in Guildford (**"the Property"**). The Property was initially acquired in the names of Rajil and his brother Vinay. However, Vinay has since transferred his interest to Rajil for the nominal consideration of $1.00.

Since its acquisition in 1999, the ground floor of the property has been occupied by the respondent, Amit Laundry Pty Ltd (**"Amit Laundry"**) where it conducts a laundry business. Since 2003, the upper floor has been occupied by the appellant and his immediate family.

Dispute arose in relation to the beneficial ownership of the Property when, on 2 November 2016, Rajil entered into a contract with a third party for the sale of the Property with vacant possession. On 4 November 2016, Rajil served on Amit Laundry a notice of termination and notice to quit the premises. The notice stated that Amit occupied the premises pursuant to a tenancy at will which was legally terminable on one month's notice. Vacant possession was required on or before 5 December 2016.

Amit Laundry did not vacate the premises as required by the notice. Instead, it lodged a caveat on the title and sought interlocutory relief to protect its claimed interests as the beneficial owner of the Property. On 12 January 2017, Amit Laundry filed a statement of claim seeking, inter alia, a declaration that Rajil held the title to the Property for it on resulting trust or, alternatively, under an express or implied trust.

Supreme Court Proceedings

The primary judge found that there was no express or implied trust in favour of the respondent. However, her Honour considered that a presumption of resulting trust arose in favour of Amit Laundry from the contributions Amit Laundry made to the deposit and by Amit as a borrower under the loan facility.

Her Honour made a declaration that Rajil held the Property on a resulting trust as to 9.08 per cent for Amit Laundry, being the proportion of the deposit to the purchase price, and as to one-third of the balance for Amit.

Appeal

Rajil appealed the following grounds:

(1) The primary judge erred in failing to find the presumption of resulting trust had been rebutted by the actual intention of the parties; and

(2) The primary judge consequently erred in ordering that the register of the land titles office be altered to reflect the title to the property in accordance with the declaration her Honour made

Amit Laundry also sought to cross-appeal the decision on the following grounds:

(1) The primary judge erred in failing to characterise the relevant intention of the parties in respect of the repayment of the loan in accordance with the approach approved in *Bloch v Bloch* (1981) 180 CLR 390 rather than that adopted in *Calverley v Green* (1984) 155 CLR 242. In doing so, the primary judge failed to find that the beneficial interest in the property was held on resulting trust for Amit Laundry.

(2) Alternatively, the primary judge erred in failing to find that Rajil held his interest in the Property on trust to permit Amit Laundry to use the premises to conduct its laundry business until it no longer required the premises and on terms that Amit Laundry would pay any water rates levied on the property for the duration of its use.

Decision

The Court of Appeal dismissed both the appeal and cross-appeal.

Appeal – Ground 1

The Court first observed that it was necessary for the party seeking to rebut the presumption to prove, as a fact, that the party or parties who contributed to the purchase price intended that the other party was to have a beneficial interest. Moreover, if the legal owner seeks the entire beneficial interest, the legal owner will have to prove as a fact that it was the common intention of all contributors that the legal owner was to have the entire beneficial interest and not only a beneficial interest proportionate to their own contribution. *Muschinski v Dodds* (1985) 160 CLR 583.

Following this, the Court held that the primary judge was right in finding there was a common intention to confer an immediate and unconditional beneficial interest on Rajil and Vinay. This was because it was implausible that Amit and Amit Laundry would have purchased the Property in the name of Rajil and Vinay without there being some protection for the operation of the laundry business.

Appeal – Ground 2

As the second ground of the appeal was consequent upon the success of the first ground, the Court dismissed the appeal.

Cross-appeal – Ground 1

The Court held the primary judge was correct to follow the principles established in *Calverley v Green* as opposed to those in *Bloch v Bloch.* This was because the outcome in Bloch v Bloch was based upon a factual finding as to the common intention of the parties at the time of acquisition of the property. In the present case, there was no common intention as to the beneficial interests in the property such as to displace the presumption of a resulting trust in proportion to the contributions made by the parties.

Cross-appeal – Ground 2

The Court also dismissed the second ground of the cross-appeal. This was because, as discussed above, the Court had already upheld the primary judge’s finding in respect of the resulting trust such that Amit Laundry is a co-owner with the right to possession as a co-owner. As such, any right to occupy the property held on trust by Rajil fell away.

Jong v Advanced Dental Services Pty Ltd

[2019] NSWCA 318

Coram: Basten JA, Meagher JA, Brereton JA

Court: New South Wales Court of Appeal

Date: 20 December 2019

LANDLORD AND TENANT — renewals and options — exercise of option — commercial premises — whether email exchange constituted exercise of option — relevance of subsequent conduct — whether absence of further guarantee required by lease precluded enforceable agreement

Facts

Ms Yeeh Yong Jong (**"Ms Jong"**) owns a premises at Blackwall Street, Woy Woy. On 27 May 2009 she let the premises to MJ Jong Pty Ltd. The lease was later assigned to the respondent, Advanced Dental Services Pty Ltd (**"Advanced Dental"**), which ran a dental clinic at the premises. The lease was for a term of five years, terminating on 26 May 2014, but with two options to renew, each for a period of five years. On 13 January 2015 the respondent gave notice of its intention to vacate the premises; it in fact did so on 28 February 2015. The appellant let the premises to third parties in December 2016.

On 26 June 2017, Ms Jong commenced proceedings in the District Court alleging that the respondent had exercised the first option to renew the lease, extending its term to 26 May 2019, and had repudiated the lease by vacating the premises prior to the termination date of the renewed lease.

At first instance, the primary judge dismissed the appellant's claims and gave judgment in favour of the respondent. The basis of the judgment was that the respondent had not in fact validly exercised the option to renew, and had instead continued to occupy the premises on a monthly basis after 26 May 2014. The respondent had thus validly terminated the tenancy by giving one month's notice of its intention to vacate.

Ms Jong now seeks to appeal that decision.

Decision

The Court dismissed the appeal, finding that the primary judge was correct in concluding that the option was not validly exercised.

Relevantly, cl 19 of the lease outlined steps to be taken to exercise the option to renew. Specifically, cl 19.1 contains an offer of "renewal" of the lease "on the conditions specified in this clause" and provides that "unless the Lessee accepts such offer strictly in accordance with the provisions contained in this clause, this offer shall lapse".

Having regard to the correspondence between the parties, the Court held that while Advanced Dental did answer "yes" in response to Ms Jong's question of whether it intended to "re-sign for another 5 years", its statement that it "would like to renew the lease" describes a present state of inclination or preference. The Court held that it was not an absolute and unqualified acceptance of the offer of renewal and does not purport to constitute an exercise of the option.

Kaji Australia Pty Ltd v Glover (No. 4)

[2019] NSWSC 1779

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 17 December 2019

LAND LAW— possession of land — claim for possession and judgment for the amount owing under a loan agreement and mortgage — short-term loan pending approval of long-term finance — where the borrower had failed to repay the loan pursuant to the loan agreement — lenders entitled to possession and amount owing under loan agreement — parties instructed to bring in short minutes to quantify sum owing

CONSUMER LAW — unconscionability — where the borrower claimed that the loan agreement was unconscionable either under the general law or statute — where the borrower claimed that the lenders should have requested proof of income — where the borrower claimed that a third party was exerting undue influence over him to the knowledge of the lenders — where the borrower claimed that he did not receive adequate independent advice about the loan agreement — where the borrower claimed that the loan was improvident because there was no effective exit strategy — no finding of unconscionability

CONTRACT — unjust contract — whether the loan agreement was unjust pursuant to the Contracts Review Act 1980 (NSW) — where the borrower was aware at all times of the interest rates being charged — where the borrower understood the risks of entering into the mortgage — no evidence that the interest rates were unreasonably high or not reasonably necessary for the protection of the plaintiffs — contract not unjust

CONSUMER LAW — misleading or deceptive conduct — s 18Australian Consumer Law (Cth) — whether a cross-defendant made misleading or deceptive representations about a prospective loan — whether representor was a mere conduit for information provided by another — no evidence to support a finding that any such representation as pleaded was made — no misleading or deceptive conduct found

TORT — fraud — whether the cross-defendant engaged in a fraud on the borrower and conspired with others to enrich themselves through the sale of the borrower's property — no evidence whatsoever to support the assertion of fraud nor the assertion of conspiracy

Facts

On 21 February 2011 the defendant, Johann Benson Glover (**"Mr Glover"**), entered into a loan agreement with the plaintiffs, Kaji Australia Pty Ltd and William Bradley Webster to borrow $115,000. The loan was repayable on 21 April 2011. Mr Glover provided a mortgage over his property at 15 Vincent Street, Mount Druitt (**"the Property"**) as security for the loan.

Mr Glover failed to repay the loan on 21 April 2011. On 8 April 2014 the plaintiffs commenced proceedings against Mr Glover seeking possession of the Property and judgment for the amount then owing under the loan.

Mr Glover sought to deny that the plaintiffs were able to obtain possession or claim the amount said to be owing under the loan agreement. Specifically, he relied upon a cross-claim he filed against the plaintiffs which asserted that the loan agreement and the mortgage were unjust pursuant to s 7 of the *Contracts Review Act 1980* (NSW), and that they were unconscionable contrary to ss 12CA and 12CB of the *Australian Securities and Investments Commission Act* 2001 (Cth).

Three other parties were also joined to the cross-claim. Namely, Mercia Financial Solutions Pty Ltd (**"Mercia"**) as the third cross-defendant, Richard Nicholson (**"Mr Nicholson"**) as the fourth cross-defendant, and Rodney Shields (**"Mr Shields"**) as the fifth cross-defendant. Those parties were alleged to have been involved in obtaining finance for the defendant that led ultimately to his entry into the loan agreement on 21 February 2011. Against Mr Nicholson, the cross-claim asserted that they had engaged in misleading and deceptive conduct in the form of representations contrary to s 12DA of the *ASIC Act* and/or s 18 of the *Australian Consumer Law* (Cth); as against all of the cross-defendants it alleged fraud and conspiracy.

Decision

Davies J dismissed the cross-claims brought by Mr Glover and held that the plaintiffs had established their right to possession of the land and to judgment for the amount owing under the loan agreement and mortgage.

Cross-claim against the plaintiffs

While Mr Glover sought to argue that the interest rate in respect of default was not reasonably necessary for the protection of the cross-defendants, His Honour was satisfied on the evidence that the Mr Glover had received appropriate advice as well as independent advice about the transaction he was entering into. His Honour found that Mr Glover was at all times was aware of the interest rates being charged. Indeed, on the defendant's own evidence, he noted that he was informed about the interest rate of 36% per annum.

His Honour further held that there was no unconscionable pressure placed upon the defendant by the plaintiffs to enter into the loan agreement. While his Honour did observe that it was likely that the defendant would have entered into this arrangement in any event because he was prepared to do anything to save losing his house by being bankrupted by the ATO, such was not found to have any bearing on fairness of the contract or point to any evidence of unconscionability.

The defendant was also found not to be at a special disadvantage. Whilst he was certainly in great need of a loan and perceived himself to be in a desperate situation, his Honour held that there was nothing in the evidence to show that the plaintiffs took any advantage of the situation in which the defendant found himself.

Cross-claim against Mr Nicholson

Prior to entering into a loan with the plaintiffs, Mr Glover had sought to obtain a loan from St George Bank on the recommendation of Mr Nicholson. A loan application was made and St George granted a conditional approval of the loan. This meant that while the loan was approved in principle, it did not provide a guarantee of a formal approval. Indeed, the St George loan did not eventuate and Mr Glover was unable to obtain the loan sought.

It is against this factual background that Mr Glover alleged that Mr Nicholson knew that the St George application and the Letter of Approval were not genuine, and that the representations were made for the purpose of forcing the defendant into the position of obtaining the loan from the plaintiffs. The representations were said to be both false as well as misleading and deceptive as, it is alleged, there were no reasonable grounds to believe that the loan approval would result in the loan being granted by the Bank. The defendant further submitted that if he had known the St George approval was conditional he would never have entered into the loan with the plaintiffs.

His Honour rejected this submission and held that Mr Nicholson had only represented that St George had granted a *conditional* loan approval. His Honour further held that even if it was found that Mr Nicholson engaged in misleading or deceptive conduct by representing that the loan approval was other than conditional, it is likely that he would have still entered into the loan with the plaintiffs in the hope and expectation that the loan would become unconditional. To hold otherwise would be inconsistent with the defendant's evidence that he was, effectively, prepared to do anything to save losing his home.

Cross-claim for conspiracy

Mr Glover submitted that the evidence shows that there was a conspiracy to defraud him of his home or most of his equity in it. Specifically, he submitted that the conduct of Mr Nicholson showed that he intended to induce the defendant to enter into the plaintiffs' loan in the belief that he had an exit strategy via the St George bank loan. The defendant submitted that Mr Nicholson could not have been acting on a frolic of his own. His fraud would only exist in the context of the conspiracy with Mr Shields and the plaintiffs.

His Honour rejected this submission and held that the matters put forward by the defendant to suggest a conspiracy are entirely insufficient and inadequate to do so. Rather, his Honour found that any conclusion that there had been fraud or conspiracy by the cross-defendants could only be attained by speculation and a predisposition to believe it.

Kannisto v Kannisto

[2019] NSWSC 245

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 8 March 2019

LAND LAW — possession of land — licence agreement between father and son — licence terminated — proceedings seeking possession — defence filed discloses no defence to the claim — defence struck out

Facts

The plaintiff is the registered proprietor of land at 119 Lakeslands Drive at Dapto. The defendant is the son of the plaintiff. The defendant has been in occupation of the property for some nine to ten years under a licence arrangement.

In August 2018 and again on 3 September 2018, the defendant was served with a Notice to Vacate the property. However, the defendant has refused to vacate the property.

As such the plaintiff commenced proceedings seeking to take possession of the property. In response, the defendant filed a document headed “Defence”. The document contained a short narrative and annexes a number of documents. The narrative indicates that the property is his home, that he is a man of limited means, that he cannot afford a solicitor, that he has nowhere else to go and that Legal Aid was limited.

Decision

Davies J found there to be nothing in the document entitled “Defence” which discloses any defence to the claim known to the law. The relationship between the parties appears to be that of licensor and licensee, and that licence has been brought to an end by the notices given to the defendant requiring him to vacate the property. As such, his Honour ordered the defence to be struck out.

Khadivzad v The Owners – Strata Plan 53457

[2019] NSWSC 157

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 26 February 2019

LAND LAW — strata title — validity of by-laws — by-law granted exclusive rights to certain lot owners to use parts of common property for car parking — by-law purportedly repealed in 1999 by special resolution of Owners Corporation — no written consent obtained from lot owners concerned prior to repealing the by-law as required by Strata Schemes Management Act 1996 (NSW) ('SSM Act'), s 52(1)(a) — Change of By-Laws recorded on title within two years — proceedings commenced in 2018 to challenge validity of repeal — effect of SSM Act, s 52(3) — conclusive presumption after two years that all conditions and preliminary steps precedent to the making of a repealing by-law have been complied with and performed — requisite consent of owners is a condition or preliminary step precedent to the making of a repealing by-law — proceedings dismissed

Facts

Strata Plan No 53457 was established in October 1996. The strata scheme consisted of 32 lots located in a residential development in Milsons Point, NSW. The development involved a building of 8 storeys, with two basement levels. The plaintiff is the sole registered proprietor of Lot 9 in Strata Plan 53457.

These proceedings concern a special by-law that conferred upon a number of proprietors of lots in the strata scheme rights to exclusively use certain parts of the common property for the purpose of carparking. The special by-law provided, inter alia, that the proprietor of Lot 9 and persons authorised by the proprietor were entitled to the exclusive use and enjoyment of an area (marked "H" on the relevant plan) located on basement level 1 of the building.

However, at the Annual General Meeting of the Owners Corporation held on 14 December 1999, a special resolution was passed to the effect that certain By-laws and Additional by-laws "be confirmed", and that "the Bylaws in existence up to this time be repealed".

The plaintiff alleges that the special resolution was not effective to validly repeal the special by-law. The plaintiff contends that the special by-law could only be validly repealed if done in accordance with s 52(1) of the *Strata Schemes Management Act 1996* (NSW) (**"the Act"**), which had come into operation on 1 July 1997. Specifically, s 52(1) of the Act provides that an owners corporation may only make, amend or repeal a by-law with the written consent of the owner(s) the lot(s) concerned and in accordance with a special resolution.

The plaintiff submits that at least one of the owners of the lots concerned did not provide written consent to the repeal. In these circumstances, the plaintiff seeks declaratory relief to the effect that the special by-law remains in full force and effect.

Decision

Darke J declined to give the declaratory relief sought by the plaintiff to the effect that the special by-law remains in full force and effect.

In his reasons, his Honour observed that the plaintiff was correct in submitted that a special by-law could only be repealed in accordance with the requirements of s 52(1) of the Act. His Honour further accepted that the written consent of the owners of the lots concerned was not obtained prior to the passing of the special resolution on 14 December 1999 which purported to repeal the existing by-laws.

That being said, his Honour considered the operation of s 52(3) of the Act which provides that "After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed." And so, given that it has been over two years since the passing of the special resolution on 14 December 1999, it is conclusively presumed that the consent requirement under s 52(1)(a) has been complied with.

Lawrence v Ciantar; Ciantar v Lawrence

[2019] NSWSC 464

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 26 April 2019

CONTRACTS — written terms — oral terms — construction — whether plaintiff contractually obliged to carry out and complete certain works — whether joint venture agreement or contract caught by Home Building Act 1989 (NSW)

CONTRACTS — interpretation — ambiguity — evidence of surrounding circumstances — evidence of prior negotiations — evidence of subsequent conduct

STATUTORY INTERPRETATION — definitions — Home Building Act 1989 (NSW) — meaning of 'residential building work' — contract to do sub-division works including construction of a driveway, retention tank and drainage works — whether preparatory works under contract constituted 'residential building works'

Facts

In 2015, Mr Lawrence (**"Builder"**) entered into an agreement with Mr Ciantar and Ms Sammut (**"the Owners"**) to carry out the development of a three-lot sub-division at a property in Forestville, Sydney (**"the Property"**).

The Builder claims that under the agreement, he is entitled to a one-third interest in the Property. That interest is said to arise from him having agreed to fund the cost of the demolition and sub-division works at the Property in accordance with the council development approval and those works having been completed.

The Owners deny that the Builder is entitled to enforce any interest in the Property. They claim the agreement made the Builder responsible for carrying out and completing the works which involved "residential building work". As a result, they claim the agreement is caught by the Home Building Act 1989 (NSW) (**"HBA"**) and any proprietary interest the Builder purportedly holds is void. They also claim they validly rescinded the agreement under the terms of the HBA.

At issue is whether, on its proper construction, the agreement entered into by the parties is a contract under which the Builder undertook to do residential building work as defined by the HBA. If the agreement is not caught by the HBA, the issue for determination is whether it was lawfully terminated by Mr Ciantar and Ms Sammut.

Decision

Henry J found the agreement to be a contract caught by the HBA.

This was because on a proper construction of the contract, the Builder was obliged to carry out and complete the development works, either by himself or supervising others, in return for an interest in the Property. The works further satisfied the definition of residential building work for the purposes of the HBA as while the preparatory works involved the construction of the driveway, retaining wall and drainage works, they were for the purposes of a dwelling.

Accordingly, his Honour found that the Builder's claim to a one-third interest in the Property were unenforceable due to the operation of ss 7D and 10 of the Home Building Act.

Levy v Close

[2019] NSWSC 1027

Coram: Lindsay J

Court: Supreme Court of New South Wales

Date: 14 August 2019

EQUITY — Equitable interests in property — Contribution to acquisition or improvement of another's property — Resulting trust — Family arrangement for purchase of residence with separate accommodation of parent

EQUITY — Trusts and trustees — Resulting trust — Family arrangement for purchase of residence with separate accommodation of parent

Facts

In her capacity as a representative of the deceased estate of her late father Graham Rex Crowley (**"the deceased")**, the plaintiff brought proceedings against her sister (**"the first defendant"**) and her sister's husband (**"the second defendant"**) for relief arising from the deceased's contribution of funds to the defendants' purchase of a residential property at North Narrabeen in 1982 (**"the Narrabeen Property"**).The deceased made his contribution on terms which included an agreement between the deceased and the defendants that he would reside with them in separate accommodation on the Narrabeen Property (**"the Flat"**).

The deceased died in 2003 and in 2016 the defendants sold the Narrabeen Property. Using the proceeds of sale, the defendants then purchased a residential property at Swansea (**"the Swansea Property"**).

The plaintiff contends that she should obtain a one half share of the fruits of the deceased's contribution to purchase of the North Narrabeen property.

Decision

His Honour accepted that it was common ground that the deceased made a financial contribution to acquisition of the Narrabeen property in the names of the defendants in 1982. At issue was whether that contribution gave rise to a resulting trust in favour of the deceased proportionate to his contribution to the cost of acquisition of the property. His Honour held that it did. This was because at the time of acquisition of the Narrabeen property, the deceased intended that, by his financial contribution to purchase of the property, he acquired ownership of an interest in the property.

Accordingly, a resulting trust was found to arise in favour of the deceased and, following his death, his deceased estate. On his Honour's assessment, it was held that the estate of the deceased had a beneficial interest in the Narrabeen property of 13.15%, being proportionate to the deceased's financial contribution to purchase of the property.

His Honour further found that the defendants were obliged to account to the deceased’s estate a share of rental income they received when, between 2007-2016, they intermittently let out the Flat which the deceased previously resided in.

Thus, his Honour held that upon completion of the defendants' sale of the Narrabeen property, they became obliged to account to the estate of the deceased for $216,225, being the sum of: (a) $203,825, representing 13.15% of the $1,550,000 proceeds of sale; and (b) $12,400, representing 13.15% of the rental income received between 2007-2016.

Lincu v Registrar-General

[2019] NSWSC 568

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 16 May 2019

LAND LAW — Torrens title — Compensation for loss of interest in land — Torrens assurance fund — Whether 'breach of trust' exemption from compensation includes fraudulent breach of trust or applies only where sole cause of loss or damage is breach of trust — Real Property Act 1900 (NSW), s 129(2)(f)(i)

Facts

The Apostolic Church of Nazarene - Sydney (**the "Church"**) owns a church located at Arncliffe (**the "Church Property"**) on land originally held by five trustees.

Two of the original trustees died. One of the surviving trustees (Mr Krnjulac) tricked the other two surviving trustees (Mr Lincu and Mr Kovacevic) into signing documents which enabled Mr Krnjulac to transfer the Church Property to himself and his two sons. Mr Krnjulac borrowed a large amount of money from Community First Credit Union Ltd (**the "Credit Union"**) secured by a mortgage over the Church Property.

Mr Krnjulac was unable to repay the Credit Union and is now a bankrupt. To preserve the Church Property from being sold by the Credit Union, Mr Lincu and others borrowed money. They paid out the Credit Union and took an assignment of the Credit Union's mortgage. They now seek to recover the amount they borrowed, and other incidental costs from the Torrens Assurance Fund (**the "Fund"**) which exists to pay compensation where loss and damage has been suffered in specified circumstances as a result of the operation of Real Property Act 1900 (NSW) (**"RPA"**).

Relevantly, s129(2)(f)(i) of the RPA provides an exemption from eligibility for compensation in (**the "Exemption"**). Specifically, it provides that compensation is not payable from the Fund where "the loss or damage arises from the breach by a registered proprietor of any trust (whether express, implied or constructive)". As such, the issue for determination here is whether the Exemption applies to loss and damage which arose from what the parties agree was a fraud and a breach of trust.

Mr Lincu and other trustees advanced a number of arguments as to why the Exemption did not apply. They are as follows:

(1) As a matter of construction, the Exemption only applied where fraud was not a material cause such that the sole cause of the loss and damage was a breach of trust. This required the Exemption to be read in one of two, alternative ways (each shown in italics):

"the loss or damage (1) *solely* arises from the (2) *non-fraudulent* breach by a registered proprietor of any trust (whether express, implied or constructive)." They relied on the decision of the NSW Court of Appeal in *Parker v Registrar-General* [1977] 1 NSWLR 22

(2) Alternatively, the expression "arises from" requires the Court to determine the "true cause" of the loss or damage. In this case that true cause was the fraudulent design of Mr Krnjulac, of which a mere incident was the fact that he breached a trust in implementing that design.

Decision

Kunc J found that the Exemption applied and thereby precluded the plaintiffs from seeking compensation from the Fund.

The reasons for this decision are as follows:

(1) The natural and ordinary meaning of the Exemption in the context in which it appears does not require it to be read to the effect that it applies only where the breach of trust is the sole cause of the loss and damage nor does it invite an inquiry as to the "true cause" when there are multiple causes. The Exemption operates in accordance with its terms if one (not de minimis) cause of the loss and damage is a breach of trust, irrespective that there may be other causes;

(2) Changes in the statutory language and the scheme of the Fund generally since *Parker* mean that case is no longer binding or persuasive as to the construction of the Exemption;

(3) The legislative history and the various iterations of the RPA make clear that trusts are not a matter to which the legislation is directed, in particular trusts are not to be recorded on the register, and there is therefore no logical reason why the Fund should respond to loss and damage caused by the breach of trust of a registered proprietor;

(4) The legislation establishes an administrative method for dealing with claims for compensation from the Fund. As such, a construction of the Exemption which minimises the need for factually and legally complex analyses of questions of causation is to be preferred.

