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REAL PROPERTY CASES 2020

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2020

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Abdallah v Baygan

[2020] NSWSC 166

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 2 March 2020

LAND LAW — caveats — removal of caveat — order that caveats be withdrawn pursuant to s 74MA of the Real Property Act 1900 (NSW) – where there is an order for judicial sale of the property – where no appearance by a caveator – where plaintiffs undertake to hold net proceeds of the sale on trust

Facts:

These proceedings concerned the first, second and third plaintiffs agreeing to lend the first defendant the sum of $600,00, consisting of $400,000 loaned by the first plaintiff and $200,000 loaned by the second plaintiff. However, the defendants defaulted on payment in respect of both loan amounts. The plaintiffs sought judgment against the first and second defendants in respect to the amounts outstanding under the loan agreement – collectively, $614,000 – and accordingly, an order for judicial sale of Property. The third defendant, Westpac Banking Corporation was joined in the proceedings because of a registered first mortgage over the Property. Further, the fourth, fifth and sixth defendants were also joined as parties to the proceedings as some also claim security interests.

In previous proceedings commenced in 2019, Ball J found that the plaintiff's unregistered mortgage over the Property, which had been granted to secure the second defendants' obligations, took effect as an equitable charge, and made orders for the judicial sale of the Property.

The plaintiffs' notice of motion as settlement of the sale of the Property was scheduled to take place soon after the date of the present proceedings. Accordingly, the plaintiffs sought orders under s 74MA of the *Real Property Act 1900* (NSW) '('**RPA**') that the fourth, fifth and sixth defendants be required to withdraw any caveats recorded on the title to the land contained in the Property.

Decision:

The Court noted that the fourth defendant had not appeared at the hearing. Consequently the fourth defendant led no evidence as to the nature of the interest sought to be protected by its caveat, or, why it should not be withdrawn. Accordingly, these matters were sufficient for the

Court to conclude that an order under s 74MA of the RPA should be made, and therefore, required the fourth defendant to withdraw its caveat.

Abdallah v Baygan (No. 3)

[2020] NSWSC 680

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 1 June 2020

LAND LAW – equitable charge over sale proceeds – priority dispute resolved by consent – declaratory relief appropriate – no issue of principle

Facts:

These proceedings concerned Brian Abdallah and Karli Anderson (‘**the plaintiffs**’) seeking judgment against the first and second defendants for amounts outstanding under a loan agreement, pursuant to which the plaintiffs advanced sums totalling $600,000 to the first defendant. The proceedings were listed for hearing as the parties required determination on the issue regarding competing claims to the net sale proceeds by the plaintiffs and the other defendants.

The second defendant guaranteed payments of all monies owing by the first defendant under the loan agreement. She also granted a mortgage over a house she owns (‘**Property**’) to secure her obligations under the guarantee. The mortgage is unregistered. Accordingly, in the proceedings before Ball J in November 2019, his Honour determined that the plaintiffs’ unregistered mortgage took effect as an equitable charge over the Property, alongside making orders for the judicial sale of the Property. Accordingly, the net sale proceeds of around $414,000 required distribution to the secured creditors and was held in the plaintiffs’ solicitors’ trust account.

The plaintiffs contended that they were entitled to the net sale proceeds as a secured creditor, and that their equitable charge takes priority over any claims by the fourth, fifth and sixth defendants.

Decision:

The Court held that the outstanding sum was secured by the plaintiffs’ unregistered mortgage over the Property and is greater than the amount of the net sale proceeds. Thus, subject to any interest claims by the other defendants, it was determined that the plaintiffs are entitled to have the net sale proceeds released to them.

Ageist Pty Limited v More Than Skin Deep Pty Limited

[2020] NSWSC 698

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 22 May 2020

REAL PROPERTY – Caveats – s 74MA Real Property Act – mortgage required consent of mortgagee before disposing of property – default on loan – notice of default – mortgagor trying to refinance – mortgagor's wife (also finance broker and director of purchaser) assisting with finance – mortgagor signs contract of sale to related parties – sale price above market – deposit not paid – unclear whether agent on contract actually retained – mortgagee not told – contract to support higher value of property for refinance – not bona fide contract of sale – offer of finance – offer not accepted – finance insufficient anyway – power of sale exercised – mortgagee sells at auction – caveat lodged citing earlier contract of sale – whether serious issue to be tried – no evidence purchaser could get finance – balance of convenience favoured removal of caveat

Facts:

These proceedings concerned Ageist Pty Ltd ('**the plaintiff**') seeking an order under s 74MA of the *Real Property Act 1900* (NSW) ('**RPA**') that More Than Skin Pty Ltd ('**first defendant**') and Mr Stojcevski ('**second defendant**') withdraw a caveat lodged on the title of a property in Leichhardt ('**Property**'). The caveatable interest was a charge arising under a contract of sale between Mr Murabito and the defendants ('**the First Contract of Sale**'). Accordingly, the plaintiff was the second registered mortgagee of a Leichhardt property owned by Mr Murabito. The plaintiff became the second mortgagee by taking an assignment of a loan and a transfer of mortgage from H & H Mezz Pty Ltd.

The caveat issue posed to the court was described as two-fold. Firstly, Mr Murabito and the defendants are related parties. The first defendant is a company of which Lily and Lupco Strojcevski are directors, and Mr Stojcevski is the sole shareholder. Lily Stojcevski is the defector wife of Mr Murabito and the sister of Mr Stojcevski. Second, the plaintiff has itself sold the Property at auction, having exercised its power of sale ('**the Second Contract of Sale**').

The defendants submitted that they had an indisputably valid caveat, and it would be unusual or rare to order that the caveat be removed in such circumstances. The defendants also contended that, whilst the plaintiff's power of sale was not disputed, the plaintiff was not entitled to disregard the First Contract of Sale and that the defendants were *bona fide purchasers* under an earlier contract in time.

The plaintiff submitted that there was no serious question to be tried: the plaintiff was a registered mortgagee and had indefeasibility of title under s 42 of the RPA. It was further submitted that on the default by the mortgagor, the plaintiff had a power of sale, provided that it complied with the RPA, which it had. As the mortgagor issued a notice of default in June 2019, the mortgagee's right to exercise its power of sale arose before the First Contract of Sale, although it was not necessary for the plaintiff's interest to arise earlier in time given that its rights as registered mortgagee defeated any equitable interest. Accordingly, and because there was no bad faith in the power of sale, the plaintiff further submitted that it had a right of sale which could not be defeated by an equitable interest in the property (except in the case of fraud).

Decision:

The Court agreed with the plaintiff's submissions, ordering that the first and second defendants withdraw the caveat on the Property.

Ageist Pty Ltd v More Than Skin Pty Ltd (No 2)

[2020] NSWSC 1176

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 31 August 2020

LAND LAW — Caveats — Removal of caveat — Removal by order of Court — where the principal judgment requested the parties to determine whether a valuable undertaking as to damages could be proffered — where the parties were in dispute as to the course the Court should take — where the short minutes of order provided must be refined to reflect the circumstances — where equity will act to preserve value when that can be done — chance given, on condition, to sell property at the proposed higher amount

Facts:

Ageist Pty Ltd (‘**Ageist**’) was the second mortgagee over a property, whose registered proprietor is Mr Murabito. In the exercise of its mortgagee’s power of sale, Ageist entered into a contract for the sale of the property. After the date of the contract, Mr Murabito lodged a caveat against the title of the property (‘**Murabito Caveat**’), which had the effect of preventing the completion of the contract. These proceedings therefore concerned an application by Ageist for an order under s 74MA of the *Real Property Act 1900* (NSW) (‘**RPA**’) for the withdrawal of the Murabito Caveat.

Initial hearing:

In circumstances more fully explained in the principal judgment from the initial hearing, Ageist allowed a mere 11-day advertisement program for the property. The price reached at such auction was $1,015.000. The evidence at the initial hearing established that the best use of the property was at retail premises, and Ageist sought to justify the price under the contract by relying on a professional valuation of the property. On the basis of valuing the property for retail purposes, the valuation evidence gave a range of values from slightly more than the contract price, to $1,700,000. Thus, the valuation evidence indicated that the price under the contract was below the reasonably range of values for the property.

If Mr Murabito established at the final hearing that Ageist had breached its mortgagee’s duty of good faith, and the Property had been sold at a substantial undervalue, he would be entitled to compensation from Ageist and the Court may have ordered the withdrawal of the Murabito Caveat. This, however, was not a satisfactory resolution of the dispute in the initial hearing, as the second mortgage had been assigned by the original second mortgagee to Ageist. As such, if there was a reason for the assignment other than to deprive Mr Murabito of his rights under the *National Consumer Credit Protection Act 2009* (Cth), none was suggested by Ageist, and thus, there was no apparent purpose in the assignment other than to achieve that result. The Court indicated that even if Mr Murabito established that Ageist had breached its duty of good faith to him, the Court had no confidence that Ageist would have the assets sufficient to enable a proper account to Mr Murabito.

Accordingly, this led to an issue concerning the Court's consideration of the balance of convenience, as the conventional outcome would have been to order the withdrawal of the Murabito caveat, on the basis that Mr Murabito would be adequately protected by his entitlement to an account from Ageist. Nonetheless, there was inadequate reason for the Court to believe that the right to an account was valuable given Ageist's net assets position. Therefore, as neither choice available to the Court would have constituted a satisfactory resolution to the determination of the balance of convenience, Robb J gave Ageist and Mr Murabito a period in which to consider their position, and to determine whether they could offer a satisfactory undertaking of damages that they sought from the Court.

These Proceedings:

Ageist Offering

The undertaking to the Court offering by Sydney Wyde (the mortgage manager) was to the following effect:

1. It indemnifies Ageist in respect of any judgment amount awarded against Ageist in favour of Mr Murabito arising out of the purported under sale of the Property;
2. It will quarantine the sum of $650,000 in its account and that sum will not be released until the earlier of:
   i) the further order of the Court;
   ii) any agreement between the parties to the contrary;
   iii) a period of 6 months from the date of the undertaking.

However, the Court indicated that it had no confidence that the proceedings could be heard and determined within a six-month period. Consequently, the Court was not satisfied with the undertakings to the Court that had been offered by Ageist and Sydney Wyde.

Mr Murabito Offering

Turning to the position concerning the undertaking offered by Mr Murabito, he supported such position through three affidavits. Although Robb J did not discuss the affidavits in detail, his Honour established that the evidence did not suggest a substantial likelihood that Mr Murabito could establish the security, or that the New Purchaser will be able to make the necessary arrangements within a matter of a few weeks to prove that he will be able to purchase the Property for $1,600,000. Ultimately, Mr Murabito was obliged to submit that if there was any chance that the property could be sold for a price of $1,600,000, Mr Murabito should be given that opportunity. Accordingly, if he failed to satisfy the two conditions, then that would be the end of the matter and the Murabito Caveat would then have to be withdrawn.

Decision:

The court considered that, if there is any real chance that the property may be sold for $1,600,000, the balance of convenience favours the Court making orders that permit that possibility to come to fruition. Further, provided the ability of Ageist to complete the contract is preserved, the Court should not waste the possibility that the sale of the Property will generate an additional $585,000.

Ageist Pty Ltd v More Than Skin Pty Ltd

[2020] NSWSC 1117

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 21 August 2020

LAND LAW — Caveats — Removal of caveat — Removal by order of court — whether there is a serious question to be tried — where the second defendant made a complaint to the Australian Financial Complaints Authority with respect to the exercise of a mortgagee's power of sale — where that right was subsequently assigned to the plaintiff, who was not subject to the Australian Financial Complaints Authority Scheme — where the operation of s 333 of the *National Consumer Credit Protection Act 2009* (Cth) means that is unlikely that the assignment would be invalid — where there is a real risk that the property will be sold at a substantial undervalue after an 11 day advertisement process — where there is a substantial prospect that the Court will find, on a final hearing, that the plaintiff has breached its duty of good faith in the manner of the sale — where the amount the plaintiff is entitled to recover from the second defendant under his guarantee should be reduced as the increase in default interest may be a penalty — whether the guarantee of the debt is liable to be unenforceable under the *Contracts Review Act 1980* (NSW) — where there are multiple serious questions to be tried

LAND LAW — Caveats — Removal of caveat — Removal by order of court — whether the balance of convenience is in favour of the caveat being withdrawn — where there are numerous considerations, including interest and valuation, as to whether the security value of the properties has been exhausted — where there must be a significant probability that the effect of the prevention of completion of the Contract would impose a risk of ultimate loss on the plaintiff — where there is substantial reason for doubt that the plaintiff would have the means to pay compensation to the second defendant — where both the plaintiff and the second defendant have not offered a valuable undertaking as to damages to either secure the continuation or withdrawal of the caveat — result pending on the undertaking proposed

Facts:

These proceedings concerned a dispute between Ageist Pty Ltd ('**Ageist**') and the second defendant, Mr Murabito. Ageist, as second mortgagee by assignment of a property in Leichhardt ('**Property**'), entered into a contract to sell the Property in the exercise of its mortgagee's power of sale. Mr Murabito lodged a caveat against the title to the Property ('**Murabito Caveat**'), which had the effect of preventing the completion of the contract. The first and third defendants also lodged caveats against the title to the Property to protect different proprietorial interests that they claim to have. Ageist commenced these proceedings and sought orders against the three defendants that the defendants withdraw the caveats.

Mr Murabito's Submissions

The grounds put forward by Mr Murabito were examined by the Court as a basis for determination as to whether the Murabito Caveat should remain on the title of the Property.

First, Mr Murabito submitted that the debt assignment from H & H Mezz Pty Ltd was invalid because it was prohibited by the legislative regime that establishes the Complaint Resolution Scheme Rules implemented by AFCA ('**AFCA Scheme**'). Further, Mr Murabito contended under this complaint that the terms of the mortgage – whereby default interest accrued at a very high rate, compounded monthly – is a penalty, and would have formed a basis for a complaint to AFCA. Accordingly, Mr Murabito submitted that he is entitled to relief because of these unfair terms of the mortgage.

Second, Mr Murabito submitted that the sale of the Property was substantially undervalued, on the basis of the limited 11-day notice period for the auction. Further, he contended that there is a real risk that if the Murabito Caveat is ordered to be withdrawn and the contract is completed, the amount of the shortfall in the purchase price would be lost to Mr Murabito as Ageist's financial position in not a reliable source of funds.

Consideration on the balance of convenience

Ageist and Mr Murabito accepted that these proceedings were to be dealt with on an interlocutory basis, and that, provided relevant serious questions to be tried are established, the question is what orders should be made on the balance of convenience. The Court noted that the parties' evidence and submissions had not addressed all necessary issues, and it was not possible to identify with sufficient confidence the course required by the balance of convenience. This was ultimately due to the real risk that, if the Court made orders sought by either Ageist or Mr Murabito, the other will suffer significant loss. Further, neither party had offered to propose to the Court the usual undertaking as to damages or demonstrated that such an undertaking would provide adequate protection to the other party.

Decision:

As neither choice available to the Court would have constituted a satisfactory resolution to the determination of the balance of convenience, Robb J gave Ageist and Mr Murabito an opportunity to respond to this omission by considering their position and determining whether they can offer a satisfactory undertaking as to damages to support the interlocutory order that they seek from the Court. Robb J indicated that the orders will be determined according to the most appropriate responses from Ageist and Mr Murabito. As such, in the absence of the Court receiving at least one satisfactory undertaking as to damages, the Court suggested that it would require to make a somewhat arbitrary choice between two unsatisfactory alternatives.

Alexandria Landfill Pty Ltd v Transport for NSW

[2020] NSWCA 165

Coram: Basten JA, Macfarlan JA and Leeming JA

Court: New South Wales Court of Appeal

Date: 4 August 2020

JUDGMENTS AND ORDERS – reasons – compulsory acquisition of land – assessment of compensation by Land and Environment Court – allegations of constructive failure to exercise jurisdiction and inadequacy of reasons – highly complex discounted cash flow exercise undertaken in protracted hearing – appeal confined to questions of law – minimum acceptable standard of reasons

CIVIL PROCEDURE – procedural fairness – judge expressed preference for one expert over another allegedly on the basis of material not in evidence – finding held properly based on evidence

CIVIL PROCEDURE – apprehension of bias – apprehension alleged to arise solely from outcome of case and reasons for judgment – impermissible approach

LAND LAW – compulsory acquisition of land – compensation for disturbance – s 59(f) *Land Acquisition (Just Terms Compensation) Act* – meaning of “other financial costs” – no actual use of the land by claimant – agency relationship not established

LAND LAW – compulsory acquisition of land – compensation for special value – s 57 *Land Acquisition (Just Terms Compensation) Act* – failure to establish relevant use – agency relationship not established

Facts:

These proceedings concerned a dispute between Alexandria Landfill Pty Ltd (‘**ALF**’) and Transport for NSW for the compulsory acquisition of the ALF site for the St Peters Interchange, which was part of the M8 Motorway. By way of brief background for these long running proceedings, the West Connex Delivery Authority (‘**WDA**’) began negotiations with the owner, ALF, and the tenant, Boiling Pty Ltd (‘**Boiling**’) in 2014. At the time, these companies were part of the Dial a Dump Group. However, the parties could not agree on the amount of compensation, and as a result, the WDA compulsorily acquired two lots. Relevantly, WDA then merged into Roads and Maritime Services, which then merged into Transport for NSW in 2019.

In 2015, the Valuer-General determined ALF’s entitlement to compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 (‘**Just Terms Act**’) in the amount of around $70 million. This included $56,900,000 for market value and $13,119,285 for disturbance. Boiling was awarded $11,000 for legal and valuation fees. ALF and Boiling rejected such compensations offers and instead filed for proceedings in the Land and Environment Court ('**LEC**'), eventually claiming over $600 million in compensation.

Interestingly, neither ALF nor Boiling carried out the landfill and waste operations on the land. Instead, another entity controlled by the same directors named Dial A Dump Industries Pty Ltd ('**DADI**') did so. However, pursuant to many earlier proceedings, DADI failed to establish that it had an interest in the land, and thus, was deemed not to be entitled to any compensation.

First Instance:
The LEC proceedings were massive, including five interlocutory applications and judgments. The claim by ALF included some $348 million for the market value of both lots, $60 million for special value and approximately $195 million for disturbance. Meanwhile, Transport for NSW argued that ALF was only entitled to $50,089,177.70, comprising of the market value of the land and reimbursement of legal and valuation fees. This amount was $20 million less than the Valuer-General's determination.

The central issue posed in the initial hearing was the identification of the highest and best use of the land. The Court accepted Transport for NSW's submission that such use involved operating a landfill and recycling operation from year 1-8, and then selling the land as a single parcel of 'general industrial land' at the conclusion of those operations. The Court also accepted Transport for NSW's evidence that on the date of acquisition, there was significant asbestos and other contamination in various waste stockpiles on the land that would have required to be processed and removed. In turn, this imposed an immediate liability for the hypothetical purchaser and reduced the value of the land by approximately $31 million.

In assessing the market value of the land, the LEC accepted that a discounted cash flow ('**DCF**') approach was appropriate. Further, the LEC determined the key inputs into the DCF model, and found that on majority of the key inputs, the evidence of Transport for NSW's experts was more supportive.

Consequently, the LEC rejected ALF's claim for $348 million for the market value of the land, and instead agreed with the submission of Transport for NSW in that the market value was $3.9 million for Lot 1 and $45.7 million for Lot 2. The LEC also found that, in relation to the $195 million claimed for disturbance, the ALF could not claim any lost profits as there was no actual use of the land. Accordingly, ALF had leased the entirety of the land to Boiling, and therefore, ALF was not in possession nor control of the land. As for the legal and valuation costs, the LEC awarded $424,910 for ALF and $11,000 for Boiling. Finally, the LEC also rejected ALF's claim for compensation for special value on the basis that there was no real evidence supporting such argument. Therefore, the Court awarded ALF compensation totalling to $50,087,180.68.

The Appeal

In these appellant proceedings, the ALF argued that the LEC erred on seven grounds, summarised as follows:

1. The Court constructively failed to exercise jurisdiction;
2. The Court failed to provide any, or adequate, reasons for findings;
3. There was a lack of procedural unfairness in the trial judge preferring a key expert for Transport for NSW;
4. There was apprehended bias in the trial judge finding for Transport for NSW on all material issues;
5. The Court erred in rejecting compensation for disturbance;
6. The Court erred in rejecting the special value claim; and
7. The Court erred in respect of a decision on a question of law in that it failed to identify and apply the law in relation to attribution of loss as between ALF and DADI.

<u>Grounds 1 and 2:</u> *Constructive failure to exercise jurisdiction and failure to provide adequacy of reasons*

The Court of Appeal held that the LEC did not fail to exercise his proper jurisdiction nor did he fail to provide adequate reasoning noting:

- the hearing extended over 50 days;
- the judgement involved 270 pages and 861 paragraphs;
- the judge made numerous interlocutory rulings, delivering five interlocutory judgments, only one of which was (indirectly) challenged;
- orders were also made which, in their terms, addressed and resolved the ultimate issue, namely the just compensation to be paid for the acquired land;
- the reasons were structured, expressly identified the key issues, and outlined the evidence and submissions on the many different issues.

The Court also indicated that a trial judge is not required to provide reasoning for every single aspect of each party’s arguments. As such, the Court affirmed that the reasons of Sheahan J in the LEC were rational and provided a sufficient basis to determine the most financially advantageous use of the acquired land. Thus, there was no reason to believe that the trial judge lost sight of statutory exercise and for these reasons, grounds 1 and 2 were rejected.

<u>Ground 3</u>: *Procedural Fairness*

ALF argued that the reasons provided by Sheahan J, that preferred the evidence of Transport for NSW's expert, amounted to a denial of procedural fairness due to the expert's experience in assessing compensation under the Just Terms Act. However, unlike the precedent relied upon where there was a denial of procedural fairness due to a witness' familiarity to the Court, the Court of Appeal held that this did not occur. On the contrary, Sheahan J indicated that there was no unfairness in the expert having greater experience in assessing compensation in land acquisition cases and more extensive qualifications. Thus, ground 3 was rejected.

<u>Ground 4</u>: *Apprehended Bias*

ALF also contended that there was a reasonable apprehension of bias because, in essence, the trial judge resolved all disputes in favour of Transport for NSW. However, the Court held that the outcome alone cannot support a claim of reasonable apprehension of bias, based on prejudgment, and therefore, ground 4 was also rejected.

<u>Grounds 5, 6 and 7</u>: *Disturbance*

ALF's arguments in respect to the $195 million claim for disturbance compensation was unprecedented. In essence, ALF argued that it could claim the disturbance costs of another party, being DADI, on the basis that this was not prevented and that DADI was acting as ALF's agent. In addition, ALF argued that Transport for NSW was estopped from denying the agency argument. However, the Court affirmed the long-standing position that disturbance can only be claimed by the entity entitled to compensation, which in this case, was not DADI. Further, the Court rejected the agency argument, as ALF had not provided any evidence of an agency relationship between ALF and DADI. Finally, the estoppel argument was also rejected. Thus, grounds 5, 6 and 7 failed.

<u>*Special Value Claim*</u>

ALF's claim for special value relied on a finding of agency, which, having been rejected by the trial judge on the facts, was similarly rejected by the Court of Appeal.

Decision:

Therefore, given that ALF's grounds of appeal were all rejected, the appeal was dismissed with costs.

Arcidiacono v The Owners – Strata Plan No 17719; Arcidiacono v The Owners – Strata Plan No 61233

[2020] NSWCA 269

Coram: Macfarlan JA, White JA and McCallum JA

Court: New South Wales Court of Appeal

Date: 28 October 2020

LAND LAW – easements – creation of easements by prescription – servient owners unknown – whether servient owners acquiesced in user – whether acquiescence a necessary element

LAND LAW – easements – creation of easements by order of court – *Conveyancing Act 1919* (NSW) s 88K – whether easements reasonably necessary – whether easements not inconsistent with the public interest – evaluative decision in which appellate courts should exercise restraint

Facts:

These proceedings concerned an application for leave to appeal and purported appeals against a decision of Henry J regarding two small parcels of land in Sydney's CBD (the '**Dock**' and the '**Passage**'). In 2000, the Dock and the Passage were sold by the Sydney City Council to Anthony and Anna Marie Arcidiacono ('**the appellants**') as rates were unpaid. Further, the owners of neighbouring land at 71 York Street and Clarence House on Clarence Street ('**the respondents**') claimed that they had easements over the Dock and Passage.

First Instance:

The primary judge held that the respondents had established easements by prescription for rights of carriageway over the Dock and Passage based on long open use. Her Honour also stated that it that were not the case, she would have alternatively ordered easements to be imposed under s 88K of the *Conveyancing Act 1919* (NSW) and awarded limited amounts of compensation. Further, her Honour also imposed easements under s 88K over the Dock and Passage in favour of 71 York Street for overhanging and encroaching structures to remain and for services and repairs.

The Appeal:

The appellants, who own the servient tenements alongside another two adjacent allotments of land, commenced appellant proceedings. The principal issues on appeal can be summarised as follows:

1. Whether the respondents had established easements by prescription over the Dock and Passage;

2. Whether easements for rights of carriageway should have been imposed over the Dock and Passage under s 88K; and
3. Whether the other easements (for overhanging and encroaching structures and for services and repairs) should have been imposed under s 88K.

On the first issue, the appellants contended that the respondents did not establish knowledge by previous owners of the parcels of their adverse use, and that there was in any event insufficient evidence of such use to give rise to easements by prescription. However, the Court affirmed the primary decision and confirmed that her Honour was correct to consider whether prudent owners of the Dock and Passage would have known of their ownership and of the persistent adverse user of their land.

On the second issue, the appellants submitted that it was not reasonably necessary to impose the easements, that their imposition would be inconsistent with the public interest, that the appellants were not able to be properly compensated for the loss resulting from the imposition of the easements and finally, in respect of one parcel, that her Honour erred in assessing the amount of compensation to be awarded. However, all aspects of this ground were rejected on the basis that it was not shown to be unreasonable and her Honour's assessment of compensation that should be paid in the event of an imposed easement was appropriate.

On the third issue, the appellants contended that the primary judge erred in finding that easements should be imposed in favour of 71 York Street for overhanging and encroaching structures to remain, and for repairs and services. However, the Court of Appeal held that the primary judge exercised her discretion to impose the relevant easements and no error was shown in her decision. The inferences her Honour made were reasonably open to her on the evidence and did not involve a reversal of the onus of proof.

Decision:
The appellants were granted leave to appeal to the extent that leave may be necessary. However, as each of the appellants' grounds of appeal to the primary judgment failed, the appeal was dismissed with costs.

Armidale Regional Council v Vorhauer (No 2)

[2020] NSWSC 56

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 11 February 2020

LAND LAW – possession of land – unpaid rates and charges – local council's right of sale – contract of sale with vacant possession – failure of occupiers to vacate land in response to statutory notice – proceedings commenced by Council – defences previously struck out – no appearance by defendants – right of council to possession – where sale price exceeded outstanding rates and charges – whether legal costs of the proceedings amounted to expenses in connection with the sale – s 718 Local Government Act 1993 (NSW)

Facts:

These proceedings concerned the Armidale Regional Council ('**the plaintiff**') seeking possession of land in Armidale to give effect to a contract of sale of the land resulting from unpaid rates and charges. The plaintiff commenced proceedings against the owner of the land ('**the first defendant**') and her two daughters, however, one daughter had unfortunately died in the early stages of the proceedings, whilst the other daughter was still an occupier of the land ('**the second defendant**').

Rates and charges had allegedly been owing in respect of the land since 2013. In 2018, the plaintiff resorted to sell the land, having been provided with certification by the chief executive officer on the matters. In accordance with the requirements of s 715 of the *Local Government Act 1993* (NSW) ('**the Act**'), notices of the proposed sale of land were given and the land was put up for sale by public auction. However, the reserve price was not met so thereafter, the land was offered for sale by private treaty. Although the contract was entered into successfully, the rates and charges in respect of the land were still outstanding.

The first and second defendants were subsequently issued with notices to vacate, however, the defendants failed to leave the property and proceedings were then commenced. The plaintiff sought possession of the land, and an order that the plaintiff would be able to recover its costs of the proceedings out of any remaining proceeds of the sale of land once the cost of unpaid rates and charges had been recovered.

The first and second defendants filed defences, however, these were struck out by the Court on application of the plaintiff. Accordingly, the Court noted that the defendants did not appear at the hearing of the strike out application, the directions hearing or at the final hearing.

Though, the first defendant did file submissions which concerned, amongst other things, a caveat that the owner had lodged on the land.

Decision:

The Court held that the plaintiff had satisfactorily provided the amount outstanding in rates and charges, and that the contract of sale had been entered into. Further, the Court indicated that the caveat claim on the land did not constitute a defence, as the caveat did not prevent the land from being sold by contract; though evidently, the caveat required removal before completion could take place. Thus, the plaintiff was entitled to the possession of the land because the caveat did not prevent possession from being ordered.

Ausbao (286 Sussex St) Pty Ltd v Registrar-General of NSW

[2020] NSWSC 50

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 11 February 2020

REAL PROPERTY – Torrens system – claim for compensation from Torrens Assurance Fund – area of parcel of land erroneously overstated in deposited plan – whether compensation excluded by s 129(2)(e) of the Real Property Act 1900 (NSW) – whether loss arose because of an error or miscalculation “in the measurement of land” – real question to be determined – claim not clearly untenable or manifestly groundless – summary dismissal not appropriate

PRACTICE AND PROCEDURE – summary dismissal – claim for compensation from Torrens Assurance Fund – whether claim excluded by s 129(2)(e) of Real Property Act 1900 (NSW) – whether loss arose because of an error or miscalculation “in the measurement of land” – real question to be determined – claim not clearly untenable or manifestly groundless – summary dismissal not appropriate

Facts:

These proceedings concerned the defendant seeking an order for the summary dismissal of the plaintiff’s claim concerning compensation from the Torrens Assurance Fund pursuant to s 129 of the *Real Property Act 1900* (NSW) (‘**the Act**’).

The plaintiff claimed that it suffered loss upon its purchase of certain parcels land on Sussex Street, Sydney in 2013. In making such a purchase, the plaintiff contended that it relied upon the site areas of the parcels, and that the area of one of the parcels were erroneously overstated. The plaintiff thus invoked s 129(1)(a) and (c) of the Act.

However, the defendant contended that such claim is untenable because it is defeated by s 129(2)(e) of the Act, operating in circumstances which disclosed no reasonable cause of action. Further, the defendant did not adduce any evidence in support of its application and was content to proceed on the basis of the facts asserted in the Statement of Claim. Nonetheless, on the evidence, the Court acknowledged that the stated area appeared to have failed to account for the 91m2 that had earlier been excised from the parcel as part of a resumption of loan for road widening purposes.

Decision:

The Court held that it would not be appropriate to summarily dismiss the plaintiff’s claim, as it was established that there was a real question to be tried which the rights of the parties depended on. Such question was posed by the Court as whether the inclusion of the overstatement of area of Lot 1 was an error or miscalculation in the measurement of land. In essence, it was of the Court's view that the construction of the Act, advanced by the plaintiff, was not incorrect. Accordingly, the Court declined to dismiss the plaintiff's claim and ordered that the defendant's amended notice of motion be dismissed with costs.

Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council

[2020] NSWCA 292

Coram: Baesten JA, Gleeson JA, Preston CJ

Court: New South Wales Court of Appeal

Date: 18 November 2020

LAND LAW – easements – imposition of easement by Court – standard of appellate review – requirement that proposed easement be "reasonably necessary for the effective use or development" of the land – *Conveyancing Act 1919* (NSW), s 88K(1)

LAND LAW – easements – validity – characterisation under general law – rights not to confer exclusive use of servient tenement – enclosure of community land for waste transfer and recycling facility – loss of owner's use of enclosed land and limited use of residue – whether proposed easement capable of being characterised as an easement

LAND LAW – community land – inability of Council to grant easement over community land – whether Court can impose easement where owner cannot grant it – *Local Government Act 1933* (NSW), s 46 and *Conveyancing Act 1919* (NSW), s 88K

Facts:

Isas Pty Ltd ('**the second appellant**') was the owner of a parcel of land in South Strathfield, bordering the Cox's Creek drainage channel. Aussie Skips Recycling Pty Ltd ('**the appellant**') was the lessee which operated a waste transfer and recycling business on the second appellant's land. These proceedings concerned a dispute relating to a narrow strip of land owned by Strathfield Municipal Council between the appellants' land and the drainage channel. Whilst building a high wall along the boundary of the appellants' land and the Council land, the appellants used part of the Council's land within their operations. Accordingly, the Council commenced enforcement proceedings in the Land and Environment Court ('**LAC**') in restraining the contained occupation of its land by the appellants.

Meanwhile, the appellants also commenced proceedings in the Supreme Court seeking the imposition of four easements over the narrow strip owned by the Council which they were using for their business. Those proceedings were however transferred to the LAC.

First Instance:

The LAC refused the application for the imposition of easements. In reaching such conclusion, Duggan J found that the rights of access purportedly conferred on the Council were in truth an illusion, raising the issue of what purpose would the access serve. Accordingly, the narrow strip of the Council's land taken by the appellants served no useful purpose to either party in isolation from the rest of the appellants' land.

The Appeal:
Brought from the dismissal of the application for the easements, the appeal raised two broad issues:

1. Whether the easements were at law capable of being characterised as easements; and
2. If so, whether the test of "reasonable necessity" for imposing an easement was satisfied.

On the first issue, it was held by the Court that the proposed easements were incapable of comprising easements at law. The appellants enclosed 68% of the Council's lot, in a manner which practically excluded the Council, as the servient tenement, from any use of the enclosed land. Thus, the Council's rights of access to the land were illusory, and the enclosure diminished the Council's enjoyment of the residue land.

On the second issue of reasonably necessity, the Court indicated that the trial judge correctly rejected the asserted factual basis that underpinned the claimed necessity, relating to the manoeuvring of trucks at the site alongside the submission on the cost of removing the wall.

Decision:
Therefore, it was held by Basten JA that the appeal be dismissed, in agreement with Gleeson JA and Preston CJ of LEC.

