REAL PROPERTY CASES 2021

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2021

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1190 Pacific Highway Pty Ltd v Link Start Pty Ltd

[2021] NSWSC 671

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 4 June 2021

LAND LAW — Caveats — Extension of operation of caveat — Balance of convenience

Facts:

These proceedings concerned an application for an extension of certain caveats on properties situated on the Pacific Highway at Pymble. The plaintiff and defendant entered into a joint venture agreement ('**Agreement**') to undertake a project involving the development of the Pacific Highway land.

The parties also entered into an option deed, where the defendant granted a call option to enable to grantee to require the grantor to sell the property. Relevantly, the call option exercise period made clear that it is only exercisable once the call option fee of $1.2 million had been paid. Further, the option deed contained that a payment of $50,000 had already been paid and the second tranche of $950,000 was due eight weeks after the date of the document.

The defendant gave a notice of termination of the Agreement, relying upon a failure by the plaintiff to pay the second tranche of consideration and following multiple default notices that had been issued by the plaintiff. The termination of the Agreement also operated to terminate the call option deed by reason of interdependency between the two.

The plaintiff had lodged caveats over the properties that were the subject of the Agreement between the parties. The relevant caveatable interest that was identified by the plaintiff was the right to purchase the property under the call option deed. The plaintiff maintained, and the defendant denied, that the defendant had repudiated its obligations under the Agreement. The test that was applied in determining whether to extend the caveat is that there must be a serious question to be tried as to the existence of the caveatable interest and then that the balance of convenience favours the extension of the caveat.

The defendant argued that there was no serious question for trial as the call option was granted in consideration of payment of the $1.2 million option fee, and that the fee had not been paid pursuant to the tranches contained in the option deed. Further, the defendant argued that even if it's alleged breach of the Agreement had occurred, the plaintiff was not ready, willing and able to pay the consideration required for the call option fee. In the absence of an offer to make such payment, the defendant submitted that the caveats should not be extended.

Decision:
Ward CJ agreed with the defendant and was of the view that the relief be refused, and that summons seeking an extension of the caveats were to be dismissed. Accordingly, the Court ordered that the plaintiff pay the defendant's costs of the proceedings.

Ageist Pty Ltd v Lilly (Lila) Stojcevski

[2021] NSWSC 1105

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 23 August 2021

LAND LAW — Caveats — Removal of caveat – Application to remove caveat over property under a contract of sale entered into on 11 December 2020, settlement having been delayed since February 2021 - several prior caveats lodged and claims made by the Defendants and related parties on and in respect of the property — the Court, on prior occasions, ordered that all caveats lodged by the Defendants (and other related parties, including the Defendants' mother) be removed — Plaintiff contends there is no serious question to be tried and no injunction would be granted to the caveators to preclude the sale and that the balance of convenience favours the removal of the caveat – where the property is subject to two registered mortgages and the debt under the second mortgage will not come close to being satisfied by sale of the property, and where the Defendants claim an equitable interest – whether there is a lack of utility — Held: there is no utility in the caveat because there could be no balance over which the Defendants can make a claim, the caveat is not bona fide, and the balance of convenience strongly favours the progress of the sale.

Facts:

These proceedings concerned Ageist Pty Ltd ('**the plaintiff**') seeking the removal of a caveat ('**the current caveat**') lodged by the Defendants in respect of a property at Port Kembla ('**the Property**'). The current caveat assets a beneficial interest in a constructive trust for the caveators. There were two registered mortgages on the Property, one in favour of The Trust Company (PTAL) Ltd ('**PTAL**') which secured a debt of around $386K and the second, which was held by the plaintiff, securing a debt of around $1 million.

The plaintiff exercised its power of sale and entered into a sale contract with Ms Eva Nordstrom for $650K. The sale was not able to proceed due to numerous caveats lodged on title firstly by the registered proprietor Samuel M Holdings Pty Limited ('**SMH**'), by Bosilka Stojcevska (the mother of the defendants) and by the two defendants themselves.

The Court noted that the SMH caveat was withdrawn in a separate judgment of her Honour Justice Henry ('**the SMH Judgment**'), as well as the other caveats in other proceedings. The plaintiff was not aware of the current caveat until right before the SMH Judgment was handed down. Henry J refused to deal with the current caveat at that time, which was the reason for these fresh proceedings in relation to the current caveat.

The plaintiff submitted that the caveat should be removed because there is no serious question to be tried and no injunction would be granted to the caveator to preclude the sale to the purchaser, and even if there was, the balance of convenience favours the removal of the caveat.

Decision:

In applying the principles analogous to an application for an interlocutory injunction, Rein J held that the debt under the second mortgage would not have come close to being satisfied by a sale of the property. As such, the sale proceeds of $650k would be insufficient to meet both the first and second registered mortgage debts. Further, Rein J held that the equitable interest claimed by the defendants could not defeat the interests of the registered mortgagees, and consequently, the caveat can have no utility. Therefore, Rein J was not convinced that the current caveat was bona fide, and ordered its removal on that basis.

Finally, the balance of convenience strongly favours the progress of the sale to Ms Nordstrom.

Ageist Pty Ltd v Samuel M Holdings

[2021] NSWSC 988

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 6 August 2021

LAND LAW – Caveats – Extension of operation of caveats – where caveats claim interests based on bad faith by mortgagee in exercising its power of sale – where bad faith alleged in relation to mortgagee's removal of property from auction and decision to sell to third party – caveats ordered to be withdrawn

Facts:

These proceedings concerned a caveat lodged against the title to the Port Kembla property by Mrs Stojcevska ('**the second defendant**'). The caveat had prevented completion of a contract of sale entered into by Ageist Pty Ltd ('**the plaintiff**') in the exercise of its power of sale as mortgagee. Samuel M Holdings Pty Ltd ('**the first defendant**') was the registered proprietor of the Port Kembla property.

On 19 July 2021, Darke J made orders that the second defendant withdraw its caveat, be restrained from lodging any further caveats on the Port Kembla property, and pay the plaintiffs costs. The plaintiff had applied on numerous occasions for numerous caveats to be removed.

The Court approached the current application by applying the principles for withdrawal of a caveat under s 74MA of the *Real Property Act*. The defendants contended that the interest claimed in the caveat is an equitable interest, whereby the plaintiff as mortgagee had entered into a contract for sale of the Port Kembla property in bad faith in the purported exercise of the power of sale. The defendants submitted that there was overarching bad faith by the plaintiff as it had taken possession of the Port Kembla property, purported to sell it via auction and to other purchases, and incurred expenses in doing so to gain an advantage.

The plaintiffs submitted that there were no serious questions to be tried in respect of the interests claimed in the caveats, and that it was merely exercising a legal right under its registered mortgage to sell the property. Accordingly, the plaintiffs submitted that the purported equitable interests claimed by the caveators were not capable of interfering with the plaintiff's indefeasible legal right. It was also submitted that its power of sale was exercises properly by entry of sale with an arm's length and a third party purchaser. As to the bad faith argument, the plaintiff submitted that a mortgagee is free to determine the time and manner of the sale as the power of sale is bestowed upon a mortgagee for the mortgagee's own benefit. Finally, the plaintiff submitted that even if the Court proceeded on the assumption that a serious question to be tried did exist, the balance of convenience weighed heavily in favour of the removal of the defendant's caveats, particularly, that deficit would remain after the sale of the property to the third party. Therefore, the plaintiff concluded by submitting that the caveats lodged were not bona fide.

Decision:

The Court held that the defendant's caveats should both be withdrawn, and that this decision was based primarily on balance of convenience grounds. Accordingly, in respect of the first caveat, Henry J concluded that the risk of injustice to the plaintiff if the caveat remained, so as to prevent the sale, exceeded the risk to the defendant as mortgagor, and the sale was to proceed. In respect of the second caveat, Henry J accepted the plaintiff's argument that there was a serious question to be tried as to the failure to establish a proprietary interest of the nature claimed in that caveat. Therefore, the Court ordered that the first and second defendants be restrained from lodging any further caveats on the property.

Alexakis v Wan

[2021] NSWSC 367

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 12 April 2021

LAND LAW – contracts for the sale of land – deposit payable in two instalments – second instalment payable "on the 4th month after the contract date" – contract dated 4 April 2019 – whether second instalment required to be paid by 4 August 2019, or by 31 August 2019 – held that payment was required by 4 August 2019 – vendors held to be entitled to terminate contract on 5 August 2019 – Conveyancing Act 1919 (NSW) s 181(1)(d) definition of "month" as "calendar month" – Interpretation Act 1987 (NSW) s 21 definition of "calendar month"

EQUITY – equitable remedies – relief in respect of exercise of legal rights – exercise of right to terminate contract for sale of land – breach giving rise to right of termination brought about by purchaser's mistake – mistake not caused or contributed to by conduct of vendors – serious breach in failing to pay part of deposit within time agreed to be essential – no substantial loss or prejudice to vendors if contract ordered to be performed – not unconscientious of vendors to rely upon their termination – equitable relief declined – forfeiture of deposit of 5% of the price not unjust or inequitable in the circumstances – no order made for return of deposit under s 55(2A) of Conveyancing Act 1919 (NSW)

Facts:

These proceedings concerned a contract for the sale of land in Vaucluse, where the deposit was due to be paid by the purchaser ('**the plaintiff**') in two instalments to the vendors ('**the defendants**'). The purchase price under the contract was $4,830,000, and the first page of the contract indicated that the deposit was $483,000, being 10% of the purchase price. However, Additional Condition 38 provided for a deposit of only $241,500, being 5% of the purchase price, payable in two instalments. It became common ground that the deposit was in fact only $241,500, and that the plaintiff paid the first instalment of $150,000 on the exchange of contracts as required.

The dispute between the parties was premised on the true construction of the obligation to pay the second instalment of $91,500. In accordance with Additional Condition 38, the second instalment was to be paid "on the 4th month after the contract date". As such, the defendants took the view that this required payment by no later than 4 August 2019. Thus, as the plaintiff did not pay the second instalment by that date, the defendants purported to terminate the contract on 5 August 2019.

The plaintiff contended that the second instalment was not required to be paid until 31 August 2019, or alternatively until 5 August 2019, and in either case the defendant's purported termination was ineffective. The plaintiff in fact paid $91,500 the second instalment on 7 August 2019, after the purported termination of the contract. Further, the plaintiff sought relief against forfeiture in relation to the defendants' exercise of the legal right to terminate, or in the alternative, an order under s 55(2A) of the *Conveyancing Act 1919* (NSW) for the return of the deposit.

The defendants submitted that the fourth month after the contract date was a period that commenced on 5 July 2019 and concluded on 4 August 2019. Accordingly, the defendants contended that they were entitled to terminate the contract on 5 August 2019. The defendants relied upon s 181(1)(d) of the *Conveyancing Act 1919* (NSW) which defines a 'month' as a 'calendar month' under in s 21 of the *Interpretation Act 1987* (NSW). Therefore, the question was whether the second instalment was required to be paid on the 4th or by the 31 of August 2019, and in particular, the meaning of the expression "on the 4th month after the contract date".

Decision:

Darke J accepted the defendant's argument and held that the second instalment of the deposit was required to be paid by the plaintiff no later than 4 August 2019. Therefore, the failure of the plaintiff to make payment within that time meant that the plaintiff had failed to comply with an essential time requirement of the contract. Accordingly, the defendants were thereby entitled to terminate the contract on 5 August 2019 and keep the first instalment of the deposit of $241,500. Further, the plaintiff was denied relief against forfeiture of the deposit, as it was not found to be unjust or inequitable in the circumstances, alongside the return for the deposit under s 55(2A).

Almona Pty Ltd v Parklea Corporation Pty Ltd

[2021] NSWCA 171

Coram: Bathurst CJ, Basten and White JJA

Court: New South Wales Court of Appeal

Date: 11 August 2021

MORTGAGES AND SECURITIES – mortgages – duties, rights and remedies of mortgagee – power of sale – mortgagee's duty to exercise power of sale in good faith – effect of contract of sale upon mortgagor's rights – whether attempt to refinance and discharge mortgage prior to transfer of title can prevent sale – where mortgagor's attempts to refinance accelerated the sale process

MORTGAGES AND SECURITIES – mortgagee exercising right of sale – price higher if vacant possession given – requirement of vacant possession not communicated to occupant – damages awarded for failure to communicate occupation condition

LAND LAW – Torrens title – exceptions to indefeasibility – fraud by mortgagee exercising power of sale – bid-rigging where alleged collaborator later acquired share in successful purchaser – whether collusion established

LAND LAW – mortgages – mortgagee sale – where owner of the mortgagee financed the purchase and acquired option to control purchaser – honesty and independence of sale process – good faith exercise of power of sale – pre-existing relationship between parties acting on other projects – whether lack of independence in sale process indicative of fraud – burden of disproving fraud

Facts:

Almona Pty Ltd ('**the plaintiff**') was the registered proprietor of land over which SAP ('**the third defendant**'), part of the Pacific Alliance Group ('**PAG**'), held a mortgage. In 2013, the plaintiff defaulted entered into a refinancing agreement with the third defendant, but defaulted under the agreement. The third defendant sought to exercise its power of sale as mortgagee and a sales process was conducted. The highest bidder was originally Wesco Capital Pty Ltd, but later reduced its bid substantially and left Dyldam Group to be the highest bidder. As such, Parklea Corporation Pty Ltd ('**the first defendant**') was established by Dyldam to be the purchaser. The first defendant entered into a contract with the third defendant to sell the land, whereby a sale price of $85.35 million was agreed with vacant possession, or $81.1 million if the plaintiff's principal, whose home was on the land, remained in possession. The land was ultimately sold for the lower purchase price of $81.1 million.

Representatives of PAG and Dyldam had met prior to settlement in Hong Kong. When they sale settled, the bulk of the finance came from another PAG entity, which had an option to acquire 80% interest in the first defendant. However, before settlement, the third defendant delayed the provision of information to the plaintiff, and expedited the settlement process in order to avoid the plaintiff's attempt to settle its debt.

First Instance:

After settlement, the plaintiff commenced proceedings seeking to set aside the transactions on grounds of fraud, breach of duty, unconscionable conduct and misleading or deceptive representations on the part of the first and third defendants. The trial judge awarded the plaintiff $4.25 million against the first defendant for failure to reveal the occupation condition but otherwise rejected the plaintiff's primary claim. The plaintiffs primary claim included allegations that:

a. PAG had manipulated the sale process by hastening settlement of the sale to prevent the plaintiff from obtaining funding to discharge its mortgage;
b. PAG had manipulated the sale process by acquiring through another subsisrary an option to obtain a controlling interest in the purchaser; and
c. There had been collusive bidding through an arrangement between Wesco Capital Pty Ltd and the first defendant whereby Wesco reduced a higher bid in exchange for an interest in the purchaser.

The Appeal:

The plaintiff appealed, and the first defendant cross appealed. The orders sought by the plaintiff on appeal included setting aside the contract of sale and the registered mortgages which financed the purchase by the first defendant, revesting the land, and taking accounts as between the plaintiff and the first and third defendant.

Decision:

The Court found that the third defendant was required to exercise its power of sale honestly and for the purpose of recovering its debt. However, the Court held that it had not breached its duty by accelerating settlement of the sale while the plaintiff attempted to obtain funding to discharge its mortgage. The Court went on to indicate that the evidence did not establish that the purpose of the sale was to give PAG an interest in the property, rather than to allow it to recover its money. Therefore, it could not be established that the sale was not an independent process. Further, the Court held that whilst the inference that Wesco had colluded with Dyldam to ensure that Dyldam made the highest offer was available, the claim of fraud was not pleaded and therefore could not constitute a basis for finding a breach of the mortgagee's duty. Accordingly, the appeal was dismissed, and the first defendant's cross-appeal was also dismissed.

Anastasia Kalathas v 89 Ebley Street Pty Ltd

[2021] NSWSC 490

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 19 April 2021

LAND LAW — Conveyancing — Contract for sale — Rescission – in 2017 the Vendor and Purchaser entered into a contract for sale of a commercial property which was yet to be built (“the Contract”). Upon registration of the strata plan in February 2020 (“the February Strata Plan”) the Vendor issued a Completion Notice, an Occupation Certificate, and subsequently a Notice to Complete. The Contract included a car space for the commercial premises, however, the February Strata Plan did not include a car space allocated to the commercial lot of the Purchaser – the Purchaser sought to rescind the Contract in accordance with the Flight v Booth principle – the Vendor was not in the position to complete the Contract as at the date of the Notice to Complete as there was no car space on the registered plan allocated to the Purchaser’s lot – the Purchaser was entitled to draw the conclusion from the February Strata Plan, the Vendor’s Completion Notice and Notice to Complete that the Vendor was not proposing to convey a car space – the Purchaser was entitled to terminate the Contract and entitled to return of her deposit – the fact that the Vendor, almost three months after the Purchaser had commenced proceedings, registered a new strata plan and was by then in a position to complete did not assist the Vendor.

CONTRACTS — Termination — Repudiation of contract — Readiness and willingness – by the February Strata Plan which did not include a car space and by issuing the Notice to Complete, the Vendor indicated an unwillingness to perform the Contract – the Court upheld the termination of the Contract on the basis of the Vendor’s repudiatory conduct. No affirmation of the Contract by the Purchaser with knowledge of the absence of a car space.

Facts:

These proceedings concerned a contract for sale of a commercial premises in Bondi Junction that was to contain both residential and commercial elements (‘**the contract**’). 89 Ebley Street Pty Limited (‘**the defendant**’) was the vendor, and Ms Anastasia Kalathas (‘**the plaintiff**’) was the purchaser, under the contract. the plaintiff commenced proceedings to seek an order that the contract is at an end, and that she be returned a $37,500 deposit paid by her to the second defendant. The draft strata plan showed the lot including a car space, and completion would follow the strata plan’s registration.

As the lot required building, the contract dealt with the contingencies, allowing for differences between the registered strata plan and the draft strata plan. Differences were either “minor strata variations”, such as changing lot numbers or reducing the lot’s area by less than 5%, or other variations, presumably substantial variations. The contract further curtailed rescission rights, expressly indicating that the purchaser could not “rescind, terminate or delay completion” because of differences between the strata plan in draft and as registered.

Once the strata plan was registered in 2020, the plaintiff’s lot 1 on the draft strata plan became lot 3 on the registered strata plan. At this stage of completion, the car spot was missing, but the plaintiff did not notice at this stage. Thereafter, the plaintiff did not complete, not because of the missing car spot (which arose later), but due to the changing of lot 1 to 3, contending that this was significant, and that completion should be delayed.

The next day, the defendant issued a notice to complete. The plaintiff, becoming aware of the missing car space, contended that the notice to complete was forcefully attempting to accept the lot, despite it substantially differing from the contract due to the absence of a car space. Accordingly, the plaintiff notified her rescission of the contract, and in the alternative, terminated the contract by accepting the defendant’s repudiation.

In response, the defendant contended that it could rectify any error by providing a car space, and was said to prevent the plaintiff’s rescission right or for their being a repudiation capable of acceptance. As such, the defendant promised the provide the car space if the plaintiff were to complete within a reasonable time.

Decision:
The Court identified that the issues for determination were whether there is a discrepancy between the subject matter of the contract and what the defendant was proposing to covey in satisfaction of the defendant’s obligation under the contract, and, whether the plaintiff is entitled to rescind the contract and entitled to return of her deposit.

The plaintiff relied upon the principle in *Flight v Booth*, in that, purchasers cannot be forced to accept a property that is substantially or materially different from what they contracted to buy. Rein J held that the plaintiff was entitled to draw the conclusion that the defendant was not proposing to convey a car space as part of the commercial lot. Accordingly, the plaintiff was entitled to terminate the contract, and whilst there was no contractual provision dealing with the return of the deposit, the plaintiff was entitled to return of her deposit.

Ausko Cooperation Pty Ltd v Junapa Pty Ltd

[2021] NSWSC 615

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 1 June 2021

CONTRACTS – formation of contracts – intention to make concluded bargain – lessee sought to negotiate new five-year lease with lessor – retail shop premises – parties reached consensus as to terms necessary for a new lease but did not execute a lease document – previous lease dealt comprehensively with the parties' obligations to each other – no discussion of a number of important matters including insurance, bank guarantee and guarantee of lessee's obligations – requirements of Retail Leases Act 1994 (NSW) not met – not implicit that the parties intended to be bound on the terms of previous lease save for changes to accommodate the matters agreed upon in negotiations – held that the parties did not intend to be bound immediately – no binding agreement reached

LAND LAW – leases – Retail Leases Act 1994 (NSW) ("the Act") – "retail shop lease" – necessary that there be a concluded agreement intended to be binding whereby a right of occupation is granted – no such agreement concluded for a right of occupation for a 5 year term with an option for a further term of 5 years – section 8 of the Act is concerned with when a retail shop lease is deemed to have commenced or been entered into not whether a retail shop lease has come into existence – no retail shop lease came into existence

Facts:

These proceedings concerned Ausko Cooperation Pty Ltd ('**the plaintiff**') challenging the validity of a notice to vacate that had been served by Junapa Pty Ltd ('**the defendant**') in respect of a retail premises in Concord. The plaintiff was in occupation of the premises for the purpose of conducting a café restaurant and gift shop business. Further, the plaintiff sought declaratory relief to the effect that it was entitled to have the agreement for lease of the shop premises specifically performed.

The central issue for determination was whether the plaintiff and defendant entered into a binding agreement for a new lease of the shop premises. The plaintiff as lessee, and the defendant as lessor, had been parties to a registered lease of the premises for a five-year term, from 31 August 2015 to 30 August 2020. Further, the lease contained an option to renew for a further period of 5 years, however, the plaintiff decided not to exercise the option within the relevant period. Nonetheless, the plaintiff later entered into negotiations with the defendants, indicating a willingness to continue business at the premises, only at a substantially lower rent. The proceedings were chiefly concerned with the legal effect of such negotiations between the parties that followed.

The plaintiff contended that the parties entered into a new lease of the shop premises or made a new lease of the premises on the commercial terms agreed between them. Alternatively, it was submitted that the parties agreed to enter into a new lease on the terms of the existing lease save for changes made to accommodate the matters agreed upon in the correspondence between them. Finally, the plaintiff also advanced a case in estoppel, based on an alleged representation made by the defendant to the effect that it was intended that the new lease or agreement for a new lease was to be legally binding.

In response, the defendant submitted that some issues had not been resolved between the parties, and contended that the subject if the existing lease was not the subject of discussion at all. It was further submitted by the defendant that the conduct of the parties should be viewed objectively, and should not be regarded as having intended to be immediately bound to a lease for a term of 5 years with an option for a further 5 years. Therefore, the defendant submitted that no concluded agreement had been reached.

Decision:

The Court considered that it the plaintiff and defendant had reached an agreement upon the terms that are legally necessary to constitute an agreement for a lease, as they were in agreement regarding the premises, the term and the rent. However, the Court indicated that agreement on what is legally necessary for a lease agreement is not equivalent to an intention to make a concluded bargain. As such, in determining whether the parties had that intention, it was necessary for the Court to objectively analyse their conduct. In these circumstances, the parties should have contemplated that a formal lease document would be prepared and executed, alongside other requirements such as a lessor’s disclosure statement.

Thus, Darke J was u0nable to accept that the parties intended to be bound to an agreement on only the terms set forth in correspondence, without addressing the various issues of the existing lease. The Court also rejected the plaintiff’s alternative arguments on a similar basis. Therefore, the plaintiff failed to make out any of its claims against the defendant, and accordingly, the statement of claim was dismissed with costs.

Australian Retirement Holdings v Tracing Higgins

[2021] NSWSC 1158

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 13 September 2021

LAND LAW — Adverse possession — Possessory application over Torrens title land — Where the plaintiff sought a declaration that it and its predecessors had exercised adverse possession over neighbouring land and that it was entitled to be registered as the proprietor of that land — Where the active defendant is the executor of the estate of the registered proprietor of that land — Where the plaintiff claimed that the defendant is statute-barred from seeking recovery of the land — Where the defendant did not admit the plaintiff's claim and put the plaintiff to strict proof of its validity — Where the plaintiff's case was that it and two predecessors had exercised adverse possession over the land in fact and had the relevant intention to possess for the required 12 year period — Where the Court found that the evidence of actual possession in fact relied upon by the plaintiff was not sufficient to establish adverse possession over the land, as opposed to mere use — Where the Court found that it was not satisfied that the plaintiff and its predecessors had the relevant intention to possess the land for the required 12 year period — Where the Court held that the plaintiff did not establish that it and its predecessors successively exercised adverse possession over the land for the relevant 12 year period

LIMITATION OF ACTIONS — Operation of bar — Extinction of title after expiry — Where the plaintiff adverse possessor claimed that the defendant was statute-barred from exercising a right of recovery of land — Where the plaintiff claimed that it and its predecessors had successfully exercised adverse possession over the land for the relevant 12 year period — Where the Court found that the actions of the plaintiff were likely sufficient to establish adverse possession over the land in recent years but were insufficient to establish adverse possession over the land for the entire 12 year period

Facts:

Australian Retirement Holdings Pty Ltd ('**the plaintiff**') was the registered proprietor of a retirement village situated in Gilead, NSW. The plaintiff was the latest in succession of numerous other proprietors of that land in respect of construction that commenced in 2006. Ms Tracey Higgins ('**the first defendant**') was the administrator of the estate of her grandmother, Monica Pritchard. Ms Beverly Higgins ('**the second defendant**') was the first defendant's mother. Monica and her husband were joint tenants to land that was contiguous with the land owned by the plaintiff.

In mid-2019, the first defendant was made aware that the land remained in the name of her grandparents, and applied for letters of administration of the will of Monica Pritchard. It followed that, subject to the validity of the plaintiff's claim, the first defendant was entitled to the transmission of the land into her name as registered proprietor in her capacity as administrator of her grandmother’s estate.

The plaintiff sought to establish that it and its predecessors had exercises exclusive possession over Mrs Pritchard’s land for a continuous period that is sufficient to cause the first defendant’s entitlement to an order for possession of the land to be statute-barred, with the result that any estate or interest in that land has now been extinguished. In determining this, the onus was on the plaintiff to establish that they had maintained exclusive possession over the property for a continuous period of 12 years, and that the acts that constituted possession of the land were done with the intention to enjoy that possession.

Accordingly, the plaintiff submitted that since 2013, it had cleared vegetation and weeds from the late Mrs Pritchard’s property. further, it was contended that a gate was at the entrance of the road used for access to the property, and that the gate was kept locked unless construction was taking place. In addition, the plaintiff contended submitted that it had reached an agreement with the local Council to maintain the road for construction access. In 2019, the plaintiff hired a security company to patrol the road and the property.

Decision:
The plaintiff’s prospects of success in these proceedings relied on two elements: exclusive possession and 12 years of using the property as if it were its own. Robb J held that the evidence tendered by the plaintiff regarding use of the land was consistent with its argument, however, various members of the local community disputed the plaintiff maintaining exclusive possession. The community members provided evidence that the property was frequently being used for public recreational purposes, and the gate being situated was also in question. The Court found that the plaintiff had also failed to establish that it and its predecessors had exercised adverse possession for the required 12-year period due to the sporadic nature of the development’s construction and proof of a different road being used for access in earlier years. Therefore, the proceedings were dismissed with costs.

Blanco v Wan

[2021] NSWSC 273

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 March 2021

LAND LAW – contract for sale of land – deposit – penalty doctrine – purchaser agreed to pay $205,500 (being 10% of price) by instalments as deposit – purchaser paid $80,000 soon after exchange – remaining $125,500 was payable "on or before settlement" or upon "default" – purchaser failed to complete contract – vendor terminates and seeks to recover the $80,000 paid and also the unpaid $125,500 – held that the initial $80,000 was a deposit to which the principles concerning penalties do not apply – held that the $125,000 was not truly a deposit because it was not payable at a time when it would be an earnest of performance – held that the obligation to pay the $125,000 "on or before settlement" or upon "default" is penal – amount held to be extravagant and disproportionate to the interest of the vendor sought to be protected – vendor held entitled to recover the $80,000 but not the $125,500

CONTRACTS – unfair contracts – Contracts Review Act 1980 (NSW) – contract for the sale of land – agreement made after negotiation of terms – purchaser claimed that she had been exhausted and "gave in" to vendor's agent – whether contract should be set aside as being unjust – no material inequality of bargaining power – purchaser could protect her own interests – held that purchaser entered into contract with an adequate appreciation of its main terms – held that contract did not operate in an unconscionable, harsh or oppressive manner – held that contract should not be set aside

Facts:

These proceedings concerned a contract for the sale of a property in Kingsford between Mr Blanco ('**the plaintiff**') as vendor, and Ms Wan ('**the defendant**') as purchaser. It was agreed that the defendant pay $205,000 (10% of the purchase price) by instalments as a deposit. The defendant paid $80,000 soon after exchange, and the remaining $125,000 was payable 'on or before settlement' or 'upon default.' The defendant failed to complete the purchase, so the plaintiff served a notice of termination of the contract and sought recover the $80,000 paid as well as the unpaid $125,000.

The plaintiff commenced proceedings seeking a declaration that the termination of the contract was valid, and accordingly, orders for payment. The defendant contended that the contract for sale be set aside as an unjust contract due to the circumstances in which it was made, and further sought an order for the return of the deposit that was paid. As such, the defendant submitted that it had signed the contract after the selling agent made representations to her and coerced her into signing where she had an incomplete understanding of the contractual terms, particularly, that there was no cooling-off period.

Further, the plaintiff argued for various monetary claims against the defendant, including recovery of the deposit and the further amount of $125,000. As such, Clause 9 of the contract operated where the plaintiff had terminated the contract due to the failure of the defendant to comply with an essential term of the contract. Clause 9.1 also provided that in these circumstances, the plaintiff could keep or recover the deposit to a maximum of 10% of the purchase price. Accordingly, the plaintiff invoked that Clause 9.1 amounted to $205,000, which is 10% of the purchase price, and consisted of the paid $80,000 and the unpaid $125,000.

Decision:

Setting aside the contract and the termination of the contract

Darke J held that neither the contract as a whole, nor any particular provisions of the contract should be regarded as unjust. The manner in which the contract was made, the substantive terms of the contract and the manner in which the contract would operate, including the absence of a cooling-off period was considered. As such, the Court was not of the view that the contract was unconscionable, harsh or oppressive. Further, Darke J found that defendant entered into the contract freely, and her misunderstanding was not the fault of the plaintiff or his selling agent. For those reasons, the defendant's claim that the contract be set aside was rejected. In addition, Darke J found that the evidence made clear that the defendant failed to complete, and therefore, the plaintiff had a right to terminate the contract by notice. Thus, a declaration to that effect was made.

The plaintiff's claim to recover the deposit

Darke J held that subject to one qualification, the plaintiff would clearly have the entitlement of recovering the whole deposit amount, in the sum of $205,000. As such, the Court held that the initial $800,000 was a deposit, and therefore, the general principles concerning penalty provisions did not apply. Therefore, the position was held to be different towards the $125,000, because that amount was not a deposit and not payable at a time when it would be an earnest of performance. In essence, the $125,000 did not fall within the notion of "the deposit" and it was a penalty. Therefore, the plaintiff was entitled to recover the deposit price of $80,000 together with any interest accrued on that money, but was not entitled to the further $125,000.

BP7 v Gavancorp Pty

[2021] NSWSC 265

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 22 March 2021

STATUTORY INTERPRETATION – meaning of "option to purchase" and "option granted for the purchase" in Division 9 of Part 4 of Conveyancing Act 1919 (NSW) – whether "option to purchase" includes put options – held that "option to purchase" should be construed as an option in the nature of a call option that gives holder or grantee the right to purchase property – "option granted for the purchase" has no wider meaning – statutory expressions given ordinary and natural meanings

LAND LAW – options – deeds of put and call option in respect of fourteen strata scheme lots – vendors granted call options to purchaser – purchaser granted put options to vendors – purchaser paid call option fee being 10% of the respective purchase prices – call option fee to be credited as deposit if any option is exercised – call options not exercised by purchaser – put options exercised by vendors – contracts for sale of land deemed to be entered into – purchaser subsequently rescinded contracts for sale relying upon statutory cooling off period – purchaser forfeits 0.25% of the respective purchase prices – whether purchaser is entitled to refund of call option fees less forfeited amount – where call option fees treated as deposits – held that the purchaser is entitled to refund of call option fees less 0.25% of the respective purchase prices – Conveyancing Act 1919 (NSW), s 66V

Facts:

These proceedings concerned 14 contracts for sale for apartments in two strata schemes in Cronulla, where each contract arose from the vendor ('**the defendants**') exercising a put option granted by the purchaser ('**the plaintiff**'). The call options were not exercised, and the contracts arose pursuant to the exercise of put options by the defendants. Thereafter, the plaintiff purported to rescind each contract during the statutory cooling-off period, pursuant to s 66U of the Conveyancing Act 1919 (NSW) ('**the Act**').

The plaintiff commenced proceedings and sought declarations to the effect that the contracts were rescinded, and that the defendants were in each case obliged to refund certain money in the nature of call option fees that had already been paid by the plaintiff. The defendants denied that the plaintiff had validly exercised rights of rescission under the Act, and accordingly, denied that the plaintiff was entitled to the claimed refunds.

The defendants filed a cross-claim against the plaintiff and also against the solicitors that had been retained by the defendants in relation to the sale transaction. As against the plaintiff, the defendants sought orders for specific performance of the contracts, or alternatively, orders that they were entitled to the call option fees paid by the plaintiff. As for the solicitors, the defendants sought common law damages for alleged breaches of retainer or negligence, and damages under the ACL in respect of misleading and deceptive conduct.