Lithgow State Mine Railway Ltd v City of Greater Lithgow Mining Museum Inc

[2019] NSWSC 1131

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 2 September 2019

PRACTICE AND PROCEDURE — parties — joinder — application by third party to become a defendant — proceedings for specific performance of a contract for sale of land — where third party claims to be entitled to a lease of the land by way of proprietary estoppel — where third party lodged caveat on the title of the land — whether third party ought to have been joined as a necessary party to the proceedings — whether joinder is necessary for the determination of all matters in dispute in the proceedings — third party's joinder not necessary — application dismissed

Facts

The plaintiffs (Lithgow State Mine Railway Ltd and COC Ltd) seek specific performance of an alleged agreement to the effect that the defendant (City of Greater Lithgow Mining Museum Inc) would transfer certain land near Lithgow to one or other of the plaintiffs (**"Lot 10"**). The principal relief sought is an order that the defendant "do all things necessary to facilitate the transfer" of Lot 10 to one or other of the plaintiffs.

Lithgow Railway Workshop Pty Ltd (**"LRW"**) claims to have an equitable interest in Lot 10 in the nature of a lease, by way of a proprietary estoppel. It has lodged a caveat on the title to Lot 10 claiming that interest. LRW is not presently a party to the proceedings, but seeks to be joined to the proceedings as a defendant.

LRW contends that it is a necessary party to the proceedings because it is a claimant in respect of the subject matter of the proceedings, namely Lot 10. LRW submits that the plaintiffs and LRW assert competing equitable interests in Lot 10. Further, LRW submits that if the plaintiffs succeed on their claim they will obtain orders for the transfer of Lot 10 to one or other of them, and upon registration of a transfer would obtain an indefeasible title to Lot 10. Accordingly, it was submitted, the relief claimed by the plaintiffs directly affects LRW's claimed interest in Lot 10.

Decision

Darke J declined to make the order for joinder sought by LRW.

His Honour found that the orders for specific performance sought by the plaintiffs in the present case did not directly affect whatever rights LRW may have in respect of Lot 10. The orders, if made, would operate *in personam* against the defendant to require it to perform contractual obligations. Insofar as LRW is concerned, those obligations would extend no further than a requirement to seek the removal of LRW's caveat. Such orders would not establish or recognise a proprietary interest in Lot 10 that is correspondingly detrimental to LRW. Nor would the making of the orders themselves diminish or restrict any rights LRW may have over Lot 10.

LTDC Pty Ltd v Cashflow Finance Australia Pty Ltd

[2019] NSWSC 150

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 25 February 2019

EQUITY — priorities — competing equitable interests — postponing conduct — real property subject to first registered mortgage — invoice financier obtains charge over property — practice of invoice financiers not to lodge caveats until facility is in default — subsequent lender obtains mortgage over property — whether in the circumstances the failure to caveat causes first lender to lose priority — subsequent lender acted in reliance upon results of title searches — reasonably safe for subsequent lender to assume that no equitable mortgage or charge existed — priority of first lender postponed

Facts

This case concerns a priority dispute between two lenders who obtained unregistered interests in land in Chipping Norton, NSW.

In January 2017, the defendant, Cashflow Finance Australia Pty Ltd, entered into a Finance Facility Deed with Madebra Enterprises Pty Ltd (**"Madebra"**). Two directors of Madebra, Ms Geary and Mr Shaikho, were parties to the Deed as Guarantors. By cl 38, the Guarantors each granted the defendant a charge over their interests "in real or any other personal property held now or in the future". The charges extended to the Chipping Norton property of which they were the registered proprietors as joint tenants. However, no caveat was lodged by the defendant in respect of the charge it had obtained over the Chipping Norton property until 24 November 2017.

On 12 April 2017, the plaintiff, LTDC Pty Ltd, entered into a loan agreement with Madebra. Under the agreement, Ms Geary and Mr Shaikho guaranteed the loan and provided a mortgage over their property in Chipping Norton. On the same date, the plaintiff lodged a caveat on the title to the Chipping Norton property, claiming an interest as mortgagee.

Decision

Darke J found in favour of the plaintiff and held LTDC Pty Ltd to possess the better equity.

His Honour found that the failure of the defendant to promptly lodge a caveat on the title to the Chipping Norton property left the owners of the property in a position to represent that the property was not subject to a charge in favour of the defendant. His Honour further found that the plaintiff had proceeded in reliance upon the results of the two title searches which relevantly showed only the registered first mortgage. Accordingly, it was reasonable for the plaintiff to assume, based on those results, that no equitable mortgage or charge existed.

Lukas v Browne

[2019] NSWSC 222

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 7 March 2019

ESTOPPEL — equitable estoppel — plaintiffs and defendants executed form of written lease — the term of the lease not included in form — whether defendants made representations that the lease would be for 5 years with the possibility of a 10 year term being offered later — clear representations held to have been made — whether plaintiffs relied on representations — detriment — estoppel made out — plaintiffs entitled to a lease for a term of 5 years

Facts

The plaintiffs, Paula Lukas and Michael Camilleri, seek a declaration that they are entitled in equity to a lease of a 52 hectare property in Falls Creek for a term of 5 years commencing on 13 August 2016. The plaintiffs are currently in possession of the property.

The plaintiffs contend that their entitlement arises by the operation of an equitable estoppel. The estoppel is said to be based upon a number of oral representations made by the defendants up to and at the time of the execution by the parties of a standard form Residential Tenancy Agreement in respect of the property on 31 July 2016. The plaintiffs allege that various representations were made to them to the effect that the term of the lease would be 5 years, or at least 5 years.

However, the executed agreement did not provide for any term of the agreement. The form was left blank in the space provided for that purpose. Further, even though a starting date of 13 August 2016 was written in, no ending date was nominated. On its face, therefore, the agreement provided for a periodic tenancy rather than a fixed term tenancy for the purposes of the *Residential Tenancies Act 2010* (NSW).

Decision

Darke J found in favour of the plaintiffs and granted the declaration sought.

Applying the principles of equitable estoppel, his Honour concluded that the defendants had made clear representations to the plaintiffs, including on the occasion when the agreement was signed, that the lease was to be for a period of 5 years. His Honour further held that the plaintiffs relied upon those representations when they proceeded to move into the Falls Creek property, and undertake at considerable expense, various works upon it. Finally, his Honour observed that the plaintiffs would suffer detriment if there was a departure from the represented position.

Macquarie International Health Clinic Pty Ltd v Sydney Local Health District

[2019] NSWSC 1199

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 12 September 2019

ENVIRONMENT AND PLANNING — Building approval — whether the building approval had lapsed — 'substantial physical commencement' test in s 104 of the Local Government Act 1993 (NSW) — whether there has been some positive unequivocal step indicating that construction of the hospital has been commenced and that some substantial part of the works has been physically commenced

CONTRACTS — Construction — Principles — construction of commercial contracts — whether a clause of a Construction Deed permitted the inclusion of 'new' activities and the extension of dates in a revised project timetable for activities said to have been already completed

CONTRACTS — Construction — Contractual obligation of utmost good faith — whether that obligation operated as a constraint on an 'absolute and unfettered' discretion to extend dates in project timetable — Implied terms — whether implied contractual obligation to act reasonably in exercise of discretion to extend dates in project timetable — Implied 'Mackay v Dick' obligation to co-operate in the performance of the contract and/or not to deny a party the benefit of the contract — whether promulgation of the new project timetable and/or issue of default and termination notices derogated from any such obligations

LAND LAW — Conveyancing — Service of notices — whether default notices were invalid or liable to be set aside — whether the default notices issued under leases complied with requirements of s 129 of the Conveyancing Act 1919 (NSW) — whether there was sufficient particularity and a reasonable time allowed for alleged breaches to be remedied — whether termination notices validly issued

CONTRACTS — Remedies — Damages — whether inquiry as to damages should be ordered — whether causation of more than nominal damage established

Facts

This case is set against a long-running dispute between Macquarie International Health Clinic Pty Ltd (**"Macquarie"**) and Sydney Local Health District (**"SLHD"**) arising out of arrangements entered into by the parties over two decades ago. The arrangements concerned the proposed construction of a private hospital and medical centre on land owned by SLHD in Camperdown, NSW. Specifically, the current dispute turns on the construction of a deed entered into by the parties in 1997 (**"the Construction Deed"**) and the validity of various default and termination notices issued in 2017.

The notices in question assert that Macquarie failed to comply with various activities specified in a revised timetable issued by SLHD in September 2016 (**"the September Timetable"**). In issuing the notices, SLHD sought to rely on cl 2.5 of the Construction Deed which it alleged was contractually binding on Macquarie. Relevantly, cl 2.5 provided that:

> *"The Landlord (SLHD) may grant an extension to any date in the Timetable in its absolute and unfettered discretion if there is any delay to the Works caused by an event beyond the control of the Tenant (Macquarie)."*

The arguments advanced by each party may be summarised as follows:

- Macquarie argued that the default notices (and hence the termination notices) issued by SLHD in 2017 were invalid as it was not contractually open to SLHD unilaterally to impose a binding new timetable which included "new" activities or to extend dates for activities specified in the original timetable which have already been completed. Namely, these completed activities concerned the obtainment of building approvals in 1998 which, it alleged, remain on foot.

- SLHD, on the other hand, argued that it was permitted to include the disputed activities in its revised timetable given the introduction of a new regime for building approvals. SLHD further argued that even if it was not permissible for it to extend the time for compliance with activities that had already been completed, Macquarie had in fact failed to satisfy those particular steps in the original timetable since the building approval that had been obtained in 1998 was not for the whole of the Hospital complex provided for under the Construction Deed. As such, SLHD alleged that the September Timetable was a permissible extension of the time periods originally specified for those activities (and Macquarie was in default of that revised timetable).

Even assuming that there was power under cl 2.5 of the Construction Deed to issue the September Timetable, there was further dispute as to:

- Whether SLHD acted unreasonably or not in compliance with contractual obligations in good faith in issuing the September Timetable;

- Whether the default notices were themselves invalid or liable to be set aside on the basis that they did not comply with s 129 of the *Conveyancing Act 1919* (NSW) (insofar as they related to the Leases), by reason of:

    - the defaults being specified with insufficient specificity as to what action was required to remedy the asserted defaults; or

    - the time provided to remedy the asserted breaches and defaults not being reasonable.

Decision

Ward CJ found in favour of SLHD and dismissed Macquarie's claims.

Whether cl 2.5 gave SLHD the power to issue the September Timetable?

His Honour held that it was open to SLHD to extend the date for the obtainment of "building approvals" in the Timetable. This was because the commercial purpose of cl 2.5 was to provide for a mandated timetable for the construction of the Hospital; an objective which necessarily sought to provide commercial certainty for both parties. Accordingly, where there has been a delay to the Works beyond Macquarie's control such that a further building approval is required, then it must be the case that cl 2.5 permits SLHD to extend the date for that activity in the Timetable.

His Honour went further to consider what a reasonable businessperson would understand by the use of the term "building approval" where specified in the Timetable. To this, his Honour held that the entry for "building approval" in the Timetable must contemplate all necessary building approvals; and that if, as here, it transpires that a fresh or further building approval is required (for reasons beyond Macquarie's control) then it is open to SLHD in its absolute and unfettered discretion to extend the time for that to occur.

Reasonableness of the September Timetable

His Honour found that SLHD had in fact acted in accordance with its good faith obligations and had not acted unreasonably in issuing the September Timetable.

His Honour's reasons may be summarised as follows:

- Macquarie had been on notice of SLHD's concerns as to timetabling issues for some time; and had largely ignored SLHD's requests for comment in respect of a proposed revised timetable.
- SLHD allowed Macquarie a considerable period of time and ample opportunity to engage in the process of putting in place a timetable for and implementation of steps in relation to the construction of the Hospital, before invoking the cl 2.5 regime.
- SLHD's expert evidence supported the conclusion that the proposed time frames in the September Timetable were not unreasonable.

Validity of termination having regard to s 129 of the Conveyancing Act 1919 (NSW)

His Honour rejected Macquarie's submissions that SLHD's default notices lacked sufficient particularity and provided for an unreasonable time period to remedy the asserted breaches.

His Honour found that the default notices contained sufficient particularity to indicate to Macquarie what it was required to do. They outlined Macquarie's obligations under cl 2.1 of the Construction Deed and what SLHD asserted Macquarie needed to do to remedy the alleged defaults - namely, that Macquarie was required to lodge a construction certificate application with SLHD and then with the private certifier. Indeed, the internal communications of Macquarie make it clear that it, as well as its consultants, were well aware of what it was required to do.

As to the reasonableness of the time in fact allowed to remedy the defaults, his Honour found that SLHD had ultimately allowed Macquarie 6 – 8 months to remedy the alleged breaches before issuing its termination notices. This was found to be a sufficient amount of time to prepare a modification application and was thus reasonable in the circumstances. Indeed, Macquarie's own submissions appear to accept that a time frame of approximately six months to remedy the default would have been reasonable.

Makary v Hamdan; Hamdan v Makary

[2019] NSWSC 460

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 26 April 2019

ESTOPPEL — equitable estoppel — proprietary estoppel — company associated with the defendant held a five year lease with an option to renew for a further five years over a property owned by the plaintiff — defendant carried out renovation works on the property — whether plaintiff had assured the defendant that a further five year lease with a five year option would be granted if renovation works to the property were undertaken — assurance held not to have been made — estoppel claim dismissed

LAND LAW — leases — claim by landlord for possession of property — defendant continued to occupy property following the termination of a lease — defendant continued to pay rent to the plaintiff whilst negotiations for a new lease were on foot — plaintiff commenced proceedings for possession of property — whether defendant occupied property under a tenancy at will or a periodic tenancy — defendant held to occupy property under tenancy at will — tenancy terminated by commencement of proceedings — judgment for possession entered against the defendant

Facts

This case concerns a service station site in Fairfield Road, Guildford West, which forms part of a parcel of land contained in Auto Consol 7814-55. The first plaintiff, Mr Makary, is the registered proprietor of the land. Mr Makary and the second plaintiff, Makary Investments Pty Ltd, seek orders for possession of the service station against the defendant, Mr Hamdan.

The claim for possession is relatively straightforward. In summary, it is alleged that Mr Makary granted a lease of the premises in favour of Makary Investments Pty Ltd for a term ending on 1 January 2016. Makary Investments Pty Ltd then granted a sublease of the premises to Gas Point Guildford West Pty Ltd (**"Guildford West"**), a company associated with Mr Hardman, for a term ending on 31 December 2015 with an option for a further term of 5 years. Guildford West subsequently failed to exercise the option, and went into liquidation on 11 November 2015. Neither Mr Hamdan, nor any person or entity associated with him, subsequently entered into any lease of the premises for a term. Since the termination of the Guildford West tenancy, the premises have been occupied by Mr Hamdan on the basis of either a tenancy at will or a periodic tenancy from month to month. Further, any tenancy has been terminated by the giving of notice or the commencement of proceedings.

Mr Hamdan and Guilford West bring their own claim in which it is alleged that Mr Makary is bound by an estoppel that precludes him from denying the existence of an equitable lease of the service station for a term of 5 years with an option for a further 5 year term. Specifically, it is alleged that in a conversation between Mr Makary and Mr Hamdan in about July 2014, Mr Makary agreed that if Mr Hamdan undertook a renovation of the service station he would grant a lease for a 5 year term with a 5 year option. Mr Hamdan alleges that he subsequently carried out a renovation of the service station at considerable expense, acting on the assumption that a lease for 5 years with a 5 year option would be granted. Mr Hamdan contends that it would be unconscionable if Mr Makary was permitted to depart from the assumption he induced.

Decision

Darke J found in favour of Mr Makary.

Having considered all of the evidence, his Honour was not persuaded that Mr Makary made any promise to Mr Hamdan, or gave any assurance to Mr Hamdan, that a five year lease with a five year option would be granted if Mr Makary renovated the service station. Indeed, his Honour observed that it was extremely unlikely that a clear promise or assurance of that nature would be given by Mr Makary with no mention of either the nature or scope of the renovations proposed to be carried out, or the rent that would be payable under the new lease.

In finding Mr Hamdan’s estoppel claim to fail, his Honour thus found Mr Makary’s claim for possession to succeed. This was because the equitable estoppel claim was the basis of Mr Hamdan's defence to Mr Makary's claim for possession.

Mangano v Bullen

[2019] NSWSC 1704

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 3 December 2019

REAL PROPERTY — indefeasibility — fraud exception to indefeasibility — Real Property Act 1900 , s 42 — defendant and her late de facto partner ('the deceased') witness the affixation of a company seal of the corporate vendor to a memorandum of transfer of real property under the Real Property Act — memorandum of transfer registered — the defendant and the deceased thereby become tenants-in-common — but at the time of execution of the transfer, the company had already been deregistered — the defendant and the deceased occupy the property until his death in 2015 — shortly before his death, her tenancy-in-common with the deceased is converted to a joint tenancy — the defendant becomes the registered proprietor of the property by survivorship after his death — the plaintiff, the daughter of the deceased and executrix of his estate, seeks a declaration that the transfer and the later creation of the joint tenancy were void as a fraud upon the National Companies and Securities Commission, in whom the property was vested at the time of the 1986 transfer — whether the defendant was knowingly involved in any fraud associated with the transfer — whether the transfer and the later creation of the joint tenancy are defeasible at the suit of the plaintiff

Facts

Camfield Propriety Limited (**"Camfield"**) was incorporated on 31 May 1979 and deregistered on 13 March 1984. During its short existence, Mr Mangano and his partner, the defendant, Ms Bullen, used Camfield as the corporate vehicle to develop five properties in inner western Sydney. They occupied one of these together: a property located in Talfourd Street, Glebe (**"the Glebe property"**).

Almost two and a half years after Camfield's deregistration, Mr Mangano and Ms Bullen transferred the Glebe property to themselves as tenants-in-common (**"the Camfield Transfer"**). The Camfield Transfer was registered on 16 February 1987.

They continued to live in the Glebe property together until Mr Mangano died in July 2015. But just before he died, Mr Mangano converted his tenancy-in-common to a joint tenancy with Ms Bullen. After his death she became registered proprietor of the Glebe property by survivorship.

Mr Mangano had been married before he met Ms Bullen. He had a daughter, the plaintiff, Ms Mangano, by that marriage. Ms Mangano now seeks a declaration that the Camfield Transfer to Mr Mangano and Ms Bullen is invalid and void *ab initio.* Specifically, she argues that Ms

Bullen did not gain indefeasible title to the Glebe Property because Ms Bullen's and Mr Mangano's execution of the Camfield Transfer was a fraud upon the National Companies and Securities Commission (**"NCSC"**). Ms Bullen further contends that the circumstances in which the Camfield Transfer was executed and registered attract the fraud exception to indefeasibility under s42 of the Real Property Act 1900 (NSW) (**"RPA"**).

Decision

Slattery J found Ms Mangano's primary case to fail.

This is because Ms Mangano failed to establish that either Mr Mangano or Ms Bullen participated in any fraud on the NCSC when they executed the Camfield Transfer. Rather, the Camfield Transfer was signed on behalf of the purchasers by the solicitor, Mr Passaro, who was likely unaware of the fact that the vendor did not exist. His Honour observed that it was unlikely that Mr Passaro was participating in a deliberately false act. His Honour further noted that it was likely that the solicitor's involvement presumably also gave Mr Mangano and Ms Bullen each some reassurance that they were proceeding in a legitimate fashion. Indeed, it would be unlikely that the legally unqualified Mr Mangano and Ms Bullen were both cleverly concealing their fraud on the NCSC from their own solicitor.

His Honour further held that the s42 fraud exception to indefeasibility was not enlivened by Mr Mangano and Ms Bullen's conduct in taking the Camfield Transfer. They both gained indefeasible title as a result of registration of the transfer. Accordingly, there was no earlier fraud on her part that could arguably taint Ms Bullen's later acquisition of title by survivorship from her joint tenancy with Mr Mangano after his death.

Mayrin DM Pty Ltd v Kaiyu Deng

[2019] NSWSC 1552

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 31 October 2019

LAND LAW — Caveats — Caveatable interest — What constitutes a caveatable interest — Whether a constructive trust not yet declared by a court is a caveatable interest — Plaintiff seeking an extension of the caveat in circumstances where the only proceeding currently on foot is the plaintiff's application for preliminary discovery

LAND LAW — Caveats — Formal requirements — Requirement to specify particulars of estate or interest claimed — Where defendants assert that the plaintiff has not sufficiently articulated the basis of the claimed interest; described in the caveat as a 'beneficial interest in trust' arising from the defendants' breach of fiduciary, contractual and other duties, rather than specifically as a 'constructive trust'

Facts

Mayrin DM Pty Ltd (**"Mayrin"**) is a property developer. In April 2017 Mayrin retained Mr Deng under a contract of employment as a "Property Acquisition Specialist" to help locate and purchase suitable properties for investment and development. In September 2018 Mayrin entered into a similar agreement with Mr Younes but through a company called Trademark Group Pty Ltd (**"TGP"**). Mr Younes was to help Mayrin find development sites and buyers for projects undertaken by Mayrin. Deng left Mayrin's employ on 22 January 2019 and Younes left on 15 March 2019.

An area of particular interest for projects was Westmead and suburbs adjoining the Sydney Metro West transport development. Both Mr Deng and Mr Younes were involved in searching and assessing properties in and near Westmead. On 31 January 2019 and 7 March 2019 Mr Deng became the registered proprietor of two properties in Westmead (**"the Westmead Properties"**).

On 17 April 2019 Mr Wu, the general manager of Mayrin, received an email from Mr Younes to Mr Deng's old email address at Mayrin. The email was sent by mistake to that address, but it caused Mr Wu to investigate the matter and discover the purchase of the Westmead Properties. The email attached a draft joint venture deed between Mr Deng and Mr Younes.

After discovering these purchases, Mayrin lodged caveats on the respective titles of the Westmead Properties on 25 June 2019.The caveats contained the following description of the "estate or interest claimed":

> *"By virtue of: Beneficial Interest in Trust*

> *Details Supporting the Claim: This property was purchased by the registered proprietor in breach of his employment contract with, his fiduciary duties and duties under the Corporations Act 2001 owed to, the caveator. Accordingly, the caveator has a right in equity and under s 1324 of the Corporations Act to an injunction."*

In September 2019, Mayrin filed a Summons seeking preliminary discovery from Deng, Younes and TGP in relation to the purchase of the properties. By Notice of Motion, Mayrin also sought orders that the caveats be extended until at least after it has obtained the documents it seeks by its Summons. An extension was granted by the Court until 31 October 2019 to enable counsel to provide further written submissions.

The essence of Mayrin's claim is that Mr Deng and Mr Younes have, in breach of their fiduciary duties, contractual duties and obligations imposed by ss 182-184 of the Corporations Act 2001 (Cth), wrongly appropriated the opportunity to purchase the properties that was an opportunity available to and exercisable by Mayrin. Accordingly, Mayrin claims that the circumstances give rise to a constructive trust and that Deng holds these properties on trust for Mayrin.

In the current proceedings, Mr Deng and Mr Younes seek to oppose the extension of the caveats. They maintain that the claim that a property is held on constructive trust gives rise to no caveatable interest in land because a constructive trust is only imposed as a remedial measure.

Decision

Rein J held that the caveats should be extended until after the outcome of the preliminary discovery application is known and Mayrin has had a reasonable opportunity to decide whether to commence substantive proceedings.

Relying on the judgement of White J in *Choi v Kim,* his Honour held that a constructive trust could give rise to a caveatable interest. His Honour noted that while no proprietary interest in the land exists until the Court imposes a constructive trust over the property, the question for determination is not what rights has the Plaintiff now established but what rights it claims to have. As such, his Honour held that the lodgement of the caveat does not require that the claimant prove that it must succeed on its claim but rather that it claims to be entitled to an interest in land and.

Medi-Aid Centre Foundation Ltd v Joys Child Care Ltd (No 2)

[2019] NSWSC 1105

Coram: Walton J

Court: Supreme Court of New South Wales

Date: 27 August 2019

POSSESSION OF LAND — mesne profits — principles — quantification — mesne profits awarded

COSTS — ordinary basis — costs follow the event

Facts

Medi-Aid Centre Foundation Ltd (**"Medi-Aid"**) brought proceedings against Joys Child Care Ltd (**"Joys"**) for vacant possession of its property, being the ground floor, level 1 and level 2 of 60 Campbell Street, Parramatta (**"the Premises"**). Medi-Aid also brought claims for rental arrears, mesne profits (pursuant to an express contractual right and at law) and damages against Joys.

The relief was predicated upon two fundamental considerations. The first was that the Medi-Aid and Joys were parties to a valid registered lease for the premises. The second was that Joys, as lessee, had committed breaches of the lease consisting of a failure to pay rent for more than two years, using the premises contrary to its permitted use as a childcare centre by allowing people to live at the premises and using the premises in a manner contrary to law, by operating a childcare centre without the relevant approvals.

On 22 October 2018, the court gave judgment in the matter: Medi-Aid Centre Foundation Ltd v Joys Child Care Ltd [2018] NSWSC 1586. It was held that a lease was validly entered into on and from 27 July 2015 and, was terminated upon the plaintiff's exercise of the power of entry on 23 March 2017. The Court further held that Joys had breached the lease by failing to pay rent; failing to comply with governance as to use; and failing to comply with all laws regulating the premises.

On the point of mesne profits and damages payable to the plaintiff, the Court held that a number of inconsistencies as to how such costs are to be calculated must be resolved before final orders are made. On 5 November 2018, the plaintiff filed written submission in relation to the question of mesne profits and damages. By that submission, the plaintiff no longer sought damages but made submissions in support of its claim for mesne profits.