Australia City Properties Management Pty Ltd v The Owners - Strata Plan No 65111

[2020] NSWSC 1505

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 28 October 2020

LAND LAW – strata title – building manager – duration of caretaker agreement – agreement made in 2001 provides for 10 year term with options for three additional 5 year terms – legislation introduced in 2003 regulates appointments of caretakers and duration of caretaker agreements – effect of legislation including transitional provisions upon variations to caretaker agreement made in 2010 and 2015 – variations provided for additional options for further terms – held that agreement as varied not an agreement the duration of which is protected by transitional provisions – held that agreement as varied has maximum duration of 10 years from date when agreement as varied authorised caretaker to act under it – Strata Schemes Management Act 1996, s 40B and Sch 4 Part 4, cl 12 – effect of transitional provisions of Strata Schemes Management Act 2015, ss 66-70 and Sch 3 cll 3, 15

LAND LAW – strata title – owners corporation – meetings of owners corporation – voting by proxy – voting by a proxy who is a caretaker – where vote would confer or assist in conferring a material benefit on the proxy – where proxies held by persons said to be acting on behalf of caretaker as its agent – the provision that invalidates certain votes by a proxy who is a caretaker held to apply only to votes by the caretaker itself as proxy – Strata Schemes Management Act 1996, Sch 2 Part 2 cl 11

LAND LAW – strata title – building manager – cl 9.3 of caretaker agreement gives owners corporation the right to terminate the agreement if caretaker guilty of gross misconduct or gross negligence in performing its responsibilities – numerous allegations of misconduct or negligence including overcharging, standing for election to executive committee, improper use of electricity and failures in respect of fire safety – held that caretaker was guilty of gross misconduct in taking supply of electricity paid for by owners corporation over 18 year period – held that caretaker was guilty of gross misconduct or gross negligence in failing to promptly report to executive committee about unresolved faults in fire alarm system – owners corporation entitled to terminate caretaker agreement under cl 9.3 – right to terminate exercised by executive committee of owners corporation – right to terminate validly exercised despite no advance approval of general meeting of owners corporation – action of executive committee later ratified by resolution passed at general meeting – caretaker had not in the meantime terminated the agreement for repudiation by owners corporation – upon termination under cl 9.3 parties bound to follow regime laid down by cl 10 of agreement – owners corporation in breach of cl 10 by taking possession of caretaker lot, but conduct held not to be repudiatory – caretaker entitled to damages and compensation pursuant to usual undertaking as to damages for deprivation of possession of caretaker lot – Strata Schemes Management Act 2015, s 68(3)

Facts:

These proceedings concerned a caretaker agreement entered into by The Owners – Strata Plan No 65111 (‘**Owners Corporation**’) with the caretaker Australia City Properties Management Pty Ltd (‘**Caretaker**’). The dispute surfaced when the Owners Corporation terminated the caretaker agreement on the basis of a term within the agreement stipulating that it could be terminated should the Caretaker be guilty of gross misconduct or gross negligence in performing its responsibilities. The Caretaker contended that the Owners Corporation was not entitled to terminate the agreement and, consequently, the Caretaker was entitled to damages of around $2 million for the Owners Corporation's repudiation of the agreement. Importantly, the Caretaker calculated such damages based on the Owners Corporation taking possession of the caretaker Lot 179 ('**Strata Scheme**') and claimed that, had the Owners Corporation not repudiated the agreement, the existing caretaker agreement, in relation to the Strata Scheme, would remain for another 40 years. This was an excessively long term of the agreement, created by way of numerous deeds of variation that added option periods to the initial caretaker agreement.

The Owners Corporation resisted these claims on numerous grounds by way of Cross-Claim. First, the Owners Corporation contended that various breaches of the agreement had occurred based on the alleged overcharges by the Caretaker. Second, the Owners Corporation claimed restitutionary relief in respect of amounts said to have been paid by it to the Caretaker when they were not. Third, there was a further claim for relief pursuant to the Australian Consumer Law in respect of these amounts, based on misleading and deceptive conduct in issuing invoices for payment. The final claim by the Owners Corporation against the Caretaker was for improper use of electricity supplied to the Strata Scheme, which the Owners Corporation paid for.

Terms of the Caretaker Agreement

An important aspect of the proceedings concerned that validity of the agreements between the parties. In turn, these issues raised various questions as to the interpretation and operation of the relevant legislation, namely, the *Strata Schemes Management Act 1996* (NSW) ('**the 1996 Act**'), and pertinent amendments to the 1996 Act that were affected by the *Strata Schemes Management Amendment Act 2002* (NSW), the *Strata Schemes Management Legislation Amendment Act 2008* (NSW) ('**Amendment Acts**') and *Schemes Management Act 2015* (NSW) ('**SSMA 2015**')

The first issue posed to the Court was what the appropriate term of the caretaker agreement should be in consideration of the initial agreement, the various deeds of variation (adding option periods to the initial agreement) alongside the legislative changes brought about by the Amendment Acts. Accordingly, the specific definition of 'caretaker' (pursuant to s 40A) set the maximum term of any caretaker agreement to 10 years (pursuant to s 40B) and provided greater power to the Civil and Administrative Tribunal ('**Tribunal**') in making orders with respect to caretaker agreements (s 183A), including the length of the agreement's term.

As such, any caretaker agreement entered into prior to the Amendment Acts was retrospectively brought within the amendments, however, the maximum 10-year term and additional power granted to the Tribunal was limited in that it did not apply to "such an agreement". Darke J therefore indicated that the relevant question turned on whether the agreement constituted such an agreement. His Honour concluded that the second deed of variation of the caretaker agreement displaced the original agreement, stating that it would be absurd if the legislation operated so that parties to "such an agreement" could vary the terms of the agreement by adding decades.

Darke J then turned to the final deed of variation entered into by the parties, which fell within the savings and transitional provisions of the SSMA 2015. This stipulated that any caretaker agreement in force, prior to the introduction of SSMA 2015, would only be given an additional term of 10 years. His Honour held, however, that this deed of variation was also a separate agreement with a capped 10-year term resulting in the term of the caretaker appointment expiring no later than 2025.

<u>Gross Misconduct and Gross Negligence</u>

As aforementioned, the Owners Corporation contended that gross misconduct and gross negligence had amounted in numerous situations. However, Darke J held that whilst these breaches could be regarded as misconduct, the seriousness and scale of the breaches did not amount to gross misconduct in entitling the Owners Corporation to terminate the Agreement. Therefore, his Honour did not accept the majority of the allegations raised, particularly with the alleged overcharging.

Improper Use of Electricity

However, notwithstanding the various matters that did not constitute gross misconduct, his Honour held that the use of electricity supplied to the Strata Scheme by the Caretaker, which was paid for by the Owners Corporation, did amount to gross misconduct. In reaching this conclusion, his Honour considered the agreement between the parties failing to entitle the Caretaker to a free supply of electricity to Lot 179. Therefore, it was determined that the Caretaker was in breach of the agreement by accepting the benefit of electricity, remaining silent about the matter and deliberately deceived the Owners Corporation.

Failures in respect to Fire Safety

Further, the Owners Corporation made two complaints regarding the conduct of the Caretaker with respect to fire safety; firstly, the failure to implement an evacuation plan for the building and, secondly, the failure to take timely action in the face of fire alarm system faults, referred to as the Emergency Warning and Intercommunication System ('**EWIS**'). His Honour concluded that the failure of the Caretaker to prepare an evacuation plan was not gross misconduct nor gross negligence as it was evaluated to be a medium priority item by an expert. However, His Honour also concluded that the Caretaker's misconduct with respect to the EWID was gross, as the Caretaker was required to promptly report all matters that are a hazard or danger, of which it has notice, to the Owners Corporation. Therefore, having regard to the potentially serious consequences of a faulty EWIS, Darke J held that the breach of the agreement was sufficiently serious to amount to gross misconduct or gross negligence.

Decision:

His Honour's conclusions can be summarised as follows:

- The termination of the agreement by the Owners Corporation was valid;
- As a result, the Caretaker's claim for loss of bargain damages failed;
- The Caretaker remains entitled to possession of Lot 179;
- The Owners Corporation was also required to pay around $30,000 in damages and compensation to the Caretaker; and
- The Cross-Claim was dismissed.

Bijkerk Investments Pty Ltd v Bikic

[2020] NSWSC 1336

Coram: Leeming J

Court: Supreme Court of New South Wales

Date: 1 October 2020

CONTRIBUTION - contribution in equity - lender sued one of two borrowers for unpaid money - judgment obtained - bankruptcy notice served and creditor's petition filed - whether debtor entitled to declaratory relief that other debtor liable to contribution - whether necessary to establish that debtor was ready willing and able to pay

REAL PROPERTY - co-ownership - application for sale pursuant to *Conveyancing Act 1919* (NSW) s 66G - whether property held on express or constructive trust for one co-owner

TRUSTS - common intention constructive trust - whether co-owned property held on trust for one co-owner - whether express or implied common intention that property held on trust - consideration of relationship between common intention constructive trust and estoppel

Facts:

These proceedings concerned a dispute between the second plaintiff Mr Roy Bijkerk ('**Roy**') and the defendant, Mr Ned Bikic ('**Ned**'). Please note that Mr Bijkerk and Mr Bikic have quite similar surnames, and without any disrespect, this paper will follow the course reflected in the proceedings by referring to them as "Roy" and "Ned" respectively. Roy and Ned, either personally or through corporate entities controlled by them, bought four properties. Two were sold by them at a profit, the third property was sold by a receiver and the fourth ('**fourth property**') was the subject of an application for sale pursuant to s 66G of the *Conveyancing Act 1919* (NSW), which is the principal relief sought on the summons. The registered proprietors were the first plaintiff, Bijkerk Investments Pty Ltd as trustee for the Bijkerk Family Trust, and Ned, as tenants in common in equal shares.

In essence, Ned opposed the sale on the basis that the fourth property was held beneficially for him, pursuant to an express or constructive trust. Ned also sought declaratory relief in relation to his liability to contribute to a judgment debt obtained against Roy, arising out of a loan made to Roy and Ned by Ms Tania Clarke. Further, Ned was opposed to the fourth property's sale based upon Roy's imminent bankruptcy, and upon his failure to account to Ned for half of the profits from the sale of the other two properties.

<u>The Factual Dispute</u>

Leeming JA indicated that there were no large disputes as to the applicable legal principles, but rather, a very substantial factual dispute as to the conversations said to give rise to a trust, and as to how the funds on the various properties were derived.

The Parties' Arguments

Bijkerk Investments claimed an entitlement to sell the co-owned fourth property and retain 50% of its net proceeds of sale. In opposition, Ned contended that he is the sole beneficial owner, and asserted that either an express trust or a constructive trust was formed when the fourth property was acquired, alongside his detrimental reliance by spending money on such property by way of acquisition, renovations and loan repayments. Although Ned admitted that the men did not explicitly use the word 'trust', he contended that Bijkerk Investments became a co-owner and co-borrower because he could not obtain finance in his own name.

Further, in 2016, Roy and Ned purchased the third property as tenants in common in equal shares in their own names. Ned alleged that he had no beneficial interest in such property and was in fact pressured into being a registered proprietor, as Roy agreed to be on title for him with respect to the fourth property. Following the exchange of contracts, Ned obtained a short-term finance from two associates for much of the purchase price, claiming that those loans were to him personally. However, in response, Roy argued that both parties borrowed the money.

Decision:

In resolving this dispute, Leeming JA gave the greatest weight to only part of the documentary evidence that was posed in the proceedings. On such little reliable evidence, the Court was unpersuaded that Ned had established that there was a common intention – whether express or implied – between him and Roy that the fourth property would be owned beneficially by him. A variety of considerations were provided throughout the reasoning to evidence His Honour's lack of satisfaction. Furthermore, Leeming JA concluded that Ned had not established that either when the fourth property was acquired, or thereafter, there was an express or implied common intention that it be held on trust for Ned alone. It followed that there was no reason to deny Bijkerk Investments the ordinary right of a co-owner to a sale.

It also followed that Roy was entitled to declaratory relief to suppress the controversy between the parties; that the latter is obliged to pay half of the judgment debt obtained by Md Clarke when both parties defaulted on their obligations to repay her.

Finally, it was ordered that Ned pay the prima facie costs of Bijkerek Investments and Roy on the summons and the cross-claim.

Blackwell v Blackwell

[2020] NSWSC 1208

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 4 September 2020

LAND LAW – *Conveyancing Act 1919* (NSW), s 66G – application for appointment of trustees for sale

Facts:

These proceedings concerned a property in Helensburgh, co-owned as tenants in common by brothers Adam Blackwell (‘**plaintiff**’) and Nathan Blackwell (‘**defendant**’). The plaintiff sought orders for the property to be sold and the net proceeds to be divided between the parties. The bank loans were in the joint names of the plaintiff and defendant and were secured by a mortgage over the property. The parties generated income by leasing part of the property out and undertaking farming activities, which was paid into a joint account between the parties. Similarly, expenses relating to the property, including mortgage repayments, council rates and insurance, were paid out of the joint account.

In 2015, disputes between the parties began to arise when the joint account went into overdraft, and when the defendant began to neglect contributing any further funds to the payment of expenses through the joint account. Consequently, to the extent that such expenses had not been covered by income generated from the property, the plaintiff was continually forced to make the necessary payments through his own funds. Further disputes arose between the parties concerning the way in which the property was being used.

In essence, the plaintiff commenced proceedings against the defendant in 2020, seeking equitable relief, including proprietary relief, under s 66G based on the existence of a partnership between the plaintiff and defendant.

Decision:

Parker J concluded that there was nothing in the evidence before the Court which would suggest that there is any restraint on the plaintiff in such proceedings, particularly considering that no defence had been filed on behalf of the defendant. Therefore, the Court was satisfied that the plaintiff was entitled to a s 66G order, and in turn, entitled to contribution for excess payments made for mortgage repayments, council rates and insurance.

Bondi Road Development Pty Ltd v Selected Properties Pty Ltd

[2020] NSWSC 845

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 1 July 2020

LAND LAW – real property – joint venture agreement to develop properties owned by parties – where plaintiff commenced proceedings seeking specific performance of the joint venture agreement – those proceedings settled – where plaintiff now seeks specific performance of settlement deed – where settlement agreement agreed to be a contract for sale of land – whether terms were implied into settlement agreement by s52A(2)(b) of Conveyancing Act 1919 (NSW) and Conveyancing (Sale of Land) Regulation 2017 (NSW) concerning land tax certificates – whether purported notice to complete and notice of termination of settlement agreement effective

CONTRACTS – remedies – specific performance – whether plaintiff entitled to specific performance of settlement agreement

Facts:

The plaintiff, Bondi Road Development Pty Ltd ('**Bondi Road**') entered into a joint venture agreement with the defendants, Selected Properties Pty Ltd ('**Selected**') and Charles Lo-Presti Pty Ltd ('**Lo-Presti**') ('**the Joint Venture Agreement**'). The joint venture concerned the development of a residential unit building proposed to be constructed on 7, 9 and 11 Bondi Road in Bondi Junction.

At the time of the Joint Venture Agreement:

1. A residential unit development was erected on 7 Bondi Road;
2. Selected was the registered owner of Units 1, 2, 4, 5 and 7 in that Strata Plan;
3. Lo-Presti was the registered owner of Unit 9;
4. Bondi Road had also exchanged contracts to purchase the remaining units at 7 Bondi Road (Units 3, 6 and 8); and
5. Contracts were also exchanged to purchase the adjoining properties at 9 and 11 Bondi Road, on which cottages are presently erected.

However, the properties at 7, 9 and 11 on Bondi remained undeveloped as the parties eventually fell out. Following the dispute, Bondi Road commenced proceedings seeking specific performance of the Joint Venture Agreement. In March 2020, the parties settled those proceedings on the basis of a document executed on the same date ('**the Settlement Agreement**'). In June 2020, Bondi Road commenced these proceedings in order to enforce specific performance of the Settlement Agreement. It was established that Bondi Road did not pay Selected and Lo-Presti $4.5 million within the 28-day period specified in the Settlement Agreement. In response, Selected and Lo-Presti served on Bondi Road a document purporting to terminate the Settlement Agreement. Therefore, Bondi Road brought the present proceedings essentially claiming:

1. A declaration that the purported Notice of Termination is void and of no effect;
2. A declaration that it is entitled to have the Settlement Agreement specifically performed;
3. An order that Selected and Lo-Presti specifically perform their obligations under the Settlement Agreement; and
4. Damages

<u>Bondi Roads' Submissions</u>

Bondi Road contended that the terms of the Settlement Agreement included that Selected and Lo-Presti, as vendors, must serve a current land tax certificate, at least 14 days before completion. Accordingly, as Selected and Lo-Presti did not serve such a certificate in accordance with those terms, they were not entitled to terminate the Settlement Agreement.

<u>Selected and Lo-Presti's Submissions</u>

It was common ground that the Settlement Agreement constituted a contract for the sale of land for the purposes of s 52A of the *Conveyancing Act 1919* (NSW) ('**the Act**'). However, Selected and Lo-Presti submitted that the terms were not implied into the Settlement Agreement as it was a contract between co-owners providing for the acquisition by one co-owner of part of the share or interest of any other co-owner (cl 11 of the Settlement Agreement), and that s 52A of the Act does not apply. Therefore, Selected and Lo-Presti argued that they were only co-owners with Bondi Road, and that the Settlement Agreement could only be enforced if the effect of the Joint Venture Agreement was that they have Bondi Road and equitable interest over the defendant's units.

Decision:

The question posed to the court of whether the Joint Venture Agreement, properly construed, gave Bondi Road an equitable interest was decided against. In turn, since no equitable interest existed, it followed that Selected and Lo-Presti were not co-owners with Bondi Road on the date of the Settlement Agreement. In addition, since no land certificate had been served by Selected and Lo-Presti, it also followed that Bondi Road was not yet obliged to complete and, thus, the purported Notice of Termination was of no effect. Therefore, Stevenson J held that Bondi Road was entitled to have the Settlement Agreement specifically performed.

Bowden v Bowden

[2020] NSWSC 1863

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 17 December 2020

CIVIL PROCEDURE – Alternative dispute resolution – Court referral to referee – Court's use of report – in a May 2019 judgment of the Court the first plaintiff and the first defendant were found to each hold a 50% interest in certain real property – the balance of the proceedings concerning the parties' contributions to the improvement of that property was to be determined by a referee, pursuant to *Uniform Civil Procedure Rules 2005*, r 20 – the referee produced a report to the Court on 25 May 2020 – the defendants seek orders that this report be adopted – the first and second plaintiff resist the making of such an order – where the report does not consider the contributions made to the real property by the second plaintiff, a family trust – where other complaints are made about the report the first and second plaintiff seek an adjournment to put on further evidence.

Facts:

Mrs Julie Bowden ('**the first defendant**') was the registered proprietor of a residential property in Nowra ('**the Nowra property**') and was married to Mr Ian Bowden ('**the second defendant**'). Mr Kevin Bowden ('**the first plaintiff**') was Ian and Julie's brother-in-law. Kevin Bowden and a family trust of which he was the trustee ('**the second plaintiff**') commenced these proceedings in 2017 and sought declarations that the first and second plaintiffs (together, '**the plaintiffs**') held a 50% interest in the property.

Initial Proceedings:

The proceedings commenced before Pembroke J in 2019, where His Honour gave judgment, and found that the first plaintiff and the first defendant each held a 50% interest in the property. The judgment also provided that the 50% interest was in the acquisition of the unimproved land component of the Nowra property before any building was erected on it.

However, His Honour's judgment failed to distinguish between the first and second plaintiff, in considering the interest it each held in the unimproved Nowra property. His Honour then dealt with events that followed the acquisition of the land, which included the construction of a house on the property. Due to the competing claims of the parties, where each claimed to have expended money on the construction of the house on the Nowra property, the Court found that the original agreement of a 50% interest for the first plaintiff and the first defendant may have required adjustment. Therefore, Pembroke J made orders for the proceedings to be referred out to a referee for a report determining the expenditure of the plaintiffs and the defendants in the construction of a house on the Nowra property. Such report was said to have been required in determining the final adjusted interest of each of the plaintiffs and defendants would be in the property.

The adoption of the referee's report

As aforementioned, the report made findings about the relative financial and non-financial contributions of the parties alongside making the appropriate adjustments to the original 50:50 ownership of the Nowra property determined by Pembroke J.

In June 2020, the defendants sought to have the report adopted, which came on for hearing in these proceedings. The adoption of the report would vary the parties' interest in the Nowra property by the plaintiffs holding 52.2% and the defendant holding 47.8%. The motion not only sought adoption of the report, but also sought the sale of the property by the trustees for sale under s 66G of the *Conveyancing Act 1919* (NSW)

The first plaintiff contended that the report should not be adopted for the reasons as follows:

1. The report did not consider the various contributions made by the family trust in the construction of a house on the Nowra property. As such, the report refers to both Kevin Bowden and the trust jointly as 'the plaintiff';
2. The report's analysis of the financial contributions made by the defendants to the Nowra property should not be accounted for. Also, the non-financial contributions alleged by the defendants were much lower than the report found and do not come to the figure of approximately $67,000 that the referee had determined;
3. The report does not take proper account of the plaintiffs' construction expenditure in the provision of bearers and joists, doors, the kitchen and tiles among others, incorporated into the building on the Nowra property; and
4. Principally, the plaintiff did not have time to put on the evidence they they wish to advance, to show:
    a. What material was given to the referee which was not taken into account by him; and
    b. What material before the referee shows that a different conclusion should have been reached by him.

Therefore, this, alongside other unrelated matters, required an adjournment in order to provide some time for them to put this material on.

Decision

The circumstances of these proceedings lead the Court to grant the application for adjournment which had been sought by the plaintiff. Accordingly, the Court made the following orders:

1. Direct the plaintiffs to put on any evidence upon which they wish to rely in order to oppose the adoption of the referee’s report; and
2. Direct the plaintiffs to put on any evidence upon which they wish to rely in general.

Boyded Industries Pty Ltd v Gateway Parramatta Two Pty Ltd

[2020] NSWSC 1368

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 8 October 2020

EQUITY – equitable remedies – relief against penalties – parties enter into Deed of Call Option with defendants as grantor and plaintiff as grantee – plaintiff prohibited by clause 8(a) from causing any caveat to be registered on title of property – clause 8(b) records acknowledgement by parties that cl 8(a) is an essential term and that breach of cl 8(a) entitles defendants to immediately terminate Deed – plaintiff lodges caveat on title of property – defendants terminate deed – plaintiff claims cl 8(b) is unenforceable as a penalty – held that cl 8(b) is not collateral or accessory to cl 8(a) – held that even if cl 8(b) was a secondary stipulation it should not be characterised as a penalty having regard to defendants' interests in the performance of obligation under cl 8(a)

EQUITY – equitable remedies – relief against forfeiture – contract terminated for plaintiff's breach of an essential term – plaintiff claims relief against forfeiture where defendants have suffered no loss and plaintiff would lose valuable rights if termination allowed to stand – whether relief against forfeiture available – whether plaintiff had proprietary interest in land – conduct of defendants not shown to have contributed to breach – plaintiff's breach held to be wilful – plaintiff's claim for relief against forfeiture fails

CONTRACTS – waiver – election – whether defendants waived right to terminate for plaintiff's breach – whether defendants elected to affirm contract – held no waiver by delay, no implied waiver and no waiver in accordance with requirements of contract – plaintiff fails to establish affirmation – defendants' conduct not inconsistent with the exercise of the right to terminate for breach

Facts:

These proceedings concerned a Deed of Call option ('**the Deed**') that was entered into by Gateway Parramatta Two Pty Ltd and Gateway Parramatta Two Commercial Pty Ltd ('**the defendants**') as Grantor, and Boyded Industries Pty Ltd ('**the plaintiff**') as Grantee. The defendants granted the plaintiffs a call option, pursuant to the Deed, to purchase a property owned by the defendants in Parramatta, referred to as the Central Land. The part of the property that was the subject of the option was described as a lot in an unregistered stratum plan and referred to as the Car Show Room.

By way of clause 8 of the Deed, the plaintiff was prohibited from registering any caveat on the title of the Central Land or the Car Show Room. Such clause contained that in the event of a breach, the defendants would be entitled to immediately terminate the Deed.

Nonetheless, a caveat was recorded on the register against the title to the Central Land and was lodged by the instructed solicitors for the plaintiffs. However, the existence of the caveat did not come to the defendants' attention until around two weeks after it was lodged, and only thereafter was there were some communications between the solicitors acting for the plaintiff and defendant relating to the caveat. It followed that the defendants terminated the Deed on the basis that the plaintiff had breached clause 8.

The plaintiff challenged the validity of the termination and accepted that by registering the caveat on the title of the Central Land, it had breached clause 8 of the Deed. However, it was also argued that the defendant, by their conduct, waived any right to rely upon a breach of clause 8 or otherwise, elected to affirm the Deed. The plaintiff then claimed that clause 8 of the Deed was unenforceable as a penalty or, in the alternative, that relief should be given against the forfeiture of its interest under the Deed, which it says, is a proprietary interest. Meanwhile, the defendants maintained that their termination of the Deed was valid and contended that relief against forfeiture was not appropriate.

Wavier and Election

The Court initially dealt with the issue of whether the defendants, by their conduct, had either waived any right to rely upon the plaintiff's breach of clause 8, or otherwise elected the affirm the Deed. As such, the plaintiff submitted that any right to terminate was waived due to the time that had elapsed between lodgement of the caveat and the purported termination more than a year later. It was further submitted that throughout such period, the plaintiff conducted its affairs usually according to the Deed, and the defendants making no complaint about the caveat. The defendants submitted, however, that the waiver argument was defeated by the terms of clause 12 of the Deed, which provided that no failure to exercise a right constitutes a waiver, and any wavier must be in writing and signed by the party giving the waiver. The defendants further submitted that there was no evidence that the plaintiff conducted its affairs due to the Deed remaining ongoing, and in any event, was beside the point because unless or until the defendants chose to terminate the Deed, both parties remained bound.

Accordingly, Darke J maintained that there was no waiver by the defendants of the right to terminate the deed. First, the evidence indicating that the existence of the caveat did not come to the attention of the defendants until about 8 August 2019 was accepted. Second, clause 12 of the Deed makes it plain that any delay in exercising a right of termination does not amount to a waiver. Third, Darke J did not agree that the defendants took a position that they were not going to terminate through the emails sent on 14 August 2019, as those communications did not mention anything about terminating the Deed. Therefore, it was decided that the emails did not amount to any waiver, even impliedly, of the right to terminate – and is not, in any event, communication that satisfies the written and signed requirements of clause 12 of the Deed.

Turning to the issue of election, it was submitted that the defendants made an unambiguous election to affirm the Deed by contacting the plaintiff to ask for the caveat to be removed. As such, the defendants were said to have made a deliberate choice to have sought to have the caveat removed, rather than avail themselves of the right to terminate under clause 8 of the Deed. The defendants submitted that there was no election, either by express words or conduct, inconsistent with the right to terminate. Darke J affirmed this and therefore held that the conduct of the defendants did not amount to an election against the right to terminate.

Decision:

Was Clause 8 of the Deed unenforceable as a penalty?

The second branch of the plaintiff's claim was premised on the submission that the doctrine of penalties could apply to clause 8 of the Deed, as it was a contractual stipulation that was collateral to the primary stipulation in clause 8. Such stipulation prohibited the plaintiff from registering a caveat on the title of the Car Show Room or the Central Land, and thus, clause 8 on its own did not entitle the defendants to terminate for its breach. However, having regard to the totality of the circumstances present at the time the Deed was entered into, Darke J held that clause 8 should not have been characterised as a penalty. As such, the provision should not have been regarded an unconscionable or out of proportion to the interest that the defendants sought to protect; namely, the interest in the due performance of clause 8. Therefore, it was held that the penalty doctrine was not engaged as clause 8, which did no more than define an essential term of the Deed, did not attract the doctrine of penalties.

Relief against Forfeiture

The final issue that was posed to the Court was the plaintiff's alternative argument that it should be given relief against any forfeiture of its interest under the Deed, due to termination. As such, the plaintiff claimed that its interest under the Deed, as the Grantee of a call option, gave it an interest in the land, and further contended that it would be unconscionable in deciding that the Deed had been validly terminated. In response, the defendants submitted that there was nothing that would make it unconscientious to rely upon their legal right to exercise termination. Further, it was submitted that relief against forfeiture was not available because neither proprietary rights nor rights that would be specifically enforced were involved. Accordingly, Darke J affirmed the defendant's position and held that relief against forfeiture was not available in these proceedings.

On the three predominant issues posed by the plaintiff to the Court, Darke J concluded as follows:

1. The plaintiff's claim in establishing a wavier and election both failed;
2. Clause 8 was not enforceable as a penalty, and by reason of the plaintiff's breach, the defendants were entitled to terminate the deed; and
3. The plaintiff's claim for relief against forfeiture also failed.

Brunton v Hennessy

[2020] NSWSC 972

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 29 July 2020

LAND LAW – contract for sale of land – plaintiffs enter into contract with first defendant to purchase lot in an unregistered subdivision – access to proposed lot to be by rights of way over vendor's land – road already constructed over proposed right of way – whether contract contains term that obliges vendor to construct road on right of way to standard set by development consent to be issued – held that contract contains no express or implied term to that effect

EQUITY – remedies – specific performance – condition of contract for sale of land required vendor to install cattle grids at various locations along right of way – vendor fails to do so – purchasers seek specific performance – purchasers fail to show that damages are an inadequate remedy – not shown that installation of grids would serve any useful purpose for purchasers – specific performance refused – nominal damages awarded

Facts:

Mr Paul Brunton and Ms Robyn Brunton ('**the plaintiffs**') commenced these proceedings in relation to two adjoining parcels of land, Lot 2 and Lot 4. The lots were created by two separate subdivisions of land within property known as Macquarie, located near Bathurst. Mr Paul Hennessy ('**the first defendant**') was the owner of Macquarie. The plaintiffs acquired Lot 4 and Lot 2 in accordance with two different contracts for sale, entered into with the first defendant at different times. As such, each contract was for the purchase of a lot in a subdivision that was yet to be registered and made provision to rights of access for the relevant property. Such rights were referred to as the William Lawson Drive access (for both Lots 2 and 4) and the Fish River access (for Lot 2).

These proceedings concerned the plaintiffs raising various issues in relation to the rights of access, and can be summarised as follows:

1. The first defendant failed to create the Fish River access;
2. The first defendant unlawfully interfered with the plaintiffs' use of the Fish River access;
3. The first defendant unlawfully interfered with the plaintiffs' use of the William Lawson Drive access;
4. The first defendant breached the Lot 4 contract by failing to construct a road of a particular standard along with the William Lawson Drive access; and
5. That the first defendant breached the Lot 4 contract by failing to install various cattle grids along the William Lawson Drive access.

However, a number of such claims against the first defendant were resolved before the present hearing. By way of a Transfer Granting Easement form executed by the plaintiffs and the first defendant, registration shortly thereafter enabled the Fish River access. Similarly, the issues concerning the alleged unlawful interference with the rights of access were resolved. Further, although the plaintiffs also made claims that Mr Peter Lynch (‘**the second defendant**’) unlawfully interfered with the plaintiffs’ use of the Fish River access and the William Lawson Drive access, these claims were also resolved.

The plaintiff’s first claim for breach of contract

Accordingly, the only claims that remained for determination were the claims of breach relating to the Lot 4 contract. In that regard, the plaintiffs sought orders for specific performance of the obligations they allege remain outstanding, and in the alternative, sought damages. In essence, the plaintiffs contended that the defendant had breached an express, or alternatively implied, term of the Lot 4 contract by refusing the construct the William Lawson Drive access in compliance with the requirements of the term – stipulating the construction of a road. However, the first defendant denied that the Lot 4 contract contained such term pleaded by the plaintiffs and argued that on the proper interpretation of the contract, he was only bound to ensure that the development consent for the proposed subdivision contained conditions similar to a previous development consent he obtained. Accordingly, the first defendant denied that the contract had been breached as alleged.

The plaintiffs further contended that the parties to the contract knew that a development consent would be necessary for the subdivision to be registered and, that any reasonable business person would have understood that the defendant would necessarily comply with any conditions of consent. Moreover, it was submitted that the plaintiffs were entitled to assume that the defendant would comply with any consent conditions, and accordingly, that the conditions concerning the specifications for the William Lawson Drive access were express conditions of the Lot 4 contract. Alteratively, the plaintiffs submitted that the term alleged was implied.

In response, the first defendant argued that the term pleaded did not appear expressly in the Lot 4 contract and could never have arisen by implication bearing in mind that it was not in existence when the contract was made. In essence, the first defendant submitted that he did not promise that he would build a better grade road than what had presently existed along the William Lawson Drive access. Darke J affirmed this position and determined that the language of the contract does not include any explicit or implicit promise given by the first defendant to the plaintiffs to comply with any development consent conditions. Having considered the language and nature of the contract, it was held by Darke J that the reasonable business person in the position of the parties would not have understood that the first defendant had made any promise to construct the William Lawson Drive access in accordance with any development consent condition.

The plaintiff's second claim for failure to install cattle grids

The second issue posed to the Court was that the first defendant refused to install cattle grids in accordance with the same additional condition of the Lot 4 contract. As such, the Court found that the failures of the first defendant to install cattle grids amounted to breaches of the additional condition. As aforementioned, the plaintiffs sought the remedy of specific performance and, although damages were claimed in the alternative, no evidence was adduced in establishing any loss, damage or injury as a result of the absence of cattle grids.

In response, the first defendant contended that specific performance should refused as four new cattle grids would serve no useful purpose, amongst other things. Darke J agreed with the defendant and held that the plaintiffs had failed to demonstrate that it would be appropriate to grant relief through specific performance. Instead, the plaintiffs were rewarded nominal damages only, in the sum of $100, in respect of the first defendant's breach of the additional condition in the Lot 4 contract.

Decision

Therefore, the plaintiffs failed to make out their claim that the Lot 4 contract expressly or impliedly contained a term to the effect that the first defendant would construct a gravelled right of carriageway along the William Lawson Drive access. Further, the plaintiffs did not make out that a failure to install cattle grids amounted to relief through specific performance, and instead, established an entitlement to recover nominal damages of $100.

Cameli Pty Ltd v Place Management NSW

[2020] NSWSC 1132

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 25 August 2020

LAND LAW – leases – parties enter into lease pursuant to Retail Leases Act 1994 (NSW) ("the Act") – parties agree to extend tenancy by entering into a Deed of Retail Licence – despite its terms, Deed of Retail Licence held to be a "retail shop lease" and hence subject to the Act – whether term of lease extended by operation of s 44 of the Act – held that lessor failed to give notice under s 44(1) within specified period – whether lessor later gave notification as required by s 44 – held that such notification was given on 14 February 2020 – whether lessee made written request for an extension of term pursuant to s 44(3) – held that such a request was made on 11 February 2020 – term of lease extended to 14 August 2020 – whether term could be further extended pursuant to cl 9 of Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) and leasing principles of National Code of Conduct – held that even if cl 9 applied, the leasing principles of the Code were not relevant to the question concerning the operation of s 44 of the Act

Facts:

These proceedings concerned a café operator ('**the plaintiff**') entering into a retail lease for premises at the Rocks Centre in Sydney. As the use of the premises fell under the retail uses listed in Schedule 1 of the *Retail Leases Act 1994* (NSW) ('**the Act**'), the lease was accordingly subject to the requirements under the Act. The lease was for a term of 3 years. Following the expiration of this initial term, the plaintiff remained in possession of the shop with the consent of the landlord ('**the defendant**') on a 'holding over' basis, whereby the tenancy could be terminated by either party on 1 month's prior written notice.

By a deed, the parties entered into what was described as a 'retail license', commencing March 2019 and expiring March 2020. Accordingly, the retail license contained an express provision that the Act would not apply to the deed. Although there was an issue about whether the retail license was nonetheless subject to the Act, it was accepted by the parties in the proceedings that the retail license was subject to the Act.

In 2019, the defendant conducted an expression of interest process in respect to granting a new 5-year lease for the premises. The plaintiff participated by submitting a Letter of Offer to apply for the 5-year term, however, the defendant chose to grant the new lease to another entity and therefore maintained that the plaintiff was not entitled to a further term. In response, the plaintiff argued that the lease would be extended by 6 months to June 2020, pursuant to s 44(3) of the Act. Such provision provides that if the landlord fails to give notice to the tenant at least 6 months prior to the expiry of the retail lease that it would not offer the tenant a renewal or extension of the lease, then the term of the lease is extended for 6 months.