The main issue requiring the Courts' determination was whether such a cooling-off period, and associated rescission rights, were available under the Act. As such, there are limited exceptions to the cooling-off regime stipulated by s 66T of the Act. Particularly, the central issue was the meaning of "option to purchase" under this section, and whether this included put options. Further, the second issue was whether the plaintiff was entitled toa. Refund of the option fees less the forfeited amount of 0.25% of the purchase prices provided under s 66V of the Act.

Decision:

The meaning of 'option to purchase'

Dark J reiterated the rule governing statutory interpretation should be given its ordinary and natural meaning and held that "option to purchase" should be construed as a right in the nature of a call option. It followed that the exemption would not extend to contracts formed in consequence of the exercise of put options.

Did the plaintiff validly rescind the sale contracts?

Noting the above, this question depended upon whether the plaintiff had the benefit of a cooling-off period under the Act, so that it had rights of rescission under s 66U of the Act. Accordingly, Darke J found that the cooling-off period applied in relation to the sale contracts that arose upon the exercise of the put options, and was not excluded by the operation of s 66T(d) of the Act. It followed that the plaintiff was entitled to rescind the contracts within the cooling-off period.

Was the plaintiff entitled to a refund of the call option fee?

Darke J did not accept the defendant's submission that the proper characterisation of the call option fee was not a deposit but rather a non-refundable fee. The Court found that in the circumstances where the put option is exercised, the call option fee is credited as the deposit under the contract. Thus, the call option fee should be regarded as an amount paid by the purchaser in relation to the contract, and on that basis, falls within the notion of a deposit. Therefore, Darke J held that the remaining balance of the call option fee became payable to the plaintiff, and further, that each contract allowed the plaintiff to recover the deposit following the valid rescission of the contract.

CB Cuckoo Pty Ltd v Kyriacou

[2021] NSWSC 991

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 2 August 2021

LAND LAW — Caveats — Removal of caveat — Removal by order of court — Whether serious question to be tried

Facts:

These proceedings concerned an application by CB Cuckoo Pty Ltd and Somersby Aust Pty Ltd (‘**the plaintiffs**’) against George Kyriacou (‘**the defendant**’). The relief sought by the plaintiffs was that the defendant withdraws a caveat over a property on Pitt Street, where the caveatable interest claimed was described as an estate in fee simply by virtue of a beneficial interest in a trust. The plaintiffs were the registered proprietors of the land in question.

The plaintiffs contended that the form of the caveat did not comply with the requirements set out in s 74F(5) of the *Real Property Act* (‘**the Act**’) and that any evidence relied upon by the defendant establishes that the defendant has a caveatable interest in the land. Further, the plaintiffs position was that the defendant’s evidence did not assert facts that give rise to a caveatable interest by the defendant, rather, that the only interest pleaded is that he is the beneficiary of a discretionary trust, as the discretionary object of a family trust. The plaintiffs submitted that it would be the defendant’s mother, Filomina Kyriacou, that would be the appropriate party to seek to claim or enforce some sort of beneficial interest in relation to the property.

The defendant maintained that it is the beneficiary of an express trust in respect of the property, and as such, has a caveatable interest in the trust property. It was not disputed that the relevant issue for determination on the present application was whether a serious question to be tried, that there is a caveatable interest, exists.

Decision:

Ward CJ was of the view that the defendant’s evidence did not give rise to a serious question to be tried as to the defendant holding an equitable caveatable interest in the Pitt Street property. Therefore, the Court accepted the plaintiffs’ submission that the proper caveator would have been Filomina Kyriacou, not her son, the defendant. On this basis, the Court was not satisfied that that there was a serious question to be tried. Accordingly, it was ordered that the caveat over the Pitt Street property be withdrawn.

CEG Direct Security Pty Ltd v Wang

[2021] NSWCA 76

Coram: Bathurst CJ, Meagher and Brereton JJA

Court: New South Wales Court of Appeal

Date: 7 May 2021

LAND LAW – Torrens title – Indefeasibility of title – Effects of indefeasibility – Construction of third party mortgages – Where executed pursuant to forged Powers of Attorney – Identification of secured money – Where no money advanced to or at the request of mortgagors – Where no acknowledgement of receipt – Mortgages held to have secured no money – Appeal dismissed – Balance of matter remitted

MORTGAGES AND SECURITIES – Mortgages – Duties, rights and remedies of mortgagee – Possession

CIVIL PROCEDURE – Court of Appeal – Leave to appeal – From separate questions – Practical effect of resolving claims finally and adversely to applicant – Leave granted

Facts:

These possession proceedings concerned three properties, two in Marsfield and one in Hunters Hill NSW. CEG Direct Security Pty Ltd (‘**the plaintiff**’) was the mortgagee, and Xihai Wang and Hai Li (‘**the defendants**’) were the registered proprietors of three properties and the mortgagors. The mortgages were executed on behalf of the defendants by their son pursuant to forged Powers of Attorney. The first mortgage, advanced to a company controlled by the defendants’ son, purported to secure a sum of $200,000. The second mortgage purported to secure that and advance a further sum of $181,000. Importantly, the key provision in the mortgages was to the effect that $200,000 was agreed to be lent “to you or at your request”, and that this amount was called the “secured money”.

First Instance:

The company defaulted and the plaintiff commenced proceedings for possession. The primary judge held that the Powers of Attorney were forged, that the mortgages were not entered into by the defendants, that the advanced made to the company were not at the request or discretion of the defendants, and that the mortgages did not secure the sum indicated in them, and therefore secured nothing.

The Appeal:

The plaintiff commenced appellant proceedings only from the last of the abovenamed determinations, that is, that the mortgages secured nothing. The Court indicated that while it is now well-established that the registration of a forged mortgage conders on the mortgagee an indefeasible interest, absent fraud on the part of the mortgagee, such registration does not mean that all terms and conditions have effect as if the mortgage were not forged. Further, the Court found that the quantum of the indefeasible interest depends upon the construction of the registered mortgage.

Decision:

The Court determined that the core question was the construction of the definition of ‘secured money’, as this was what the defendants had acknowledged indebtedness for. As such, it was held the effect of the words “to you or at your request” was that the secured money was the amount actually advanced to the defendants or at their request. Therefore, as there was no acknowledgment of receipt by them, the defendants secured nothing and the appeal was dismissed.

Chetwynd v Rose

[2021] NSWCA 193

Coram: Meagher JA, Leeming JA and White JA

Court: New South Wales Court of Appeal

Date: 31 August 2021

EQUITY – Trusts and trustees – Express trusts – Declaration of trust – Where only evidence of trust was a conversation purported to have occurred 23 years before hearing – Where evidence inconsistent with later documentary evidence – No issue of principle

LAND LAW – Co-ownership – Rights between co-owners – Account – Where accounts showed beneficial co-owners paid "rent" to third beneficial co-owner – Where accounting secured a tax advantage for the third co-owner – Where no evidence that the accounting was intended to reflect payment of an occupation fee – Whether beneficial co-owners entitled to adjustment

Facts:

Mr and Mrs Chetwynd ('**the appellants**') had a long-standing close personal and business relationship with Ms Rose ('**the respondent**'). After the appellants sold a property to discharge the debts of a company through which both parties conducted their business, the respondent granted the appellants each a one-third interest in a property which she owned in Neutral Bay. That property was leased, and the rent was paid into an account in the name of the respondent.

In 1990, the appellants and the respondent acquired shares 10% and 90% respectively of the shares in a company, Wincot Pty Ltd ('**Wincot**'). As with the Neutral Bay property, it was agreed that all parties were to have a one-third beneficial interest in the shares in Wincot. In 1993, the appellants negotiated the purchase of a property in Armidale, which was purchased in the name of the respondent to conceal it from the claims of the appellants' creditors. The appellants intended to live in the property. A sum of $110,000 was due to the vendors on completion, and a further $110,000 was payable, secured by a mortgage over the property in the name of the respondent.

Most of the funds used to acquire the Armidale property were provided by Wincot, which also made around $150,000 worth of vendor finance repayments, which were debited to the respondent's loan account. The appellants made repayments to Wincot, ultimately repaying a total sum of around $68,000, either from salary paid or credited to them, or by debit to their loan accounts.

First Instance:

Following deterioration of the parties' relationship, the appellants brought proceedings seeking a declaration of their full beneficial ownership in the Armidale property, which they contended that the respondent held on trust for them, or alternatively, for Wincot. The respondent submitted that, as with the Neutral Bay property and Wincot, she enjoyed a one-third interest in the property, and sought the appointment of trustees for sale of the property.

The primary judge found that the Armidale property was held according to the same "three-way split" arrangement which governed the parties' ownership of the Neutral Bay property and the shares in Wincot, and appointed trustees for sale. Further, the Court ordered that the appellants were to pay the respondent a further approximate $100,000 plus interest, representing an indemnity in favour of the respondent for two-thirds of her loan account debt.

The Appeal:

The principal issues on appeal can be summarised as follows:

1. Whether the appellants (or alternatively Wincot) enjoyed full beneficial ownership of the Armidale property;
2. Whether there was an agreement that the Armidale property was not to be sold without the agreement of the appellants and the respondent;
3. Whether the appellants repaid Wincot for its payment of the purchase price of the Armidale property;
4. Whether the primary judge erred in adjusting the parties' entitlements to the sale proceeds; and
5. Whether the appellants were entitled to an adjustment in respect of monies purportedly debited to their salary or loan account with Wincot as payment of rent to the respondent that enabled her to claim tax deductions when the Armidale property was negatively geared.

The Court of Appeal made respective determinations as follows:

1. The primary judge did not err in rejecting the appellants' evidence that the respondent had agreed to hold the Armidale property on trust for the appellants;
2. The primary judge did not err in finding that the arrangement between the parties that the appellants be permitted to live in the property could not be elevated to the kind contended for;

3. The money repaid by the appellants to Wincot from salary paid or credited to them, or by debit to their loan accounts, were categorised as purported rent paid to the respondent for occupation of the Armidale property. As such, had they constituted repayments to Wincot, the appellants would have been credited to their loan account;
4. The debiting of the respondent's loan account for vendor finance paid by Wincot did not entitle her to be indemnified by the appellants for two-thirds of the amounts debited as she did not personally fund the payments, but Wincot's payments were funded either from rental payments from another property of which the parties were co-owners or from Wincot's trading operations; and
5. In respect of the purported payment of rent, the Court found that the treating Wincot's vendor finance repayments as debits to the respondent's loan account allowed the respondent to claim tax deductions on purported rent, and this had no legitimate basis. Accordingly, an adjustment was made in favour of the appellants' amount to two thids of the 'rent' paid by them to the respondent.

In sum, the appeal was rejected insofar as it challenged the primary judge's findings as to the beneficial ownership of the Armidale property and the order for the appointment of trustees for sale. However, the Court allowed the appeal and made a declaration in favour of the appellants that they were entitled to an adjustment in the accounts of Wincot for around $47,000, being two thirds of 'rent' debited to their loan account with Wincot.

Cross v Cross-Boyd

[2021] NSWSC 977

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 10 August 2021

LEASES AND TENANCIES - licences - occupancy fee - right to occupy pursuant to a Deed of Family Arrangement - whether there was a relevant default - whether acceptance of fee after default amounted to waiver - whether payments made by defendant to repair premises entitled her to offset amounts paid against weekly contributions - whether requirement in Notice of Termination that defendant continue to pay occupancy fee until property vacated waived the default – whether defendant entitled to relief against forfeiture – whether relief could be granted where defendant had no proprietary or possessory rights - where defendant's payments were up to date by time of hearing – where no unconscionability shown - whether occupancy arrangement constituted a residential tenancy agreement – effect of s 119 of the Residential Tenancies Act

CIVIL PROCEDURE – amendment – late application to amend defence – where change of counsel – where new defences raised points of law – where no further evidence required – where no need for adjournment – leave to amend granted

Facts:

These proceedings concerned seeking possession of a property in Maroubra, arising out of the Will of the late Horace Sylvester Cross ('**the deceased**'). The deceased appointed his wife and sons, William and Gregory ('**the plaintiffs**') to be the executors of his will. The will directed that a trust was to provide a place to live for his daughter Kathryn, who had an intellectual disability, and that such a place was to be the Maroubra property. However, the will provided that if it became necessary to sell that property, the trustees were to provide a fund to enable Kathryn to find other accommodation.

Further, an arrangement was entered into ('**the Deed**') whereby Kathryn's sister ('**the defendant**') would live at the property with Kathryn on certain conditions, including that the defendant pay a sum of $150 per week. Following this, the plaintiffs sought to terminate the agreement made under the Deed and evict the defendant, due to her failure to pay the weekly fee. The defendant began to pay the fee, although at somewhat irregular intervals.

Subsequently, the plaintiffs issued a notice of termination requiring the defendant to deliver up vacant possession of the property. The proceedings were commenced a few months later, on the basis that the defendant was in default for periods of hour weeks or more in the payment of the fees. By the time of the hearing, the defendant had such payments in accordance with the deed, and proposed in her defence that the plaintiffs waived any right they had to terminate the defendant's occupancy by sending the notice of termination. Further, the defence proposed that the plaintiffs were estopped from terminating the occupancy, that the defendant be granted relief against forfeiture, and that the arrangement whereby the defendant occupied the property constituted a residential tenancy.

Decision:

Whether there was a relevant default on the part of the defendant

Although there was some confusion about what defaults they purported to rely on, it was clear that the were a number of periods where no payment was made for the defendant for four or more consecutive weeks. The Court noted the difficulty for the plaintiff on relying on those earlier periods, as the plaintiffs continued to accept payment of the weekly fee, notwithstanding those defaults. Thus, the Court held that such acceptance amount to a waiver of the breach.

Waiver and Estoppel issue

The Court held that there was no waiver of the plaintiffs' rights by the terms of the notice to terminate. As such, the requirement to continue to pay the fees amounted to nothing more than a reminder that the defendant was obliged to do so until she vacated the property.

Whether the defendant should be granted relief against forfeiture

The Court found that the defendant had no more than contractual rights, and the plaintiffs had not taken unconscientious advance of the defendant in seeking to evict her because of asserted defaults under the Deed.

Whether the arrangement in the Deed constituted a residential tenancy agreement

The Court held that arrangement whereby the trustees and/or executors granted the defendant a right of occupation in the property for use as a residence in return for $150 a week amounted to a residential tenancy agreement. As such, it was found s 119 of the *Residential Tenancies Act* provided a complete defence to the claim because the proceedings should have been brought in NCAT and not the Supreme Court.

In sum, the Court determined that the plaintiffs did not establish a breach of the Deed for the reasons outlined above. In any event, the Court considered that the arrangement in the Deed was a residential tenancy agreement and therefore the proceedings should not have been commenced in the Supreme Court

Darzi Group v Nolde Pty Ltd

[2021] NSWSC 774

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 28 June 2021

LEASES AND TENANCIES — Renewals and options — Exercise of option — Where lessee commenced original proceedings seeking declaration that the parties had entered into a retail lease — Where Court of Appeal held the parties had entered into a retail lease — Where lessee now seeks specific performance of lessor’s agreement to renew the lease pursuant to lessee’s exercise of option — Where lessor pleads that the Court should use its discretion to withhold specific performance on account of the inability of the parties to cooperate, the toxic interpersonal relationship between the principals of the lessor and lessee, and because damages would be an adequate remedy — Where the Court found that a breakdown in personal relations between principals of parties to the lease is not a proper basis for the Court to deny the lessee its proprietary right to a renewal of the lease — Where the Court found that damages are not an adequate remedy — Where the Court grants specific performance of lessor’s agreement to grant a renewed lease to lessee

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to pay rent in circumstances where lessee paid less than the rent due under the lease on its interpretation of the operation of the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) — Where COVID-19 regulatory regime required rent to be renegotiated in good faith by lessor and lessee — Where lessor failed to renegotiate in good faith — Where the Court found that the lessor will never be entitled to take a prescribed action against lessee in respect of the short payments in rent

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to pay insurance premiums in relation to outgoings pursuant to the lease — Where lessor and lessee disputed the meaning of ‘insurance’ — Where lessor claimed lessee must pay a share of product and public liability insurance — Where lessee held its own insurance in that regard — Where the Court held that the lessee did not breach the lease by failing to pay the share of premiums claimed by the lessor

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to maintain the premises in good condition — Where lessor sought order requiring lessee to perform a list of maintenance tasks — Where it is unclear on the evidence whether the rectification of the alleged breaches are the responsibility of the lessor or lessee under the lease — Where the Court held that it should make an appropriate order that will facilitate the Court being able to make an order in relation to the cleaning, repair and maintenance of the Premises

LEASES AND TENANCIES — Retail leases — Retail shop lease — Lessee in breach of obligations — Where lessor claimed lessee failed to provide access to the premises for inspection — Where no evidence lessor sought to access premises for purpose of inspection — Where the Court refused to make the orders sought by the lessor

TORTS — Trespass to land — Damages — Where lessor claimed damages against lessee for trespass on parts of property outside leased premises — Where lessor has not proved that it suffered any loss — Where lessor has not establish that it had title to bring a claim in trespass against lessee — Where the Court found that if the lessor has title to bring a claim in trespass, the damages awardable would be nominal in any event

Facts:

The parties in these proceedings had a chequered history of litigation between them. Darzi Group Pty Ltd ('**the plaintiff**') had, since 2014, operated a restaurant on a property in Forster, which was owned by Nolde Pty Ltd ('**the defendant**').

History of Proceedings

In previous proceedings between the parties, the NSW Court of Appeal found that the plaintiff and defendant entered into heads of agreement, pursuant to which the plaintiff would obtain a lease for certain premises to operate the restaurant. A dispute arose as to whether the heads of agreement was binding and if so, whether the parties had entered into a lease with an option to renew. The Court of Appeal held that the parties had entered into a retail shop lease under s 8 of the *Retail Leases Act 1994* (NSW) when the plaintiff was in possession of the premises as lessee. The Court also found that a binding and enforceable lease agreement came into existence, after the parties agreed to the final terms of the agreement, and that this lease agreement replaced the heads of agreement.

These Proceedings

The plaintiff commenced these proceedings seeking a declaration that it had exercised the option to renew the lease found by the Court of Appeal. The defendant served the plaintiff with a s 133E *Conveyancing Act 1919* (NSW) prescribed notice ('**s 133E notice**') with the effect that the plaintiff's entitlement to exercise an option was extinguished one the grounds of three breaches of the lease. Under the s 133E notice, the plaintiff was required to seek an order for relief against the effect of the alleged breaches to prevent being precluded from its entitlement to the option. Ultimately, the defendant withdrew the s 133E notice, executed the lease and served a second s 133E notice on the ground of one breach of the lease, specifically, for failure to pay outgoings. In response, the plaintiff contended that the defendant had refused to comply with its obligations to renegotiate rent and various other terms of the lease, pursuant to clause 7 of the *Retail and Other Commercial Lease (COVID-19) Regulation 2020* (NSW) ('**the COVID-19 Regulation**').

Renegotiation of rent under the COVID-19 Regulation

The plaintiff provided the defendant with a statement that it was an "impacted lessee" and accordingly, requested a renegotiation of its rent. The defendant, upon receiving financial statements, denied that the plaintiff was suffering financial stress and was entitled to a rent deduction. The defendant also contended that the plaintiff did not provide sufficient information to determine whether it was an impacted lessee, and although confirmation of Jobkeeper enrolment was provided, requested further evidence that the plaintiff qualified for the scheme.

The plaintiff partially paid the defendant rent it considered was payable for May and June 2020, in proportion to its reduction in turnover. This was consistent with Principle 3 of the *National Cabinet Mandatory Code of Conduct SME Commercial Leasing Principles During COVID-19* ('**the Code**'). The plaintiff's turnover subsequently recovered, to the extent that it could no longer qualify as an impacted lessee, and had then paid the defendant the full amount of rent payable under the lease. Thus, the dispute regarding the shortfall in rent payments, and the operation of the COVID-19 Regulation, was for a period of only two months.

The defendant contended that the plaintiff had unilaterally decided to reduce the rent it was willing to pay, which led the defendant to serve the plaintiff with a s 129 *Conveyancing Act 1919* (NSW) notice. The defendant submitted that the notice was served due to a breach of the lease, in that, the plaintiff decreased the rent payments without consent and without providing sufficient evidence that it was an "impacted lessee".

Decision

Robb J found that the plaintiff was an impacted lessee for the relevant months it sought to renegotiate the rent, and that the defendant was unreasonable in denying the ATO's acknowledgement that the plaintiff did in fact qualify for JobKeeper, and in insisting that the plaintiff provided any further information in that regard. Accordingly, it was found that the ATO's acknowledgement was adequate proof, and that the defendant was obliged to renegotiate the rent in good faith. This was because, in accordance with the Code, the evidence made clear that the plaintiff's turnover was less than $50 million in the relevant financial year. Therefore, the Court found that the defendant did not comply with its obligation under clause 7 of the COVID-19 Regulation to renegotiate the rent payable of the lease at the request of the plaintiff.

Di Liristi v Matautia Developments Pty Ltd (No 6)

[2021] NSWSC 663

Coram: Cavanagh J

Court: Supreme Court of New South Wales

Date: 11 June 2021

LEASES AND TENANCIES – *Residential Tenancies Act 2010* (NSW) – Termination – By landlord – Where tenant has caused soil contaminated with asbestos to be placed on the property – Whether there has been a valid termination of the tenancy agreement – Significant credibility issues relating to the tenant

Facts:

These proceedings concerned a residential tenancy agreement between the lessee, Antonio Di Liristi ('**the plaintiff**') and the owner of the property, Matautia Developments Pty Ltd ('**the first defendant**'). The dispute between the parties concerned the first defendant purporting to terminate the tenancy agreement whilst the plaintiff remained in possession, although it had not paid any rent. The central legal issue was whether the first defendant had validly terminated the tenancy agreement.

The plaintiff maintained that, having regard to the terms of the tenancy agreement, the first defendant was not entitled to terminate the tenancy agreement. Further, the plaintiff asserted that the first defendant was estopped from terminating the tenancy agreement. The plaintiff sought orders that the first defendant pay damages in respect of losses arising from the failure to effect insurance and for various other costs related to improving the premises.

The first defendant contended through a cross-summons that the plaintiff breached the tenancy agreement by introducing polluted material onto the premises, and pleaded that the various breaches of the lease was sufficient to justify termination of the tenancy agreement. Thus, the first defendant sought an order for possession of the property, alongside damages or alternatively, contribution to the cost of the clean-up of the premises and payment of unpaid rent.

Decision:

The Court found that the first defendant had validly terminated the tenancy agreement on the basis that the plaintiff had intentionally or recklessly caused or permitted serious damage to the property. As such, the Court accepted that bringing a large quantity of contaminated soil onto land without the consent of the lessor constituted a breach of the tenancy agreement by the plaintiff. Further, the Court held that the plaintiff had not discharged the onus which was required for establishing the estoppel claim, and thus, was not entitled to succeed upon that basis. Finally, the plaintiff was not entitled to any of the declarations or orders that he sought. The matter was remitted to NCAT for appropriate orders to be made.

Dudley v Ainsworth

[2021] NSWSC 1478

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 17 November 2021

LAND LAW – easements – right of carriageway – actionable nuisance – plaintiff's land has the benefit of a right of carriageway 48.645m long over the defendants' land – right of carriageway used as a driveway to access public road – defendants constructed fence along the right of carriageway with 7.4m gap to permit plaintiff access to his land – plaintiff constructed large shed north of the gap and has a barn south-west of the easement area – plaintiff owns numerous vehicles including 11m long bus – whether fence with only 7.4m gap obstructs the plaintiff's enjoyment of rights under the easement – held that fencing impedes or restricts ability of dominant owner to move large vehicles from easement to large shed and from easement to south-western area of the land – real substantial interference with enjoyment of rights – held appropriate to grant injunctive relief to remedy continuation of interference

Facts:

These proceedings concerned a right of carriageway, running across a portion of Ainsworths' ('**the defendants**') land, and benefitting Dudley's ('**the plaintiff**') land. The plaintiff sought injunctive relief against the defendants, including an order to remove a fence and associated landscaping and drainage works installed by the defendants. The plaintiff contended that the fence and associated works amounted to a substantial interference with its reasonable use of the easement.

The defendants denied this and submitted that the 7.4m gap in the fence afforded adequate access. Further, the defendants filed a cross-summons, seeking modification of the terms of the easement, resulting in the existing fence being expressly permitted under the easement. The plaintiff resisted any modification to the easement and contended that none of the grounds under s 89 of the *Conveyancing Act 1919* (NSW) had been made out. In particular, the plaintiff denied that the proposed modification would not substantially injure the plaintiff as a person entitled to the easement.

The central issue in these proceedings was whether the fence and associated works undertaken by the defendants amounted to an actionable nuisance by obstructing the plaintiff's enjoyment of its rights under the easement. The plaintiff submitted that the practical impact of the unilaterally imposed fencing and associated works was to limit its capacity to enter and exit to a single 7.4m wide opening in the fence, whereas it had previously made reasonable use of the full length of the right of carriageway (approximately 48m) for access purposes. The defendants submitted that there was no basis to order the removal of the entire fence, and that the evidence did not justify some form of less extensive relief such as an order requiring a larger gap in the fence or additional access points.

Decision:

The Court held that the defendants' works did interfere with the plaintiff's reasonable user of the right of way by denying two sufficient points of access through gates. As such, Darke J found that the existing fence amounted to a real substantial interference with the plaintiff's enjoyment of the easement. This conclusion meant that his Honour did not accept that the modification of the easement proposed by the defendants will not substantially injure the persons entitled to the easement under s 89 of the *Conveyancing Act 1919* (NSW). Therefore, the Court held that the defendants were entitled to fence their property along the boundary in the easement area, but not so as to deny points of access. As such, injunctive relief against the defendants was granted in order to remedy the continuation of that interference.

Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd

[2021] NSWSC 504

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 10 May 2021

CONTRACTS – construction – agreement for sale of hotel property and business – vendor obliged to carry on business in usual manner until completion of contract – public health orders made in response to COVID-19 pandemic limited ability to operate business – whether vendor in breach of obligation to carry on business in usual manner – obligation construed as not requiring the carrying on of business in any manner contrary to law – vendor held not to be in breach

CONTRACTS – discharge by frustration – agreement for sale of hotel property and business – vendor obliged to carry on business in usual manner until completion of contract – public health orders in response to COVID-19 pandemic limited ability to operate business – actual performance of obligation departed from that which the parties contemplated would occur – whether contract frustrated – essential purpose of contract was for sale and transfer of particular assets for agreed price – vendor's obligation to carry on business until completion designed to further this essential purpose – no warranties given as to future performance of business – unexpected events did not give rise to such a fundamentally different situation that it would not be just to hold the parties bound to the terms of the contract – held that contract not frustrated

CONTRACTS – damages – assessment – date for assessment of damages – vendor terminated contract for purchaser's breach – damages for loss of bargain – held that damages should be assessed as at date the bargain was lost – no justification to assess damages at later time – avoided loss principle – whether vendor obtained compensating advantage by retaining assets the subject of sale – not established that retention of assets is attributable to a decision made in consequence of the purchaser's breach – mitigation of damage principles not engaged

Facts:

These proceedings concerned Dyco Hotels Pty Ltd ('the plaintiff'), as the purchaser, entering into a contract with Laundy Hotels (Quarry) Pty Ltd ('the defendant'), as the vendor. The sale was for a freehold hotel property in Pyrmont known as The Quarrymans Hotel, along with its associated hotel license, gaming machine entitlements and hotel business. The contract for sale contained various standard obligations that were applicable between the date of signing and settlement, including Clause 50.1, which required the defendant to "carry on the business in the usual and ordinary course as regards its nature, scope and manner".

Performance of that obligation became affected by the commencement of the NSW Government's Public Health (COVID-19 Places of Social Gathering) Order 2020, which essentially forced the closure of all licensed premises including pubs and hotels, except for the purpose of providing takeaway to customers or those using the hotel for accommodation. In response, the defendant attempted to maximise sales through implementing a takeaway food service. However, the plaintiff argued that the contract for sale had been frustrated, or alternatively, that the defendant breached the contract as it was not able to comply with Clause 50.1.

The central issue in this case was whether, in light of the COVID-19 orders, the contract for sale was discharged by frustration. The plaintiff contended that the contract was frustrated because the hotel business was not able to be operated as a going concern, or in the usual and ordinary course as regards its nature, scope and manner as required by Clause 50.1. The plaintiff further contended that the value of the assets the subject of the contract decreased by at least $1 million, and that if the contract has been frustrated, the deposit of $562,500 should be returned.

The defendant denied that the contract was discharged by frustration as alleged, and denied that it would be appropriate for the Court to order the return of the deposit. The defendant contended that the hotel business continued to trade as a going concern, albeit that it was restricted to takeaway food and beverages. In these circumstances, the defendant contended that the plaintiffs wrongfully refused to perform or otherwise repudiated the contract, and failed to complete the contract as required by a Notice to Complete issued in April 2020. By its cross-claim, the defendant sought declaratory relief to the effect that it validly terminated the contract and forfeited the deposit, and sought damages for loss of the bargain.

Decision:
The determinations were made in accordance with the two key issues posed to the Court, including the defendant’s obligations to carry on the hotel business, and frustration of the contract.

The Court observed that it was necessary to understand the extent to which, if at all, Clause 50.1 obliged the defendant to carry on the business in a manner contrary to the provisions of the various public health orders that were issued after the contract was made. This turned on what a reasonable business person would have understood the contractual terms to mean, which would require consideration of the language used by the parties, the surrounding cirumstances known to them and the commercial purpose or ojbects to be secured by the contract. Accordingly, the Court held that the parties were both experienced in the operations of hotels in Sydney, and thus could be taken to have knowledge of the nature of the legal environment within which hotels operate. Further, the Court held that upon true construction of the contract, Clause 50.1 did not oblige the defendant to carry on the business in a manner contrary to the public health orders and the law. Consequently, the Court found that the obligation was to carry on the business in the usual and ordinary course as far as it remained possible to do so in accordance with the law. The Court indicated that doing otherwise, and essentially breaking the law, would place the business in some jeopardy and diminish the goodwill of the business. Therefore, the Court held that the defendant did not breach its obligation to carry on the hotel business in the usual manner.

The other key issue requiring the Court’s consideration was whether the making of public health orders brought about a situation where the contract was discharged by frustration. The Court considered whether these unprecedented events gave rise to a fundamental commercial difference between the actual and contemplated performance of the contract, or a fundamentally different situation, such that it would be unjust to hold the parties bound to the contract. In essence, the terms, nature and surrounding circumstances of the contract was considered. Accordingly, the Court held that all the components of the sale transaction remained transferable, even in the event that there was a temporary alteration in the nature of trading during the period between signing and settlement. Therefore, the Court held that the contract had not been frustrated, the contract remained on foot and the defendant was entitled to retain the deposit. Further, the Court made an order for the defendant in the sum of $900,000 in damages for loss of bargain.

El-Cheikh v Miraki

[2021] NSWCA 271

Coram: Bathurst CJ, Basten JA, Emmett AJA

Court: New South Wales Court of Appeal

Date: 8 November 2021

APPEALS — Contracts — Whether loan advance paid pursuant to loan agreement — Error of primary judge — Where loan advance never repaid

EQUITY — Trusts and trustees — Express trusts — Unit trusts — Where trust documents not correctly executed — Where no unit holders had subscribed for units — Whether trust constituted — Whether unit holders had a right to trust property if trust constituted — error of primary judge — Where trust constituted and unit holders acquired beneficial interest in trust property

Facts:

These proceedings concerned Mr Omar El-Cheikh ('**the first appellant**') and Mr Navid Miraki Ardestani ('**the first respondent**') arranging to purchase a commercial office unit in Castle Hill ('**the Property**') in 50/50 shares. The parties agreed the property would be purchased by Gladstone Rd Enterprises Pty Ltd ('**the Trustee**') of which the first respondent's wife, Ms Miraki, was the sole director, secretary and shareholder as trustee of the Gladstone Unit Trust ('**the Trust**').

The purchase of the Property in the name of Ms Miraki for the sum of $1,700,000 was completed and she became the sole registered proprietor of the Property. A Unit Holder Agreement was prepared with two equal unitholders: the first appellant's corporate vehicle, El-Cheikh Group Pty Ltd ('**the second appellant**') and the first respondent's corporate vehicle, Iconic Constructions Pty Ltd ('**the second respondent**') and required a subscription fee of $50 to be paid by each unit holder.

In addition, the first appellant provided $450,000 in cash before settlement and a Loan Agreement, between him as lender and Ms Miraki as borrower, was executed. Under the Loan Agreement, any amount advanced by the first appellant was to be secured by mortgage or charge over the Property. The loan was not repaid.

First Instance:

Proceedings were brought by the first and second appellant in the Equity Division to recover the loaned money and claiming a 50% interest in the property. Ultimately, the only issues pursued in those proceedings were:

1. Whether Ms Miraki purchased the Property as trustee of the Trust or another trust; and
2. Whether the first appellant advanced $450,000 to Ms Miraki under the Loan Agreement.

The trial judge determined that the Trust was never constituted, since neither of the unit holders had subscribed to units in the Trust, no property was the subject of the Trust and there were no unit holders. Further, the Unit Holder Agreement did not operate to appoint Ms Miraki as trustee of the Trust. Additionally, the trial judge found that the payment of $450,000 by the first appellant was not made pursuant to the Loan Agreement. Accordingly, the proceedings were dismissed with the first and second appellant ordered to pay the respondents' costs.

The Appeal:

The first and second appellants appealed the orders of the trial judge on the grounds that the judge erred:

1. In determining that the first appellant did not advance moneys to Ms Miraki pursuant to the loan agreement;
2. In concluding that the Trust was never constituted; and
3. In concluding that the Unit Holder's Agreement did not operate to appoint Ms Miraki as trustee of the Trust and ought to have held that it recorded and implemented a resolution of the Unit Holders to so appoint her.