Decision

His Honour turned to the unchallenged evidence of Mr Khoury, an experienced property leasing agent, that established that the market rent for the Premises was between $369,985 to $422,840 (inc GST). Erring on the side of caution, his Honour chose to adopt the lower end of the range given by Mr Khoury ($369,985 inc GST per annum). Accordingly, his Honour held that judgment should be given for the Plaintiff in the amount of $588,275.61 (inc GST) for mesne profits from 24 March 2017 to 25 October 2018.

Midcoast Petroleum Pty Ltd v Keldros Pty Ltd

[2019] NSWSC 970

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 1 August 2019

CONTRACTS — construction — interpretation — proper construction of a fuel supply agreement — whether applicable in respect of supply of products to particular premises

CONTRACTS — Breach of contract — Lease and fuel supply agreement — claims for past and future remediation costs, make good, regulatory claims and a claim in debt

Facts

This case concerns a number of actions brought by Midcoast Petroleum Pty Ltd (**"Midcoast"**), the registered proprietor of land in Budgewoi, New South Wales, (**"the Budgewoi Premises"**). Relevantly, the Budgewoi Premises comprised Lot 7 in Deposited Plan 708,066 (**"Lot 7"**), and since 17 April 2014, Midcoast has also become the registered proprietor of the site adjacent to Lot 7 (**"Lot 8"**)

Specifically, Midcoast brought claims against:

- The first defendant (the former lessee of the site), Keldros Pty Ltd (**"Keldros"**), for alleged breaches of a lease and of a separate fuel supply agreement; and
- The second defendant (the sole director of Keldros), Mr Andrew Plant, in his capacity as guarantor of Keldros' obligations under the relevant lease.

At all material times, the Budgewoi Premises has been the site of a motor vehicle service station of which Keldros was the operator from November 2005 until mid-2015.

Midcoast claims that Keldros breached the Lease and Fuel Supply Agreement by:

- Failing to make good (in breach of cll 6.3, 9.2 and 10.4 of the Lease);
- Permitting contamination (in breach of cll 6.11(a), 6.11(b)(i), 6.11(b)(i) of the Lease);
- Failing to remediate (cll 6.5, 6.11 and 9.1 of the Lease); and
- Failing to comply with environmental obligations (in breach of cll 6.2, 6.5 and 6.11 of the Lease)

- Permitting contamination (in breach of cll 10.1, 10.2 and 10.3, of the Fuel Supply Agreement); and

- Failing to comply with environmental obligations (in breach of cll 4.3, 10.1, 10.2 and 10.3 of the Fuel Supply Agreement).

Midcoast seeks to claim the following sums from Keldros:

- Past Remediation Claim: the sum of $8,249.75 paid by Midcoast in respect of an invoice issued to it by Wyong Shire Council (the Council) in September 2011, following the issue by the Council to Keldros of a clean-up notice dated 31 January 2011 (the clean-up notice) in relation to the Budgewoi Premises;

- Future Remediation Claim: the sum of $639,561 for future remediation of the service station site arising from contamination that is alleged to have occurred to the Budgewoi Premises during Keldros' occupation of the site;

- Regulatory Claims: the sum of $59,895.44 by way of loss and damage said to have arisen from Keldros' alleged failure, during its occupation of the Budgewoi Premises, to take the necessary steps to comply with environmental regulations which were introduced in 2008 and 2010;

- The Make Good Claim: an amount of either $87,188.75 or $38,019.60 for Keldros' alleged failure to comply with its make good obligations on the determination of the relevant lease; and

- The Debt Claim: the sum of $35,000 (plus a claimed service charge) in respect of a debt allegedly owing by Keldros for petroleum products supplied to it by Midcoast during the term of the lease.

Decision

Ward CJ found in favour of Midcoast in limited amounts.

Enforceability of the Fuel Supply Agreement

Before considering the alleged breaches claimed by Midcoast, his Honour first turned to consider whether the Fuel Supply Agreement was applicable and enforceable against Keldros.

His Honour noted that definition of "Site" provided in the Fuel Supply Agreement did not refer to the Budgewoi Premises or any location as such. In the absence of a specified location, his Honour held that on the proper construction of the agreement, it was intended to apply in relation to the supply and delivery of products to Keldros at any petrol retailing facility from which, from time to time, Keldros was operating. Indeed, his Honour found that the fact that the agreement contemplated that there might be more than one such location supported such a construction. That being said, his Honour held that the Fuel Supply Agreement did not encompass the adjacent Lot 8 and, relevantly, the fuel infrastructure situated on Lot 8.

Past Remediation Claim

His Honour held that Keldros was liable for breaching cll 6.5 and 6.11(d) of the Lease, and in turn, was liable to indemnify Midcoast the costs of remediation.

Relevantly, clause 6.5 required Keldros to execute all works required by a local authority upon or in respect of the use of the premises and to indemnify Midcoast against all costs, charges and expenses.

Clause 6.11(d) further provided that where a notice or order is issued by an authority in relation to "Contamination" arising during Keldros' occupation of the premises, Keldros is required, if Midcoast complies with the notice, to indemnify Midcoast for all costs and expenses incurred.

While his Honour refrained from suggesting that the clean-up notice arose from any act or omission on the part of Keldros, he nonetheless held the clean-up notice constituted a direction by a local authority. Accordingly, Keldros was liable to indemnify Midcoast for these costs.

Future Remediation Claim

His Honour found Keldros liable to pay costs of the Future Remediation Claim, but only in a limited amount.

Midcoast's claim was based on the allegation that Keldros had breached cl 6.11(b)(i) of the Lease which provides that's Keldros must not permit the Premises, Building, Land or the Environment to be contaminated, polluted or affected by Contaminants. Specifically, it is said by Midcoast's experts that contamination to Lots 7 and 8 was most likely caused by the failure of three underground storage tanks and/or associated fuel lines at some time between the commencement of Keldros' lease and up to and including the January 2011 pollution incident.

While his Honour noted that the operation of cl 6.11(b)(i) was not limited to contamination affecting Lot 7, he did not think Keldros "permitted" the failure of tanks 2–4 and hence permitted the release of contaminants onto Lot 8. Nor was there any obligation on the part of Keldros to prevent any such contamination on Lot 8 (an area over which it had no control). Accordingly, his Honour found Midcoast had no right to indemnification for the cost of remedial works affecting Lot 8.

With respect to the residual contamination on Lot 7, his Honour held that Keldos was in fact in breach of cl 6.11(b)(i) of the Lease. That said, his Honour was not persuaded that Midcoast had successfully established the quantum of any damage suffered by it as a result of the contamination, which was to a relatively small portion of Lot 7. Accordingly, his Honour limited Midcoast's Future Remediation Claim to the costs of deploying Oxygen Release Compound socks (ORCs) to monitor contamination on Lot 7 (being $162), together with such proportion of the costs of the environmental assessment reports obtained.

Regulatory Claims

His Honour refused to allow recovery of any amount for Midcoast's Regulatory Claim as there was no proof of any loss due to breaches of (NSW) Protection of the Environment (Underground Petroleum Storage Systems) Regulation 2008.

Make Good Claim

His Honour dismissed Midcoast's Make Good Claim on the basis the items either became otiose once there was a substantial reconfiguration of the Budgewoi Premises, or they fell within the reasonable fair wear and tear exception.

The only part allowed was the sum of $150 for the plant anchor points to workshop slab which Mr Plant conceded Keldros was responsible to make good.

Debt Claim

While there was no dispute between the parties that Keldros had incurred a debt for petroleum products in the amount of $35,000, the parties disagreed as to whether a security bond provided by Keldros to Midcoast in or around August 2015, could be used to discharge the debt.

His Honour held that it could; this was because there was a clear direction by Keldros to permit Midcoast to apply the amount for the purpose of discharging the debt and it was not open to Midcoast to retain the amount in a bank account as some form of security for a claim it might later make for breach of the Lease.

Claim against Mr Plants

His Honour held that Mr Plant was liable, as guarantor, for the loss and damage caused by Keldros for its breach of the Lease.

In summary, Midcoast claims the following amounts from Keldros:

(1) the sum of $8,249.75 paid by Midcoast in respect of an invoice issued to it by Wyong Shire Council in September 2011, following the issue by the Council to Keldros of a clean-up notice dated 31 January 2011 (the clean-up notice) in relation to the Budgewoi Premises (**"Past Remediation Claim"**);

(2) the sum of $639,561 for future remediation of the service station site arising from contamination that is alleged to have occurred to the Budgewoi Premises during Keldros' occupation of the site (**"Future Remediation Claim"**);

(3) the sum of $59,895.44 by way of loss and damage said to have arisen from Keldros' alleged failure, during its occupation of the Budgewoi Premises, to take the necessary steps to comply with environmental regulations (**"Regulatory Claims"**);

(4) an amount of either $87,188.75 or $38,019.60 for Keldros' alleged failure to comply with its make good obligations on the determination of the relevant lease (**"Make Good Claim"**); and

(5) the sum of $35,000 in respect of a debt allegedly owing by Keldros for petroleum products supplied to it by Midcoast during the term of the lease (**"the Debt Claim"**).

Decision

Ward CJ found in favour of Midcoast and entered into judgement against the defendants in the following amounts:

(1) in respect of the Past Remediation Claim: $8,249.75;

(2) in respect of the Future Remediation Claim: $162 (being one-quarter of the amount attributable to the deployment of an ORC sock in MW12 in 2016), together with such proportion of the costs of the environmental assessment reports obtained in 2004, 2005 and 2007 that relates to an assessment of contamination;

(3) in respect of the Make Good Claim: $150;

(4) in respect of the Debt Claim: $35,000, to be set off in its entirety by the sum of that amount drawn down by the plaintiff in or about 2015 on presentation of a bank guarantee that had been provided by the first defendant to the plaintiff.

Myra May Worth by her tutor NSW Trustee and Guardian v Rodney Worth

[2019] NSWSC 122

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 19 February 2019

REAL PROPERTY — Possession List — claim by registered proprietor against licensor — defence filed does not plead a defence to claim — defence struck out — leave to re-plead

Facts

The plaintiff and the late Geoffrey James Worth were the registered proprietors of a property at 18 Lake Heights Road Lake Heights. Geoffrey James Worth died on 9 August 2016. They owned the property together as joint tenants.

The defendant, who is the son of the plaintiff, is in occupation of the property. He says that he has lived in the property for 52-years and he wishes to stay there. He claims to have permission from the plaintiff to stay in the property.

He has filed a defence on 30 November 2018 where he claims to be a protected person and says that he is entitled to live in the house after his mother moved into a nursing home. He says he is her only family. He says that he is the executor of her will and that he has permission from the plaintiff to reside in the property.

Decision

Davies J found none of the matters included in the defence filed to constitute a defence to a claim for possession. As present defence does not provide any defence that the law recognises, his Honour ordered that it be struck out.

That said, given that the defendant was unrepresented, his Honour adjourned the matter for a brief period to enable the defendant to obtain legal advice and to file a further defence.

Myra May Worth by her tutor NSW Trustee and Guardian v Rodney Worth (No. 2) [2019] NSWSC 244

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 8 March 2019

LAND LAW — possession of land — implied licence agreement for defendant to occupy land — licence withdrawn — defence struck out and no further defence filed — plaintiff entitled to possession

Facts

This case follows on from the judgement *of Myra May Worth by her tutor NSW Trustee and Guardian v Rodney Worth* summarised above.

Despite Davies J adjourning the matter in the previous hearing, the defendant has nonetheless failed to obtain legal advice and thus has not filed a new defence.

Decision

With there being no defence, Davies J found the plaintiff to be entitled to default judgment. Accordingly, his Honour entered into judgment for the plaintiff for possession of the land situated at and known as 18 Lake Heights Road, Lake Heights

National Australia Bank Limited v Sayed

[2019] NSWSC 653

Coram: McCallum J

Court: Supreme Court of New South Wales

Date: 8 March 2019

MORTGAGES AND SECURITIES — mortgages — duties, rights and remedies of mortgagee — power of sale — fiduciary duty of mortgagee in possession exercising power of sale — whether bank breached its duty to mortgagor during sale of the mortgaged property

Facts

These proceedings began as a claim for possession brought by National Australia Bank against Mr and Mrs Sayed in respect of their residential property at Woonona. The loans secured by that property were also secured by a vacant development property at Corrimal consisting of two adjoining lots. The Corrimal property had been sold by the bank as mortgagee in possession prior to the commencement of the proceedings. Mr Sayed has brought a cross-claim against the bank for breach of its fiduciary duty as mortgagee in possession in respect of that sale.

The issues raised by the claim for possession were resolved in an “In Principle Agreement” entered into by the parties shortly after the commencement of a hearing before Adams J. The issues left for determination are those related to Mr Sayed’s cross-claim.

Relevantly, the purchase price stated on the contract for sale when Mr Sayed purchased the Corrimal property in June 2006 was $1,500,000. The property was mortgaged to NAB to secure a loan in the sum of $500,000 and later was sold by NAB on 19 February 2010 for $545,454.54.

Mr Sayed contends that the fair market value of the property at the time of the sale was $1,430,000 (based on an internal valuation by the bank before the loan was advanced) or alternatively $1,050,000 (based on the highest formal valuation obtained after the bank went into possession of the property). Mr Sayed contends that the sale at $545,454.54 was at a gross undervalue. He seeks equitable damages and a declaration that the bank breached its duty as mortgagee exercising a power of sale.

Mr Sayed contends that, in breach of that duty, the bank “wilfully and recklessly sacrificed Mr Sayed's interests as mortgagor in the sale and the circumstances surrounding the sale in that it failed to take reasonable precautions to obtain a proper price for Corrimal”.

Decision

McCallum J was not persuaded on the evidence that NAB had breached its fiduciary duty as mortgagee in possession. The cross-claim was thus dismissed with costs.

His Honour rejected the claim that NAB, in advertising the sale as a sale by a mortgagee in possession, failed to advertise Corrimal properly prior to the sale. This was because there was no evidence to that effect, and even if there was, such would not amount to a breach of any duty of the mortgagee.

His Honour also rejected the claim that NAB failed to obtain adequate valuations of the property and alternatively that the bank disregarded previous valuations it had obtained. Rather, his Honour was satisfied that the bank acted properly in testing the discrepancies in the information it was receiving concerning the value of the property.

National Australia Bank Ltd v Charlton; Charlton v The General Manager, NSW Rural Assistance Authority (No 4)

[2019] NSWSC 1477

Coram: Walton J

Court: Supreme Court of New South Wales

Date: 29 October 2019

REAL PROPERTY — farm debt — possession of land-default under farm mortgage — Farm Debt Mediation Act — mediation — whether s 11 certificate valid — whether satisfactory mediation — construction of s 4(1A) — was mediation in good faith — did mediator provide summary of mediation at end of mediation — was notice provided by bank that it had agreed to a mediation — was bank required to mediate with farmer in personal capacity and in capacity as trustee — whether subsequent mediation invalid — enforcement action — whether proceedings void pursuant to s 6 of the Farm Debt Mediation Act — whether enforcement action prior to mediation — scope of enforcement action under the Farm Debt Mediation Act — was notice of cancellation of overdraft a farm mortgage — whether bank entitled to withdraw reliance on default notices — whether bank engaged in continuation of enforcement action — trust law — was property held by trust — is trust liable to pay the loans rather than individual — whether joint trustee — whether individual validly resigned as trustee — whether individual indemnified under trust deed — service — was cancellation notice required to be served — was cancellation notice served — was default notice served — consumer law — misleading or deceptive conduct — whether representation made by bank that facilities would be extended — administrative law — judicial review — error of law — procedural fairness — application for extension of time to bring proceedings — application dismissed

Facts

The National Australia Bank Ltd (**"NAB"**) brought debt and possession proceedings against Josephine Joan Charlton in her own capacity and as trustee for the Phoenix Trust (**"the Trust"**) Specifically, NAB sought to claim a debt owed by Ms Charlton which was made up of an Overdraft, a First Business Options Loan and a Second Business Options Loan and further sought an order for possession under a mortgage.

A cross-claim was then brought by Ms Charlton in her own capacity and Kevin O'Brien as Trustee of Phoenix Trust against the General Manager of the NSW Rural Assistance Authority (**"the RAA"**) and NAB. These were judicial review proceedings alleging that the mediation managed by the RAA was unsatisfactory.

Decision

Walton J found in favour of NAB. His Honour held that NAB had discharged its onus of establishing the matters necessary for an entitlement to possession and judgement for debt.

Specifically, his Honour held that it was clear on the evidence that:

(1) Ms Charlton is the registered proprietor of the property and holds (or at least held) the legal interest in that property in her capacity as trustee of the Trust;

(2) Ms Charlton entered into the First Business Letter of Offer and Second Business Letter of Offer;

(3) Ms Charlton received, and had the benefit of, monies from NAB pursuant to the Overdraft, First Business Options Loan and Second Business Options Loan;

(4) Ms Charlton granted security over the property to NAB in respect of those facilities pursuant to the Mortgage; and

(5) Ms Charlton has defaulted in her obligations under the First Business Letter of Offer, the Second Business Letter of Offer and the Mortgage.

His Honour further dismissed the cross-claim advanced by Ms Charlton and Mr O'Brien for the following reasons:

(1) His Honour rejected the claim that a lack of good faith by NAB could bring the mediation within the limited circumstances outlined by Sheppard AJA in *Gain* as to what constituted an unsatisfactory mediation. Indeed, there was no evidence that the mediation fell within the limited circumstances alluded to in Sheppard AJA's judgment in *Gain* .

(2) His Honour further rejected the proposition that the RAA failed to afford Ms Charlton procedural fairness in its decision to issue the s 11 certificate. His Honour observed that Ms Charlton could not seek to impugn the decision of the RAA on the basis that they failed to take into account relevant material, simply because the decision-maker ascribed it little to no weight. Such an approach would amount to an impermissible merits review.

New South Wales Land and Housing Corporation v Orr

[2019] NSWCA 231

Coram: Bell P, Ward JA, McCallum JA

Court: New South Wales Court of Appeal

Date: 19 September 2019

LEASES AND TENANCIES — Social Housing Tenancy Agreement — Agreement terminated by order of NCAT pursuant to s 91 of Residential Tenancies Act — whether termination would occasion undue hardship to tenant — meaning of undue hardship in context of Residential Tenancies Act — discretion to terminate notwithstanding undue hardship — whether NCAT had regard to hardship in exercise of its discretion — adequacy of reasons for exercising discretion

ADMINISTRATIVE LAW — requirement for NCAT to give reasons — adequacy of reasons for making of a discretionary decision to terminate a social housing tenancy agreement — whether NCAT had regard to hardship to the tenant of termination — whether reasons for decision adequately disclosed how hardship was taken into account

TRIBUNALS — New South Wales Civil and Administrative Tribunal — required to give reasons — adequacy of reasons — reference to 'all of the circumstances of the case'

Facts

This case concerns a social housing tenancy agreement between the New South Wales Land and Housing Corporation ("**the Corporation"**) and Ms Susan Orr (**"the respondent"**). Under the agreement, Ms Orr was given a leasehold interest in a property at Kingscliff (**"the Property"**).

<u>*Litigation History*</u>

The Corporation applied to the NSW Civil and Administrative Tribunal seeking to terminate the agreement following the respondent's second conviction for cultivation of cannabis at the Property. This application was made pursuant to s91 of the Residential Tenancies Act.

It was common ground that the respondent suffered a disability within the meaning of the Anti-Discrimination Act and the meaning of s 154D(3) of the Residential Tenancies Act. The relevance of this was that it meant that the Tribunal was not bound to make a termination order pursuant to s 154D(1) of the Residential Tenancies Act if it was satisfied that the termination order, if made, would be likely to result in undue hardship being suffered by the respondent.

The Tribunal on this occasion determined that the respondent was not likely to suffer undue hardship as a result of a termination order for the purposes of s 154D(3) of the Act. The

Tribunal on this occasion determined that the respondent was not likely to suffer undue hardship as a result of a termination order for the purposes of s 154D(3) of the Act.

The respondent then unsuccessfully appealed the Tribunal's decision to the Appeal Panel. Following this, the respondent sought leave to appeal the Appeal Panel's decision in the Supreme Court. The matter came before Adamson J who granted the respondent leave to appeal, set aside the Appeal Panel's decision and orders, set aside the Tribunal's decision and orders and ordered that the matter be remitted to the Tribunal for rehearing.

Current Proceedings

The current proceedings concern an application brought by the Corporation to appeal the decision of Adamson J. The Corporation claims that the primary judge erred in finding that:

(1) The Tribunal had not considered a mandatory relevant consideration (namely, hardship) such that the discretion miscarried;

(2) The Tribunal failed to indicate the process of evaluation for the purposes of s 91 of the Act had been properly carried out such that the discretion miscarried;

(3) The Tribunal's reasons were inadequate for failing to indicate whether hardship was taken into account in exercising the s 91 discretion;

(4) The reasons issued by the Tribunal were inadequate for failing to indicate that the process of evaluation for the purposes of s 91 of the Act had been properly carried out.

Decision

The Court of Appeal found in favour of the Corporation.

The Court held that the Tribunal did take hardship to the respondent into account in reaching its decision. It noted that the Tribunal's analysis of the undue hardship question in [8] of its reasons treated both fault and hardship as relevant considerations.

It further highlighted that the Tribunal had given adequate explanation as to *how* it took hardship into account. Namely, the Tribunal noted that aspects of the respondent's case on hardship were not supported by evidence; to the extent that the respondent gave evidence of hardship, the Tribunal found such evidence evasive; and the evidence of hardship was outweighed by other discretionary considerations, in particular, the Tribunal's consideration of the issue of fault and likelihood of further misconduct.

Nguyen v Nguyen

[2019] NSWSC 131

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 22 February 2019

REAL PROPERTY — resulting trust — constructive trust — oral agreement between plaintiff and defendant to purchase property — property purchased in name of defendant — plaintiff pays the deposit, stamp duty and a portion of the mortgage payments for the property — whether defendant holds the property as to a 40% interest on constructive trust for the plaintiff — whether the defendant holds the property legally and beneficially

Facts

The plaintiff, Ms Thi Anh Thuy Nguyen, and the defendant, Dr Anh Tuan Nguyen, are siblings. They made an oral agreement in 2001 about the purchase of a property in Woodlands Road, Terrigal (**"the Terrigal Property"**). Soon afterwards, the Terrigal Property was purchased in Dr Nguyen's name as registered proprietor.

Dr Nguyen contends that the parties agreed, at the time of its purchase, that he would be both the legal and beneficial owner of the Terrigal Property and that, after the purchase, he would rent the property to the plaintiff for $250 per week.

But Ms Nguyen contends they agreed that: they would purchase the Terrigal Property together as joint beneficial owners; and they would be equally responsible to repay loans used to fund the purchase of the property. She claims, in the alternative, that her brother holds the Terrigal Property on trust for her either: to an extent reflecting her financial contributions to the purchase and later improvement of the property; or on the basis of a later 2003 revised arrangement, in which she says it was mutually acknowledged that she would take a 40% interest in the property.

Decision

Slattery J found that Dr Nguyen held the property on constructive trust for Ms Nguyen as there was an express agreement to jointly invest in the Terrigal Property. Specifically, his Honour declared that Ms Nguyen held a 40% interest in the Terrigal Property

In arriving at this decision, his Honour pointed to the high level of Ms Nguyen's early financial commitment to the purchase. Notably, Ms Nguyen paid the deposit of $44,000, the stamp duty of $15,294, legal fees of $1,487 and a bank valuation fee of $500. Ms Nguyen also co-borrowed $335,000 from the CBA with Dr Nguyen to purchase the Terrigal Property and assumed with him a joint liability to pay that loan. Moreover, in the 15 months following the purchase, Ms Nguyen paid at least $90,000 to the CBA in several lump sum contributions to reduce the loan liability to the CBA of $335,000.

Dr Nguyen never proposed that Ms Nguyen be relieved of her liability to the CBA so he could take full responsibility for the liability himself. Rather he continued to take advantage of her creditworthiness, whilst she paid the rates on the property. His Honour observed that these facts were more consistent with a joint venture agreement than a mere rental arrangement.

In addition to this, his Honour noted that Ms Nguyen behaved throughout as a joint-venturer. This was because Ms Nguyen and her husband renovated and improved the Terrigal Property in a manner only consistent with a joint venture. She managed the letting of the property only consistent with a joint venture. And until he locked his sister out in 2014, Dr Nguyen seemed to accept the benefit of his sister's and her husband's improvement work and other efforts to maximize the return from the property in the manner that it was offered; as conduct in furtherance of a joint venture.

Nicholas Arthur Stokes v Molly Harris Toyne

[2019] NSWSC 274

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 18 March 2019

LAND LAW — Conveyancing — Contract for sale — Deposit — Application for relief from forfeiture of deposit pursuant to Conveyancing Act 1919 (NSW) s 55(2A) — Whether unjust or inequitable — Factors relevant to exercise of the Court's discretion — improvements to land between exchange and termination — lengthy pre-contractual negotiations between parties — Significant funds expended to obtain finance — Vendor's right to terminate exercised after several extensions — Purchaser conferred benefit and detriment on Vendor by works undertaken on land — Purchaser caused modest increase in value of land — Order for return of deposit

Facts

This case concerns an application under section 55(2A) of the *Conveyancing Act 1919* (NSW) by Nicholas Stokes, a purchaser under two contracts for sale of land, for the return of the deposits from Molly Toyne, the vendor. The deposits total $110,000.