The Parties' Submissions

The plaintiff contended that the term of its license should be extended under the Act as the defendant failed to provide notice of its intentions at the end of the term. The plaintiff also sought to invoke s 9 of the Covid-19 Regime (NSW) to have its tenancy further extended, submitting that:

- The landlord wanted to recover possession of the shop from the plaintiff;
- Having regard to the Code of Conduct, it is just and equitable for the court to order that the tenancy's terms be further extended to compensate for trading disruptions due to the government's implication of COVID-19 restrictions; and
- A 6-month extension to the term is appropriate, given the plaintiff's 6-month rent deferral and principle 12 of the Code of Conduct.

In essence, the defendant argued that:

- The plaintiff was operating under a license, not a lease, for the period of March 2019 to March 2020, as the provisions of the Act were specifically excluded from application to the license;
- The correspondence from the defendant was an invitation to the plaintiff to submit an offer and a business proposal for consideration by the defendant. As such, it was not a letter of offer as argued by the plaintiff, because it was clear that other proposals were also being considered; and
- The submission of the proposal could not create any legally binding agreement or any form of 'new lease'.

Decision:

The Court indicated that the parties entered into a retail lease for the term March 2019 to March 2020, despite the fact that the parties described it as a retail licence, it was correctly a retail lease and therefore was subject to the provisions of the Act. Thus, the defendant was required to give written notice to the plaintiff of its intention not to renew or extend the term. Whist the defendant argued that the retail license itself constituted the required notice, the Court disagreed, as the statement in the license did not clearly relate to the intentions of the defendant, pursuant to s 44(1)(b) Act.

The question then became whether the plaintiff gave the required notice of its desire for an extension, prior to the expiry of the license term. The Court agreed with the plaintiff's argument that this notification was in the form of correspondence sent to the defendant and noted that the correspondence expressly referred to the defendant's failure to comply with the requirements under s 44 of the Act.

Accordingly, the Court ordered that the defendant was restrained from leasing the shop to any entity other than the plaintiff, or re-taking possession of the premises and enabled the plaintiff to remain in occupation of the shop through a 6-month lease extension.

Carmelita Paolucci v Makedyn Pty Ltd

[2020] NSWSC 1871

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 17 December 2020

BUILDING AND CONSTRUCTION — Contract – the Plaintiff (a landowner) and the Defendant (a developer) entered into a contractual arrangement by which the Plaintiff would sell her property to the Defendant for $3.5M of which $2.5M was payable in cash and which included an agreement that the Defendant would on completion of the development reconvey to the Plaintiff two lots (which later became three lots) with completed dwellings constructed on the lots – a "Sunset Clause" provided that the contract could be rescinded by either party "at any time" after 24 May 2017; registration of the relevant subdivision plans was achieved by May 2018. The parties then fell into a dispute concerning the dimensions of the residences required by the Reconveyance Contract to be constructed – issues which arose were: (1) whether the Defendant was in breach of the Reconveyance Contract in failing to complete the construction and reconveyance; (2) whether specific performance or an order for partial specific performance was available; (3) whether the Defendant had a contractual right of rescission pursuant to the Sunset Clause (cl 32.1.4 of the Reconveyance Contract); (4) whether the limitation on damages in cl 32 of the Reconveyance Contract was limited to rescission; (5) whether the reference in cl 30.1 of the Reconveyance Contract to 241.54m^2 was a reference to the size of the Duplex or to the two residences forming part of the Duplex –Held: (1) the dimensions of 241.54m^2 is a reference to the total area of the Duplex rather than a reference to each residence; (2) the Defendant was in breach of the requirement to provide a layout plan for the House and the Duplex but this breach was rectified in late 2018; (3) the Defendant was not otherwise in breach of the Reconveyance Contract. The long delay in registration of the relevant plans of subdivision was not the fault of the Defendant. The Defendant had not wilfully and deliberately failed to achieve completion of the contract and non-completion was a consequence of the dispute about dimensions; (4) the limitation on damages was not limited to rescission; (5) specific performance or partial specific performance not available because the Defendant by failing to complete was not in breach of the contract and is willing and able to complete the Reconveyance Contract.

LAND LAW — Conveyancing — Contract for sale — Rescission – The Defendant cross claimed seeking permission pursuant to s 66ZS(6) of the *Conveyancing Act 1919* (NSW) ("the Conveyancing Act") to rescind the Reconveyance Contract and later amended its cross claim to rely on s 66ZS which is the successor to s 66ZL (see s 66ZU).There were long delays in registration of the relevant plans of subdivision. The Reconveyance Contract contained a "Sunset Clause" which permitted either party to rescind if various "Conditional Matters" had not been achieved by a particular date, i.e. 24 May 2017 – Held: (1) cross claim dismissed – rescission by the Defendant should not be permitted pursuant to s 66ZS of the Conveyancing Act because it was not just and equitable to permit the Defendant to rescind.

EQUITY — Equitable remedies — Specific performance – whether an order for specific performance or partial specific performance was available – Held: specific performance or partial specific performance not available because the Defendant was not in breach of the contract and is willing and able to complete the Reconveyance Contract.

EVIDENCE — Privileges — Without prejudice privilege – whether without prejudice correspondence should be admitted – Held: (1) correspondence allowed into evidence – the status of the letter was doubtful but, in any event, if privileged a misleading impression would be created if that content was excluded.

Facts:

Mrs Paolucci (‘**plaintiff’**) and Makedyn Pty Ltd (‘**defendant’**) entered into a contract by which the plaintiff would sell her property to the defendant for $3.5M. The contract also included that the defendant would, on completion of the development, reconvey to the plaintiff two lots (which later became three lots) with completed dwellings (a “**House**” and a “**Duplex**”) constructed on the lots (“**the Reconveyance Contract**”). Further, a ‘Sunset Clause’ contained in the contract permitted either party to rescind the contract if various “conditional matters” had not been achieved by a particular date.

The parties then fell into a dispute concerning the dimensions of the residences required by the Reconveyance Contract to be constructed. The issues that arose may be summarised as follows:

1. Whether the reference in the Reconveyance Contract to 241.54m2 was a reference to the size of the Duplex or to the two residences forming part of the Duplex;
2. Whether the defendant was in breach of the Reconveyance Contract in failing to complete the construction and reconveyance;
3. Whether the defendant had a contractual right of rescission pursuant to the Sunset Clause indicated in the Reconveyance Contract;
4. Whether specific performance or an order for partial specific performance was available; and
5. Whether the limitation on damages in the Reconveyance Contract was limited to rescission.

Decision:

The Court found in favour of the defendant and held:

1. The dimensions of 241.54m2 is a reference to the total area of the Duplex rather than a reference to each residence;
2. The defendant was in breach of the requirement to provide a layout plan for the House and the Duplex but this breach was rectified in late 2018;
3. The defendant was not otherwise in breach of the Reconveyance Contract. The long delay in registration of the relevant plans of subdivision was not the fault of the defendant, as the defendant had not wilfully and deliberately failed to achieve completion of the contract and, thus, non-completion was a consequence of the dispute about dimensions;

4. Specific performance or partial specific performance not available because the defendant, by failing to complete, was not in breach of the contract and is willing and able to complete the Reconveyance Contract; and
5. The limitation on damages was not limited to rescission.

CBS Leasing Pty Ltd v Imseis

[2020] NSWSC 1408

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 13 October 2020

LAND LAW – leases – agreement for lease – breach – related company of plaintiff enters into contract for sale of premises with defendants – completion of contract for sale conditional upon entry into Agreement for Lease between defendants as landlord and plaintiff as tenant – Agreement to Lease entered into and sale completed – Agreement for Lease requires defendants to undertake Landlord's Works with practical completion to occur by defined date – whether date varied by agreement – handover of premises to plaintiff to occur to allow plaintiff to perform Tenant's Works– liquidated damages payable if Landlord's Works delayed beyond defined date – damages calculated on daily basis until handover occurs – held that handover occurred when plaintiff granted access to commence Tenant's Works and received set of keys – liquidated damages calculated accordingly

CONSUMER LAW – misleading conduct under statute – misleading or deceptive conduct – representations – cross-claimants contend cross-defendant falsely represented that Construction Certificate for development had been approved – representation held to be misleading – cross-claimants did not adduce evidence that had cross-defendant's conduct not occurred they would have taken a different course and thereby avoided loss – cross-claimants' claim for damages under Australian Consumer Law fails

Facts:

These proceedings concerned a contract sale of property in Austral entered into in 2016. The property was sold by the cross-defendant, Pham Property Investments Pty Ltd ('**Pham Property**') to Ebrahim and Rima Imseis ('**the defendants**'). The defendants then entered into an agreement for lease with CBS Leasing Pty Ltd ('**the plaintiff**'). The plaintiff is a company related to Pham Property by operating in childcare centres. The agreement for lease was entered into on the same day the contract fort sale was completed, whereby the defendants were obliged to carry out certain Landlord's Works in order to turn the premises into a childcare facility as depicted in architectural plans. It was agreed that the premises be handed over to the plaintiff for it to undertake certain Tenant's Works before the lease itself would commence.

<u>Plaintiff's Submissions</u>

CBS sought orders for specific performance in respect of the agreement for lease, and also claimed liquidated damages of almost $370,000 and additional damages in respect of expenditure incurred. In essence, the plaintiff contended that the defendants failed to carry out the Landlord's Works in the manner and within the time required by the agreement.

In response, the defendants denied the damages claims on various grounds, and it became apparent in the proceedings that the only substantial dispute relating to the specific performance claim concerned the commencement date of the lease.

Cross-Claim against Pham Property

By their cross-claim the defendants sought damages from Pham Property pursuant to s 236 of the *Australian Consumer Law* ('**ACL**'). It was alleged that Pham Property falsely represented that the property was construction certificate approved, when in fact no construction certificate had been issue for its development. The defendants contended that they relied upon such construction certificate representation in entering into the contract for sale. In turn, it was also contended that the defendants suffered loss by having to pay additional costs amounting to about $96,000 in order to obtain the certificate, and by not receiving rent for a period due to the 7-month delay in issuing the certificate.

Decision

Plaintiff's claim for damages

The Court indicated that despite the lack of contractual formality in these proceedings, through the commencement of the fit-out of the promises and receiving the keys for the premises, the plaintiff did accept the handover of the premises. On this basis, it was decided that the plaintiff was entitled to liquidated damages under the agreement for lease calculated for 142 days, amounting to around $105,000.

Plaintiff's claim for specific performance

The plaintiff sought orders for specific performance to compel the defendants to grant the lease in accordance with the terms of the agreement for lease. The Court indicated that the only matter in dispute here concerned the commencement date of the lease. Accordingly, the Court held that the date that should be accepted is the date when the defendants complied with the agreement for lease in full.

Cross-Claim against Pham Property

Darke J then turned to the plaintiffs' cross-claim against Pham Property concerning the claim for damages pursuant to s 236 of the ACL. The Court indicated that Pham Property, through the advertising and statements of its agent, made representations concerning a construction certificate being approved on the property. However, despite this finding, the Court also held that no evidence had been put forward to demonstrate that any wrongful conduct had occurred. Therefore, since it was no evidenced that the overall transaction had been commercially disadvantageous to the defendants, or put them in a worse-off position, the cross-claim for damages in accordance with the ACL was not made out.

CEG Direct Securities Pty Ltd v Shining Pty Ltd (No 2)

[2020] NSWSC 1213

Coram: Cavanagh J

Court: Supreme Court of New South Wales

Date: 9 September 2020

CIVIL PROCEDURE — Separate determination of questions — final decision — whether powers of attorney forged — mortgages and loan agreements executed pursuant to forged powers of attorney

LAND LAW — Torrens title — Indefeasibility of title — Effects of indefeasibility — Construction of third party mortgages — Whether indefeasibility extends to covenants contained in the mortgages and loan agreements — Identification of debt secured by mortgage representing charge on the land — Where no sum advanced to or at request of mortgagors — Whether acknowledgement of receipt or indebtedness — Meaning of "Secured Money" and "Collateral Documents" in mortgages

GUARANTEE AND INDEMNITY — Factors affecting validity of guarantee — Forgery

LAND LAW — Torrens title — The register — Correction of the register

Facts:

These rather complex proceedings involved a consideration of the extent to which a mortgagee could enforce a mortgage when the signatures of the mortgagors had been forged on powers of attorney. CEG Direct Securities Pty Ltd ('**plaintiff**') is a commercial lender, and the third and fourth defendants are owners of three properties, being:

1. 131/94-116 Culloden Road, Marsfield ('**First Property**')
2. 22/94-116 Culloden Road, Marsfield ('**Second Property**'); and
3. 2 De Milhau Road, Hunters Hill ('**Third Property**')

The second defendant is the son of the third and fourth defendants. Finally, Shining Pty Ltd ('**defendant**') is a company of which the second defendant was the sole shareholder and director.

<u>Loan Agreements</u>

Pursuant to a loan agreement between the plaintiff and defendant, the plaintiff advanced the sum of $200,000 to the defendant in May 2017 ('**the loan agreement**'). The repayment of that amount was purportedly guaranteed by the second third and fourth defendants, pursuant to a deed of guarantee and indemnity. The First Property was subject to a mortgage granted in favour if the plaintiff to secure the initial sum advanced ('**the First Mortgage**').

In June 2017, the plaintiff loaned a further amount to the defendant, increasing the principal sum advanced under the loan agreement to $381,000, pursuant to a variation agreement ('**first variation agreement**'). Similarly, the second, third and fourth defendant again purportedly guaranteed that loan by subjecting a further mortgage onto the second and third properties to secure the money advanced ('**the Second Mortgage**'). Then, pursuant to a further variation agreement in September 2017, the principal sum loaned to the defendant was again increased, to $575,000.

The dispute amongst the parties arose when the defendant defaulted on repayment of the loan, and the second, third and fourth defendants failed to honour their obligations said to arise under the deeds of guarantee and indemnity. In February 2018, the plaintiff commenced proceedings seeking:

1. Judgment for possession of the First Property;
2. Judgment for possession of the Second Property;
3. Judgment for possession of the Third Property;
4. Leave to issue a writ of possession forthwith; and
5. An order that the defendants pay to the plaintiff the sum of $727,695.45 together with interest.

The plaintiff had already obtained judgment against the first defendant in earlier proceedings; however, the second defendant had not filed a defence. The third and fourth defendants filed defences denying that they signed the mortgages and guarantees, whilst suggesting that their purported signatures on power of attorney were forged, by their son, who is the second defendant.

The Separate Questions

The separate questions that required the Courts' determination were extensive and detailed and, in essence, may be divided into two predominant issues as follows:

1. First issue (Questions 1, 2, 3, 6, and 7 in the proceedings) which all relate to whether the third and fourth defendant's signatures were forged on the powers of attorney; and
2. Second issue (Questions 4 and 5 in the proceedings) which assumes a finding in favour of the third and fourth defendants on the forgery issue, and relate to the proper construction of the registered mortgages.

Decision:

The first issue — were the signatures of the third and fourth defendants forged?

The answers to the majority of questions raised by the Court depended upon whether it was accepted that the powers of attorney were validly executed by the third and fourth defendants or whether, contrary to that position, their signatures were forged. On the evidence, where the third and fourth defendants indicated that they did not sign the powers of the attorney, any other documents and they had no knowledge of the mortgages, the Court accepted this position. Particularly considering the absence of any challenge to this position, it was held that the third and fourth defendants did not sign the purported powers of attorney, and evidently, their signatures were forged.

The second issue — the proper construction of the mortgages

The answers to the remaining questions related to the construction of the registered mortgages and the entitlement of the plaintiff. The Court took the view that the third and fourth defendants were not parties to the loan agreement or the first variation agreement and, therefore, neither agreement imposed any obligation on the third and fourth defendants. Therefore, any amount payable could not be secured money, as it is not money which directly or indirectly becomes due by the mortgagors to the mortgagee. As such, it was held that the third and fourth defendants owe no money to the plaintiff.

Central Coast Council v Pastoral Investment Land & Loan Pty Ltd

[2020] NSWSC 777

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 19 June 2020

CONTRACT — breach — parties enter into a Deed which contemplates a re-zoning of defendant's land so that it is partly zoned industrial and partly zoned conservation — Deed provides for defendant to lodge a development application to subdivide the land into two lots to reflect the zonings — Deed further provides for the defendant to transfer to the Council the conservation lot following approval of the subdivision — defendant lodges development application for subdivision and vegetation clearing — Council issues Notice of Determination consenting to subdivision but rejecting vegetation clearing — defendant appeals to Land and Environment Court — whether defendant by failing to lodge subdivision application breached implied term to do all that is reasonably necessary to secure performance of the Deed — held that Deed does not prevent exercise of rights of appeal — held that defendant not in breach where rights of appeal have not been exhausted — specific performance not granted

LOCAL GOVERNMENT — powers, functions and duties — property — whether Council entered into the Deed ultra vires or unlawfully — held that Council had statutory power to enter into the Deed

LOCAL GOVERNMENT — powers, functions and duties — property — whether the Deed included an unlawful fetter upon the future exercise of Council's statutory powers — held that Council did not fetter the future exercise of its statutory powers where Deed does not include any obligation upon the Council to grant development consent

Facts:

Central Coast Council ('**plaintiff**') commenced proceedings against the registered owner, Pastoral Investment Land & Loan Pty Ltd ('**defendant**'), of parcels of land in Warnervale. In 2007, the parties had entered into a Deed of Agreement in relation to the land, which provided that:

- The plaintiff would use its best endeavours to obtain a certain re-zoning of the land
- The defendant would lodge a development application to subdivide the land in an agreed manner if the land was re-zoned; and
- If the development application was approved and the plan of subdivision registered, the defendant would transfer a lot containing land of high environmental conservation value to the Council for $1.00.

The rezoning of the land as intended by the Deed of Agreement was affected in 2008. However, it was not until 2015 that the defendant provided a draft plan of subdivision to the plaintiff. Following discussions with the plaintiff, a development application was lodged in

2017, which accounted for subdivision and clearing of vegetation ancillary to subdivision. Disputes began to arise when the plaintiff opposed such vegetation clearing and issued development consent in 2019 for boundary realignment only, making it abundantly clear that no clearing of native vegetation was permitted under the consent.

The defendant commenced proceedings in the Land and Environment Court appealing determination of the development application and sought that the consent be modified to permit the clearing of the land. The plaintiff then commenced Supreme Court proceedings against the defendant, arguing that because the defendant had failed to advance the subdivision, it had breached an implied term of the Deed of Agreement obliging it to cooperate with the plaintiff. On this basis, the plaintiff sought orders for specific performance. The defendant denied that it had breached the Deed of Agreement and, by way of cross claim, contended that the Deed of Agreement was entered into unlawfully by the plaintiff and, amongst other things, comprised an unlawful fetter on the plaintiff's ability to exercise future statutory powers.

Decision:

Was the Deed of Agreement entered into by the plaintiff unlawful?

Darke J found that at the time the Deed of Agreement was entered into, the plaintiff, as a corporate body, had the power to do what was necessary for or incidental to the exercise of its functions. As such, the plaintiff had the power to acquire land by agreement for the purpose of exercising any of its functions, pursuant to the *Local Government Act 1993 (NSW)*. Further, a resolution passed by the plaintiff authorised the plaintiff's entry into the Deed of Agreement.

Did the Deed of Agreement constitute an unlawful fetter upon the future exercise of the plaintiff's statutory powers?

The defendant argued in its cross-claim that by entering into the Deed of Agreement, the plaintiff had impliedly agreed to grant development consent to the defendant. In turn, the plaintiff could not obtain the benefit of receiving the conservation lands if the development consent was not issued. However, the Court was unable to find an obligation, or even an implied obligations, on the plaintiff to grant development consent from the provisions in the Deed of Agreement and, therefore, the plaintiff did not bind itself such that it was required to grant development consent.

Should orders be made for specific performance of the Deed of Agreement?

The Court, having found that the Deed of Agreement was valid and enforceable, considered whether orders for specific performance should be made. The plaintiff contended that the defendant was in breach of the Deed of Agreement, as it failed to lodge an application for a subdivision certificate as required by the development consent. It further contended that the defendant was in breach of an implied term of the Deed of Agreement and, thus, sought specific performance to progress the subdivision. In response, the defendant contended that it was entitled to challenge the conditions of the development consent issued by the Council and, therefore, implying such a term sought by the plaintiff would be inconsistent with the exercise of that right.

Although the Court found that there was an implied term within the Deed of Agreement that each party was to partake in all that was reasonably necessary to be done on its part to facilitate the release by the plaintiff of the signed plan of subdivision, the Court also accepted that the defendant was not prevented from challenging the development consent issued by the plaintiff. Thus, it was held that the Deed of Agreement did not prevent exercising the rights of appeal, and the defendant was not in breach where rights of appeal had not been exhausted.

Therefore, the defendant’s challenge to the validity and enforceability of the Deed of Agreement was not made out, and the plaintiff’s claim for orders for specific performance was declined.

Chamberlain v Registrar-General of NSW

[2020] NSWSC 923

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 21 July 2020

LAND LAW — Torrens title — claim for compensation from the Torrens Assurance Fund — property of plaintiff company transferred to director of company and his wife in 1997 — transfer effected as part of fraud perpetrated by director — director transferred his interest to wife in 2000 — wife thereafter held title as sole registered proprietor — company commenced statutory derivative proceedings in 2008 against director and wife to recover the land — held at first instance that wife's title was indefeasible but orders for equitable compensation made against director — on appeal company successful in obtaining order that wife held property on trust for it — in 2015 High Court holds that wife's initial title was indefeasible but she held a one-half interest on trust for the company — company makes claim in 2017 for compensation from Assurance Fund — Registrar-General rejects claim on basis that it was made out of time — whether claim for compensation brought outside time stipulated in s 131(2) of Real Property Act 1900 (NSW) — whether "compensable loss" within s 129 of Real Property Act arose more than six years before claim made in 2017 — held that "compensable loss" had been suffered by 15 September 2000 — held that "compensable loss" was not first suffered at time of High Court decision — whether cause of action barred by s 14(1)(d) of Limitation Act 1969 (NSW) — held that six year limitation period commenced to run on 15 September 2000 — held that limitation period was not thereafter suspended on the basis that company was a person "under a disability" within s 52 of Limitation Act — disability provisions of s 52 held to apply only to natural persons — held that in any event company was not substantially impeded by reason of any relevant impairment or restraint — held further that even if under a disability during a period of receivership the limitation period would have expired in March 2012 — no action brought on cause of action before expiry of limitation period — cause of action extinguished — proceedings dismissed.

Facts:

These proceedings concerned a claim for compensation from the Torren Assurance Fund, pursuant to Part 14 of the *Real Property Act 1900* (NSW) ('**Act**'). The claim was brought against the Registrar-General by Gerard Cassegrain & Co Pty Ltd (in liquidation) ('**company**'). The company was the second plaintiff, and the first plaintiff was Christopher Mel Chamberlain, liquidator of the company. The company had been in liquidation since July 2012. When the proceedings were commenced in May 2019, the liquidator was the only plaintiff. However, the liquidator discontinued the proceedings so far as he was personally concerned in November 2019.

The claim was brought about concerning eight parcels of land near Wauchope ('**property**'). Prior to 10 March 1997, the company was the sole registered proprietor of the unencumbered property. On 10 March 1997, Claude Cassegrain and his wife Felicity Cassegrain became the registered proprietors of the property as joint tenants. It was later revealed that the transfer took place as part of a fraud perpetrated against the company by Claude Cassegrain. In essence, the conduct alleged to be fraudulent involved:

1. The assertion by Claude Cassegrain that he was personally entitled to $4.25 million out of a settlement paid to the company by the Commonwealth Scientific and Industrial Research Organisation;
2. The taking of steps by Claude Cassegrain to have the company acknowledge that it had a liability to him of $4.25 million; and
3. The arranging of the transfer of the property from the company to himself and Felicity Cassegrain in such a way as to create the false impression that in exchange for its interest in the property the company would receive the benefit of a $1 million reduction of an existing liability to Claude Cassegrain.

History of Proceedings and current Supreme Court Proceedings

A series of earlier proceedings arose in the Supreme Court and was appealed all the way to the High Court of Australia, concerning Claude Cassegrain, Felicity Cassegrain and the company. Following such complex proceedings, and an unsuccessful administrative claim for compensation lodged by the company on 17 January 2017, the company lodged these proceedings claiming compensation under a different provision of the Act.

In essence, the company alleged, and the Registrar-General denied, that at the time of the refusal of the claims, the company was entitled to compensation under Part 14 of the Act. Thus, this dispute was primarily centred on competing contentions as to when the company became entitled to seek compensation under the Act, and whether the making of such a claim became barred by the operation of an applicable limitation provision.

Limitation Issues

The limitation issue referred to the fact that any claim under s 132, by way of court proceedings, required commencement within a six-year limitation period prescribed by the *Limitation Act.* In this regard, the company contended that the registration on 10 March 1997 resulted in persons other than the company being registered as proprietors of the land, and that further registered interests in the land occurred when the two mortgages were later registered. It was then alleged that the company, thereafter, suffered loss and damage arising from this, and that such loss and damage was a result of the operation of the Act where the company was ultimately unable to recover its unencumbered interest in the whole of the land. Finally, the company alleged that its entitlement to compensations comprised loss and damage that had arisen during the six years prior to 17 January 2017.

Decision:

The Court made several determinations as follows:

- By 15 September 2000, the company had suffered a compensable loss for the purposes of Part 14 of the Act;
- The company had an entitlement to make a claim for the compensation from the Torrens Assurance Fund pursuant to s 131 of the Act; and
- The company was also entitled, subject to obtaining necessary consent of the Registrar-General or the leave of the court, to claim compensations from the Torrens Assurance Fund by means of court proceeding against the Registrar-General;

However, Darke J also held the following:

- The limitation period prescribed by the Limitation Act for the case of action to recover compensation from the Torrens Assurance Fund expired on 15 September 2006, or at the latest, in March 2012 if the period was suspended for the duration of the period the company was in receivership; and
- As no action was brought on the cause of action before the expiry of the limitation period on 15 September 2000, the company's claim for compensation was not advanced in these proceedings.

The proceedings were therefore dismissed, and the question of assessment of compensation did not arise.

Chetwynd v Rose (No 2)

[2020] NSWSC 870

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 7 July 2020

COSTS — Party/Party — Bases of quantification — Factors relevant to the court's discretion when quantifying costs — Gross sum costs order

COSTS — Party/Party — Bases of quantification — Indemnity basis — Where self-represented plaintiffs properly advised should have understood proceedings likely to fail — Where conduct of self-represented plaintiffs unreasonably lengthened proceedings and complicated issues

COSTS — Party/Party — Orders when proceedings involve multiple parties — How parties liable — Liability as between natural plaintiffs and corporate plaintiff controlled by them

JUDGMENTS AND ORDERS — Interest — Recoverability — Time from which interest is payable — Not limited to when cause of action arose —Factors relevant to court's discretion — Civil Procedure Act 2005 (NSW), s 100(1)(b)

LAND LAW — Co-ownership — Statutory trust for sale — Order for sale on terms — Adjustments between co-owners before proceeds of sale distributed — Conveyancing Act 1919 (NSW), s 66G

Facts:

The heart of these proceedings concerned a dispute about the ownership of a property in Armidale, which had been Brian and Jill Chetwynd's ('**plaintiffs**') family home. This Armidale property was purchased in 1993 and, pursuant to an arrangement between the parties, Glynis Rose ('**defendant**') was recorded as the registered proprietor.

<u>*Initial Proceedings*</u>

The plaintiff contended that the defendant held the Armidale property on trust for them and that it cannot be sold without their consent. The defendant, however, argued that the longstanding three-way split agreement had been entered into and that she held the Armidale property for the three of them. Accordingly, the defendant argued entitlement to orders for its statutory sale over the objection of the plaintiffs and to one-third of the sale proceeds.

The Court delivered its reasons in this matter in February 2020: *Chetwynd v Rose* [2020] NSWSC 111 ('**Principal Judgment**'). The Principal Judgment indicated that Brian and Jill Chetwynd (together, the '**Chetwynds**') failed in the matter, except in relation to two relatively minor matters. As such, the Court found that, first, the defendant owed the plaintiffs $15,953 for dividend payments that they should have received but did not, and second, that the plaintiffs are entitled to a declaration that their loan account in the books should be adjusted by $53,740 being from the defendants' loan account and a corresponding credit being made to the plaintiffs' loan account. For her part, the defendant had the vast measure of success, as she succeeded in all but the minor matters. Accordingly, and most importantly, the defendant satisfied the Court that she is a one third beneficial owner of the Armidale property who is entitled to orders for the sale of that property pursuant to s 66G of the *Conveyancing Act 1919* (NSW) ('**Act**').

Decision:

This judgment was concerned with costs and other consequential matters in the matter. As such, the questions requiring the Court's determination were summarised as follows:

1. *Should the Chetwynds and Wincot pay the defendant's costs of the proceedings?*

The issue of whether the defendant was entitled to her costs was dealt with by the first and second plaintiffs ('**Chetwynds**') and the third plaintiff ('**Wincot**') written submissions. The defendant submitted that the Chetwynds and Wincot should be jointly and severally liable to pay her costs of the proceedings on the indemnity basis. The Chetwynds and Wincot submitted that the Court should order that each party pay their own costs. However, the defendant's position (and the Principal Judgment) was affirmed by holding that the Chetwynds and Wincot were liable to pay the defendant's cost of the proceedings.

2. *On what basis should the defendant's costs of the proceedings be paid?*

The Chetwynds submissions on this issue did not engage in terms with the distraction between ordinary and indemnity costs. Nevertheless, the Court accepted the defendant's submission that she should have her costs on the indemnity basis.

3. *Should there be a gross sum costs order in favour of the defendant and, if so, in what amount?*

The defendant also sought a gross sum costs order in the sum of $350,000. Again, the Chetwynds' submissions did not really engage with the defendant's submissions both as to whether a gross sum costs order should be made and in what amount. Nevertheless, the Court understood the position of the plaintiffs to be that if they were ordered to pay the defendant's costs, those costs should be assessed. Alternatively, the plaintiff submitted on the basis of what he said was research he had undertaken and his own view of the matter, that if the defendant's costs were assessed as a gross sum, the amount should be $150,000. However, the Court concluded that the sum of $350,000 represents a more than adequate discount in fairness to the plaintiffs from what the defendant would be likely to recover on an assessment of her costs on the indemnity basis.

4. *<u>As between the Chetwynds and Wincot, who should be responsible for the defendant's costs?</u>*

The defendant submitted that the Chetwynds and Wincot should be jointly and severally liable for the costs of the entire proceedings in the sum of $350,000. The Court affirmed this position.

5. *<u>What interest, if any, should be payable on the Adjustment Sum?</u>*

The Court concluded that the defendant's real and practical loss in relation to the Adjustment Sum, for which she is entitled to compensation by interest, began when she sought to bring the arrangements between the parties to an end. Therefore, pre-judgment interest at Court rates on the Adjustment Sum was calculated from January 2015, and not from July 2000 as contended by the defendant.

6. *<u>What interest, if any, should be payable on the $76,457.08 held by the defendnat for, and subsequently paid by her to, the Chetwynds from the sale of the Neutral Bay Property?</u>*

The Court held that the Chetwynds failed to demonstrate that they had suffered any loss compensable by interest in relation to the Neutral Bay Proceeds, as the defendant paid the Neutral Bay Proceeds to the Chetwynds, including the interest, without demur.

7. *<u>What interest, if any, should be payable on the $15,953 for dividend payments owed by the defendant to the Chetwynds?</u>*

The Court did not accept the Chetwynds' submissions that interest should be calculated from when the dividends were paid in the 1990s, as this would have mischaracterised what occurred. Thus, on this issue, the Court concluded that the Chetwynds were entitled to pre-judgment interest on the sum of $15,953 at Court rates calculated from January 2015, being the date on which the defendant precipitated the final reckoning between the parties.

8. *<u>To what is the defendant entitled from the proceeds of sale of the Armidale Property?</u>*

Following the payment of the costs of sale and the trustees' fees plus other expenses, the various amounts (which the Court determined each party owes the other) were held to be set off and paid to a net creditor from the balance of the proceeds of the sale of the Armidale Property. Accordingly, the Court also held that any remaining should then be paid by the trustees to the parties in accordance with the latters' beneficial interests in the Armidale Property.

Cooper v The Owners - Strata Plan No 58068

[2020] NSWCA 250

Coram: Basten JA, Macfarlan JA, Fagan J

Court: New South Wales Court of Appeal

Date: 12 October 2020

LAND LAW – strata schemes – by-laws – scope of subject-matter – purposive limits to the power to make by-laws – *Strata Schemes Management Act 2015* (NSW), s 136(1)

LAND LAW – strata schemes – by-laws – restrictions on by-laws – requirement that by-law not be harsh, unconscionable or oppressive – whether by-law imposing blanket prohibition on keeping animals contravenes provision – *Strata Schemes Management Act 2015* (NSW), s 139(1)

STATUTORY INTERPRETATION – use of dictionaries – whether three words comprise a composite statutory criterion

WORDS AND PHRASES – "harsh, unconscionable or oppressive" – Strata Schemes Management Act 2015 (NSW), s 139(1)

Facts:

These proceedings concerned Johanna Cooper and Leo Coope ('**applicants**') owning a lot in a freehold strata scheme, a 43-storey apartment building in Darlinghurst, known as The Horizon. The applicants also kept a dog in their apartment in contravention of the strata schemes' by-law 14. Relevantly, such by-law provided that an owner or occupier of a Lot must not permit any animal to be on a Lot or on the common property.

First Instance:

Upon an issue being raised as to their ongoing contravention of the by-law, the applicants commenced proceedings in the NSW Civil and Administrative Tribunal ('**NCAT**') seeking a declaration that the by-law was invalid. It was primarily contended that a blanket ban on animals in a Lot or common property contravened s 139(1) of the *Strata Schemes Management Act 1996* (NSW) ('**the Act**') and sought a declaration for the by-law to be invalid. The Act provides that a by-law must not be harsh, unconscionable or oppressive.

The Appeal:

Although the applicants were successful before NCAT, they lost on appeal to the NCAT Appeal Panel. Following this, the applicants sought to appeal the decision from the Appeal Panel. In these proceedings, the applicant submitted that, if the appeal were to be allowed, this Court should reinstate the orders made by the Senior Member. The respondent contended in its written submissions that, if the by-law were to be declared invalid, it could have unintended consequences for the strata scheme, which would then be left without a by-law governing the keeping of animals. However, it was held that these potential consequences did not provide a basis for overturning the orders made by NCAT.

Decision:

Accordingly, the Court of Appeal upheld the appeal and held that a blanket ban on animals infringes the limitation that a by-law must not be 'harsh, unconscionable or oppressive' under s 139(1). In addition, it was held that the by-law also restricted the lawful use of each lot on a basis which lacked a rational connection with the enjoyment of other lots and the common property. Therefore, by allowing the appeal, the orders made by the Appeal Panel were set aside, which in turn set aside orders made by the Senior Member in the first instance.