Decision:

The Court observed that the first question raised on appeal was whether Ms Miraki held the Castle Hill property as trustee, and if so for whom. The second question was whether part of the purchase moneys was provided by way of a loan from the first appellant. If so, the first appellant sought judgment against Ms Miraki for the amount of the loan which has not been repaid.

The full Court agreed to allow the appeal and determined that the first appellant was entitled to judgment in its favour in the sum of $450,000. Further, it was agreed that Ms Miraki held her interest in the Property as trustee, and the intended beneficiaries of the trust were the second appellant and second respondent. The Court indicated that although it may have been intended that the Property would ultimately be held by Ms Miraki or a new trustee on trust for those corporations, the parties did not give effect to that intention. Accordingly, their Honours made the following conclusions:

1. The trial judge erred in concluding that the first appellant had failed to discharge the onus of demonstrating that the sum of $450,000 had been advanced pursuant to the Loan Agreement. The parties intended that the loan constituted an advance made pursuant to the Loan Agreement which would be repaid upon settlement of another property. Therefore, the first appellant was entitled to be repaid the sum of $450,000; and
2. The trial judge correctly found that no trust had been established, as neither unit holder had paid the subscription moneys. Therefore, the Court found the first appellant was entitled to 50% of the amount payable to Ms Miraki upon sale of the Property.

It followed from the above that the respondents be ordered to pay the appellants’ costs of the appeal, and the orders made by the primary judge be set aside.

Etex Australia Pty Ltd v Shi

[2021] NSWSC 498

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 5 May 2021

LAND LAW – caveats – extension of operation of caveat – where charge created by guarantee for credit agreement – where judgment for amount owed under credit agreement partially satisfied

Facts:

These proceedings concerned an application by Etex Australia Pty Ltd ('**the plaintiff**') for an order extending the operation of a caveat in respect of a property in Wahroonga. Hewei Shi ('**the first defendant**') and Shixian Lu ('**the second defendant**') were married and the registered proprietors of the property. The first defendant held a 99% share in the property, whilst the second defendant held a 1% share.

The first defendant was the sole director of a company which had entered into a commercial credit account with the plaintiff in 2014, and is now deregistered. Under this credit agreement, the first defendant provided a guarantee in favour of the plaintiff for all of her company's indebtedness and liabilities and unconditionally indemnified the plaintiff against all losses, costs and expenses. The guarantee in the credit agreement also included a charging provision, by which the first defendant charged all of her interest in land as security for the performance of her obligations under the guarantee.

On an application for an extension of a caveat, a test which is substantially the same as that for an interlocutory injunction applies. First, the applicant must demonstrate that a caveat has or may have substance, where the phrase "may have substance" encompasses the concept of a seriously arguable case. The second matter that the Court will have regard to is the balance of convenience and any prejudice or other discretionary considerations.

Decision:

Henry J was satisfied that the plaintiff had a caveatable interest in the Wahroonga property and granted the extension order sought by the plaintiff. Further, the Court noted that entering judgment against the first defendant, as guarantor for the company's debts, did not preclude the plaintiff from relying upon the charge in the guarantee over the Wahroonga property as supporting its caveatable interest. As to the balance of convenience, the Court indicated that extending the operation of the caveat should not prevent any refinance from taking place in circumstances where the plaintiff would consent to terms that enabled its interest to continue to be secured.

Fang v Yang

[2021] NSWSC 890

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 22 July 2021

LAND LAW – Caveats – Extension of operation of caveat – where extension sought on different factual basis of contribution to purchase price rather than development agreement – whether serious question to be tried – whether difference in description can be overcome by ss 74L or 74O of the Real Property Act 1990 (NSW) – extension refused

Facts:

These proceedings concerned an application for an order extending the operation of a caveat in respect of a property owned by Xia Yang (‘**the defendant**’) and purchased in 2013. The proceedings were commenced by Leo Shi Ran Fang (‘**the plaintiff**’) following the serving of a lapsing notice, and sought a declaration that the defendant holds the plaintiff’s interest in the property on trust for him.

The issue that arose for determination was whether the plaintiff had established that there was a serious question to be tried that he had a caveatable interest in the property and whether it should be extended. This was in the context where the plaintiff accepted that the Caveat did not accurately describe the facts giving rise to his claimed interest and the plaintiff’s evidence regarding who paid the initial deposit for the property changed during the course of the proceedings.

From the outset of the hearing, the plaintiff accepted that the interest which he sought to protect by the Caveat was based on him having paid the deposit monies of $17,500 in connection with the purchase of the property and that the wording of the Caveat referencing a Development Agreement did not support the factual basis for his claimed interest. Accordingly, the plaintiff submitted that the misdescription could be overcome by s 74L of *the Real Property Act*. In addition, the plaintiff contended there was a seriously arguable case that his claimed interest had substance, and relied on evidence including paying a deposit, withdrawing significant amounts of money around the exchange of contracts, and money being paid towards the purchase. Further, the plaintiff submitted that the balance of convenience was in its favour, as the caveat was not impacting any sale of the property and the plaintiff had not been offered any substitute security.

The defendant submitted that the misdescription of the factual basis of the claimed interest meant that the Caveat was defective and could not be extended. She also submitted that the evidence did not establish that there was a serious question to be tried that any interest arose from the provision of money by the plaintiff toward a deposit. Further, the defendant contended that, even if it did, the plaintiff's delay of seven years in asserting any such interest indicated that the balance of convenience was against extending the operation of the caveat.

Decision:

The Court found that even if the plaintiff established that there was a seriously arguable claim to an interest in the property based on the $17,500 deposit payment, the interest was based on the development agreement, which was clearly different to the factual basis of the claimed interest which he then sought to assert. Further, the Court was not persuaded that the defects in the caveat could be overlooked by s 74L of the *Real Property Act*. The Court indicated that the issue with the plaintiff's reliance on s 74L was that he accepted that his interest was not founded on the development agreement, an agreement to which the defendant was not a party and did not make any mention of the deposit money paid by the plaintiff in relation to the purchase of the property. Accordingly, the plaintiff's application for an extension of the caveat was refused.

Finnie v Day

[2021] NSWSC 276

Coram: Payne JA

Court: Supreme Court of New South Wales

Date: 24 March 2021

LAND LAW – Torrens title – the register – correction of the register – where land transferred and caveat lodged pursuant to a fraudulent scheme – declaration of constructive trust – orders to remove caveat and restore title – Real Property Act 1900 (NSW), ss 74MA, 138

CIVIL PROCEDURE – settlement of dispute – satisfaction of Court to make proposed consent orders disposing of proceedings

Facts:

These proceedings concerned a parcel of land in Wyee, NSW, in which Mr Paul Kay was the registered proprietor. Mr Darren Day (‘**the defendant**’) was the former registered proprietor of the land, although he still resides in the property.

Whilst the defendant was the registered proprietor of the land, he had borrowed money to purchase his interest in the property from Pepper Finance and granted a mortgage to that company, which was registered on the title. The proceedings arose out of an attempt by the defendant to refinance his interest in the property in 2013, which led to Mr Kay becoming the owner and Westpac Banking Corporation becoming the holder of a registered mortgage securing repayment of a sum it had advanced to Mr Kay. For the purpose of seeking refinance, the defendant retained My Sydney Finnie (‘**the plaintiff**’) to act as his finance broker. The plaintiff was not a holder of an Australian Financial Services Licence and had at that time, unknown to the defendant, an extensive criminal record for fraud offences.

The plaintiff did not effect a refinance of the Pepper Finance borrowing but instead put in place a scheme by which the land was allegedly transferred by the defendant to a Mr Paul Kay. Westpac was induced to lend a sum of money, purportedly to Mr Kay, which was largely used to discharge the mortgage held by Pepper Finance. The remaining funds were paid to interests associated with the plaintiff. Westpac took a mortgage over the Wyee property, which was subsequently registered.

The loan by Westpac to Mr Kay fell into arrears and Westpac began to take steps preparatory to enforcing its mortgage. Mr Kay says, and the Court accepted, that he did not borrow money from Westpac, has no knowledge about any transfer of an interest in the Wyee property to him and that he has co-operated with the defendant to restore his title to the property. The plaintiff then lodged a caveat on the Wyee property.

The defendant brought a cross-claim (‘**the first cross-claim**’) and sought, among other things, an order that the title be rectified so as to record the defendant as the registered proprietor of the Wyee land. The defendant pleaded that the plaintiff had put in place a fraudulent scheme with the intention of cheating him out of his interest in the land by transferring ownership of the land to Mr Kay and obtaining a financial benefit for themselves. The defendant also sought damages in negligence from Mr Spencer, the solicitor who acted for the defendant in relation to the purported transaction.

Decision:

The Court was satisfied that the evidence established that the defendant, Mr Kay and Westpac were victims of a fraudulent scheme, under which the identity of Mr Kay was used without his knowledge to borrow money from Westpac, pay out the existing mortgage to Pepper Finance and effect a transfer of the land to Mr Kay in order to obtain a financial benefit for the plaintiff. As such, the Court held that the defendant was entitled to declarations about his interest in the land, and the Court found that Mr Kay and the plaintiff had no interest whatsoever in the property.

First Mortgage Capital Pty Ltd v Westpac Banking Corporation Ltd

[2021] NSWSC 1143

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 9 September 2021

MORTGAGES AND SECURITIES – powers of mortgagee – clogs on equity of redemption – collateral advantages – plaintiff advanced $289,915 to mortgagors – second ranking mortgages held over various properties – mortgage charged Lower Rate of Interest at 30% p.a. and Higher Rate of Interest at 60% p.a. in event of default – clause 18.3(h) which operates following default allowed plaintiff to pay out other mortgages – any money so paid to form part of the "Secured Money" – plaintiff pays out first ranking mortgages over three of mortgagors' properties for total of $487,000 – plaintiff seeks to pay out first ranking mortgages over a further two properties – whether clause 18.3(h) provides a collateral advantage and is an impediment to redemption – held that plaintiff's power to pay out first mortgages and charge interest at 60% p.a. on amounts paid out can be regarded as a collateral advantage and an impediment to redemption – whether clause 18.3(h) is unfair and unconscionable – held that reliance on power to charge interest at 60% p.a. on amounts paid out to first mortgagees is unfair and unconscionable – reliance on clause 18.3(h) in that fashion amounts to an unconscientious exercise of a contractual right – plaintiff entitled to rely upon clause 18.3(h) to redeem or acquire first mortgages but is confined to charging interest at the rate provided for in the first mortgage

Facts:

These proceedings concerned a loan agreement, entered into by Glocal Villager International Pty Ltd ('**Glocal**') and First Mortgage Capital Pty Ltd ('**the plaintiff**') for around $290,000. In support of the loan agreement, Ms Zufaidah Binte Juri ('**second defendant**') and Sheik Taleb Bin Sheik Husain ('**third defendant**') provided a personal guarantee and mortgages to the plaintiff over properties located in Point Cook and Belmont, Victoria.

The plaintiff advanced the net amount of $250,000 to the second and third defendant, with the remaining funds being used for payment of interest and various fees. Glocal defaulted on the mortgage, and therefore in May 2019, the plaintiff lodged caveats over the Point Cook and Belmont properties, and various other properties, pursuant to the terms of the loan agreement. However, such properties has pre-existing mortgages, which can be summarised as follows:

1. Darley (mortgaged to Commonwealth Bank of Australia ('**CBA**'))
2. Albion Park Rail (mortgaged to Westpac ('**the first defendant**'))
3. Fairy Meadow (mortgaged to Westpac)
4. Point Cook (mortgaged to Westpac)
5. Belmont (mortgaged to Westpac)

Mr Albert ('**the fourth defendant**') had also lodged caveats in respect of each property, claiming interests pursuant to an agreement with the second and third defendant. He lodged his caveats in November 2019.

In January 2020, the plaintiff redeemed the mortgage held by CBA over the Darley property, and purported to sell the property. Subsequently, the plaintiff redeemed the mortgage held by the first defendant over the Albion Park property, and also sold that property.

In October 2020, the plaintiff filed a summons that sought orders that the first defendant transfers its two registered mortgages over, respectively owned by the second and third defendants, over the Albion Park Rail property. The plaintiff also sought an order that the fourth defendant's caveats be withdrawn so as to permit the transfers of the Westpac mortgages. The second and third defendants resisted the relief sought by the plaintiff. By a Cross-Claim filed in January 2021, they sought injunctive relief to restrain the plaintiff from redeeming any mortgage over any property owned by them. Further, the second and third defendants sought relief against the plaintiff is respect of alleged unconscionable conduct in relation to the entry into the loan agreement, and improper exercises of powers by the plaintiff. Particularly, the cross-claim sought:

1. the rate of interest stipulated, namely, 60% p.a. as the Higher Rate and 30% p.a. as the Lower Rate; and
2. the exercise of a power by the plaintiff under its mortgages to pay-out other mortgagees, and add the amounts so paid to the secured money such that interest would henceforth run on those amounts as well

Finally, the second and third defendants submitted that the plaintiff had exercised ing its power under cl. 18.3(h) in order to: "*charge interest at the rate of 60% rather than the commercial rates charged by Westpac and CBA and therefore effectively acquire all of the cross-claimants' equity in their property portfolio (on a $289,915 loan)*".

Decision:
Darke J did not agree with the submissions made by the second and third defendants, namely, that the plaintiff's interest rates were exorbitated for short term commercial loans. As such, the Court made various determinations which can be summarised as follows:

1. Cause 18.3(h) did grant the ability for the plaintiff to charge interest at the rate of 60% p.a. on the portion of the amount involved in paying out a major bank (like CBA or Westpac) and it was a collateral advantage for the plaintiff. However, even though the provision is a collateral advance, it is still unfair and unconscionable. There was no

commercial justification for charging interest on the redeemed amount and instead allowed the plaintiff to extract an unjustifiable high return in respect of a portion of debt that remains by a first ranking mortgagee;

2. It was acceptable that in the ‘event of default’, the plaintiff was allowed to pursue the redemption of higher ranked securities in order to assist it in realisation of its debts;
3. The unfairness and unconscionability arose from charging the higher rate of interest (60% p.a.) on the amount that was paid to the first ranking mortgagee or used to redeem the mortgage of the mainstream bank and incorporated into the ‘secured money’; and
4. The overall conduct was deemed to fall below accepted community standard.

Darke J ordered that the plaintiff was not permitted to charge higher rate of interest on the amounts it had paid to CBA and Westpac over the Darley and Albion Park Rail properties. Instead, the plaintiff was required to charge interest as per the terms in the respective first mortgagee’s loan agreement. Therefore, the Court granted the plaintiff the right to redeem the mortgages held by Westpac over Fairy Meadow, however, they were not permitted to charge the mortgagors interest at the rate of 60% p.a., rather it was to charge interest as per the terms of Westpac’s loan agreement over Fairy Meadow

Gambacorta v Di Giovanni

[2021] NSWSC 61

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 9 February 2021

EQUITY — Co-ownership — Severance of joint tenancy — Severance in equity — where married couple held as joint tenants several shared bank accounts and shares — where the wife predeceased the husband — whether their conduct severed the joint tenancy in the shared bank accounts and shares — where wills were made by the wife and the husband — whether the distribution of assets in those wills indicated an intention that each will would operate in accordance with its terms on the death of either — where the deceased's will would operate on the deceased's half of the property, such that it would not pass by survivorship — joint tenancy severed in equity.

Facts:

Caterina Gambacorta ('**the plaintiff**') was the niece and executrix of the estate of the late Maria Di Giovanni, and commenced proceedings principally claiming declaratory relief against Giuliano Di Giovanni ('**the defendant**'), the deceased's husband. The principal issue in these proceedings was whether half of the value of some shares and money that was in numerous bank accounts owned jointly by Maria and Giuliano were assets of Maria's estate to be dealt with in accordance with her final will. The plaintiff also sought a declaration that 1900 AGL shares held in Giuliano's name were held as tenants in common between Maria and Giuliano as to 50% each, and accordingly, that Maria's share is an asset of her estate.

The primary question was whether Maria and the defendant, by their conduct culminating in wills made by each of them, severed the joint tenancy in the joint bank accounts and the shares with the effect that, upon Maria's death, half of the funds in the accounts and the shares devolved in accordance with Maria's will, or whether those assets passed to the defendant by survivorship.

In determining this, the plaintiff and defendant submitted evidence concerning the discussions regarding the wills, and the defendant's proficiency in English. The defendant submitted that numerous discussions took place in English, which he submitted that he did not read, write or speak. Particularly, the defendant claimed that he was not able to understand the conference about altering or changing the way jointly held bank accounts or shares were held by him and Maria. The plaintiff submitted that Maria died with the expectation, which was supported with evidence, that her will would operate and that her half of the jointly owned property would pass to her relatives, including the plaintiff and her siblings.

Decision:

The Court indicated that there was no reason to think that the defendant did not fully understand the significance of the couple making their final wills. The Court considered that, if the defendant was not satisfied that the terms of the wills had been adequately explained to him, the defendant would have protested and sought further explanation before signing the will. Therefore, the Court was satisfied that the defendant understood in practical terms how the wills would work depending upon who died first.

It followed that Robb J was satisfied that the defendant understood that both Maria's and his wills dealt with each testator's half of their joint property, to give half to their relatives in a manner that was inconsistent with the property jointly passing to the surviving joint tenant. Thus, at the time of Maria's death, the joint tenancy in the couple's jointly owned property was severed so that Maria's will would operate on Maria's half of that property, and accordingly it would not pass to the defendant by survivorship.

Therefore, the plaintiff was entitled to a declaration that the joint tenancy in the joint bank accounts and jointly owned shares was severed, and accordingly, Maria's half share in the jointly owned property was part of Maria's estate.

Gazcorp Pty Ltd Woolworths Group Ltd

[2021] NSWSC 308

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 30 March 2021

CONTRACTS – discharge by frustration – agreement for lease – landlord agrees to carry out Landlord's Works to construct shopping centre and grant lease of part of shopping centre to tenant – development consent obtained – whether agreement varied so as to incorporate a department store – held that agreement was varied – development application for revised shopping centre refused – appeal against refusal dismissed – held that agreement as varied was frustrated

CONTRACTS – discharge by abandonment – agreement for lease – agreement made in 2008 – lengthy period during which landlord was not carrying out Landlord's Works and tenant was not calling upon landlord to perform – certain rights of tenant under contract expired – development consent authorising the Landlord's Works due to lapse in February 2014 – inference drawn that parties had mutually agreed to abandon agreement by about the beginning of 2014

CONTRACTS – discharge by frustration – agreement for lease – Landlord's Works authorised by a development consent – common assumption that Landlord's Works would continue to be able to be carried out lawfully – neither party contractually responsible for maintaining that state of affairs – common assumption proves to be mistaken when development consent lapsed – agreement held to have been frustrated

Facts:

These proceedings concerned two adjoining blocks of land in Alexandria, owned by Gazcorp Pty Ltd ('**the plaintiff**'). In 2004, the plaintiff entered into negotiations with Woolworths Group Ltd ('**the defendant**') about a lease of space in a proposed shopping centre development. After plans were approved in 2008 ('**2008 Consent**'), the parties entered into an agreement for lease in relation to the land. The agreement was varied later that year, however, the parties differ as to the extend of the variation. The plaintiff contended that the variation included a revision of the required Landlords's Works, so as to accommodate the inclusion of a Big W store in addition to a Woolworths supermarket. The defendant contended that the variation encompassed the extension of some dates, but dd not extend so far as to include a revision of the Landlord's Works as alleged by the plaintiff.

As such, the central issue in the proceedings was whether the varied agreement remained on foot. The plaintiff contended that the agreement had come to an end, either due to frustration when 2008 Consent lapsed, or by reason of mutual abandonment. The defendant accepted that if the agreement was varied as alleged by the plaintiff, then it was frustrated when, in 2009, a Land and Environment Court refused a development application that included a Big W store. However, the defendant maintained that if the agreement was not varied as alleged by the plaintiff, then it remained on foot. The plaintiff commenced these proceedings seeking declaratory relief to the effect that the agreement had been terminated and was no longer in force.

Abandonment

The plaintiff submitted that from the time of the Land and Environment Court decision, neither party performed the agreement nor required the other party to do so. As such, the plaintiff submitted that the Court infer the long period of inactivity as the parties mutually abandoning the agreement. On the abandonment issue, the defendant submitted that there was no evidence that it had at any time expressed to the plaintiff an intention to abandon the agreement. It was also put that years of no contact between the parties would be required before the Court could infer an abandonment of the agreement. Accordingly, the defendant submitted that the plaintiff's unilateral desire to abandon the agreement was insufficient to establish the plaintiff's own abandonment, let alone the mutual abandonment of the agreement.

Frustration

Firstly, the plaintiff submitted that the parties entered into the agreement on the common assumption that the plaintiff would continue to be able to lawfully carry out the Landlord's Works. Secondly, the plaintiff submitted that, under the agreement, neither party took responsibility for the continuation of that state of affairs, there being no provision which imposed such an obligation or even dealing with a situation where carrying out the Landlord's Works ceased to be lawful. Thirdly, it was submitted that the common assumption had proven to be mistaken in circumstances where the 2008 Consent lapsed.

On the question of frustration, the defendant submitted that that even after the Land and Environment Court decision, the communications between the parties indicated that they continued to regard the agreement as being on foot. Further, the defendant submitted that the agreement had not been frustrated so long as the commercial purpose of the agreement remained possible. It was also put that there was a high threshold to meet before a court would hold that a contract had been frustrated, and this was particularly the case where, as with these proceedings, the contract concerned the grant of a valuable interest in property. Finally, the defendant submitted that it was not enough that an intended means of performance was no longer available if other means could be employed consistently with the contract.

Decision:

Abandonment

The Court accepted the defendant's submission and held that the conduct of the parties towards each other was consistent with an acceptance that the agreement was no longer on foot. As such, the Court found that statements were made to the effect that the agreement remained in existence, and therefore the plaintiff's mutual abandonment submission failed.

Frustration

The Court accepted the plaintiff's submission that the parties entered into the agreement on the common assumption that the Landlord's Works would be able to be lawfully carried out. The Court indicated that the plaintiff complied with this, through seeking all necessary approvals and consents in order to carry out the Landlord's Works. The Court also accepted the plaintiff's second proposition that, under the agreement, neither party took responsibility for the continuation of a state of affairs where the plaintiff was able to lawfully carry out the Landlord's Works. As such, Darke J said that neither party became liable under the agreement if the carrying out of the Landlord's Works ceased to be lawful. Finally, the plaintiff's third proposition, that the common assumption proved to be mistaken, was also made out.

In sum, when the 2008 Consent lapsed, it was no longer possible for the plaintiff to lawfully carry out the Landlord's Works under the Agreement, as it brought to an end a state of affairs the parties had assumed would continue to exist during the life of the contract. Neither party took contractual responsibility for the continuation of that state of affairs. The common assumption proved to be mistaken, and this meant that performance of the plaintiff's obligations in respect of the Landlord's Works was no longer possible.

Accordingly, Darke J held that if the agreement had not already been mutually abandoned, it was terminated by frustration when the 2008 Consent lapsed, through the Land and Environment Court refusing the development application. Thus, a declaration was made that the agreement for lease was no longer on foot.

Goyal v West

[2021] NSWSC 526

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 7 May 2021

LAND LAW — Torrens title — Exceptions to indefeasibility — Overriding statutes — Retirement Villages Act 1999 (NSW), s 182G — Priority of interests

STATUTORY INTERPRETATION — Approaches — Mischief rule — Legislative purpose — Interpretation Act 1987 (NSW), s 33 — Extrinsic materials — Interpretation Act 1987 (NSW), s 34

Facts:

These proceedings encompassed the first judicial consideration of Part 10A of the *Retirement Villages Act 1999* (NSW) ('**the Act**'). Part 10A was inserted into the Act in 2010, aiming to assist in protecting the ingoing contributions of residents and former occupants of retirement villages. Rahul Goyal and Margaret Conneely ('**the plaintiffs**') as receivers, sought to sell the assets of the operator of a retirement village ('**the property**') as well as the property itself. The proceeds of sale were insufficient to reimburse all its creditors, which included financers and the former occupants of the property, who were all parties to the proceedings. The first to sixth defendants were former occupants of units in the property.

The urgency of the matter rested upon the fact that the plaintiffs had entered into a contract for the sale of the property that was conditional on the making of an order for its sale by the Court, pursuant to s 182F of the Act. As such, if completion of the sale did not take place by 1 June 2021, then either the plaintiffs or the purchaser could rescind the contract.

The key issue was whether on the proper construction of ss 182F and 182G of the Act, the proposed order of distribution of the proceeds of sale should be made. The plaintiffs contended that the creditors and former occupants be reimbursed in priority order based on the time each security was created, including to the statutory charges of the residents or former occupants. It was the position of the plaintiffs that only half of the former occupants should be repaid their ingoing contributions ('**the First Group**'). The plaintiffs further submitted that the First Group rank in priority ahead of the rest of the parties, whose statutory charges were created after the mortgages (‘**the Second Group**’). As such, the orders sought would have resulted that in Second Group of former occupants not being able to recover their ingoing contributions.

The Second Group’s position was that the interests of all holders of statutory charges (i.e., all the former occupants) rank in priority over the First Group, which would have the effect that all the statutory charges (amounting to around $750,000) would be discharged out of the sale proceeds, but that there would be a shortfall for the proceeds going to the First Group.

The First Group’s position was that they were largely agnostic to the construction argument since, on either side’s construction, their statutory charges will be discharged, subject to one qualification. That is, if the construction put by the plaintiffs were to be accepted, and that an order for sale could not be made unless it was in the best interests of the majority of former occupants, then they would argue against the effect of such a combination of constructions.

Decision:
Ward CJ held that the proper construction of s 182G of the Act did operate to protect the ingoing contribution of all residents ahead of the secured creditors, such that all former occupants in the proceedings were repaid their ingoing contributions.

Guan v Li

[2021] NSWCA 65

Coram: Bell P, Basten and Meagher JJA

Court: New South Wales Court of Appeal

Date: 23 April 2021

AGENCY — Property, Stock and Business Agents Act 2002 (NSW) — where person performs services without real estate agent licence — whether services performed as "real estate agent"

STATUTORY INTERPRETATION — Property, Stock and Business Agents Act 2002 (NSW) — definition of "real estate agent" — meaning of phrase "as an agent"

Facts:

Xiuyan Guan ('**the appellant**') was the sole shareholder and director of a company which owned development land that was subject to a guaranteed mortgage. In late 2014, the mortgagee in possession appointed agents to sell the property, who in turn retained another firm as exclusive selling agents. Such agents conducted an expressions of interest process, which invited parties to register their interest in purchasing the land and make an offer by March 2015. Following the close of that process, the offers were assessed and negotiations entered into with one or more shortlisted parties.

In January 2015, the appellant entered into a written agreement with Kevin Yung Lui ('**the respondent**'), requiring the respondent to identify potential investors and introduce them to the expressions of interest process. The respondent would earn a commission of 2% of the highest bid made by a potential investor that he introduced, irrespective of whether that investor was the ultimate purchaser and that bid amount the actual sale price. However, although the party who ultimately purchased the property was introduced to the sales process by the respondent, he was not involved in any correspondence between the then prospective purchaser and the mortgagee's agents or the exclusive selling agent.

First Instance:

The respondent commenced proceedings to recover the commission payable under the agreement with the appellant. The trial judge held that, although the respondent did not hold a real estate agent's license, he was not precluded form recovering that amount by s 8(2)(a) of the *Property, Stock and Business Agents Act 2002* (NSW) ('**the Act**'). That particular section provided that a natural person was not entitled to bring any proceedings in any court to recover a commission for any service provided for that person as a real estate agent, unless the person held a license.

The Appeal:

The issues requiring the Court of Appeal's determination were as follows:

1. Whether the respondent's services were performed "as a real estate agent"; and
2. Whether the relevant activities were engaged in by the respondent as part of the business of a real estate agent.

As such, the appellant contended that in introducing prospective purchasers and encouraging them to make non-binding bids, the respondent was acting as a "real estate agent" and accordingly not entitled to sue to recover any fee for services performed in that capacity under s 8(2)(a) of the Act. The appellant made these submissions notwithstanding that the respondent did not purport to represent the appellant in anything he did and had no authority from the vendor, or any selling agent retained by the vendor, to represent them in introducing prospective buyers to the sales process. Instead, the appellant contended that in identifying prospective purchasers and encouraging them to participate in the expressions of interest process, the respondent was acting "as an agent for" the sale of land or for inducing or attempting to induce persons to make offers to purchase that land, or for introducing prospective purchasers to the vendor or its exclusive selling agent.

Decision:

The full Court held that a real estate agent is a person who carries on business as an agent for various transactions or activities, and further, that the word "agent" was to be used in its legal and technical sense. Accordingly, the Court observed that for a person to constitute a real estate agent, they must represent a principal. Although the respondent introduced his contacts to the expression of interest process and encouraged them to make bids, he did not do so acting as agent for any party: the appellant, the vendor, or any agent of the vendor. Therefore, in light of the determination that the respondent was not acting as a real estate agent, any business he carried on was could not considered as a real estate agent's work.

The appeal was dismissed with costs.

Hans-Egon Bruno Bernhard Metzner & Anor v Jaqueline Rita Metzner

[2021] NSWSC 1336

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 8 October 2021

EQUITY — Trusts and trustees — Resulting trusts — Presumption of advancement — Property purchased by parents (the Plaintiffs) in daughter's (the Defendant) name — Consideration of whether the Plaintiffs intended to gift the whole of the Property to the Defendant or retain the beneficial interest, or a part thereof, for themselves — Consideration of whether the Plaintiffs have rebutted the presumption of advancement — Plea by the Defendant, in the alternative, that if she holds the Property on trust for the Plaintiffs, it is only in respect of a life estate for the Plaintiffs — Held: the Plaintiffs have not discharged their onus of rebutting the presumption of advancement, save to the extent of a life interest — Declaration that the Defendant holds the Property on trust for the Plaintiffs for their lifetimes and then for herself absolutely

EQUITY — Unconscionable conduct — Special disability or disadvantage — No special disability or disadvantage

EVIDENCE — Witness evidence — Competence — Lack of capacity — First Plaintiff deposed to two affidavits — Plaintiffs assert that the First Plaintiff lost capacity on account of his diagnosis of mixed vascular Alzheimer dementia soon after swearing his second affidavit — Consideration of whether the Court should make an order permitting the Plaintiffs to use those affidavits pursuant to r 35.2(3) of the Uniform Civil Procedure Rules 2005 (NSW) — Second affidavit sworn so close in time to diagnosis that the First Plaintiff's cognitive function is likely to have been seriously affected — Plaintiffs only permitted to use the first affidavit, but limited weight given to that affidavit

EVIDENCE — Witness evidence — Cross-examination — Rule in Browne v Dunn (1893) 6 R 67 — Submissions involving assertions of fact not put to the Defendant in cross-examination

Facts:

These proceedings concerned a property in Bowral ('**the Property**'), which was purchased for $840,000 by Mr Hans-Egon Bruno Bernhard Metzner ('**Egon**') and Mrs Rita Elisabeth Metzner ('**Rita**') (together, '**the plaintiffs**'). Although the plaintiffs actually paid entirely for the Property, the purchaser was described as Mrs Jaqueline Rita Metzner ('**Jackie**'), who was the registered owner.

The plaintiffs claimed that Jackie, their daughter, held the Property on trust for them and they sought the transfer of the Property to them. Further, the plaintiffs asserted that, notwithstanding they had provided all of the purchase money for the Property and arranged for Jackie to be the purchaser, they agreed with Jackie that she would be registered as the owner of the Property on the basis of:

1. Representations made by Jackie that this would prevent Jackie's sister, Marilyn Barbara Metzner ('**Marilyn**'), from interfering with the plaintiffs' intention to leave the Property to Jackie when they died, and would avoid payment of stamp duty on the transfer of the Property after their deaths ('**the Pleaded Representations**'); and
2. Jackie's promise that she would regard the plaintiffs as the true owners of the Property if they purchased the Property in her name ('**the Pleaded Promise'**).

The plaintiffs also asserted that:

1. Jackie made no contribution to the cost of acquisition of the Property;
2. Jackie knew or should have known that they relied on her "to act honestly, prudently, and carefully in the plaintiffs' interests";
3. Jackie:
    a. knew the Pleaded Representations were untrue or was recklessly indifferent as to the truth or otherwise of the representations;
    b. alternatively, was mistaken about the matters the subject of the Pleaded Representations;
4. Jackie has taken unconscionable advantage of the plaintiffs by:
    a. making the Pleaded Representations and Pleaded Promise and by denying their interest in the Property; or
    b. "accepting the benefit of legal ownership of the Property, knowing the basis on which it had been conferred"; and
5. Jackie holds her interest in the Property on a resulting or constructive trust.

Jackie denies that she made the Pleaded Representations or made the Pleaded Promise and she asserted that the plaintiffs purchased the Property in her name, told her that they intended it to be a gift to her and made a gift of the Property to her. Alternatively, Jackie contended that, should the Court have concluded that the Property be held on trust for the plaintiffs, Jackie only does so for the remainder of their lives, following which the full beneficial interest in the Property vests in her. By that alternative defence, Jackie asserted that the plaintiffs were not entitled to a transfer of the legal title in the Property, as any such transfer would be inconsistent with the trust.