Ms Toyne and her husband had originally endeavoured to develop and subdivide two properties which they owned in Gundaroo and wished to engage Mr Stokes' services as a contractor. However, it was later proposed that Mr Stokes would develop and subdivide one property and be paid from the sale of the sub-division. Ultimately, it was agreed that Mr Stokes would purchase both properties with a view to developing the land between exchange and completion. Such did not happen due to inclement weather and difficulties obtaining finance, and Ms Toyne terminated the contracts.

Whilst the protracted process caused both Mr Stokes and Ms Toyne significant frustration, the question for the court is whether Ms Toyne should refund or retain the deposits.

Decision

Rees J noted that in contracts for sale of land where the purchaser takes possession and does work before completion but the contract is terminated, the Court may “think fit” to order the repayment of the deposit having regard to:

(1) whether the purchaser is a sophisticated commercial person such as a developer;

(2) whether the purchaser was responsible for the lack of finance to complete the purchase;

(3) whether the contract contains a special condition which governs the parties' rights in respect of the improvements in the circumstances;

(4) whether the vendor has received other benefits or compensations aside from the deposit, such as an occupation fee, rates and outgoings, mesne profits, damages or interest on a deposit released on exchange; or

(5) whether the vendor has on-sold the property for an higher price, where the uplift appears referable to the work done by the purchaser.

In particular, her Honour noted that each case will necessarily turn on its facts as to whether, having regard to these and other matters, “unjust and inequitable consequences” will result from forfeiture of the deposit.

In the present case, her Honour observed that Mr Stokes had sustained substantial losses as a result of his attempt to complete the contracts of sale. He spent some $35,000 on building costs and council fees; he spent time working on the site which he could otherwise have spent working for his company; and he spent some $100,000 on finance costs.

Her Honour noted it was only when Mr Stokes appeared to have finally overcome the multitude of hurdles in his path — many of which were there at Ms Toyne's request — that Ms Toyne exercised her right to terminate. This was found by her Honour to be extremely harsh in the circumstances given that Ms Toyne would have appreciated that in terminating the contract, she would likely inflict financial loss on Mr Stokes from which he would be unlikely to recover. Moreover, Ms Toyne did this in circumstances where Mr Stokes had been labouring on the site for months to her knowledge, including by improving the portions of the property which she wanted to continue to live on.

As such, her Honour found that it would be unjust in all of the circumstances for Ms Toyne to retain the benefits of the work done by Mr Stokes and also the deposit.

NS Admin Pty Ltd v Singh

[2019] NSWCATAP 69

Coram: Durack Senior Member, Robertson Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 26 March 2019

LEASES AND TENANCIES — retail and commercial tenancies legislation — retail shop lease — water ingress — breach of covenant of quiet enjoyment — proof of loss — hearsay evidence in expert's report — leasing next door premises to a competitor — alleged unconscionable conduct by lessor — no error of law — no appealable error of fact

Facts

NS Admin Pty Ltd (**"NS Admin"**) was the landlord of the respondents, Mr and Ms Singh, under a retail lease of a grocery and takeaway food store in Western Sydney. The retail lease was entered into on 26 August 2015 for a term of five years, with an option to renew for a further five years. Under the lease the respondents were required to use the premises as an "Indian Supermarket/Take Away Shop".

The statutory disclosure statement provided by NS Admin to Mr and Ms Singh on 22 July 2015 contained contradictory statements about exclusivity of use. Amongst the "Key Disclosure Items", on the first page of the disclosure statement, it was clearly stated that the lease did not provide the lessee with exclusivity in relation to the permitted use of the premises (item 8). On the other hand, on the second page, it said that the permitted use of "Retail store or as otherwise agreed" was exclusive to the lessee.

On various occasions from June 2016, water leaked into the premises through the roof and ceiling. In a witness statement, Ms Singh gave considerable evidence about the water ingress and the serious disruption that this caused. She also gave evidence about the failure of the appellant to take any effective steps to rectify this problem despite notification and requests from the respondents. It was not until 20 December 2017 that the appellant replaced the roof of the premises. In addition to this, in July 2017, NS Admin leased out the store next door to the Mr and Ms Singh's premises to a shop called Meena Bazaar. This store sold the same groceries as those sold by the respondents.

Before the Tribunal, the respondents sought to claim damages for loss suffered as a result of the water ingress problem. These included:

(1) $6,025.81 in respect of damaged stock;

(2) $17,643.19 in respect of lost profit on lost sales in the catering arm of the business;

(3) $2,430.17 in respect of lost profit on lost sales of takeaway hot food; and

(4) $13,300.00 in respect of cleaning costs.

These amounts were calculated by the respondents' expert accountant, Mr Haddad, in two expert reports.

At first instance, the Tribunal upheld the claim for each of these amounts except as to the quantum of the claim for cleaning costs. Instead, the Tribunal awarded an amount of $1,770.00 in respect of this claim. The Tribunal further found that the operation of Meena Bazaar had an adverse effect on the profitability of the respondents' business and thus amounted to unconscionable conduct. Accordingly, a further $15,236.09 was awarded to the respondents.

NS Admin now seeks to appeal this decision. Specifically, the appellate seeks to reduce the award by a total of $43,105.26. This reduction is made up of two sums - first, the sum of $15,236.09 in respect of a finding of unconscionable conduct by the appellant concerning the emergence of the competitor. Secondly, the sum of $27,869.17 in respect of the leaking roof.

Decision

Unconscionable Conduct Claim

The Appeal Panel held that it was not open to the appellant to simply argue that the Tribunal must have applied the wrong test because if the correct test had been applied the Tribunal would have found that the conduct was not unconscionable. Such does not amount to an error of law. Rather, the Tribunal's conclusion about unconscionability was an evaluative judgment and one which minds might well differ.

Given this, the Appeal Panel was not persuaded the Tribunal's finding of unconscionable conduct was one that was beyond the legitimate choice of the Tribunal or that it was more than arguably wrong or resulted in an injustice that was reasonably clear.

Water Ingress Claim

Focussing particularly on the Category (1), (2) and (3) losses, NS Admin submitted that the Tribunal found causation of loss in the absence of any evidence linking the water ingress with the particular losses claimed. It was submitted that whilst there was lay evidence from Ms Singh in general terms about damage to stock and disruption to the business, including to the catering arm, there was no evidence to the effect that the losses claimed were the specific consequences of the water ingress. Rather, NS Admin alleged that all that the Tribunal was presented with were assumptions as to those aspects set out in Mr Haddad's first report.

While the Appeal Panel accepted that better proof might have been supplied, they nonetheless rejected this submission. The Appeal Panel held that it was sufficiently apparent from Mr Haddad's report that he based his calculation of losses upon instructions from the respondents as to the specific details making up the losses. While this amounted to hearsay evidence, the Tribunal was not bound by the rules of evidence. Accordingly, insofar as the application for leave to appeal applied to Category (1), (2) and (3) losses, such was dismissed by the Appeal Panel.

That being said, NS Admin was granted leave to appeal in respect of the Category (4) losses on the basis of an error of law. This is because, there was no evidence that the respondents suffered any pecuniary loss at all for cleaning costs. On the contrary, the evidence suggested that the clean-up work was done by the respondents themselves.

Oak Capital Mortgage Fund Limited v Dlakic

[2019] NSWSC 1538

Coram: Fullerton J

Court: Supreme Court of New South Wales

Date: 7 November 2019

MORTGAGES AND SECURITIES — mortgages — duties, rights and remedies of mortgagee — default on mortgage — whether mortgagee entitled to possession of land — leave granted to issue writ of execution

CONTRACTS — cross-claim — general contractual principles — harsh, unconscionable or oppressive contracts and statutory remedies — whether higher interest rate under loan agreement amounted to a contractual penalty — whether contract unjust for purposes of s 9(1) of the Contracts Review Act — no relief granted

Facts

Kasim Dlakic and his wife Hamida Dlakic (the first and second defendants) are the registered proprietors of a property in Randwick which they hold as joint tenants (**"the Randwick Property"**). They have been the registered proprietors of the Randwick Property since 1989.

The plaintiff, Oak Capital Mortgage Fund Limited (**"Oak Capital"**), claims an entitlement to an order for possession of the Randwick Property. This is made on the basis of a guarantee and indemnity dated 28 December 2017 provided by each of the defendants in respect of a loan advanced by Oak Capital to Beachview Australia Pty Ltd (**"Beachview"**) in the amount of $1,193,594.The guarantees and indemnities were secured by a registered mortgage granted by each of the defendants against the Randwick Property. The mortgage incorporated two schedules executed by the first and second defendants as directors of Beachview which had the effect of incorporating into the mortgage Beachview's obligations as borrower under the loan agreement with the plaintiff.

The defendants deny any liability to the plaintiff and deny the plaintiff has an enforceable mortgage over the Randwick Property. Specifically, the defendants contend that "the loan, guarantees and mortgage" were unfair and unjust within the meaning of s 9 of the *Contracts Review Act 1980* (NSW) and that they should be set aside pursuant to s 7 the Act.

Decision

Fullerton J found in favour of the plaintiff and made an order for possession of the Randwick Property.

His Honour rejected the defendants' claim that the operation of the contract or the manner in which it was made renders either the contract or any of its provisions unjust in all the circumstances. In particular, his Honour rejected the contention that the defendants were operating under any substantial incapacity at the time of entering into the arrangements with the plaintiff, either as directors of Beachview or as guarantors of that loan, such that their capacity to appreciate and assess the risks entailed in getting a fresh mortgage over the Randwick Property was in any sense compromised.

Perry v Gao

[2019] NSWSC 1022

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 2 August 2019

EQUITY — Trusts and trustees — Constructive and resulting trusts — Family and domestic relationships — Where a de facto husband advanced the full purchase price for a house of which the de facto wife became the sole registered proprietor; whether the de facto wife held the property on trust for the de facto husband — Held: there was no trust, as the de facto husband intended to, and did, make a gift of the property to the de facto wife (although the transaction was set aside on other grounds)

EQUITY — Undue Influence — Unconscionable conduct — Special disability or disadvantage — Where the Plaintiff is a lonely, elderly man and the Defendant is a much younger woman; where parties are in a de facto relationship; where the Plaintiff spoke of committing suicide if the Defendant would not enter into, and remain in, a relationship with him; where the Plaintiff sold his house and, at the Defendant's behest, used the proceeds to buy another house which she became the sole registered proprietor of; where the Plaintiff did not receive independent legal advice about the transaction — Held: transaction set aside on grounds of undue influence and, alternatively, unconscionable conduct. Plaintiff thereby entitled to a 50% interest in the property (50% being all that he seeks)

FAMILY LAW — Property — Financial agreements — s 90UB agreement — Where the property the subject of the agreement was owned wholly by one partner; where the property the subject of the agreement has been sold and the proceeds used to buy another house in which the couple lived; where the agreement is set aside due to being 'impracticable' pursuant to s 90UM

FAMILY LAW — Property — De facto relationship — Adjustment of property interests — Where the relationship lasted for 7-8 years; where the Plaintiff contributed the only major asset of the relationship with minimal contributions from the Defendant; where the Plaintiff made a gift of his entire interest in the property to the Defendant early in the relationship so that she became the sole registered proprietor; where the Plaintiff seeks an order pursuant to s 90SM for only 50% of the property, despite arguably being entitled to a greater share — Held: Plaintiff owns a 50% share of the property, to be distributed to him following sale by trustees

Facts

These proceedings concern a property known as 129A Railway Street Parramatta (**the "Parramatta Property"**). The Plaintiff, Mr Perry, claims that he has, or should be found to have, an interest of 50% in that property. The Plaintiff's primary argument is based on equitable principles (the doctrines of resulting and constructive trusts, as well as undue influence and unconscionable conduct). The Plaintiff also makes a claim in the alternative pursuant to s 90SM of the *Family Law Act 1975* (Cth) (**the "FLA"**), should he be unsuccessful on the primary claim.

The Defendant, Ms Gao, is the registered proprietor of the Parramatta Property, and became so on 9 February 2010. At the time of entry into the purchase contract in December 2009 the Plaintiff paid the $66,000 deposit. The balance of funds ($594,000) came from the proceeds of sale of another property at Curl Curl (**the "Curl Curl Property"**), which was owned by the Plaintiff. The Plaintiff claims that having met the Defendant in April or March 2009 they had decided, by September 2009, to live together in a de facto relationship at the Curl Curl Property and then in the Parramatta Property, with settlement of the purchase of the Parramatta Property to take place in February 2010.

The Plaintiff asserts that in September 2009 he and the Defendant entered into a written financial agreement (**"the Financial Agreement"**) pursuant to s 90UB of the FLA. The Agreement is signed by both parties, is dated September 2009 and provides that upon the breakdown of the relationship, Mr Perry shall transfer his interest in the Curl Curl Property to Ms Gao. This was to be done in accordance with the following schedule:

Period of Relationship (no. in years or part thereof)	Percentage of interest in the Property to be transferred
1	15%
2	25%
3	35%
4	45%
5+	50%

It is also common ground that at a meeting on 14 December 2009 in relation to the purchase of the Parramatta Property, the Plaintiff instructed a solicitor, Ms Alice Yang (of Alice Yang & Associates), in the presence of the Defendant, that the Defendant should be named as the sole purchaser and become registered proprietor of the Parramatta Property. Ms Yang acted for the Plaintiff on the sale of the Curl Curl Property to a third party and on the purchase of the Parramatta Property in the name of the Defendant.

The issues of determination are as follows:

(1) Did the Plaintiff make a gift of the Parramatta Property to the Defendant and, if so, was the gift intended to be a gift of only the legal interest?

(2) If he did make a gift of all of his interest in the Parramatta Property, was it a result of:

(a) undue influence exercised by the Defendant on the Plaintiff; and/or

(b) unconscionable conduct on the part of the Defendant, and specifically because of some special disadvantage under which the Plaintiff laboured and of which the Defendant was, as at 14 December 2009, aware?

(3) Were the Plaintiff and Defendant in a de facto relationship as at December 2009, as the Plaintiff contends?

(4) What, if anything, is the significance of the Financial Agreement and should it be set aside pursuant to s 90UM of the FLA?

(5) What orders, if any, should be made pursuant to s 90SM of the FLA?"

Decision

Rein J held that while the Plaintiff did intend in December 2009 to make a gift of his entire interest in the Parramatta Property he did so:

(1) Because he was elderly and lonely, and infatuated with the Defendant. He was unable to appreciate that his decision to do so when they had spent very little time living together in a de facto relationship (on his case) and no time living together (on the Defendant's case) was a very imprudent decision, and entirely disregarded his own interests.

(2) Either unaware that the Defendant intended to maintain her relationship with her boyfriend (on his evidence) or aware that she did (on her evidence), making the gift even more unwise.

(3) In circumstances where, not three months before, he had entered into the Financial Agreement that protected him to a degree that the gift did not.

(4) In circumstances where, on the Defendant's evidence, she had no real interest in any relationship with him and no affection for him whatsoever but regarded him as a lonely and desperate old man who she could not imagine wanting to live with and, on his evidence, because he hoped for a normal romantic and physical relationship.

Accordingly, Rein J set aside the Plaintiff's gift of the Parramatta Property to the Defendant on grounds of undue influence and ordered that the Plaintiff be entitled to a 50% interest in the Parramatta Property (50% being all that he seeks).

While his Honour treated this as an instance of undue influence on the part of the Defendant, his Honour noted that the present case may also be framed as unconscionable conduct on the part of the Defendant in attempting to retain the benefit that she has obtained by reason of the Plaintiff's infatuation with her and his vulnerability.

Furthermore, while it was unnecessary to consider the issues arising from the FLA, his Honour nonetheless noted that he would have allowed the Plaintiff to have the s 90UB Financial Agreement set aside for impracticability pursuant to s 90UM. Accordingly, his Honour would have allowed an order to be made pursuant to s 90SM of the FLA that the Plaintiff be entitled to a 50% interest in the Parramatta Property.

Pham v Enterprise ICT Pty Ltd

[2019] NSWSC 1857

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 17 December 2019

LAND LAW — Caveats — Lodgement of caveat claiming same interest as previous caveat — Lodgement with leave of court — Caveat lodged in breach of earlier order not to lodge further caveats

Facts

These proceedings concern a property at Chiswick (**"the Chiswick Property"**) which was sold by Mr Robert Sebie (**"Mr Sebie"**) to the plaintiffs in the present proceedings, Mr and Mrs Pham. Over the course of a lengthy litigation, it was held that the Chiswick Property was in fact transferred to Mr and Mrs Pham and the proceeds of sale were paid into Court. There is presently fixed for hearing before Sackar J in the new term an argument concerning the entitlement of various interested parties to those proceeds of sale. Those parties include Mr Sebie, ENA Development Pty Ltd (**"ENA"**) Court, Mr Sebie's ex-wife and Mr and Mrs Pham.

The present application is advanced by ENA for the extension of a caveat which was lodged over the Chiswick Property on or about 23 April 2019 (**"the Second Caveat"**). It is common ground between the parties that the Second Caveat has lapsed.

ENA had previously lodged a caveat lodged against the Chiswick Property in January 2018 (**"the First Caveat"**). The two caveats are relevantly in exactly the same form and claim substantially the same interest. Some minor differences should be noted.

- In the First Caveat the registered proprietor of the Chiswick Property is Mr Sebie. In the Second Caveat the registered proprietor of the Chiswick Property is Mr and Mrs Pham.

- The First Caveat claimed an estate or interest being that "ENA Development Pty Ltd has equitable estate (as an owner and mortgagee)" in the Chiswick Property. By contrast, the Second Caveat claimed an estate or interest being "ENA Development Pty Ltd has an equitable interest (as an owner)" in the Chiswick Property.

Decision

Kunc J dismissed ENA's application.

His Honour found that there were two insuperable difficulties which ENA faced in its attempt to lodge, yet again, a caveat over the Chiswick Property.

The first is that the First Caveat, which is in substantially the same terms as the Second Caveat, was the subject of a fully contested application determined by Slattery J. The orders when were made on 26 March 2018 included:

(5) *Order pursuant to section 74MA of the Real Property Act 1900 that by 4pm on 29 March 2018 ENA remove the caveat which bears dealing number AN33247 (referred to as the 'the Caveat' in these orders).*

…

(7) *Pursuant to Real Property Act section 74O, ENA is restrained from lodging, or causing to be lodged, any further caveat or other dealing on the title to the Chiswick property.*

Accordingly, ENA's lodgement of the Second Caveat was in clear breach of the order made by Slattery J.

The second is that the Chiswick Property has now been transferred to Mr and Mrs Pham. As such, ENA is unable to assert an interest in the Chiswick Property capable of defeating the indefeasible title of Mr and Mrs Pham as its now registered proprietors.

Phung v Phung

[2019] NSWSC 117

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 19 February 2019

LAND LAW — contract for sale of land — claim for specific performance — whether oral contract for sale of land concluded — defendant subsequently signs written note referring to agreement to 'transfer the ownership' of property — whether written note satisfies writing requirements under Conveyancing Act 1919 (NSW), ss 23C(1)(a) and 54A — doctrine of part performance — whether sufficient acts of part performance — plaintiff goes into possession, pays outgoings and undertakes renovations — sufficient acts of part performance established — whether specific performance should be refused on the basis of unfairness or hardship — specific performance granted

Facts

The plaintiff, Cam Vinh Phung, seeks orders in the nature of specific performance of an alleged oral agreement for the sale of a residential unit in Swete Street, Lidcombe (**"the Lidcombe Property"**). The Lidcombe Property is owned by the plaintiff's younger brother, Cam Tai Phung, who is the defendant in the proceedings.

The alleged oral agreement is claimed to have been made in about January 2010. In short, the alleged agreement is to the effect that the defendant would transfer the title to the Lidcombe Property to the plaintiff in consideration of the plaintiff paying $180,000 to the defendant. The plaintiff has in fact made payments of approximately $180,000 to the defendant since January 2010.

The defendant disputes that any agreement for sale of the unit was made. He contends that if any agreement was made, it was an agreement conferring a right of residence or a life tenancy. The defendant further contends that the plaintiff cannot enforce the alleged contract for sale, or any proprietary interests arising from it, due to a want of writing that satisfies ss 23C(1)(a) and 54A(1) of the *Conveyancing Act 1919* (NSW).

In response to this, the plaintiff seeks to rely on a document that was prepared by the defendant in September 2013, and failing that, invokes the law relating to part performance. Finally, the defendant raises various arguments as to why the Court should not in any event make orders in the nature of specific performance.

Decision

Darke J found in favour of the plaintiff and made an order of specific performance.

His Honour concluded that the plaintiff has established that in about January 2010 a contract for the sale of the Lidcombe Property came into existence. His Honour observed that when viewed objectively in the then prevailing circumstances, the parties should be taken to have agreed that the plaintiff would pay $180,000 to the defendant in return for a transfer of the title of the Lidcombe property. Indeed, by early March 2010 instalments totalling $50,000 had been paid and accepted. From there, the remaining portion of the $180,000 was paid by instalments of $200 per week.

With respect to the requirement of writing set out in s54A of the *Conveyancing Act,* his Honour noted that the plaintiff's claim to enforce the contract would be precluded unless the agreement or some memorandum or note thereof, is in writing, and signed by the party to be charged, relevantly the defendant. While the plaintiff submitted that the document prepared and signed by the defendant on 25 September 2013 amounted to a memorandum or note of the agreement, such was not accepted by his Honour. This is because the document did not contain all the essential terms of the agreement as there was no reference at all to the consideration to be paid for the transfer of the Lidcombe Property to the plaintiff.

That being said, his Honour found that the plaintiff could rely on the doctrine of part performance to enforce the contract. His Honour observed that the plaintiff had successfully established the existence of acts that are unequivocally, and in their own nature, referable to a contract for the sale of the Lidcombe Property. In particular, his Honour pointed to the plaintiff's acts in taking possession of the Lidcombe Property, carrying out renovations to the property, and paying the outgoings in respect of the property, as amounting to sufficient acts of part performance.

Private Mortgages Australia Pty Limited ACN 600 628 813 as trustee for the PMA Trust v Stever

[2019] NSWSC 462

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 26 April 2019

CONTRACTS — construction and interpretation — whether fees stipulated in agreement are payable where loan did not proceed — whether fees stipulated for payment constitute a penalty — Andrews v Australia and New Zealand Banking Group Limited (2012) 247 CLR 205 applied

CONTRACTS — unjust contracts — Contracts Review Act 1980 (NSW) — where defendant chose not to read document — where defendant not a sophisticated businessperson

LAND LAW — caveats — whether caveatable interest arose before fees became due and payable — extension of operation of caveat

Facts

The plaintiff, Private Mortgages Australia Pty Limited as trustee for the PMA Trust (**"Private Mortgages Australia"**) sent a letter of offer dated 27 February 2015 to the first and second defendants, Merril Stever and Bruce Maples. Pursuant to this offer, the plaintiff was to arrange a loan of $550,000 to EMIC Holdings Pty Ltd I.I.O.R & A.T.F 165 Donaldson Range Road Unit Trust (**"EMIC"**). The defendants executed the letter of offer as guarantors.

The loan was to enable EMIC to purchase property in Razorback NSW (**"the Razorback property"**), which the second defendant and his business partner wanted to develop. However, the purchase of the Razorback property fell through and the loan did not proceed.

The plaintiff claims that an originator fee in the amount of $18,150 and the balance of legal and administration costs of $2,750 are payable by the defendants as guarantors pursuant to the executed letter of offer.

The defendants accept that they signed the letter of offer as guarantors but say that the amounts claimed are not payable in circumstances where the loan did not proceed to settlement. In the alternative, they claim that the amounts are not payable either because they are a penalty or, insofar as it relates to the first defendant, the letter of offer is unjust and therefore void under the *Contracts Review Act 1980* (NSW).

The plaintiff also seeks orders in relation to a caveat it lodged to secure payment by the defendants of fees and expenses over land owned by the first defendant at Carrington Road, Robertson (**"the Robertson property"**), including that the caveat be extended until the amounts claimed as owing are paid.

The defendants dispute that any caveatable interest existed at the time the plaintiff lodged the caveat. To the extent there currently exists a caveatable interest, they submit the Court should exercise its discretion and not allow the caveat to remain.

Decision

Construction of the Contract

Henry J held that words used in the Executed Letter of Offer were unambiguous and make plain that the obligation to pay the originator fee and the legal and administrative fees was not limited to a situation in which the loan proceeded to settlement or the plaintiff had the funds available and was otherwise ready, willing or able to proceed with the loan. Rather, the Fees section in the Executed Letter of Offer is expressed in mandatory terms.

Furthermore, his Honour observed that the obligation on the defendants (as guarantors) to pay those fees is also clearly set out on the last page of the Executed Letter of Offer where it states that the guarantors "agree to pay" the originator and legal and administrative fees in consideration for the plaintiff proceeding with the establishment of the loan. Indeed, that agreement to pay was not expressed to be limited to payment upon settlement of the loan. Instead, it was expressed as pursuant to the Executed Letter of Offer which expressly provides for payment in the event that the loan does not proceed to settlement.

Penalty

His Honour further rejected the defendants' submission that the requirement to pay an originator fee in accordance with the Executed Letter of Offer amounts to a penalty and is thus void. His Honour considered the definition of a penalty set out in the High Court case of *Andrews v Australia & New Zealand Banking Group Ltd* (2012) 247 CLR 205. Relevantly, it held that:

> "a stipulation prima facie imposes a penalty on a party (the first party) if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. In that sense, the collateral or accessory stipulation is described as being in the nature of a security for and in terrorem of the satisfaction of the primary stipulation."