Double Bay Bowling Club v Council of the Municipality of Woollahra trading as Woollahra Municipal Council

[2020] NSWSC 1861

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 8 December 2020

LAND LAW — Restrictive covenants — Extinguishment of restrictive covenants — Extinguishment by order of court – in 1948 Woollahra Municipal Council (“the Council”) sold Lots 9 and 101 to Double Bay Bowling Club (“the Club”) and imposed as a condition of sale a Restrictive Covenant which prohibited the Club from using the lots for any purpose other than a recreational purpose connected with a bowling club (“the Covenant”). Lot 101 is used as a bowling club. Lot 9 had, until 2018, a cottage which was rented to the Club’s greenkeeper. The cottage has been demolished and two townhouses are now being constructed on Lot 9 pursuant to a development consent given by the Council in 2017 – the Club seeks to have the Covenant removed from Lot 9 on a number of grounds including obsolescence – town planning evidence that use of Lot 9 for recreational purposes is now prohibited under current zoning and use as a residence for a greenkeeper for the Club’s bowling club (at Lot 101) was in breach of the Covenant and was not a recreational purpose – Consideration of discretionary factors under s89(1) of the *Conveyancing Act 1919* (NSW) (“the Conveyancing Act”) – Held: the Covenant imposed on Lot 9 should be extinguished pursuant to s 89(1)(a) and (c) of the *Conveyancing Act* because it was obsolete, impeded the reasonable use of the lot and because there was no practical benefit that would be lost or likelihood of harm to the Council if the Covenant were extinguished.

CONTRACTS — Formation — Agreement – the Council asserts it and the Club entered into a binding agreement pursuant to which the Council agreed to removal of the Covenant and in return the Club agreed to a new restriction that would require the Club on sale of Lot 9 to pay to the Council an amount based on what was described as the “Before and After Method” of valuation – whether the parties entered into a binding agreement – whether a typed name in email constitutes a signature – *Masters v Cameron* categories of agreement considered and whether the parties intended to make a concluded bargain; whether the requirements of s 54A of the *Conveyancing Act* were met – Held: no binding agreement was entered into between the parties. Alternatively, if there was a binding agreement, that agreement was abandoned by the parties.

Facts:

The Woollahra Municipal Council (‘**Council’**) sold two parcels of land to Double Bay Bowling Club (’**Club**’) in 1948. One parcel was known as ‘**Lot 101’**, where three law bowls greens and a clubhouse were located, and the other parcel was known as ‘**Lot 9**’. Lot 101 was at the time already being used for bowling greens, whilst Lot 9 had a residential cottage on it that, before 1948, had been turned into a temporary clubhouse for the Club. Such use of Lot 9 continued until 1954, when a permanent clubhouse was built on Lot 101 and the cottage was returned to use as a residence. For many years, the residence was rented by the Club to the Club's greenkeeper.

In 1948, as a condition of sale of the lots, the Council imposed a restrictive covenant which prohibited the Club from using Lots 9 and 101 for any other purpose than a recreational purpose connected with a bowling club ('**Covenant**'). In agreement with the Council, in 1980 the Club was able to sell off some of Lot 101 to a developer for the purposed of constructing a new apartment block. The remainder of Lot 101 was then, and still is, in use as a bowling club. In 2018, the Club demolished the cottage on Lot 9 and, in accordance with a development consent obtained from the Council, began construction of two townhouses which, at the time, were largely complete.

The Club's Arguments

Disputes began to arise between the parties when the Club sought the permission to sell at least one of the townhouses and rent out or sell the second townhouse. The Club claimed that there was no benefit to the Council in forcing the Club, by means of the Covenant, to use Lot 9 for the residence of the greenkeeper.

As such, the Club sought to have the Covenant extinguished insofar as it relates to Lot 9, pursuant to s 89 of the *Conveyancing Act* 1919 (NSW) ('**Act**'), on a number of grounds including obsolescence. The Club contended that, in accordance with town planning evidence submitted, the use of Lot 9 as a residence for the greenkeeper was not a use permitted by the Covenant.

Separately, another issue was posed to the Court asking whether rental of the cottage on Lot 9 to a greenkeeper was a use ancillary to the recreational purpose of a bowling club. In addition, and if it was, it was also posed whether that was within the requirements of the Covenant and whether the demolition of the cottage and replacement by the two townhouses brough any such use to an end.

The Council's Arguments

The Council asserted, by way of cross claim, that it and the Club had entered into a binding agreement in May 2016, pursuant to which the Council agreed to removal of the Covenant and in return the Club agreed to a new restriction. In essence, the new restriction required that in order to sell one or both of the townhouses the Club would need to pay the Council an amount based on what was described as the 'before and after method' of valuation, where the Club was to pay the Council the difference between what Lot 9 is worth with the Covenant in place and what it is worth without the Covenant (an amount of at least $3M). Accordingly, the Club denied that it had entered into a binding agreement with the Council.

Decision:

The Club's Arguments

The Court held that the use of Lot 9 as a residential dwelling was not use for a recreational purpose in connection with a bowling club. Additionally, whether leased as a matter for convenience to a greenkeeper or not, it was held that the covenant had, in effect, become obsolete when Lot 9 ceased being used as a temporary club house, and that the continued operation of the Covenant stultified the appropriate use of Lot 9.

The Court also held that, even if 'recreational purpose of a bowling club' included an ancillary use, rental to a greenkeeper of a residence on Lot 9, as a matter of convenience as opposed to an essential matter, would not be sufficient. Further, it was determined that even if the use of Lot 9 as a residence for the Club's greenkeeper was permitted by the Covenant, forcing the Club to house the greenkeeper in one of the townhouses, and effectively precluding the use of the other townhouse, would similarly involve a stultification of the use of Lot 9.

Additionally, the Court held that the Council had not identified any benefit or advantage to the Council arising out of the Covenant insofar as it concerned Lot 9, and the Court was not persuaded that any practical benefit would be lost, or that any likelihood of any injury to the Council, by reason of extinguishment of the Covenant, had been established.

The Council's Arguments

In essence, the Court disagreed with the Council's contentions and held that there was no binding agreement between the Club and Council in relation to a new restriction. Alternatively, even if there was a binding agreement contrary to that finding, that agreement was abandoned by the parties. Finally, the Court supported that the Covenant be extinguished pursuant to s 89(1)(a) and (c) of the Act.

First Renewable Pty Ltd v Nastevski

[2020] NSWSC 1508

Coram: Lindsay J

Court: Supreme Court of New South Wales

Date: 28 October 2020

LAND LAW – Leases – Sublease – Whether, for the purpose of COVID-19 legislation, a sublessee is a "lessee" to the head lessor.

EQUITY – Equitable remedies – Relief against forfeiture – Application for interlocutory relief.

Facts:

These proceedings concerned First Renewable Pty Ltd ('**plaintiff**') leasing a strata factory unit in St Peters ('**Premises**') from Zoro Nastevski ('**defendant**'). This lease prohibited assigning and subletting of the Premises without the defendant's consent. However, the plaintiff entered into a sublease with Bodhi Satori Pty Ltd ('**Bodhi**'), a company owned and controlled by the sole director of the plaintiff. The plaintiff did not seek the defendant's consent to the sublease.

The defendant served on the plaintiff a Notice of Breach itemising breaches of the lease, including sub-letting the Premises without the defendant's consent, and called for remedial action to remove any sub-tenants from the Premises or alternatively seek the defendant's consent to the sublease. Nonetheless, the plaintiff did not remove the sublessee from the Premises and did not seek the defendant's consent to the sublease to Bodhi.

Following the defendant re-entering the Premises, the plaintiff applied to the Court and sought relief against forfeiture of the lease and the sublease. The plaintiff contended that it was entitled to the benefit of the COVID-19 Leasing regime and an inference should be drawn that the defendant was aware of the existence of the sublease for various reasons, principally because Bodhi sometimes paid the plaintiff's rent to the defendant.

Decision:

The plaintiff's application for relief against forfeiture of the lease was dismissed, and the application of the COVID-19 Leasing Regime was considered. The decision was essentially addressed according to three main issues posed to the Court as follows:

1. *Whether a sublessee can rely on the benefits of the COVID019 Leasing Regime from a head lessor*

It was found that, generally, a sublessee cannot rely on the benefits of the COVID-19 Leasing Regime as against the head lessor - which in this case, was the defendant. The Court instead suggested that the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (‘**Regulations**’) might apply to a head lessor and sublessee relationship if there was a contract between them, or, if the head lessor had granted consent to the sublease.

2. *Whether payment of rent by a sublessee to a head lessor constituted ‘consent’ to a sublease*

   The Court found that the defendant did not give consent to a sublease by accepting the payment from Bodhi for the plaintiff’s rent to the defendant.

3. *Whether the COVD-19 Leasing Regime could apply to breach for lease covenant prohibiting subtenancy*

   On this issue, the Court found that the Regulations did not apply for a breach unrelated to rent.

Therefore, the plaintiff’s notice of motion was dismissed.

Fobeza Pty Ltd v James Adam Pty Ltd

[2020] NSWSC 597

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 20 May 2020

CONTRACTS — construction — contract for the sale of proposed lot in plan of subdivision — area of lot affected by area of another proposed lot — sketch plan annexed to contract showed area of other lot as 2001m² — correct figure was 2205m² — purchaser given right to rescind if area of other lot shown as 2100m² or more on registered plan — plan of subdivision as registered showed area of other lot to be 2205m² — purchaser rescinded — vendor claimed that sketch plan should be read as if it showed the correct area (2205m²) — vendor claimed that objective intention of parties was to confer a right of rescission if area shown on registered plan exceeded area shown on sketch plan by 5% — whether mistake in contract can be corrected as a matter of construction — whether literal meaning of language of contract created an absurdity — whether objective intention self-evident — held that a reasonable person in the position of the parties would not appreciate the existence of the error — held no absurdity where area recorded on sketch plan not obviously wrong — held that suggested objective intention not self-evident — held that purchaser validly rescinded the contract

Facts:

These proceedings concerned a contract for sale of land at Woodstock, entered into between Fobeza Pty Ltd (‘**plaintiff**’) as the purchaser and James Adam Pty Ltd (‘**defendant**’) as the vendor. The contract was expressed to be conditional upon registration by the defendant of a proposed plan of subdivision, under which a parcel of land called ‘Lot 101’ would be excluded from the sale. Annexed to the contract was a sketch plan of the proposed subdivision, and clause 39 of the contract indicated that the registration of the plan of subdivision was to be in accordance with the sketch plan. The contract provided for a purchase price of $2.25 million, with a deposit of $112,500.

The sketch plan was drawn by a registered surveyor, and precisely defined the boundaries of the proposed Lot 101 with specific lengths and bearings. However, the area of Lot 101 was incorrectly indicated as ‘2001m2’, when the correct area was in fact 2205m2. This incorrect area was shown on the plan of subdivision as registered. Once the defendant notified the plaintiff of such registration, the plaintiff purported to rescind the contract, in accordance with clause 41 of the contract. Such clause provided that the purchaser would have a right of rescission if the area of Lot 101 in the plan of subdivision as registered was shown on the plan as being 2100m^2 or more. The plaintiff, in essence, claimed that it was entitled to rescind on the following grounds:

1. The area of Lot 101 in the registered plan of subdivision was shown on the plan as exceeding 2100m^2; and
2. The location of an easement in the registered plan of subdivision was substantially different to that shown on a sketch plan that was attached to the contract.

In response, the defendant denied the validity of the recission and served the plaintiff with a notice to complete.

Accordingly, the Court noted that the validity of the purported rescission was the central issue in the proceedings. The plaintiff sought a declaration in the Supreme Court that it had validly rescinded the contract and sought the return of the deposit. As such, the plaintiff contended that it validly rescinded the contract and that it is entitled to have the deposit refunded, together with interest. The defendant sought a declaration that the contract should be construed so as to read “2100” in cl 41 as “2310”. This was on the basis that as 2100m2 was about 5% greater than the incorrect area of 2001m^2, and 2310m was the intended area to trigger the right of rescission, as it was about 5% greater than the correct area of 2205m^2. In addition, the defendant contended that the plaintiff was not entitled to rescind the contract under the additional clause, and that in turn, the contract remained on foot. By way of cross-claim, the defendant also sought orders for specific performance of the contract.

Decision:

The Court indicated that the determination of such issue also depended upon the resolution of a number of smaller questions of construction of the contract for sale. On the plaintiff’s first submission, the Court accepted that the area in respect of proposed Lot 101 should have been stated on that plan as 2205m^2 not 2001m^2, and thus, was regarded as incorrect. In these circumstances, the Court indicated that a reasonable reader of the sketch plan would regard it as showing the approximate location, shape and size of the proposed Lot 101. Therefore, it followed that the Court was not satisfied, to the high level required, that this was a situation where the mistake in the language of a contract could be corrected as a matter of construction.

As such, the area of Lot 101 in the plan of subdivision as registered was shown on the plan as 2205m^2 and the plaintiff had a right to rescind the contract pursuant to that provision. It also followed that the plaintiff was entitled to have the deposit refunded to it. The Court noted that this conclusion rendered it unnecessary to deal with the plaintiff’s alternative argument that it had a right to rescind because of the location of the easement as registered was substantially different to that shown on the sketch plan.

Therefore, declarations were made to the effect that the contract was validly rescinded by the plaintiff, and that the plaintiff was entitled to have the deposit of $112,500 refunded to it. The defendants cross-claim was also dismissed.

Foundas v Arambatzis (No. 3)

[2020] NSWCA 87

Coram: Bell P, Basten JA., White JA

Court: New South Wales Court of Appeal

Date: 7 May 2020

LAND LAW — Co-ownership — whether order to pay occupation rent ought to be set aside – where the trustee was not the registered proprietor at the time the demand for occupation rent was made – effect of an order under s 66G Conveyancing Act 1919 (NSW) on the rights of a co-owner – order not set aside

Facts:

In these proceedings, Cassiani Foundas (‘**appellant’**) had previously challenged a judicial decision made in the Equity Division, whereby the appellant’s notice of motion to set aside orders made in her absence was dismissed. Although the orders of the primary judge were largely confirmed, the appeal was allowed in part. Amongst those was an order for the appointment of trustees for the sale of a property co-owned by the appellant and Peter Arambatzis (‘**respondent**’). Consequential orders were also made for the charging of the appellant with an occupation fee on the taking of an account (‘**Order 8**’). Such occupation fee was to be payable from the date the trustees for sale demanded payment of rent until possession was provided in accordance with the Court’s Orders 6 and 7.

The appellant’s present application sought to set aside order 8. Orders 6 and 7, for vacant possession, were also challenged in light of the COVID-19 pandemic. However, the central issue in these proceedings was whether Order 8 should be set aside due to the appellant’s right as co-owner to occupy the joint property without charge. The Court elaborated by providing that in accounting for the balance of the net proceeds of sale between the appellant and the respondent, the trustees for sale should charge the appellant with reasonable market rent for occupation of the property until the date of her delivering vacant possession.

The appellant submitted that, as a general rule, a co-owner (in this case, the respondent) who has not chosen to exercise their right of possession – that is, to live on the property – cannot seek any compensation from the other co-owner because each co-owner has the right to occupy the entire property and does not have to pay for that right. As such, the Court observed that an order made under s 66G of the *Conveyancing Act 1919* (NSW) operates to transform a co-owner’s beneficial interest in the property into the right to see the trust for sale performed and to a share of the net proceeds of sale. However, in these proceedings, once the order under s 66G was made, the appellant no longer had a right to possession against the trustees for sale.

Decision:

Accordingly, the Court of Appeal unanimously rejected the application and held that the plaintiff was liable to a rent or occupation fee, so long as she remained in occupation. The Court indicated that when the order appointing trustees for sale was made, the appellant was no longer entitled to occupy the property by virtue of her legal ownership. In addition, although the trustees for sale had not taken the step of registering their interest – which resulted in the appellant maintaining legal title – that bare legal title was insufficient to support a right to possession against the trustees for sale after the s 66G order was made.

Foundas v Arambatzis

[2020] NSWCA 47

Coram: Bell P, Basten JA., White JA

Court: New South Wales Court of Appeal

Date: 24 March 2020

LAND LAW — Co-ownership — Resulting trust – whether proceeds from sale of property be distributed in accordance with the legal title – where property held as tenants in common – where unequal contributions by co-owners to acquisition costs– whether arguable that presumption of resulting trust not rebutted

LAND LAW — Co-ownership — Statutory trust for sale – whether share of property held on trust for other co-owner – whether arguable defence to an application under s 66G Conveyancing Act 1919 (NSW) for appointment of trustees for sale

Facts:

These proceedings concerned Cassiani Foundas (‘**appellant’**) challenging a judicial decision of the Equity Division, whereby the appellant’s notice of motion was dismissed. This case involved two properties located in Ashcroft which were held by the appellant and Peter Arambatzis (‘**respondent**’) in equal shares as tenants in common, one known as the ‘Stanwell Crescent property’ and the other ‘Magee Street property’. The second respondents in the proceedings were the court appointed trustees for sale of the Magee Street property and took no active part in the appeal.

In October 2014, the mortgagee of the Stanwell crescent property exercised its power of sale and, after satisfying the mortgage debt, deposited the remaining sum in an unrelated solicitor’s trust account. These funds were ultimately distributed to the appellant alone.

First Instance:

In October 2018, the primary judge gave judgment for the respondent for half the funds received by the appellant from the sale of the Stanwell Crescent property less $1,340. Further, it was ordered that trustees for sale be appointed under s 66G *Conveyancing Act 1919* (NSW) to the Magee Street property with the proceeds of that sale to be distributed equally between the parties. Following this, the appellant became aware of such orders made in her absence and filed a notice of motion seeking those orders be set aside. This motion was heard and dismissed in September 2019.

The three primary issues in these proceedings can be summarised as follows:

1. Whether the appellant had an arguable defence that the respondent's interest in either property was held on trust for the appellant and to the application for the appointment of trustees for the sale of the Magee Street property;
2. Whether the appellant had an arguable defence for the respondent's claim for his share of the proceeds of sale of the Stanwell Crescent property; and
3. Whether the appellant had an arguable claim to a greater proportion of the net proceeds of sale of the Magee Street property.

Decision:

On the above issues, the Court of Appeal unanimously allowed the appeal in part holding:

1. There was no evidence for the appellant's contention that the respondent held his interest in either property on trust for the appellant. In accordance with past communication with the respondent, the Court indicated that the contrary would be inconsistent with the position taken by the appellant. Thus, there was no arguable defence to the application for the appointment of trustees for sale of the Magee Street property;
2. The appellant and the respondent did not contribute equally to the purchase of the Stanwell Crescent property, and therefore, the appellant had an arguable claim that the presumption of resulting trust was not rebutted; and
3. The appellant and the respondent did not contribute equally to the purchase of the Magee Street property, and therefore, the appellant had an arguable claim to more than half of the net proceeds of sale, in that, it was arguable that the presumption of resulting trust was not rebutted.

Thus, the Court of Appeal ordered that the primary judge's orders should be varied to reflect the parties' contributions for both properties.

Frimont v Case

[2020] NSWSC 850

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 3 July 2020

LAND LAW – possession of land – where plaintiff is administrator of estate and is seeking an order for possession – where a contract for the sale of the land is pending – deceased died intestate – letters of administration taken out but administrator later died – land not transmitted to earlier administrator - where estate has been in limbo unadminstered for many years – deceased's son remained in occupation of property after deceased's death - where defendant moved into property to care for deceased's son – where deceased's son died - where defendant remained in occupation and commenced to pay portion of property rates – whether a residential tenancy agreement arose between deceased's son and defendant – whether residential tenancy agreement could be implied between defendant and unadministered estate - where defendant continues to pay rates after plaintiff appointed administrator - whether residential tenancy agreement arose by implication – whether estoppel arose from prior payment of rates – where no evidence that plaintiff knew of payments – plaintiff entitled to possession

LEASE AND TENANCIES – residential tenancy agreements – where land owned by unadministered estate - whether residential tenancy agreement arose by reason of occupation of land by defendant and payment of rates by him – whether subsequently appointed administrator estopped from claiming no residential tenancy agreement existed – where no evidence of acceptance by administrator of payment of rates

Facts:

This case concerned the death of Albert Bruce Case, who died intestate in 1968. Following Albert's death, Letters of Administration were granted to Donald Bruce Case's ('**defendant**') father, Kenneth Bruce Case, until his death in 2003. Thereafter, Albert's estate remained in limbo until the grant of Letters of Administration to Pamela Elizabeth Frimont ('**plaintiff**') in 2018.

In 2010, the defendant, grandson of Albert, moved into the property to care for his uncle, Robert Case. Since Robert's death in 2011, the defendant and his wife had continued to live on the property. The plaintiff arranged for two written notices to be given to the defendant to vacate in November 2018 and May 2019, and proceedings were commenced in 2020 with a contract of sale to sell the land for $1.27 million.

The central issue between the parties was whether or not the defendant was entitled to possession of the land by virtue of a residential tenancy agreement ('**RTA**') between the estate and himself. On this issue, the defendant submitted that there were three difference occasions when an RTA came into effect, which can be summarised as follows:

1. The first was the defendant made the arrangement with Robert to move into the property in 2010;
2. The second occasion was when Robert died in 2011, and
3. The third occasion was when the plaintiff became the Administrator in 2018.

Decision:

With respect to the first occasion, the defendant submitted that when the defendant moved into the property, he entered into an arrangement with the major beneficiary of an estate – being Robert – to care for him, and further, that this arrangement was agreed to by the plaintiff during a meeting. The defendant went on to allege that during this time the defendant began to pay some half of the rates on the property. However, although it was pleaded that the defendant's purpose in moving to the house was to look after Robert, there was no certainty about what care was to be provided. Moreover, the plaintiff denied ever attending such a meeting or agreeing to such an agreement. In turn, given the lack of evidence on the defendant's side on this issue, the Court rejected this claim altogether. In addition, the Court indicated that even if an RTA was in operation, it terminated once the plaintiff obtained the title of Administrator, as in essence, it is a superior title for the purposes of an RTA.

In relation to the second occasion, the defendant submitted that an RTA came into effect in 2011, immediately after Robert had died. The Court noted that there were two issues with such submission:

a. First, there was no person to enter into that agreement with the defendant to grant any right of occupation. Until Letters of Administration were obtained by the plaintiff in 2018, the land remained registered in the name of Albert; and
b. Second, although the defendant claimed that his payment of part of the rates constituted 'value' for the purpose of s 13 of the RTA, there was no evidence that the plaintiff knew he was paying rates. In this regard, Davies J held that a unilateral decision by one party to undertake some obligation voluntarily is not sufficient to satisfy s 13 unless, at least, that obligation is accepted by another party.

Finally, in respect to the third occasion, the defendant contended that an RTA arose when the plaintiff was appointed the Administrator of Albert's estate in 2018. The defendant alleged to have continued making payment towards some of the rates to the knowledge of the plaintiff, and further alleged that the plaintiff accepted the payments. However, it was established that the plaintiff was unaware that the defendant was making such payments. In the absence of any knowledge, there could be no acceptance to such an arrangement by the plaintiff, and therefore the Court held that there was no agreement.

The defendant further submitted an estoppel claim, where it was pleaded that the plaintiff seeking possession amounted to unconscionable conduct, given that she had accepted that the defendant pay half the rates. However, the Court held that there was no evidence to support this claim.

Therefore, Davies J concluded that there was no RTA in force when the proceedings were commenced, and thus, the defendant had no right to remain on the land.

GR Capital Group Pty Ltd (Receivers and Managers Appointed) (subject to Deed of Company Arrangement) v Yan

[2020] NSWSC 911

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 16 July 2020

LAND LAW — Caveats — Removal of caveat — Withdrawal of caveat by caveator — where there are uncertainties involved in determining the effect of the relevant agreements — where, noting the probable indefeasibility of a registered mortgage, a sufficiently serious question to be tried has not been established — where, in the circumstances, the balance of convenience is in favour of an unconditional order for the withdrawal of the caveat

LAND LAW — Caveats — Caveatable interest —where mortgage duty was not paid in respect of the relevant agreements or the caveat — where the failure to attend to the requirements of s 227 of the *Duties Act 1997* (NSW) means that the caveat should be withdrawn

Facts:

These proceedings concerned GR Capital Group Pty Ltd (Receivers and Managers Appointed) (subject to Deed of Company Arrangement) ('**plaintiff**') being the registered proprietor of a property in Hurstville ('**Hurstville Property**'). The Hurstville Property had erected a residential unit development which had become the subject of a plan of subdivision. The plaintiff entered into 'off the plan' contracts for sale of the units in the development. There were 39 lots ('**the Lots**') that were the subject of contracts of sale that has not been completed.

The plaintiff and the defendants entered into a facility agreement with Everest Private Pty Ltd ('**Everest Private**') for the provision of a loan facility of up to $27.5 million. This loan was for the purpose of enabling the plaintiff to develop 75 residential lots and two retail lots in respect of the proposed plan of subdivision on the Hurstville Property. In 2017, the plaintiff granted a mortgage to Everest Private to secure its obligations under the facility agreement ('**Everest Private Mortgage**') as well as a general security agreement. The Everest Private Mortgage was the registered first mortgage encumbering the title to each of the Lots.

In addition, there was lodgement of three caveats against the title to each of the Lots, by Xinfeng Australia International Investment Pty Ltd ('**first defendant**') and by Mr Uy ('**second defendant**'). The plaintiff reached an agreement with the first defendant and, orders were made by consent on the morning of the hearing for the withdrawal of the caveat lodged by the first defendant. Such caveat claimed an equitable interest in the lots by virtue of a loan agreement between the first defendant and the plaintiff.

The substantive order that was sought by the plaintiff against the second defendant in these proceedings was hat that the caveat over the Hurstville property be withdrawn by the second defendant

Effect of non-payment of mortgage duty

In exercise of the Court's discretion, the Court observed that it may be justified in ordering the withdrawal of a caveat that did not comply with s 227 of the *Duties Act 1997* (NSW) ('**the Act**'). The Court went on to state that this issue applied for reasons concerning the prevention of mortgagees protecting their mortgages by lodging caveats in circumstances that did not comply with the Act, and only attending to the payment of mortgage duty after steps are taken to obtain a Court order for the withdrawal of the caveat. As such, it was expressed that this issue will only rarely arise since the insertion of s 203A of the Act.

On this issue, the second defendant submitted that such practice was unfair, because s 227(3) of the Act clearly imposes the obligation to pay mortgage duty on the mortgagor. He further submitted that the mortgagee should not be required to pay the mortgage duty in order to perfect its mortgage and entitlement to protect the mortgage by lodgement of a caveat, as the mortgagee may not be able to be reimbursed from the mortgagor.

Although the Court accepted that there was some weight in the second defendant's argument, the Court did not accept that mortgagees ordinarily have difficulty requiring that the mortgage and the caveat be stamped, and that the mortgagor pay the requisite duty. As such, and attending to the requirements of the Act, the mortgagee should have had sufficient bargaining power to require that the relevant mortgage duty be paid as an incident of the transaction.

Is the Everest Private Mortgage indefeasible?

The Court noted that, on the basis of the evidence tendered, it was quite possible that the second defendant had a valid claim against Everest Private for breach of contract. However, in respect to the existence of interest in the Lots that the second defendant has sought to protect by the caveat, the Court was not satisfied that the second defendant had established a sufficiently serious question to be tried. Therefore, having regard to the probable indefeasibility of the Everest Private Mortgage, the Court was justified in making an order for the withdrawal of the caveat on the condition contended for by the second defendant.

Decision:

Therefore, the Court considered that the proper course for the Court to take was to order the withdrawal of the caveat on the Hurstville Property, and the second defendant pay the plaintiff's costs of the proceedings.

Hardy v Sidoti

[2020] NSWSC 1057

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 12 August 2020

LAND LAW - Adverse possession – Actual possession – Claim to remnant of "dunny lane" incorporated into plaintiff's garden – Land converted from old system title to limited title during period of possession but before limitation period expired – Whether plaintiff's rights survived conversion – Whether possessory title provisions of Real Property Act applicable to limited title land – Limitation Act 1969 (NSW), s 27(2), s 65(1) – Real Property Act 1900 (NSW), s 28T(8), s 45C(2)

Facts:

These proceedings concerned an issue of ownership of a "dunny lane" in Redfern. Christopher Hardy ('**plaintiff**') resided in a terrace house in Redfern ('**Hardy Property**'), which was purchased in 1998 by old system conveyance. The first defendant, Joseph Sidoti, and the second defendant, Natalie Martinoski (together, '**the defendants**') purchased a terrace house also in Redfern ('**Sidoti Property**') which abutted the Hardy Property. As such, the rear of the Sidoti Property was burdened by a right of way, which was the "dunny lane"; created when those lots were originally subdivided and developed to enable collection of waste from the strip of properties.

In 1988, a limited title under the Real Property Act 1900 (NSW) ('**the Act**') for the Hardy Property was issued by the Registrar General. At that time, what is now the Sidoti Property had been owned by the Theodorou family for 40 years. By 1998, the "dunny lane" was no longer useable as a right of way, as it had been blocked off at various points (for other residences on the road), however, there were gates which provided access from both the Hardy Property and the Sidoti Property.

However, following the continuous use of the "dunny lane", the plaintiff took down the fence and began to renovate such area. By reason of such conduct, the plaintiff contended that it had acquired legal title to the "dunny lane" by adverse possession.

Moreover, the defendants purchased the Sidoti Property from the Theodorou family in 2018 and, in addition, the "dunny lane" was included on the title as part of the Sidoti Property. The defendants purported to reclaim the "dunny lane" from the plaintiff by also renovating their respective area that adjoined the Sidoti Property to the "dunny lane".

Plaintiff's Submissions:

Adverse Possession at Common Law

The plaintiff submitted that it had clearly satisfied the requirements tp establish at common law a claim of title by adverse possession of the "dunny lane", having continuously and exclusively used the "dunny lane" since early 1998 – when the plaintiff had first become the registered proprietors of the Hardy Property. Further, it was submitted that the plaintiff's occupation of the "dunny lane" was done peacefully, openly and without the agreement of both the Theodorou Family (from 1998) and the defendants (from 2018). The plaintiff also contended that because of the renovation work undertaken over numerous years, the plaintiff had assumed a proprietorial position concerning the "dunny lane" as if it had formed part of his backyard.

Application of the Act

The plaintiff submitted that if he were successful in establishing his claim for adverse possession at common law, he would seek to have the "dunny lane" incorporated into the Hardy Property by a delimitation plan. He further contended that this was not a case for a possessory application, because Part 6A of the Act did not apply to the proceedings. Rather, it was submitted that because the Sidoti Property was a limited folio, then the case merely involved Part 4B of the Act.

Defendants' Submissions:

Adverse Possession at Common Law

The defendant submitted that the plaintiff's claim at common law of adverse possession of the "dunny lane" fails due to the following:

1. The plaintiff was unable to shoe a sufficient degree of physical custody and control of the "dunny lane";
2. The plaintiff was unable to show the requisite intention to exclude the world at large; and
3. As a consequence of matters 1 and 2, the plaintiff had failed to satisfy the limitation period provided in s 27(2) of the *Limitation Act 1969* (NSW) ('**LA**'), for a continuous and uninterrupted period.

The defendant broadly characterised the above three matters into seven alleged failures to act on part of the plaintiff.

Application of the Act

The defendant submitted that even if the plaintiff's claim of common law adverse possession was established, such findings could not be applied in the real world, as he was precluded from making an application for possessory title against the defendants. Unlike the position put by the plaintiff, the defendant readily accepted that Part 6A of the Act applied.

Decision

The Court's conclusions may be summarised as follows:

1. The Sidoti Property is land under the Act;
2. Possessory title to land under the Act can generally only be acquired in accordance with the provisions of Part 6A of the Act. Thus, if the Act applied in this case, the plaintiff's case must fail against the defendants;
3. The Act does not apply because the plaintiffs adverse possession of the "dunny lane" commenced by no earlier than either 2002 or no later than January 2005. Thus, by reason of ss 28U(2) and 45C(2) of the Act, the Act does not prevent the plaintiff's acquisition of a possessory title by adverse possession of the "dunny lane" at common law;
4. Pursuant to the LA, the relevant limitation period for an action by the Theodorou family as then documentary title holders to recover the "dunny lane" had expired no later than 2017. At that time, their title to the "dunny lane" was extinguished (s 65(1) of the LA). It follows that the defendants did not acquire title to the "dunny lane" when they purchased the Sidoti Property in 2018; and
5. The plaintiff had therefore acquired possessory title at common law to the "dunny lane" and was entitle to orders to recognise that ownership.

Harrison v Office of Registrar General & Anor

[2020] NSWSC 626

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 25 May 2020

LAND LAW – Torrens title – The register – Order for issue of new certificate of title – Bankrupt refuses to provide certificate of title to trustee

Facts:

Mr Brett Harrison (‘**plaintiff**’) was the trustee of a bankrupt estate of Ms Leonie Hartwig (‘**second defendant**’). As the beneficiary of her late mother’s estate, the second defendant succeeded to and become the registered proprietor of a property in Dubbo (‘**Property**’). These proceedings concerned the plaintiff seeking an order that the Office of the Registrar General (‘**first defendant**’) issue to the plaintiff a replacement Certificate of Title for the Property. The plaintiff requires such Certificate of Title so that, in his capacity as the second defendant’s trustee in bankruptcy, he can sell the Property for the purpose of paying out her bankrupt estate’s creditors.

Although the plaintiff was the registered proprietor of the Property, it brought these proceedings because the second defendant had failed to deliver the Certificate of Title to the Property to the plaintiff. Accordingly, the second defendant admitted to withholding the original Certificate of Title and failing to comply with the plaintiff’s requests. The Court therefore concluded that if the second defendant fails to deliver up the Certificate of Title in accordance with an order from the Court, then the first defendant should be ordered to issue a replacement Certificate of Title.

Plaintiff’s submissions

The plaintiff submitted that there were two bases upon which the plaintiff can call for the delivery of the Certificate of Title for the Property; first, by virtue of the second defendant’s property vesting in the plaintiff, and second, the fact that the LRS transmitted ownership of the Property, so that the plaintiff is now the registered proprietor. Further, it was submitted that a claim for substantive relief for the second defendant to deliver up the Certificate of Title was sufficient to satisfy the precondition to a grant of ancillary relief.

Second defendant’s submissions

The Court noted that the second defendant had not filed nor served any formal submissions or evidence in these proceedings.

Decision:

The resolution of the legal issue posed by these proceedings was indicated by the Court as straightforward. The Court was satisfied orders requiring delivery should be made, and then, if necessary, a replacement Certificate of Title for the Property to be issued and delivered to the plaintiff for the following reasons:

1. As the second defendant's trustee in bankruptcy and the current registered proprietor of the Property, the plaintiff was entitled to possession of the Certificate of Title of the Property;
2. The Court's jurisdiction to make ancillary orders under s 138(3) of the RPA was enlivened;
3. The Court found that second defendant had the current Certificate of Title for the Property in her possession; and
4. The Court was of the opinion, for the purposes of s 138(2) of the RPA, that the Certificate of Title for the Property had not been, and is not likely to be, produced by the second defendant.

Therefore, the orders made stipulated that the second defendant deliver up the possession of the Certificate of Title for the Property to the plaintiff.

Haxglow Pty Ltd v Mirvac Retail Sub SPV Pty Ltd

[2020] NSWSC 233

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 17 March 2020

VALUATION – expert determination – valuer appointed pursuant to lease to determine current market rent – whether determination carried out in accordance with the terms of the lease – adequacy of reasons given by valuer – whether valuer required to comply with code of professional conduct – whether valuer failed to comply with code – whether valuer failed to disregard goodwill of lessee's business – whether valuer failed to have regard to incentives given to lessees of comparable premises – not shown that determination was not carried out in accordance with the provisions of the lease – determination held to be final and binding on the parties

LAND LAW – leases – rent – provision for review of rent – valuer appointed as expert to determine current market rent – whether determination carried out in accordance with the terms of the lease – adequacy of reasons given by valuer – whether valuer required to comply with code of professional conduct – whether valuer failed to comply with code – whether valuer failed to disregard goodwill of lessee's business – whether valuer failed to have regard to incentives given to lessees of comparable premises – not shown that determination was not carried out in accordance with the provisions of the lease – determination held to be final and binding on the parties

Facts:

These proceedings concerned Haxglow Pty Ltd ('**plaintiff'**), Mirvac Retail Sub SPV Pty Ltd and Perron Investments Pty Ltd ('**defendants**') being unable to reach an agreement as to what the current market rent was for lease of premises in Broadway Shopping Centre in Ultimo. The plaintiff was the lessee and operated a hotel from the premises, whilst the defendants were the successors in title to the lessor. The lease was for a 25-year term and contained three options to renew for further terms of 10 years each.