Accordingly, the Court was required to make determinations on the following matters:

1. Did Jackie make the Pleaded Representations?
2. If so:

   a. Were the Pleaded Representations false?
   b. Did the Plaintiffs rely on the Pleaded Representations?
3. Should the Court find a resulting trust in favour of the plaintiffs because they provided all of the purchase money?
4. Is there to be inferred a presumption of gift (otherwise known as the "presumption of advancement") because Jackie is the daughter of the plaintiffs?
5. If Jackie holds the beneficial interest in the Property, is that subject to a life interest in the Property for the plaintiffs?

Decision:
The Court found that the plaintiffs had not established, on the balance of probabilities, that Jackie made the alleged representations. This was primarily because it was the plaintiffs' intention that they would be able to utilise the Property whenever and for whatever period they wanted, and Jackie accepted that was their intention. Jackie also accepted that she was not free to sell the property whilst either of her parents were alive. Further, the plaintiff's unconscionability case was not established.

In regard to the principal question of whether a resulting trust applied in favour of the plaintiffs, Rein J held that the plaintiffs' onus of rebutting the presumption of advancement was unsuccessful. Therefore, it was concluded that the presumption of resulting trust was rebutted by the presumption of advancement. The plaintiffs did not rebut the presumption of advancement save for Jackie's admission that she understood that the property could be used by her parents whenever they wanted, her promise not to sell the property whilst they were alive and her implicit acceptance that her parents had a claim to the property. Accordingly, the Court made a declaration that Jackie held the property on trust for her parents for their lifetime and then for herself absolutely.

Helou v Chahhoud

[2021] NSWSC 878

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 21 July 2021

CONTRACTS – deed of loan negotiated and signed by husband to complete purchase of property in the name of his wife – husband purports to sign deed on his wife's behalf – no direct dealings between wife and lender – whether husband had authority to commit his wife

EQUITY – subrogation – unauthorised and unenforceable borrowings – equity in Bannatyne v MacIver – claim not available on the pleadings

CIVIL PROCEDURE – interlocutory application – withdrawal of solicitor – conflict of interest – discretionary factors

Facts:

These proceedings concerned Fawaz Helou and Helou Developments Australia Pty Limited ('**the plaintiffs**') commencing proceedings against six defendants for repayment of the outstanding balance ($450,000) of a $500,000 loan. The loan was made for the purpose of purchasing a property in Peak View, NSW, and arose out of dealings between Mr Helou and Mr Elias Joseph Taleb ('**the second defendant**'). Ms Chadia Chahhoud ('**the first defendant**') was the wife of the second defendant and the sole shareholder and director of Elias Pty Limited ('**the sixth defendant**'). The remaining parties to the proceedings were three other Taleb/Chahhoud companies ('**formwork companies**'). The plaintiffs contended that, under the terms of the loan agreement, they are entitled to register a mortgage on the property to secure the defendants' repayment obligations. As such, the plaintiffs sought specific performance orders

The plaintiffs' case is primarily based on a loan agreement in the form of a deed, which is dated three months after the loan was initially made. The deed was signed by the second defendant on his own behalf and purportedly on behalf of all of the defendants. It purported to make all of the defendants' borrowers for the purposes of the loan and liable to repay it. The deed also purported to oblige the borrowers to give a mortgage over the Peak View property if called upon to do so by the lender. The Peak View property was acquired in the name of the first defendant, so because she remains the registered proprietor, the plaintiffs' specific performance claim is made against her.

The defendants' defence was that the deed of loan was a false document, and disputed the plaintiff's submission that it was signed by the second defendant and witnessed. However, in final submissions, Counsel for the defendants did not press this contention.

The major issue on the contractual claim was whether the first defendant was bound by the deed of loan (or by any previous oral agreement). In addition, there was an alternative claim against the first defendant in equity. Counsel for the plaintiffs put the contractual claim against the defendants on two bases: the primary basis was under the deed of loan. Further, the defendants contended that oral arrangements were binding on the first defendant, even if the deed of loan was not.

Counsel also submitted that equity was engaged because the money provided by the lender in the belief that the second defendant was acting as agent for his wife and the moneys were in fact applied in settling a debt of hers, namely, the purchase of the Peak View property.

Decision:

Contractual Claim

Parker J held that the contractual claim against the first defendant failed because its submission that the present case was similar to the facts of *Erceg v Volonakis* was not accepted. The Court found that the present case was different as there was no evidence from the second defendant or any other party that the first defendant was awareof the terms of the loan, let alone that she agreed to them.

Equitable Claim

The Court found that the plaintiff must have proved that the money was actually applied to the putative principal's debts, and as such, no factual allegation was pleaded in the statement of claim. Accordingly, Parker J held that reliance on the equity fell outside the pleadings.

Therefore, the Court found that the second plaintiff was entitled to judgment against the second defendant and the formwork companies under the deed of loan.

Hobhouse v Mount Gilead Pty Ltd

[2021] NSWSC 684

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 11 June 2021

LAND LAW — Conveyancing — Options — Call options — Whether on proper construction option could be validly exercised if purchase price had not yet been determined in accordance with terms of agreement — No issue of principle

Facts:

These proceedings concerned a Deed of Settlement and Release ('**the Deed**') between Katrina Julia Denzil Hobhouse ('**the plaintiff**') and her brother Lee Macarthur-Onslow ('**the third defendant**'). The arrangements under the Deed were complex and involved significant property assets, conferring a number of options to purchase different properties on behalf of the plaintiff and the third defendant. As part of such arrangement's, the third defendant was given a 60-day option to purchase an apartment in Yarranabbe Road, Darling Point ('**Yarranabbe Road Apartment**'). The combined effect of two clauses in the Deed was that the purchase price for the Yarranabbe Road Apartment under the call option was the midpoint between two valuations. Another clause in the Deed required any option to be exercised by giving written notice and an executed contract, together with a 10% deposit.

The proceedings arose because the call option was to expire on 23 April 2021, and the third defendant purported to exercise it by a notice given on 23 April 2021, in circumstances where only one of the two valuations had been obtained. The issue requiring the Court's determination was whether the call option could be exercised before the purchase price had been determined in accordance with the Deed.

The plaintiff contended that the call option could not be validly exercised because no completed contract or deposit cheque had been provided, both of which would require the purchase price to be known at the time. As such, the plaintiff sought a declaration that the third defendant had not validly exercised the call option and consequential relief.

The third defendant's primary submission was that the call option had been validly exercised, and advanced two arguments in support of this submission. Firstly, it was contended that exercising the call option without knowing the price was not a commercially odd result in circumstances where the third defendant was familiar with and has a right of occupancy over the Yarranabbe Road Apartment. In support of this argument, the provision of an executed contract and a deposit cheque would be inapplicable when the price had not been determined

Decision:

The Court concluded that the third defendant had validly exercised the call option, because on its proper construction, the Deed did not require the purchase price to have been determined at the time the option was exercised. The Court also agreed with the third defendant, in that, because the price of the Yarranabee Road Apartment had not been determined in accordance with the Deed, it was not necessary for the third defendant to provide a cheque or an executed contract with the notice.

Integrated Securities No 3 Pty Ltd v Oceans 5 Ultimate Getaways Pty Ltd

[2021] NSWSC 278

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 24 March 2021

LAND LAW – mortgages – possession of land – unregistered second mortgage – claim for possession - where mortgagor subsequently bankrupt – whether s 58 Bankruptcy Act precluded order for possession

Facts:

These proceedings concerned a loan agreement that was entered into between Integrated Securities No 3 Pty Ltd ('**the plaintiff**') and Oceans 5 Ultimate Getaways Pty Ltd ('**the first defendant**'). Under the loan agreement, the first defendant borrowed a sum of around $575,000 from the plaintiff. A number of other parties were guarantors of the obligations of the first defendant, amongst whom was Walid Chami ('**the second defendant**'). Part of the guarantee given by the second defendant was a mortgage over property owned by him in Erskineville. Although the loan was repayable on 31 October 2018, the first defendant defaulted. Subsequently a notice under s 57(2)(b) of the *Real Property Act 1900* (NSW) was served on 22 March 2019, however that notice was not complied with.

The plaintiff commenced proceedings on 4 June 2019, seeking judgment for the amount owing, and for possession of two parcels of land, one of which was the second defendant's, given by way of security for the loan. Default judgment had been obtained against the first, third and fourth defendants, who were not parties to the present proceeding, so the plaintiff sought summary judgment against the second defendant.

The second defendant filed a defence on 3 March 2020 and an amended defence about a week later. The defence principally denies the plaintiff's allegations and otherwise asserts that other persons, and particularly the fourth defendant, misled the second defendant into agreeing to become a guarantor and provide a mortgage over the property. Further, and by reason of that alleged behaviour, the second defendant pleaded that the contract was unjust according to s 7 of the *Contracts Review Act 1980* (NSW).

However, the second defendant became bankrupt on 28 July 2020, and for this reason, the Court indicated that he had no further interest in the proceedings brought against him for possession of the property, and accordingly, had no standing to be heard in defence of the plaintiff's claim.

The plaintiff firstly sought a declaration that the second defendant had in equity mortgaged the Erskineville property to the plaintiff, secondly, an order that the agreement between the plaintiff and the second defendant be specifically performed, and thirdly, an order for judicial sale of the property.

Decision:

Davies J was satisfied that the plaintiff established it had a mortgage over the second defendant's property, which came into existence through a contractual arrangement between the parties. Therefore, in the circumstances where the second defendant had been made bankrupt, albeit after a defence was filed, the Court was satisfied that the plaintiff was entitled to summary judgment for possession of the land. As such, numerous orders were granted in favour of the plaintiff.

Ippin Textiles Pty Ltd v Winau Aust Pty Ltd

[2021] NSWCA 9

Coram: Macfarlan JA, Leeming JA, Brereton JA

Court: New South Wales Court of Appeal

Date: 12 February 2021

LAND LAW – Torrens title – indefeasibility of title – fraudster procured execution and registration of mortgages purportedly on behalf of mortgagor – whether mortgages properly construed secure anything against the lands

LAND LAW – Torrens title – indefeasibility of title – effect of acknowledgment of receipt of payment in registered mortgage – acknowledgment prima facie evidence of receipt but must yield to the facts as proved – no advance actually made to mortgagor due to intervention of fraudster

LAND LAW – Torrens title – indefeasibility of title – whether an unregistered document can be incorporated by reference into a registered mortgage – existence of Special Condition in registered mortgage excluding unregistered document where void – unregistered document void due to fraud

Facts:

These proceedings concerned three parcels of land In Eastwood (‘**the Lands**’) that was purchased in 2016 by 183 Eastwood Pty Ltd (‘**third respondent**’). Two years later, Mr Scott Chan fraudulently procured ASIC to record him as the sole director and secretary of the third respondent, had Westpac Banking Corporation open a bank account in name of the third respondent with only Mr Chan entitled to operate it (‘**the WBC Account**’) and finally, had the LRS issue him with replacement Certificates of Title for the Lands.

Mr Chan executed, on behalf of the third respondent but without its authority, mortgages over the Lands in favour of the mortgagees as security for a loan of $4 million. The mortgagees paid the available loan amount into the WBC Account. In the absence of receiving any repayments, the mortgagees served a Notice of Default and sold the Lands. The proceeds of sale were paid into court, and were pending the outcome of these proceedings.

First Instance:

The trial judge directed that the separate question be determined first, that was, whether the registered mortgage secured anything in favour of the mortgagees against the Lands ang against the proceeds of sale. His Honour answered the separate question in the negative and found in the third respondent’s favour, finding that the mortgages did not secure anything against the properties and that the proceeds of sale should consequently be paid to the third respondent.

The Appeal:

The mortgagees then sought leave to appeal, challenging the trial judge's answer to the separate question. The primary submission on appeal was that a forged mortgage could gain indefeasibility under the *Real Property Act* and, as a matter of construction, it extended to the money advanced by the mortgagees. As such, the Court of Appeal was required to consider whether the mortgage secured anything in favour of the mortgagees against the properties.

The mortgagees contended that various terms of the mortgage constituted acknowledgements of the receipt of the advance intended to be secured by the mortgage. The Court of Appeal was prepared to accept that the mortgage identified the amount intended to be secured and that its terms at least implicitly acknowledged receipt of the advance by 183 Eastwood.

Decision:

However, the Court of Appeal found that such terms constituted only prima facie evidence of an acknowledgement of receipt of the money advanced. It held that an 'advance', in the present context, meant 'a voluntary act causing payment to be made to the intended recipient or at its direction'.

The Court indicated that even if it was assumed that the mortgage identifies the amount intended to be secured and acknowledges receipt by the mortgagor, this constituted at best prima facie evidence of what was asserted and must have yielded to the facts as proved. The fact that the mortgagees believed that they were advancing money to the third respondent or that the funds were transferred into a bank account in the name of the third respondent was immaterial. Thus, no "advance" was made to the third respondent, as payment into the WBC Account set up by Mr Chan without authority did not constitute payment to the third respondent.

As such, the Court of Appeal upheld the decision at first instance, finding that there had been no advance to the third respondent, meaning that although the mortgage was indefeasible, it secured no debt.

Irvine v Dowling

[2021] NSWSC 119

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 12 February 2021

LAND LAW — Conveyancing — Requirements of writing — Agreement to create or dispose of interest in land — Where beneficiaries including executrix agree in writing to bid among themselves to purchase estate property instead of sale by public auction — Whether subsequent purported oral variation enforceable —Conveyancing Act 1919 (NSW), s 54A(1)

Facts:

These proceedings concerned the writing requirements of an agreement to purchase an Estate property, and the entitlements of three siblings (Elizabeth, Max and Robert) in relation to their father's estate. Elizabeth Dowling ('**first defendant**') was the registered proprietor of a property of the estate, which she held on trust for herself and her siblings as beneficiaries of the estate.

Max Irvine ('**the plaintiff**') commenced the proceedings to have the first defendant removed as executor relying on, among other things, her alleged delay in administering the Estate. The first defendant claimed that she was entitled to purchase the property and that she had been ready, willing and able to complete that purchase.

Further, the first defendant claimed that she was entitled to buy the property as the highest bidder pursuant to a written agreement between the three siblings that the property should be sold to the highest bidder by a private auction between themselves using written bids. Subsequently, the siblings agreed orally to a process of verbal bids ('**the verbal agreement**').

What was initially a dispute over the administration of the estate and revocation of probate became a contest over whether the first defendant had a present entitlement to purchase the Property pursuant to the agreement. The parties ultimately accepted that the success of their respective cases turned largely on the principles of contract, including the application of the Statute of Frauds as enacted in s 54A(1) of the *Conveyancing Act 1919* (NSW)

The parties agreed that the written agreement was valid and binding under s 54A, because the successful bidder was required to enter a written contract to buy the property on specified terms. However, the verbal agreement was not enforceable as it was a 'purported variation' because it sought to change the bidding method of the agreement but was not in writing (as required under s 54A).

Decision:

The Court held that while the first defendant's delay had been a breach of the agreement, no party had purported to accept that breach and terminate the agreement. Thus, she was entitled to purchase the property from the estate however, on equitable grounds, was required to pay interest for her delay.

Kim v Anwar

[2021] NSWSC 930

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 28 July 2021

LAND LAW – caveats – extension or removal of caveats – defendant lodged caveat over the plaintiffs' property – claimed interest described as a charge – no evidence of any agreement creating a charge over the plaintiffs' property – no serious question to be tried – plaintiffs entered into a contract for the sale of the property with third party purchaser – purchaser issued notice to complete – balance of convenience favours removal of caveat – order that the defendant withdraw caveat pursuant to section 74MA of the Real Property Act 1900 (NSW)

COSTS – departure from the general rule – successful plaintiffs seek costs on indemnity basis – defendant's caveat was lodged with consent or concurrence of first plaintiff – lodgement of caveat part of arrangement intended to hinder or undermine completion of contract for sale to which plaintiffs were bound – lodgement of caveat an abuse of caveat system – first plaintiff and defendant both responsible for abuse – cost of proceedings as much a product of arrangement between first plaintiff and defendant as a product of defendant's refusal to withdraw caveat – appropriate to depart from the general rule – no order made as to costs to the intent that each party bear their own costs of the proceedings

Facts:

These proceedings concerned Young Mi Kim ('**the first plaintiff**') and Ryung Han ('**the second plaintiff**') seeking an order under s 74MA of the *Real Property Act 1900* (NSW) for Decky Anwar ('**the defendant**') to withdraw a caveat he lodged against the title to a property that was owned by the plaintiffs. The first plaintiff was the mother of the second plaintiff, and the defendant was the father of the second plaintiff. The application was brought on urgently in circumstances as the property was the subject of a contract for sale which was overdue for completion.

The caveat was lodged in unusual circumstances, as it was arranged between the first plaintiff and the defendant. The arrangement arose from the first plaintiff's concern that the price on the contract was too low, and asked the defendant whether there was a way to change the contract. The defendant's suggestion was to lodge a caveat, and the first plaintiff agreed to that occurring.

The Court indicated that on an application under s 74MA, the caveator bears the onus of showing that there is a serious question to be tried as to the existence of the interest claimed in the caveat. If that onus is discharged, the caveator then has the onus to show that the balance of convenience is in favour of the continued operation of the caveat.

Decision:

Darke J was not satisfied on the evidence that there was a serious question to be tried as to the existence of a charge over the property in favour of the defendant, particularly because the extent of the claimed charge was entirely unclear. In any event, the Court held that even if there was a serious question as to the existence of a charge, Darke J did not believe that the balance of convenience was in the favour of the continued operation of the caveat. As such, the property was already the subject of the contract for sale to an innocent third-party purchaser by the time the caveat was lodged. Therefore, the balance of convenience was in favour of ordering the removal of the caveat.

On the issue of costs, the plaintiffs sought their costs of the proceedings from the defendant. In ordinary circumstances, Darke J indicated that such an order would be appropriate in accordance with the general rule that costs follow the event. However, the circumstances of this case were unusual, as the caveat in question was lodged with the consent of the first plaintiff. Darke J found that, in essence, the first plaintiff did not come to the court with clean hands, and her consent hindered the completion the contract for sale. Thus, the Court departed from the general rule that costs follow the event, and ordered the parties to bear their own costs of the proceedings.

Kumar v Registrar-General of New South Wales

[2021] NSWSC 1103

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 31 August 2021

LAND LAW – Torrens title — Compensation for loss of interest in land – Torrens assurance fund – plaintiff held an equitable interest as unpaid vendor or as equitable mortgagee – plaintiff's agent left signed withdrawal of caveat form with director of registered proprietor – director dishonestly used form in order to remove plaintiff's caveat as part of refinancing transaction – refinancing transaction involved creation of new interests including new first registered mortgage – new first mortgage secured greater sum – first mortgagee exercised power of sale – proceeds remaining after satisfaction of first mortgage divided by agreement amongst competing claimants – plaintiff received 26% of remaining funds – whether plaintiff deprived of land as a consequence of fraud – whether plaintiff suffered loss or damage as a result of the operation of the Real Property Act – not shown that plaintiff would have been financially better off had refinancing transaction not occurred – plaintiff failed to establish that he suffered loss or damage that falls within s 129(1)(e) of the Act – compensation in any event not payable under s 129(2)(a) of the Act because any such loss or damage is a consequence of acts or omissions of the plaintiff

Facts:

These proceedings concerned Mohan Kumar ('**the plaintiff**') commencing proceedings against the Registrar-General ('**the defendant**') for compensation from the Torrens Assurance Fund. The plaintiff claimed have suffered a loss as a result of the operation of Part 14 of the *Real Property Act 1900* (NSW) ('**the Act**') in respect of a property in Dural. The property was sold by the plaintiff to a development company ('**Bargo**'), so the plaintiff claimed to have an interest in the land in the nature of an unpaid vendor's lien, or as an equitable mortgagee. As such, the plaintiff alleged that the interest ranked first in priority behind a first registered mortgage, protected by a caveat, including in the period from December 2017 to March 2018.

During that period, Bargo effected a refinancing transaction which created additional interests in the land. One of the interest holders, Kesinda Pty Ltd ('**Kesinda**') became registered as a first ranking mortgagee in place of the existing mortgagee, N & M Investments/Properties Pty Ltd ('**N & M**'). In order to facilitate the refinancing transaction, Bargo made use of a withdrawal of caveat form that had been executed on behalf of the plaintiff. The plaintiff alleged that the use of the withdrawal of caveat form was contrary its instructions, and amounted to fraud.

In about June 2018, Kesinda exercised its rights as mortgagee to take possession of the property. The property was later sold pursuant to the exercise by Kesinda of its power of sale, where the proceeds of sale was around $2 million. Kesinda commenced proceedings in which it paid into Court the remaining funds. Such proceedings became the vehicle for the resolution of the competing claims of the parties who claimed to have an interest in the Dural property or its proceeds of sale. The plaintiff received a total of $527,839.22, being 26% of the available funds.

In those circumstances, the plaintiff alleged that he had suffered loss or damage as a result of Part 14 of the Act, and that the loss or damage arises from having been deprived of an interest in the Dural property as a consequence of fraud, under s 129(1) of the Act. In particular, the plaintiff contended that the loss suffered was due to the registration of the Kesinda mortgage, which secured an amount greater than the amount secured by the N & M mortgage. Further, the plaintiff submitted that loss was suffered as he was placed into a situation where he had to compete with other claimants for priority after the first registered mortgagee. Accordingly, it was said that rather than obtaining all of the remaining proceeds of about $2 million, the plaintiff received only around $528,000. On that basis, a further loss of $1.5 million was claimed.

The defendant denied that the plaintiff had been deprived of his interest in the Dural property, or suffered a loss or damage as a result of Part 14 of the Act or as a consequence of fraud. Further, the defendant contended that any loss or damage that may be found was a consequence of the plaintiff's own acts or omissions in relation to the withdrawal of caveat form, and to that extent, compensation was not payable.

Decision:

Darke J emphasised that in order to succeed in establishing an entitlement to compensation in relation to any claimed loss or damage, the plaintiff must not only show that any deprivation of land or an estate or interest in the land was a consequence of fraud, but also show that the loss or damage that arose thereby was a result of the operation of the Act.

On the fraud issue, Darke J accepted that Bargo, in making use of the withdrawal of caveat form to facilitate the refinancing transaction, acted contrary to the instructions he had been given by the plaintiff's agent. As such, the Court accepted that Bargo's principal had acted dishonestly and fraudulently.

It followed the loss or damage issue, it followed that the plaintiff would have been entitled to compensation if any loss or damage can be said to have arisen from the Act. However, the Court was not satisfied that the plaintiff suffered loss or damage as a result of the operation of the Act in respect of the Dural property. Accordingly, Darke J held that it could not have simply been assumed that the plaintiff's equitable interest ranked first in priority, or that the plaintiff would in fact have been able to recover to the full extent of the available equity.

The Court was not satisfied that plaintiff would have been financially better off had refinancing transaction not occurred, and therefore, the plaintiff failed to establish that he suffered loss or damage that fell within s 129(1)(e) of the Act. Thus, the plaintiff's claim for compensation from the Torrens Assurance Fund was refused.

Kyriacou v Makis

[2021] NSWSC 60

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 09 February 2021

CONTRACTS — Formation — Agreement — Intention to make concluded bargain — where alleged draft written contract provided that it would become binding when signed by the parties — where the draft was not signed by either party — no contract created — no point of principle

CONTRACTS — Formation — Agreement — where the defendant had not authorised the person who provided the alleged draft written contract to the plaintiff to enter into a contract on the defendant's behalf — no contract created — no point of principle

CONTRACTS — Formation — Agreement — where there were a number of different draft contracts and other documents referring to different and inconsistently worded terms of the alleged contract — no contract created — no point of principle

EQUITY — General principles and maxims — Statute of Frauds — Part performance — whether specific performance of an unsigned agreement should be ordered — where it is alleged that one party has performed their obligations but the other party has not — where the Court holds that there was no agreement made — where, even if there was an agreement, the acts relied upon for part performance are not consistent only with partial performance of the alleged agreement — no point of principle.

Facts:

Mr Kyriacos Kyriacou ('**the plaintiff**') was employed as a kitchen cabinet maker, and Ms Andrea Makis ('**the first defendant**') was a primary school teacher. Mr Ioannis Papatheodotou was the former husband of the first defendant, and was not a party to the proceedings but a significant witness. The personal and business relationship between the three parties meant that, until disputes began, affairs were conducted with a high level of mutual trust, and was guided by the business experience of Mr Papatheodotou.

The plaintiff's primary objective in these proceedings was an order for specific performance of an agreement that was he claims was made by Mr Papatheodotou on behalf of the first defendant with the plaintiff. The nature of the agreement was to split the investments held by the plaintiff and the first defendant between them, so that their investments would thereafter be separate. Although the plaintiff denied that the relationship between the parties was a partnership, the document prepared by Mr Papatheodotou and given to the plaintiff was called a "Partnership Dissolution Agreement" ('**the PDA**').

However, the PDA was not signed by either party. The plaintiff contended that the PDA was enforceable notwithstanding that it was not signed, and further, that his obligations had been performed, but the first defendant had refused to perform hers. The subject of the allegedly unperformed obligation of the first defendant under the PDA was the transfer of her half interest in a block of eight home units (‘**the MacDonald Street Units**’) to the plaintiff, subject to an existing mortgage to the ANZ bank.

The first defendant denied that the PDA was agreed by her and the plaintiff, contending that the parties never met or discussed the dissolution of the investment relationship, and that she never authorised anyone to negotiate the PDA on her behalf with the plaintiff. As such, the first defendant denied that she held her interest in the MacDonald Street Units on trust for the plaintiff.

The issues required for the Court’s determination were as follows:

1. Was there an agreement made between the plaintiff and the first defendant relating to the separation of assets and liabilities then jointly owned by them (as evidenced in the form of the PDA);
2. If so, has the agreement been partially performed?
3. If so, should specific performance, or alternatively damages be ordered?

Decision:

Robb J was not satisfied that the first defendant agreed to be bound by the terms of the PDA, as there were no signatures from either parties effecting the agreement. Further, Robb J held that the first defendant has not given Mr Papatheodotou the authority to enter into a contract on her behalf with the plaintiff. The evidence also established that Mr Papatheodotou did not discuss the PDA specifically with the first defendant at the time it was prepared because the plaintiff had not first agreed to those terms.

Therefore, the Court was not satisfied that there was any real agreement concerning the assets and debts relevant to the parties' ventures. Consequently, it was not strictly necessary for the Court to determine whether the conduct of the plaintiff constituted sufficient acts of part performance of the PDA to make it enforceable insofar as it provided for the sale or other disposition of land or any interest in land within the meaning of s 54A of the *Conveyancing Act.* Therefore, the last question did not arise.

Landream Melbourne v Aust and NZ International Investment Group

[2021] NSWSC 650

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 28 May 2021

CONTRACTS — Termination — Breach of term – Plaintiff and Defendant entered into an agreement concerning the rezoning and redevelopment of a property owned by the Defendant - the Defendant (on its case) terminated or (on the Plaintiff's case) purported to terminate the agreement on the basis of breach of a clause requiring the Plaintiff to notify the Defendant if there is a "change in control including a change in the majority shareholding of [the Plaintiff] or its parent company without [the Defendant's] approval not to be unreasonably withheld" – in September 2020 the sole shareholder (and sole director) transferred all of his shares to three different companies – consent was not sought prior to the transfer of shares or the appointment of a new director – the Plaintiff contended the Defendant was not entitled to terminate the agreement as on the proper construction of the clause it was not required to notify the Defendant of the change – the Court considered the three alternative constructions of the change in control clause advanced by the Plaintiff – the Court held the requirements of the clause were met and that the change in the majority shareholders without approval entitled the Defendant to terminate.

CONTRACTS — Remedies — Liquidated damages — Penalty – in the alternative the Plaintiff contended the change in control clause constitutes a penalty – consideration of whether the provision is a primary or secondary obligation – whether the purpose of the clause was punish the borrower for breach then compel performance – consideration of the principles of Kay v Playup Australia Pty Ltd [2020] NSWCA 33 and Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205 and the predominant purpose of the clause – the Court held the change in control clause was not a penalty.

CONTRACTS — Termination — Relief against forfeiture – the Plaintiff contended that, if the Defendant was found to be have been entitled to terminate the contract, it should be granted relief against forfeiture – issue of whether the remedy is available in respect of a contractual breach which does not involve a proprietary interest – whilst there were significant consequences for termination for breach, the Court did not find the Defendant's conduct was unconscientious or unconscionable – the Court held no relief against forfeiture should be granted.

Facts:

These proceedings concerned an agreement between Landream Melbourne Pty Ltd ('**the plaintiff**'), and Aust & NZ International Investment Group Pty Ltd ('**the defendant**'). The agreement was described as an Exclusive Dealings Agreement and Term Sheet ('**Term Sheet**') and concerned a property in Parramatta operated by the defendant as a Holiday Inn Hotel ('**the Hotel**'). The defendant sought to have the Hotel rezoned and redeveloped, and therefore purported to terminate the Term Sheet on the basis of Clause 11(a). This clause stipulated that the defendant was permitted to terminate if there was a change in control including a change in the majority shareholding of the plaintiff or its parent company without the defendant's approval.

The plaintiff contended that the defendant was not entitled terminate the agreement as, on its proper construction, Clause 11(a) was not a change which required the defendant's consent. The plaintiff then asserted that if the first argument was not accepted, the clause constituted a penalty. Further, the plaintiff contended if neither of these arguments were upheld, then it should be granted relief against forfeiture.

The essence of the plaintiff's primary argument was that if the termination was invalid, the Court should be satisfied that rezoning would have occurred if the defendant had signed a Voluntary Planning Agreement ('**VPA**'). Further, the plaintiff claimed that the Court should infer that it was the defendant's failure to obtain its lender's support for the signing that prevented rezoning from occurring. On this argument, the defendant accepted that it decided not to seek approval from its lender because of the plaintiff's breach of Clause 11(a) of the Term Sheet, but disputed that the Court conclude that rezoning would have been achieved even if it had not terminated the Term Sheet.

Decision:

Construction Argument

Rein J held that there was no warrant for reading into Clause 11(a) with the words as submitted by the plaintiff, that was "beneficial ownership" or replacing "shareholding" with "unitholding". As such, it was held that the existing words of the Term Sheet were clear and unambiguous, and the interpretations advanced by the plaintiff would only have introduced a complication that could not reasonably have been intended by the parties. Therefore, the Court found that the change in the majority shareholders of the plaintiff without the approval of the defendant did entitle the defendant to terminate the Term Sheet.

Penalty Argument

Rein J found that there was nothing unconscionable in relying on a clause which required one party to seek the other's agreement to a change in the majority shareholding, and further, that a lack of consent was a ground for termination. As such, the Court indicated that the fact that the plaintiff could have sought consent also undermined its case that the clause is a penalty. Therefore, it was concluded that Clause 11(1) was not a penalty.

Relief Against Forfeiture Argument

The plaintiff contended that if it had been unsuccessful on the construction and penalty grounds, it should be granted relief against forfeiture. Rein J held that it was too late for the plaintiff to advance that contention at such a late stage of the proceedings. Further, his Honour said that the relief against forfeiture which the plaintiff sought was to reinstate the Term Sheet, however the defendant would be adversely affected by such a reinstatement if it was precluded from relying on the failure to obtain rezoning. Therefore, it was concluded that no relief against forfeiture be granted.

It followed that the plaintiff's summons be dismissed and the plaintiff pay the defendant's costs.

Liv Style Group Pty Ltd v Eternity Fortune Group Pty Ltd

[2021] NSWSC 1398

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 28 October 2021

LAND LAW – Mortgages – where second unregistered mortgage granted by guarantor to secure loan debt owed to plaintiff – where property subject to first registered mortgage and subsequent caveat – where guarantor currently located in China offered to repay but did not participate in proceedings – where unclear whether third party occupies property – whether orders for judicial sale and ancillary orders for possession appropriate

Facts:

These proceedings concerned an application by Liv Style Group Pty Ltd ('**the plaintiff**') seeking orders for judicial sale of a property in Rosebery and ancillary orders for possession. The relief was sought against Mr Zihuan Qin ('**the second defendant**') who is the registered proprietor of the property.

The plaintiff entered into a loan agreement as lender with Eternity Fortune Group Pty Ltd ('**the first defendant**') as borrower for the principal sum of $200,000. The loan was made to enable the second defendant to settle his purchase on the property. The loan agreement stipulated that security was to be provided by way of a registered second mortgage over the property. A first registered mortgage had already been granted by the Bank of China (Australia) Ltd ('**the fourth defendant**'). The second defendant signed the loan agreement as a co-guarantor of the loan, and the other co-guarantor was Mr Tung Tong ('**the third defendant**'). As security for his obligation as the guarantor, the second defendant granted a second mortgage over the property, which was unregistered, and the subject of a caveat lodged by the defendant in relation to the property in question. No repayments were made on the loan.

By way of ancillary orders, the plaintiff contended that the second defendant deliver up vacant possession of the property, and an order granting leave to issue forthwith a writ of possession.

Decision:

The Court ordered that the property be sold by the plaintiff, the second defendant deliver up vacant possession of the property, and granted the plaintiff leave to issue a writ of possession.

Ludwig v Jeffrey (No. 3)

[2021] NSWSC 23

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 27 January 2021

EQUITY – Trusts and trustees – Powers, duties, rights and liabilities – Indemnity of trustee – the plaintiffs and the defendant were registered proprietors as joint tenants of certain real property – the defendant held his one third interest as joint tenant in the property on trust for the plaintiffs – the property sold and the net proceeds held pending the outcome of these proceedings – pursuant to orders of the Court part of the proceeds were applied by the plaintiffs to acquire another property – the defendant incurs costs, expenses and tax liabilities as the trustee of his legal interest in the property – the maximum quantum of that indemnity in relation to the defendant's costs and expenses are fixed – the defendant's potential liability to capital gains tax and other taxes appears to be zero or very low – what orders should now be made with respect to the payment out of money which is held by an independent solicitor – should a cost assessment now take place or should a gross sum costs order be made – new issue raised as to whether Trustee Act 1925, s 100A may modify the amount paid out of the fund held by the independent solicitor.