In the present case, his Honour held that the obligation to pay the originator fee did not arise as a result of the defendants' failure to satisfy an obligation under the Executed Letter of Offer. As such, his Honour found the defendant's argument to fail because the obligation on the defendants to pay the originator fee is not "collateral" to, or intended to secure satisfaction for, some other obligation or promise contained in the Executed Letter of Offer.

Unjust Contract

His Honour was not satisfied that the Executed Letter of Offer or the provisions relating to the payment and liability for the originator and legal/admin fees were unjust within the meaning of s 7 of *Contracts Review Act*. The reasons for this are as follows:

- The first defendant was not under any special disability which meant she was unable to understand the agreement into which she was entering;

- The first defendant's counsel did not submit or adduce any evidence that the terms contained in the Executed Letter of Offer were unusual or contained special features which gave rise to some substantive injustice;

- There was no predation and no unconscionable conduct or behaviour by which the plaintiff sought to take advantage of the first defendant; and

- The submission by the first defendant that she would not have signed the letter of offer if the terms had been explained to her did not seem plausible in light of her evidence that she signed because she understood her husband needed the funds urgently for a good deal.

Caveatable Interest

His Honour held that the terms of the charge granted by the defendants in the Executed Letter of Offer created an immediate security and equitable interest in the defendants' property, including the Robertson property. His Honour observed that the security charge and equitable interest were not dependent on or postponed until the contract was terminated or until the plaintiff became entitled to demand payment of the originator and legal/admin fees.

Rather, the equitable interest in the defendants' property arose upon the grant of the fixed charge by the defendants to the plaintiff on 27 February 2015, being the date of the Executed Letter of Offer.

Accordingly, his Honour held that the plaintiff had a caveatable interest on 13 March 2015 and was entitled to lodge the Caveat as it did to secure payment of the originator and legal/admin fees. Moreover, as the fees have not been paid, his Honour granted an extension of the caveatable interest in the Robertson property.

Orders

His Honour made the following orders:

(1) Declare that the plaintiff has a caveatable interest in the land described in certificate of title folio number 2/843560, known as and situated at 102 Carrington Falls Road, Robertson NSW 2577.

(2) The operation of caveat number AJ331474 be extended until the payment of the judgment debt or further order of this Court (whichever is earlier).

(3) Judgment for the plaintiff against the first and second defendants in the sum of $20,900.

(4) Interest to be payable on the judgment sum in accordance with section 101 of the *Civil Procedure Act 2005* (NSW).

(5) The first and second defendants to pay the plaintiff's costs of the summons.

Rayner v Rayner (No 2)

[2019] NSWSC 819

Coram: Lonergan J

Court: Supreme Court of New South Wales

Date: 2 July 2019

LANDLORD AND TENANT — notice of motion — application for stay of possession order made by New South Wales Civil and Administrative Tribunal pending appeal -appeal listed in November — further stay granted

Facts

The current proceedings concern an application for a stay of possession of the residence at which the plaintiff lived. Orders were previously made ex parte by Lonergan J on 11 June 2019. His Honour granted the plaintiff a stay of possession until 9 am, 14 June 2019, and ordered that the defendant be served with the notice of motion and be given an opportunity to be heard about any ongoing stay.

This application follows on from an unsuccessful appeal by the plaintiff from an order made by the New South Wales Civil and Administrative Tribunal on 30 July 2018 enforcing the defendant's termination notice under s 85(2) of the *Residential Tenancies Act 2010* (NSW). The plaintiff has since sought leave to appeal to the Supreme Court.

The plaintiff argued that he had an arguable appeal from the Panel decision because it did not properly deal with his equitable defence.

Decision

Lonergan J ordered a stay of possession until 9am on 8 November 2019 which was conditional upon the payment of an occupation fee of $28.57 per day.

His Honour referred to the judgment in *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694 which held that an applicant seeking a stay of possession is required to demonstrate a reason or an appropriate case to warrant discretion in his favour. In determining this, there is also a requirement that the balance of convenience be considered and the competing rights of the parties be balanced.

While his Honour was unable to form a clear view as to the prospects of success of the plaintiff's arguments, he nonetheless found that if the stay was not granted, the plaintiff would be removed and the appeal rendered otiose. Indeed, his Honour acknowledged that he did not have the benefit of completed evidence, or fully articulated submissions that would allow him to have an informed basis to hold that the appeal is entirely baseless and doomed to fail.

Realm Resources Ltd v Aurora Place Investments Pty Ltd

[2019] NSWSC 379

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 8 April 2019

DEEDS — what amounts to a deed — whether document intended to be a deed — competing indications of intention — sublease negotiated and drafted by solicitors — where a clause stipulated that the sublease is a deed — where execution pages do not use language associated with deeds — sublease held to be intended to operate as a deed

DEEDS — execution — execution of deeds by corporations — where a clause stipulated that the sublease is a deed — whether sublease executed as a deed in accordance with Corporations Act 2001 (Cth) s 127(3) — whether sublease expressed to be executed as a deed — sublease held to be executed as a deed in accordance with s 127(3)

DEEDS — delivery — intention to deliver — parties entered into non-binding heads of agreement prior to executing sublease — clause in heads of agreement stated that proposed sublease is subject to 'satisfactory legal documentation being entered into by the parties' — where the parties decided to use a deed — where sublessee executed deed and provided it to sublessor — where sublessee requested sublessor to execute deed and have it registered — conduct of sublessee evinced an intention to be immediately bound — sublessee held to have delivered deed

CONTRACTS — formation — agreement — acceptance of offers — where offer by sublessor prescribed a particular mode of acceptance — where sublessor required the sublessee to provide certain certificates of currency to accept offer — where sublessee did not provide all certificates of currency — no agreement reached between the parties

CONTRACTS — formation — agreement — revocation or withdrawal of offers — where sublessee made an offer by sending executed sublease to sublessor — where sublessee subsequently sent letter to sublessor asking sublessor not to execute sublease 'at this stage' pending further communication — letter not effective to withdraw or revoke offer — offer accepted by sublessor executing sublease — agreement reached between the parties

PRINCIPAL AND AGENT — contract by agent — ratification — where the holder of a power of attorney acting for sublessor executed sublease — attorney not shown to have executed in accordance with requirements of power — where acts of attorney subsequently ratified by principal — where the sublessee had in the meantime withdrawn from the sublease — ratification held to relate back to time of execution of sublease

Facts

This case concerns a dispute about whether a binding sublease for a term of 5 years was entered into between the Realm Resources Ltd (**"Realm"**) as sublessee and Aurora Place Investments Pty Ltd (**"Aurora"**) as sublessor.

Aurora contends that in August 2017, Realm became bound by the terms of a sublease, for a 5 year term commencing on 1 September 2017. Specifically, Aurora contends that Realm became bound by any one of the following three ways:

(1) execution of the sublease as a deed and delivery of the sublease to Aurora;

(2) acceptance of an offer to enter into the sublease, by executing and returning the sublease and providing a cheque, a bank guarantee and a certificate of currency of insurance; or

(3) by making an offer to enter into the sublease, which offer was accepted by Aurora executing and returning the sublease.

Realm, on the other hand, disputed that the sublease was intended to operate as a deed. Realm further contended that the parties negotiated on the basis that the sublease would not become binding until either:

(1) the sublease had been executed and exchanged by the parties; or

(2) the sublease had been executed by Realm, and Aurora had communicated to Realm that all relevant board approvals had been obtained and it considered itself to be bound by the sublease.

Realm contended that before either of those events occurred, it withdrew from the proposed sublease.

Decision

Darke J found in favour of Aurora and held that the parties were bound by the sublease.

His Honour found that overall, the indications that the parties intended that the sublease would operate or take effect as a deed clearly outweigh the indications to the contrary. In particular, his Honour pointed to cl 19.20 which stated that "This Lease is a deed, even if it is not registered." Such was found to strongly point to an intention that the sublease would, as an instrument, operate as a deed rather than a simple contract. His Honour observed that cl 19.20 operated as more than a mere description of the instrument. Rather, it was a substantive provision, chosen by the parties, that was directly concerned with the nature and manner of operation of the sublease.

His Honour then turned to consider whether formality requirements had been adequately met. Indeed, it was clear that Realm had executed copies of the sublease in accordance with s 127(1) of the *Corporations Act*; that is, without using a common seal, signed by a director and company secretary. However, the issue was whether Realm executed the sublease as a deed for the purposes of s 127(3) of the Corporations Act.

Section 127(3) provides:

> "A company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection (1) or (2)."

His Honour was of the view that when Realm executed the copies of the subleases in accordance with s 127(1), it executed the sublease as a deed within the meaning of s 127(3).

His Honour further found that Realm had delivered the deed, and thereby became bound by it such that it could not be recalled. Insofar as the email sent by Maddocks on 24 August 2017 was an attempt to recall the deed, his Honour found it to have been ineffective. This was because the language of the email was ambivalent, and failed to clearly convey that the offer was withdrawn, or that Realm no longer wished to proceed. Accordingly, his Honour concluded that the deed, binding upon both parties, came into effect on 25 August 2017 when it was executed on behalf of Aurora and delivered.

Realtek Holdings Pty Ltd v Wetamast Pty Ltd

[2019] NSWSC 1869

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 20 December 2019

CONTRACTS — Breach of contract — Breaches of implied obligations of vendor under contract for the sale of business and sublease — Derogation from the relevant grants in circumstances where the purchaser was completely denied possession and use of the premises and was prevented from conducting the business purchased, and where the vendor sought to recapture as much of the benefit of the goodwill sold as possible — Transaction documents validly terminated in the circumstances

CONTRACTS — Breach of contract — Consequences of breach — Total failure of consideration argument rejected — Purchaser's entitlement is to damages against the vendor — Calculation of damages

CONTRACTS — Unconscionable conduct — Unconscionable conduct within the meaning of s 21 of the Australian Consumer Law — Relationship between breach of contract and unconscionable conduct

TORTS — Miscellaneous torts — Interference with contractual and other relations — Liability for inducing breach of contract — Director not liable for causing breach of contract by company

CONTRACTS — Construction — Context — Where the parties entered into a suite of transaction documents at or around the same time to give effect to a bargain — Transaction documents to be read together

Facts

The plaintiffs are Realtek Holdings Pty Ltd (**"Realtek"**) and Mr Daniel Lambert (**"Mr Lambert"**). At all material times, Realtek has engaged in business as a real estate sales agency, with Mr Lambert acting as its principal.

The defendants are Wetamast Pty Ltd (**"Wetamast"**), and Mr Brian Dorling (**"Mr Dorling"**). Wetamast conducted the business of a real estate agency as a franchisee of LJ Hooker Franchising Ltd, and later Raine & Horne Ltd, from premises at Princes Highway, Dapto NSW (**"the Dapto office"**). Until he retired about two years ago, Mr Dorling was the principal of Wetamast.

These proceedings arise out of a contract for sale of business between Wetamast as vendor and Realtek as purchaser, dated 2 May 2012. The sale concerned that part of Wetamast's LJ Hooker franchise business that consisted of a property sales agency for a price of $200,000.

This meant that Wetamast would retain that part of its business that consisted of the management of its letting business and its rent roll.

To assist Realtek pay the purchase price, Wetamast and Realtek entered into a deed of loan dated 18 May 2012, under which Wetamast advanced Realtek $50,000 to go towards the purchase price on certain terms as to repayment. Realtek, on the same date, gave a charge over its assets under a security agreement to secure its liability to repay the loan to Wetamast.

On 2 May 2012, Mr Lambert entered into a deed of guarantee in favour of Wetamast, whereby he guaranteed the obligations of Realtek to that company.

In order to enable Realtek to enjoy the benefit of its arrangement with Wetamast, on 24 May 2012, LJ Hooker, as franchisor, entered into a franchise agreement with Realtek as franchisee and Mr Lambert as guarantor.

Following the execution of these agreements, Mr Lambert, and the other employees of Realtek, shared the Dapto office. However, over the ensuing months, the relationship between Mr Lambert and Mr Dorling deteriorated, and various events occurred that undermined the relationship. These may be summarised as follows:

- Without notice to Realtek, Mr Dorling decided that Wetamast would cease operating as an LJ Hooker franchisee and that he would rebadge Wetamast's business as a Raine & Horne franchise. Mr Dorling caused the LJ Hooker sign and livery to be removed from the premises, and the corresponding name of Raine & Horne and its livery installed.

- Realtek and Mr Lambert were faced with a fait accompli. It was a term of Realtek's LJ Hooker franchise agreement that it continue to operate its franchise business under the LJ Hooker name. However, it was entirely impractical for Realtek to continue to operate as an LJ Hooker franchise property sales agency business in competition with the Raine & Horne franchise businesses that would henceforth be conducted from the same Dapto office.

- Consequently, on or about 23 September 2013, Realtek served on Wetamast notices of termination of the contract for sale, the sublease and the security agreement. Thereafter, Mr Lambert did what he could to operate the LJ Hooker franchise property sales agency business from his home, until about November 2013 when he found a new office in which to carry on the business.

- Eventually, Realtek found a permanent home for its business, but on 31 May 2015, the LJ Hooker franchise agreement was not renewed by the franchisor, which had given the six months' notice of its decision not to renew that was required by law. Realtek was able to make an alternative arrangement to enter into a franchise with First National Real Estate, and, as I understand the case, it has continued to trade as a franchisee of that franchisor.

As Realtek had not, by the time it purported to terminate its agreements with Wetamast, repaid the whole of the $50,000, and as some payments for shares in the outgoings in respect of the lease of the Dapto office had not been made by Realtek, Wetamast instituted proceedings to recover the amounts that it claimed were owed in the Local Court at Wollongong.

Realtek and Mr Lambert filed the statement of claim in these proceedings and sought the following:

(1) Declarations that the various agreements between Realtek and Wetamast, including the contract for sale, had validly been terminated by Realtek.

(2) An order that Wetamast repay it the amount of $183,333.33 or, in the alternative, $200,000. The lesser amount reflects the portion of the $50,000 that Realtek had borrowed from Wetamast that it has not repaid.

(3) An entitlement to damages from Wetamast for breach of the contract for sale and sublease.

Decision

Breach of implied contractual obligations

Robb J held that the unusual degree of cooperation that was required between Wetamast and Realtek if the latter was to enjoy all of the benefits for which it paid the $200,000 price, meant that even after the execution by Wetamast of so much of the consideration that it was able to provide at the time of completion on 18 May 2012, Wetamast remained subject to implied legal obligations. These were described by his Honour as follows:

(1) Wetamast was prohibited from taking any step that unreasonably diminished Realtek's ability to fully operate the business of the sales arm of the LJ Hooker franchise that had been sold to it, or to take any action calculated to regain from Realtek the benefit of the goodwill of that business; and

(2) Wetamast was prohibited in its capacity as sub-lessor of the Dapto office from altering the structure or appearance of the premises in any way that unreasonably interfered with Realtek's ability to operate the LJ Hooker franchise, including its ability to comply with its obligations under the franchise agreement.

His Honour found that Wetamast had fundamentally breached the implied obligations in a manner that had the result that Realtek was completely denied possession of the premises demised by this sublease and the use of the Dapto office, and was entirely prevented from conducting the LJ Hooker property sales agency franchise business from that office.

In determining damages, his Honour concluded that while Realtek may have enjoyed some of the rights and benefits for which it bargained, that enjoyment was largely ephemeral. This was because Mr Dorling wilfully caused Wetamast to breach the implied obligations in a manner that plainly brought Realtek to its knees. Thus, it was found that Realtek had lost the benefit of the whole of the $200,000 price, save for the $35,000 representing the value of the continuing business. Consequently, His Honour found Realtek to be entitled to an order that Wetamast pay $165,000 in damages.

Declarations of valid termination by Realtek

In view of finding Wetamast's breach as having substantially deprived Realtek of the whole benefit of the contract, his honour held that Realtek was entitled to terminate the contract. His Honour further found that the notice of termination served by Realtek was valid.

Wetamast's claim

His Honour found that $18,750.05 of the $50,000 debt remained outstanding at the termination date. This was in addition to a sum $1,433.56 of outstanding outgoings and expenses. Accordingly, his Honour found Wetamast liable to pay damages to Realtek equal to $165,000 less the total of $18,750.05 and $1,433.56. The amount of damages is $144,816.

Reliance Financial Services Pty Ltd v Sunset 53 Pty Ltd

[2019] NSWSC 531

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 10 May 2019

CIVIL PROCEDURE — No appearance — Service — Absent parties

REAL PROPERTY — Caveat — Removal of caveat — Property held by discretionary trust — Removal of trustee — Appointment of new trustee — Vesting of property in new trustee — Registrable mortgage in the property

Facts

A caveat had been lodged by Reliance Financial Services Pty Ltd (**"Reliance Financial"**) over certain property in South Maroota, NSW (**"the South Maroota Property"**). The caveat claimed an equitable interest in the South Maroota Property, being that interest securing certain outstanding debts allegedly owed by Sunset 53 Pty Ltd (**"Sunset 53"**), the registered proprietor of the South Maroota Property, to Reliance Financial.

Specifically, Reliance Financial claimed to be owed a debt of $1,200,000 pursuant to a Deed of Acknowledgement and Security (**"the Security Deed"**) executed on 23 July 2010 and an additional debt of $531,820 alleged to have been advanced to Sunset 53 in October and November 2010 for the purchase of the South Maroota Property. Reliance Financial claimed that Sunset 53's liabilities were secured by an unregistered charge or mortgage against the South Maroota Property, pursuant to the terms of the Security Deed.

The caveat dispute was resolved by agreement between Sunset 53 and the second and third defendants (respectively, ASV Consulting Pty Ltd (**"ASV"**) and South Maroota Farm Pty Ltd (**"South Maroota"**)). That settlement resulted in the making of orders by consent between those parties for the dismissal of Reliance Financial's claim on the basis that it agreed to withdraw the caveat.

However, what was left extant in the proceedings were two cross-claims.

The first was brought by Sunset 53 and Mr Angelo Russo (the director and shareholder of Sunset 53) against an accountancy firm CAP Accounting (**"CAP"**), Mr Sam Cassiniti (as agent of that firm) and Reliance Financial. They sought a declaration that the Security Deed was void and an order that it should be set aside; or, alternatively, damages from CAP and Mr Sam Cassaniti, who were retained to incorporate Sunset 53.

It was alleged that it was unconscionable or negligent for CAP and Mr Sam Cassaniti to allow Sunset 53 to enter into the Security Deed, or to fail to disclose that Sunset 53 had entered into the Security Deed prior to the appointment of Sunset 53 as trustee of the South Maroota Trust. Sunset 53 alleged that Reliance Financial had knowledge of this unconscionable conduct on the basis of the knowledge of Mr David Cassaniti, who was the sole director of Reliance Financial, the sole director of CAP, the settlor of the South Maroota Trust, and the cousin of Mr Sam Cassaniti.

The second claim was brought by South Maroota and ASV against Sunset 53 and Reliance Financial. Relevantly, on 25 September 2017, Sunset 53 was removed as trustee of the South Maroota Trust and replaced by South Maroota. On the same date, Sunset 53 executed a transfer to South Maroota, as transferee, in respect of the South Maroota Property. Following this, on 29 November 2017, South Maroota entered into a loan agreement with ASV to pay out Sunset 53's liability to the Commonwealth Bank of Australia (which had been registered as first mortgagee over the South Maroota Property and was originally a party to these proceedings).

South Maroota and ASV sought declarations that Sunset 53 had not entered into the Security Deed; that no amount was owing under the Security Deed; and that any charge or mortgage under the Security Deed was not enforceable (including on the ground that Sunset 53 did not enter into the South Maroota Trust, that trust not being settled until on or about 18 October 2010, some three months after the alleged entry into the Security Deed).

First Cross Claim

The matter was initially listed for hearing on 9 November 2018. However, there was no appearance for Sunset 53 or Mr Russo on that occasion. Furthermore, while those parties were notified of the listing of the matter for hearing, Sunset 53 and Mr Russo again failed to attend the present proceedings. Given this, Ward CJ made an order pursuant to UCPR r 29.7(4) that the first cross-claim should be dismissed with costs.

Second Cross Claim

His Honour held that it was appropriate to make the declarations and grant the relief sought by South Maroota and ASV in respect of the second cross-claim, in order to: finalise the proceedings; avoid any further dispute arising between Sunset 53, South Maroota and ASV regarding their dealings affecting the South Maroota Trust; and ensure that the South Maroota Property vests in South Maroota as trustee of the South Maroota Trust.

Based on admissions made by Sunset 53 in its defence to the second cross-claim, his Honour found they were sufficient to establish that:

- Sunset 53 held the South Maroota Property on trust for the South Maroota Trust;
- Sunset 53 was removed from the office of trustee on 25 September 2017 and South Maroota was appointed as trustee;
- Sunset 53 executed a transfer of the South Maroota Property on 25 September 2017 and the transfer was delivered to South Maroota on the same day;

- the transfer is held by South Maroota in its capacity as trustee;
- ASV Consultancy repaid Sunset 53's liability to the Commonwealth Bank of Australia with the consequence that it is subrogated to the Commonwealth Bank of Australia in respect of first registered mortgage number AF906215; and
- ASV retains a registrable interest as first mortgagee in the South Maroota Property.

Roads and Maritime Services v United Petroleum Pty Ltd

[2019] NSWCA 41

Coram: Basten JA, Macfarlan JA, Payne JA, Sackville AJA, Preston CJ of the LEC

Court: New South Wales Court of Appeal

Date: 6 March 2019

LAND LAW — compulsory acquisition — compensation — interest in land acquired terminable on one month's notice — claim for loss attributable to disturbance — termination of business — claim for loss of ongoing profits of business — Health Administration Corporation v George D Angus Pty Ltd [2014] NSWCA 352 not followed

LAND LAW — compulsory acquisition — compensation — loss attributable to disturbance — claim for additional rental paid to acquiring authority for period between compulsory acquisition and vacant possession

COSTS — compulsory acquisition — claim for compensation — claimant successful at trial — claim rejected on appeal — claim not unreasonable — exception to general rule that costs follow the event — Dillon v Gosford City Council [2011] NSWCA 328; 184 LGERA 179 applied

Facts

In August 2015, Roads and Maritime Services (**"RMS"**) compulsorily acquired a parcel of land for the purposes of the Pacific Highway upgrade between Woolgoolga and Ballina. The land was owned by two companies and leased to a third, related company, which operated a service station and restaurant business known as the Harwood Roadhouse.

The owners of the fee simple estate were offered (and accepted) compensation in an amount in excess of $3 million. The present appeal involves an assessment of the compensation payable to the company, United Petroleum Pty Ltd (**"United"**), which operated the Harwood Roadhouse.

United accepted that it had no claim for compensation for the market value of its interest in the land, which was a tenancy terminable on one month's notice. Rather, it claimed compensation for "loss attributable to disturbance", due to the loss of its business calculated as a capital sum based on maintainable earnings for an indefinite period. That claim was accepted by the primary judge, Robson J, in the Land and Environment Court. As calculated from the date of vacant possession, the amount awarded was a little under $2 million.

In addition to this sum, United was awarded a further $83,000 to compensate for the difference between the rent which United would have paid, but for the acquisition, and the higher sum paid to the appellant for continued occupation of the land from the date of the compulsory acquisition to the date on which the appellant obtained vacant possession.

RMS sought to appeal this decision on the following grounds:

(1) The primary judge erred in finding that 'lost profits can, and in the circumstances do, constitute costs reasonably incurred' within the meaning of the Just Terms Act; and

(2) The primary judge erred in awarding United $83,000 for the difference in rent, as payment to RMS was not the direct and natural consequence of the acquisition of the terminable interest in the land, but rather the consequence of United's decision to remain in occupation at the agreed fee.

Decision

The Court of Appeal allowed the appeal.

The Court accepted that on a correct construction of s 59(f), financial losses, such as loss of profits of a business, do not necessarily fall outside the scope of "any other financial costs" in s 59(f). However, any loss of profits incurred after the business was terminated (and the actual use of the acquired land ceased) does not fall within s 59(f), as the incurring of the financial loss was not "relating to the actual use" of the land or "as a direct and natural consequence of the acquisition". Accordingly, it was held that the primary judge erred in its calculation of compensation as the capitalised value of a notional perpetual stream of profits from the business on the acquired land.

The Court further accepted RMS's argument with respect to the rental adjustment. It held that there is no authority for the proposition that an occupation fee payable under s 34 is recoverable as loss attributable to the disturbance of the land, pursuant to s 59(f). Indeed, the cost incurred by United was a direct and natural consequence of its decision to stay in occupation for the agreed occupation fee.