The plaintiff commenced these proceedings to claim that it overpaid rent in the amount of around $1 million and sought recovery of that sum, together with interest, as money had and received by the defendants for the plaintiff's use. The alleged overpayment was based on the assumption that the rent under the lease was determined by a binding Rental Determination that was carried out by Mr Paul Hall of Ray White Advisory ('**RWA**'). The parties agreed that if the Rental Determination is final and binding, the plaintiff is entitled to succeed. However, the defendants contend in their Cross-Claim that the Rental Determination is not final and binding, alleging the following:

1. RWA, in preparing the Rental Determination, was required to comply with the Australian Property Institute Code of Professional Conduct (‘**the Code**’), but failed to;
2. RWA, in preparing the Rental Determination, was required to comply with the requirements of the lease, but failed to; and
3. The various failures of RWA have the consequence that the Rental Determination is not final and binding for the purposes of the lease.

The defendants further submitted that, properly construed, the lease required the valuer to comply with the instructions to be given, and a failure to comply would have the consequence that the Rental Determination was not carried out in accordance with the lease. In addition, the defendants contended that in determining the current market rent, Mr Hall failed to disregard the goodwill of the lessees. Therefore, the defendants contended that the Rental Determination failed to disclose the sufficient detail of data, facts or information relied upon as the basis of the opinion as to the current market rent.

The plaintiff denied such allegations and maintained that the parties to the lease are bound by the determination of the Current Market Rent at $480,000 p.a. plus GST. The plaintiff further submitted that the suggestion that Mr Hall had failed to take reasonable steps to gather sufficient relevant data, facts or information was no more than a mere speculation.

Decision:
The Court found in favour of the plaintiff and made an award of costs plus pre-judgment interest against the defendants. As such, the Court did not accept that defendants’ submission that in determining the current market rent, Mr Hall failed to disregard the goodwill of the lessee’s business and hence failed to comply with the lease and the Code. Therefore, it was held that the defendants did not establish that the Rental Determination was not carried out in accordance with the provisions of the lease, or with the Code.

It followed that Mr Hall’s determination of current market rent at $480,000 p.a became the minimum rent, and further, that such determination was final and binding on the parties. As such, the plaintiff was entitled to recover an overpayment of rent in the amount of around $1 million.

Hua Cheng International Holdings Group Pty Ltd (Receivers and Managers Appointed) (In Liquidation) v James Hui Xiao Xu

[2020] NSWSC 922

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 20 July 2020

LAND LAW – application for mesne profits – where defendant failed to provide possession pursuant to a notice of termination of a contract for sale – where defendant remained in possession for over two years – no issue of principle – mesne profits and interest ordered

Facts:

In this matter, Hua Cheng International Holdings Group Pty Ltd (Receivers & Managers Appointed) (in Liquidation) ('**first plaintiff**') sought judgment against Caiwei Xu ('**third defendant**') for damages by way of mesne profits, in relation to the third defendant's possession of an apartment in Hurstville ('**Lot 10**'). The first plaintiff was the developer of a mixed residential and commercial building in Hurstville, which includes Lot 10. Super Vision Resources Ltd ('**second plaintiff**') loaned money to the first plaintiff to carry out the development and was the registered mortgagee of the resulting strata title units, including Lot 10. Units in the development were sold by the first plaintiff off the plan. Accordingly, the first plaintiff (as vendor) and the third defendant (as purchaser) entered into a contract for sale of Lot 10 for $320,000.

The development was completed in 2016. However, in January 2017, the first plaintiff defaulted under the loan agreement with the second plaintiff. Since June 2017, the first plaintiff had been under the control of receivers and managers appointed by the second plaintiff, including Marcus Ayres ('**Receiver**'). In addition, a liquidator was appointed to the first plaintiff in July 2017. Following this, the Receiver terminated the contract for sale between the first plaintiff and the third defendant for Lot 10, as a consequence of the third defendant's failure to pay the deposit and procure a guarantee and indemnity as required under the contract for sale. The notice of termination required the third defendant to vacate Lot 10 by a certain date, which she failed to do.

The plaintiffs commenced these proceedings against the third defendant, and four other defendants, seeking possession of certain lots in the development, including Lot 10, and damages by way of mesne profits against the first, second and third defendants. In May 2019, the plaintiffs obtained default judgment against the fourth and fifth defendants. In July 2019, judgment for possession was granted to the first and second plaintiffs against the first, second and third defendants in relation to the lots. Leave was also granted to the plaintiffs to issue writs of possession. In October 2019, following the execution of the writs, the first plaintiff obtained possession of Lot 10 from the third defendant, and, on the same day. The second plaintiff obtained possession of the other lots. As such, the parties had reached a settlement with the first and second defendants. Therefore, the only remaining claim in these proceedings was the first plaintiff's claim against the third defendant for damages for mesne profits.

Claim for mesne profits

The first plaintiff sought an order for mesne profits in respect of the third defendant's possession of Lot 10 for a certain period ('**Relevant Period**'). The Court was satisfied that mesne profits were payable by the third defendant as sought by the first plaintiff. It was noted that the third defendant did not appear to these proceedings, and as such, the uncontested evidence established that the third defendant had no right to possession or occupation of Lot 10 during the Relevant Period. As to the calculation of mesne profits, Mr Keen, a qualified valuer, assessed that the total rent value of Lot 10 for the Relevant Period was around $48,000, and accordingly, this was accepted by the Court.

Interest, costs and orders

The first plaintiff also made a claim for interest, whereby it was determined that the total interest claimed was around $4,500.

Decision:

Therefore, the Court found in favour of the first plaintiff in the amount of around $48,000 plus interest of around $4,500, and the third defendant to pay the first plaintiff's costs.

Hutson v Roufeil

[2020] NSWSC 864

Coram: Ierace J

Court: Supreme Court of New South Wales

Date: 3 July 2020

REAL PROPERTY – possession of land – Indefeasibility of title – personal equities – where the plaintiffs are receivers and managers appointed by a lender who has legal title over the property – where the second defendant alleges an *in personam* exception to indefeasibility – where second defendant alleges a life estate was granted and estoppel by convention applies – no evidence of the requisite assumptions being adopted by all parties – no exception to indefeasibility found – possession granted to the plaintiffs

Facts:

The nature of this matter was an application for summary judgment for possession of land brought by Robert Hutson ('**first plaintiff**') and Jennifer Nettleton ('**second plaintiff**') (together, '**the plaintiffs**'). The plaintiffs were the receivers and managers appointed by the lender. The lender held a registered mortgage over certain property that was owned by Mark Fraser, who is a bankrupt ('**bankrupt**'). The first defendant in the proceedings was the trustee of the bankrupt estate, and the second defendant was the father of the bankrupt.

The lender's mortgage secured payment for two facilities totalling to $8,500,000. Prior to the proceedings, the borrower defaulted, and the lender served default notices proposing to exercise their power of sale. Following the expiry of the notices, the plaintiffs commenced proceedings seeking an order for possession of the property in question. As such, a title search was conducted over the property which revealed that the second defendant had lodged a caveat over the property. Following the second defendant joining the proceedings, it was pleaded that he had an unregistered proprietary interest over the property, being a life estate. The basis for the second defendants pleading was pursuant to a Deed of Agreement ('**Deed**'), whereby the second defendant was granted an interest in part of the property for the remainder of his life.

Therefore, the primary issue posed to the court was whether the second defendant had an interest in the property in priority to the bankrupt's registered interest which was the subject of security. In respect to this, the second defendant claimed that a cause of action arose by way of an estoppel by convention, which constitutes an in personam exception to the infeasibility of the lender's title. Both parties broadly agreed on the elements constituting estoppel by convention, which required the following:

1. The plaintiff must adopt an assumption as to the terms of its legal relationship with the defendant;
2. The defendant must adopt the same assumption;
3. Both parties must conduct their relationship on the basis of the mutual assumption;
4. Each party must know or intend that the other party act on the basis; and
5. Departure from the assumption must cause detriment to the plaintiff.

Decision:

The Court held that the defendants failed to establish all of the above elements, and therefore, the plaintiffs were granted possession of the remaining four lots over the property. As such, the Court was not satisfied that the lender was aware of the life estate at the time of lending funds to the borrower, and as a consequence of not being aware of the interest, they could not possibly agree to be bound by it. The Court summarised this point by indicating that in order for any relationship to be established between two parties, it would be necessary for the defendant to establish awareness on the part of the lender of the existence of a life estate, and an agreement by the lender to be bound by the unregistered interest. For those reasons, the Court found in favour of the plaintiff for the possession of the land and ordered the second defendant to pay the plaintiff's costs.

Kailis Bros Pty Ltd v Clarke

[2020] NSWSC 1150

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 27 August 2020

MORTGAGES AND SECURITIES – charges – plaintiff enters into trading agreement with company of which defendant is sole director – agreement provides for company and guarantors to charge their interests in real property to secure payments due under agreement – agreement executed by defendant – whether defendant executed only on behalf of company or also as a guarantor – defendant held to have executed for company and also personally as a guarantor – charge granted by defendant in favour of plaintiff

Facts:

These proceedings concerned Kalilis Bros Pty Ltd ('**plaintiff**'), a company registered in Western Australia, seeking a declaration that it has a caveatable interest in a property in Thornton. The property at issue was owned jointly by Justin Clarke ('**defendant**') and Mandee Clarke. In addition, the plaintiff sought an order pursuant to s 74K of the *Real Property Act 1900* (NSW) ('**RPA**') extending the operation of a caveat it lodged against the title to the property. The defendant had also served a lapsing notice in respect of the caveat.

The interest claimed by the plaintiff in the caveat is a charge said to be by virtue of a Credit Application and Guarantee Indemnity ('**agreement**') between the plaintiff and the defendant. Essentially, the caveat only affected the defendant's interest as registered proprietor of the property. The plaintiff commenced proceedings against the defendant in the District Court of Western Australia to recover the amount outstanding pursuant to the guarantee said to have been given by the defendant.

In essence, the plaintiff claimed that the defendant granted a charge in favour of the plaintiff over his interest in the Thornton property to secure amounts that are payable to the plaintiff under the agreement. The plaintiff further submitted that the defendant signed the agreement on behalf of Clarke Foods Pty Ltd and also in his capacity as guarantor. In response, the defendant submitted that the only party that signed the agreement was Clarke Foods Pty Ltd, and that the defendant signed only in his capacity as sole director of the company. Further, the defendant contended that the agreement was not a deed, and no consideration was given for any promise given by the defendant.

Decision:

The Court was unable to accept the defendant's submissions, as it was clear that the agreement was intended to be read as a whole, and therefore, the defendant signed not only on behalf of Clarke Foods Pty Ltd, but also in his personal capacity as a guarantor. The Court further determined that it was incorrect to state that no consideration was given for the defendant's promise to be a guarantor. Accordingly, the agreement stated that the guarantors guarantee payment to the plaintiff of the price charged by the plaintiff to Clarke food Pty Ltd for goods and services, in consideration of the plaintiff agreeing to grant the trading facility to Clarke Foods Pty Ltd. In these circumstances, the Court stated that it did not matter whether the instrument was executed as a deed.

Finally, the Court noted that it was in any event clear that the defendant granted a charge in favour of the plaintiff over his interest in the Thornton property to secure the performance of his obligations under the agreement. Therefore, it was appropriate for the Court to make a declaration to that effect.

Lavigne v Kumar

[2020] NSWSC 1120

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 21 August 2020

LAND LAW – contract for the sale of land – validity of Notice to Complete – plaintiffs enter into Option Deed under which defendant grants an option to purchase – plaintiffs take immediate possession of the property in accordance with the Option Deed – plaintiffs exercise the option several years later – parties exchange settlement sheets claiming various amounts in addition to amounts payable under contract for sale – defendant issues Notice to Complete – whether defendant in a position to issue Notice to Complete – whether defendant ready, willing and able to perform – whether defendant adopting an unequivocal stance concerning amounts due on completion – whether defendant required to provide Occupation Certificate – Notice to Complete held to be valid

LAND LAW – contract for the sale of land – termination of contract – where time of the essence for completion of contract – where defendant insisting upon payments at settlement pursuant to other contractual arrangements – where plaintiffs incorrectly maintain that defendant is required to provide Occupation Certificate prior to completion – completion does not occur – defendant terminates contract for sale – defendant claims entitled to terminate contract for plaintiffs' repudiation or alternatively pursuant to cl 12.7 of Option Deed – held that neither party ready, willing and able to complete – held that conduct of both parties amounted to repudiation – defendant able to terminate on account of plaintiffs' repudiation but not entitled to recover the deposit or sue for damages – no entitlement to terminate under cl 12.7 of Option Deed

LAND LAW – contract for the sale of land – rescission – defendant contends contract validly rescinded under cl 7 of standard form contract – where cl 7 precludes certain claims by purchaser – plaintiffs make claim for cost of replacement of roof – whether a claim made under cl 7 – defendant gives notice of intention to rescind – plaintiffs waive claim under contract but continue to assert claim otherwise – held that plaintiffs' conduct viewed objectively does not show an intention to proceed under cl 7 – held that in any event claim was waived under cl 7 – held that waiver of claim under cl 7 does not amount to a waiver of claim at large – defendant not entitled to rescind

LAND LAW – residential tenancy agreements – held that tenancy conferred under the Option Deed is a residential tenancy agreement within the meaning of the Residential Tenancies Act 2010 (NSW) – held that defendant gave notice of termination such that periodic tenancy was terminated – defendant entitled to mesne profits

Facts:

These rather complex proceedings were commenced by Jason Lavigne and Mia Lavigne ('**plaintiffs**') against Somna Kumar ('**defendant**') and concerned a property in Bellevue Hill. The parties entered into a Deed of Put and Call Option in 2014 ('**the Option Deed**'), and pursuant to the Option Deed, the defendant (as grantor) gave the plaintiffs (as grantee) a call option to purchase the property. The Option Deed further provided that the plaintiffs could go into occupation of the property during a specified occupation period. The plaintiffs and their children moved into the property in 2015 and had remained in occupation ever since.

In short, the plaintiffs exercised the call option in 2019, so a contract for sale of the property then came into effect between the defendant (as vendor) and the plaintiffs (as purchaser), for $12 million. Although completion was due for January 2020, completion did not then occur, which led the defendant to serve a Notice to Complete. However, completion still failed to take place on this further date, specified as February 2020. Further, parties were in dispute about various other matters involving the occupation certificate and what amounts were owing under the Option Deed. The defendant then purported to serve a Notice of Termination and Rescission in terminating the contract for sale on various grounds, including the Option Deed.

The parties' submissions

The plaintiffs commenced these proceedings in order to dispute the validity of the termination and recission by claiming that the contract remained on foot. Accordingly, the plaintiffs sought orders for specific performance, alongside a claim for damages for breach of the Option Deed.

The defendant maintained that it validly terminated the contract for sale, and by Cross-Claim, sought a declaration to that effect, together with an order for the recovery of the $600,000 deposit payable under the contract. In the alternative, the defendant sought a declaration to recover rent pursuant to the Option Deed, possession of the property, damages (in the nature of mesne profits) and orders for the withdrawal of two caveats the plaintiffs had lodged against the title to the property.

Was the contract for sale terminated by the defendant in February 2020?

In determining the central issue of these proceedings of whether the defendant's purported termination of the contract for sale was valid and effective, it was necessary for the Court to consider whether the Notice to Complete was effective to make time of the essence in respect of the obligation to complete. In sum, the plaintiffs submitted that the defendant was not in a position to serve a Notice to Complete for the following two reasons:

1. The defendant's insistence on payment at settlement of amounts not due under the contract for sale; and
2. The defendant's failure to provide an occupation certificate in accordance with the contract for sale.

The defendant submitted that at the time the Notice to Complete was issued, it was ready and willing to proceed to completion of the contract for sale. However, the Court indicated that neither the provisions of the Option Deed nor the stance that had been adopted by the defendant supported the conclusion that the defendant was not in a position to serve a Notice to Complete. Therefore, the Court determined that the Notice to Complete was validly issued and was effective to make time of the essence for completion of the contract to take place in February 2020.

Following the determination that the Notice to Complete operated to bind both of the parties, the Court considered the parties' arguments as to whether the defendant was entitled to terminate the contract. The defendant claimed that the termination was valid on grounds that included the plaintiffs' repudiation in refusing to complete unless an occupation certificate was provided.

The Court observed that it was open to the defendant to accept the plaintiff's repudiation of the contract for sale, and thereby terminate the contract so as to discharge both parties from future performance. However, the conclusion that the defendant was herself not in a position of readiness, willingness and ability to perform her obligations under the contract had the consequence that she was unable to obtain any relief beyond the discharge of future obligations. Therefore, since the Court concluded that the defendant was not relevantly ready, willing nor able to perform her obligations, the defendant was not entitled to damages or recovery of the $600,000 deposit.

<u>Consequences of the termination of contract</u>

As aforementioned, the defendant further claimed that she was entitled to recover amounts of rent under the option Deed and sought damages in the nature of mesne profits for the plaintiff's failure to vacate the property. The Court indicated that the plaintiff's residential tenancy agreement was able to be terminated by the defendant, and further, that it was accepted by both parties that in these circumstances the plaintiffs would be obliged to continue to pay rent. On this conclusion, the plaintiffs were not entitled to remain in occupation after June 2020, and it was therefore determined that the plaintiffs pay rent and mesne profits to the defendant for their occupation since such date.

Decision:

The Court made several conclusions which can be summarised as follows:

1. The contract for sale was validly terminated by the defendant on account of the plaintiff's repudiation;
2. The defendant was not entitled to recover the $600,000 deposit under the contract nor sure for damages of breach;

3. The defendant was entitled to an order for possession of the property;
4. The defendant was further entitled to recover rent in accordance wth the Option Deed from December 2019 to June 2020;
5. The defendant was entitled to mesne profits for the period from June 2020 until possession is given, at the rate of $5875 per week;
6. Orders for the plaintiff to withdraw the caveats they had lodged against the title to the property; and
7. The plaintiff's Statement of Claim was dismissed.

Lithgow State Mine Railway Ltd v City of Greater Lithgow Mining Museum Inc (No 3)

[2020] NSWSC 35

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 4 February 2020

COSTS – departure from the usual rule – where first plaintiff successful in obtaining orders for specific performance of a contract for the sale of land – where defendant maintained in correspondence that the claim was hopeless – where parties engaged in settlement negotiations – where the defendant filed a submitting appearance – no reason to depart from the usual rule – defendant ordered to pay the first plaintiff's costs of the proceedings on the ordinary basis

Facts:

On 28 October 2019, the Court delivered the principal judgment in this matter ('**Principal Judgment**'). In the Principal Judgment, the Court determined that there was a binding agreement between the first plaintiff, Lithgow State Mine Railway Ltd ('**LSMR**') and the defendant, City of Greater Lithgow Mining Museum Inc ('**GLMM**'). The land and the subject of the agreement was Lot 10, owned by GLMM, and created on site of the former Lithgow State Coal Mine. As such, the Court established that GLMM agreed to transfer Lot 10 to LSMR. It should also be noted that the second plaintiff, COC Ltd ('**COC**') and LSMR are closely related entities who share directors in common.

In December 2019, the Court made a declaration as to the existence of the agreement and made orders for the agreement to be specifically performed. Additionally, the Court made directions for the parties to file and serve affidavits, alongside provide written submissions, on the question of costs.

<u>*Should GLMM pay the plaintiffs' costs of the proceedings?*</u>

As LSMR was successful in obtaining declaratory relief and orders for specific performance against GLMM, the default position is that LSMR is entitled to its costs of the proceedings unless it appears to the Court that some different costs order is warranted. On this issue, the plaintiffs contended that GLMM should pay their costs of the proceedings on either the ordinary or indemnity basis. GLMM contended that there should be no order as to costs, or alternatively, that it should pay costs up to and including the date that GLMM filed its submitting appearance. GLMM also sought an order that the plaintiffs pay its costs on the preparation of its written submissions on costs.

Should the plaintiffs pay GLMM's costs of preparing its written submissions?

On this issue, GLMM submitted that the plaintiffs should pay its costs of preparing the written submission in respect of this application. In essence, the defendant contended that the preparation of such submissions may have been avoided if the plaintiffs had made any attempt to engage with GLMM on the question of costs.

Decision:

Plaintiff's costs of the proceedings

The Court concluded that it was appropriate that GLMM pay LSMR's costs of the proceedings as there was no good reason to depart from the usual position that costs follow the event. However, the same reasoning was not applied to COC, which was not successful in obtaining relief against GLMM, and therefore, GLMM was not ordered to pay COC's costs of the proceedings. In addition, the Court was not persuaded that GLMM should pay LSMR's costs on an indemnity basis, and accordingly, ordered a payment of LSMR's costs of the proceedings on the ordinary basis.

Defendant's costs of preparing written submissions

The Court indicated that GLMM at no stage accepted that it should pay the costs of the successful plaintiff. As such, the Court did not accept that the plaintiffs should pay GLMM's costs of its written submissions, as the submissions were required due to a disagreement on an appropriate costs order.

Lopez v The Office of the Registrar General and anor.

[2020] NSWSC 1816

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 21 August 2020

PRACTICE AND PROCEDURE – Application for summary dismissal – Where plaintiff brought proceedings arising from a refusal of the first defendant to pay compensation from the Torrens Assurance Fund – Where cause of action arose from an unregistered sub-lease – Where there was no loss or damage arising as a result of the operation of the *Real Property Act 1900* (NSW) – Compensation not payable – Proceedings dismissed

WORDS AND PHRASES – "Operation of the Act"

Facts:

These proceedings concerned two notices of motion for the Court's determination. The first was filed by Jose Lopez ('**plaintiff**') seeking the determination of a separate question or issue, namely, whether a fraud had been committed. The second notice of motion was filed the Office of the Registrar of General and Stephen Prent (together, '**defendants**'), seeking the dismissal of the proceedings. The plaintiff was a director of the SG Spark Group Pty Ltd and is the purported former sub-lessee of bar located within restaurant premises in Leichhardt ('**premises**'). The sub-lessors of the bar were Sol & Mar Pty Ltd ('**Sol & Mar**'), Marshe Abdallah ('**Abdallah**') and Hugo Zepeda ('**Zepeda**'). Sol & Mar was deregistered.

It was purported that a sublease was entered into by the parties for a term of two years and was purportedly made subject to a head lease with an option to renew for a further three-year period. As such, neither the purported head lease nor the sublease was registered.

The plaintiff commenced proceedings against the defendants on his own behalf, without legal assistance, and it was therefore somewhat difficult for the Court to determine his precise cause of action. It was observed, however, that the plaintiff's pleadings stem from a decision of the first defendant to refuse the plaintiff payment of compensation from the Torrens Assurance Fund, pursuant to Part 4 of the *Real Property Act 1900* (NSW) ('**the Act**').

Initial Proceedings:

Following on from the above, the plaintiff had lodged a claim for compensation with the first defendant in 2018. However, it was noted that an amount of compensation sought, nor any evidence, was presented. In 2019, the plaintiff's claim for compensation was refused, as he had failed to establish a nexus between the operation of the Act, and the loss or damaged that he allegedly suffered. Following this outcome, the plaintiff was advised that any claim for compensation would be better directed to Sol & Mar, to which proceedings in NCAT were commenced accordingly. As such, those proceedings were successful for the plaintiff and resulted in an order for the payment of compensation by Sol & mar to the plaintiff being made.

These Proceedings:

Bearing the history of the proceedings in mind, the plaintiff's case against the first defendant arose from the 2018 decision, submitting that to refuse the payment of compensation under the Act constitutes either jurisdictional error or an error in law. The plaintiff contended, pursuant to s 192(1)(e) of the Act, that there was fraud committed by Abdallah and Zepeda. In response, the defendants submitted that even if this allegation were made out, s 129 has no application where neither the head lease nor the sublease were ever registered. Further, it was contended that any loss or damage which may have been suffered by the plaintiff could not be said to have been sustained under the operation of the Act.

The order sought by the defendants was an order to summarily dismiss the proceedings. As such, the Court indicated that the uncontested evidence was that neither the head lease nor the sublease was ever registered, and therefore, was a sufficient basis upon which to conclude that the requirements of s 129 had not been met. The Court went on to indicated that any loss or damages that the plaintiff may had suffered did not arise as a result of the operation of the Act.

Decision:

The Court was therefore satisfied that test to summarily dismiss the proceedings had been met and ordered that the plaintiff pay the defendant's costs.

Mehmet v Carter

[2020] NSWSC 413

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 17 April 2020

CONTRACTS — Termination — Repudiation of contract — where purchasers raised requisitions — where plausible contentions and vendors refused to address

LAND LAW — Conveyancing — Contract for sale — Breach — Error or misdescription — Requisitions — Vendors' obligations — Notices to complete — Purchasers' remedies

ENVIRONMENT AND PLANNING — Heritage conservation — Protection of Aboriginal heritage — meaning of "Aboriginal object" — National Parks and Wildlife Act 1974 (NSW)

Facts:

These proceedings concerned a dispute as to the termination of a contract for the sale of land in Byron Bay. The plaintiffs in these proceedings were the purchasers, whilst the defendants/cross-claimants were the vendors. In essence, each party contended that it validly terminated the contract.

The primary position of the purchasers was that the vendors were not ready and willing to prove a good title, because the vendors were not ready, willing and able to show that there were no "Aboriginal objects" in or on the land. Alternatively, the purchasers argued that they had established the existence of "Aboriginal objects" on the land and that the vendors did not in fact have a good title to the land because of the presence of one or more of those objects. In the further alternative, the purchasers argued that the vendors' insistence on what the purchasers said was an invalid notice to complete, and the vendors' purported termination of the contract on that basis, constituted repudiation. Finally, a claim for misleading and deceptive conduct was also made, together with a claim under s 55(2A) of the *Conveyancing Act 1919* (NSW) ('**the Act**') for relief against forfeiture of the deposit.

Decision:

The Court held that the vendors, following the discovery of the existence (or potential existence) of various "Aboriginal objects" on the land in question, repudiated a contract for sale. As such, the Court found that the presence of these objects was capable of constituting a defect in title. The Court further found that, in such circumstances, the refusal of the vendors to address the purchasers' objections, together with the vendors' insistence on an invalid notice to complete, amounted to repudiation.

Additionally, the Court found that had it been necessary to determine, the memorial stone and plaque does constitute "Aboriginal objects" within the meaning of the broad statutory definition but, otherwise:

1. The evidence did not establish the existence of the graves as a matter of fact;
2. The vendors' insistence on completion based on an invalid notice to complete, coupled with an invalid claim for default interest, would have also constituted repudiation;
3. The purchaser's claim based on s 55(2A) of the Act would have succeeded; and
4. That the misleading or deceptive conduct claim (raised as a defence to the vendors' Cross-Claim) would not have been made out because it was not shown that the purchasers had relied upon the impugned representations.

MIR Holdings Pty Ltd v Marina Square Retail Pty Ltd

[2020] NSWCA 286

Coram: Bathurst CJ, Bell P, Leeming JA

Court: New South Wales Court of Appeal

Date: 11 November 2020

APPEALS – leave to appeal – application for leave – relief sought inappropriate on an interlocutory appeal in the absence of necessary and proper parties

CIVIL PROCEDURE – parties – necessary and proper – where third-party lessees of premises not joined to proceedings for relief against forfeiture brought by earlier lessees

EQUITY – equitable remedies – declarations – whether capable of being made on interlocutory basis

REAL PROPERTY – landlord and tenant – agreements for lease – breach – *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) – where tenants in arrears before the relevant "prescribed period" – leave to appeal refused in circumstances where all necessary and proper parties not joined in proceedings

Facts:

MIR Holdings Pty Ltd ('**MIR**') and SKRG Pty Ltd ('**SKRG**') (together, '**the applicants**') were the lessees of a commercial retail premises located in the Marina Square shopping centre at Wentworth Point. Marina Square Retail Pty Ltd ('**respondent**') was the lessor for each of the premises. The applicants operated restaurant businesses on the premises.

In September 2020, the respondent served on each of the applicants a Notice of Breach of Covenant ('**Notice of Breach**') indicating that they were in default under the Lease Agreement for failure to pay rent and other charges, alongside a failure to contribute to outgoings and a marketing fund. Following the non-compliance of the Notice of Breach from the applicants, in October 2020, the respondent served on them a Notice of Re-Entry and Termination with immediate effect.

The premises were re-let to new lessees ('**new lessees**') pursuant to lease agreements entered into in August 2020 and September 2020 respectively. Accordingly, by October 2020 the new lessees had received keys to the premises and handover notices from the respondent, which had assumed vacant possession of the premises one week earlier.

First Instance

Also in October 2020, the applicants commenced proceedings against the respondent in the Equity Division and sought interlocutory and final relief against forfeiture by Summons, coupled with a Notice of Motion seeking interlocutory relief. However, Rein J declined to grant the relief sought in view of its potential impact on the new lessees of the premises who had not been joined as parties to the proceedings.

When the applicant's pursuit of relief against forfeiture was renewed before Stevenson J, the primary judge, the new lessees still had not been joined in the proceedings. The primary judge held that this factor alone was sufficient to decline the relief sought by the applicants. The primary judge also dismissed the applicants' argument that the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) ('**Regulation**') applied to the applicants' circumstances.

The Appeal

Following the primary judge's orders, the applicants proceeded to file Leave to Appeal, alongside a Draft Notice to Appeal, which challenged the primary judge's findings in respect of the application of the Regulation. Relevantly, the Draft Notice of Appeal did not challenge the primary judge's finding that he was not prepared to grant relief against forfeiture without hearing from the new lessees. As such, in seeking leave to appeal, the Court brought to light the necessity of joining the new lessees as parties to the proceedings. Accordingly, the primary issue posed to the Court of Appeal was whether it was appropriate to make the first and second proposed order without the new lessees being joined as parties to the proceedings.

Consequentially, the applicants sought to confine the claims for relief in the draft Notice of Appeal to the following:

1. A declaration that the respondent's re-entry into and re-possession of the premises was unlawful ('**first proposed order**'); and
2. An order that the Notice of Re-Entry and Termination be set aside ('**second proposed order**').

The applicants further fought to confine their claim to one for damages.

Decision:

The Court refused leave to appeal, holding that the relief sought, even as confined into the first and second proposed orders, could not be allowed in the circumstances where the new lessees had not been joined as parties to the proceedings. Further, the Court held that even if they joined, the new lessees would not have been bound by the declaration sought in the first proposed order.

Additionally, the Court held that if the second proposed order was made, it would create a problematic situation where there were either concurrent leases granted over the same premises or, alternatively, the new lessees would potentially become trespassers on the premises. Either way, the new lessee's rights and interests would have been directly affected by the proposed orders sought by the applicants.

Finally, the Court indicated that the applicants suffered from confining their case to one for damages, as there had been no order for a separate trial of liability.

Musa v Alzreaiawi

[2020] NSWSC 638

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 29 May 2020

LAND LAW — Torrens title — Exceptions to indefeasibility — Fraud

Facts:
These proceedings concerned Mr Musa (‘**plaintiff**’) and Ms Alzreaiawi (‘**defendant**’), who had married in Saudi Arabia before emigrating to Australia and buying a property together in Smithfield. The couple separated, but before the divorce, they acquired the Smithfield property. The contributions to the deposit and mortgage repayments remained in dispute, with questions being raised as to whether the defendant paid the entirety of the deposit, or only part of it, with gold bars and jewellery she brought with her to Australia.

In 2020, the plaintiff moved to Canberra. In 2011, a transfer of the plaintiff’s one-half share in the property to the defendant was registered, and a mortgage discharge authority was submitted. The plaintiff contended that it did not sign the transfer, or the mortgage discharge authority, and that the defendant must have engaged in forging his signature. The defendant denied that she did so and contended that the plaintiff signed the documents knowingly and in fulfilment of an agreement they reached for it to occur. Following this, in 2017, the defendant sold the Smithfield property.

The parties’ positions
Both the plaintiff and the defendant agreed that in 2009, they intended that the Smithfield property was for their children, however, they differed on how this was to be achieved. The plaintiff was of the impression that the property would remain in his and the defendant’s names but would eventually devolve to their children on the parties’ death. Accordingly, the plaintiff sought half of the proceeds of sale of the property for himself. On the other hand, the defendant believed that they agreed the plaintiff would transfer the property to her, that she would have sole responsibility for mortgage repayments, and that she would use the property for the children’s benefit.

Given the above, the primary issue before the Court was whether the plaintiff’s signature on the transfer had been forged. However, the evidence of the joint handwriting expert pertaining to whether the signature was a genuine signature was inconclusive. As such, there was no piece of conclusive evidence that evidently pointed to the signature having been forged. Given the severity of an allegation of fraud, the Court found that there was insufficient evidence to reach an actual state of satisfaction, on the balance of probabilities, that the plaintiff's signature had been forged.

Decision:

Therefore, the plaintiff's claim against his former wife, for an account of half the proceeds of sale of the Smithfield property, was dismissed with costs. As such, it was found that the plaintiff had not discharged his onus of proof to shoe that a fraud had been committed.

National Australia Bank Ltd v Charlton; Charlton v The General Manager, NSW Rural Assistance Authority (No 5)

[2020] NSWSC 283

Coram: Walton J

Court: Supreme Court of New South Wales

Date: 23 March 2020

REAL PROPERTY – farm debt – possession of land –default under farm mortgage – judgment for debt – calculation of debt – leave to issue writ of possession – cross-claim dismissed – costs – orders

ADMINISTRATIVE LAW – judicial review – application dismissed – costs – orders

Facts:

These lengthy proceedings concerned National Australia Bank Pty Ltd ('**NAB**') bringing debt and possession proceedings against Ms Charlton in her own capacity and as trustee for the Phoenix Trust ('**Trust**'). NAB claimed 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.

Ms Charlton, then as first cross-claimant, and Mr O'Brien, as the second cross-claimant, brough a cross-claim in the debt and possession proceedings ('**the cross-claim proceedings**'). Further proceedings were commenced by Ms Charlton in her own capacity, and Mr O'Brien as Trustee of Phoenix Trust against the General Manager of the NSW Rural Assistance Authority ('**RAA**') and NAB (these were '**judicial review proceedings**'). Orders were made for the debt and possession proceedings, cross-claim proceedings and the judicial review proceedings be heard together in one matter (collectively, '**the proceedings**').

NAB's Submissions

NAB made submissions for final orders in respect to its claim against Ms Charlton and Ms Charlton ad Mr O'Brien's cross-claim against NAB. The final orders sought the following:

1. Possession of the property in accordance with NAB's rights as mortgagee, ad leave to issue a writ of possession;
2. Debt owed by Ms Charlton under the overdraft, the first business options loan and the second business options loan, in the amount of around $1.6 million;
3. Dismissal of the cross-claim; and
4. The payment of NAB's costs by Ms Charlton and Mr O'Brien.