Facts:

These proceedings concerned a trust property of around $204,000. On 2 December 2020, in attempting to reduce the areas of disagreement between the parties, the Court decided to assist them to achieve consensus by providing draft declarations and orders. However, despite such assistance, the parties did not reach agreement about the balance of the orders to reflect the Court's reasons in its 30 November 2020 judgment.

The parties provided competing short minutes order to the Court, which ultimately revealed conflicts in the following three areas:

1. Whether or not a further costs assessment was required;
2. Whether legal costs and expenses in the conduct of the plaintiffs/cross-defendants' motion should be awarded on the indemnity basis or otherwise; and
3. The possible future application of s 100A of the *Trustee Act 1925* to the trust.

Decision:

A further costs assessment:

The parties were at issue about the appropriate form of order to be made for the release of funds from the account of an independent solicitor. Mr Jeffrey ('**the defendan**t') proposed the immediate release of around $140,000, which was the sum of three amounts for legal costs and expenses incurred. The Ludwigs (**'the plaintiffs**') accepted that the first amount of $29,558.78 can be released by the independent solicitor, however, the plaintiffs do not permit the immediate payment out of the other two sums other than by agreement or as a result of the determination and certification of an amount after the completion of a costs assessment. The parties were therefore at issue as to whether there should be a costs assessment before payment out from the independent solicitor's fund under the second two sums. The Court made an order providing for the payment of some funds out by the independent solicitor to the defendant.

Costs of the previous motion:

The defendant proposed that the costs of the motion before Lindsay J be recoverable on an indemnity basis. The Court accepted this request.

The possible application of the Trustee Act 1925, s 100A

The Court directed the parties to elect whether they will raise the issues concerning the trustee Act 1925, and reserved that issue for further consideration.

David Ian Mansfield, the Trustee of the Property of Thi Ngoc Hahn Son, A Bankrupt v Tia

[2021] NSWSC 1080

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 26 August 2021

CIVIL PROCEDURE – dismissal of proceedings – plaintiff appointed as trustee of a bankrupt's estate and thus became co-owner of real property with defendant – plaintiff commenced proceedings to sell property pursuant to section 66G of the Conveyancing Act 1919 (NSW) – parties entered into Deed of Sale in relation to the property – property sold – no longer any utility to the proceedings – proceedings dismissed

COSTS – departure from the usual order – usual position that costs of section 66G application are paid out of proceeds of sale – property sold pursuant to Deed of Sale – plaintiff seeks costs – whether defendant acted unreasonably in failing to respond to plaintiff's attempts to negotiate – held that defendant had no obligation to negotiate prior to commencement of proceedings and any delay after commencement of proceedings not shown to be entirely the defendant's fault – defendant seeks no order as to costs – whether Deed of Sale disposed of all issues including as to costs of proceedings – Deed indicated that parties reached no concluded agreement as to costs of proceedings – open to Court to make order as to costs – held that the circumstances do not justify a departure from the usual position that involves a sharing of costs between co-owners – defendant ordered to pay half of the plaintiff's costs

COSTS – gross sum order – whether appropriate to make such an order – plaintiff incurred actual costs of $42,511.72 and seeks gross sum order fixed at $32,717.02 – Deed of Sale provided that the parties would bear their own costs in relation to the Deed – some costs claimed by plaintiff appear to relate to preparation of the Deed – held that there is some doubt the Court could fix a fair sum between the parties – defendant should not be deprived of the benefit of a costs assessment – gross sum order not made

Facts:

These proceedings concerned Mr Mansfield ('**the plaintiff**') seeking a statutory sale of a co-owned property in Cabramatta pursuant to s 66G(1) of the *Conveyancing Act 1919* (NSW). The plaintiff and Binh Long Tia ('**the defendant**') had entered into a Deed of Agreement and Sale of the property, and was subsequently sold. Although completion of sale occurred, which removed the need for the proceedings to continue, there was a dispute as to costs.

Accordingly, the plaintiff sought an order for the dismissal of the proceedings and an order that the defendant pay the plaintiff's costs as a gross sum, fixed at $32,717.00. The plaintiff submitted that the defendant failed, refused, or neglected to respond to the plaintiff, despite being aware of the communications sent to him. Further, the plaintiff submitted that he was required to commence these proceedings, in which he ultimately incurred legal costs of $42,511.72.

Decision:

The Court found that the defendant lacked any obligation to negotiate with the plaintiff before the commencement of the proceedings, and once the proceedings had begun, the delays had not been shown to be entirely the defendant's fault. For these reasons, the plaintiff failed to demonstrate that the defendant's conduct warrants the order for costs the plaintiff sought. Therefore, the Court did not depart from the general position that the costs be equally shared between the plaintiff and defendant co-owners, and the proceedings were dismissed.

McNamee v Martin as Financial Manager for John Boden McNamee

[2021] NSWSC 568

Coram: Sackar J

Court: Supreme Court of New South Wales

Date: 20 May 2021

PERSONAL PROPERTY — Co-ownership — Joint tenancy — Severance — whether unilateral severance of a joint tenancy by alienation to oneself is effective in relation to chose in action

PERSONAL PROPERTY — Co-ownership — Statutory trust for partition — Appointment of trustees — whether a debt is "property" within the meaning of s 66G of the Conveyancing Act or whether it is a "chattel" within the meaning of s 36A of the Conveyancing Act

Facts:

Margaret McNamee ('**the plaintiff**'), who was married to John McNamee ('**the first defendant**'), were the parties in these proceedings. In December 2019, the Court made orders appointing a financial manager for the first defendant. Lorebray Pty Ltd ('**the second defendant**') was the family company and the trustee of the McNamee Property Trust. The plaintiff and first defendant were directors of the second defendant until their resignation in May 2020.

There was no dispute that the second defendant was indebted to the plaintiff and first defendant for a significant sum of money ('**the Parent's Loan**'). The Parent's Loan was made to the second defendant by the plaintiff and first defendant, at law, as joint tenants. That is because, at law, there is ordinarily no tenancy in common in respect of a chose in action. Therefore, when either the plaintiff or the first defendant passed away, their interest in the Parent's Loan would pass onto the other pursuant to the principle of survivorship.

On 17 December 2020, the plaintiff executed a Deed of Assignment ('**the Assignmen**t'), and notice of the Assignment was served on the second defendant on 18 December 2020. The Assignment assigned the plaintiff's right in the Parent's Loan to herself "absolutely" and for consideration. The first question to be determined was whether this was sufficient to sever the joint tenancy to which the Parent's Loan is held.

The plaintiff sought orders which would give effect to her severance from the Parent's Loan from a joint tenancy to a tenancy in common. In the alternative, the plaintiff sought an order that the loan be held on statutory trust for partition pursuant to s 66G of the *Conveyancing Act*

1919 (NSW) (‘**the Act**’) or, alternatively, that the Parent’s Loan be divided equally pursuant to s 36A of the Act.

The plaintiff made three submissions. Firstly, it was contended that the effect of a Deed of Assignment was that the joint tenancy in the Parent’s Loan was ended, thereby validly alienating her interest. Secondly, the plaintiff contended that irrespective of whether the Deed of Assignment effectively severed the joint tenancy of the Parent’s Loan, for the avoidance of doubt the Court should order the Parent’s Loan be held on statutory trust for partition pursuant to s 66G of the Act as “property (other than chattels)”. Thirdly, and in the alternative to the second submission, the plaintiff submitted that the Court should order that the interest in the Parent’s Loan be divided equally pursuant to s 36A of the Act as a “chattel”.

Decision:

Effect of the Assignment

The Plaintiff submitted that because she was both assignor and assignee, the Assignment is a unilateral severance of the joint tenancy by alienation to oneself, as allowed by s 24 of the Act. Therefore, the plaintiff submitted that the Assignment is capable of is capable of constituting an effective alienation at the very least in equity, thereby effecting severance of the joint tenancy. Sackar J agreed and held that the plaintiff’s assignment, by a validly executed and delivered deed poll of the chose in action on 17 December 2020, was sufficient to sever the joint tenancy. As such, the Court indicated that the result of that Assignment was to release and relinquish the right of survivorship previously inuring to her

Section 66G of the Act

The Court indicated that the plaintiff, as one of two joint tenants, clearly had standing to seek for the partition of the relevant property, as she was a co-owner for the purposes of s 66F(1) of the Act. In addition, the Court noted that the chose in action fell squarely within the definition of “property” for the purposes s 7 of the Act. As such, the only question was the appropriateness of such an order. Sackar J observed that these proceedings were somewhat unusual as the common type of case involved real property, whilst the property in contention here was the Parent’s Loan. That being said, the Court found that the Parent’s Loan was still clearly property for the purposes of the Act.

Section 36A of the Act

Sackar J found that it was strictly unnecessary for his Honour to deal with this provision.

Miles v Amos

[2021] NSWSC 38

Coram: Hallen J

Court: Supreme Court of New South Wales

Date: 3 February 2021

PERSONAL PROPERTY – Assignment of choses in action based upon Deed of Debt – Whether assignment valid if Defendant's signature on Deed of Debt not proved to be her signature – Evidence of two witnesses of the Plaintiff that Defendant signed Deed of Debt in their presence – Defendant denies having signed Deed of Debt – Two of her witnesses give evidence that the Defendant could not have done so as one, or both, of them were with her on the day the Deed of Debt said to have been signed – Fourth signatory on Deed of Debt not called and each of the other signatories deny knowing him – Also evidence of expert forensic document examiner

EVIDENCE – Standard of proof – Whether the Plaintiff has satisfied the Court that the Deed of Debt was signed by the Defendant – Credibility of the lay witnesses – The expert evidence on handwriting regarding simulation of the Defendant's signature on Deed of Debt – No expert forensic evidence called on behalf of the Plaintiff – Seriousness of allegation – Whether Plaintiff able to discharge burden of proof as to authenticity of Defendant's signature on Deed of Debt

PERSONAL PROPERTY – Assignment of choses in action – Whether Deed of Debt assigned and if so nature of the assignment – Whether Deed of Assignment rectified

CONTRACTS – Rectification – Intention – Deeds of rectification – Where rectification of two different Deeds of Assignment purported to give effect to actual intention of the assignor and assignee, respectively, in Deeds of Assignment – Whether sufficient evidence of actual intention of each of the parties to first Deed of Assignment

Facts:

These proceedings concerned a claim made by Phillip Miles ('**the plaintiff**') against Catherine Amos ('**the defendant**') pursuant to a valid assignment of debt owed but unpaid, which includes the value of jewellery said to have been retained by the defendant. The two significant witnesses in the proceedings, although not parties to the proceedings, was Ms Ong and Mr Baena. Ms Ong, a businesswoman, was said to have assigned to debt (and chose in action) to Mr Baena, a solicitor, who in turn assigned the debt (and chose in action) to the plaintiff. The claim was for the sum of $305,334 plus interest, as asserted in the plaintiff's third amended Statement of Claim.

The central issue requiring the Court's determination was whether the defendant signed a written Deed of Debt, and whether she had retained the jewellery, which she acknowledged that she received, but which she said had returned.

In essence, the plaintiff sought recovery of a debt said to be owed by the defendant. However, the claim was brought by the plaintiff as the second assignee of the debt. As such, the underlying transaction said to have given rise to the debt was one between the defendant and Ms Ong. The plaintiff contended that the defendant and Ms Ong had entered into a partly oral contract to the effect that the defendant would purchase land in Tasmania in Ms Ong's name, and would arrange for the construction of a building on that land. In consideration, the plaintiff contended that Ms Ong would initially pay $40,000 to the defendant in cash, and would pay the balance $265,334, by giving her jewellery said to be of that value. The plaintiff further contended that Ms Ong had paid the defendant in accordance with the agreement, however, the defendant had failed to purchase the land in Ms Ong's name and construct anything upon it. Finally, the plaintiff's case was that due to such a failure to uphold the terms of the agreement, those parties had entered into a Deed of Debt.

The Deed of Debt stipulated that the parties had unconditionally and willingly agreed that the Debtor owes the Creditor in the amount of $305,334.00 AUD plus interest." This amount consisted of two bank transfers and various jewellery. However, the defendant denied that the Deed of Debt had been signed by her. She called two witnesses to support her denial, and additionally, a forensic document examiner to give expert evidence on the topic. Accordingly, the defendant denied that any assignment was legally effective on the following four grounds:

1. The debt, Deed of Debt and cause of action did not exist (as she had not been a party to and had not signed that document);
2. The alleged cause of action was not capable of being assigned at law, or in equity, as it was a bare right to bring an action for the tort of conversion;
3. Alternatively, the alleged cause of action was not capable of being assigned as a contractual right, as the plaintiff did not have a genuine commercial interest in the enforcement of the claim; and
4. The proceedings constituted an abuse of process as the plaintiff was trafficking in litigation.

Finally, the defendant denied that the plaintiff held any equitable interest in the defendant's interest in certain land at Mount Annan on the title to which he had lodged a caveat.

Decision:

Hallen J indicated that, in order to provide that the Deed of Debt was authentic, the plaintiff bore the onus of rebutting the allegation that the defendant never signed it. As such, his Honour found that the plaintiff failed on that issue, and was therefore not satisfied that the plaintiff had established that the defendant signed the Deed of Debt. Having come to such conclusions, the plaintiff could not rely upon the assignment of the rights under that Deed to establish its case.

It followed that as Mr Baena had only purchased and taken all of Ms Ong's "rights, title and interest over the above-mentioned Deed of Debt", the assignment by Mr Baena to the plaintiff could not be for more than that which had been assigned to Mr Baena by Ms Ong. It followed that the assignment to the plaintiff could only be of all of Ms Ong's "rights, title and interest over the above-mentioned Deed of Debt". In the circumstances, the plaintiff's case was dismissed with costs, and the removal of the caveat lodged over the Mount Annan property was ordered.

Miles v Amos

[2021] NSWCA 210

Coram: Meagher JA, Leeming JA, Brereton JA

Court: New South Wales Court of Appeal

Date: 10 September 2021

DEEDS – execution – whether defendant signed deed – creditor and witness testified that defendant signed deed – defendant testified that she did not sign deed – uncontradicted expert evidence that defendant's signature was not authentic – primary judge dismissed proceedings on basis of not being persuaded that debtor had signed deed – whether conclusion disclosed appellable error – appeal dismissed

Facts:

These proceedings concerned an appeal from Mr Miles ('**the appellant**') from the dismissal of his third amended statement of claim against Ms Amos ('**the respondent**'). The notice of appeal included 49 grounds, plus a further ground related to costs and an application for leave to adduce further evidence. However, notwithstanding the notice of appeal, the Court of Appeal indicated that the appeal turned on a single issue, that was, whether the respondent signed a "Deed of Debt".

First Instance:

The appellant maintained that he purchased a debt owed by the respondent, from Mr Baena, who had himself purchased it from Ms Ong. Mr Baena and Ms Ong were not parties to the proceedings, but were significant witnesses in the trial proceedings. The debt consisted of dealings between Ms Ong and the respondent, involving transfers of money and the delivery of jewellery. At first instance, there was considerable dispute about the nature of such dealings, and whether the jewellery had been returned. Such matters occupied much of the evidence and the reasons of the trial judge.

Further, the appellant relied on the Deed of Debt, purportedly signed by the respondent and Ms Ong, and witnessed by two other parties, which was said to formalise the dealings between the respondent and Ms Ong. The appellant submitted that the respondent's signature was on all six substantive pages of the Deed of Debt, and as such, Ms Ong and the respondent's biological sister gave evidence that they saw the respondent sign the Deed of Debt.

In response, the respondent denied ever signing the Deed of Debt, relying on an expert report from Ms Holt ('**the expert**') which concluded that there was strong support for the proposition that someone other than the respondent had signed the Deed of Debt.

As the primary judge was unable to conclude which version of evidence was more probable than the other, the issue was decided on the basis of onus. Accordingly, the primary judge held that the appellant had not satisfied that the appellant has established that the respondent signed the Deed of Debt.

The Appeal:

The appellant's challenge to the evidence concerning the respondent's signature

The Court indicated that the appellant was required to establish error in the finding which the primary judge treated as dispositive, namely, the Court's failure to be satisfied that the respondent had signed the Deed on which the appellants' case turned. Acknowledging this, the appellant directed the majority of his oral submissions to an attack on that finding, starting with the expert's opinions and evidence. Accordingly, the appellant submitted that the expert had been provided with relatively informal documents rather than the most formal documents, such as her driver's licence and passport.

However, the Court of Appeal held that such submissions were unpersuasive, as the signatures were provided on a wide range of quite formal documents, included a bank signature, a power of attorney, a withdrawal slip, and a property transfer document, all of which were dated back in 2015. Further, the Court accepted that a signature on a passport of a driver's license is an electronic image of a signature, rather than an original, and thus inapt for the comparison undertaken by the expert. Therefore, the Court did not accept any of the appellant's submissions which sought to undermine the weight given to the expert's opinions.

Challenge to the costs order

Separately, the appellant contended that even if all other grounds failed, the costs discretion, of the appellant paying the respondent's costs, had miscarried. However, the Court of Appeal held that the appellant could have made submissions as to costs at the end of the trial, which he did not undertake. As such, and in circumstances where the primary judge was not asked to make special orders as to costs, the Court found that there was no error in the order which was made.

Therefore, the appeal was dismissed with costs.

Mudge v Business Finance Pty Ltd (Receiver and Manager Appointed)

[2021] NSWCA 250

Coram: Gleeson JA, Simpson AJA

Court: New South Wales Court of Appeal

Date: 20 October 2021

APPEALS – application for leave – where mortgagee brought proceeding for removal of caveats lodged by guarantor/mortgagor against two adjoining properties – interlocutory order made for withdrawal of caveats – sale of properties completed – contention that sale of properties unauthorised – whether leave should be granted – whether injustice which is reasonably clear – leave refused

Facts:

These proceedings concerned Mr John Mudge (‘**the applicant**’) seeking leave to appeal from the whole of the orders made by Darke J on 21 May 2021, in proceedings brought by Business Finance Pty Ltd (Receiver and Manager Appointed) and Mr Ayres as receiver and manager (‘**the respondents**’).

First Instance:

The respondent commenced proceedings in the Supreme Court for the removal of caveats lodged by the applicant against the titles of two adjoining properties of which he was the registered proprietor, and for ancillary relief. The properties were known as the Gilmore Close land and the Sneaths Road land. The caveats were an impediment to the completion of contracts for sale entered into by the respondents in February 2021.

The primary judge noted that the complaints made by the applicant fell into two categories. Firstly, that various default notices were either not served or properly served, and accordingly, no rights to possession or sale arose. On this issue, the primary judge found that there was sufficient evidence of service of the demands, and accordingly, that the applicant had delayed taking any action to prevent the sale of the properties. Further, his Honour considered the delay by the applicant in pursuing the alleged non-service of the demands to be a relevant factor in the Court’s exercise of discretion on the application for withdrawal of the caveats.

Secondly, the primary judge noted that the process of sale by the respondents was improper or not in good faith such that the contracts for sale were voidable. On this issue, the primary judge found that none of the ten arguments advanced by the applicant supported his claim to a caveatable interest, and that he did not have an interest or right sufficient to impugn the exercise of the power of sale or the completion of the contracts for sale. Therefore, the primary judge concluded that the applicant had failed to satisfy the onus of showing that there was a serious question or issue to be tried.

The substantive orders made at first instance which the applicant sought to challenge included the following:

1. That the applicant withdraw two caveats and be restrained from lodging any further caveats on either of the two properties (‘**orders 3 and 4**’);
2. The refusal of an application for leave to file a cross-claim (‘**order 1**’), a confidentiality order in relation to certain documents exhibited to an affidavit of Mr Ayres (‘**order 2**’), and an order requiring the Registrar General of New South Wales to give effect to the sale of the Sneaths Road land and transfer that land to the purchasers in circumstances where the original certificate of title for that land could not be produced (‘**order 5**’).

In addition, the applicant sought leave to appeal from a costs order subsequently made by Darke J on 22 June 2021 that the applicant pay the respondents’ costs of the proceedings on the ordinary basis in the sum of $110,000. Accordingly, the applicant required leave to appeal in respect of all the above-named orders made.

The Appeal:

The applicant required an extension of time for leave to appeal, despite belatedly seeking the order. Although the respondents accepted that the delay is not inordinate, they submitted the delay was unexplained and the applicant had failed to demonstrate that he had a reasonably arguable case for obtaining leave to appeal if an extension of time was granted. The Court indicated that was convenient to address this question following consideration of the merits of the application for leave.

The essence of the applicant’s argument was said to have identified three high level questions, which included the following:

1. Whether the applicant’s claim as caveator has or may have substance and should have been “maintained/preserved” over the two properties;
2. Whether the primary judge erred by not considering, accepting or placing any weight on the applicant’s “credible” evidence in eight specified respects; and
3. Whether the primary judge erred in failing to find that the Australia Post evidence showed that the applicant was not served with the demands

Decision:

The Court of Appeal held that the applicant's argument did not identify any legal or factual error in the primary judge's rejection of the applicant's first contention that he had a caveatable interest with respect to the properties. The applicant's second complaint that the primary judge failed to consider, accept or place any weight on the applicant's "credible" evidence, that the notice of demand had not been served at the Gilmore Close property, also failed. This was because the respondents adduced evidence from Australia Post confirming service by Express Post of an envelope containing the demand addressed to the applicant at the Gilmore Close property. Accordingly, the Court held that the primary judge was entitled to prefer this evidence over the applicant's denial. The applicant had also failed to demonstrate any injustice in relation to the "service" point.

Finally, the Court of Appeal was satisfied that although the proposed appeal was without merit, an extension of time was granted given that the delay was not inordinate and that there was no prejudice to the respondents by that delay. Therefore, an order was made for extension of time for filing the summons seeking leave to appeal, and an order for the applicant paying the respondent's costs was also made.

Nguyen v Sage Consultant Group Pty Ltd; Dang v Nguyen

[2021] NSWSC 753

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 24 June 2021

EQUITY — Equitable charges and liens — Contribution to acquisition or improvement of another's property — Whether defendant holds property on constructive trust for plaintiff — Where plaintiff claims constructive trust arose out of an oral agreement that defendant would hold title to and take out mortgage over the property for plaintiff's benefit — Where plaintiff claims that she provided all monies other than the mortgage for purchase of the property — Where plaintiff lodged a caveat against the property after judgment creditors had registered a writ for the levy of property against the title to the property — Where terms of the caveat and statements made by plaintiff's solicitors were inconsistent with plaintiff being the beneficial owner of the property — Where no objective contemporaneous or subsequent evidence corroborates plaintiff's claim — Where the Court found that the evidence does not justify a finding that the defendant holds the property on constructive trust for the plaintiff

EQUITY — Equitable charges and liens — Contribution to acquisition or improvement of another's property — Whether plaintiff has an equitable lien over the property arising out of an oral agreement with defendant — Where plaintiff pleaded in the alternative an equitable lien over the property which secured recoupment from the defendant of funds contributed by the plaintiff towards the acquisition of the property — Where plaintiff lodged caveat against the property to protect claimed unregistered equitable lien — Where the plaintiff did not plead any alternative factual basis for the existence of the equitable lien than the constructive trust claim — Where no constructive trust — Where evidence has not established that plaintiff and defendant made any agreement to charge the property to secure any obligation of repayment of contributions plaintiff made towards acquisition of the property — Where the Court found that the plaintiff is not entitled to an equitable lien or charge on the basis of the oral agreement

EQUITY — Equitable interests in property — Mere equities — Whether plaintiff has an equitable interest in the property capable of being protected by a caveat — Where plaintiff lodged a caveat against the property to protect a claimed unregistered equitable interest — Where plaintiff failed to establish a constructive trust or an equitable lien in her favour — Where plaintiff made some monetary contributions towards the acquisition of the property — Where plaintiff may be entitled to be subrogated to the registered mortgage in future but where that may not constitute a present proprietary right — Where the Court found that plaintiff's interest in the property if it exists is likely a "mere equity"
LAND LAW — Caveats — Caveatable interest — Whether plaintiff has a caveatable interest — Where plaintiff lodged caveat against the property — Where plaintiff's interest in the property is likely a 'mere equity' and not an equitable interest — Where it is established caveats cannot protect 'mere equities' — Where the Court found no caveatable interest so that the caveat cannot be maintained

LAND LAW — Caveats — Effect of caveat — Prevention of further dealings — Where caveat lodged after registration of a writ for the levy of property against title to the property prevents the subsequent registration of a writ issued on a judgment obtained before lodgement of the caveat — Where Sheriff unable to execute writ in favour of judgement creditors on the basis of the caveat on the title preventing future registration of a transfer procured under sale of the property by the Sheriff — Where caveator's claim does not have substance and caveat does not protect a caveatable interest — Where the Court found that the judgment creditors are entitled to an injunction requiring plaintiff to withdraw the caveat and to not lodge another caveat interfering with judgement creditors' entitlement to register a new writ on the title to the property or the ability of the Sheriff to execute the writ

LAND LAW — Caveats — Removal of caveat — Whether judgment creditors have standing to seek an order for the withdrawal of a caveat pursuant to s 74MA of the Real Property Act — Where judgment creditors do not have an estate or interest in the property — Where it is established that the issue of a writ for the levy of property does not grant judgment creditors an estate or interest in property — Where the Court found that the judgment creditors do not have the requisite standing

LAND LAW — Caveats — Removal of caveat — Service of lapsing notice — Whether judgment creditors to whom a writ has been issued and whose writ is prohibited from registration by terms of a caveat can use lapsing notice procedure in s 74I of the Real Property Act to procure both registration of the writ and also withdrawal or complete lapsing of the caveat on an interlocutory basis — Where caveator sought an order extending the caveat — Where caveator's claim does not have substance and caveat does not protect a caveatable interest — Where effect of s 74I of the Act is that the caveat only lapses to the extent necessary to enable writ to be registered — Where the Court found that this outcome does not compel the withdrawal or complete lapsing of the caveat to enable the Sheriffs to execute the writ

LAND LAW — Caveats — Removal of caveat — Service of lapsing notice — Whether lapsing notice issued by the Registrar-General on the application of judgment creditors pursuant to s 74I of the Real Property Act was improperly issued or invalid — Where plaintiff claimed lapsing notice was invalid because second writ had already been registered — Where plaintiff failed to establish this in fact — Where the Court found that lapsing notice was probably not improperly issued or invalid

Facts:

These proceedings concerned two previous proceedings in the Supreme Court, being '**the 2017 proceedings**' and '**the 2019 proceedings**'. The three plaintiffs in the 2017 proceedings were three members of a family ('**the Nguyens**'.) The first plaintiff was the father, who resides in Vietnam, whilst the second and third plaintiffs were his children, who reside in Australia. The first defendant was Sage Consultant Group Pty Ltd ('**Sage**'). The second defendant was '**Mr Hoang**', and the third defendant was Mr Hoang's mother ('**Ms Dang**').

The 2017 Proceedings

The 2017 proceedings were commenced by the Nguyens due to the conduct of Mr Hoang, which had been responsible for loss suffered by the Nguyens. In essence, Mr Hoang misrepresented himself to the first plaintiff as being an Australian lawyer with the right to act for immigrants in respect of obtaining appropriate visas. The first plaintiff paid money to the Mr Hoang to secure such permanent residency visas for the second and third plaintiffs. This transaction involved at least a breach of contract by Mr Hoang. Eventually, and separately, the Nguyen children achieved permanent residency. Sage was a company associated with Mr

Hoang and had some involvement in the events that led to the Nguyens commencing the 2017 proceedings, however, it had not taken part in the present proceedings.

The Nguyens obtained summary judgment against Sage and Mr Hoang. They then sought to recover the amount of the judgment by having the Court issue a writ for the levy of property. Mr Hoang was the registered proprietor of a property at Smithfield, and accordingly, the Nguyens took steps for the Sheriff of New South Wales to sell the Smithfield property in execution of the writ. However, that course of action was not successful. Meanwhile, Ms Dang lodged a caveat against the title of the Smithfield property, claiming to be entitled to an unregistered equitable lien over the Smithfield property. The Nguyens also took steps to have the caveat removed, as the Sheriff refused to sell the Smithfield property unless some appropriate arrangement was made concerning the removal of the caveat. Ms Dang responded by asserting that the Nguyens did not have standing to seek an order for the removal of the caveat. In brief, the total amount of the judgment entered against Mr Hoang was $239,906.

The 2019 Proceedings

Subsequently, Ms Dang was ordered to commence new proceedings for the purpose of responding to a lapsing notice which the Nguyens caused to be issued by the Registrar-General. Ms Dang filed a summons which commenced the 2019 proceedings. She sought an order that the lapsing notice was invalid and also declarations to establish the proprietary interest she claimed in the Smithfield property. The Nguyens, Mr Hoang and the Registrar-General were named as defendants to those proceedings.

Several notices of motion had been filed by the parties amongst the course of both the 2017 and the 2019 proceedings. Putting the dispute simply, the Nguyens' position was that the Court should decide the question of whether Ms Dang had a caveatable interest in the Smithfield property that was properly protected by the caveat, and if she did not, the Court should order that the caveat be withdrawn. In response, Ms Dang submitted that the outstanding question was whether the Nguyens had standing to challenge the validity of Ms Dang's caveat, and that the fair course for the Court was to decide that question, and not to elide it by determining the substantive question of the validity of the caveat.

Accordingly, the Court noted that such a dispute had made it necessary for his Honour to analyse the procedural course of the 2017 and 2019 proceedings, as the Court had been placed in the unusual position of conducting the hearings of the two proceedings simultaneously. The Court noted that the extremely detailed analysis of the two proceedings' procedural course was necessary to work out the proper course for the Court to take, and provide proper reasons for the Court's determination.

Writs

In 2018, the Court issued a writ authorising the Sherriff to levy on the property of Mr Hoang to the amount of $240,669 plus interest together with the reasonable costs of the execution of the writ ('**the first writ**'). The first writ had been registered against the title to the Smithfield property. In 2019, after the first writ had expired, the Court made a new order for the issue of a new writ ('**the second writ**').

<u>The parties' positions concerning the issues for determination of the present proceedings</u>

The Nguyens Position

The first issue premised on the assumption that Ms Dang may have paid money towards the acquisition of the Smithfield property that would cause a resulting trust to arise in her favour, subject to the issue of whether the presumption of advancement applies, with the effect that the payments would be treated as a gift to Mr Hoang.

The second issue assumed the presumption of advancement did not apply and asked whether the circumstances of any payment gave Ms Dang a valid equitable interest in the Smithfield property that the Caveat could validly protect. Alternatively, it asked whether any payment was only a loan or a mere equity.

The third issue was whether a transferee under a sale by the Sheriff would have priority over the estate claimed by Ms Dang pursuant to the caveat, so that the transferee would be entitled to registration as proprietor of the Smithfield property free of the interest claimed by Ms Dang. This issue assumed that the Court finds both that Ms Dang only has a mere equity or loan and also that she has an equitable lien, being a form of charge. If she did have a charge, that would give her an equitable interest in the property. Finally, the Court noted that the fourth issue did not arise in reality, particularly if the third issue was not relevant.

Ms Dang's Position

The first two issues were parallel to the issued raised by the Dang motion filed in the 2017 proceedings, being whether the Nguyens were not entitled to make an application under s 74MA of the *Real Property Act,* because the first writ did not give them a proprietary interest in the Smithfield property, and because they were not entitled to make an application in the 2017 proceedings after they had been dismissed.

The third issue referred to the second Nguyens motion in the 2017 proceedings, being the application to join the Sheriff and for orders directing the Sheriff to execute the first writ and to apply to the Court for an order that the Caveat be withdrawn. The fourth issue concerned to the question of whether the Nguyens did not have a right to cause the lapsing notice to be issued pursuant to s 74I of the *Real Property Act* because they had applied for the registration of the second writ while the first writ remained recorded against the title to the Smithfield property. The final issues (fifth to tenth) raised no longer arose.

Ms Dang's claim for an equitable interest in the Smithfield property

In brief, the Court in these proceedings was required to determine the substantive question as to whether Ms Dang had an equitable interest in the Smithfield property via either of the alternative forms claimed in her statement of claim. If an equitable interest in the Smithfield property was established by Ms Dang, the question would then arise as to whether it is protected by the caveat. Regardless of whether Ms Dang established this, it remained necessary for the Nguyens to establish that they had a right to an order against Ms Dang that she withdraw the Caveat.

Her primary claim was that Mr Hoang held his interest in the Smithfield property on trust for Ms Dang. The trust asserted by Ms Dang arose out of an alleged oral agreement between her and Mr Hoang, that Mr Hoang would purchase the Smithfield property in his name for the benefit of Ms Dang, that Ms Dang would service the mortgage taken out by Mr Hoang to purchase the property, that she would pay for all utilities, and that she would use the property as her residence with Mr Hoang being free to live at the property if he desired to do so. Alternatively, Ms Dang sought declarations that she was entitled to an equitable lien over the Smithfield property for the recoupment from Mr Hoang of funds contributed by Ms Dang in relation to the acquisition of the Smithfield property.

In support of her primary claim, the evidence relating to the servicing of Mr Hoang’s NAB mortgage was important. Robb J considered that the evidence justified a finding that Ms Dang made payments in the total sum of $90,700 that may be secured by means of subrogation to the NAB mortgage over the Smithfield property.