Salloway Pty Ltd v Barlow

[2019] NSWSC 1234

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 19 September 2019

LAND LAW — mortgages — construction — time stipulations — where first plaintiff granted to the defendant a registered mortgage in respect of a property in North Avoca — mortgage granted pursuant to special condition under a contract for sale of property in Central Mangrove entered into between the second plaintiff as purchaser and defendant as vendor — where Central Mangrove property the subject of a Clean-Up Notice issued by the Environmental Protection Agency — where mortgage secures obligation to repay $250,000 loan made by the defendant in the nature of vendor finance — where clause in mortgage requires the defendant to forgive the loan if notice stating that the Clean-Up Notice has been complied with is not received by mortgagor within 12 months of the date of the mortgage — where notice not received by mortgagor within 12 months — whether the 12 month time period is essential — time period held to be essential — the $250,000 loan held to be forgiven

EQUITY — equitable remedies — relief against penalties — mortgage given in connection with a contract for the sale of land — whether clause in mortgage requiring the defendant to forgive a $250,000 loan in the event that a notice is not received within 12 months of the date of the mortgage attracts the penalty doctrine — whether clause requiring the forgiveness of the loan out of all proportion to the legitimate commercial interests of the parties to the transaction — clause part of arrangements made for the setting of the consideration to be paid for the transfer of the land — clause not characterised as penal

EQUITY — equitable remedies — relief against forfeiture — whether clause in mortgage requiring the defendant to forgive a $250,000 loan in the event that a notice is not received within 12 months of the date of the mortgage is intended to secure the defendant's obligations to procure the notice — clause operates in its terms without any exercise by mortgagor of a contractual right — relief against forfeiture refused in circumstances where the clause was part of a freely made agreement the terms of which were negotiated with the assistance of solicitors

Facts

This case concerns two related agreements. The first is a contract for the sale of land between the second plaintiff, CMQ Nominees Pty Ltd (**"CMQ"**), and the defendant, Heather Barlow, in respect of a property in Central Mangrove. The second is an associated mortgage granted by the first plaintiff, Salloway Pty Ltd (**"Salloway"**), in favour of the defendant in respect of a property in North Avoca.

Under the contract for sale, the CMQ agreed to purchase the Central Mangrove property from the defendant for a price of $1,550,000. By Special Condition 53 of the contract, Heather

Barlow agreed that on completion she would provide an interest free loan of $250,000 to CMQ, with the loan to be secured by a mortgage over the property that would include certain terms.

The contract was completed on 15 November 2013. It appears from the Settlement Sheet that the $250,000 loan the subject of Special Condition 53 was applied as an allowance by the vendor against the purchase price. However, instead of the contemplated mortgage over the property, the loan was secured by the mortgage, dated 15 November 2013, given by Salloway over the North Avoca property.

Also on 15 November 2013, the CMQ and Heather Barlow entered into a Deed which provided that it was agreed that the North Avoca mortgage was accepted as satisfying the requirements of Special Condition 53.

It is relevant to note that the Central Mangrove property was at the time of the sale contaminated with approximately 40,000 tonnes of various waste materials. This fact was noted in the Planning Certificate attached to the contract for sale, as was the fact that the property was subject to a Clean-Up Notice which had been issued by the Environment Protection Agency (**"EPA"**).

Included in the mortgage between Salloway and Heather Barlow was the provision that:

> *"'Firstly - the Mortgagor will pay to the Mortgagee the principal sum or so much thereof as shall remain unpaid on that date ("the date") being twenty-one (21) days after the date of receipt by the Mortgagor of written notification ("the EPA satisfaction notice") from EPA that the requirements of the Clean Up Notice ("the Notice") referred to in Gosford City Council Planning Certificate No. 124505 dated 6th August 2013 ("the certificate") (a copy of which is annexed marked "B") which affects the [Central Mangrove property] have been satisfied.*
>
> *Secondly - the Mortgagee shall at the cost of the Mortgagee do all acts and things and take all steps required by EPA to ensure that the EPA satisfaction notice is issued by EPA. In the event that it is determined by EPA that the requirements of the notice are satisfied and the EPA satisfaction notice is issued upon the basis that the contamination of the property may be capped and left in situ then the Mortgagor and the Mortgagee shall accept this determination by EPA.*
>
> *…*
>
> *Sixthly - in the event that the EPA satisfaction notice set out in the covenant Firstly referred to herein is not received by the Mortgagor within twelve (12) months of the date of this Mortgage then the Mortgagee forgives the loan to the Mortgagor and the Mortgagee shall provide a discharge of this Mortgage to the Mortgagor upon the anniversary date of this Mortgage.*
>
> *Seventhly - the Mortgagor and the Mortgagee agree that this Mortgagee satisfies the mortgage requirements agreed to by the Mortgagor as Purchaser and the Mortgagee as Vendor as provided by special condition 53 under the Contract for Sale of Land dated 5th November, 2013 of the [Central Mangrove property]."*

Following completion of the sale and entry into the associated agreements on 15 November 2013, the defendant and her consultants undertook steps aimed at satisfying the requirements of the EPA. However, by early September 2014 it had become apparent that it was unlikely that the EPA would make a final decision concerning the Clean-Up Notice prior to the end of

November 2014. The defendant's solicitor sent a letter to the plaintiffs' solicitor on 5 September 2014 in which it was stated that there may be a need to “approach you concerning an extension of the time within which our client has to comply with Special Condition 53”. No such approach was made.

It is common ground that no EPA satisfaction notice was received by Salloway within 12 months of the date of the mortgage. On 17 November 2014, the solicitor for the plaintiffs sent a letter to the solicitor for the defendant seeking a discharge of the mortgage on the basis that special condition 53 had not been met.

On 1 December 2014, the defendant's solicitor sent a letter to the plaintiffs' solicitor enclosing a letter from the EPA dated 28 November 2014 indicating the requirements of the Clean Up Notice have been met.

Later on 1 December 2014, the plaintiffs' solicitor sent a letter in response to the defendant's solicitor. It noted that no extension of time to obtain clearance from the EPA was sought or granted, and further asserted that the defendant had not complied with the terms of the mortgage in failing to provide a final notice from the EPA prior to the 16th November, 2014.

No discharge of mortgage has since been provided by the defendant. Neither has any payment been made to the defendant.

The question for determination was thus whether the first plaintiff is entitled to receive a discharge of the mortgage or whether the defendant is entitled to enforce the mortgage to require the first plaintiff to repay the principal sum of $250,000, together with interest.

Decision

Darke J found in favour of the plaintiffs and made orders in the nature of specific performance to compel the defendant to perform her obligations under clause Sixthly to provide a discharge of the mortgage.

In arriving at this decision, his Honour pointed to the language of clause Sixthly of the mortgage agreement and found it to plainly provide that if the EPA satisfaction notice is not received by the first plaintiff within 12 months of the date of the mortgage, then the loan to the first plaintiff is immediately forgiven. Indeed, his Honour found that reasonable business persons in the positions of the parties to the mortgage would have understood clause Sixthly to operate in such a way. Accordingly, his Honour found that the provision to the first plaintiff of an EPA satisfaction notice after the expiry of the 12 month period was too late to prevent the forgiveness of the loan.

Scott v Ennis-Oakes

[2019] NSWSC 1257

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 23 September 2019

LAND LAW — contract for sale of land — claim for loss of bargain damages — vendor and purchasers entered into contract for sale of lot in proposed subdivision — term of contract required plan of subdivision to be lodged for registration as soon as practicable and with due expedition — contract gave either party right to rescind if plan of subdivision not registered within 12 months — vendor purported to rescind contract on basis that registration of plan of subdivision did not occur within 12 months — purchasers thereupon commenced proceedings for specific performance of contract — vendor subsequently rescinded contract pursuant to a different contractual provision — purchasers accept the validity of that rescission — purchasers abandon claim for specific performance and instead seek loss of bargain damages — whether loss of bargain damages recoverable — contract not terminated for wrongful conduct of vendor — no claim for loss of bargain damages had accrued by the time of the rescission — loss of bargain damages not recoverable

Facts

This case concerns a contract for the sale of land entered into on 9 June 2015 between the plaintiffs (Kylie and Bradley Scott) as purchasers and the defendant (Nicole Ennis-Oakes) as vendor. The land the subject of the contract was a lot in a proposed subdivision of the defendant's property in Vicary Road, Terrigal, with the contract price for the land being $750,000. While the contract provided for a deposit of $75,000, the parties agreed that a deposit of $37,500 would instead be paid and released to the defendant.

Relevantly, the contract provided for a number of additional conditions:

Additional Condition 35 provided that completion of the contract was to take place within 42 days from the date of the contract or 21 days of receipt by the purchasers' solicitor of notice of registration of the plan of subdivision, whichever was the later.

Additional Conditions 36.2 to 36.4 provided:

36.2 The Vendor will as soon as practicable and with due expedition lodge such plan for the approval of the proper authority or authorities and for registration at the Land and Property Information NSW as a Deposited Plan and all costs and expenses of and incidental to the preparation, approval and registration of the said plan shall be borne by the Vendor. If registration is not effected within twelve (12) months of the date of this contract then either party shall have the right by notice in writing to the other to rescind this Contract whereupon the deposit shall be refunded by the Vendor to the Purchaser and neither party shall have any claim whatsoever, the one against the other.

36.3 The Vendor must do everything reasonable to have the plan registered, within twelve (12) months after the contract date, with or without any minor alteration to the plan or any document to be lodged with the plan validly required or made under legislation. If the plan is not registered within that time and in that manner:

(a) the Purchaser can rescind; and

(b) the Vendor can rescind.

36.4 If the Vendor is prevented by force majeure from having the plan registered within twelve (12) months after the Contract date, the Vendor shall be entitled to rescind."

Additional Condition 37 provided that either party may rescind the contract by notice in writing should either party, prior to completion:

(a) die or become mentally ill; or

(b) be declared bankrupt or enter into any scheme or make any assignment for the benefit of creditors; or

(c) being a Company, resolve to go into liquidation, have a winding up petition presented against it, enter into any scheme or arrangement with its creditors or have a liquidator, receiver, official manager or administrator appointed;

On 12 April 2017, the vendor's conveyancer sent a notice to the plaintiffs indicating an intention to rescind the contract on the basis that the vendor has been unable to achieve the registration of the plan. On 15 May 2017, solicitors for the plaintiffs sent a letter to the defendant's conveyancer refusing to consent to the proposed rescission.

On 31 July 2017, the plaintiffs commenced proceeding seeking specific performance to compel the defendant to comply with her obligations under the contract.

On 12 November 2017 the defendant entered into a Scheme of Arrangement Deed with Philnic Holdings Pty Ltd and Philip Oakes; and on 14 December 2017, the vendor's solicitors sent a letter to the plaintiffs indicating the vendor's intention to rely upon Additional Condition 37(b) to rescind the contract.

A formal notice of rescission was sent to the plaintiffs on 21 December 2017 and this was accepted by the plaintiffs on 18 July 2019 as valid. Following this, the plaintiffs abandoned their claim for specific performance and instead sought loss of bargain damages.

Decision

Darke J dismissed the plaintiffs claim, finding there to be no proper basis for the plaintiffs to claim loss of bargain damages.

His Honour held that any entitlement the plaintiffs had to terminate the contract due to wrongful conduct on the part of the defendant had not been exercised when the contract was rescinded under Additional Condition 37 on 21 December 2017. Accordingly, no cause of action for damages for loss of bargain had by that time accrued to the plaintiffs.

Sebie v Pham

[2019] NSWCA 184

Coram: Bell P, Emmett AJA

Court: New South Wales Court of Appeal

Date: 17 July 2019

PRACTICE AND PROCEDURE — application for leave to appeal — whether primary judge failed to consider witness' evidence — where witness' affidavit read — where witness cross-examined on evidence before primary judge — where witness' evidence the subject of express analysis by primary judge

PRACTICE AND PROCEDURE — application for leave to appeal — whether primary judge erred in not taking into account documentary evidence — where documents not in evidence before primary judge — where documents sent by email to primary judge's chambers in purported answer to notice to produce — importance that evidence be formally tendered

PRACTICE AND PROCEDURE — application for leave to appeal — whether party was denied procedure fairness before primary judge — where party did not appear at the hearing — where no evidence that application was made for affidavit of party to be read — where no submissions as to arguments party would have made

Facts

On 29 October 2014, Mr Robert Sebie sold a property in Chiswick (**"the Chiswick Property"**) to Mr and Mrs Pham. After various proceedings in this Court, including a proceeding for specific performance brought by Mr and Mrs Pham against Mr Robert Sebie, settlement of that sale occurred on 2 May 2018.

The sale price was paid into Court and continues to be held by the Court pending the outcome of various proceedings, including Family Court proceedings which involve Mr Robert Sebie, his former wife, a company of which Mr Robert Sebie is not the director and, the parents of Robert Sebie.

Robert Sebie accepts that having sold the property to Mr and Mrs Pham and that sale having been completed, he has no possessory or other interest in the Chiswick property. That said, he seeks to remain in possession of that property until the resolution of either, a summons seeking leave to appeal from judgments of Slattery J and of Kunc J given on 13 July 2018 and 4 October 2018 respectively, or until proceedings have been concluded in the Family Court of Australia.

In the present proceedings, Mrs Rose Sebie and Mr Ramzy Sebie seek leave to appeal a number of decisions.

(1) The first decision from which leave to appeal is sought is the judgment of Slattery J *in Pham v Enterprise ICT Pty Ltd; Pham v Sebie (No 3)* [2018] NSWSC 381.

(2) The second decision from which leave to appeal is sought is another decision of Slattery J in the matter of *Pham v Enterprise ICT Pty Ltd; Pham v Sebie (No 7)* [2018] NSWSC 1063, a decision delivered on 13 July 2018.

(3) The third decision which is the subject of the application for leave to appeal is the decision of Kunc J delivered in *Pham v Enterprise ICT Pty Ltd (No 8)* [2018] NSWSC 1492.

The Court found that the only judgments which Mr Ramzy Sebie has any interest in or standing to seek leave to appeal from are those of Kunc J of [2018] NSWSC 1492 and Slattery J of [2018] NSWSC 1063. This was because he was not party to the proceedings in [2018] NSWSC 381. With respect to Mrs Rose Sebie, the Court found her to only have an interest in or standing to seek leave to appeal the decision Kunc J of [2018] NSWSC 1492; she was not party to the other two proceedings.

As Mr Ramzy Sebie's application for leave to appeal decision of Slattery J of [2018] NSWSC 1063 was out of time, the Court found it only necessary to address submissions filed by both Mr Ramzy Sebie and Mrs Rose Sebie in respect of the decision of Kunc J.

Decision

The application for leave to appeal was dismissed with costs.

The Court rejected the assertion that Mrs Rose Sebie was denied procedural fairness for the following reasons:

- The suggestion that Kunc J failed to consider the evidence of Ms Jade Oswald was factually wrong. An affidavit of Ms Oswald was read and she was cross examined in the proceedings before his Honour. Indeed, Ms Oswald's evidence and its significance was the subject of analysis by his Honour in his judgement.

- The complaint that Kunc J did not take into account fortnightly "rent receipts" which were said to support the existence of lease agreements was also rejected as such documentary evidence had not been properly tendered as evidence in Court. Rather, the receipts had only been sent by email to his Honour's chambers.

The Court further rejected the submission that Kunc J erred in a characterising Mr Robert Sebie as the sole carer of his mother. It held that whilst it may not have been factually accurate to describe Mr Robert Sebie as the sole carer, this point bears no materiality to his Honour's reasons or the correctness or otherwise of those reasons.

Sergio Andres Chocron v Mina Onkoud

[2019] NSWSC 1823

Coram: N Adams J

Court: Supreme Court of New South Wales

Date: 23 December 2019

CIVIL LAW — real property — possession — action by mortgagee — mortgage over interest of a tenant in common — mortgagee former brother-in-law of mortgagor — sale of property between husband and wife — ongoing family law proceedings — whether deed of mortgage was a sham — whether deed of mortgage complied with s 38(1) Conveyancing Act — four different copies of deed — tort of deceit — part performance — confusing series of transactions — credibility of witnesses — whether money repaid pursuant to the mortgage

Facts

Sergio Chocron (the plaintiff) seeks possession of real property in North Parramatta (**"the Property"**) which was the former home of his brother, Fabian Chocron, and Fabian Chocron's estranged wife, Mina Onkoud (the defendant). Fabian Chocron and Mina Onkoud are the registered proprietors of the Property as tenants in common in equal shares.

The basis of the Sergio Chocron's claim is a Deed of Mortgage dated 1 December 2010 entered into between the plaintiff and the defendant. The Sergio Chocron contends that the Deed was validly executed and that funds totalling an amount of $107,500.00 were advanced by him to Ms Onkoud pursuant to the Deed.

Against this claim, Ms Onkoud advanced a number of arguments in her defence.

(1) The Deed is a "sham" contract created and procured by Sergio and Fabian in order to give the appearance of a loan between Sergio and Ms Onkoud when none had actually occurred;

(2) The Deed is void either by reason that:

   (a) Her signature was procured by deceit;

   (b) The Deed did not conform to the requirements set out in s 38(1) of the *Conveyancing Act 1919* (NSW); or

(3) There was no performance of the Deed as all transactions were between Fabian Chocron and Sergio Chocron, not herself and Sergio Chocron.

(4) In the alternative, if a valid mortgage did exist between Sergio Chocron and her, the loan had been repaid.

Decision

Ward CJ dismissed Sergio Chocron's claim, finding that while the Deed was valid, there was insufficient evidence to show that there were outstanding sums owing.

Was the Deed a sham?

His Honour was not satisfied that the Deed between Ms Onkoud and Sergio Chocron was a "sham" for the following reasons:

(1) The Deed was not intended to operate in a different manner to its terms. Rather, it was intended to operate as a mortgage and, by all accounts, did operate as a mortgage. This was notwithstanding the fact that Ms Onkoud and Fabian Chocron had an understanding that although the documents would describe the loan from Sergio Chocron as being to her alone, Fabian Chocron would in fact be the one responsible for repaying the loan out of their joint funds.

(2) It was established by Diplock LJ in *Snook* that a sham requires "common intention among participants to the transaction" that the document does not create the legal rights and obligations that it purports to create. This was not the case here as the alleged ruse Ms Onkoud relied upon was between Sergio Chocron and Fabian Chocron, whereas the parties to the Deed were herself and Sergio Chocron.

Was the Deed void for deceit?

His Honour found that the tort of deceit could not be made out.

This was because as set out in *Magill v Magill*, one core element of the tort of deceit is that the plaintiff must have suffered damage as a result of reliance on the false representation. Here, there is no evidence that she has suffered any damage for even if Fabian Chocron knowingly made a false representation with the intention that Ms Onkoud rely on it, she has still ended up with a half share of the home.

Was the Deed void for breach of s 38(1) of the Conveyancing Act?

Ms Onkoud submitted that the Deed was invalid because it had not been signed by an independent witness, as required by s 38(1) of the *Conveyancing Act.* This argument was rejected by his Honour on the grounds that there was evidence of a Deed which contained the signatures of both Sergio Chocron and Ms Onkoud; as was witnessed by Ms Potter.

Was there performance of the Deed?

Ms Onkoud alleged that there was no performance of the Deed; rather, there were simply "a series of transfers to the benefit of Fabian Chocron and there was no performance by the plaintiff pursuant to the Deed".

To this, his Honour observed that the relevant bank records show that the money under the Deed went into her accounts and this constituted the relevant performance. It was irrelevant that the moneys were largely spent on refinancing rather than for Ms Onkoud's personal use.

Has the loan been repaid?

While his Honour was satisfied that the plaintiff extended a loan of $107,500 to Ms Onkoud in 2010, he was not satisfied on the balance of probabilities that the debt remained outstanding.

Relevantly, it was common ground that there were significant transfers between the couple's joint account and Sergio Chocron over time which amounted to either $152,465.18 (on Sergio's calculation) or $163,155 (on Ms Onkoud's calculation). The plaintiff's explanation for these repayments is that he had provided this amount in cash to his brother in Buenos Aries in 2014 and these transfers reflect repayments for that amount. This was the evidence of both Fabian Chocron and Sergio Chocron.

His Honour was unconvinced by the plaintiff's explanation for the following reasons:

- Sergio Chocron's evidence is that without the assistance of any documents or bank records. Indeed, there is scant evidence about the alleged cash advances which amount to $112,514.74.

- Fabian Chocron's evidence that he was able to open a bank account by March 2014 but still chose to deal with his brother by way of cash loans is a suspiciously convenient explanation in the circumstances.

- It seems unlikely that so much money would be loaned so casually by Sergio Chocron to the couple when a loan of a smaller amount required a deed of mortgage/caveat.

- The claim that Ms Onkoud still owed a debt to Sergio Chocron was raised for the first time when marriage difficulties emerged.

- His Honour made adverse credit findings against both Sergio Chocron and Fabian Chocron in relation to their evidence concerning fabricated emails.

Sik v The Owners – Strata Plan No 58961

[2019] NSWCATAP 63

Coram: Durack Senior Member, Robertson Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 20 March 2019

LAND LAW — Strata title — By-laws — validity of by-law restricting the use of a lot

LAND LAW — Strata title — owners corporation — liability of owners corporation — no cause of action lies for breach of statutory duty in respect of passage of invalid by-law

WORDS AND PHRASES — "dealing”

Facts

The appellants are the owners of two ground floor commercial use lots (Lots 50 and 51) in Strata Plan 58961, a mixed-use multi-storey building in Collaroy. They have owned those lots since 1999. The respondent is the owners corporation of Strata Plan 58961.

The facts giving rise to the appeal are set out as follows in the decision under appeal:

- Since [1999] the Applicants [the appellants] have conducted a number of businesses from the Lots and Lot 51 has been untenanted since 10 August 2015.

- The Applicants received interest from a potential tenant known as JUMP Swim Schools (JUMP) for a six year lease for $47,040 pa plus GST with a six year option to renew. A deposit was paid to the Applicant's real estate agent.

- JUMP lodged a Development Application DA2016/0933 for use of Lot 51 as a Recreation Facility and Signage which was refused.

- JUMP thereafter engaged a town planner and on 11/5/17 lodged an application for review of the earlier refusal: REV2017/0020.

- The Council invited submissions on the Review, and the Respondent and three other owners made objections, principally on the grounds of limited parking, traffic and pedestrian safety, with a number of other issues including noise, and Respondent's consent not given.

- During this time the Respondent moved to pass a By-law to exclude the use of Lot 3 [[sic]] as a swimming school.

- On 8/9/17 the Review was completed and the application was refused by the Northern Beaches Council. Relevantly the grounds for refusal are set out in the Council's determination which canvasses the objections received including parking, traffic and pedestrian safety; noise; and absence of the Owners Corporation Consent.

- After the Council refusal of the Review Application, on 12/9/17 the Respondents passed Special By-Law 10 - Use of a Lot, which was registered thereafter.

- Special By-Law 10 prohibited the use of a lot for, among other things, "(f) any swimming pool or leisure/recreational facilities."

- In November 2017 JUMP ceased to pursue their development application and the proposed lease of Lot 51.

In May 2018 the appellants filed an application in the Tribunal seeking orders to rescind or invalidate the proposed by Law in respect of 'prohibited uses.'

<u>Decision of the Tribunal</u>

The Tribunal upheld the appellants' application in respect of the definition of "prohibited use". It held that By-Law 10's prohibition of the use of the lot for "any swimming pool or leisure/recreational facilities" was invalid as it purports to prohibit a use which might be permitted by the Council under the zoning laws.

However, the Tribunal rejected the appellants' claim for compensation. It held that whether or not the respondent is liable for damages is to be determined by a consideration of whether or not Special By-Law 10 was the cause of the Council's refusal to approve the JUMP Review Application. On the material facts, it found that the Council's refusal was not affected by the By-Law as it was passed after the Council refused the Review Application for use of the Lot.

<u>Appeal</u>

The appellants sought to appeal the decision of the Tribunal on the following grounds:

(1) The Tribunal erred in failing to declare invalid the entirety of Special By-Law 10, or alternatively the whole of the definition of 'prohibited use' in Clause B in Special By-Law 10, on the same basis as the Tribunal set aside sub-paragraph (f) of the definition of 'prohibited use' in Clause B of Special By-Law 10;

(2) The Tribunal erred in failing to address the appellants' application that the whole of Special By-Law 10, and in particular sub-paragraphs (a) to (e) of the definition of 'prohibited use' in Clause B of Special By-Law 10, be declared invalid;

(3) The Member erred in failing to award damages to the appellants in respect of the loss of the potential lease with JUMP or more generally in respect of losses sustained by reason of the passage of the by-law.

Decision

<u>Ground 1</u>

The appellants submitted that the Member found sub-paragraph (f) invalid by reference to s 139(2) of the *Strata Schemes Management Act 2015* (NSW) and that, logically, the same considerations applied to all sub-paragraphs of the definition of "prohibited use" and, accordingly, the Member should have declared invalid the entirety of that definition.

Relevantly, s139(2) provides:

> No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage or other dealing relating to a lot.

The Appeal Panel held that to the extent that the Member relied upon s 139(2) in declaring sub-paragraph (f) invalid, he was clearly in error. This was because the appellants' argument proceeded on the basis that a by-law restricting the use to which a lot may be put was a by-law restricting "dealing" with the lot. The Appeal Panel held this was incorrect as whatever may be the scope of "dealing" in this provision it could not extend to restricting the use of the lot. Otherwise, it would be directly contradictory of the terms of s 136(1), which permits by-laws to be made "in relation to the … use … of the lots … of a strata scheme".

<u>Ground 2</u>

The appellants also challenged the by-law on the ground that it was unconscionable and oppressive contrary to s 139(1).

The Appeal Panel accepted that the Member failed to address each sub-paragraph separately when determining whether they were invalid for unconscionability and that this amounted to an error of law.

Accordingly, the Appeal Panel allowed the appeal and remitted the matter to the Consumer and Commercial Division for consideration to determine whether any of sub-paragraphs of the definition of "prohibited use" is invalid by reason of s 139(1) of the SSMA.

<u>Ground 3</u>

The appellants' third ground of appeal challenges the Member's failure to award damages in respect of the passage of sub-paragraph (f) which was found to be invalid. The appellants submitted that the decision not to award damages was not fair and equitable.