Ms Charlton's Submissions

Debt Possession Proceedings

Ms Charlton made the following three submissions:

1. There was no adjustment made to the default interest rate charged by NAB despite notices being withdrawn ("Issue 1");
2. There was no removal of the enforcement fees charged on the 16 November 2011 notice or other notices ("Issue 2"); and
3. Costs should not be made in respect of Charlton No 4 whilst costs in relation to earlier proceedings, Charlton No 1, Charlton No 2 and Charlton No 3, ("Issue 3") remain reserved.

Judicial Review Proceedings

As to the order proposed by NAB in relation to the judicial review proceedings, Ms Charlton submitted that costs should not follow the event.

Decision:

Debt Possession Proceedings

The Court dealt with the issues raised by Ms Charlton (and Mr O'Brien who joined in those submissions) as follows:

Issue 1: The default interest rate charged by NAB in relation to the overdraft did not need to be adjusted. In other words, NAB was entitled to take action within the need for a s 11 certificate.

Issue 2: It was accepted that the judgment debt should be reduced by $927.31. This was reflected in the orders proposed by NAB.

Issue 3: It was found that Ms Charlton's costs submission were defective in that they seem to conflate the making of an order as to costs with the assessment of costs.

Judicial Review Proceedings

The Court held that there was no proper basis raised by Ms Charlton or Mr O'Brien to support an order other than that costs should follow the event. Their contentions were therefore rejected.

Orders:

Therefore, the Court made the following orders in respect to the debt and possession proceedings and the cross-claim proceedings:

1. Judgment for NAB against Ms Charlton for the whole of the land comprised in the Certificate of Title;
2. Leave to NAB to issue a writ of possession to enforce the judgment in 1 above;

3. Judgment for NAB against Ms Charlton in the sum of $1,838,388;
4. Ms Charlton to pay NAB's costs of the statement of claim;
5. The cross-claim be dismissed; and
6. Ms Charlton and Mr O'Brien to pay NAB's costs of the cross-claim.

As to the judicial review proceedings, the Court made the following orders:

1. The summons be dismissed; and
2. Ms Charlton and Mr O'Brien to pay NAB's costs of the proceedings.

National Australia Bank Ltd v Sayed

[2020] NSWSC 1002

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 30 July 2020

LAND LAW — Caveats — Caveatable interest — What constitutes a caveatable interest — Interest described as an "equitable interest"

Facts:

This dispute concerned National Australia Bank Ltd ('**plaintiff**') filing an application on an ex parte basis seeking an order that Mr Sayed ('**defendant**') withdraw a particular caveat that had been lodged on land situated in Woonona ('**Property**'), pursuant to s 74MA of the *Real Property Act 1900* (NSW) ('**RPA Act**'). The urgency of the matter was that the property was the subject of a contract for sale entered into by the bank as mortgagee in possession, and the date or completion of sale was scheduled for 3 August 2020.

The defendant contended that if it was successful in earlier appellant proceedings in overturning the judgement of the primary proceedings, then the result of that would be that the bank should never have taken action in relation to the Property in the first place. Further, the defendant's position was that the caveat described the particulars of the estate or interest in the land as an "equitable interest".

Decision:

The Court indicated that it is not a sufficient description of a caveatable interest simply to describe the interest in the land as an "equitable interest". However, the difficult that the Court had was, on its face, the caveat did not claim nor set out fully and properly the particulars of an equitable interest in the land that would constitute a caveatable interest. In other words, there are claims that, if successful in the appeal proceedings, would have the result that the caveator would have a claim for damages against the plaintiff, but a claim for damages does not give rise to an equitable interest in land per se.

Thus, in the circumstances, the Court was satisfied that the caveat should be withdrawn by the defendant. Further, the plaintiff's argument pertaining to costs being assessed on an indemnity basis was awarded.

NTT Australia Digital Pty Ltd v Cover Genius Services Pty Ltd

[2020] NSWSC 1378

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 9 October 2020

LAND LAW — Leases — Assignment of leasehold interest — Whether effective delivery of deed

EQUITY — Remedies — Specific performance — Where damages in lieu appropriate — COVID-19 pandemic — Operation of special COVID-19 regulations

Facts:

These proceedings concerned NTT Australia Digital Pty Ltd (‘**plaintiff**’) seeking an order or specific performance by Cover Genius Services Pty Ltd (‘**first defendant**’) of a deed of assignment signed by the first defendant (‘**the Deed of Assignment**’). The Deed of Assignment provided for the assignment to the first defendant of all the plaintiff’s interests, as lessee, under a lease held by the plaintiff for a commercial premises in Sydney (‘**Lease**’). The plaintiff also sought declaratory and other relief, specifically in relation to claimed rights to an indemnity for all amounts claimed by the head lessor, Perpetual Trustee Company Ltd (‘**second defendan**t’).

Meanwhile, the second defendant and Dexus Funds Management Ltd (‘**third defendant**’) claimed payment from the plaintiffs, or in the alternative the first defendant, in the sum of $492,130.1, being the rent, outgoings and other amounts payable under the Lease, along with interest. The second and third defendants also sought other declaratory relief. However, after proceedings had been commenced, the claim between the plaintiff, second and third defendants was compromised by consent, and consent orders were made.

The first defendant initially raised the doctrine of frustration in defence to the plaintiff’s claim, however ultimately, that defence was discarded. Instead, the first defendant claimed that the Deed of Assignment had never been validly executed and delivered, and was not enforceable against the first defendant.

The Court also considered the first defendant’s submission that the *Retail and Other Commercial Leases (COVID 19) Regulation* 2020 (NSW) (‘**COVID Regulation**’) ultimately changes the disposition of the proceedings. As such, the first defendant submitted that the

Lease constitutes a 'commercial lease' within the meaning of the COVID Regulation, as it was entered into before the commencement date, and in the alternative, the Deed of Assignment is a commercial lease within the meaning of the COVID Regulation, as it is an agreement to which the *Conveyancing Act 1919* (NSW) applies, relating to the leasing of a premises for commercial purposes. In response, the plaintiff maintained that the first defendant should not be permitted to rely on the COVID Regulations.

Decision:
Following an extensive review of various authorities, the Court held that the Deed of Assignment had been validly executed and delivered, and therefore, was valid and enforceable against the first defendant. However, the Court did not make orders for specific performance, and instead awarded the plaintiff relief in damages. It was further ordered that the first defendant pay the costs of the plaintiff, second defendant and third defendant.

In relation to the COVID Regulation, the Court held that the firs defendant was not entitled to raise the operation of these regulations as it had failed to properly plead the defence. In *obiter* however, the Court indicated that the Deed of Assignment is relevantly a 'commercial lease' for the purposes of the COVID Regulation, but that the first defendant had failed to adduce sufficient evidence to prove that it was an 'impacted lessee'. Nevertheless, the Court ordered that in the event the first defendant notified the other parties that it seeks rent relief, the parties must attend mediation.

Pollak v The Owners – Strata Plan No 2834

[2020] NSWSC 784

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 9 October 2020

LAND LAW – strata title – by-laws – construction of by-law – effect of new by-law passed following the enactment of the *Strata Titles Act 1973* (NSW) – exclusive use of common property – provision for amendment of, addition to or repeal of exclusive use by-law

LAND LAW – strata title – common property – whether orders for remediation of common property lacked specificity such as to amount to error of law – whether failure to take into account – relevant (and necessary) consideration – substantial loss of amenity in Lot owners losing direct access to the roof of the building – direct access to roof not part of original, approved development – no evidence that subsequent approval has been given – whether denial of procedural fairness where reliance placed on the term "usual undertaking as to damages" as defined in interim consent orders

Facts:

These proceedings concerned Dr Pollak and Ms Solden ('**plaintiffs**') seeking leave to appeal against a decision of an Appeal Panel of the NSW Civil and Administrative Tribunal ('**the Tribunal**'). The plaintiffs were the registered proprietors of Lot 44 in a Strata Plan that constituted an eight-storey building of 44 residential, for which development approval was given in 1965. Strata approval was granted under the then appliable legislation in 1967. Lot 44 was located on the top floor of the building, and above Lot 44 was a flat roofed area which was divided into two sections. On the rear section, some services like the lift shaft and the lift motor room, which was accessible by all residents of the building from the top level.

That area was separated from the remainder of the roof area ('**the front roof area**') by fencing and a locked gate. The front roof area was partially enclosed and contained a bedroom, kitchenette, laundry and bathroom. Such area was only accessible by a stairway that led directly from Lot 44, where the stairway opens into the enclosed room on the front roof area through a "hole" in the floor. Further, the entirety of the roof area was common property. At all times since the construction of the building, the responsibility for the maintenance and repair of all common property, including the front roof area, had been undertaken by the Owners Corporation ('**defendant**').

The plaintiffs became the registered proprietors of Lot 44 in 2014. Prior to the completion of their purchase, the defendant drew their attention to By-Law 28 and advised that, on the expiration of the exclusive use term, the defendant would require possession of the front roof area to be restored to the defendant. In 2018, the defendant wrote to the plaintiffs to remind them of the imminent expiration of their right of exclusive use of the front roof area, and that they would be required to yield possession and control of the area, and to remediate the hole in the floor. In response, the plaintiffs responded indicating that they did not accept By-Law 28 necessarily ended on the specified date and gave notice to claim an extension of the grant of exclusive use for a further 50 years.

Tribunal Proceedings:
Both the plaintiffs and the defendant commenced proceedings in the Tribunal. In separate applications, the plaintiffs sought interim and final orders:

- that "all lot owners and their tenants and invitees refrain from accessing the exclusive use area …" and
- that the defendant amend By-Law 28 as requested in their notice.

The defendant sought orders requiring the plaintiffs:

- to give vacant possession of the exclusive use area, to remove their property (including any fixtures or fittings belonging to them) and deliver up all keys or other devices used to provide access to the exclusive use area;
- to "seal the hole in the floor of the enclosed room" providing access from Lot 44 to the exclusive use areas; and
- to pay the defendants compensation in the form of an occupation fee or mesne profits from June 2018.

The Tribunal made orders to the following effect:

1. The plaintiffs pay the defendant an amount of money commensurate with $3,970.00 per month from July 2018 until compliant with orders 2, 3, 4 and 5 below;
2. The plaintiffs are not to restrict access to and use of parts of the common property;
3. The plaintiffs remove from all of their chattels and goods;
4. The plaintiffs deliver to the defendant all keys and other devices in their possession;
5. The plaintiffs deal with the hole in the floor of the enclosed room

The Appeal to the Appeal Panel:
The Appeal Panel was not satisfied that the plaintiffs had demonstrated a substantial miscarriage of justice, nor satisfied of any ground of appeal. Thus, all grounds of leave to appeal were refused.

Appeal to the Supreme Court:

As indicated above, the plaintiffs appealed to this Court. The questions of law that required the Court's consideration concerned:

1. A true construction of By-Law 28;
2. The principles on which, pursuant to their undertaking to the Tribunal, an order for damages may be made; and
3. The basis for the order that the hole in the floor be sealed.

Four grounds of appeal were pleaded, which concerned:

1. The construction of By-Law 28(3); (ground 1)
2. The order made by the Tribunal that the Owners Corporation seal the hole in the floor (thereby blocking direct access from Lot 44 to the roof); (grounds 2 and 3); and
3. The order for compensation (ground 4).

Decision:

<u>Ground 1</u>

The Court indicated that there was not the slightest basis of leave to appeal with respect o ground 1, and thus, leave to appeal on that ground was refused.

<u>Grounds 2 and 3</u>

The plaintiffs asserted that the replacement order made by the Appeal panel had no proper statutory foundation because it did not disclose what needed to be done with sufficient specificity. Further, the plaintiffs complained of the Appeal Panel's refusal of leave to appeal against the finding that the construction was unlawful. Accordingly, the Court found that the Appeal Panel was correct in concluded that safety was an important consideration, and, retention of the hole in the floor, unfenced, would pose a hazard to users of the rooftop area. Therefore, ground 2 and 3 of leave to appeal was refused.

<u>Ground 4</u>

The plaintiffs contended that the orders were made in denial of procedural fairness because the plaintiffs were not told that reliance would be places on the undertaking as a basis for the order. However, the Court found that like the other grounds, ground 4 was unsustainable.

Therefore, leave to appeal against the orders of the Appeal Panel of the Tribunal was refused, and the plaintiffs were ordered to pay the defendant's costs of the proceedings.

Prapas v Karageorge

[2020] NSWSC 54

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 10 February 2020

COSTS – proceedings to enforce obligation to register new lease – proceedings resolved without a determination on the merits – first defendant under a clear obligation to ensure that new lease to plaintiffs was registered – first defendant failed over a number of months to discharge obligation – plaintiffs would almost certainly have succeeded if matter had needed to go to final hearing – conduct of first defendant unreasonable – first defendant ordered to pay plaintiffs' costs

Facts:

These proceedings concerned the Prapas family (together, '**the plaintiffs**') being the lessees from Helen Karageorge ('**first defendant**') of a premises in Cronulla. In 2018, the plaintiffs exercised an option for a renewed term of 10 years commencing in 2019. Pursuant to a term of the new lease, the first defendant was required to ensure that the lease was registered. Despite this, however, the new lease was not registered. Kingsway Developments Cronulla Pty Ltd ('**second defendant**') had then lodged a caveat on the title for the Cronulla property, claiming an interest pursuant to a call option agreement. The plaintiffs urged the first defendant to take steps to have such caveat removed to allow the new lease to be registered, but no action was taken. Therefore, the new lease remained unregistered even at the time the proceedings were commenced.

The plaintiffs commenced proceedings seeking an order that the first defendant do all acts necessary to register the new lease, and an order under s 74MA of the *Real Property Act 1900* (NSW) ('**RPA Act**') for the withdrawal of the second defendant's caveat to allow such registration. At the first directions hearing, an order was made under s 74MA in respect to the caveat, and a further order was made that the second defendant pay the plaintiffs' costs of the proceedings. By the time the proceedings were nest before the Court, the new lease had been registered. However, the plaintiffs and the first defendant remained in dispute on the question of costs.

In essence, the plaintiffs submitted that it was necessary to commence the proceedings because the first defendant failed to discharge her obligation to ensure registration of the new lease, and in turn, acted unreasonably. It was also submitted that the first defendant had no defence to the plaintiffs' claim. Accordingly, the plaintiffs submitted that the first defendant be ordered to pay costs.

In essence, the first defendant submitted that as period under the call option agreement did not expire until October 2019, the plaintiffs commenced the proceedings prematurely. The first defendant further submitted that it acted reasonably in seeking the second defendant's consent to registration of the lease, and that the real reasons for the need of the proceedings was the conduct of the second defendant in maintaining its caveat on the title. Accordingly, the first defendant submitted that it would be appropriate that there be no order as to costs as between the first defendant and the plaintiffs.

Decision:

The Court ordered that the first defendant pay the plaintiffs' costs of the proceedings and observed that if the matter were to go to a final hearing, the Court was confident that the plaintiffs would have almost certainly succeeded. The Court noted that although the presence of the second defendant's caveat may have been an obstacle to registration, it was an obstacle that could have been readily overcome by action on the part of the first defendant. Further, the Court indicated that no interest asserted by the second defendant under the call option agreement could prevail over the plaintiffs'' interest arising from the option to renew contained in their earlier registered lease.

Therefore, given the first defendant's failure to discharge her obligation in n eight-month period prior to the commencement of the proceedings amounting to acting unreasonably, the Court ordered that the first defendant pay the plaintiffs' costs of the proceedings.

Qian Chen v Li Lin

[2020] NSWSC 663

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 21 May 2020

REAL PROPERTY – caveats – removal of caveats –section 74MA Real Property Act – loan agreement described in caveat did not exist – indemnity costs

PAYMENT INTO COURT – no proprietary claim to the net proceeds – no basis – FREEZING ORDER – no evidence of disposal of assets to frustrate judgment – selling asset to pay another judgment – counsel's submissions inappropriate

Facts:

These proceedings concerned the Qian Chen and Rongxia Fan ('**the plaintiffs**') seeking orders pursuant to section 74MA of *Real Property Act 1900* (NSW) ('**RPA Act**') for the removal of caveats lodged by Li Len ('**defendant**') on properties in Lindfield, Killara and George Street, Sydney by way of summons. Mr Chen owns the Killara and George Street property. By cross-summons, the defendant sought interlocutory orders that the net proceeds of sale of the Killara property be paid to her or into Court, or alternatively, a freezing order against Mr Chen.

The defendant alleged, separately on three occasions, that Mr Chen requested to borrow a total of $400,000 from her. It was further alleged that the loans were agreed upon by both parties, and that such agreements were oral. Following this, the defendant then began to press Mr Chen to make repayments, and various payments were made. Sometime after the loan agreements were said to have come into existence, Mr Chen entered into a contract to sell the Killara property for $1.6 million, to which he reassured the defendant that repayments would be made to her as soon as the property settled.

In April 2019, Ye Hu, a separate party to these proceedings, filed a Statement of Claim against Mr Chen in the District Court, seeking to recover $570,000 in loans together with interest.

In April 2020, the sale of the Killara property was due to settle but did not take place as Ms Hu had lodged a caveat on title. The defendant also lodged a caveat on the title of the Killara property asserting an "equitable interest, constructive trust and/or resulting trust" said to arise from the loan agreement between them. A caveat in like terms was also lodged by the defendant on the Lindfield property. The defendant demanded repayment of the loans, failing which proceedings would be brought in the District Court. Following this, Mr Chen requested that the caveat be withdrawn, failing which an urgent application would be made to the Court for an order that the caveat be removed.

District Court Proceedings

Mr Chen agreed to pay Ms Hu $610,000 within 42 days. The District Court made orders which provided that judgment would be entered against Mr Chen unless the amount was paid within that timeframe.

Supreme Court Proceedings

The first issue requiring the Court's determination was whether the caveator would have been granted an interlocutory injunction to protect the interest that the caveator claimed in the caveat. The Court noted that if no such interlocutory injunction be granted, the caveat should be ordered to be withdrawn. Second, the relevant interest that concerned the Court was the interest recorded in the caveat, not whether the plaintiff might otherwise have a caveatable interest.

Removal of Caveats

In respect of the caveat lodged on title of the Killara property, the plaintiffs submitted:

- That a caveat which describes a caveatable interest as an "equitable interest" inadequately described and cannot sustain a caveat;
- That there was no evidentiary basis to support a constructive or resulting trust; and
- That the Court would not be satisfied that there is a serious question to be tried in this regard.

In respect of the caveats lodged on title of the George Street property and Lindfield properties, the plaintiffs submitted:

- Section 23C of the Conveyancing Act 1919 (NSW) requires an agreement to be in writing and signed by Mr Chen to create a charge over a property;
- There is no evidence of a loan agreement executed on 3 May 2018 or at all, let alone one containing a charging clause; and
- There was no serious question to be tried as to whether these properties were charged to secure a debt owing by Mr Chen to the defendant.

The Court accepted the plaintiff's submissions. The Court observed that although the defendant had described a series of oral agreements to lend money to Mr Chen and be repaid with interest, the evidence does not suggest that Mr Chen agreed to grant an interest in the properties to secure repayment of the loans. Thus, the caveats on the three properties were withdrawn by the Court.

Payment of Net Proceeds of Sale

The basis on which the defendant sought an order that the net proceeds of sale be paid to her or into Court was said to be Mr Chen's behaviour in not readily acknowledging his indebtedness in answer to her demands for repayment, and accordingly, that she be secured the debt. The plaintiffs submitted, on this issue, that the relief ought be refused as there is no claim for final relief in the Cross-Summons that the defendant has any proprietary interest in the Killara property.

The Court accepted the plaintiffs' submissions. Even accepting the defendant's evidence for the purpose of the interlocutory relief sought in the Cross-Summons, the defendant was held to remain an unsecured creditor. Therefore, the defendant was held to have no proprietary interest in the Killara property, and the Court held that there was no reason why the defendant should be given priority over any other unsecured creditor, including Ms Hu.

Freezing Orders

The plaintiffs submitted that an applicant for a freezing order must establish, first, a good arguable case and, second, a risk that any judgment will go unsatisfied by reason of the other party dealing with their assets to place them out of the reach of the applicant. Accordingly, the plaintiffs accepted that the defendant has an arguable case, but not otherwise.

The Court agreed with such submissions and indicated that the question was whether there was any evidence that Mr Chen has, or is likely to, dispose of his assets to frustrate any judgment obtained in respect of these claims. The Court observed that, so far as the sale of the Killara property is concerned, the evidence was that Mr Chen sold his property in order to pay a debt to Ms Hu. Therefore, the sale of the Killara property did not suggest to the Court that Mr Chen had engaged in activity to frustrate the processes of the Court but rather to discharge his obligations recorded in orders made in another Court. The evidence, unchallenged, was that Mr Chen had no plans to sell the other properties. Therefore, the Court held that there was no basis made out to support a freezing order.

Decision:

In relation to the Summons, the Court held that all the caveats lodged by the defendant on the Killara, George Street and Lindfield properties be removed, and that the defendant to pay the plaintiffs' costs of the Summons on an indemnity basis. In relation to the Cross-Summons, it was ordered that all matters were to be dismissed and the defendant pay the plaintiffs' costs.

Roads and Maritime Services v Young

[2020] NSWSC 529

Coram: Fagan J

Court: Supreme Court of New South Wales

Date: 11 May 2020

LAND LAW – leases and tenancies – lease of seabed for mooring of houseboat – removal of houseboat on termination of lease – claim for costs for removal – judgment for plaintiff

Facts:

These proceedings concerned an application by Roads and Maritime Services (‘**plaintiff**’) for the costs of removal of a houseboat that was moored in Pearl Bay on Middle Harbour. Maureen Young (‘**defendant**’) kept the houseboat moored at such location and occupied it as her residence pursuant to a lease of the seabed from the plaintiff. In 2018, judgment was entered for the plaintiff for possession of the property, as for considerable time, the defendant had failed to pay rent that was due to the plaintiff in respect of the leased area. In 2019, judgment was entered in the plaintiff’s favour for $6,075.44 for rent plus $9.66 for each day after the judgment date until possession should be recovered.

In 2019, the defendant was notified by the plaintiff in writing that she should remove her chattels from the houseboat, and that it would be removed from the site should the defendant take no action to remove it herself. In this same letter of notification, the plaintiff offered that it would have the houseboat towed to a location nominated by the defendant, at her cost. The defendant did not take up this offer and took no steps to disconnect electricity and water services or to remove the houseboat from its moorings, as also requested by the plaintiff. Accordingly, the plaintiff incurred multiple costs amounting to around $145,000, including the substantial cost of deconstruction of the houseboat and removal of the pontoon.

Decision:

The Court was satisfied that the above amounts were payable by the defendant pursuant to the lease. Accordingly, the amount for which judgment will be entered for the plaintiff was $143,739.20 and the defendant was ordered to pay the plaintiff’s costs of the application to recover the removal expenses.

Rogers v Rogers

[2020] NSWSC 392

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 9 April 2020

MORTGAGES AND SECURITIES – Charges – Equitable charge – Creation of charge – Loan Agreement and Charge records an agreement for the making of a loan – agreement not concerned with any other liability to lender – agreement executed by borrowers but not lender – lender does not otherwise become bound – loan the subject of agreement never made – no charge created

Facts:

These proceedings concerned Mr John Rogers (‘**the plaintiff**’) claiming to have an enforceable charge over a property in Ermington (‘**the Property**’). The registered proprietor of the Property, Ms Samantha Rogers (‘**the first defendant**’), was the former wife of the plaintiff's older brother, Mr David Rogers (‘**the second defendant**’). The third to seventh defendants were various parties who have, or by way of caveat claim to have, an interest in the Property. The charge alleged by the plaintiff was said to have arisen from a Loan Agreement and Charge (‘**the Charge**’) that was executed by the first and second defendant in 2010. The Charge was allegedly intended to also be executed by the plaintiff, but there is no evidence that he ever did so.

The plaintiff alleged that in 2008, he agreed to lend $200,000, and a further sum of $260,000 to the first and second defendants. Both the first and second defendants denied that the plaintiff lent or paid any money to them. However, it was accepted that the plaintiff paid $200,000 in connection with the acquisition of a commercial property in Parramatta and paid a further sum of $260,000 to a company associated with the laminating busines with which the first and second defendant were involved. The Charge itself refers to a loan of $460,000 and an agreement between the plaintiff as Lender and the first and second defendants as Borrowers. Pursuant to the Charge, the Borrowers acknowledged that the Lender may lodge a caveat over the titles to the properties as security for the loans.

The first defendant denied that the execution of the Charge gave rise to a binding and enforceable charge over the Property. She contended, by way of Cross-Claim, that the circumstances surrounding tis execution are such that she would be entitled to have it set aside on equitable grounds or pursuant to statute.

In 2019, orders were made for the determination of certain question separately from and in advance of all other questions in the proceedings. The questions to be decided separately were framed to the following effect:

1. Are the first and second defendants bound by the terms of the Charge?
2. Is the first defendant entitled to an order setting aside the operation of the Charge on the grounds pleaded in her Cross Claim?
3. Is the Property the subject of an equitable charge in favour of the plaintiff securing repayment of moneys?

The first and third of the separate questions required the Court to consider the legal effect, if any, of the Charge executed by the first and second defendants. Of central significance was the question whether a binding and enforceable charge was thereby created over the Property.

Decision:

The Court found that although the plaintiffs appeared to have suffered considerable financial loss due to his dealings, he had failed to establish that the first and second defendant were bound by the terms of the Charge, or that the Property was the subject of an equitable charge in his favour securing the repayment of any money. The Court indicated that even if a binding agreement had been made on the terms of the Charge, no charge would arise or at least operate until the Loan, the subject of the agreement, had been made. Thus, until that event occurred, the plaintiff would have no right to have the Property made available for the discharge of an obligation to repay the Loan in accordance with the Charge.

Therefore, it followed that the first and third of the separate questions were answered adversely to the plaintiff, and that the second separate question did not arise.

Roma Lopeman v WIN Corporation Pty Ltd

[2020] NSWSC 1305

Coram: Sackar J

Court: Supreme Court of New South Wales

Date: 28 September 2020

CONTRACTS — Formation — Whether binding agreement existed between the parties — Where defendant provided letter to Council stating that parties had reached in principle agreement regarding the grant of easement by the defendant in favour of the plaintiff — Where parties had negotiated the terms of a Deed providing for the grant of the easement — Whether intention of the parties was not to make a concluded bargain unless and until they executed the Deed —Where the Deed was not signed by the defendant

ESTOPPEL — Promissory or proprietary estoppel — Whether the defendant represented that it agreed to or would grant an easement to the plaintiff— Whether plaintiff relied on such a representation or promise — Where defendant provided letter to Council that parties had reached in principle agreement regarding the grant of easement — Discussion as to appropriate relief if estoppel made out

LAND LAW — Easements — Whether easement should be granted pursuant to s 88K of the Conveyancing Act — Whether easement reasonably necessary — Where alternative access routes potentially available — Where proposed easement provided the safer and more practical route

Facts:

These proceedings concerned Roma Lopeman (‘**the plaintiff**’) seeking an order against WIN Corporation Pty Ltd (‘**the defendant**’) to perform its obligations pursuant to an agreement reached between the plaintiff and the defendant in 2014 (‘**Agreement**’). The Agreement involved granting to the plaintiff’s land an easement for vehicular access through the defendant’s land by way of a Right of Carriageway for residential purposes over the defendant’s land. Alternatively, the plaintiff sought a declaration that the defendant be estopped from departing from the terms of the Agreement, which were set out in an undated Deed between the parties and evidenced by a letter sent by the defendant to Wollongong City Council. Further in the alternative, the plaintiff sought an order pursuant to s 88K of the *Conveyancing Act 1919* (NSW) imposing an easement by way of Right of Carriageway over the defendant’s land.

The issues that arose involved consideration as to whether the letter from the defendant to the Council constituted a binding and enforceable agreement. Additionally, whether, by reason of the defendant’s conduct, it is estopped from departing from the terms of the alleged agreement or a representation that it would grant the easement. In the alternative, the issue was whether the plaintiff satisfied the requisite statutory test under s 88K for the granting of an easement under that provision. The defendant denied an agreement, an estoppel and that the plaintiff satisfied such statutory requirements.

Parties' Submissions

Binding and Enforceable Agreement

In essence, the plaintiff submitted that the parties had reached a binding and enforceable agreement by the time the defendant had signed the letters to Council, with respect to the provision of a Right of Carriageway by the defendant to the plaintiff in return for payment. Further, the plaintiff contended that the outward manifestations of the parties' intentions objectively ascertained indicated that the parties had reached an agreement.

The defendant essentially submitted that the parties had not conducted their negotiations, and objectively intended and conducted themselves on the basis that no agreement would be reached until the execution of a Deed.

Estoppel

In sum, the plaintiff submitted that the defendant encouraged the plaintiff to assume a binding agreement had come into existence and that it would grant the easement, constituting promissory estoppel.

The defendant contended that in matter involving land, an estoppel must be based on a mutual assumed state of facts, and further, that no mutuality existed. Moreover, the defendant submitted that the plaintiff's chosen course of conduct was not based on any representation by the defendant, and that the steps taken were pre-decided

Section 88K

The issue arising under this argument was whether the proposed easement was reasonably necessary for the effective use or development of the plaintiff's land. The plaintiff submitted that such easement was reasonably necessary, whilst the defendant submitted that the proposed easement was not reasonably necessary as there were alternative access routes.

Decision:

On the first question of whether the parties had made a legally binding agreement to the effect that the defendant agreed to the terms of the relevant easement, the Court found that they had not. Accordingly, the Court considered that objectively the parties did not intend to be bound to each other at law unless the Deed was executed and exchanged.

On the second question of whether an estoppel arises such that the defendant cannot depart from its alleged consent to the easement, the Court found that the defendant did not make any of the representations or promises asserted by the plaintiff. The Court further held that there was no promise that the easement would be granted, only an indication by the defendant to the Council that an in-principal agreement had been reached. To such extend, therefore, the defendant could not be estopped in the circumstances.

On the final issue of whether the plaintiff's alternative claim for an easement under s 88K was valid, the Court found in favour of the plaintiff and held that such an easement was reasonably necessary in accordance with the authorities. Further, the Court held that the plaintiff had taken all reasonable steps, that the easement was not contrary to the public interest and compensation had been agreed. As such, the easement was held to be reasonably necessary for the effective use and development of the land. Therefore, judgment was for the plaintiff and the easement was granted.

Ryals Hotel Pty Ltd v Zhaos Pty Ltd

[2020] NSWSC 719

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 11 June 2020

CONTRACTS — remedies — damages — assessment — failure of landlord to install a new lift in the hotel property amounted to breach of the lease — hotel without a functioning lift for a six month period — lift works undertaken in that period — assessment of effect on profitability of hotel business — whether assessment of damages should include a separate amount for inability to use the basement during the lift installation — held that no damages should be given for non-use of the basement where it was not a profit generating venue — whether tenant entitled to abatement of rent under lease — abatement available only if the premises or building are damaged or destroyed — held that the carrying out of lift works did not cause damage within meaning of abatement provision — tenant not entitled to abatement of rent

Facts:

These proceedings concerned the lessee, Ryals Hotel Pty Ltd ('**the plaintiff**'), seeking a range of declarations and orders against the lessor, Zhaos Pty Ltd ('**the defendant**') in respect to a lease of a commercial property in Glebe. At the time that the lease was entered into, there was no operational lift in the building but the lease provided that the lessor was in the process of installing a new lift. The lift was eventually installed six months later, but in the interim period without an operational lift, guests staying on the top floor had to walk up four flights of stairs, the construction work caused a disruption for guests, and the basement level could only be used for storage.

Previous declarations made by the Court in previous proceedings confirmed that the defendant had breached the lease by taking six months to install an operational lift. In these proceedings, the question posed to the Court concerned how to quantify the damages of the breach, and further, whether the plaintiff was entitled to an abatement of rent for the relevant period.

Claim for an abatement of rent

The abatement claim required the plaintiff to prove that, pursuant the abatement clause in the lease, the building was damaged and either could not be used or had diminished useability. Accordingly, the plaintiff submitted that the lift works both physically damaged the building and the useability of the building by significantly impairing the ability of the plaintiff to make full use of the building for the purpose of operating its hotel busines.

Claim for damages

In assisting to Court to quantify damages, both parties supplied expert evidence from valuers. In essence, the plaintiff's valuer concluded that the absence of an operational lift was a major factor, that prevented the hotel from operating at an optimal level and fulfilling guest expectations. Accordingly, the plaintiff's valuer calculated damages in the amount of $413,500, accounting for lost rental income relating to the basement area. The defendant's valuer, however, considered that the damages amounted to $112,142, and did not include any amount relating to the basement, on the basis that the plaintiff would not have been able to obtain rent for the basement according to circumstances unrelated to an operational lift.

Decision

Claim for an abatement of rent

The Court did not agree that the lift works constituted damage for the purpose of the abatement clause as alleged by the plaintiff, and indicated that reading the abatement clause in the context of the lease as a whole would enable the reasonable business persons in the position of the parties to understand damage as meaning damage that is physical in nature. Therefore, because the plaintiff failed to show that any damage of such nature was occasioned to the premises or the building, its claim for an abatement of rent was not made out.

Claim for damages

The Court indicated that in assessing damages for breach of contract, the plaintiff should be places in the same position as if the contract had been performed, and further, that the burden was on the plaintiff to prove the extend of its loss. However, the Court recognised the difficulties in calculating damages in the present case and indicated that the present case was one where it was not possible to adduce precise evidence of loss. As such, the absence of an operational lift was capable of causing loss, such as detracting from the quality of the experience enjoyed by the hotel guests, that is not able to be measured with exactitude. Therefore, the Court held that estimation was the best measure in assessing the loss.

The Court accepted that both the plaintiff's and defendant's valuers had attempted to provide such estimation by assessing the likely affect upon the hotel business of the lack of an operational lift. As such, the Court noted that both assessments involved a significant degree of subjective judgment on matters about which minds may reasonably differ.

Therefore, in consideration of what was fair and reasonable, the Court held that the plaintiff suffered a loss of $190,000, together with pre-judgment interest, due to the failure of the defendant to install a new lift and in breach of the lease.

S T Investment Pty Ltd v Geng

[2020] NSWSC 329

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 31 March 2020

LAND LAW – Contract for the sale of land – Purchaser fails to pay agreed deposit of 10% of purchase price – Purchaser unwilling and unable to complete – Contract terminated following Purchaser's failure to complete – Vendor promptly resells property for a lower price – Vendor seeks recovery of deposit and damages under cl 9 of standard form contract – Whether provision for recovery of deposit is a penalty – Recovery of damages for deficiency on resale and costs and expenses arising from breach – Damages for loss of bargain – Whether provision for interest if completion delayed is a penalty

Facts:

These proceedings concerned a contract for sale of a residential property in Strathfield ('**the Property**'), entered into between S T Investment Pty Ltd ('**the plaintiff**') as the vendor, and Yan Geng ('**the defendant**') as the purchaser, following an auction held on the Property. The purchase price under the contract was for $4.35 million, with a 10% deposit of $435,000 payable to a stakeholder on the making of the contract. The deposit had not been paid, and the plaintiff was advised in a letter from the defendant's solicitor that it would not be proceeding with the purchase. The contract was due for completion in December 2018, following the serving of an occupation certificate, however completion did not occur.