Decision:

Robb J held that evidence did not justify a finding that Mr Hoang holds the title to the Smithfield property on a constructive trust for Ms Dang. As such, it was not found that Ms Dang was a sufficiently reliable witness to accept her uncorroborated evidence of the alleged agreement that she made with Mr Hoang. Further, as to Ms Dang’s alternate claim of the proprietary interest in the Caveat, being an equitable lien in the Smithfield property, the court held that it was inconsistent with Ms Dang being the beneficial owner of the property by reason of the existence of the alleged constructive trust. In other words, the terms of the caveat and the statements made by Ms Dang's solicitors constituted clear admissions that were adverse to her primary claim.

Therefore, the caveat was not maintainable. Firstly, Ms Dan did not establish that she was the beneficial owner of the Smithfield property in accordance with her primary claim, so she did not have that proprietary interest in the property. Secondly, although the caveat claimed that Ms Dang had an equitable lien over the Smithfield property, she did not establish the existence of such a claim. Ordinarily, such circumstances would justify the Court in ordering that the caveat be withdrawn. However, Ms Dang would then have no protection in relation to her potential right to be subrogated to the NAB mortgage. The Court indicated that it had jurisdiction to protect Ms Dang by granting an injunction in suitable terms in relation to the sale of the Smithfield property and the dealing with the proceeds of sale after payment of the NAB debt.

Therefore, the Nguyens established that Ms Dang did not have an estate or interest in the Smithfield property. As the second writ had expired, it was necessary for the Nguyens to be issued with a new writ. Consequently, Ms Dang could no longer prevent them from obtaining registration of the new writ.

However, the Court observed that the continuation of the caveat with its residual effect would deprive the Nguyens of the benefit of their statutory entitlement to recover their judgment debt by means of the execution of the new writ by the Sheriff. As such, the Court indicated that if Ms Dang did not withdraw her baseless caveat of her own accord, her conduct would deprive the Nguyens of the enjoyment of their lawful entitlement without legitimate cause. This result gave the Nguyens an entitlement to the issue of an injunction to remove the impediment on the execution of the new writ.

Accordingly, the Nguyens were entitled to an injunction requiring Ms Dang to withdraw the caveat and to not lodge another caveat that interferes with the entitlement of the Nguyens to register a new writ on the title to the Smithfield property.

Opera Properties Pty Ltd v The Uniting Church in Australia Property Trust (NSW)

[2021] NSWSC 1436

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 8 November 2021

CONTRACTS – discharge by frustration – parties entered into Put and Call Option Deed – Deed contemplated a purchase of a subdivided portion of the defendant's land to facilitate road access to plaintiff's development land – envisaged subdivision precluded upon commencement of Pittwater Local Environmental Plan 2014 – options under the Deed could nonetheless be exercised in absence of development consent or registration of subdivision – contract formed upon exercise of either option provided that the defendant would grant a right of carriageway over its land to benefit the plaintiff's land if subdivision not registered for any reason 3 years after date of the contract – whether Pittwater Local Environmental Plan 2014 gave rise to a fundamental commercial difference between contemplated and actual performance – held that conveyance of portion of defendant's property not the only purpose of the transaction – held that the grant of the right of carriageway could be seen as an alternative means of achieving road access to plaintiff's land – Deed not discharged by frustration

Facts:

These proceedings concerned a Put and Call Option Deed ('**the Deed**') entered into by Opera Properties Pty Ltd ('**the plaintiff**') and the Uniting Church in Australia Property Trust ('**the defendant**') on about 18 November 2010. The subject matter of the options under the Deed was part of land in Warriewood, which was owned by the defendant. Upon the exercise of either option, a contract for the sale of land was to arise between the defendant as vendor and the plaintiff as purchaser in respect of an unregistered plan of subdivision of Lot 10, as depicted on a certain drawing. However, it was clear that neither option had been exercised, and the time for such exercise had expired.

The plaintiff's land, which was referred to in the Deed as the 'Development Land', at Mona Vale Road consisted of Lots 1, 3,4 and 5. Prior to the commencement of the 2014 LEP, the applicable instrument was the Pittwater Local Environmental Plan 1993 ('**the 1993 LEP**'). The plaintiff's land was zoned under the 1993 LEP, therefore, requiring the land to be re-zoned in order to accommodate residential development of the land as proposed by the plaintiff.

The plaintiff paid a Call Option Fee of $80,000 and a Call Option Extension Fee of $80,000 in accordance with the Deed. The plaintiff sought to recover those sums upon the basis that the Deed was frustrated by the commencement of the Pittwater Local Environmental Plan 2014 ('**the 2014 LEP**'). The 2014 LEP operated to prohibit any subdivision of Lot 10 so as to create a lot able to be conveyed to the plaintiff as envisaged by the Deed and the contract. Recovery by the plaintiff was sought at general law, or alternatively pursuant to s 12 of the *Frustrated Contracts Act 1978* (NSW). Recovery was also sought pursuant to s 55(2A) of the *Conveyancing Act 1919* (NSW) on the basis that the option fees be regarded as deposits within the meaning of the section.

Although the defendant accepted that the 2014 LEP prohibited any subdivision of its land that would create a lot as envisaged by the Deed and the contract, it disputed that the 2014 LEP brought about any frustration of the Deed. In that regard, the defendant contended that the provisions of the Deed demonstrated that the plaintiff assumed the risk of its proposed development not being able to proceed. The defendant further contended that steps could have been taken by the plaintiff to seek a re-zoning of the defendant's land which, if successful, would have enabled the envisaged subdivision of the land to occur regardless of the 2014 LEP. Finally, the defendant also disputed that the option fees paid by the plaintiff were deposits within the meaning of s 55(2A) of the *Conveyancing Act.*

Summary of submissions

The plaintiff submitted that when the Development Land was rezoned, making it possible to exercise the Call Option, the 2014 LEP meant that no conceivable purpose would be served by an exercise of the option. Had it (or the Put Option) been exercised, the plaintiff submitted that it would have been bound to pay the price under the contract that would come into existence, but there was no possibility that the property could be created and then conveyed. It was submitted that no other genuine benefit was capable of being obtained by the plaintiff under the contract. As such, the plaintiff submitted that the purpose of the Deed, being an option to purchase the property, was precluded. Finally, the plaintiff submitted that frustration may occur even if it remained possible for the contract to be performed without breach, and even if the nature of the contractual obligations did not change, where events give rise to a fundamental commercial difference between contemplated performance and actual performance.

The defendant submitted that the Call Option could have been exercised at any time after the Deed was signed, as it was not a term that it could only be exercised during the Call Option Period. The defendant further submitted that prior to the commencement of the 2014 LEP the plaintiff could have sought to have the land rezoned, and that if that had occurred, the 2014 LEP might not have precluded a subdivision of the land. Further, the defendant submitted that the commencement of the 2014 LEP did not bring about a situation that was fundamentally or radically different to what was contemplated by the parties. Finally, the defendant submitted that frustration of a contract should not be found merely because it has become more difficult or less profitable to perform as there was no fundamental change of situation, or a situation that was radically different to what was contemplated by the parties.

Decision:

On the issue of frustration, the Court indicated that he relevant enquiry called for a consideration of the nature and terms of the Deed, read in the light of the circumstances existing at the time it was made, and the event or events which are said to bring about the frustration of the contract. As such, the Court did not think it could be concluded that the parties entered into the Deed on a common assumption that there would be no change to applicable planning laws that would preclude a subdivision of the land so as to create the property. Accordingly, Robb J did not think that the preclusion of a subdivision of the land, brought about by the commencement of the 2014 LEP, did not give rise to such a fundamentally different situation that the Deed should be held to be frustrated.

Therefore, the Deed was not discharged by frustration upon the commencement of the 2014 LEP, and the plaintiff was not entitled to recover either the Call Option Fee of $80,000 or the Call Option Extension Fee of $80,000 on that basis. Further, the Court held that the plaintiff was not entitled to recover such sums pursuant to s 55(2A) of the *Conveyancing Act.* It followed that those conclusions were sufficient to dispose of the plaintiff’s case.

Oracle (NSW) Pty Ltd (in liq) v Matar

[2021] NSWSC 1244

Coram: Black J

Court: Supreme Court of New South Wales

Date: 15 September 2021

LAND LAW — Caveats — Application for removal under s 74MA of the Real Property Act 1900 (NSW) — Whether the balance of convenience favours the withdrawal of the caveat — Where conditions proposed by the defendants would expose the company's proprietary interest.

Facts:

These proceedings concerned an application for the removal of a caveat over the title of a property in Bowral by Ms Matar ('**the applicant**') against Oracle (NSW) Pty Ltd (in liq) ('**the Company**') and Bruce Gleeson and Daniel Robert Soire as liquidators of Oracle (NSW) Pty Ltd (in liq) ('**the liquidators**') (together, '**the respondents**'). The application was brought in proceedings in which the respondents sought relief in respect of payment of certain funds by the Company towards the construction of buildings on the property.

By their statement of claim, the respondents sought a declaration that the application held her estate or interest in the property on constructive trust for the Company and her as tenants in common in proportionate shares. These shares were claimed to be reflective of the contribution made by each of the Company and the applicant towards the acquisition of and maintenance and improvements of the property.

The applicant submitted that that the Company's moneys were applied only to maintenance and improvements of the property, and not to its acquisition. However, in principle, the applicant submitted that the application of the Company's funds to improvements on the property (ultimately increasing the value of the property) may be capable of establishing a constructive trust.

The respondents also sought an equitable account of contributions made towards the maintenance and improvements of the property, and identified the possibility that further contributions made from the Company's funds would be identified, on an account, beyond those which were already pleaded. As such, the statement of claim had pleaded around $20,000 of the Company's funds being applied to improvements of the property, a further amount of nearly $478,000 applied as a second tranche to the cost of such improvements.

The applicant admitted through its Defence that such amounts were applied in that manner. In turn, the respondents pleaded that the application of such duns amounted to a misapplication of the funds, and pleaded a claim for breach of fiduciary duty against the applicant (who was a director of the Company at the time of the first application of funds), and a claim for accessorial liability, and at least for knowing receipt, in respect of the second application of funds, which occurred at a time that the applicant was no longer a director of the Company.

In applying the principles of an order for withdrawal of a caveat, the Court found that a serious question to be tried arose from the proposition that funds of the Company were applied to improvements on a property owned by its director and former director, while the Company was under the control of her partner, so as to increase the value of that property.

The Court indicated that the real dispute in these proceedings turned on the balance of convenience. Although the respondents contended that the relief sought (by way of withdrawal of the caveat) should not be granted, they properly advanced an alternative position, by which that relief could alternatively be granted on terms which provided for payment of funds into Court or a solicitor's controlled moneys account.

The applicant in turn advanced an alternative condition, which would have preauthorised the relief of the funds paid into Court or into the controlled moneys account to be used towards the purchase of another property by the applicant once that property was located and a purchase contract had been agreed, and permit the lodgement of a caveat over that new property. The applicant alternatively indicated that she would consent to an order imposing the conditions proposed by the respondents, if she was not successful in obtaining the conditions which she sought.

Decision:
The Court held that it could not have made an order withdrawing the caveat, on the conditions that reflected the applicant’s primary position, as those conditions would not sufficiently protect the Company's interests, and the balance of convenience would not have been satisfied in respect of an order of that character. As such, the Court accepted that the respondents’ alternative position was a more straightforward one, namely that the caveat be withdrawn on terms that the amount of $1,500,000 from the sale proceeds be paid into Court or a solicitor's controlled moneys account, subject to liberty to the applicant to apply for a release of the funds, if she could not obtain the liquidators’ consent to such release.

Therefore, Black J was satisfied that, where the applicant adopted those conditions, her application for an order withdrawing the caveat can be granted on that basis.

On the question of costs, the Court held that the applicant pay the respondents' costs on the ordinary basis.

Paolucci v Makedyn Pty Ltd

[2021] NSWCA 215

Coram: Leeming JA, White JA, McCallum JA

Court: New South Wales Court of Appeal

Date: 14 September 2021

CONTRACT – contract to transfer land, subdivide it and reconvey lots to vendor on which were constructed a House and Duplex – developer failed to provide Layout Plans to vendor of House and Duplex – plans ultimately provided – plans gave rise to dispute as to dimensions of "Duplex" – developer in breach of promise to reconvey lots with House and Duplex constructed – common ground that reasonable not to construct Duplex until dispute resolved – whether order for reconveyance of lots as vacant land plus Lord Cairns' Act damages appropriate – Soames v Edge (1860) Johns 669; 70 ER 588 considered – whether primary judge misapprehended plaintiff's case – whether anything turns on misapprehension of plaintiff's case – whether primary judge erred in proper construction of "Duplex" – whether primary judge erred in failing to address availability of contractual limitation of liability

SPECIFIC PERFORMANCE – nature and availability of remedy – relevance of historic breach – need to establish not just for plaintiff to be confined to damages – damages under Supreme Court Act 1970 (NSW), s 68 (Lord Cairns' Act) – nature and availability of remedy

Facts:

These proceedings concerned an appeal by Mrs Carmelita Paolucci ('**the appellant**') from orders made by Rein J on 17 December 2020, in proceedings commenced by the appellant against Makedyn Pty Ltd ('**the respondent**') in the Equity Division of the Supreme Court. The appellant's claim was for "partial" specific performance of her agreement with the respondent and damages under s 68 of the *Supreme Court Act 1970* (NSW).

The appellant had transferred a large parcel of land to the respondent on terms that the respondent retransfer to the appellant two newly created lots on which the respondent was to have built a house and duplex. The parties had agreed this was to occur by May 2017, but it did not. In October 2018, the respondent belatedly provided layout plans of the house and duplex to the appellant, and in turn, a dispute arose as to the dimensions of the duplex.

Pursuant to a Deed of Agreement, the parties had agreed to negotiate in good faith and agree, among other matters, the layout plans. That did not occur. The subsequent reconveyance contract between the parties obliged the respondent to construct the house and duplex in accordance with the layout plans which were said to have been annexed. No such plans were annexed to the reconveyance contract. The reconveyance contract defined "duplex" to mean "a residential dwelling divided into two (2) three (3) bedroom residences on the one (1) lot of no less than 241.54m^2". The appellant contended that each residence was to be no less than 241.54m^2, whereas the respondent contended that the dwelling was to be no less than 241.54m^2.

First Instance:

The appellant commenced proceedings seeking an order that the respondent convey the newly created lots to her as vacant lots and damages reflecting the diminished value of the reconveyed land. The appellant's pleadings also sought a declaration as to the dimensions of the duplex. The primary judge dismissed her claim, holding that while there had been delay in providing the layout plans, there was no basis for an order for specific performance or damages under s 68 of the *Supreme Court Act*. The primary judge also rejected the appellant's construction of the definition of "duplex", and declined to determine her submission that a contractual limitation of liability did not apply on the basis that no such claim had been pleaded.

The Appeal:

The appellant appealed, contending that the primary judge failed to deal with her case to the effect that if the respondent had provided the layout plans promptly, the dispute would have been resolved and the respondent would have built the house and duplex. Thus, the appellant contended that she was entitled to partial specific performance (the transfer of the lots) together with damages representing the difference in value between the vacant lots and the lots with a house and duplex constructed upon them. Secondly, the appellant contended that the primary judge erred in the construction of the dimensions of the duplex required by the contract. Thirdly, it was contended that the primary judge erred in failing to determine the contractual limitation of liability.

Decision:

The Court of Appeal unanimously held that the primary judge did not err in declining to order specific performance or damages under s 68 of the *Supreme Court Act*. As such, the Court indicated that even assuming all factual matters in favour of the appellant, the failure to provide the layout plans had long since been cured and the appellant had not shown that it was not just for her to be confined to a remedy in damages. Additionally, the Court indicated that despite the primary judge being mistaken in concluding that the appellant had abandoned reliance on the failure to supply the layout plans, nothing turned on that.

As to the second issue, the Court of Appeal held that the primary judge correctly concluded that the contract provided for the construction of two residences comprising the duplex which (together) were to be of no less than 241.54m^2. As to the final issue, these grounds did not arise. In any event, the Court noted that the course taken by the appellant at trial stood in the way of making findings of deliberate or wilful or bad faith or unreasonable breach, such as to render the contractual limitation of liability inapplicable.

Accordingly, the appeal was dismissed with costs.

Pavlis v Pavlis

[2021] NSWSC 1117

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 2 September 2021

EQUITY — Equitable charges and liens — Contribution to acquisition or improvement of another's property — Alternative claims in estoppel, resulting trust, constructive trust or for charge over property where adult children contributed to substantial improvement of family home — No issue of principle — Plaintiffs fail to prove any matter that would make it unconscientious for parents to retain benefit of contributions absolutely — Plaintiffs motivated by commercial benefit to them of family home as security for their business and cultural expectation of entitlement of sons to share in parents' estate

Facts:

Francis Michael Forde served as Prime Minister from the death of John Curtin on 6 July 1945 until 13 July 1945 when Forde lost the Australian Labor Party leadership to Ben Chifley. Although he was a Queenslander, for many years the Forde family lived in Sydney in a 1906 Federation home called "Virginia" in Strathfield ('**the Property**'). This case concerned a dispute about alleged beneficial interests in the Property among the family of its current owners.

By 1986, the Property was purchased for $300,000.00 by Emanuel Pavlis ('**the first defendant**'), and his wife, Koula Pavlis ('**the second defendant**'). The first and second defendant had three sons: George ('**the first plaintiff**'), Chris ('**the second plaintiff**') and Gary. Although Garry was not a party to the proceedings and claimed no interest in the Property, he had given evidence in his parents' case and is funding their legal costs.

At the time of the proceedings, the Property had a market value of $5.5 million due to two broad phases of restoration work. The plaintiffs asserted that they supervised, physically assisted with, and funded a very large part of the renovations in the expectation, encouraged by the defendants, that the plaintiffs would receive a majority interest in the Property when their parents died. Under the defendant's wills at the time, they were not entitled to anything, although there was some benefit to their children. Their brother Garry was the principal beneficiary.

The plaintiffs alleged that they would each have a 40% interest in the Property in return for their direct and indirect contributions to the renovations. Alternatively, they submitted that their interest in the Property arose by reason of a joint undertaking that had failed without attributable blame. Their case was one of proprietary or promissory estoppel, a constructive trust, or at the very least an equitable lien.

The defendants submitted that all members of the family contributed as they were able with the renovations (supporting the various tradespeople involved), for the benefit of the family as a whole, so that they would have a home in which to live. They allege that the plaintiffs had exaggerated their contributions to the renovations. Therefore, the principal issue requiring the Court's determination was whether it was unconscientious for the defendants to retain the benefit of contributions absolutely.

Decision:
Kunc J accepted that the plaintiffs had contributed substantially through time, effort and funds (much of which appeared to have been reimbursed to them) to the renovation. However, such contribution was held to be for the significant commercial benefit, with no corresponding benefit to their parents, of using the Property as security for their business ventures and their own expectation that the plaintiffs, as sons, would receive a "fair" share of their parents' estate. It was held that such expectation did not give rise to an interest in the property or an entitlement to any other form of equitable relief.

Therefore, the plaintiffs had not established that their contributions constituted a "joint endeavour" so as to render the defendants' retention of the benefit unconscientious, as opposed to "unilateral and, to a large degree, self-interested conduct by the plaintiffs". With the exception of Garry, the Court concluded that none of the parties' evidence could be relied upon unless it was inherently likely, against interest, or supported by contemporaneous records or other independent evidence. As such, the Court did not accept the plaintiffs' evidence that the defendants expressly represented that the plaintiffs would receive a precisely identified interest of 40% or any other interest in the Property.

Payne v Timilty

[2021] NSWSC 986

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 6 August 2021

CONTRACTS – construction and interpretation of contracts – parties entered into Deed of Put and Call Option in respect of property owned by defendants – Deed defined Call Option Expiry Date as 5.00pm on 24 April 2021 unless contrary intention appears – form of contract annexed to Deed – Clause 21.5 of the form of contract stipulated that if the time for something to be done is not a business day, the time is extended to the next business day – 24 April 2021 was not a business day as defined in form of contract – whether clause 21.5 evinces a contrary intention that warrants departure from the defined meaning of Call Option Expiry Date – held that ordinary businesspeople would understand that the terms of the form of contract would operate only if either the call option or put option was exercised – held that on the true construction of the Deed the Call Option Expiry Date was 5.00pm on 24 April 2021 – plaintiffs in any event failed to pay deposit by cheque as required by the Deed – held that plaintiffs failed to validly exercise call option

Facts:

These proceedings concerned a Deed of Put and Call Option ('**Deed**') entered into by Mr and Mrs Timilty ('**the defendants**') as grantor and Mr and Mrs Payne ('**the plaintiffs**') as Grantee, in respect of a property in Burraneer owned by the defendants. The matter in dispute was whether the plaintiffs validly exercised the Call Option by delivery to the defendants of a duly executed Notice of Exercise of Call Option and a duly executed form of contract, and by payment of $280,000 into the defendants' bank account. The sum of $280,000 was the amount of the deposit referred to in the form of contract annexed to the Deed, after credit was given for $10,000 paid by the plaintiffs as the Call Option Fee.

The question whether the Call Option was validly exercised, as claimed by the plaintiffs, depended on a question of construction of cl 2.2 of the Deed, and in particular the meaning of the expression Call Option Expiry Date within that clause. The Call Option Expiry Date was defined in cl 1.2 of the Deed to mean, unless the contrary intention appeared, 5:00pm on 24 April 2021.

The plaintiffs submitted that a contrary intention appeared from cl 21.5 of the form of contract annexed to the Deed. Relevantly, cl 21.5 provided that if the time for something to be done is a day that is not a business day, the time is extended to the next business day, except in the case of clauses 2 and 3.2. As such, the expression "business day" was defined in the form of contract to mean any day except a bank or public holiday throughout NSW or a Saturday or Sunday. Further, clauses 2 and 3.2 of the form of contract concerned the payment of the deposit, or the payment of a deposit-bond for all or part of the deposit, respectively.

The plaintiffs submitted that where 24 April 2021 was a Saturday, and thus not a business day, a reasonable person would have understood the expression Call Option Expiry Date to mean 5.00pm on 26 April 2021, being the next business day after 24 April 2021. On that basis, the plaintiffs submitted that the Call Option was duly exercised prior to the Call Option Expiry Date. Accordingly, the plaintiffs sought a declaration to that effect, as well as a declaration that a concluded agreement existed with the defendants for the sale of the Burraneer property, and orders in the nature of specific performance of the agreement.

The defendants submitted that the fact that 24 April 2021 was a Saturday provided no basis for an argument that a contrary intention appeared in respect of the definition of Call Option Expiry Date. Further, the defendants contended that although the form of contract was part of the context of the Deed and was annexed to it, its terms did not govern the proper construction of the Deed. It was also submitted that the primary function of such terms was to provide certainty as to the terms of a contract that would arise in the event of the exercise of either the Call Option or the Put Option. As such, cl 21.5 did not evince any intention contrary to the defined meaning of Call Option Expiry Date.

Accordingly, the defendants submitted that the Call Option Expiry Date was 5.00pm on 24 April 2021, and the failure of the plaintiffs to do that, as required by cl 2.2, by that time meant that the Call Option had not been exercised before its expiry. Finally, the defendants submitted that in any event the plaintiffs failed to validly exercise the option because they failed to deliver a cheque, and failed to date the form of contract, as required by cl 2.2 of the Deed.

Decision:
Darke J held that no contrary intention appeared such as to warrant a departure from the defined meaning of Call Option Expiry Date. As such, his Honour did not think that the reasonable business persons in the position of the parties to the Deed would have understood that the Call Option Expiry Date was 5.00pm on 26 April 2021 rather than 24 April 2021. Broadly, the Court held that the reasonable business persons would regard the Deed and the form of contract as fulfilling different functions, the former dealing with the options and the latter dealing with the sale of the property if an option was exercised.

Therefore, upon the true construction of the Deed, the Call Option Expiry Date was held to be 5.00pm on 24 April 2021. It followed that the plaintiffs could not have been said to have validly exercised the Call Option, as the items specified in cl 2.2 was not delivered to the Grantor by that time. This conclusion was sufficient to dispose of the case adversely to the plaintiffs, even if the Call Option Expiry Date was 5.00pm on 26 April 2021, as in any event, the plaintiffs failed to validly exercise the option. The Court made an order that the summons be dismissed with costs.

Pipeclay Lawson Ltd v Brand Ventures Pty Ltd

[2021] NSWSC 909

Coram: White J

Court: Supreme Court of New South Wales

Date: 27 July 2021

LEASES AND TENANCIES — Rent and outgoings — Failure to pay — Where sublessee agreed to indemnify head lessor in respect of outgoings — Where head lessor says sublessee's failure to pay rent caused sublessor to breach head lease

LEASES AND TENANCIES — Mesne profits — Where occupation continues after termination of lease pursuant to licence — Where sublessee says it would have been entitled to an order under s 130 of the Conveyancing Act 1919 (NSW) staying any proceeding by the plaintiff to enforce a right of re-entry — Whether entitlement to such an order affects calculation of award

LEASES AND TENANCIES — Repairs, maintenance and alterations — Obligation to repair and maintain — "Good repair" — Whether premises "reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it"

Facts:

These proceedings concerned land in Chullora consisting of three warehouses ('**the Property**') owned by the Pipeclay Lawson Limited ('**the plaintiff**'). Brand Ventures Pty Ltd ('**the defendant**') was the sublessee of the property and occupier of two of the warehouses known as Warehouse A and Warehouse B, and had granted a further sublease of Warehouse C. The plaintiff commenced these proceedings claiming damages for alleged breaches by the defendant of a deed the parties made when the plaintiff consented to the sublease, and for trespass.

The property was subject to a head lease granted in 1974 to McWilliam's Wines Pty Ltd ('**McWilliam's**'), who granted a sublease of the property to the defendant. By cl 2(a) of the deed, the plaintiff consented to the sublease, and a deed of consent was entered into between the plaintiff as landlord, McWilliam's as tenant and the defendant as subtenant. By cl 3(b), the defendant promised to comply with its obligations under the sublease. That covenant entitled the plaintiff to sue the defendant for any loss suffered by the plaintiff as a result of the alleged breaches by the defendant of its sublease with McWilliam's. By cl 5 of the deed, the defendant indemnified the plaintiff against claims arising from any default by the defendant under the sublease.

In February 2020, the plaintiff terminated McWilliam's' head lease on the ground of non-payment of rent which had fallen due on 1 January and 1 February 2020. On the same day, it gave notice to the defendant of notice of termination of the sublease on the ground that the sublease automatically terminated effective from the date of termination of the head lease.

The plaintiff commenced proceedings for possession and damages. In March 2020, orders were made for the plaintiff for possession of Warehouses A and B on the property ('**5 March 2020 orders**'). The plaintiff contended that unpaid rent and outgoings were owing from 15 January 2020 to 17 February 2020 of around $182,000. Further, the plaintiff claimed a licence fee calculated by reference to what it claimed to be market rent of $212,000. Thirdly, the plaintiff claimed unpaid outgoings for the same period of around $65,000. Finally, the plaintiff claimed damages for alleged breaches of the defendant's obligations in relation to the repair and maintenance of the property and on yielding up the property of around $910,000.

Rent and outgoings from 15 January 2020 to 17 February 2020

The plaintiff submitted that the defendant had breached its covenant to comply with its obligation under the sublease or failed to pay moneys owing under the sublease which caused McWilliam's to breach their obligations under the head lease, that was cl 3. The plaintiff further submitted that it was entitled to indemnify from the defendant for loss indirectly arising from it in relation to default by the defendant in performance of its obligations in the sublease. As such, the plaintiff did not plead that the defendant was in breach of its sublease.

Occupation Fee or Damages from 18 February to 31 March 2020

The second head of claim was for damages in the nature of mesne profits or an occupation fee for the period from the termination of the sublease to when the defendant's licence under the 5 March 2020 orders expired. The Court indicated that the defendant was not a trespasser from 5 March 2020, but an occupation fee was payable for the period of the licence. The plaintiff submitted that it was entitled to damages or a fee based on the market rental value of the property for the period of the defendant's occupation plus outgoings. Therefore, the question was whether the defendant was liable for damages or an occupation fee in respect of Warehouse B.

Outgoings from 18 February to 31 March 2020

The only issues in relation to this claim for outgoings were whether the defendant was liable to pay outgoings with respect to Warehouse B or whether it could set off its liability against the monies paid to the plaintiff.

Defendant's obligations on vacating the property

Following a ruling that substantial parts of the surveyor's report, including his assertions as to the costs of work, were inadmissible, the plaintiff in final submissions confined its original claim of $1,050,065 to 28 items. As such, the plaintiff claimed damages of $379,265.30 plus 10% for contractors, preliminaries and margin, and 6% for project management consultant fees.

Decision:

Rent and outgoings from 15 January 2020 to 17 February 2020

The Court held that the plaintiff had not established that the defendant breached its sublease by failing to pay rent when due, or, if it were in arrears in paying rent to McWilliam's, that this caused the plaintiff to suffer any loss. Further, the Court indicated that there was no evidence that McWilliam's' failure to pay moneys owing under the head lease after 31 December 2019 was caused or contributed to by any failure by the defendant to pay rent owing under the sublease. Accordingly, the claim for $7,126.93 for allegedly underpaid rent for the period from 15 January to 17 February was rejected, and further, there was no issue as to the amount claimed, namely $50,542.83.

Occupation Fee or Damages from 18 February to 31 March 2020

The 5 March 2020 orders provided the defendant with a licence to occupy Warehouse B as well as Warehouse A up to 31 March 2020. This was consistent with the two warehouses being one contiguous property. Accordingly, the Court did not accept that the market rent or value of Warehouse A and Warehouse B was irrelevant to the determination of the plaintiff's claim for damages in the nature of mesne profits or for a reasonable occupation fee under the licence provided for by the orders of 5 March 2020. As such, the Court held that the plaintiff's claim for an occupation fee or damages in the nature of mesne profits was to be assessed by reference to the defendant's occupation of both Warehouse A and Warehouse B.

Outgoings from 18 February to 31 March 2020

The Court held that defendant was so liable, for the same reasons above, and was not entitled to the set-off claimed.

Defendant's obligations on vacating the property

The items comprising the plaintiff's claims and the corresponding decisions can be summarised as follows:

1. <u>Clause 13.1(a): keep in good repair</u>

   This item was rejected.

2. <u>Clause 24: remove the sublessee's property</u>

   The plaintiff submitted that property would be sublessee's property if it were property installed in the premises of which the defendant took advantage. The Court did not agree, and held that there was no evidence that McWilliam's nominated any of its property as sublessee's property. It followed that the plaintiff could not claim the expense of removing the sublessee's property, as the defendant was not in breach of its covenant under cl 3(b)(i) of the deed of consent to sublease by not removing its property that was not loose. Thus, this item was rejected.

3. <u>Signage</u>

   The Court held that there was evidence that the plaintiff incurred a cost of less than $150 to remove the large signage from the front of the property. Although there was other signage on the property, it was not of a $3000 magnitude, as claimed by the surveyor. Thus, the signage claim was allowed in the sum of $150.

4. <u>Communications equipment, stock management system and associated cabling</u>

   The Court indicated that where no evidence has been given as to the amount of damage flowing from a breach so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages. Accordingly, the Court allowed nominal damages for this item based on a breach of cl 15(a) in that the premises were not left in a tidy condition, but reject the rest of the claims for this breach.

5. <u>Security system</u>

   The third item claimed was for a sum of $1,000 for the removal of security cameras installed by the defendant. As the defendant accepted liability for this sum, the Court allowed it, although noted that it was hard to see how it could be loose sublessee's property that the defendant was obliged to remove.

6. <u>Light fixtures</u>

   The plaintiff claimed $1,800 for the cost of removing the light fixtures. The Court held that the light fixtures were not loose sublessee's property and the defendant was not required to remove them. Thus, the plaintiff was not entitled to the cost of removal because it is not an assignee of the sublessor's right.

7. <u>Bolts</u>

   The Court held that the plaintiff had not shown that, with respect to the bolts, the defendant breached its covenant to keep the premises in good repair. Thus, this item was rejected.

8. <u>Painted yellow lines</u>

   The surveyor's opinion as to the cost of removing the painted lines ($34,000) was rejected as inadmissible. The Court assessed damages for this item in the sum of $2,120.

9. Fire safety

   This claim was rejected, as it was found that the defendant had not failed to maintain fire safety records and to undertake yearly testing to sprinkler and hydrant systems, as the plaintiff claimed.

10. Hardware

    The plaintiff claimed $260 for replacement of a door handle which it said it required to put the property into a state of good repair. The defendant conceded this item.

11. Bollards

    The plaintiff's claim of $5,000 was rejected due to insufficient evidence.

12. Lights and Light fittings

    The plaintiff was only entitled to nominal damages in respect of this breach.

13. Carpets

    The plaintiff claimed $7,600 for the cost of removing the existing and fitting new carpet flooring to carpet office areas. This was allowed.

14. Floor soiled with white paint

    The Court found that the defendant was not in breach of failing to remove the white paint stains, and therefore, this item was rejected.

15. Repairs to amenities

    The plaintiff claims $5,487 under cl 13.1(a) for repairs to the amenities, being toilet blocks. This item was allowed.

16. Pipes

    The plaintiff claimed $5,027 for pipes and, more specifically, localised repairs to replace the impact damaged sections of the downpipes. This item was allowed.

17. Damaged fire insulation

    The evidence was insufficient to support a finding of such a breach, therefore, the Court rejected this item.

18. Damaged cladding

    The evidence was insufficient to support a finding of such a breach, therefore, the Court rejected this item.

19. Damaged columns

    The evidence was insufficient to support a finding of such a breach, therefore, the Court rejected this item.

20. Damaged perimeter fencing

    The Court accepted that there was some damage to the perimeter fencing, but the evidence was insufficient to establish that it fell short of the standard of good repair.