The Appeal Panel observed that the legislature, in enacting the SSMA in 2015, explicitly included provision for an action for breach of statutory duty in respect of one part of an owners corporation's duties and did not make provision for such an action in respect of any other of an owners corporation's obligations or duties. The Panel found the explicit inclusion of s 106(5) in the SSMA to the reinforce the conclusion that no such cause of action was intended to be available in respect of other duties of an owners corporation. Indeed, the alleged duty breached by the respondent did not fall within the established categories in s106(5) of the SSMA. Accordingly, the appeal was dismissed.

Singh v Khan

[2019] NSWCA 196

Coram: White JA, McCallum JA

Court: New South Wales Court of Appeal

Date: 22 July 2019

LANDLORD AND TENANT — whether landlord's refusal to produce trust deed justifies tenant's non-payment of rent — whether tax invoices issued by landlord invalid where no trust deed given to tenant — whether Tribunal at first instance lacked jurisdiction due to pending Supreme Court proceedings — no issue of general importance — application for leave to appeal dismissed

Facts

This case concerns an application for leave to appeal from orders of Button J made on 27 February 2019 dismissing the applicants' proceedings that were commenced that day before his Honour with costs. The applicants in these proceedings are Mr Gurjit Singh and ACN 605 054 242 Pty Ltd.

The background to the appeal may be summarised as follows:

- On 31 October 2018, the NSW Civil and Administrative Tribunal ordered that Fobupo Pty Ltd (**"Fobupo"**) be restrained from repossessing two shops in Kingswood from Mr Gurjit until the Tribunal had made a decision in related proceeding No. CON17/53297. This order was subject to a condition that Mr Gurjit pay $6,500 plus GST on account of rent each calendar month to Fobupo on receipt of a rent invoice from "Fobupo Pty Ltd as the Trustee of the Khan Family Trust (No 2) ABN 70 260 409 593."

- On 27 February 2019, the Tribunal made an order that Mr Gurjit Singh surrender possession to Fobupo by 10:00am on 28 February 2019. This was due to the fact that the applicant had failed to make any payment of rent since the 31 October 2018 orders were made.

- Later on 27 February 2019, the applicants sought to have the Tribunal decision quashed. This appeal came before Button J sitting as duty judge.

- The applicants asserted that the orders of the Tribunal required payment of rent to the Khan Family Trust (No 2), but no evidence had been provided that the trust existed. Reliance was placed on s 23C(1)(b) of the *Conveyancing Act* that a declaration of trust of land must be evidenced in writing, signed by the person declaring the trust, or be made by Will.

- The applicants contended that:

> "As a matter of law, no tax invoice from the trust can be valid and enforceable in favour of the trust until compliance with the Conveyancing Act s 23C(1)(b)."

- Accordingly, they claimed that there was no default in their not paying rent as required by the orders of the Tribunal as a condition of the orders restraining Fobupo from repossessing the land.

- Button J dismissed the appeal and held that s 23C of the *Conveyancing Act* had nothing to do with the matter in issue.

Decision

The Court dismissed the application for leave to appeal and held that the primary judge was correct in his dismissal of the s23C argument.

The Court observed that the applicants' submission seemed to assume that a trust is a separate legal entity and they were excused from complying with the conditions of the order because they could not satisfy themselves that the trust referred to in the invoices existed.

This was found to be plainly incorrect. The rent was payable to Fobupo. Section 23C provides for requirements of writing when a person is dealing with or declaring a trust over interest in land. The operation of s23C in no way detracts from Fobupo's entitlements as legal owner of the land to recover rent in respect of it.

Put simply, the applicants were in possession of the premises without paying rent for a considerable period and made no offer to pay rent – an order for possession was thus warranted.

Starr v George

[2019] NSWSC 60

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 7 February 2019

EASEMENTS — where plaintiff seeks easement by express grant or prescription — declaration by consent

Facts

This case concerns a dispute over a right of way with the plaintiffs, Robert Starr and Mary Starr, seeking declaratory relief that a right of way for the benefit of their property, being 212 Mitchells Flat Road, Mitchells Flat (**"Starr Property"**). The first and second defendants, Robert George and Annette George, are the registered proprietors of the land on which the Plaintiffs seek the right of way, being 374 Mitchells Flat Road, Mitchells Flat (**"George Property"**). However, prior to the present hearing, representatives of parties reached a resolution in the proceedings and proposed consent orders which included a declaration that the right of way

Decision

Henry J observed that it was not common practice for the Court to make declarations by consent without a hearing on the merits or in the absence of any facts which support the grant of a declaration. That being said, his Honour was nonetheless prepared to approve the orders, finding that the evidence presented establishes that:

(1) Historical conveyances of the George Property from 1910 through to 1988 (prior to conversion to Torrens Title) have been subject to an "Existing Right of Way by User", the location of which is consistent with the right of way now being sought by the plaintiffs; and

(2) The right of way to the Starr Property passing through the George Property has been in continuous use, including by the Plaintiffs, for many years since about 1912 through to the present day, which use has been enjoyed without seeking permission or complaint from the owners of the George Property.

Accordingly, his Honour held that the evidence supports the inference that there had been an express grant of an easement prior to the conversion of the George Property to Torrens Title in 1988, which may entitle the plaintiffs to rely on s 42(1)(a1) *Real Property Act 1900* (NSW). Alternatively, the evidence supports a finding of an easement by prescription, in accordance with the principles set out in *Fernance v Simpson* (2003) 11 BPR 20,955; [2003] NSWSC 121.

Sukkar v Sukkar

[2019] NSWSC 691

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 11 June 2019

LAND LAW — co-ownership — statutory trust for sale — claim by the plaintiff under Conveyancing Act 1919 (NSW) s 66G(1) — where plaintiff is an 'incumbrancer' within the definition of 'co-owner' in s 66F(1) as the registered proprietor of a mortgage over the interest of the first defendant — appointment of trustees refused in circumstances where the mortgage is required to be discharged pursuant to the first defendant's cross-claim

CONTRACTS — unjust contracts — Contracts Review Act 1980 (NSW) — cross-claim by the first defendant to set aside contracts which include a deed of acknowledgement, loan agreement and mortgage — plaintiff and first defendant are son and mother respectively — plaintiff outlaid various amounts of money for the benefit of the first defendant over several years — where no binding agreement whereby first defendant obliged to repay monies to plaintiff — where the plaintiff sought to 'confirm' legal relationship with the first defendant by entering into the contracts — contracts improvident from the first defendant's perspective — where first defendant entered into the contracts as a result of undue emotional pressure applied by the plaintiff — contracts held to be unjust

Facts

This case concerns an order sought by Marc Sukkar (the plaintiff) pursuant to s 66G(1) of the *Conveyancing Act 1919* (NSW) (**"CA"**) for the appointment of trustees for sale of a residential property in Emu Plains. The Emu Plains property is owned jointly by the plaintiff's parents, Rose Sukkar and Hamid Sukkar (the defendants).

Relevantly, in order to bring a claim under s 66H(1) CA, the claimant must be a "co-owner" of the property. Here, the plaintiff alleges that he satisfies the definition of "co-owner" as set out in s 66F(1) CA as an "incumbrancer" of the interest of a joint tenant. Specifically, in advancing this claim, the plaintiff relies on a registered mortgage over his mother's interest in the property.

However, Mrs Sukkar seeks to set aside the mortgage and other associated agreements on the ground that it was unjust pursuant to the Contracts Review Act 1980 (NSW) (**"CRA"**), and also on the general law grounds of unconscionable conduct, undue influence and duress. If successful, Marc Sukkar's claim to be a "co-owner" within the meaning of s 66G CA would be defeated.

Marc Sukkar claims that various amounts of money were paid by him to or for the benefit of his mother upon the basis that the amounts were loans to be repaid by his mother with interest. The claimed amounts, said to have been paid at times in the period from late 2001 to early 2017, went towards renovations of the Emu Plains home, costs incurred in relation to lengthy

Family Court proceedings between Mr and Mrs Sukkar, various chattels and general living expenses.

Both parties accepted that there was a valid Deed of Loan Agreement made on 22 April 2008 concerning the purchase of a Suzuki SX4 AWD in the amount of $27,100. However, apart from this, the only other written agreements between Marc Sukkar and Mrs Sukkar were a Deed of Acknowledgement of Debt, a Loan Facility Agreement, and a Mortgage over the Emu Plains property which were executed on 11 April 2017 in the presence of Mr Mazurkiewicz (solicitor). Various other acknowledgements and declarations were also signed by Mrs Sukkar including an authority to complete documents, a declaration about having received independent legal advice regarding the loan and security documents, and a statement to the effect that she elected not to obtain independent financial advice notwithstanding advice from the Lender to obtain such advice.

Decision

Darke J found in favour of Mrs Sukkar and granted relief pursuant to the CRA.

His Honour was of the view that the agreements made on 11 April 2017 were unjust within the meaning of s 7(1) of the CRA. His Honour held that the improvident nature of the agreements from Mrs Sukkar's perspective, coupled with the manner in which her assent to the agreements was obtained, meant that it would not be in the public interest for these agreements, made in a domestic setting, to be enforced against her.

With respect to other alleged “loans” made by Marc Sukkar to Mrs Sukkar, his Honour found the evidence to indicate that the arrangements between the plaintiff and his mother in relation to monies advanced included an agreement to the effect that they would talk about returning or repaying the money once the Family Court proceedings had finished so that they could see where they stood.

Accordingly, his Honour held that apart from the Deed of Loan Agreement of 22 April 2008, Mrs Sukkar was under no legal obligation to repay any monies to the plaintiff. His Honour made an order under s 7(1)(d) CRA requiring the plaintiff to provide to Mrs Sukkar a duly executed Discharge of Mortgage, and further declared the Deed of Acknowledgement of Debt and Loan Facility Agreement, void pursuant to s 7(1)(b) CRA.

Szeto v Situ (No 2)

[2019] NSWSC 1312

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 11 June 2019

EQUITY — General principles — Equitable estates and interests — Nature of equitable interests and ownership — Beneficial ownership — Property purchased in the name of the plaintiff alone — Whether the defendant has no right or interest in the property

REAL PROPERTY — General principles — Ownership — Beneficial ownership

Facts

These proceedings are concerned with a dispute between the two siblings, Livy Szeto (**"the Sister"**) and Liming Situ (**"the Brother"**), as to the beneficial ownership of several properties situated in suburban Sydney. The properties are situated at Henry Street, Carlton (**"the Carlton Property**"), Yerrick Road, Lakemba (**"the Lakemba Property**"), Hannam Street, Turrella (**"the Turrella Property**") and Dowling Street, Arncliffe (**"the Arncliffe Property**").

All of the Properties are under the provisions of the *Real Property Act 1900* (NSW) (**"the RPA"**). The Sister is the registered sole proprietor of the Lakemba Property and the Arncliffe Property. The Brother and Sister are registered as the proprietors of the Turrella Property as tenants-in-common in equal shares. As to the Carlton Property, beneficial ownership was determined in earlier proceedings by Darke J on 20 November 2017. Orders were made that the Sister is entitled to 48.8% of the proceeds of sale of the Carlton Property.

The Lakemba Property

The Brother sought a declaration that the Sister holds a 38.1% share of her interest in the Lakemba Property for him and an order that she transfer that share to him. In support of this claim, the Brother made the following allegations:

- In September 1992, the Sister purchased the Lakemba Property for $104,500 and became the sole registered proprietor of it.
- He contributed $30,000 towards the purchase price paid for the Lakemba Property on the basis that he would be a co-owner of it.
- The balance of the purchase price for the Lakemba Property was constituted by:
    - $27,500 from the Sister's own funds;
    - $25,000 from funds borrowed by the Sister from Advance Bank Australia Limited; and

- $22,000 from a gift to the Brother and Sister jointly by their father.

The Sister denies that allegation and asserts that the Brother lent the sum of $30,000 to her. She further asserts that their father lent the sum of $22,000 to her to enable her to buy a home unit and denies that the sum of $22,000 was a gift by their father.

On the evidence, Darke J held that it is more likely than not that the Brother and the Sister agreed that the Lakemba Property would be purchased by the Sister on the basis that the Brother would have a proprietary interest. However, his Honour was not persuaded that the father made a gift of $22,000 to the Brother and Sister jointly. Accordingly, his Honour held that the Brother's interest in the Lakemba Property would be calculated as the proportion that the sum of $30,000 bears to the total of the price paid for the Lakemba Property, including purchase costs such as solicitor's fees, stamp duty and the like.

The Turrella Property

The Brother asserts that he is entitled to one half share in the Turrella Property or an interest equal to the contribution made to the purchase price. In support of this claim, he made the following allegations:

- In or around June 1998, he and the Sister agreed to buy an investment property that they would own in equal shares and that, pursuant to that agreement, they purchased the Turrella Property in June 1998 for $265,000.

- The purchase price was funded by two loans from St George Bank, being a joint loan in the name of the Brother and the Sister in the sum of $195,000, and a loan in the name of the Sister alone, in the sum of $80,000.

- Contrary to the agreement that Turrella was to be an investment property, only two of the three bedrooms of the property have been let out to tenants with the other room occupied by the Sister and their parents.

Notably, the Sister accepted in cross-examination that the Turrella Property was purchased on the basis that she and the Brother would be joint owners as to a one-half share each. In view of this concession, his Honour held that at the time of the purchase of the Turrella Property, they were to be owners in equal shares. Accordingly, his Honour found the Brother entitled to a declaration that the Turrella Property is held by the siblings as tenants-in-common in equal shares beneficially and legally.

The Arncliffe Property

Beneficial ownership of the Arncliffe Property was left undecided in these proceedings as it was unclear on the evidence whether the Brother had made a contribution to the Arncliffe Property. Rather, the parties were given leave to adduce further material at a later date.

The Owners - Strata Plan No 54026 v Phillipa Ternes

[2019] NSWSC 1579

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 12 November 2019

PRACTICE AND PROCEDURE — Proceedings — Transfer of proceedings — Forum – application for summary dismissal or stay of proceedings – application for disclosure of details recorded on strata roll per Strata Schemes Management Act 2015 (NSW), ss 187, 188 and 232 – whether appropriate proceedings be transferred to NCAT – jurisdiction of Tribunal. LAND LAW — Strata title — Owners corporation — Strata roll – application for production from building manager of contact details of owners recorded on strata roll – Schemes Management Act 2015 (NSW), ss 187, 188 and 232 – jurisdiction of Tribunal

LAND LAW — Strata title — Owners corporation — Strata roll – application for production from building manager of contact details of owners recorded on strata roll – Schemes Management Act 2015 (NSW), ss 187, 188 and 232 – jurisdiction of Tribunal

Facts

This case concerns an interlocutory application by Phillipa Ternes, UniLodge Australia Pty Ltd and Sydney Campus Apartments Pty Ltd (the defendants), seeking orders that the proceedings against them be summarily dismissed or stayed. The proceedings concern a strata property at Broadway, Sydney.

The strata building is a former department store which has been converted into 586 units. Under the terms of the development consent for the conversion of the building, the residential units must be occupied by students. The majority of the units are managed on behalf of the investor owners by UniLodge. The holding company is UniLodge Australia Pty Ltd (**"UniLodge Australia"**). The units in the strata scheme are managed for the investor owners pursuant to lease arrangements between the owners and Sydney Campus Apartments Pty Ltd (**"Sydney Campus"**), a wholly owned subsidiary of UniLodge Australia.

In March 2015, Philippa Ternes, the general manager for UniLodge in Sydney, sent an e-mail to the then strata managing agent asking for the managing agent to enter a post office box of UniLodge as the mailing address for all of the units under UniLodge's management. It appears that the then strata managing agent, Prudential Investment Company of Australia Pty Ltd (**"PICA"**) acted on the instruction. Since that time, all of the units managed by UniLodge have had the UniLodge post office box entered as their contact address in the strata roll. This position continued for over four and a half years.

In June 2019, PICA ceased to act as strata manager, and a new strata managing agent, Whelan Property Group Pty Ltd was subsequently appointed.

On 30 October 2019, the Owners Corporation commenced proceedings in the Supreme Court of NSW against Ms Ternes, UniLodge Australia and Sydney Campus seeking orders that Ms Ternes, UniLodge Australia and Sydney Campus produce a verified list of names and addresses, together with other contact details, for the persons recorded as owners of the units. On 5 November the defendants filed a notice of motion that the proceedings should have been commenced in the Tribunal.

Decision

Jurisdiction of the Tribunal

In determining whether the proceedings should have been commenced in the Tribunal, Parker J considered relevant provisions of the *Strata Schemes Management Act* 2015 (NSW) (**"SSMA"**).

Relevantly, s 187 of the SSMA provides that: the Tribunal may, on application by an owners corporation, order an owners corporation to enter information contained in a strata interest notice in the strata roll. Parker J held that s 187 of the SSMA was not applicable in this instance as the owners corporation was seeking information rather than refusing to record information which has been supplied.

While Parker J observed that s 188 of the SSMA does allow the Tribunal to make an order for information to be supplied by an owners corporation, strata managing agent, officer or former strata managing agent, his Honour held that it did not extend to building managers.

That being said, his Honour held that the defendants could rely on s 232 of the SSMA which entitles the Tribunal to make an order to settle a dispute or complaint about the operation, administration or management of a strata scheme. This was because the orders sought by the owners corporation concern the maintenance of the strata roll, which is clearly part of the "administration" of the strata scheme under s 232(1)(a) of the SSMA.

Exclusive Jurisdiction of the Tribunal

While his Honour found that the Tribunal had jurisdiction to hear the claim, it was not an exclusive jurisdiction as contended by the defendants. Although the defendants sought the proceedings to be summarily dismissed or stayed, Parker J instead relied upon its power to make an order transferring the proceedings to NCAT.

The Owners – Strata Plan No 61233 v Arcidiacono;

The Owners – Strata Plan No 17719 v Arcidiacono

[2019] NSWSC 1307

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 30 September 2019

LAND LAW — Easements — Creation of easements — Creation by prescription — Long use of land from late 1880's and from 1981 — Whether doctrine of lost modern grant applies where identity of owners of land unknown from 1880s to 2008 — Held that easement by prescription could still arise — Use sufficiently open that a diligent owner would have been aware of it.

LAND LAW — Easements — Creation of easements — Creation under statute — Applications under s 88K Conveyancing Act 1919 (NSW) — Easements for overhang and encroaching structures to remain and for repair and services considered reasonably necessary — Where elements of first plaintiff's heritage building intrude on to defendants' land — Compensation awarded under s 88K Conveyancing Act 1919 (NSW) — Easements for drainage of sewerage and water and for light and air refused — First plaintiff failed to establish easements for light and air were reasonably necessary.

LAND LAW — Easements — Creation of easements — Creation by express grant or implication in old system deeds of conveyance — Held that general words in 1871 deed created rights of way to benefit of landlocked plots over private lane where only access to public road via that lane — Where rights of way no longer accommodate the second plaintiff's land — Held that second plaintiff does not have the benefit of any existing rights of way.

LAND LAW — Easements — Where owner of dominant tenement purported to transfer benefit of rights of way to other land — Held that purported transfer invalid — Held that easements are not 'extended' upon consolidation of landholdings.

Facts

This case concerns two sets of proceedings made against the John Arcidiacono and Anna Marie Arcidiacono (**"the defendants"**). The first was brought by The Owners - Strata Plan No. 61233 (**"the first plaintiff"**), the registered proprietor of a property at 71 York Street, Sydney. The second proceeding was brought by The Owners - Strata Plan No. 17719 (**"the second plaintiff"**), the registered proprietor of land at 104 Clarence Street, Sydney.

Specifically, this case concerned access to passageway and dock running between buildings located at 65 and 71 York Street and along the back of buildings on Clarence Street. The passageway and dock formed an "L" shape and were the only vehicular access to the rear of the buildings on Clarence and York Street. The defendants, who owned the land on which the passageway and dock sat, installed a gate at the opening of the passageway on York Street preventing access.

The plaintiffs now seek that a right of carriageway be granted over the passage and the dock allowing them access. They argued this on two fronts:

(1) That they had an existing right of carriageway over the land which was omitted from the register when the land was brought under the Torrens system (Easement by prescription).

(2) That access was necessary for the effective use of the land and that an easement for a right of carriageway should be imposed under section 88K of the *Conveyancing Act 1919* (NSW).

Decision

71 York St Proceedings

His Honour found that an easement by prescription for a right of carriageway over the dock had arisen based on long open use in the years prior to 1927. He held that a prescriptive easement should be recorded on 71 York Street's title in terms that provide for the right to pass and repass over the Dock by motor vehicles and reflect the use of the 71 York Street land for commercial activities, being office and retail space.

As 71 York Street had an existing right of way over the passage recorded on its title, his Honour held there was no need to grant 71 York Street a right of carriageway over the passage.

104 Clarence Street Proceedings

His honour held that the Clarence Street building had the benefit of easements by prescription for rights of carriageway over the Passage and the Dock based on user since 1981. He held that the prescriptive easements should be recorded on the Clarence Street building’s title in the terms of Part 1 of Schedule 8 of the Conveyancing Act.

The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney

[2019] NSWCA 89

Coram: Gleeson JA, Leeming JA, McCallum JA

Court: New South Wales Court of Appeal

Date: 24 May 2019

LAND LAW — strata title — leasehold strata scheme — enforcement of statutory warranties — whether holder of a 99-year lease a 'successor in title' under the Home Building Act 1989 (NSW)

Facts

This case concerns a property development involving the construction of 16 luxury townhouses and apartments at Spring Cove, Manly. The land subject to the development is owned by the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (**"Trustees"**). The Trustees granted development rights to Spring Cove Developments Pty Ltd (**"Developer"**) which entered into a construction contract with SX Projects Pty Ltd (now in liquidation).

The lots were sold "off the plan" according to a tripartite agreement between the Trustees, the Developer and the purchaser. Relevantly, the agreement contemplated that, upon completion of the development and registration of the strata plan, the Trustees would sell the leasehold interest in the relevant lot to the purchaser.

The strata plan was registered on 25 August 2015. Prior to registration of the plan, the Trustees agreed to create a leasehold interest in each lot by leasing it to themselves with effect from 25 August 2015. There were 16 such leases and it was common ground that each was effective. The Trustees also agreed to lease the common property directly to the Owners Corporation with effect from 25 August 2015. All 17 leases had a term of 82 years commencing on 25 August 2015 with an option to renew for a further 17 years.

Dispute arose between the parties with the Owners Corporation alleging that the apartments and areas of the common property possess a number of defects. It brought proceedings in the District Court claiming damages for breach of the statutory warranties implied into the construction contract pursuant to s 18B of the Home Building Act.

The pleading alleged that the residential building work undertaken by the Trustees and further alleged that the Owners Corporation was "the immediate successor in title to the [trustees]" and was "entitled to the benefit of the statutory warranties."

The Trustees and Developer sought to have the statement of claim struck out pursuant to r14.28 of the UCPR on the grounds that no reasonable cause of action was disclosed.

Specifically, it was alleged that the Owners Corporation was had no entitlement to enforce the warranties.

District Court Decision

The primary judge found that whether the Owners Corporation had standing to enforce the warranties could be determined as a separate question which was formulated as follows:

(1) Is the plaintiff a successor in title and immediate successor in title to the first defendant (the trustees) for the purposes of ss 18B, 18C and 18D of the Home Building Act 1989?

(2) Are the individual leaseholders successors in title to the trustees for the purposes of ss 18B and 18D of the Home Building Act 1989?

(3) If yes to question (2), does the plaintiff have standing to bring the claim as pleaded in the amended claim at paras 22A to 22I on behalf of each lot holder in regard to the common property by virtue of s 254 of the Strata Schemes Management Act 2015?

The primary judge held that the first two questions must be answered in the negative and that question (3), in that circumstance, did not arise for determination. Accordingly, the primary judge concluded that, because the Trustees retained the right of reversion in respect of the leases of each lot and in respect of the common property leased to the Owners Corporation, none of the holders of those leaseholds was a successor in title to the Trustees.

The Owners Corporation sought to appeal this decision, alleging that the primary judge erred in holding that the holder of a 99-year lease was not a successor in title under legislation which provides the benefit of statutory warranties.

Decision

The Court upheld the decision of the primary judge and dismissed the appeal. It held that the term “successor in title” in the Home Building Act is to be given its general meaning; that is, a person who holds title after another.

Vesting Point

The Court rejected the argument of the Owners Corporation that the proper construction of the phrase “successor in title” in the Home Building Act is to be informed by the operation of s 24 of the *Strata Schemes Development Act 2015* (NSW) which provides that common property “vests” in the owners corporation of the strata scheme upon registration of the strata plan.

Rather, the Court found that the nature of the title held by the Owners Corporation must be determined according to the legislation in force as at the date on which the strata plan was registered (25 August 2015). As at that date, strata schemes were governed by two statutes which, relevantly, did distinguish between freehold and leasehold title: the *Strata Schemes (Freehold Development) Act* 1973 (NSW) and the *Strata Schemes (Leasehold Development) Act 1986* (NSW).

Mount Bruce Point

The Court also rejected the submission that *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 provides a basis upon which the Owners Corporation can be said to have become the successor in title to the trustees and that no instrument was necessary for that purpose.

The Court distinguished the *Mount Bruce* case on the basis that it was concerned with the construction of a mining royalty agreement, not a statute. And so, while the High Court considered the relevance of events, circumstances and things external to the contract in *Mount Bruce,* such did not apply to the construction of statute.

Justice Fry Submission

Finally, the Court rejected the Owners Corporation's third argument which sought to draw analogy between the current case and the reasoning of Fry J in the English decision of *Taite v Gosling* (1879) 11 Ch D 273. Specifically, the Owner's Corporation sought to argue that the long-term lease of property by the holder of the fee simple having the benefit of statutory warranties in its favour should be recognised as a form of assignment carrying the benefit of those warranties.