The plaintiff commenced these proceedings claiming for relief, including orders for specific performance of the contract, damages for breach of contract in addition to or in lieu of specific performance, and alternatively judgment for $435,000 as liquidated damages and for breach of contract. By way of Cross-Claim, the defendant admitted that he had failed to pay the deposit but contended that the contract had been rescinded. Further, the defendant asserted that he could set off against the plaintiff's claims, including for payment of the deposit, an entitlement to orders for either relief against forfeiture or the return of the deposit. Following the plaintiff's investigation of the defendant's financial position, however, the plaintiff accepted that specific performance would be futile.

Decision

In accordance with the agreement the questions of damages were approached on the basis that the plaintiff validly terminated the contract, pursuant to clause 9 of the contract, following a failure on part of the defendant to complete the contract pursuant with a Notice to Complete.

Provision under such clause 9 was held to be intended to augment, rather than restrict remove, rights which a vendor would otherwise have had upon breach. Pursuant to these provisions, the Court came to conclusions of the following effect:

- Clause 9.1 entitled the plaintiff to recover from the defendant the amount of the unpaid deposit, namely, $435,000;
- Clause 9.2 of the contract was put to one side as no money was paid by the defendant under the contract;
- Clause 9.3 provided further remedies for a vendor that terminated the contract following breach by the purchaser in an essential respect;
    - Broadly, the choice was between:
        - liquidated damages pursuant to cl 9.3.1 where a resale occurs within 12 months of termination, together with certain costs; and
        - unliquidated damages for breach of contract pursuant to cl 9.3.2.

The Court held that the prima facie measure of damages, pursuant to cl 9.3.2, was $749,387.36, and further, that the plaintiff was entitled to recover such an amount from the defendant. Accordingly, judgment was entered for the plaintiff against the defendant in the sum of $749,387.36 plus interest of $15,557.48.

Sandpiper Kooragang Pty Ltd v Fortis Products Pty Ltd

[2020] NSWSC 1256

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 15 September 2020

LAND LAW – contract for the sale of land – validity of Notice to Complete – parties enter into contract upon exercise of call option granted by defendant – plaintiff nominated as purchaser under terms of the call option – defendant sends land tax certificate to plaintiff showing land tax charge – completion does not occur on contractual date for completion – defendant issues Notice to Complete – whether defendant in position to issue Notice to Complete – where plaintiff claims defendant in default of agreement for breach of warranty prescribed under the Conveyancing (Sale of Land) Regulation 2017 – plaintiff further claims that defendant not ready, willing and able to proceed to completion where not in a position to issue clear land tax certificate – held that prescribed warranty did not form part of contract – held that in any event a breach of this kind has no relevant bearing upon obligations to complete – held that defendant was in a position to obtain a clear land tax certificate by the time fixed for completion – Notice to Complete held to be valid

LAND LAW – contract for the sale of land – termination – validity of termination – on day fixed for completion parties continue to exchange documents including settlement figures – solicitor for plaintiff requests that clear land tax certificate be provided on completion – solicitor for defendant states that land tax will be paid from settlement proceeds – completion does not occur – defendant issues Notice of Termination – not in dispute that plaintiff not ready, willing and able to complete – whether defendant validly terminated contract – held that defendant not ready, willing and able to complete because not in a position to provide a clear land tax certificate on completion – termination held to be ineffective

Facts:

These proceedings concerned Sandpiper Kooragang Pty Ltd (‘**the plaintiff**’) seeking orders for specific performance of a contract or the sale of certain land at Kooragang owned by Fortis Products Pty Ltd (‘**the defendant**’). The contract was entered into in 2020 when a call option granted by the defendant was exercised, and the plaintiff was nominated to be the purchaser.

The primary issue for determination was whether the defendant’s purported termination of the contract was valid on 24 March 2020. The defendant served a Notice of Termination based upon the failure of the plaintiff to comply with a Notice to Complete, calling for completion of the contract to occur via PEXA no later than 20 March 2020.

In short, the plaintiff challenged the validity of the Notice to Complete on the following grounds:

1. The Notice of Complete was itself invalid, because at the time of service, the defendant was neither free of relevant default, nor in a position to perform its obligations as

required to be performed. As such, when the notice was served, the defendant was in breach of a warranty prescribed by cl1(d) *Conveyancing (Sale of Land) Regulation 2017* (NSW, which concerns the existence of matters relating to structures on the land that would justify the making of upgrading or demolition orders; and

2. Even if the Notice to Complete was valid, and hence effective to make time of the essence for completion of the contract, the defendant was not ready, willing and able to perform its obligations under the contract at the time stipulated for completion, specifically, for the removal of a charge for land tax and the provision of a certificate to that effect.

The plaintiff submitted that the defendant should be taken to have waived any right to insist that time for completion was essential. It was contended that therefore, the defendant was not entitled to terminate the contract for the plaintiff's failure to complete within the time stipulated by the Notice to Complete.

In response, the defendant submitted the following:

1. That the Notice to Complete was valid and effective to make time of the essence for completion, and further, even if the contract contained the prescribed warranty, and even if it was breached, it was not relevant to completion and thus did not prevent the defendant from serving a Notice to Complete; and
2. That the fact that the land tax had not been paid did not preclude service of a Notice to Complete, as land tax could have been paid on settlement. Thus, the defendant denied that it was not ready, willing and able to complete on 20 March 2020.

Further, the defendant denied that there was any waiver of essentiality in respect to time for completion, and that it validly terminated the contract due to the failure of the plaintiff to complete on 20 March 2020. Thus, the defendant concluded it was entitled to recover the deposit.

Decision:

The Court found that the defendant was not ready, willing and able to perform its obligations on 20 March 2020 in providing a clear land tax certificate on or before completion. The Court further held that having not paid the outstanding land tax and intending that payment be made on settlement out of the funds to be provided by the plaintiff, it was not possible for the defendant to provide the certificate by the time fixed for completion. Accordingly, the Court accepted that this was not a minor matter, particularly in circumstances where the plaintiff was not made aware of the amount that was charged on the land for land lax, and where the defendant did not provide any assessment of land tax to the plaintiff. Therefore, the Court held that it was not open to the defendant to rely upon the plaintiff's failure to complete as a breach of contract that entitled the defendant to terminate the contract. it followed that the defendant's purported termination of the contract was ineffective, and thus, the Court concluded the contract remained on foot.

Scott v Ennis-Oakes

[2020] NSWCA 239

Coram: Bathurst CJ, Bell P, Gleeson JA

Court: New South Wales Court of Appeal

Date: 1 October 2020

LAND LAW – Conveyancing – Contract for sale – Rescission – Respondent wished to rescind contract – Appellants did not consent to proposed rescission and maintained contract was "still on foot" – Appellants elected to affirm contract rather than terminating and seeking loss of bargain damages – Appellants sought orders for specific performance – Respondent subsequently entered into a Scheme of Arrangement Deed and sought to rescind the contract on this basis – Appellants sought loss of bargain damages – Whether contract came to an end because of supervening circumstances – Whether appellants entitled to loss of bargain damages at the time when respondent terminated contract on basis of entering into Scheme of Arrangement.

Facts:

These proceedings concerned Kylie Anne Scott and Bradley John Scott ('**the appellants'**) appealing against orders made by the primary judge dismissing a claim brought by them against Nicole Ray Ennis-Oakes ('**the respondent**') for damages arising out of the termination of a contract for sale by the respondent to the appellants of a lot in a proposed subdivision of the respondent's property.

The contract was in standard form, supplemented by certain Additional Conditions. Relevantly, they can be summarised as follows:

- Additional Condition 35 provided that completion of the contract was to take place within 42 days of the day of the contract or 21 days of receipt of notice of the date of registration of the subdivision plan;
- Additional Condition 36.2 provided that if registration was not affected within 12 months of the date of the contract than either party shall have the right to rescind the Contract, whereupon the deposit be refunded to the purchaser and neither party shall have a claim against the other;
- Additional Condition 36.3 provided that the vendor do everything reasonable to have the plan registered within 12 months after contract date, and if not, that the purchaser or the vendor can rescind; and
- Additional Condition 37(b) provided that should either party enter into any scheme, then either part may at any time thereafter rescind this contract.

The subdivision plan was never registered, and the respondent sought to rescind the contract, pursuant to Additional Condition 36.3. However, the appellants did not agree nor consent to the proposed rescission. Following this, the respondent sent a letter to the appellants purporting to terminate the contract pursuant to Additional Condition 36. In response, the defendants maintained that the contract was still on foot.

First Instance:
In 2017, the appellants commenced proceedings seeking orders for specific performance, whilst the respondent sought to rescind the contract pursuant to Additional Condition 37(b). Although the appellants initially maintained their claim for specific performance, it was later abandoned. Instead, the appellants sought loss of bargain damages based upon the alleged breach of Additional Condition 36.2 and further, alleged repudiations of the contract. Further, the respondent entered into a Scheme of Arrangement Deed and sought to rescind the contract pursuant to Additional Condition 37(b).

The primary judge held that there was no proper basis for the appellants to claim a loss of bargain damages. The Court noted that the failure of the appellants to terminate the contract meant that the contract remained on foot for the benefit of both parties. Further, the Court indicated that supervening circumstanced then arose which operated to discharge the contract, namely, the circumstances underpinning the recission, pursuant to Additional Condition 37.

The Appeal:
There were four primary issues on appeal for the Court’s consideration, which can be summarised as follows:

1. Whether the primary judge erred in concluding that the appellants’ claim for loss of bargain damages was precluded by clear statements of principle;
2. Whether the primary judge erred in finding that the contract came to an end because of supervening circumstances;
3. Whether the primary judge erred in failing to conclude that when the respondent terminated the contract pursuant to Additional Condition 37, the appellants became entitled to loss of bargain damages; and
4. Whether the primary judge erred in failing to conclude that Additional Condition 37 permitted the appellants to sue for loss of bargain damages.

Decision:

In accordance with the above four issues on appeal, the Court of Appeal's conclusions can be summarised as follows:

1. On the first issue, the Court found that the primary judge did not err in such a conclusion, and further, that it was clear that a right to claim loss of bargain damages arises on termination of the contract by an innocent party;
2. On the second issue, the Court found that the primary judge did not err in holding that the contract was terminated by a supervening event. As such, the entry by the respondent into a Scheme of Arrangement gave rise to the tight to terminate under Additional Condition 37;
3. The Court held that the primary judge did not err in coming to the conclusion concerning the third issue, as the appellants had no right to loss of bargain damages at the time when the respondent terminated the contract. As aforementioned, the appellants had elected to affirm the contract and seek specific performance, rather than terminating the contract in seeking loss of bargain damages; and
4. The Court found that the primary judge did not err in coming to the conclusion concerning the final issue, as once the contract had been terminated, there was no contract to terminate, and therefore, no right to loss of bargain damages.

Thus, the appeal was dismissed, and the Court ordered that the appellants pay the respondent's costs of the appeal.

Shalhoub v Johnson

[2020] NSWSC 1321

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 29 September 2020

TORTS – breach – duty of care to maintain support for land under section 177, Conveyancing Act 1919 (NSW) – retaining wall built in 1920s runs adjacent to boundary between supporting land and supported land – where paling fence sits atop retaining wall – not in dispute that retaining wall provides support for supported land – defendants engage builder to perform works on supporting land in 2012 – works include removal of garden bed adjacent to retaining wall and laying of concrete slab – no provision of shoring for retaining wall – plaintiff claims works carried out negligently so as to cause retaining wall and fence to rotate and cracks to form on plaintiff's land – not shown that works were carried out negligently – held further that plaintiff failed to establish that works caused or contributed to movement or rotation of retaining wall or damage to plaintiff's land

Facts:

These proceedings concerned a claim in negligence for an alleged breach of the duty of care established by s 177 of the *Conveyancing Act 1919* (NSW) ('**Act**'). Maria Shalhoub ('**the plaintiff**') was the owner of a property in Randwick, whilst Michael Johnson and Sheila Royles ('**the defendants**) were the owners of the adjoining property in Randwick.

The plaintiff contended that around 2012, the defendants negligently commenced work to be undertaken which caused a removal or reduction of support to her property. The works carried out encompassed alterations to the house, including the addition of a second storey, and installation of an in-ground swimming pool, concreting and associated landscaping. In the area to the rear of the house. The plaintiff submitted the manner in which such works were carried out was negligent and in breach of the duty imposed by the Act. As such, this allegedly caused damage to the plaintiff's property through cracking and damage to the house, garage, carport, garden beds and concrete paths.

The defendants admitted that the works carried out in 2012 included minor excavation works, however, they denied that they were negligent as alleged by the plaintiff. Further, the defendant denied that any works caused any removal or reduction of support for the plaintiff's property. In particular, the defendant's denied that the works caused movement or rotation to the retaining wall, and that the retaining wall had rotated over time due to various other factors.

Decision:

On the evidence provided by the plaintiff, the Court found that the works carried out on the defendant's property did not cause nor contribute to any movement of the retaining wall so as to remove or reduce the support it would have otherwise provided to the plaintiff's property. However, even if the Court assumed that the works had such effect, the plaintiff would have still been required to prove that the works were carried out negligently, without the exercise of reasonable care.

The Court also observed that there was little attention given to the nature of the relationship between the defendants and the builders, and as such, it was not explained how the defendants would have been liable for any negligence on the part of the builder. Thus, the Court concluded that as negligence had not been established, it was sufficient to determine the case adversely to the plaintiff.

Smogurzewski v AIT Investment Group Pty Ltd

[2020] NSWSC 490

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 5 May 2020

LAND LAW – conveyancing – contract for sale – off-the-plan purchase – purchase of home unit and carspace – where home unit constructed as an adaptable unit and carspace marked with symbol for disabled persons access – purchaser rescinds contract under rule in Flight v Booth – whether presence of symbol means that owner would not have exclusive use of carspace or gave rise to risk of unauthorised use – held that owner would have exclusive right to possess and enjoy carspace – held that owner would have right to remove or conceal the symbol – purchaser not entitled to rescind contract – contract remains on foot – no warrant for deposit to be returned to purchaser

MISLEADING OR DECEPTIVE CONDUCT – off-the-plan purchase of home unit and carspace – purchaser not informed that unit would be constructed as an adaptable unit and that carspace would be marked with symbol for disabled persons access – not shown that at time of contract vendor had that intention – no false or misleading representations made by vendor – conduct of vendor not misleading or deceptive or likely to mislead or deceive

Facts:

These proceedings concerned a contract for the sale of land, entered into by Adam Smogurzewski (‘**Purchaser**’) and AIT Investment Group Pty Ltd (‘**Vendor**’) for an off the plan unit described as proposed Lot 107, consisting of a home unit and a car space. At the time of entering into the contract, the car space for the unit was not yet allocated, and accordingly, the contract allowed the Vendor to allocate the final car space at their absolute discretion.

When a development consent was eventually issued in 2015, it was a requirement of Ryde City Council that a certain number of the units in the building be adaptable units, and further, that an adaptable car space by allocated to any adaptable unit. As such, an adaptable car space generally allowed for a certain level of width, which would enable the unloading of a wheelchair. However, prior to the amendments to the Australian Standard in 2009, and adaptable car space also required that an International Symbol of Access (‘**ISA**’) be painted on the car space, which would indicate that the space is intended for use by a person with a disability.

The unit to be acquired by the Purchaser, Lot 107, was ultimately allocated as an adaptable unit, and the car space as an adaptable car space. Despite the requirement for an ISA not ultimately being necessary pursuant to the amendments of the Australian Standard, the Vendor painted an ISA on the car space on the mistaken belief that it was still required at law.

The Purchaser attended the property for an inspection and identified that the ISA symbol was painted on the car space, and otherwise, had no issues. The Purchaser's concern was that a holder of a disability permit could mistakenly assume that the ISA symbol would indicate that they could use the car space freely, when in reality, it was dedicated to Lot 107 exclusively. As such, the Purchaser alleged that the Vendor could not convey free exclusive title to the car space, pursuant to the contract. The Vendor indicated to the Purchaser that the car space was exclusive to him, that the unit number would be marked clearly in the car space, and that there were specific visitor parking spaces designated for use by holders of disability permits.

The Purchaser ultimately served a Notice of Rescission, which required that the Vendor return the deposit. Therefore, the central issue posed to the Court was whether the Purchaser's rescission of the contract was valid and effective. The Purchaser sought a declaration that the contract was in fact validly rescinded, and further, an order that the $72,000 deposit he paid be returned, together with interest earned on the deposit.

In short, the Purchaser contended that the presence of the ISA constituted a substantial and material departure for what was promised under the contract. Further, the Purchaser made claims in the alternative to his primary rescission claim, and particularly, sought an order under s 237 of the *Australian Consumer Law* ('**ACL**') that the contract be declared void *ab initio*, and consequential orders for the return of the deposit together with interest. Such claim rested upon the allegation that the Vendor contravened ss 18 and 30 of the ACL through making false representations and remaining silent about the subject matter of the contract. In response, the Vendor denied that the rescission of the contract was valid and further denied that the Purchaser was entitled to any of the relief that he sought. In addition, the Vendor did not seek to terminate the contract and forfeit the deposit, but to treat the contract as remaining on foot.

Decision

The Court found in favour of the Vendor, and that upon settlement, the Purchaser would have become the exclusive owner of Lot 107 which included the adaptable car space. As such, the Court held that no other person would have the legal right to occupy the car space. Whilst acknowledging that there was a risk holders of a disability permit may mistakenly use the car space, the Court held that as the car park was not open to the general public and the car space was marked with the unit number, such risk was only small. As such, the Court held that such risk would have been readily eliminated by the Purchaser simply painting over, or covering over, the ISA.

Furthermore, the Purchaser failed to establish that the defendant contravened either s 18 or 30 of the ACL as alleged, and therefore, the claim for relief under these provisions was also rejected. Therefore, the Court ordered that the contract remained on foot, and that there would be no refund of the Purchaser's deposit. The proceedings were dismissed, and the Purchaser was ordered to pay the Vendor's costs of the proceedings.

Studholme v Rawson

[2020] NSWCA 76

Coram: Bell P, Basten JA, Gleeson JA

Court: New South Wales Court of Appeal

Date: 24 April 2020

APPEAL – grounds – order of consideration – bias – effect on trial – need to address first

BIAS – prejudgment – trial judge expressed views based on filed evidence – views expressed to counsel in chambers – reliance on statements in judgment – reliance on overriding purpose in Civil Procedure Act 2005 (NSW), Pt 6 – acquiescence or waiver – statements revealing legal error, not prejudgment

REAL PROPERTY – easements – compensation – assessment of compensation for owner of servient tenement – application of valuation principles in determining compensation payable – need to determine terms and conditions of easement before assessing compensation – Conveyancing Act 1919 (NSW), s 88K(4)

REAL PROPERTY – easements – whether reasonably necessary – terms and conditions of easement – need to determine when deciding whether easement reasonably necessary – drainage works – joint report of expert engineers rejected – need for remittal – Conveyancing Act 1919 (NSW), s 88K(3)

COSTS – easement application – statutory entitlement of land owner – objection based on joint report of experts – whether conduct of land owner unreasonable – basis for departure from statutory entitlement – Conveyancing Act 1919 (NSW), s 88K(5)

PRACTICE AND PROCEDURE – open justice – holding “informal directions hearings” in chambers – no access for public – absence of parties – no record of conversation – risk of participants becoming witnesses – practice decried

Facts:

These proceedings concerned Ms Elizabeth Studholme (‘**the appellant**’) owning a home in Middle Cove, Sydney. On the northern boundary of her property, there was a 2.7 metre laneway permitting rear access to eleven properties on the southern and northern sides. The original subdivision, in 1947, included the laneway as a right of way. However, the appellant’s neighbours resurfaced the laneway with concrete in or around 2003. The appellant contended that the increased height of the laneway, caused by the resurfacing, contributed to rising damp in her property.

In 2017, the appellant gave four days' notice to the owners of the properties along the laneway that she intended to build a fence on the northern boundary of her land. Effectively, this would reduce the laneway's width so as to prevent most vehicular access along it.

First Instance

In response to the notice provided by the appellant, nine of the affected residents ('**respondents**') sought an interlocutory injunction and the imposition of an easement pursuant to s 88K of the *Conveyancing Act 1919* (NSW) in 2018.

Shortly before the trial, the appellant consented to the order imposing an easement over an area extending the right of way so as to provide a right of way a little under 2.7 metres wide. The primary judge was required to resolve three primary issues to the following effect:

1. The conditions of the easement and, particularly, any engineering works that were required to address the concerns about rising damp;
2. The amount of compensation payable to the appellant; and
3. Liability for the costs of the proceedings.

The primary judge granted the easement, assessed compensation, and imposed conditions requiring that the respondents undertake certain drainage works on the appellants' land. In 2019, the Court made further orders with respect to the costs of the proceedings, where the appellant was directed to pay the respondents' costs on an indemnity basis.

The Appeal:

On appeal, the appellant contended that the primary judge was affected by bias. Although the Court of Appeal rejected this contention, it held that the primary judge was incorrect in deciding the terms of the easement, the amount of compensation payable, and liability for costs. First, there were various difficulties with the conditions on the easement that were imposed by the primary judge, however, there was insufficient evidentiary basis to alter the terms and conditions of the easement on appeal. Therefore, the Court remitted the matter in determining the appropriate terms and conditions of the easement for a right of carriageway, and further, in determining the compensation payable upon the conditions of the proposed easement.

Decision:

In respect to costs, the Court held that there was no basis to depart from the usual rule, in that the costs of the appellant were payable by the respondents. Therefore, the primary judge's order for indemnity costs was set aside, and the respondents were ordered to pay the costs of the proceedings.

Super Vision Resources Ltd v AC Holdings Co Pty Ltd

[2020] NSWSC 65

Coram: Stevenson J

Court: Supreme Court of New South Wales

Date: 14 February 2020

LAND LAW – conveyancing – voidable dispositions – whether sale of properties made with intent to defraud creditors – where transferor entered submitting appearance and taken to admit such intent in response to notices to admit

LAND LAW – conveyancing – whether plaintiff a person thereby prejudiced

LAND LAW – conveyancing – whether various documents executed by transferor in favour of director and controlling mind of transferee were shams – whether transferee a purchaser in good faith without notice of intent to defraud creditors

Facts:

Mr Lawrence Xu ('**the second defendant**') sold properties owed to him at Milsons Point and Sandringham in Sydney to AC Holdings Pty Ltd ('**the first defendant**') for a total stated consideration of $8.8 million: $3.9 million for the Milsons Point property and $4.9 million for the Sandringham property. The sole director and shareholder of the first defendant was Ms Qiao Wang. On settlement, the first defendant paid the second defendant a total of $6.46 million; $2.34 million less than the total stated consideration.

> Ms Wang has an explanation for this that I set out below. There is controversy about that explanation. Ms Wang arranged for AC Holdings to borrow the necessary funds from a third party lender.
>
> The properties were worth more than $8.8 million as at 31 August 2018. It is common ground that the value of the Milsons Point property was then $4.9 million and that of Sandringham was $5 million: a total of $9.9 million; $1.1 million more than the stated consideration.

Super Vision Resources Pty Ltd ('**the plaintiff**') was a prospective creditor of the second defendant, because the second defendant had guaranteed to the plaintiff the obligations of Hua Cheng International Holdings Group Ltd, a company of which he was the sole director and shareholder.

In these circumstances, the plaintiff sought declarations under s 37A of the *Conveyancing Act 1919* (NSW) ('**the Act**') to the effect that the second defendant's sales of the properties to the first defendant are void on the basis that they were alienations made by the second defendant with the intent of defrauding his creditors.

Issues

Did Mr Xu transfer the properties to AC Holdings with intent to defraud his creditors?

The second defendant admitted, by failing to respond to Notices to Admit Facts served on his solicitor, that he transferred the Milsons Point and Sandringham properties to the first defendant:

1. With the intent of preventing, hindering or delaying the plaintiff from executing a potential judgment against him which it was seeking to obtain in earlier proceedings; and
2. With the intent of preventing, hindering or delaying his creditors from recovering their debts against him.

The Court indicated that those admissions were sufficient to enliven the first limb of s 37A of the Act; that is, the second defendant's alienation of the two properties to the first defendant was made with intent to defraud his creditors.

Is Super Vision thereby prejudiced?

Relief is available under s 37A of the Act to any person that is prejudiced by the alienation made with intent to defraud creditors. The Court indicated that, for the purposes of s 37A, the word creditor includes future and prospective creditors, and further, that the plaintiff constitutes a creditor. In establishing that it is thereby prejudiced, the plaintiff was required to show, in addition to being a creditor, that the second defendant disposed of an asset which would be available to his creditors with the intention of prejudicing them.

The Court observed that the plaintiff was a prospective unsecured creditor of the second defendant, and the Milsons Point and Sandringham properties were fully encumbered to the second defendant's secured creditors, NAB, ANZ and Ms Wang. Further, there was no suggestion in the evidence that NAB and ANZ would discharge their mortgages without payment of the amount secured. Accordingly, and unless Ms Wang agreed to surrender her security without payment of the amount secured, the sale proceeds of the properties were not, and would not become available to the plaintiff. Therefore, the disposal of the properties was not a disposal of an asset which would be available to the plaintiff, as the assets were fully encumbered to NAB, ANZ and Ms Wang.

Was AC Holdings a purchaser in good faith not aware of Mr Xu's admitted intention to defraud his creditors?

It is a defence to claim under s 7A if the transferee can establish that they were a purchaser in good faith not having, at the relevant time, notice of the transferor's intent to defraud creditors. In the present case, the first defendant, and in effect Ms Wang, had the onus of making out the defence. Accordingly, the Court found that Ms Wang caused AC Holdings to acquire the properties as a purchaser in good faith not having notice of the second defendant's intention to defraud his creditors.

Decision:

Notwithstanding the second defendant's admitted intention to defraud his creditors by alienating his interest in the two properties, the plaintiff was not held to be a person thereby prejudiced. In any event, the Court was also satisfied that Ms Wang was a substantial and secured creditor of the second defendant. Thus, the proceedings were dismissed.

Szeto v Situ (No 3)

[2020] NSWSC 1489

Coram: Emmett AJA

Court: Supreme Court of New South Wales

Date: 27 October 2020

EQUITY — General principles — Equitable estates and interests — Nature of equitable interests and ownership — Beneficial ownership — Property purchased in the name of defendant alone — Joint loans applied to purchase of property

REAL PROPERTY – General principles – Ownership – Beneficial ownership

Facts:

These proceedings were concerned with the ownership of four properties that are the subject of dispute between Livy Szeto ('**plaintiff**') and Liming Situ and Lijan Guan ('**defendants**'). In 2017, Stevenson J published reasons for determining beneficial ownership of one of the properties ('**the 2017 Reasons**'). In 2019, judgment was handed down concerning the ownership of the other three properties ('**the 2019 Reasons**'). The 2017 Reasons dealt with a property in Carlton, and in the course of this hearing, it became apparent that there were also disputes between the parties as to beneficial ownership of the other three properties, including a property in Lakemba, Turrella and Arncliffe. Further, it became evident that there was a substantial dispute as to accounting between the parties in relation to the income and outgoing for all four of the properties.

In the 2019 Reasons, Emmett AJA concluded that any additional material should be admitted to the extent that it demonstrated, it at all, that contributions were made by either of the parties to the outgoing in respect of the Arncliffe Property following its purchase. Further, the Court held that the defendant should be afforded the opportunity of adducing any further evidence on which he wished to rely in answer to the additional material.

In these proceedings, the defendant relied on the presumption of a resulting trust arising as a consequence of his asserted contribution to the purchase price for the Arncliffe Property. Both parties accepted that the presumption may be rebutted by, for example, evidence of subsequent payments by the parties, from which interferences can be drawn as to the intentions of the parties at the time of purchase. In addition, the defendant submitted that by signing mortgage documents to secure loans in respect of the purchase price for the Arncliffe Property, he incurred increased personal liability without any corresponding gain. As such, he contended that, having regard to his increased liability in respect of his indebtedness in respect of the Joint Loan, his role in the purchase of the Arncliffe Property went beyond that of a mere surety or guarantor intended to be indemnified by the plaintiff. Rather, he argued, he made a contribution to the purchase price for the Arncliffe Property.

There was also a dispute as to what funds were paid by the defendant into the “pooling” account. The plaintiff accepted that the defendant made some payments into that account, but further asserted that, even if some of the defendant’s money was applied towards repayment of the loan secured on the Arncliffe Property, which she denies, that of itself does not create any ownership interest in the Arncliffe Property.

Decision:

The Court held that there was no evidence that the defendant ever received a statement in respect of the loans secured by mortgage of the Arncliffe Property or made any payment towards those loans. In all of the circumstances, the Court was also not persuaded that the objective material proves that the defendant, by incurring a liability in respect of loans that were applied towards the purchase price of the Arncliffe Property, was intended to acquire a proprietary interest in the Arncliffe Property. Furthermore, to the extent that any of the defendant’s funds had been applied in the discharge of any debts incurred for the purpose of purchasing the Arncliffe Property, the Court held that the defendant was entitled to be indemnified by the plaintiff.

The Owners – Strata Plan 85044 v Murrell; Murrell v The Owners – Strata Plan 85044

[2020] NSWSC 20

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 1 October 2020

LAND LAW – covenants – restrictive covenants – construction – where restrictive covenant states that no matter or thing of any nature whatsoever shall be constructed on erected on placed on or permitted to remain on the servient tenement that exceeds a height of RL 26 AHD – where airspace above the servient tenement became part of the dominant tenement after registration of the restrictive covenant – whether on the proper construction of the restrictive covenant there is an implied positive covenant or easement allowing the owner of the servient tenement to enter into the airspace on a transitory basis – restrictive covenant held not to include a positive covenant or easement

LAND LAW – easements – implied easements – easements of necessity – where airspace above the putative dominant tenement is owned by putative servient tenement – where that airspace previously formed part of the property of the putative dominant tenement until the registration of a plan of subdivision under which the airspace became part of the putative servient tenement – whether easement over airspace is essential for the use of the putative dominant tenement – implied easement of necessity held to have arisen at the time of the registration of the plan of subdivision – easement not enforceable by current owners of putative dominant tenement

TORTS – trespass – trespass to land – title to sue - where owners corporation of a strata scheme is the registered proprietor of airspace which contains a view of Sydney Harbour and is located above an adjacent property – where airspace forms part of the common property of the owners corporation – owners corporation held to have standing to bring a claim for trespass to airspace

TORTS – trespass – trespass to land – where owners corporation of a strata scheme is the registered proprietor of airspace which contains a view of Sydney Harbour and is located above an adjacent property – where it is not possible for owner of the adjacent property to access roof of that property without encroaching into the airspace – where agents of adjacent property owner enter into airspace on several occasions to effect repairs to and survey the roof for possible future development – defence of necessity established in relation to some but not all of the encroachments into the airspace – trespass held to have occurred on the other occasions – compensatory damages awarded

TORTS – private nuisance – title to sue – whether the owners corporation of a strata scheme can bring a claim for private nuisance in respect of damages or loss allegedly suffered by individual lot owners in the strata scheme – owners corporation held not to have standing to bring a claim for private nuisance on behalf of lot owners

LAND LAW – covenants – restrictive covenants – application to modify or extinguish restrictive covenant pursuant to s 89 of the Conveyancing Act 1919 (NSW) – power to make orders – where proposed modification to restrictive covenant seeks in substance to create an easement – no power to create an easement under s 89 of the Conveyancing Act

LAND LAW – easements – court-imposed easements – Conveyancing Act 1919 (NSW), s 88K – proposed easement to access the airspace owned by putative servient tenement as reasonably necessary and on a temporary basis to repair, maintain and/or improve structures on the putative dominant tenement – whether reasonably necessary for the effective use or development of the putative dominant tenement – proposed easement reasonably necessary for effective use or development insofar as it permits access to the airspace as necessary and on a temporary basis for repairs and maintenance only

LAND LAW – easements – court-imposed easements – Conveyancing Act 1919 (NSW), s 88K – compensation – whether the lot owners in a strata scheme are entitled to be compensated for any loss or other disadvantage arising from an easement to be imposed over common property of owners corporation – lot owners are not persons having an estate or interest in the common property that is evidenced by an instrument registered in the General Register of Deeds or the register kept under the Real Property Act 1900 (NSW) – lot owners not entitled to compensation – Community Association DP 270447 v ATB Morton Pty Ltd (2019) 240 LGERA 32; [2019] NSWCA 83 applied

LAND LAW – easements – court-imposed easements – Conveyancing Act 1919 (NSW), s 88K – whether reasonable attempts have been made to obtain the easement or an easement having the same effect – where first attempts to obtain the easement or an easement having the same effect made only after the commencement of proceedings – where attempts made after the commencement of proceedings were sufficient in circumstances where lengthy correspondence between the parties about access, and the owner of the putative servient tenement was not prepared to grant an easement on any terms prior to receiving the first offer

PRACTICE AND PROCEDURE – applications – leave to amend pleadings – application to amend summons and statement of claim – application made on the last day of a four-day hearing – no adequate explanation for the delay in making the application – where the proposed amendment merely clarifies what was already implicit in the existing pleadings – application granted

LAND LAW – Torrens title – contents of Register – where restrictive covenant recorded in a previous folio of the dominant land – where that restrictive covenant is not recorded in current folio of dominant land – observations about whether the dominant and servient tenements' title is subject to the restrictive covenant

Facts:

These rather lengthy proceedings concerned a nuisance dispute between neighbours, where the Court was asked to provide determination on 19 issues. The Owners Corporation owned the common property in a four-level apartment strata scheme in 95 Wentworth Road, Vaucluse ('**No 95**') and airspace above part of the adjoining land on 97 Wentworth Road ('**the Airspace**'), that had been in existence since at least 1960. In 1992, a restriction was created that prevented any improvements or other matters on part of 97 Wentworth Road, Vaucluse ('**No 97**') exceeding a certain height. The apartment had been built more recently and registered in 2011. No 95 overlooks No 97 and a slightly sloping rood on No 97 (‘**Roof**’). It was agreed that the Roof was up to 16cm below the lower horizonal boundary of the Airspace. In 2018, George and Deirdre Murrell (‘**the Murrells**’) purchased No 97 and commenced an extensive redevelopment, including alterations to the residence. During the redevelopment, disputes arose between the parties due to the Murrells accessing the Roof and the Airspace to inspect, and carry out, work to the Roof.

The Owners Corporation commenced proceedings against the Murrells claiming aggravated and exemplary damages and injunctive relief in relation to alleged trespass and nuisance (‘**Owners Corporation Proceedings**’). The Murrells commenced proceedings against the Owners Corporation claiming declaratory relief concerning the proper construction of the Restriction, and an s 89 order under the *Conveyancing Act 1919* (NSW) (‘**the Act**’) modifying the Restriction, or an easement under s 88K of the Act (‘**Murrell Proceedings**’). The two proceedings were heard together.

Issues

As aforentioned,19 issues came before Williams J for determination. In brief, the central issue that arose was the standing of the Owners Corporation to bring proceedings for the alleged nuisance and trespass, when the actual loss asserted was to one unit holder. As such, the Owners Corporation’s argument in trespass and nuisance was pleaded as a claim for loss and damage alleged to have been suffered as a result of nuisance. However, the particulars of the loss and damage was said to be the loss of privacy occasioned by the proximity of the workmen carrying out the construction work, and the loss of amenity occasioned by noise and disturbance, together with obstruction of views by the works.

Decision:

The Court found that the Owners Corporation had standing to sue on the cause of action in trespass, but not in nuisance for alleged substantial and unreasonable interference with the Unit Owner’s enjoyment of their property rights. As such, the Court held that the Murrells’ entries into the Airspace during a certain period constituted trespass, however, the claim in nuisance was dismissed in so far as it was founded on the Murrell’s entries into the Airspace. Accordingly, the Court held that then Owners Corporation was the only legal owner of the Airspace and had no estate or interest in the apartments and was neither trustee nor agent of the Unit Owners’ estate or interest in the units.