21. Damaged brickwork

    Again, the evidence was insufficient to support a finding of such a breach, therefore, the Court rejected this item.

22. Blocked drains

    The plaintiff claimed $4,400 for work undertaken to clear blocked drains. This item was allowed as there was sufficient evidence in the form of an invoice and numerous photographs.

23. Cleaning

    The plaintiff claimed $10,243.95 in respect of cleaning work which was undertaken after the defendant vacated the premises. This item was allowed as there was sufficient evidence in the form of an invoice and numerous photographs.

24. Painting

    The plaintiff claimed $114,000 and $11,700 for the cost of repainting internal and external surfaces. These larger and smaller claims were both allowed, as the standard of cleanliness and tidiness imported in the obligation to repaint so as to keep the premises looking clean and tidy.

In summary, the Court:

1. Rejected the plaintiff's claim for unpaid rent for the period from 15 January to 17 February 2020;
2. Rejected the defendant's unpleaded claim to be entitled to set off $132,727.65 against moneys otherwise payable by it to the plaintiff;
3. Accepted the plaintiff's claim for $50,542.83 as indemnity against its liability to pay outgoings;
4. Declared that the plaintiff's claim for an occupation fee or damages in the nature of mesne profits was to be assessed by reference to the defendant's occupation of both Warehouse A and Warehouse B;
5. Accepted the plaintiff's claim for outgoings for the period from 18 February to 31 March 2020;
6. Allowed the plaintiff's claim for damages in relation to the defendant's obligations on vacating the property only as follows:
    a. $150 for the cost of remaining signage;
    b. $1,000 for the removal of security canvas;
    c. $2,120 as the cost of removing painted lines;
    d. $260 for replacement of a door handle;
    e. $7,600 for the cost of removing and fitting new carpets;
    f. $5,487 for the cost of repairs to amenities;

   g. $5,027 for repair or replacement of damaged pipes;
   h. $4,400 for the unblocking of drains;
   i. $10,243.95 for cleaning;
   j. $125,700 for repainting;

7. Otherwise rejected or allowed only nominal damages for the balance of the plaintiff's claim for damages. The nominal damages were assessed in aggregate in the sum of $100.

PL Town Hall Pty Ltd v The Trust Company Ltd

[2021] NSWSC 391

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 19 April 2021

LEASES AND TENANCIES – Default and termination - commercial lease of retail premises – claim for interlocutory relief to allow a corporate tenant to recover plant and equipment from premises from which it has been excluded – tenant/plaintiff defaults in the payment of rent – landlord/defendant excludes the tenant from premises – tenant commences proceedings – settlement of proceedings ending the lease but allowing the tenant to take up occupation for what would have been the remaining term of the lease – tenant defaults upon one of the terms of the settlement and the landlord excludes the tenant again – tenant commences fresh proceedings seeking the opportunity to retrieve its stock, plant and equipment from the premises – what terms of the lease relevant to vacation of the premises still apply between the parties – what is required in order for the tenant who seeks Equity to do Equity – what directions are appropriate to prepare the matter for final hearing.

Facts:

These proceedings concerned a COVID-19-related tenancy dispute in respect of retail premises near Town Hall station. PL Town Hall Pty Limited (‘**the plaintiff**’) conducted a Priceline pharmacy in Shop 54 of the City Group Centre at 2 Park Street, Sydney (‘**the premises**’) under a lease (‘**the lease**’) from The Trust Company Limited (‘**the defendant**’). Although the pandemic worsened the plaintiffs’ capacity to meet its financial obligations under the lease, the plaintiff had been periodically unreliable in paying rent under the lease even prior to COVID-19. Accordingly, the plaintiff had continuously gone into rental default in October 2020.

The defendant issued a notice of termination of the lease in February 2021, and the plaintiff initially commenced proceedings against the defendant in the same month (‘**the earlier proceedings**’), seeking relief against forfeiture. In March 2021, Lindsay J made consent orders in the earlier proceedings, allowing the plaintiff to remain in occupation of the premises until June 2021 upon terms including a monthly occupation fee and the provision of a bank guarantee by March 2021. The plaintiff failed to provide the bank guarantee by March and Trust went back into occupation the next day by disabling electronic door access to the premises. Soon thereafter, the plaintiff sought further relief against forfeiture in the earlier proceedings before Rein J but failed. The premises have remained unoccupied since March 2021.

The plaintiff commenced these proceedings seeking orders permitting it to enter the premises for a limited period to allow it to collect its pharmaceutical and other stock, fixtures, confidential documents and chattels ('**the goods**'). The plaintiff and defendant advanced competing regimes to allow the plaintiff to collect the goods, whereby the plaintiff wanted to remove the maximum quantity of goods from the premises, whilst the defendant claimed it was entitled to some of the goods and wanted certainty about when it can relet the premises.

The defendant's proposal was that upon the plaintiff giving the usual undertaking as to damages, paying the defendant $42,000 to cover its expenses for 14 days' occupation and providing a certificate of currency of public liability insurance, that it will give the plaintiff access to the premises for 14 days. During this time, the defendant proposed that the plaintiff be permitted tom move all pharmaceutical, therapeutic or consumer goods, any personal property belonging to a director, officer or employee of the plaintiff, and any fixed assets, plant or equipment from the premises.

The plaintiff's proposal was that it be allowed into the premises upon the payment of $21,000 and be given 14 days to remove all its stock, fittings, plant and equipment. Such a proposal did not require it to provide the bank guarantee or make any further monthly payments under the consent orders from the earlier proceedings. As the defendant contended, the plaintiff was in substance seeking the grant of a mandatory interlocutory injunction, allowing it to enter the premises and to change them in various ways. The plaintiff's claim for relief calls for the application of principles relating to the grant of interlocutory injunctions and mandatory injunctions. As such, the Court was required to consider whether there was a serious question to be tried and then whether the balance of convenience and related factors warrant the grant of an interlocutory injunction.

Decision:
The Court held that the plaintiff established that there was a serious question to be tried, and that Equity requires the plaintiff to do Equity as the price of interlocutory relief. In the Court's view, doing Equity required the plaintiff to substantially honour the terms of the consent orders from the earlier proceedings. Accordingly, the Court indicated that the balance of convenience required close regard to such consent orders, but it must also be sensitive to dealing differentially with the various categories of the goods in question.

As such, the parties' contentions raised issues about three types of items that the plaintiff claimed it had left on the premises and wishes to retrieve, including:

1. Pharmaceutical products and Priceline's confidential papers;

2. Other consumer stock; and
3. Plant equipment and fittings.

The Court held to include the removal of consumer stock within the liberty to remove the plaintiff's pharmacological products and confidential papers. However, the third category was the most contentious, and the Court held that the plaintiff was required to adhere substantially to the consent orders in the earlier proceedings before it be given access to the premises to recover a broader range of goods, including fixtures and fittings. Such consent orders required that the license be granted on the conditions that the plaintiff:

1. Gives to the Court the usual undertaking as to damages;
1. Pays the sum of $88,150.58 into Court as security for the plaintiff's performance of such obligations under the lease or the consent orders as may be found at final hearing to apply to the plaintiff;
2. Pays to the defendant the sum of $21,000 for access until 30 April 2021 ("the shorter period"), or $42,000 at the plaintiff's option for access until 7 May 2021 ("the longer period"); and
3. Pays to the defendant a further sum of $88,150.58 if the plaintiff pays only for the shorter period of access, and a further sum of $110,188.22 if the plaintiff opts to pay for the longer period of access.

Robert Colin White v Nicole Maree White

[2021] NSWSC 484

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 26 April 2021

LAND LAW – Co-ownership – Statutory trust for sale – Application by trustee for possession of property – One co-owner failing to respond to notices to vacate issued by the trustees seeking possession of the property to effect its sale – Whether the co-owner in possession of the property is entitled to remain in the property until its sale – Whether the trustee is entitled to a writ of possession to effect a sale of the property

Facts:

These proceedings concerned an application for possession of a property at Hillvue ('**the Property**') of which Nicole Maree White ('**the defendant**') was the registered owner. In December 2020, Messrs Roy Hanna ('**Mr Hanna**') and Omar Khan ('**the Trustees**'), were appointed by an order of Rees J as trustees for sale of the Property. The order for the appointment of the Trustees followed on from the entry of default judgment in favour of Robert Colin White ('**the plaintiff**') against the defendant in the sum of $246,896.72, together with an order that the defendant pay the plaintiff $25,500 in a lump sum for his costs.

Following those proceedings, Mr Hanna sent a letter to the defendant, requesting that she vacate the Property by no later than 8 January 2021. The defendant did not respond to such request nor did she vacate the property. A further notice to vacate the Property was served to the defendant on 3 February 2021, and again, failed to respond or vacate the Property. Accordingly, in March 2021, the plaintiff filed a notice of motion seeking leave to issue a writ for possession of the Property.

The Court noted that the present case was one in which the Court had already appointed trustees for sale. Accordingly, the Trustees had requested that the defendant leave the premises so that they could do all that was required to put the Property on the market, including making the Property available for inspection by prospective purchasers, conducting repairs to the Property as required and having a valuation conducted to guide the Trustees in their sale of the Property. The defendant had been served with the relevant documents for the hearings, but had chosen not to attend to oppose the application which was sought by the Trustees.

Decision:

Rein J proceeded on the basis that on the appointment of the Trustees, Nicole no longer had any common interest or right to occupy or remain in possession of the Property. It followed that the Trustees were entitled to require Nicole to vacate the premises. Rein J indicated that if that was not so, the defendant had adequate notice of the proceedings to obtain possession and had chosen not to take part in them, and had not put forward any alternate plan for the plaintiff to obtain the moneys owed to him under the judgment and costs order of the Supreme Court or advance any basis upon which she is entitled to remain in possession of the Property. In relation to the costs of the application, the Court directed that the Trustees' costs be paid out of the defendant’s share of the proceeds of sale.

Sentinel Orange Homemaker Pty Ltd v Davis Investment Group Holdings Pty Ltd (in liquidation)

[2021] NSWSC 550

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 18 May 2021

CONTRACTS – construction and interpretation – contract for sale of land – condition precedent that purchaser obtain a development approval by 31 March 2020 – Council approved development on 17 March 2020 – development approval informally notified to purchaser by following day – signed development approval documents not sent to purchaser until 2 April 2020 – held that purchaser did not obtain development approval by 31 March 2020 – condition precedent not satisfied

CONTRACTS – termination – principle that a party cannot exercise contractual right in reliance upon event resulting from its own default – purchaser required to use all reasonable endeavours to obtain development approval – purchaser terminated contract due to lack of development approval –substantial chance that purchaser would have obtained development approval had they used reasonable endeavours – held that purchaser not entitled to terminate contract

LAND LAW – deposits – contract for sale of land – purchaser paid $100,000 deposit – purchaser's wrongful termination constituted repudiation – vendor accepted repudiation and terminated contract – vendor entitled to deposit

Facts:

These proceedings concerned a contract for the sale of land, entered into in August 2018, by Sentinel Orange Homemaker Pty Ltd ('**the plaintiff**') as vendor and Davis Investment Group Holdings Pty Ltd ('**the defendant**') as purchaser. The subject of the contract was a commercial site in Orange ('**the land**') and the purchase price of the land was around $4 million. An initial deposit of $100,000 was paid by the defendant prior to the exchange of contracts.

The central question was whether the plaintiff or the defendant was entitled to the deposit monies. The defendant contended that it was entitled to the deposit in accordance with Special Condition 13.4 of the contract because it validly exercised a right of termination under that provision on 31 March 2020. Special Condition 13.4 provided for a right of termination by either party if certain conditions precedent had not been satisfied or waived by a certain time. The plaintiff contended that the defendant failed to validly terminate the contract pursuant to Special Condition 13.4, and that its assertion that the contract had been terminated amounted to a repudiation of the contract which the plaintiff accepted by itself terminating the contract on 22 May 2020. The plaintiff claimed that in those circumstances, it was entitled to the deposit.

Therefore, the issue requiring the Court's determination was whether the defendant validly exercised a right of termination under Special Condition 13.4 on in March 2020. The plaintiff contended that the defendant had no entitlement to terminate at that time because te relevant conditions precedent had been satisfied by the time the defendant sought to terminate. The plaintiffs alternatively contended that if one of the conditions precedent (obtaining a development approval) had not been satisfied within the required time, the defendant was in breach of an obligation to use all reasonable endeavours to satisfy the conditions precedent, and the breach relevantly caused or contributed to the non-satisfaction of the condition precedent.

Decision:

Satisfaction of conditions precedent:

The Court indicated that the approval to the development application was not clearly conveyed on the evidence. In the absence of such evidence, Darke J was not prepared to find that there was forma communication of the Council's decision, made by a person authorised to do so. Accordingly, his Honour did not accept the plaintiff's submission that the defendant obtained development approval, such that the conditions precedent the subject of Special Condition 13.4 were satisfied.

All reasonable endeavours obligation

His Honour then turned to the question of whether the defendant was not entitled to terminate the contract on 31 March 2020 pursuant to Special Condition 13.4 4 because it was in breach of its obligation under Special Condition 13.3 to use all reasonable endeavours to satisfy the conditions precedent. The Court indicated that the onus was on the plaintiff to show that the defendant was in breach of its all reasonable endeavours obligation and, further, that the breach or breaches relevantly caused the event (being the non-satisfaction of the condition precedent referred to in Special Condition 13.1(b)). In brief, the plaintiff submitted that in such period, the defendant failed to take reasonable steps to obtain the duly signed development approval documents. Darek J agreed with this, and found that in circumstances where the signed development approval documents had still not been received by 23 March 2020, but the contractual deadline was still 8 days away, the defendant failed to take simple steps aimed at facilitating the prompt provision of the signed development approval documents.

It followed that the plaintiff was successful in establishing that the defendant breached its all reasonable endeavours obligation under Special Condition 13.3, and that such default relevantly caused the condition precedent referred to in Special Condition 13.1(b) to not be satisfied by 31 March 2020. As such, it was not open to the defendant to rely upon the non-satisfaction of the condition precedent as a basis for the exercise of a right of termination under Special Condition 13.4. Accordingly, the defendant's termination of the contract was invalid, and the defendant was not entitled to claim the deposit and any interest earned thereon.

Therefore, the plaintiff's termination of the contract was valid and effective, and upon that termination, the deposit of $100,000 was forfeited to the plaintiff.

Sheppard v Smith

[2021] NSWSC 1207

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 23 September 2021

LAND LAW – easements – application for extinguishment of right of way – whether easement abandoned – "deeming provision" in Conveyancing Act, s 89(1A) – relevance of conduct of predecessors in title – exercise of discretion – whether easement has become obsolete – whether easement would impede the reasonable user of the plaintiffs' land without securing practical benefit to the defendants – whether there would be substantial injury to the defendants if extinguishment granted

Facts:

These proceedings arose out of a dispute concerning a right of way. Dean Frederick Sheppard and Meredith Jane Chapman ('**the plaintiffs**') owned the land burdened by the right of way, and applied for an order that it be extinguished. That was resisted by Dean Clayton Smith and Emma Jane Munro ('**the defendants**'), who have the benefit of the right of way. The parties were two couples who owned adjoining terrace houses in Birchgrove, which were referred to by their street numbers, number 6 (owned by the plaintiffs) and number 8 (owned by the defendants). The right of way covered a strip one metre wide extending around two sides of number. It originally provided a passageway leading from the street to the rear of number 8 around the side and back of number 6.

The right of way was created in 1885, which was under old system title. Accordingly, it was necessary in the judgment to refer to the legal principles applicable to easements both under the *Real Property Act 1900* (NSW) (**RPA**') and under the old system. The evidence indicated that the easement was originally granted for the removal of 'nightsoil' in 1885 before the suburb of Birchgrove was sewered. As the decades went on the laneway fell into disuse and new fences, hedges, raised garden beds and backyard extensions covered parts of the former laneway.

The plaintiffs' application was made under s 89(1) of the *Conveyancing Act 1919* (NSW) ('**CA**'). That enactment gives the Court power to make an order extinguishing an easement in various circumstances, and applies to both old system and RPA land. The plaintiffs relied on three grounds, corresponding to the three sub-paragraphs of CA, s 89(1) as follows:

a. the right of way was obsolete, or unreasonably impeded the plaintiffs' use of the land without securing practical benefit to the defendants;
b. the easement has been abandoned; and
c. extinguishment of the easement would not substantially injure the defendants.

The main ground pressed was that the easement had been abandoned.

Decision:

Following consideration of the leading Australian authority on abandonment of an easement - *Treweeke v 36 Wolseley Road Pty Ltd* (1973), Parker J concluded that the right of way easement had not been abandoned. His Honour also considered the effect of s 89(1A) of the CA, which states that an easement may only be treated as abandoned if the Court is satisfied that the easement has not been used for at least 20 years. As such, it was found that s 89(1A) applied only in cases where there are no users of an easement for 20 years, and no other evidence to negate the intention of the person benefitting from the easement to abandon it. Therefore, Parker J found that there was no abandonment as there was actual evidence of an intention not to abandon the easement in question.

In determining whether the easement was obsolete, the Court had regard to the terms of the right, rather than the way that it had been exercised in the past. Further, the Court indicated that the fact that the easement required expenditure to make it readily trafficable did not mean that it was useless. As such, the defendants had expressed a wish to use the right of way and it was capable of being restored to its former condition as a rear access laneway. Therefore, the right of way was not obsolete.

Finally, Parker J held that extinguishment would substantially injure the defendants as they expressed a desire to use it, and the plaintiffs did not provide sufficient evidence to challenge this. Ultimately, the plaintiff's claim to have the easement extinguished failed.

Shoal Bay Developments Pty Ltd v Registrar-General of NSW

[2021] NSWSC 764

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 June 2021

LAND LAW – Community title – all interested parties consent to variation of community scheme – the Court must be satisfied that completion of staged scheme or continuation of scheme is impracticable – community scheme planned to proceed in three stages – a wick drainage system was installed inconsistently with development consent during stages one and two – not practically feasible to physically rectify wick drainage system – unsuccessful attempt to modify development consent in relation to drainage system – development of stage three unable to be undertaken in a way that complies with development consent – held that the completion and continuation of scheme impracticable – orders made varying the scheme

Facts:

These proceedings concerned land located in Nelson Bay, which included a subdivision of land pursuant to a community plan. A community development contract was registered with the community plan subdivision, and provided for a proposed staged development of the land in accordance with a development consent granted by order of the Land and Environment Court. The consent, as originally made and as modified, required the construction of what was described as a wick drainage system. Lot 14 of the land was owned by Shoal Bay Developments Pty Ltd (‘**the plaintiffs**’), which was intended to be developed as part of the Stage 3 development. This had not occurred, and Lot 114 remained vacant land.

The plaintiffs commenced these proceedings seeking relief under s 70 of *Community Land Development Act 1989* (NSW) (‘**the Act**’) against the Registrar-General (as required by s 71 of the Act), the Community Association, and the Port Stephens Council (the relevant consent authority) (‘**the defendants**’). In particular, the plaintiffs sought an order providing for Lot 114 to be severed from the community scheme.

The central question was whether the completion or the continuation of the staged scheme had become impracticable. The definition of community scheme in the Act meant that the scheme included the proposal in the development contract and the rights conferred and obligations imposed under the Act in relation to persons having interest in community development lots.

Decision:

Darke J indicated that the proposals contained in the development contract had not been carries our, and the obligation had not been satisfied in relation to the wick drainage system. Moreover, Darke J held that the manner in which the development had been carried out meant that it was not practically feasible to physically rectify the problem. In that situation it was not possible for Stage 3 of the development to be undertaken in a way that complies with the conditions of the consent. Therefore, His Honour found that because of the way the development had been constructed, the completion of the staged scheme and also the continuation of the scheme had become impractical within the meaning of s 70(1) of the Act. The Court thus had the power to make orders varying or terminating the scheme, and orders varying the development contract.

Sidoti v Hardy

[2021] NSWCA 105

Coram: Basten JA, Brereton JA and Simpson AJA

Court: New South Wales Court of Appeal

Date: 26 May 2021

LAND LAW – Adverse possession – Actual possession – Old system title – Conversion to Torrens title – Limited title – Indefeasibility of title – Exceptions to indefeasibility – Where successful claim at trial in respect of adverse possession of small portion of a 'dunny lane' commencing before creation of limited folio – Whether statutory possessory application over Torrens title land able to be made – Alternatively, whether adverse possession claims preserved at common law by reason of possession for any length of time commencing prior to creation of folio – Whether wrong description of parcel or boundaries in circumstances where adverse possessory claim inchoate but not crystallised at time of conversion – Appeal dismissed

LIMITATION OF ACTIONS – Actions to recover land – Adverse possession – Interaction of Limitation Act 1969 (NSW), ss 27 and 65, with Real Property Act 1900 (NSW), s 45C

STATUTORY INTERPRETATION – Interpretation of Real Property Act 1900 (NSW) – Extrinsic materials – Explanatory memoranda and notes – Legislative history – Registrar-General's guidelines – Second reading speeches

MORTGAGES AND SECURITIES – Mortgages – Duties, rights and remedies of mortgagee – Right to notice of proceedings in which orders might be made affecting mortgagee's interest – Where no notice given and no application by mortgagee to set aside orders below – Where application may not succeed – Where if successful, ultimate result unlikely to be different – Where impact on value of mortgagee's security likely de minimis – Absence of notice not decisive of appeal

APPEALS – Leave to appeal – Whether leave required – Monetary threshold – Whether threshold denotes value of whole parcel of land or disputed portion only – Where questions of principle and public importance as to Torrens system also raised – Leave granted

Facts:

These proceedings concerned a parcel of land in Redfern owned by Joseph Geoffrey Sidoti ('**the appellant**'), which comprised of a limited folio of the register of land titles maintained under the *Real Property Act* 1900 (NSW). The land's northern boundary adjoined the southern boundary of another parcel of land, of which Christopher Luke Hardy ('**the respondent**') was the registered proprietor. The right of way ('**the Yellow Land**') was created when the two parcels of land were originally subdivided, for the purposes of enabling access for a night soil carter to collect waste from the outhouses on the property, colloquially, a dunny lane.

The appellants' property was conveyed to previous proprietors in 1958 and again in 1985 by deeds containing metes and bounds descriptions that included the Yellow Land. However, when the respondent's property was conveyed to him in 1998, the deed did not refer to the Yellow Land. By this time, the Yellow Land was no longer usable as a right of way, due to various fences, and the respondent used the western end of the strip to store garden tools, as his predecessors had.

At all relevant times, the Yellow Land was within the surveyed and described boundaries of the appellants' property, and outside those of the respondent. In August 1998, the respondent's land was brought under the *Real Property Act*. The deposited plan did not refer to nor include the Yellow Land. In 2002, the respondent undertook renovations and removed the fence along the northern boundary of the strip. Between 2003 and early 2005, further works were carried out, fully incorporating the Yellow Land into the respondent's backyard and effectively closing off access from the appellants' property.

At the same time, the appellants' property was brought under the *Real Property Act* in 2005 by the creation of a qualified and limited folio. The appellants became registered proprietors in April 2018, by which time the qualified title cautions had been removed. However, the land remained limited title. The appellants commenced works to reclaim the Yellow Land.

First Instance:
The proceedings were then commenced by the respondent in October 2019. The primary judge held that the respondent had acquired title to the Yellow Land by reason of adverse possession.

The Appeal:
The appellants sought to appeal the primary decision, however, the primary judge's factual finding that adverse possession was established was not challenged. The Court granted leave to appeal on the basis that the appeal raised questions of principle with importance to the operation of the Torrens title system. However, after surveying the relevant provisions of the *Real Property Act*, the Court (by majority), ultimately dismissed the appeal.

While the respondent was not entitled to make a possessory application under s 45D of the Real Property Act, s 45C(2) of that Act preserved the common law right of the respondent to acquire title by reason of adverse possession for any length of time commencing before the creation of the limited folio. This required only that adverse possession had commenced by the time the qualified or limited folio was created, which was unchallenged in this case, and not that the documentary titleholder's cause of action to recover possession has been extinguished by the expiry of the relevant limitation period at that time.

Decision:

The relevant limitation periods

The full Court held that title to land may be acquired by possession for a period of 12 years, as the owner's cause of action to recover land becomes statute barred after that period, and it thereupon extinguished. However, s 8(1)(a) provides that nothing in the Limitation Act 1969 (NSW) affects the operation of the s 45C of the *Real Property Act*, and s 45C(1) excludes the operation of any statute of limitations, subject to s 45C(2).

Application under s 45D of the RPA Act

Basten JA held that none of the permutations within the RPA act, allowing for the acquisition of title by possession, were applicable to the present case. Brereton JA held that s 45D(1) was not available as the Yellow Land is not a whole parcel of land, s 45D(2) was not available as the part of the whole parcel in dispute rested upon the occupational boundary and the true legal boundary. Simpson AJA also held that the avenues provided by s 45D were inapplicable, as the claim was not for the whole parcel of land, as required by ss 45D(1) and (2), nor for a residue lot, as s 45D(2A) contemplates, because although the Yellow Land was part of a service lane, it was not contained on a separate title.

Therefore, the appeal was dismissed.

Smith & Hillig v Gao

[2021] NSWSC 1016

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 16 July 2021

COSTS — Party/Party — Bases of quantification — Indemnity basis – Unreasonable conduct

LEASES AND TENANCIES — Ejectment — Order for vacant possession— Writ of possession — Mesne profits

Facts:

These proceedings concerned an application made by Michael John Morris Smith and Peter Hillig (‘**the applicants**’) who were the trustees for the sale of land in Parramatta (‘**the Property**’) pursuant to orders made by Rein J on 2 August 2019. The Property was registered in the name of Ms Gao (‘**the defendant**’). The orders sought were for vesting of the Property in the trustees for sale, for the delivery of vacant possession, for the issue of a writ of possession and for orders as to how the trustees should account for the balance of the proceeds of sale after the usual costs and expenses of sale. There was also an application that the defendant pay the applicants’ costs of the motion.

At first instance, Rein J concluded that the plaintiff (an elderly man who had been in a relationship with the defendant and who had transferred, in effect, the whole of his estate to the defendant) was entitled t relief on the basis of finding of unconscionable conduct ad undue influence. Further, his Honour made declarations that the plaintiff had an interest of 50% in the Property and that the defendant held the Property on trust for the plaintiff to the extent of the plaintiff’s 50% interest in the property. Rein J also ordered that the trustees for sale distribute 50% of the net proceeds of sale to the plaintiff and distribute the remaining 50% of the net proceeds of sale to the defendant. His Honour indicated that the plaintiff and the defendant cooperate in the sale of the Property, but did not make a formal vesting order of the Property in the trustees for sale.

Turning to the relief sought in the present application, the first order is an order for the property formally to vest in the trustees appointed for sale. The Court indicated that the juridical basis for the application for suchorder is on the basis of the slip rule.

Decision:
Her Honour was satisfied that the slip rule had been properly invoked, but in any event that there was jurisdiction to make the order sought and that it should be made. Accordingly, the first order sought (delivery of vacant possession and writ for possession) was made. The Court noted that there was no basis to refuse the order. Her Honour considered, in the circumstances, that it would be appropriate to allow a period of 2 months for the order for delivery of vacant possession to take effect.

The next set of orders related to whether the applicant would be justified in or should charge the defendant with a reasonable market occupation fee for her occupation of the Property, up to the date of her delivering vacant possession of the execution of the writ of possession. Ward CJ considered it appropriate that the payment of an occupation fee or damages by way of mesne profits, equivalent to reasonable rent for the occupation of the premises, should be from the date by which vacant possession of the premises was demanded.

Accordingly, the Court ordered that the defendant pay the applicants' costs of the motion, assessed on an indemnity basis, and that those costs be paid from the proceeds of sale of the land subject of the applicants' appointment as trustees for sale.

SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue

[2021] NSWSC 395

Coram: Payne JA

Court: Supreme Court of New South Wales

Date: 20 April 2021

LAND LAW – fixtures – whether plant and equipment installed at a wind farm are fixtures – intention of parties – degree of annexation – where wind turbines very strongly affixed to land – purpose of annexation – whether wind turbines annexed for better enjoyment of land

LAND LAW – fixtures – whether plant and equipment installed on leased land for the purposes of a wind farm are tenant's fixtures

TAXES AND DUTIES – land tax – liability – tax threshold – whether taxpayer a "landholder" for the purposes of Ch 4 of the Duties Act 1997 (NSW) – whether the value of the land holding is less than $2,000,000

TAXES AND DUTIES – land tax – liability – valuation – how interest in land is properly to be valued

TAXES AND DUTIES – land tax – liability – whether entity owns goods which could be disregarded under s 163G of the Duties Act 1997 (NSW) – whether items characterised as "goods" are fixtures – items not "goods" – s 163G not applied

Facts:

These proceedings concerned the acquisition by SPIC Pacific Hydro Pty Ltd ('**the plaintiff**') of shares and units in the entities operating the Taralga Wind Farm. The case chiefly involved an assessment under the landholder provisions of the Duties Act applicable at the relevant time. Taralga was an operating wind farm with leases of around 25 years, and as the tenant, had installed wind turbine generators and associated infrastructure such as roads, hardstands, met masts, and control and switching stations.

The Chief Commissioner ('**the defendant**') determined that Taralaga had landholdings with a value of $223.6 million and assessed the taxpayer for around $12,400,400 in landholder duty, based on the value of landholdings and dutiable goods. The plaintiff contested that Taralaga was a 'landholder' for the purposes of s 146(1) of the *Duties Act 1997* (NSW) ('**Duties Act**'). As such, the plaintiff submitted that the wind farm assets on the leases were chattels rather than fixtures, so therefore, no landholder duty should apply. Alternatively, it was submitted that if they were found to be fixtures, then the dutiable value should be lower than the value adopted by the defendant.

The issues requiring the Court's determination can be summarised as follows:

1. What, if any, of the plant and equipment installed on the leased land was a fixture?
2. To the extent that any plant and equipment installed on the leased land was a fixture, to what, if any, interest in land did this give rise on the part of the Holdco Land Trust (through its linked entities)?
3. Having regard to the answers to issues 1 and 2, was the Holdco Land Trust a "landholder" for the purposes of the relevant provisions of the Duties Act?
4. How were any interests in land on account of fixtures to be valued?
5. Was the power under s 163G of the *Duties Act* available and, if so, should it be exercised?

Decision:

Plant and equipment as a fixture

In considering whether the wind warm assets were fixtures or chattels, the Court considered the degree of annexation, that is, how attached they were to the land, alongside the object of annexation, which involved assessing the purpose or objective intention for attaching them to the land. The Court noted that in making such a classification, every individual case turned on its own facts, and held that in the present case, the wind farm equipment were fixtures. The Court accepted that some assets, namely, development costs, construction costs, furniture and fittings, spare parts and those parts of the electronic control system not affixed to the land were not fixtures. However, the roads and tracks were held to be landlords fixtures rather than tenants fixtures. The Court made the following key points on this issue:

1. The wind farm equipment was to be considered as a part of an interconnected whole rather than individual items, as none of these items had a function or use independent of the wind farm operation conducted on the land;
2. The wind farm equipment was intended to remain in place for a substantial period of time. Accordingly, although there was a clear intention for the assets to be removed from the land at the end of the lease, the Court held that the evidence before it did not indicate that it was a "realistic commercial possibility" that the assets would actually be removed from the lease before the end of their effective lives; and
3. The assets in question were installed on the leasehold land so that the land could be used as a wind farm. Ultimately, this was for the better enjoyment of the land rather than turbines.

Taralga's interest in the fixtures

The Court held that the wind turbine generators and associated plant and equipment were tenant's fixtures, whilst the roads had become the landlord's fixtures as there was no intention of removing those. Nevertheless, legal title to the fixtures vested in the landlord, not Taralga until Taralga exercised its rights to sever and remove the asset at the end of the lease. The defendant submitted that tenants have a separate equitable interest in the tenant's fixtures as well as a legal interest created by the lease. Payne JA rejected that there was any separate equitable interest, and instead held that the tenant's only interest in the land was its rights under the lease.

Taralga as a landholder & how was Taralga's interest to be valued

The third and fourth issues were intertwined, but effectively concerned the interest as tenant under the lease and how this was to be valued. Both parties had prepared valuations which valued the leasehold interest and wind farm equipment separately. The Court rejected the discount rate adopted by the plaintiff's valuer and adopted a valuation closer to the defendant's assessment. Nevertheless, the approach taken to valuing the lease, including the right of use of the plant and equipment during the term of the lease, was found to be correct. Therefore, as the value of the leasehold interest was above $2 million, Taralga was held to be a landholder.

The power under s163G of the Duties Act

In light of the abovenamed conclusions, the plant and equipment were not found to be 'goods' and therefore s 163G of the *Duties Act* was not applicable.