However, given that *Taite v Gosling* was concerned with the operation of a negative covenant, such was found by the Court to be unhelpful when construing the words of the Home Building Act.

The Owners – Strata Plan No. 12289 v Donaldson

[2019] NSWCATAP 213

Coram: Curtin Senior Member, Ransome Senior Member

Court: NSW Civil and Administrative Tribunal

Date: 22 August 2019

LAND LAW — strata title — common property — common property rights by-law — unreasonable refusal — objective test — reasons — subsequent evidence

CONSTITUTIONAL LAW — Commonwealth Constitution — jurisdiction — whether an owners corporation is a 'resident' for the purposes of s 75(iv) of the Constitution

Facts

This case concerns an appeal from a decision of the NSW Civil and Administrative Tribunal. The appellant is the body corporate consisting of the owners of the five lots in a strata scheme in Manly, NSW.

At the rear of the building, there had previously been a staircase connecting the carpark to Lot 5. In December 2015, the former owners of Lot 5 sought and obtained unanimous approval from the body corporate to demolish the staircase and construct a lift and stairway, with the stairway curling around the lift. A Special By-Law approving and allowing for those works was passed. Those works are referred to below as the "approved works".

Notwithstanding that approval, the former owners did not commence construction of the approved works. Instead, they sold Lot 5 to the respondents in April 2016.

The first respondent was wheelchair bound. Accordingly, the respondents desired to construct a lift in lieu of the then existing staircase from the carpark to Lot 5. The respondents were advised that the original lift design would need to be changed in order to accommodate the first respondent's needs (**the "proposed works"**). However, they were incorrectly advised that local council consent to that change was not required. The respondents were further unaware that the proposed works differed sufficiently from the approved works such that the appellant's consent was required.

While the respondents commenced construction of the proposed works in June – July 2017, they were forced to cease works by the appellant. The respondents then requested the appellant to make a common property rights by-law to allow them to construct the proposed works. The respondents (having since been further advised) also requested the appellant consent to a development application to be lodged with the local council so that council approval for the proposed works could be obtained. The appellant refused both requests.

The respondents commenced proceedings against the appellant in the Tribunal and sought an order that the Tribunal prescribe a change to the by-laws to enable the construction of the proposed works pursuant to s 149 of the Strata Schemes Management Act 2015 (NSW) (the

"SSMA"); and an order that the appellant consent to the making of a development application in relation to the proposed works pursuant to s 232 of the SSMA.

At first instance, the Tribunal found that the appellant had unreasonably refused to make the by-law sought by the respondents and made an order that that by-law be made and registered. The Tribunal also ordered the appellant to consent to the proposed development application.

The appellant now seeks to appeal this decision.

Decision

The Appeal Panel dismissed the appeal and upheld the decision of the Tribunal.

The Panel dismissed the suggestion that the Tribunal lacked jurisdiction to hear the case. The basis of the appellant's appeal was that because the respondents were resident in Queensland and the appellant was "resident" in NSW, *Burns v Corbett* [2018] HCA 15 necessarily bars the Tribunal from hearing the proceedings. However, the Panel held that the appellant was not a "resident" of NSW within the meaning of that term in s 75(iv) of the *Constitution.* The Panel pointed to the judgement in *The Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* [1922] 31 CLR 290 where the majority held that the terms "resident" and "residents" in s 75(iv) of the *Constitution* refer to natural persons only and not to artificial persons or corporations of any kind.

The Panel rejected the assertion that the Tribunal applied the incorrect test when deciding whether the appellant's refusal to consent to the proposed by-law was unreasonable. The Panel held that contrary to the appellant's submissions, the Tribunal did not engage in the impermissible "balancing test" and had instead correctly applied test posed by s 149(1) of the SSMA.

The Panel rejected the claim that the Tribunal erred in deciding whether it was relevant for the owners corporation to take into account whether the proposed works involved a greater or different encroachment on the car park area compared to the approved works, rather than deciding whether the respondents had demonstrated that it was unreasonable to do so. This was because the Tribunal had found as a fact that there was no practical increase in the "restriction within the already constricted car park" and there is no ground of appeal asserting that that factual finding involved an error of law, nor does Ground 2 assert any error in that factual finding.

The assertion that the Tribunal erred by dismissing as irrelevant certain safety concerns was also rejected by the Panel. The Panel found that the Tribunal did not decide safety was irrelevant; but rather, the Tribunal found that the degree of danger was trivial and thus it was unreasonable to refuse the application for this reason.

Thomas v Registrar-General of New South Wales

[2019] NSWCA 198

Coram: Bell P, Leeming JA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 14 August 2019

LAND LAW — Torrens system — claim for compensation from Torrens 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 alleged that loss was suffered as a result of dealings because claimant forced to sell another property — claimant failed 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

Ms Thomas and her late partner Mr Pinchman were the registered proprietors of a property in East Hills Property (**"the East Hills Property"**). They borrowed monies on the security of a mortgage of the East Hills Property to invest in the development of a property in Terrigal (**"the Terrigal Property"**). They intended to service the interest on their borrowing with the income from their investment.

The investment in the Terrigal Property was secured by an unregistered second mortgage and a caveat lodged in respect of the Terrigal Property. However, the caveat was removed as a result of fraud on the part of the registered proprietor of the Terrigal property and, as a consequence, Ms Thomas and Mr Pincham were deprived of their interest, as equitable mortgagees, in the Terrigal Property.

Subsequently, Ms Thomas and Mr Pincham defaulted under the terms of the loan secured by the mortgage of the East Hills Property and, as a consequence, it was necessary for them to sell the East Hills Property in order to repay the loan that they had borrowed to invest in the Terrigal Property.

Ms Thomas made a claim on the Torrens Assurance Fund on the basis that, because she and Mr Pincham had been deprived of their interest in the Terrigal Property, they lost the opportunity of benefitting from the increase in the value of the East Hills Property after it was sold.

Specifically, the appellant claimed that had the fraud not occurred, she and her partner would:

- Have leverage over the Terrigal Property;
- Could have extracted repayment of some or all of the $200,000 (and any interest amounts) that were owing at the time of the fraudulent withdrawal of caveat;

- Could have used this ‘equity’ to manage their repayment obligations with respect to the East Hills Property; and

- In consequence, the East Hills Property would not have been required to be sold.

Supreme Court Proceedings

At first instance, Darke J dismissed Ms Thomas’ application for compensation from the Torrens Assurance Fund. His Honour did so on the basis that the claim for loss, so formulated, required the Court to engage in impermissible speculation.

Ms Thomas now seeks to appeal this decision on the basis that the mere difficulty in calculating loss or quantifying damage does not relieve a court from its obligation to do so.

Decision

The Court of Appeal upheld the decision of Darke J and dismissed the appeal.

Central to the Court’s finding were the concessions made by counsel for the appellant that:

(1) the Appellant's claim depended, as a first step, on being able to establish that her equitable interest as unregistered second mortgagee over the Terrigal Property had some value;

(2) whether or not it did depended on the value of the Terrigal Property at the time of the fraudulent withdrawal of caveat, and the level of indebtedness to the prior ranking mortgagee; and

(3) there was no evidence before the Court as to either.

Indeed, the Court found these to be fatal to the appellants claim.

The Court further observed that even if Ms Thomas had been able to demonstrate that her equitable interest in the Terrigal Property had some economic value, it would also have been necessary to demonstrate that she and her partner would have been able to extract repayment of some or all (and if any, how much) of their loan and any amounts owed to them and that this amount would have meant that the East Hills Property would not have needed to be sold.

Vacation Club Ltd v A G G Properties Pty Ltd

[2019] NSWSC 1357

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 9 October 2019

LAND LAW — co-ownership — statutory trust for sale — application by plaintiffs under Conveyancing Act 1919 (NSW) s 66G(1) — timeshare resort operated by company on property — where property is co-owned by hundreds of defendants — where almost all of the defendant co-owners are members of the company — where company passed resolutions to authorise certain co-owners to make application to the Court for the appointment of trustees for sale in respect of the property — whether it is appropriate to appoint trustees for sale — no reason to refuse relief — trustees for sale appointed

LAND LAW — Torrens title — powers of Court — Real Property Act 1900 (NSW) s 138 — ancillary orders sought to cancel sub-folios and to create a new consolidated folio in respect of property — where co-owners have each been issued with a certificate of title in respect of their respective sub-folios — where plaintiffs sought orders for the production of the certificates of title — where only some of the certificates of title produced to the plaintiffs — where Court satisfied that certificates of title have not been, and are not likely to be, produced — orders made under s 138(2)

Facts

This case concerns an application pursuant to s 66G of the *Conveyancing Act 1919* (NSW) (**"CA"**) for the appointment of trustees for sale of land situated at Settlement Point Road, Port Macquarie (**"the Property"**). Upon the land is a timeshare resort known as Vacation Village (**"the Resort"**) which is operated by the first plaintiff, Vacation Club Ltd (**"the Club"**). The second and third plaintiffs are the directors of the club.

The title of the Property is divided into 1,248 individual shares. Each of the plaintiffs and all 492 defendants are registered owners of one or more of these shares as tenants in common. A sub-folio has been created in respect of each share, and a certificate of title has been issued to the owners of each share. Being a registered proprietor of one or more of these shares is a requirement for membership of the Club. The plaintiffs and almost all of the defendants are members of the Club.

On 10 November 2018, an EGM was held where several resolutions were passed by an overwhelming majority of members. In effect, those resolutions held that orders would be sought from the Court to appoint trustees to sell the Property and that the Club would be appointed as agent of the members to lead this process. A further resolution was passed authorising Mr William Dawes and the third plaintiff to make the present application on behalf of the Club's members. Mr Dawes was replaced by the second plaintiff prior to the commencement of the proceedings.

The plaintiffs also seek ancillary orders pursuant to s 138(3) of the *Real Property Act 1900* (NSW) (**"RPA"**) to facilitate the trustees' sale of the Property. These orders include the cancellation of the existing sub-folios issued in respect of the Property; the creation a new single folio; and the issue of a new Certificate of Title naming the proposed trustees as registered proprietors of the Property.

On 20 September 2019, at the final directions hearing, counsel for the plaintiffs suggested that it may be appropriate for the Court to proceed to determine the application on the papers. The Court agreed given that none of the defendants have indicated any opposition to the relief sought.

Decision

Darke J granted the appointment sought.

His Honour found it clear on the evidence that the plaintiffs are co-owners of the Property within the meaning of s 66G CA and are therefore entitled to orders for the appointment of trustees for sale.

Now, his Honour did observe that it is possible for such a right to be barred if there exists an inconsistent proprietary right or contractual or fiduciary obligation. Indeed, some of the agreements entered into for the purchase of shares may be said to include an inconsistent contractual obligation in providing that the co-owner purchaser "waives" their right to seek orders for the appointment of trustees for sale.

That being said, his Honour found that such provisions did not provide a good reason to exercise the discretion to decline the appointment of trustees for sale.

This is because the resolutions passed at the EGM on 10 November 2018 appointed the directors apply for the appointment of trustees for the sale of the Property. In these circumstances, the application is not made by a co-owner seeking to take advantage of an individual right as co-owner to seek the appointment of trustees to sell the Property. Rather, the application is made by the second and third plaintiffs in their capacity as duly authorised representatives of the Club seeking to carry out the wishes of the Club members as a whole.

With respect to orders for ancillary relief, his Honour was satisfied that the plaintiffs had made out an appropriate basis for the making of ancillary orders of the kind set out in s 138(3). Specifically, his Honour was satisfied that the requirement in s 138(2) had been met in virtue of the fact that only *some* of the Certificates of Title issued to the owners were received despite there having been orders for their production.

His Honour thus ordered that the existing sub-folios in respect of the Property be cancelled, and that a new consolidated folio be issued.

Valverde v Inch

[2018] NSWSC 366

Coram: Lindsay J

Court: Supreme Court of New South Wales

Date: 24 April 2019

LAND LAW — Co-ownership — Nature of joint tenancy — Contrast with office of co-executors of deceased estate

SUCCESSION — Executors and administrators — Co-executors — Nature of office — 'Joint tenants' without right of survivorship

Facts

This case concerns competing claims to the net proceeds of sale of a property in Bondi Junction (**"the Bondi Junction property"**). The Bondi Junction property comprised a residence on a main lot fronting Botany Street, together with four smaller lots. The Bondi Junction property was for many years the family home of Maud Maria Inch (**"Maud Maria"**) who died on 2 September 1968, and her two unmarried children: Maud Inch (**"Maud"**), who died on 23 October 2009 and Cecil Inch (**"Cecil**"), who died on 23 November 2009.

The background to this case may be summarised as follows:

- During her lifetime, Maud Maria was the registered proprietor, and sole beneficial owner, of the main lot – Lot 2. The back blocks were acquired by Cecil, and registered in his name as proprietor.

- By her will, Maud Maria appointed Cecil and Maud as her "executors and trustees". They were also entitled under the will as sole beneficiaries of Maud Maria's estate "in equal shares".

- After Maud Maria's passing, Cecil and Maud obtained a grant of probate of Maud Maria's will and became registered as proprietors of the main lot, in their representative capacity, as joint tenants.

- On 9 September 2009, Cecil married the defendant.

- On 12 September 2009, the Bondi Junction property was sold by auction to a third party for $2.2 million. The auctioneer signed the sale contract on their behalf as vendors.

- On 16 September 2009, Cecil made a will in which he appointed the defendant as his sole executor and beneficiary. On 23 October 2009, Maud died.

- On 9 November 2009, Cecil caused the contract for sale of the Bondi Junction property to be settled by deploying a memorandum of transfer signed by himself alone. Following this, the net proceeds of sale were received into the trust account of the solicitors (currently used by the defendant) and later disbursed by them on her instructions.

- On 23 November 2009, Cecil died, leaving his will dated 16 September 2009, in respect of which no grant of probate or administration has been made.

- As to the net proceeds of sale of the Bondi Junction property, it was accepted that the solicitors for the defendant accounted for them to the defendant as the sole executor and beneficiary of Cecil's unprobated will to the exclusion of Maud junior's estate.

The essential controversy for determination is whether, upon completion of the sale, the estate of Maud was beneficially entitled to any part of the proceeds of sale.

Decision

Lindsay J held that in effecting the sale of the Bondi Junction property, Cecil proceeded on the basis that the beneficial entitlements of himself and Maud were to Lot 2 were governed by their mother's will. That is, Cecil and Maud held the legal title to that land as tenants in common (not joint tenants) on behalf of themselves as beneficiaries.

In arriving at this conclusion, his Honour drew particular attention to the fact that when Maud was alive, Cecil received a payment from the solicitors' trust account, funded by the deposit paid by the purchaser of the property, which was described as "Cecil's share of deposit (60 per cent)". This was viewed by his Honour to demonstrate that:

(1) Maud had an identifiable, separate "share" of the deposit and the proceeds of sale of the Bondi Junction property generally; and

(2) It was agreed between Cecil and Maud that their beneficial entitlements to the sale proceeds as a whole were to be apportioned, as to 60 per cent, for Cecil and, as to 40 per cent, for Maud.

Moreover, his Honour observed that even if Maud's interest as co-owner of Lot 2 was that of a joint tenant to which principles of survivorship attached, Cecil's entry into the contract for sale on her behalf, pursuant to an enduring power of attorney, was sufficient, in equity, to sever any joint tenancy.

Accordingly, it was held that the estate of Maud was entitled to 40% of the proceeds of sale.

Victorsen v Easy Living Holdings Pty Ltd

[2019] NSWSC 1721

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 5 December 2019

LAND LAW — Contract for sale of land — Claim for rescission pursuant to the rule in Flight v Booth (1834) 1 Bing (NC) 370 — Plaintiffs entered into a contract to purchase a proposed lot in an unregistered plan of subdivision — Where contract promised that the lot would contain an outdoor area covered by lawn — Where defendant changed the location of the on-site stormwater detention tank — Tank now built under outdoor area in such a way as to preclude a lawn — All access grates for tank located on the lot — Whether material and substantial discrepancy between the subject matter of the contract and the property available to be conveyed — Material and substantial discrepancy established — Plaintiffs establish entitlement to rescind.

Facts

This case concerns an "off the plan" contract for the sale of land entered into on 19 June 2017 between Mr and Mrs Victorsen (**"the Purchasers"**) and Easy Living Holdings Pty Ltd (**"the Vendor"**).

The Purchasers claim that they are entitled to rescind the contract on the basis that:

- *Flight v Booth* (1834) 1 Bing (NC) 370 provides that a purchaser can rescind a contract for the sale of land where there is a material and substantial discrepancy between the subject matter of the sale and that which the vendor can convey;

- In the alternative, the Vendor engaged in misleading or deceptive conduct in contravention of the Australian Consumer Law (**"ACL"**)

Specifically, the Purchasers claim that the property is materially and substantially different from that which the Vendor promised to convey, or represented it would convey, in that an outdoor area intended to be covered by a lawn is adversely affected by the construction beneath it of an on-site stormwater detention tank (an OSD tank).

Decision

Darke J held the purchasers could rely on the principles set out in *Flight v Booth* to rescind the contract for sale.

In considering the operation of special condition 8 which obliged the vendor to construct "the building" and to do so in a proper and workmanlike manner, his Honour held that because the contract in question was an off the plan contract, "the building" should be construed as a reference to the approved development consent plans and the approved construction certificate plans.

Relevantly, the approved development consent and construction certificate landscape plans provided for the unit's outdoor area to be a turfed area or an area covered by lawn. The approved stormwater plans further provided for an OSD tank that would be partly beneath the outdoor area, at a depth that would allow turf or lawn on the surface above it.

In view of this, his Honour held there to be a clear difference between what the vendor was able to provide and what the vendor promised to provide. This was because the change in the location of the OSD tank, away from that shown in plans, meant that the vendor was unable to provide the outdoor area as promised. Indeed, his Honour held that had the purchasers been made aware prior to the contract that rather than a turfed or grassed area the outdoor area of the property would be as it has actually been constructed, it may reasonably be supposed that they would not have entered into the contract at all.

Winau Aust Pty Ltd v LCC Property Development Pty Ltd

[2019] NSWSC 499

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 17 April 2019

LAND LAW — Caveats — Application for extension of caveat

Facts

This case concerns an application by the third defendant, 83 Eastwood Pty Limited, for an order pursuant to s 74K of the *Real Property Act 1900* (NSW) (**"RPA"**) extending the operation of a caveat (caveat no AN865737) until the final disposal of the proceedings.

The caveat in question claims an estate or interest in three parcels of land in Eastwood. The estate or interest claimed in the land is described as follows:

> "Estate in fee simple by virtue of transfer dated 25 February 2017 between 183 Eastwood Pty Limited and Rong Sheng Eastwood Pty Limited."

The details supporting the claim are set out in the caveat as follows:

> "The Caveator was the sole registered proprietor of the Lands since 25/02/2017 until 12/11/2018. On 12/11/2018 the Registered Proprietor was registered as the registered proprietor of the Lands pursuant to a Transfer by Mortgagee Under Power of Sale. The mortgage is disputed by the Caveator."

Appearing, by leave, in order to resist the application for an extension of the caveat is the purchaser of the property, Rong Sheng Eastwood Pty Limited (**"Rong Sheng**"). Rong Sheng has been registered on the title to the property but is not joined as a party to the substantive proceedings in this Court.

Rong Sheng submits that there is nothing in the caveat to indicate the nature of the claimed interest, nor is there anything in the evidence or supporting material filed on the present application which identifies the nature of the claimed interest in the land such as to enliven the discretion under s 74K RPA.

Decision

Ward CJ dismissed the application for an extension.

His Honour was not satisfied that the caveat in its present form has or may have substance. This was because while the caveatable interest claimed is "an estate in fee simple," the submissions of the applicant indicate that the interest actually sought was a form of entitlement or equity to have the transfer set aside and the register rectified to have 183 Eastwood restored on the title as the legal owner of the property.

Xinfeng Australia International Investment Pty Ltd v GR Capital Group Pty Ltd

[2019] NSWSC 884

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 3 July 2019

JUDGMENTS AND ORDERS — Amending, varying and setting aside — Consent orders

LAND LAW — Caveat

Facts

This case concerns an application brought by the receivers and managers of the property of GR Capital Group Pty Limited (**"GR Capital"**), the first defendant in these proceedings, in conjunction with Everest Private Pty Limited as a secured lender to GR Capita).

The application is for a variation of orders made by consent by the Court on 13 August 2018 in relation to the extension of a caveat that had been filed by the plaintiff in these proceedings, Xinfeng Australia International Investment Pty Limited (**"Xinfeng"**). Relevantly, that order provided that "[u]pon the plaintiff by its counsel giving the usual undertaking as to damages, the operation of caveat AN 467327 be extended until further order of this Court".

To understand the reason for the application, it is necessary set out the factual background to the matter which may be summarised as follows:

- On 26 October 2018, Mr Ryan Eagle and Mr Philip Quinlan were appointed receivers and managers of all of the assets and undertakings of GR Capital. The assets to which the receivers have been appointed as receivers and managers include a Hurstville property which was under development.

- Since their appointment as receivers and agents of GR Capital, the receivers have continued the development of the Hurstville property. That development was the subject of Council approval on 12 May 2015 for the construction of a mixed use residential and retail development. At the time of the appointment of the receivers, GR Capital had completed approximately 80% of the development.

- Prior to Mr Eagle's appointment as receiver, GR Capital had entered into 50 pre-sales contracts with various purchasers for the sale of a number of residential units. The significance of the pre-sales contracts is that, under the pre-sales contracts, GR Capital is required to register a proposed plan of subdivision within 36 months from the date of the pre-sales contracts. This time period has since been extended by a further period of 12 months, with the earliest sunset dates commencing from 28 September 2019.

- If the proposed plan of subdivision is not registered by the applicable sunset date as extended, the pre-sales purchasers may become entitled to rescind their respective pre-sales contracts.

The applicants on the present application have sought to register the plan of subdivision but have received a requisition from Land Registry Services in the following terms:

> "As advised by NSW LRS Legal Officer, order of court AN583901 noted on the title to extend the operation of the caveat AN467327, a variation of Court order is required for registration of your plan."

Accordingly, they now seek to vary the orders previously made such that they are entitled to register the subdivision plan.

Decision

Ward CJ observed that there was no objection by the caveator (Xinfeng) or by any of the subsequent caveators to the registration of the plan of subdivision. Accordingly, his Honour found there to be nothing preventing the registration by those in Land Registry Services of the plan of subdivision and that no variation of the orders made on 13 August 2018, extending the operation of the caveat until further order, would be required.

That being said, given that the Land Registry Services officers have taken a different view (and have issued a requisition in relation to this matter), his Honour found it appropriate for the avoidance of doubt that there be a variation of the order made on 13 August 2018 in order to make clear that there is no prohibition on the Registrar General from acceding to the request for lodgement of the plan of subdivision in this case.

Yapp v Pollak

[2019] NSWSC 449

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 April 2019

LAND LAW — contract for sale of land — claim by vendor for specific performance — construction — special condition in contract stipulated that the vendor agrees to replace lower staircase in the property in accordance with a Development Approval prior to settlement — special condition further stipulated that 'the vendor warrants that all Development Consent Conditions will be satisfied on or before completion' and will provide an occupation certificate prior to settlement — where not all works permitted by Development Approval had been carried out — whether special condition required the vendor to complete all the works the subject of the Development Approval — special condition held to require only the replacement of lower staircase and provision of an occupation certificate in respect of that work — vendor held to have complied with special condition — specific performance ordered

Facts

Yapp (**"Vendor"**) and Pollak (**"Purchaser"**) entered into a contract for the sale of land in Woolloomooloo on 30 June 2018. While the stipulated date for completion was 11 October 2018, the Purchaser did not complete the contract on the basis that the Vendor failed to adhere to obligations contained in Special Condition 49.

Special Condition 49 provided that:

> "Notwithstanding clause 35, the vendor discloses works have been carried out in accordance with the Development Approval annexed to the contract, however, the lower staircase requires replacement. The vendor agrees to ensure the replacement of the lower staircase is carried out in accordance with the Development Approval prior to settlement. The vendor warrants that all Development Consent Conditions will be satisfied on or before completion and will provide an occupation certificate to the purchaser prior to settlement. The purchase cannot make a claim or requisition or rescind or terminate in respect of this work."

Some but not all of the works authorised by the Development Approval had been carried out. On 24 August 2018, the accredited certifier issued an interim occupation certificate in respect of the property, noting that the building was suitable for occupation or use in accordance with its classification under the Building Code of Australia BCA class 1a. The IOC was then forwarded onto the Purchaser and purported to be "in satisfaction of Special Condition 49."

Decision

Darke J dismissed the cross-claim brought by the Purchaser seeking orders that the Vendors specifically perform and carry into effect Special Condition 49 of the contract by satisfying all of the development consent conditions of the Development Approval referred to in the contract and providing an occupation certificate in accordance with that Special Condition.

Rather, his Honour held that:

- The warranty contained in Special Condition 49 did not require the Vendor to complete the balance of the works permitted by the Development Approval. Rather, it was only a warranty in respect of works which had already been carried out in accordance with the Development Approval as set out in the first sentence.

- Special Condition 49 could be satisfied by the provision of an interim occupation certification as opposed to a final occupation certificate.

Accordingly, his Honour found that the Vendor had complied with Special Condition 49 and subsequently made an order for specific performance in favour of the Vendor.