Further, Williams J determined that the nature of the loss of privacy and loss of amenity particularised meant that the Owners Corporation could only have suffered by certain Unit

Owners and not by the Owners Corporation being the representatives of the Unit Owners as a whole. In addition, the Court recognised that s 254 of the *Strata Schemes Management Act 2015* (NSW) entitled the Owners Corporation to enforce proceedings for the common property but held that such right only applied if the lot owners were jointly entitled to take such proceedings, and all lot owners were affected. Therefore, the Court determined that the lot owners were not jointly entitled.

Thus, orders were made to the following effect:

Owners Corporation Proceedings:

1. Judgment for the plaintiff in the sum of $10,000 in respect of the defendant's trespasses into the Airspace;
2. The summons and statement of claim otherwise dismissed.

Murrell Proceedings:

3. Dismiss the claims for relief and the statement of claim

The Owners Strata Plan 97121 v RCBS Devco Pty Ltd

[2020] NSWSC 1247

Coram: Hammerschlag J

Court: Supreme Court of New South Wales

Date: 14 September 2020

REAL PROPERTY – Conveyancing Act 1919 (NSW) s 37A – where real property was sold by the second defendant to the third defendant at an undervalue and proceeds distributed immediately – where transactions were completed soon after the second defendant became aware that the plaintiff was contemplating litigation against it for alleged building defects – whether alienations were made with intent to defraud creditors – HELD – the alienations were made with intent to defraud the plaintiff as a creditor.

Facts:

These proceedings concerned determination of separate questions framed to resolve whether transactions entered into by the second defendant (‘**Landco**’), under s 37A of the *Conveyancing Act 1919* (NSW) (‘**the Act’**), were made with intent to defraud creditors and, if so, the appropriate relief that is to be provided. The plaintiff (‘**Owners Corporation**’) was the registered proprietor of the common property in a strata scheme in Blacktown, a 27-storey building (‘**the Building**’) comprising 106 residences and four commercial lots.

Landco and the first defendant (‘**Devco**’) were associated with Messrs Cassab (‘**Cassab**’) and Brett Suttor (‘**Suttor**’), who had known with each other through various corporate vehicles in the business of property development.

<u>*Sale at an Undervalue*</u>

The substance of the transactions in dispute was that Landco sold Lot 3 at an alleged undervalue to a newly formed company, Altitude G3 Pty Ltd (‘**G3**’) who was the third defendant in these proceedings and controlled by Cassab and Suttor. Landco immediately distributed the proceeds of sale and, in effect, left Landco with no assets.

The Owners Corporation used an expert land valuer who concluded that the market value of Lot 3 was sold by Lanco for $245,000 less than what it was worth. Such evidence was accepted by the Court.

<u>*Intention to Defraud Creditors*</u>

Suttor and Casseb gave evidence that denied any intention or motivation in bringing about the sale of Lot 3, or the immediate distribution of the proceeds of sale, were with intent to defraud creditors. Both of the parties contended that they did not believe that there was a realistic possibility that the Owners Corporation would sue Lanco for building defects, and that they therefore did not believe that the Owners Corporation was or would be its creditor. Accordingly, Suttor and Casseb submitted that they did not intend, and could not have intended, the defraud the Owners Corporation. The Court rejected these arguments.

Decision:
The Court held that the objective contemporaneous circumstances undermined Casseb's and Suttor's credibility as a witness. Thus, it was found that the alienation of the property both by the sale of Lot 3 to G3 and by the immediate distribution of the proceeds of sale, were with intent to defraud creditors. Therefore, pursuant to s 37A of the Act, the Court:

1. Declared the transfer of the property void;
2. Declared the distributions void; and
3. Granted other relief to be heard.

The Owners Strata Plan No 2245 v Veney

[2020] NSWSC 134

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 27 February 2020

LAND LAW – strata title – by-laws – construction – special by-law conferring right upon lot owner to use part of common property for parking – whether right conferred in substitution for right of lot owner to park in existing parking lot – use of extrinsic circumstances as an aid to construction – cautionary approach – special by-law construed so that right conferred is not in substitution for owner's right to park in existing lot

LAND LAW – strata title – obligations of owners and occupiers – whether parking by lot owner in parking lot causes a nuisance to other occupiers of lots – inconvenience also caused by presence of gardens on common property – parking on lot held not to amount to a nuisance – not an unreasonable interference with the rights of other owners or occupiers of lots – Strata Schemes Management Act 2015 (NSW), s 153(1)(a)

Facts:

These proceedings concerned a strata scheme registered in 1966, comprising of 100 lots. Lots 1 to 50 were residential apartments, whilst lots 51-100 were parking spaces for the corresponding residential lots. The Owners Corporation ('**the plaintiff**') sought declaratory relief in relation to the proper construction of a special by-law, alongside injunctive relief to prevent a lot owner, Mr Veney ('**the defendant**') from parking any motor vehicle in his parking space lot (Lot 51) within the strata scheme.

The plaintiff argued that the defendant's use of Lot 51 to park a motor vehicle meant that several other parking space lots in the scheme could not be easily accessed by other motor vehicles. As such, several other occupiers of parking lots spaces could not enter and exit their parking spaces when the defendant parked a vehicle within his parking space, because of the dimensions and location of Lot 51. It was established in Court that such issue was caused by deficiency in the original design layout of the parking area, and a garden rockery located on the common property in the vicinity of Lot 51.

The plaintiff had passed a special by-law in 1998 granting the owner of Lot 51 – who, at this time, was not the defendant – a right to exclusive use and enjoyment of an area of the common property the purpose of parking a vehicle.

Issues:

The plaintiff contended that when read in the context it was made, the intent of the by-law was to provide the owner of Lot 51 with an alternative parking space on the common property, on the condition that Lot 51 would not be used to park a vehicle. However, the by-law itself was silent on this matter and included no conditions in relation to such use of Lot 51. Additionally, the plaintiff asserted that the defendant had no right to use the lot as a parking space. Further, the plaintiff submitted that the Court should account for evidence to the following effect:

- The historical context of the making of the by-law;
- The physical characteristics of the land at the time the by-law was made; and
- The contents of a letter which discussed a potential arrangement whereby the use of the common property would be given to the owner of the lot in exchange for forfeiture of the right to park a vehicle within Lot 51.

The plaintiff further submitted that so long as the defendant used Lot 51 as a parking space, he was committing an actionable nuisance under s 153(1) of the *Strata Schemes Management Act 2015* (‘**SSMA**’), alleged to be regarding the other lot owners having obstructed vehicular access to their parking lots.

Decision:

Interpretation of the By-Law:

The Court indicated that regard should not be given to the historical evidence relied upon on the question of construction of the by-law, and instead, it is to be interpreted according to its language, understood in the statutory context in which it was made. Further, Darke J held that if the by-law was to be intended to cut down the property rights of the owner of Lot 51, it would be expected that words clearly showing the intention would be included. Therefore, the plaintiff’s submission concerning the proper construction of the by-law was rejected, and the Court held that the language of the by-law, in its statutory context, would convey to the reasonable person that a new right was being conferred upon the owner of Lot 51. Thus, none of the conditions specified in the by-law operated to restrict of a right held by the owner to park a vehicle.

Nuisance:

The Court made conclusions on this issue to the following effect:

- There was little evidence available to ascertain with precision the extent to which the defendant parking a care in Lot 51 interfered with occupiers of other lots in the use and enjoyment of their parking space lots:
- Even if Lot 51 was not occupied by a vehicle, getting into and out of the other parking spaces would require a number of manoeuvres anyway;

- The owners of the other parking spaces had no legal right to manoeuvre their vehicles into the defendants Lot 51;
- The inconvenience was not brough about solely by parking a vehicle in Lot 51, but also by additional factors, such as the rockery; and
- It was open to the plaintiff to take steps to alter the layout of the parking area by having the common property rockery and other landscaped areas removed to address the issue, which the plaintiff was unwilling to do

Therefore, the Court also dismissed the claim of actionable nuisance.

Tonks v Cummins

[2020] NSWSC 1723

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 2 December 2020

LAND LAW – caveats – removal of caveat – removal by order of court – service of application – *Real Property Act 1900* (NSW), ss 74MA, 74N

Facts:

These proceedings concerned an application under s 74MA of the *Real Property Act 1900* (NSW) for a removal of a caveat which had been lodged over a property in Oakhurst. Richard Cummins ('**defendant**') was formerly the registered proprietor of the property, which he purchased in 2007. The defendant was made bankrupt by an order of the Federal Circuit Court in 2018. Bradley Tonks ('**plaintiff**') was by that order appointed as the trustee for the defendant's bankrupt estate. On the face of the matter, therefore, the defendant's interest in the property passed to the plaintiff as his bankruptcy trustee at that time.

When the defendant was made bankrupt, he was in occupation of the property. The plaintiff commenced proceedings for possession in 2018, however, order of possession was then challenged by the defendant which delayed the execution of the writ of possession. Ultimately, the writ was executed, and the plaintiff obtained possession of the property in 2019.

The plaintiff entered into a contract for the sale of the property in 2020, whereby the contract was in the amount of $550,000. The defendant lodged a caveat on the property, which is the subject of these proceedings. The plaintiff sought an order to remove the caveat so that he could complete the sale of the property before a specified sunset date, and further, an order under s 74MA(2)(b) restraining the defendant from lodging any further caveat over the property.

The defendant raised two vague points in relation to the caveat in the proceedings, the first concerning s 116 of the *Bankruptcy Act 1966* (Cth). It seemed that the defendant contended that the money used to purchase the property were "protected moneys" for the purpose of s116, being deriving from damages or compensation for a "personal injury or wrong" done to the defendant.

Decision:

On the evidence, the Court held that the defendant's contention appeared to be unjustified, and further, that a search of the property demonstrated that at the time it was acquired, it was almost entirely funded with a mortgage loan from a bank, and the remainder of the money was provided under the first buyers' scheme of the Commonwealth Government.

In the circumstances, the Court made an order under s 74MA(2)(a) for the withdrawal of the caveat, and further, an additional order restraining the lodgement of any further caveat as requested by the plaintiff. The defendant was ordered to pay the plaintiff's costs of the proceedings.

Trickey v Ewert

[2020] NSWSC 691

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 4 June 2020

LAND LAW — Conveyancing — Contract for sale — Completion – where the plaintiffs seek an order that the defendants give vacant possession of a property – where the defendants did not have any defence – order made

Facts:

These proceedings concerned Mr and Ms Trickey (‘**plaintiffs**’) being the owners of a rural property located at Finley (‘**the Farm**’) and seeking an order for vacant possession of the Farm against Ms Ewert and Mr Monson (‘**the defendants**’), who were occupiers of the Farm. The plaintiffs sought relief to the following effect:

1. Judgement for the plaintiffs for possession of the Farm;
2. Declaration that the defendants had been trespassing on the Farm;
3. Order that the defendants are to give the plaintiffs vacant possession of the Farm;
4. That the defendants immediately withdraw a caveat lodged on the Farm;
5. Damages; and
6. Costs.

In her amended defence, Ms Ewert admitted that she entered into a contract for the sale and purchase of the Farm in 2016, and alleged that certain representations were made to her before she entered into the contract. Further, she alleged that the contract was not consistent with such representations, however, such inconsistencies were not subsequently identified. Therefore, the Court indicated that it could not find that there was some actionable misrepresentation that gave rise to any legal rights. Further, Ms Ewert submitted in her amended defendant that the effect of a special condition of the contract was to entitle Ms Ewert to possession of the property as a licensee.

Decision:

The Court indicated that it was not clear what legal consequences Ms Ewert believed arose from the facts, and accordingly, the Court found that Ms Ewert had not alleged or established any breach of the contract by the plaintiffs. Further, the Court held that, on the evidence, Ms Ewert had not at any time, before or after the date when the plaintiffs terminated the contract, been able to demonstrate that she had the finance necessary to complete the contract by payment of the balance of the purchase price.

Therefore, the Court was satisfied that the plaintiffs were entitled to the relief claimed, save for their claim for damages. Accordingly, the Court accepted that the plaintiffs had lead evidence relevant to the quantification of their loss but would not make an order for damages without first receiving submissions on this issue. The plaintiffs were also entitled to an order for their costs of the proceedings against the defendants.

Varcity Solutions Pty Ltd v Gulliver; Varcity Solutions Pty Ltd v Jagbo Pty Ltd

[2020] NSWSC 1517

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 30 October 2020

LAND LAW — Caveats — Removal of caveat — Removal by order of court — where the plaintiffs have not demonstrated any real likelihood of establishing the interest in the property that they claim — where, in those circumstances, significant weight is to be given to the proposition that a registered proprietor is entitled have title free from any blot that interferes with rights to use the property in any legally permissible way — order for removal of caveat made

Facts:

These proceedings concerned the issue of whether the Court should order for a withdrawal of a caveat lodged by Varcity Solutions Pty Ltd and Paidonexchange Pty Ltd (‘**the plaintiffs**’) against the title to a residential property at Riverview owned by Ms Gulliver (‘**the defendant**’). The caveat was lodged by the plaintiffs to protect interests in the Riverview property to which they claim to be entitled under two loan agreements. The first was described as a loan agreement between the first plaintiff and a company named Jagbo Pty Ltd (‘**the debtor**’) as borrower, and the defendant’s husband, Mr Gulliver, as guarantor. The second loan agreement was described as a factoring agreement between the second plaintiff, the debtor, and Mr Gulliver, again as guarantor.

The plaintiffs commenced proceedings following the defendant serving a lapsing notice on them, and final relief was claimed through seeking a declaration that the plaintiffs hold an interest in the Riverview property. Additionally, the plaintiffs sought interlocutory relief to the following effect:

1. An order extending the operation of the caveat;
2. Upon the plaintiffs providing the usual undertaking as to damages the operation of the caveat be extended.

Related Debt Proceedings:

The plaintiffs commenced separate proceedings, where the debtor, a company controlled by Mr Gulliver, is the first defendant, and Mr Gulliver is the second defendant. Ms Gulliver was the third defendant. The plaintiffs claimed declarations in the alternative that Mr Gulliver holds an interest in the Riverview property pursuant to a resulting or constructive trust. Thus, while in the caveat proceedings the plaintiffs have sought a declaration that Ms Gulliver holds an interest in the Riverview property on a resulting trust for her husband, in the debt proceedings the interest is claimed to have been based upon either a resulting trust or a constructive trust.

Issues:

In these circumstances, the Court indicated that the question of whether the Court should make an order that the plaintiffs withdraw the caveat was discussed. It followed that if no order was made, then the caveat would continue to be extended until further order, under an order made in previous proceedings. The plaintiffs accepted that they bore the burden of establishing that the caveat should be further extended.

The Court disposed a number of the bases of the plaintiffs' claim that a trust existed that the Court considered to be untenable on the evidence, even to an interlocutory standard. Accordingly, the question that was pressed was whether there was a serious case to be tried that the defendant held an interest in the Riverview property on constructive trust for her husband. In the debt proceedings, the plaintiffs alleged no more than that the constructive trust arose simply upon the basis that Mr Gulliver made the payments for the maintenance of the Riverview property that they alleged.

Decision:

The Court indicated that the plaintiffs had not submitted that Ms Gulliver and her husband had a common intention that the husband would have an equitable interest in the Riverview property. Therefore, the Court could not find that there was a serious case to be tried that Mr Gulliver was entitled in the property through a constructive trust. Thus, the Court made an order requiring the plaintiffs to withdraw the caveat over the title to the Riverview property.

Consequentially, the orders of the Court in the caveat proceedings were made to the following effect:

1. The caveat be withdrawn from the title to the Riverview property;
2. The plaintiffs to pay the defendant's costs of the caveat proceedings.

In addition, the orders of the Court in the debt proceedings were made to the following effect:

1. Order the plaintiffs to pay the costs of the third defendant by reason of the plaintiffs not being ready for the proceedings to be heard;
2. Order that the costs payable under Order 1 be paid on the indemnity basis.

Wang v Polaris Holdings Rosebery Pty Ltd

[2020] NSWSC 213

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 11 March 2020

LAND LAW – contract for sale of land – claim for rescission pursuant to the rule in Flight v Booth (1834) 1 Bing (NC) 370 – plaintiff entered into contract to purchase a stratum lot in an unregistered plan of subdivision – draft plan annexed to contract showed areas at various levels – whether areas should be understood as areas of the lot at those levels or floor areas at those levels – held that areas should be understood as areas of the lot – no substantial discrepancy between the subject matter of the sale and what was able to be conveyed – plaintiff had no right to rescind

LAND LAW – contract for sale of land – deposit – vendor entitled to forfeit deposit upon termination for purchaser's failure to complete – statutory return of deposit – whether vendor made misrepresentation as to floor space in building once constructed – no misrepresentation made by vendor – no grounds for order for return of deposit under s 55(2A) of Conveyancing Act 1919 (NSW)

MISLEADING AND DECEPTIVE CONDUCT – contract for sale of stratum lot in unregistered plan of subdivision – draft plan annexed to contract showed areas of various levels – whether vendor made misrepresentation as to floor space in building once constructed – no misrepresentation made by vendor – vendor did not engage in conduct that was misleading or deceptive or likely to mislead or deceive within the meaning of s 18 of Australian Consumer Law – no grounds for order for return of deposit

Facts:

These proceedings concerned a contract for the sale of a stratum lot in an unregistered plan of subdivision, located in Rosebery. The contract was entered into in 2015 between Yu Wang ('**the plaintiff**') as the purchaser and Polaris Holdings Rosebery Pty Ltd ('**the defendant**') as the vendor, for a purchase price of $1,548,000. A deposit of $154,800 was provided by the plaintiff by way of bank guarantee that was accepted by the defendant. The primary dispute in these proceedings relate to such deposit, as both parties claim to be entitled to it.

In 2018, the plaintiff served a Notice of Recission/Termination upon the defendant and was based upon purported discrepancies between the draft subdivision plan that was annexed to the contract, and the subdivision plan as registered. As such, it was alleged that there had been a decrease one of the lots, of some 91m, with the consequence that the plaintiff was entitled to rescind or terminate the contract as it was justified on her grounds that existed at the time.

The parties' arguments

The plaintiff contended that the contract of sale contained or conveyed a presentation that the total floorplan area would be a certain size, whereas the actual floor place was smaller. Further, the plaintiff alleged that she was induced by that representation to enter into the contract, and that the representation was false or misleading. Accordingly, the plaintiff submitted that it is entitled to the return of the deposit.

The defendant denied that the contract contained or conveyed any representation of the character alleged by the plaintiff and denied that the plaintiff had any entitlement to rescind or terminate the contract. Accordingly, the defendant denied that there are any grounds warranting an order that the deposit be refunded back to the plaintiff. By its Cross-Claim, the defendant further contended that it lawfully terminated the contract following the failure of the plaintiff to complete the contract in accordance with a Notice to Complete, and therefore, that the defendant is entitled to forfeit the deposit.

Decision:

The Court determined that there was no suggestion that the building as ultimately constructed differed from that which the defendant promised to construct. As such, although some changes were made to the dimensions of the lot from those shown on the draft plan to those shown on the registered plan, those changes were expressly contemplated by the terms of the contract, and in any event are only slight or trivial. Accordingly, the Court held that such changes could not result in the plaintiff receiving something different in substance from that which she contracted to purchase. Therefore, the Court found that the plaintiff had not shown that there was a discrepancy between the subject matter of the sale and what was available to be conveyed that a right of rescission arose.

Thus, the Court determined that the plaintiff's termination of the contract was invalid, the contract remained on foot and the defendant was entitled to terminate the contract and recover the deposit. The Court was also not persuaded that the defendant made any false representations that intended to mislead or deceive the plaintiff.

White v Arambasic

[2020] NSWSC 1376

Coram: Campbell J

Court: Supreme Court of New South Wales

Date: 9 October 2020

LAND LAW – caveats – where prior caveat lapsed - lodgment of caveat claiming same interest as previous caveat - lodgment with leave of court – where leave necessary to preserve interest of mortgagee

CIVIL PROCEDURE – default judgment – default in filing defence – where defendant may have arguable defence – where defendant must file a defence

CIVIL PROCEDURE – stay of proceedings - pending proceedings in other court - common issues in both proceedings – risk of inconsistent judgments – where proceedings in Federal Circuit Court are further developed

Facts:

These proceedings concerned three Notice of Motions being filed, the first two by Jasmin White (‘**the plaintiff**’) and the third by Steve Arambasic (**‘the defendant**’). The first motion sought an urgent order to extend the operation of a caveat on title of the subject property. The second motion sought default judgment for possession of the land. The third motion, filed by the defendant, sought the stay of the proceeding until the determination of a threshold issue or preliminary question in proceedings commenced in the Federal Circuit Court. Those proceedings sought a determination of the property rights of the parties and a property settlement arising out of what the defendant alleged, and the plaintiff denied, was a former de facto relationship between them.

The plaintiff’s claim for possession was based upon a loan agreement and an unregistered deed of mortgage, claiming that the defendant had been in breach of the terms of the loan agreement when the plaintiff purported to serve a default notice on him. The defendant did not file a defence in the proceedings and was self-represented.

Decision:

The plaintiff’s motion to extend the caveat

Having regard to the findings made by Sackville AJA in previous proceedings, the Court was satisfied that the plaintiff’s claim to be entitled to an interest in the land as an unregistered mortgagee under the loan agreement and the deed of mortgage is of substance. Therefore, leave was granted to the plaintiff to lodge a further caveat to protect her interest in the land under further order.

The plaintiff's application for summary judgment

Looking at the substance of the matter through the analysis of the previous proceedings between the parties, the Court held that the defendant had a fairly arguable defence to the plaintiff's claim for possession. Therefore, the court did not grant default judgment, but ordered that the defendant file a defence.

The defendant's application for a stay of the proceedings

Subject to compliance with the order for the filing of a defence, the Court granted the defendant's interim stay pending the determination of the separate question in the Federal Circuit Court of Australia.

Winau Aust Pty Ltd & Ors v LCC Property Development Pty Limited & Ors

[2020] NSWSC 434

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 22 April 2020

LAND LAW — Torrens title — Indefeasibility of title — Effects of indefeasibility — Funds advanced by mortgagee pursuant to registered mortgage procured by alleged fraudster purportedly on behalf of mortgagor company — Mortgaged property sold — Which of innocent mortgagee and innocent mortgagor entitled to proceeds

Facts:

These proceedings concerned a consequence of fraud that ultimately posed the question of which of the two innocent parties should bear the financial consequences of the misdeed. In the present case, the choice fell between the mortgagees who believed they were making a loan secured by a registered mortgage to the mortgagor company, or the mortgagor company whose identity was, in effect, stolen by the fraudster purporting to be its sole director and shareholder.

183 Eastwood Pty Ltd ATF Eastwood Unit Trust (‘**183 Eastwood**’) owned three parcels of land in Eastwood with which it intended to develop property (‘**the Lands**’). The third, fourth and fifth defendants (‘**the Mortgagees**’) advanced $4,000,000 secured by three identical registered mortgages (‘**the Mortgages**’), one over each parcel of the Lands. By his allegedly wrongful conduct, Mr Chan (‘**the second defendant**’) was able to hold himself out as the sole director and shareholder of 183 Eastwood, and obtain replacement certificates of title for the Lands, and was a guarantor under the Mortgages. The funds advanced by the Mortgagees were paid into a bank account in the name of 183 Eastwood that had been set up by the second defendant without the knowledge or authority of the true directors of 183 Eastwood.

No repayments were made to the Mortgagees, and the funds that they advanced were gone. The Court indicated that the second defendant was also the subject of various criminal charges. In exercising their rights, the Mortgagees sold the Lands and the proceeds of sale had been paid into Court. The mortgagees submitted that they are entitled to such proceedings, whilst 183 Eastwood and the other plaintiffs submit to the contrary. The parties agreed that the Court decide on a separate question, being, whether the registered mortgages secure anything in favour of the mortgagees against the Lands and against the proceeds of sale of the Lands (‘**the Separate Question**’).

The Parties' submissions

The parties accepted that answering the Separate Question was solely a question of the proper construction of the Mortgages. The parties' submissions were conveniently divided into three limbs:

1. What did the Mortgages secure?
2. The Westpac Bank Account.
3. Mr Chan's guarantee.

Submissions on what the Mortgages secured

Plaintiffs' submissions:

In essence, the plaintiffs' submission was that the Mortgages, although indefeasible upon registration, secured nothing because no money was ever advanced to nor received by 183 Eastwood. In other words, without any advance to 183 Eastwood pursuant to the terms of the Mortgages, there was simply nothing to which the alleged debt can attach.

Mortgagee's submissions:

The Mortgagees submitted that the Separate Question be answered in the affirmative and pressed for the release of the entirety of the proceeds of sale to them, rejecting that 183 Eastwood had any basis to those funds.

Submissions on the Westpac Bank Account

The Court indicated that the appropriate question under this limb was who owned the money deposited by the Mortgagees into the Westpac Bank Account opened by Mr Chan in the name of "183 Eastwood". In other words, to whom did the Mortgagees pay the monies that were deposited into that account?

Plaintiffs' submissions

The plaintiffs submitted that the mere fact Mr Chan set up a bank account in the name of 183 Eastwood did not make it the company's bank account, therefore, 183 Eastwood could not be beneficially entitled to the amount remitted by the Mortgagees.

Mortgagee's submissions

The Mortgagees submitted that 183 Eastwood owned the money deposited into the Westpac bank account in the name of 183 Eastwood.

Submissions on Mr Chan's guarantee

Plaintiffs' submissions

The plaintiffs contended that Mr Chan's personal liability under the guarantee was not rendered indefeasible by registration of the Mortgages.

Mortgagees' submissions

The Mortgagees argued that this was an irrelevant issue, with none of the contentions put forward by the Mortgagees relying upon Mr Chan's personal guarantee being indefeasible.

Decision:

In applying of basic principles of contract and legal personality to the terms of the Mortgages properly construed, and in answering the Separate Question, the Court held that the Mortgages did not secure anything, and that 183 Eastwood was entitled to the proceeds of sale of the Lands.

Winau Aust Pty Ltd & Ors v LCC Property Development Pty Limited & Ors (No 2)

[2020] NSWSC 586

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 19 May 2020

LAND LAW — Torrens title — Indefeasibility of title — Effects of indefeasibility —Proper construction of acknowledgement in mortgage where advance never received by mortgagor due to intervention of alleged fraudster

Facts:

The Court received oral and written submissions in connection with this case concerning entitlement to the proceeds of sale of a property (‘**the Lands**’) that had been paid into the Court.

183 Eastwood Pty Ltd ATF Eastwood Unit Trust (‘**183 Eastwood**’) owned three parcels of land in Eastwood with which it intended to develop property (‘**the Lands**’). The third, fourth and fifth defendants (‘**the Mortgagees**’) advanced $4,000,000 secured by three identical registered mortgages (‘**the Mortgages**’), one over each parcel of the Lands

The parties agreed that the Court decide on a separate question, being, whether the registered mortgages secure anything in favour of the mortgagees against the Lands and against the proceeds of sale of the Lands (‘**the Separate Question**’). By its judgment published on 22 April 2020, the Court answered that the registered Mortgages did not secure anything in favour of the Mortgagees against the Lands and against the proceeds of sale of the Lands.

In such proceedings, no final orders were made to give effect to a Principal Judgment and the parties were invited to consider whether they were prepared to consent to a course which would facilitate the just, cheap and quick resolution of the remaining issue. The course which the Court suggested was that:

1. The parties identify those parts of their submissions which dealt with the Mortgagees’ contention that an acknowledgment of receipt by the mortgagor company of the principal amount, which enabled the benefit of indefeasibility upon registration; and
2. That the Court issue a judgment dealing with this express contention.

Mortgagees’ submissions

In short, the Mortgagees submitted that clause 2.3 of a Memorandum of Common Provision ('**MCP**') contained a freestanding acknowledgement of receipt by 183 Eastwood of the Principal Amount, which clause obtained the benefit of indefeasibility upon registration so that the Mortgages secured the Mortgagees' right to repayment of the Principal Amount against the Lands. The Mortgagees further submitted what was referred to as an Indefeasibility Acknowledgement Argument - where an acknowledgement of the advance of funds was recorded in a registered mortgage, the mortgagee obtains an indefeasible entitlement to payment of those monies from the security property. The Mortgagee's contended that if the Indefeasibility Acknowledgement Argument was accepted by the Court, then the analysis in the Principal Judgment would be altered.

Decision:

The Court did not accept the Mortgagees' Indefeasibility Acknowledgement Argument. As such, the Court denied that clause 2.3 of the MCP created a freestanding obligation on 183 Eastwood to repay the funds advanced by the Mortgagees, which obligation was secured by the Mortgages and thereby gained the benefit of indefeasibility. Therefore, since the Court rejected the Indefeasible Acknowledgement Argument, the Court's answer to the Separate Question remained "No – the Registered Mortgage does not secure anything in favour of the Mortgagees against the Lands and against the proceeds of sale of the Lands".

Xu v Lindsay Bennelong Developments Pty Limited

[2020] NSWSC 1692

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 27 November 2020

LAND LAW — Conveyancing — Contract for sale — Off-the-plan purchase — Alleged breach of fundamental term — Remedies

CONTRACTS — Misleading conduct under statute — Misleading or deceptive conduct — Representations — Remedies

Facts:

These proceedings involved Lijun Xu ('**the plaintiff**') seeking specific performance against TFM Rushcutters Bay Land Pty Ltd ('**the third defendant**') due to alleged misleading representations made by Lindsay Bennelong Developments Pty Limited ('**the first defendant**'). The first defendant sold a parcel of a residential apartment lot in Rushcutters Bay to the plaintiff; however, the plaintiff was expecting the apartment to also contain two parking spaces.

The first defendant sold the third defendant the underdeveloped parcel of land by contract of sale ('**TFM Contract**'). prior to such sale, the plaintiff and her husband had entered into a contract ('**Xu Contract**') for the sale of Lot 36, which was to be created on registration of a strata plan once the development was completed. On the first defendant's sale of the land to the third defendant, the parties entered into a Novation Deed, and the third defendant was directed that the plaintiff would be the sole purchaser.

In essence, the plaintiff's primary case was that she was entitled to a second car parking space (or in the alternative, damages) pursuant to the Xu Contract. Such claim arose out of the fact that what the third defendant ultimately transferred to her was an apartment – being Lot 36 of the Strata Plan – with a single parking space. Accordingly, the plaintiff contended that the apartment was alleged to have a tandem car parking space, pursuant to the draft strata plan annexed to the Xu Contract, or two car parking spaces, pursuant to the notation on the floor plan contained in the marketing brochure provided to the plaintiff. As such, the plaintiff contended that it was a fundamental term and the main purpose of the Xu Contract, or in the alterative, an implied term that the property to be conveyed to her (Lot 36) have two car spaces. Therefore, the plaintiff sought specific performance of the Novation Deed, by an order that the third defendant transfer a second car space to her.

Decision

Although it was accepted that representations were made to the plaintiff by the first defendant, ad later by the third defendant, as to what was promised in the u Contract, the Court found that those representations were not misleading or deceptive. Further, the Court considered that insofar as those representations were of future matters, it was found that they were not misleading or deceptive as there was reasonable basis for the making of those representations at the time they were made, based on the evidence provided by the first defendant.

In addition, the Court did not accept that a promise had been made to the plaintiff that the property would be identically depicted per the draft strata plan. As such, to the extent that the representation was a future matter, the Court held that such representation would have been understood by the reasonable person in the plaintiff's position as being the subject to the terms of the Xu Contract. Further, the Court also considered that the first defendant had satisfied the evidentiary onus of submitting evidence and that it had reasonable grounds for the making of such a representation.

Finally, the Court held that it was abundantly clear that the plaintiff signed the Deed of Novation, not in reliance on any promise or representation made by the first defendant, but in reliance on the promise made by the third defendant in the Novation Deed that, in effect, it would honour the obligations of the vendor under the Xu Contract. Thus, the Court dismissed the plaintiff's claim against the defendants.

Ye v Fang

[2020] NSWSC 687

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 3 June 2020

CONTRACTS – formation – whether binding oral loan agreement made – parties intended to be immediately bound to agreed terms albeit that it was contemplated that a written agreement would be entered into later – advances made in accordance with agreement – subsequent agreement to make another advance – agreement a separate agreement not a variation of existing agreement – separate agreement not part of pleaded case – written Loan Agreement does not include further advance – lender entitled to recover amount due under Loan Agreement – amount secured by equitable charge granted under Loan Agreement

Facts:

These proceedings concerned Mr Ye (‘**the plaintiff**’) seeking relief against Ms Fan Fang (‘**the first defendant’**) and Fang Fan Pty Ltd (‘**the second defendant**’) in respect of a loan agreement the plaintiff alleges was made in 2017. The plaintiff sought declaratory relief as to the existence of the agreement, and as to an alleged variation of the agreement. Further, a declaration was also sought that the plaintiff has an equitable charge over a property in Lidcombe owned by the first defendant. The plaintiff further sought an order that the first and second defendants (‘**the defendants**’) pay him a sum of $503,000, which is alleged to be the amount of principal and interest outstanding under the agreement. In the alterative to that order, the plaintiff sought an order for the judicial sale of the Lidcombe property.

The plaintiff contended that the loan agreement was entered into in 2017 and, so far as the agreement was written, it was contained in a Loan Agreement prepared at about that time and executed by the parties a few months later. The material terms of the agreement were alleged to include the following:

1. That the plaintiff would lend the sum of $300,000 to the defendants;
2. That the defendants would pay interest at the rate of $60,000 per annum;
3. That the loan would be repaid by minimum monthly payments of $4,166.70 with any balance outstanding to paid to the plaintiff by 2019; and
4. That the defendants would provide security by means of a caveat over the Lidcombe property.

The plaintiff further alleged that the agreement was varied in 2017 in a conversation he had with the first defendant, such that the loan principal was increased to $383,000.

There was no doubt in the evidence that various sums totalling to $383,000 was transferred into an account held by the first defendant's partner. As such, the plaintiff contended that such transfers constituted the advances of principal under the loan agreement. There was also no doubt that the execution of the loan agreement took place due to an instrument dated accordingly. The defendants admitted execution of the Loan Agreement in 2017 but denied that they entered into any agreement with the plaintiff as alleged. Specifically, the defendants denied that either of them received any funds pursuant to the Loan Agreement from the plaintiff, and further denied that the plaintiff was entitled to any relief.

There were also issues surrounding the reliability and credibility of the parties in providing evidence, particularly with respect to alleged meetings and conversations that had occurred between the plaintiff and the first defendant, including the conversation whereby the agreement was varied. Accordingly, the Court formed a reasonably favourable impression of Mr Cheng, the plaintiff's solicitor, as a witness, and therefore accepted most the plaintiff's evidence.

Decision:

The Court held that the plaintiff was entitled to judgment in the sum of $420,000, plus $28,677.81 interest. Furthermore, the Court was satisfied that the first defendant granted an equitable charge in favour of the plaintiff to secure repayment to him of amounts owing under the agreement, and therefore, made a declaration to that effect. The Court however did not find any need for any other declaratory relief in relation to the Loan Agreement. Finally, the plaintiff indicated that as the registered mortgagee of the Lidcombe property was not a party to the proceedings, it was not appropriate to seek orders for judicial sale.