The Court concluded that although the plaintiff failed in some of its arguments, it nevertheless succeeded in demonstrating that the assessment was excessive and succeeded in a number of its principal arguments. Therefore, the Court held that the plaintiff was entitled to have the assessment revoked and to have a fresh assessment for a lesser amount. It was also ordered that the defendant pay the plaintiff's costs

Tapp v Barnett

[2021] NSWSC 1271

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 6 October 2021

CONTRACTS – formation of contracts – intention to be bound – plaintiffs as purchasers and defendant as vendor signed front page of standard form contract for sale of land – signing occurs in the presence of a licensed conveyancer acting for all parties – nine lots the subject of sale comprised approximately half of the property known as “Myoora” – purchase price expressed to be $1.00 – form of contract records all matters essential for a binding contract for sale of land – defendant contended that form of contract was in the nature of a draft and not intended to be binding – dispute as to what was said about document at time of signing – held that form of contract was not merely a draft – held that binding contract for sale was made when the parties signed form of contract – orders made for specific performance of contract

ESTOPPEL – equitable estoppel – proprietary estoppel – defendant to inherit “Myoora” under mother’s will subject to making payments of $500,000 – defendant tells plaintiffs that if they could provide the money to enable the payments to be made, she would transfer half of “Myoora” to them – plaintiffs make payment of $150,000 on basis that amount would be part of the buy in for half of “Myoora” – mother’s will amended so gift of “Myoora” to defendant now subject to making payments of $350,000 – following mother’s death plaintiffs assist defendant to make the payments of $350,000 – plaintiffs became borrowers with the defendant on a $340,000 loan and provided a further $10,000 – held that reference to a transfer of “half of Myoora” sufficiently certain to support an equitable estoppel – held it was reasonable for the plaintiffs to rely upon the defendant’s assurances and assume or expect that the defendant would fulfil her promise – held that it would have been unconscionable for the defendant to depart from the assumption or expectation she created

Facts:

These proceedings concerned a contractual dispute between two parties for the sale of a farming and grazing property located at Wimborne, known as Myoora. The property consisted of nine lots on separate titles of land owned by Jan Barnett (‘**the defendant**’), which comprised approximately half of the vendor’s property. Ben Tapp and Kylie Barnett (‘**the plaintiff**’) are de facto spouses, and Kylie Barnett was the daughter of the defendant. The plaintiffs claimed that they entered into a contract with the defendant, whereby the parties agreed to sell about half of Myoora to them for nominal consideration. The facts were undisputed, in that, each of the parties signed a contract for sale and purchase of land in the office of a licensed conveyancer, which provided for various parcels of land, for a price of $1.00. The plaintiffs sought an order that the defendant specifically perform the contract.

In the alternative, the plaintiffs brought a claim based on the principles of equitable estoppel, namely, proprietary estoppel by encouragement. It was alleged that from around 2018, the defendant made various representations to the effect that she would transfer half of Myoora to the plaintiffs in return for the plaintiffs providing benefits to her, including by transferring cattle, paying money at her request, and assuming liability with her for a bank loan. As such, the plaintiffs alleged that they had acted to their detriment in reliance upon the representations, and that it would be unconscionable for the defendant to depart from the representations.

By her cross claim, the defendant contested that a binding contract ever came into existence, and sought a declaration to that effect. In addition, the defendant sought an order that Kylie Barnett pay her a sum of $30,000 which was said to be the amount outstanding under a loan of $180,000 she alleged that she made. Kylie Barnett disputed that any such liability was owed to her mother.

The respective accounts of events, including the principal conversations alleged by the plaintiffs, and as to the circumstances in which the contract for sale was executed, differed markedly. Therefore, the assessment of the credibility and reliability of the testimony of the witnesses assumed central significance in the determination of the issues. As such, Darke J indicated that evidence of the plaintiffs was generally preferred to that of the defendants where the evidence was in conflict.

Decision:

Darke J held that the parties become bound by a contract for sale of a portion of Myoora when they executed the contract, as the parties signed a contract that recorded all the matters essential for a binding contract for sale. Viewed objectively, Darke J also held that the conduct of the parties, in signing the form of contract in the circumstances, evinced an intention to be immediately bound by its terms. His Honour rejected the defendant's submission that the signing of only the first page of the standard form of contract, and the failure to annex documents, indicated that the parties had not reached finality on all the terms of their bargain. As such, it was held that the manner in which the transaction was documented was to be seen as a reflection of the relatively informal dealings of the parties in relation to Myoora that had taken place over some time.

The Court's conclusions rendered it strictly unnecessary to consider the plaintiffs' alternative claim that the defendant was bound by a proprietary estoppel by encouragement. Therefore, the Court was satisfied that when the written contract was signed by the parties, they entered into a binding contract for the sale of a certain portion of Myoora, for a purchase price of $1.00.

It was therefore appropriate to make orders in the nature of specific performance to compel the outstanding performance of the contract.

The Highlands on a Plate Pty Ltd v Roloz Pty Ltd

[2021] NSWSC 1072

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 25 August 2021

LAND LAW – conveyancing – options – plaintiff lessee operated a café from premises owned by defendant lessor – lessee served a Notice of Exercise of Option to renew lease for further 5 year term – lessor responded with a Notice under section 133E of the Conveyancing Act 1919 (NSW) – the Notice stated the lessee was overdue on rent and electricity outgoings and proposed to treat those breaches of the lease as precluding the lessee from entitlement to the option – held that the plaintiff was not overdue on electricity outgoings – held that the plaintiff was overdue on rent but by less than half of the amount stated in the Notice – whether Notice specified the lessee's breach of the relevant obligation – Notice failed to specify the lessee's breach and thus was of no effect in respect of the breach – held that reliance upon a section 133E Notice in respect of the breach would in any event be contrary to cl 6(1) of the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) – held that the lessee validly exercised its option to renew the lease – order made for specific performance to compel the grant of new lease

Facts:

These proceedings concerned the exercise of an option to renew a retail lease shop located in Bowral. The lease, entered into between The Highlands on a Plate Pty Ltd ('**the plaintiff**') as lessee, and Roloz Pty Ltd ('**the defendant**') as lessor, provided for a 5-year term ending on 13 December 2020, with an option to renew for a further period of 5 years. On 31 August 2020, the plaintiff served a Notice of Exercise of Option upon the defendant, to which the defendant served a notice pursuant to s 133E of the *Conveyancing Act 1919* (NSW) ('**the Act**') upon the plaintiff. In such notice, the defendant indicated that the plaintiff was in rental arrears in the amount of around $43,000, as well as a failure to pay electricity charges, and therefore, could not exercise an option to renew.

The plaintiff commenced these proceeding seeking a declaration that it validly exercised the option to renew, and an order for specific performance to compel the grant of the renewed lease. The plaintiff also sought an order that the notice served by the defendant was invalid and of no effect, and further sought relief in the alterative pursuant to s 133F of the Act so as to overcome the effect that any breaches may have upon its entitlement to exercise the option to renew.

The alleged breaches of the lease that were the subject of the notice the defendant served concerned the plaintiff's obligations to pay rent and to pay electricity charges. However, Darke J indicated that a failure of the defendant to comply with the implicit requirements with Item 28 of the lease had the consequence that the defendant was not in fact entitled to demand payment for electricity charges. As such, Item 28 of the lease was not held to oblige the plaintiff to reimburse the defendant for the cost of electricity where the defendant was in breach of its obligations under the regulatory regime in respect of that electricity. Therefore, Darke J found that the plaintiff was not obliged to pay the defendant the claimed amount, and therefore, no amount of outgoing was overdue for payment.

Decision:
Darke J indicated that in order for a s 133E notice to have effect in respect of an actual breach of a lease, it must accurately specify the breach, including the precise sum of money. As such, it was held that the monetary amount of such a breach was not a minor misstatement, as the actual breach was only a failure to pay rent in the amount no greater than $18,766.24. this was well under half of the amount specified in the notice, being around $43,000. In essence, Darke J found that the notice failed to specify the plaintiff's breach of the relevant obligation, and therefore, the notice had not been served on the plaintiff. It followed that the plaintiff did validly exercise the option to renew, and thus, the defendant was obliged to grant a new lease to the plaintiff in accordance with the option for a 5-year term.

Accordingly, a declaration that the plaintiff validly exercised the option to renew, and an order in the nature of specific performance to compel the grant of such lease, were made. The defendant was ordered the pay the plaintiff's costs of the proceedings.

The Migrant's Son Pty Ltd v Yagmur

[2021] NSWSC 1236

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 29 September 2021

LEASES AND TENANCIES — Construction and interpretation — Lessor partners held premises as tenants in common in equal shares — Whether transfer of one partner's half interest to the other upon dissolution of partnership triggered lessee's first right to purchase premises — Measure of damages for breach — Proper construction of "selling"

Facts:

These proceedings concerned an action in contract for damages said to have been caused by the alleged breach of a lessee's first right to purchase under a lease. The Migrant's Son Pty Ltd ('**the plaintiff**') leased a commercial property from Ali and Kenan Yagmur ('**the defendants**') to operate a restaurant. The defendants were the registered proprietors of the land as tenants in common in equal shares. The lease was entered into for a period of five years with three options to renew, each for a further five years.

In July 2017, the defendants transferred their respective half interests in the land to Snah Pty Ltd ('**Snah**') for consideration of $615,000 ('**the transfer price**'). Snah was a company that was beneficially owned and controlled by Ali Yagmur. It was common ground that the defendants did not give the plaintiff any notices as required under cl 30.1 of the lease in the event of a sale. On 17 March 2019, the plaintiff entered into a new five-year lease of the land with Snah pursuant to the exercise of the plaintiff's first option under the lease. Soon after, the plaintiff commenced these proceedings, as the plaintiff was not aware of the transfer to Snah until the plaintiff gave notice that it was exercising its option under the lease.

As such, the plaintiff submitted that the defendants had breached cl 30.1 by failing to issue a sale notice and failing to issue an offer notice stating that an offer to purchase for $615,000 had been made. As such, it was submitted that cl 30.1 was to be construed objectively, by reference to what a reasonable person would have understood the terms to mean in light of the text, surrounding circumstances known to the parties, and the purpose of the transaction. The plaintiff also submitted:

1. The term "chapeau" stipulated in cl 30.1 provided the circumstance in which the clause was engaged if the landlord "shell be desirous of selling the premises";

2. There were no words of limitation in the chapeau which would displace its literal meaning;
3. Cl 30.1 should be given a broad construction which included an unsolicited offer to purchase;
4. However, even if cl 30.1 was to be construed narrowly so that the defendants did not have to give notice of an unsolicited offer, cl 30.1(b) still applied; and
5. Cl 30.1 was not expressed to be limited to a sale by private treaty that is the result of putting the premises on the open market or inviting offers. Further, if the land was proposed to be sold by private treat, the defendants were required to first make an offer to the plaintiff on the same terms.

Accordingly, the plaintiff submitted that the transfer to Snah was a sale within the meaning of cl 30.1 because it was a transfer for consideration. Finally, the plaintiff contended that it was entitled to damages on two grounds. The first was described as “loss on capital gain”, calculated at $760,0885, being the difference between the transfer price (and the purchase costs of around $25,000) and the market value of the land, said to be $1,400,000. The second alleged head of damages was described as “loss on rental savings” calculated as around $400,000.

The defendants disputed and raised two defences. First, the defendants as landlord under the lease were never “desirous of selling the Premises” within the meaning of cl 30.1. In fact, what had occurred was the dissolution of their partnership, evidenced by the transfer of half a share in the land to Snah. Second, the defendant argued that the plaintiff was estopped by convention from bringing its claim. The estoppel allegedly arose from a conversation explaining that what was occurring was not a sake but a dissolution of the partnership. The then director of the plaintiff allegedly did not contest this.

Decision:

Kunc J concluded that the plaintiffs claim failed, and the reasons can be summarised as follows:

1. The obligations in cl 30.1 were triggered if the “landlord shall be desirous of selling the premises”. Irrespective of the meaning of selling:
    a. The “landlord” as defines in the lease were never desirous of doing anything. In transferring their respective interests in the land, the defendants were not acting as the landlord, but were acting in their own right as the owner of a half interest in the land; and

   b. The defendants were not desirous of selling the “premises” as defined in the lease. They were instead dealing with their own respective half interests in the land that was subject to the lease.

2. “Selling” in the chapeau of cl 30.1 was construed by reference to the context provided by cl 30,1, which made clear that on its proper construction, “selling” meant a sale to a party unrelated to the “landlord”, where both the landlord and the purchaser are acting independently in their own interests; and
3. Even if there was a breach of cl 30.1, the plaintiff suffered no loss.

The Court’s conclusions meant that it was not necessary to consider the defendant’s defence based on an alleged conventional estoppel. Therefore, the Court ordered that the proceedings be dismissed and that the plaintiff pay the defendants’ costs of the proceedings

Thorn Australia Pty Ltd v Centuria Property Funds Ltd

[2021] NSWSC 1217

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 27 September 2021

LEASES AND TENANCIES DEEDS – delivery – intention to be immediately bound – lessee and lessors entered into heads of agreement concerning proposed lease – heads of agreement reserved to each party a right to withdraw from negotiations at any time prior to execution of formal lease documents by both the lessee and the lessors – lessee signed a lease and an incentive deed – both documents in the form of deeds – soft copies of deeds sent to lessors by email – originals sent by lessee's solicitor to lessors' solicitor by courier – lessee's solicitor suggested a procedure involving an exchange of deeds – solicitor subsequently accepted a procedure that involved the deeds being signed first by the lessee and then by the lessors who would then attend to registration of the lease – agreed process not necessarily inconsistent with right to withdraw at any time prior to execution of formal lease documents by both sides – lessee withdrew from transaction prior to lessors executing documents – held that lessee did not evince an intention to be immediately bound by deeds – held that there was no delivery of deeds – lessee held to be entitled to withdraw from the transaction

Facts:

These proceedings considered whether provisions of a signed lease and incentive deed, which were signed by Thorn Australia Pty Ltd ('**the plaintiff**') as tenant, and delivered to Centuria Property Funds Ltd ('**the defendant**') as the landlord, could amount to the plaintiff being immediately bound by the deeds.

In April 2021, both parties had entered into a heads of agreement which was prepared by the defendant. The agreement relevantly provided that the information it did not constitute as a binding lease between the parties, and that it was subject to approval. Further, the agreement also indicated that the parties reserved the right to withdraw from and terminate negotiations at any time prior to the execution of formal lease documents by both parties.

Soon after, the draft transaction documents (the incentive deed and the lease) were sent to the plaintiff's lawyers. Following negotiations between the parties, the plaintiff signed the documents. The plaintiff's lawyers then sent two signed copies of the lease and one signed copy of the incentive deed, attached with a cover letter which referred to "formalising the arrangements". Under this agreement, the plaintiff proposed arrangements which would include the defendant sending the plaintiff a scanned copy of the documents signed by the defendant as landlord. Further, it was said that if the plaintiff was satisfied at that point, they would authorise the defendant to exchange and date the incentive deed and date the lease.

However, the defendant did not agree to such conditions, and following further discussion, the parties agreed that the defendant would arrange execution of both counterparts and registration of the lease to be sent to the plaintiff. This meant that there was no exchange of counterparts. As requested by the defendant, the plaintiff provided another signed incentive deed, alongside the required bank guarantee as security for the plaintiff's obligations. Due to COVID-19 lockdown restrictions, the defendant was unable to complete execution of the documents in a timely manner after the plaintiff had delivered its signed copies. It was during this period of inactivity that the plaintiff withdrew from the transaction.

The plaintiff contended that it did not intend to be immediately bound on delivery of the signed deeds. The defendant contended that the lease and the incentive deed, which were signed as deeds by the plaintiff, were delivered by the plaintiff such that the plaintiff became bound by those deeds and could not later recall them. However, the plaintiff disputed that there was any delivery of the deeds, and thus, it was free to withdraw from the transaction.

Decision:
Darke J concluded that the conduct of the plaintiff in relation to the second signed version of the incentive deed did not evince an intention to be immediately bound by it, or the other deeds it had signed. As such, the Court held that there was no delivery of any deed, and in these circumstances where the right to withdraw had not been abandoned, it remained the position that the parties had reserved to themselves the right to withdraw until such time as formal lease documents were executed by both sides.

Therefore, the plaintiff was entitled to withdraw from the transaction and recall the deeds, as it purported to do. The Court made a declaration to that effect, and the defendant was ordered to pay the plaintiff's costs of the proceedings.

Tout v Johnson

[2021] NSWSC 1311

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 14 October 2021

LAND LAW – easements – creation of easements – creation by order of the Court – plaintiff and defendants own adjoining rural lots – lots used for residential and rural purposes – plaintiff seeks right of carriageway over a track on defendants' land to obtain access to public road – prior to hearing track was damaged by heavy rain and became impassable – easement ultimately sought by plaintiff would allow plaintiff to undertake works on track to repair damage – access to public road available using only plaintiff's land – quality of access constrained due to a creek crossing – whether easement sought is reasonably necessary for the effective use or development of plaintiff's land – whether use or development of plaintiff's land with easement at least substantially preferable to use or development of the land without the easement – deficiencies in evidence as to cost of works required on plaintiff's land and defendants' land to facilitate access – plaintiff failed to show that easement was reasonably necessary for the effective use or development of her land – s 88K(1) of the Conveyancing Act 1919 (NSW) not satisfied

Facts:

Michelle Tout ('**the plaintiff**') was the owner of certain rural lots near Port Macquarie. She commenced these proceedings seeking an order under s 888K of the *Conveyancing Act 1919* (NSW) for the imposition of an easement in the nature of a right of carriageway over a parcel of land owned by Brendan Johnson and Jodie Williams ('**the defendants**'). The plaintiff claimed that the easement was reasonably necessary for the effective use or development of her land, as it formed part of the route of a road that provided a way for vehicles to pass between the plaintiff's land and a public road. Further, the plaintiff submitted that her quality of access was constrained due to a creek crossing being washed away as a consequence of severe rainfall in late March 2021.

The defendants disputed the imposition of an easement and contended that the plaintiff had alternative ways for vehicles to pass between her land and the public road, which do not involve passing over the defendant' land. As such, the defendants contended that the easement sought was not reasonably necessary for the effective use or development of the plaintiff's land. The defendants advanced other arguments against the making of the orders sought by the plaintiff, but the issue of reasonable necessity was the central issue in the case.

Further, the defendants submitted that the plaintiff had failed to discharge her onus of showing that the easement sought was reasonably necessary. As such, it was submitted that the plaintiff failed to provide any particularity in respect of the easement sought, and did not adequately address the competing alternative access routes. Additionally, the defendants submitted that the plaintiff's evidence amounted to no more than assertions of convenience and historic use, rather than necessity. Finally, the defendants contended that the plaintiff did not adduce enough evidence to enable a comprehensive assessment of any such alternatives.

Decision:

Darke J observed that, at the time of the proceedings, the plaintiff had alternate access, but had merely availed herself of that access route. Therefore, viewing the circumstances of the case, Darke J was not satisfied that the plaintiff had demonstrated that the easement she sought was reasonably necessary for the effective use or development of her land. In other words, it was clear that the plaintiff's land could be effectively used or developed without the proposed easement, as there was a viable alternative.

Further, in the circumstances where the plaintiff's evidence was deficient in various respects, it was not possible for the Court to undertake a proper assessment of the relative costs of use or development with and without the easement. Rather, Darke J accepted video evidence adduced by the defendants, which established that the track in question could be readily traversed, including at the creek crossing. Thus, the Court concluded that the plaintiff failed to satisfy s 88K in respect of the proposed easement, and it followed that the plaintiffs claim was dismissed

Tracey v Osland

[2021] NSWSC 1074

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 25 August 2021

LAND LAW — Conveyancing — Requirements of writing — Agreement to create or dispose of interest in land — Sibling co-owners of the land — Sister's solicitor accepts brother's offer to purchase sister's interest set out in letter from brother to solicitor — Whether specific performance should be granted

Facts:

These proceedings concerned an application for specific performance of an alleged contract for the sale of an interest in a property in Paddington ('**the property**'). Vivien Tracey ('**the plaintiff**') and Edward Osland ('**the defendant**') were siblings, and were the executors and beneficiaries in equal shares as tenants in common of the estate of their late mother. The evidence disclosed that there were discussions in 2018 between the plaintiff and the defendant, in which the defendant agreed to buy the plaintiff's interest in the Property for $1.25 million.

The defendant enclosed what was referred to as the 'stage one payment' of $50,000 togetehr with a letter, and also made the 'second stage payment'. Since then, the defendant had failed to make the third and fourth stage payments despite demands having been made by the plaintiff. The plaintiff then commenced these proceedings for specific performance of the contract said to have arisen through exchange of correspondence.

Decision:

Kunc J accepted the plaintiff's submissions and held that the defendant's letter was sufficient written memorandum of the contract for the sale of the plaintiff's interest in the Property, and signed by the defendant as the party to be charged. As such, the Court found that the defendants first and second stage payments constituted acts of part performance directly referable to the contract evidenced by the letter. Further, the parties intended the be legally bound by the terms of the letter, as the terms of the letter sufficiently identified the parties, the subject matter and the price. Therefore, the contract evidenced by the letter was valid, binding on the parties and enforceable, and the Court was satisfied that orders for specific performance be made.

Trentelman v The Owners – Strata Plan No 76700

[2021] NSWCA 62

Coram: Leeming JA

Court: Supreme Court of New South Wales

Date: 19 April 2021

PRACTICE - stay of execution pending appeal - appropriateness of interlocutory relief - appeal concedely reasonably arguable - whether appellant had established significantly greater prospect of success - balance of convenience - application for stay pending appeal refused

Facts:

These proceedings concerned Natalia Trentelman (‘**the plaintiff**’) applying for a further stay of execution of declaratory and, more particularly, injunctive relief issuing from the Supreme Court. The interim stay ordered by the primary judge from, whose substantive orders the plaintiff had filed a notice of appeal, was also expiring the day after these proceedings occurred.

First Instance:

The dispute in the Equity Division arose from two separate proceedings between the plaintiff and the owners corporation known as the Owners – Strata Plan No. 76700 (‘**the defendant**’). The subject matter of the dispute was land contained on Lot 53, which was owned by the plaintiff, on which a swimming pool had been constructed. The dispute also extended to access to the pool by the owners corporation and persons authorised by it.

The dispute originally arose out of events in 2014, in which the plaintiff sought the carriage of a resolution converting certain lots they owned into ordinary (non-strata) blocks of land held under the *Real Property Act 1900* (NSW). It was alleged by the defendant that the necessary resolution was passed at the annual general meeting, whereby the plaintiff promised to ‘give the pool’ to the apartment building lot owners. The documents association with such resolution was describe as the Pool Notation, which indicated that the pool located within lot 53 was common property.

Briefly, one of the two proceedings before the primary judge was the plaintiff’s application concerning the validity of the Pool Notation. The other, in which the defendant was the plaintiff and the plaintiff the defendant, concerned the defendant’s claimed entitlement, either as a matter of contract, or as a matter of equitable estoppel, to obtain relief in relation to either ownership of or access to the pool.

The Appeal:
So far as is presently relevant, dealing with the second proceeding, the primary judge rejected the defendant's claims in contract, but upheld its claim as a matter of equitable estoppel. The substantial challenge by the plaintiff's appeal in the present proceedings was to the essential elements of the reasoning underlying the accepted claim in equitable estoppel. As such, for this purposes, Order 2 of the primary judgment was of greatest significance, which enjoined the plaintiff from keeping the defendant or persons authorised by the defendant out of the pool and related facilities. Thus, the subject of these proceedings is what access, if any, should be given to the defendant and those authorised by it to the pool.

Leeming JA indicated that the starting point of analysis was that on an application such as this, a single Judge of Appeal does not ordinarily go beyond the question as to whether the appeal is reasonably arguable. The defendant accepted that the appeal was reasonably arguable, whilst the plaintiff contended that this a case where the prospects of success were so strong that it went beyond what was reasonably arguable and contributed to the plaintiff's entitlement to interlocutory relief. First, it was argued that the defendant had only called evidence of a minority of lot owners, and not all of those had said they had relied upon what had been said concerning the swimming pool. The second way in which it was contended that the plaintiff had a case which was stronger than one which was merely reasonably arguable turned upon the reasoning of the primary judge which ultimately rejected a submission that a representation had been made.

Decision:
On the plaintiff's first submission, Leeming JA accepted that this aspect of the appeal was reasonably arguable, however, its strength did not exceed the ordinary principle applicable to appeals. As such, his Honour was unpersuaded that there was any error in what was determined in the primary judgment. On the plaintiff's second submission, Leeming JA was again unpersuaded that such aspect of the appeal had been established to go beyond what was reasonably arguable for the purposes of exercising the discretion as to a stay of execution.

Therefore, the plaintiff's preliminary submission that this was a case where the Court should, on an inevitably preliminary basis, form a view as to the strengths of the appeal over and above what is reasonably arguable, was rejected. It followed that this application turned principally on considerations of balance of convenience.

Although the Court attempted to deal with all of the matters relied upon by the plaintiff in support of her application, it was fair to note that the most prominent factor was her concern that she would lose tenants. Bearing that in mind, the Court indicated that it was desirable that there be as little doubt as possible about the position relating to access to the pool between the expiration of the substantive orders and the determination of the appeal. As such, Leeming JA held that there would be substantive merit for the defendant to display prominently in its common property, and notify all lot owners, that the orders made by the primary judge was subject to an appeal.

It followed that the Court granted liberty to apply in respect of the interlocutory regime on two business days' notice. Otherwise however, the Court did not make the only outstanding order on the notice of motion, which was order 2, and thus it was dismissed.

Tutzing Pty Ltd v Upper Lachlan Shire Council

[2021] NSWSC 1221

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 September 2021

PRACTICE AND PROCEDURE – parties – joinder – proceedings for specific performance of a Deed – application by third parties to become defendants – whether applicants are necessary parties to the proceedings – order sought by plaintiff would require defendant Council to proceed to close a public road that adjoins land owned by applicants – held that applicants would be directly affected by orders sought by the plaintiff – applicants held to be necessary parties to the proceedings – application for joinder granted

Facts:

These proceedings concerned a deed entered into by Tutzing Pty Ltd (‘**the plaintiff**’) and Upper Lachlan Shire Council (‘**the defendant**’). The plaintiff was an owner of a rural property, which was within the boundaries of the defendant, and the plaintiff obtained access to its property via a public road that was vested in the defendant. The plaintiff commenced these proceedings seeking orders in the nature of specific performance to compel the defendant to perform its obligations under the deed. The defendant disputed the plaintiff’s claim.

Cameron Willis (‘**the second defendant**’) and Tania Willis (‘**the third defendant**’) sought orders for their joinder to the proceeding, claiming to be necessary parties to the proceedings on the basis that the relief sought by the plaintiff would, if granted, directly affect their rights in relation to the public road. The proposed joinder was resisted by the plaintiff, which submitted that joinder is not appropriate in circumstances where the plaintiff sought specific performance of a deed to which the second and third defendants are not parties. Further, the plaintiff submitted that it sought no relief against the second and third defendants, and their interests would not be directly affected by the orders sought. The proposed joinder was not opposed by the defendant, which took a neutral position.

Clause 3 of the deed provided that the defendant and the plaintiff agreed that the plaintiff wuld submit road construction plans and specifications to the defendant, which would include accesses to the plaintiff’s property. Further, the evidence before the Court disclosed that the road had been transferred to the defendant, and that the defendant had passed a resolution to close the road.

The relief sought by the plaintiff was in the nature of specific performance of the deed, and further, that the Council so all such things that were necessary to approve the draft plan to enable its registration. The third order sought by the plaintiff was that, upon registration of such plan, the Council do all things and execute all documents necessary to transfer the title of the land in lot 1 of the plan to the plaintiff; that was, the land that presently comprises the public road.

Decision:

Darke J noted that in the rather unusual circumstances of the present case, the second and third defendants' submission that the case here goes beyond a suit for specific performance insofar as it entails questions of construction of the Deed. As such, Darke J found that the question was whether the second and third defendants were persons directly affected by the orders ought by the plaintiff. However, in circumstances where a transfer of the land would only be able to occur once the road has been closed, the third order sought by the plaintiff would entail requiring the Council to proceed to close the road. As a closure of the road would extinguish the rights of the second and third defendants to use the land as a road, Darke J held that the second and third defendants were persons who would be directly affected by the making of the orders sought by the plaintiff.

Having come to that conclusion, the Court made an order that the applicants be joined to the proceedings as the second and third defendants. The Court also ordered that the plaintiff pay the second and third defendants' costs.

Van der Merwe v Cantale

[2021] NSWSC 1203

Coram: Ward CJ

Court: Supreme Court of New South Wales

Date: 14 September 2021

LAND LAW — Caveats — Lodgment of caveat claiming same interest as previous caveat — Caveat claiming same interest is of no effect

Facts:

This was an application made by Mario Cantale (‘**the first defendant**’) seeking an order pursuant to s 74MA of the *Real Property Act 1900* (NSW) (‘**the Act**’) that Mr and Mrs Van den Merwe (‘**the plaintiffs**’) withdraw a caveat over some property owned jointly by the first defendant and his wife in Abbotsford. The urgency of this matter arose because the property was the subject of an exchanged contract for sale, and completion was scheduled for the date of this application.

There were two caveats lodged by the plaintiffs over the property. The first claimed an equitable interest by way of charge of virtue of an agreement dated November 2020 between the plaintiffs and the defendant. The second caveat, the subject of the present application, claimed an equitable interest held by the plaintiffs, by virtue of the November 2020 agreement. The particular interest in the land in respect of which a caveat was lodged in the first instance by the plaintiffs in the present case was the estate or interest of the defendant. As such, the Court indicated that there was no doubt that the further caveat that had been lodged by the plaintiffs is in respect of the same estate, interest or right of the defendant in the land.

The first basis on which the first defendant sought to have the order made for the withdrawal of the caveat turned upon the proper construction and application of s 74O of the Act. The second basis on which the order for withdrawal of the caveat was lodged did not strictly arise.

Decision:

The Court held that s 74O of the Act applied, and an order was made for the withdrawal of the further caveat that had been lodged in relation to the claimed equitable charge, as the caveat claiming same interest was of no effect.

Vella v Nergl Developments Pty Ltd & Ors (No. 3)

[2021] NSWSC 1352

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 29 October 2021

SPECIFIC PERFORMANCE – form of orders – orders for specific performance of heads of agreement to settle litigation and to grant an easement – orders for specific performance already made in a 2020 judgment which was upheld on appeal in 2021 – matter remitted to the trial judge to settle the final form of orders – dispute about whether caveats lodged by the proposed dominant tenement holder of the agreed easement over the proposed servient tenement should be withdrawn before a Conveyancing Act 1919, s 88B instrument lodged and deed of settlement executed – disputes about the form of instrument under Conveyancing Act 1919, s 88B – ascertainment of what was required by the original heads of agreement – scope of the Court's discretion to settle additional terms to achieve that specific performance of an agreement.

Facts:

This was the third judgment made in these proceedings, where principal judgment was handed down in October 2020 in *Vella v Nergl Developments Pty Ltd & Ors* [2020] NSWSC 1405 ('**the principal judgment**'). In the principal judgment, Mrs Vella ('**the plaintiff**') was substantially but not wholly successful in her claim against Nergl Developments Pty Ltd ('**the first defendant**') and Kindelon Pty Ltd ('**the fourth defendant**').

The second judgment was handed down in June 2021 and dealt with the issue of costs ('**the costs judgment**'). As a result of the costs judgment, the Court ordered the following:

1. The first and fourth defendants to jointly and severally pay 80% of the plaintiff's costs of the proceedings up to 30 October 2019;
2. The first defendant pay 80% of the plaintiff's costs of the proceedings after 30 October 2019, but excluding the costs of the costs issues; and
3. The plaintiff pay 60% of the common costs of the first and fourth defendants on the costs issue.

The first and second defendants appealed from the principal judgment and the costs judgment. The appeal was dismissed but the Court of Appeal varied orders 1 and 2 of the orders consequent upon the costs judgment to remove potential ambiguity in their guidance to a costs assessor ('**the Court of Appeal judgment**'). Order (1) was varied to signpost the date of the heads between the parties, as the date from which the first and fourth defendant were liable to jointly and severally pay the plaintiff's costs, and the costs were made inclusive of the end date of 30 October 2019. Order (2) was varied to remove the exclusion of the costs of the costs issues, such that the fourth defendant would be responsible to pay 80% of the plaintiff's costs of the proceedings after 30 October 2019.

This judgement concerned two areas of disagreement regarding the final orders in the proceedings which can be summarised as follows:

1. Whether the fourth defendant's caveats will be ordered to be removed from the property now, or at a later time after a damages dispute between the parties is resolved; and
2. Which of the parties' competing draft versions of the Deed of Settlement and Release ('**Settlement Deed**') and the s 888B Instrument should the Court order to specifically perform.

This first issue related to the implementation of Order (6) of the orders made with the principal judgment. The fourth defendant submitted that four consequences flowed from the plaintiff's alleged breach of contract and her conduct undermining the Court's principal judgment, which can be summarised as follows:

1. The plaintiff's breach of the heads meant that, properly construed, order 6 made with the principal judgment should not have required the fourth defendant to withdraw the caveats, because the proviso to that order required the plaintiff to comply with the heads, and she had not complied as she was in breach; and
2. The plaintiff should be required to "do equity" in order to gain the benefit of the remedy of specific performance.

Further, as a result of the exchanges of submissions the parties had agreed upon the terms of the proposed Settlement Deed, however they still had remaining disagreements about their proposed *Conveyancing Act,* s 88B Instrument. This involved the ascertainment of what was required by the original heads of agreement, and discussion was had in relation to the scope of the Court's discretion to settle additional terms to achieve specific performance of an agreement. In doing so, the parties made various submissions as to proposed amendments to numerous of the clauses in the s 88B Instrument.

Decision:
Slattery J reiterated that the real question was how order 6 should be interpreted and applied in the changed circumstances before the Court in these proceedings. As such, the fourth defendant's submission were held to be unpersuasive. As such, accepting that the plaintiff

held an obligation to “do equity”, the plaintiff must have first remedied the alleged but disputed damage to the road over a separate easement dispute. Therefore, it was not necessary for there to be any stay or other condition imposed or other relief granted in relation to the alleged damage to the road, as there were many options for the resolution of such damage issue.

Further, the Court held that the fourth defendant’s submissions were more persuasive on the second issue regarding the s 88B Instrument. The Court indicated that the parties were, as a result of this judgment, in a position to finalise the Settlement Deed and the s 88B Instrument which, upon execution and upon compliance with Order (6) of the principal judgment, lead to the withdrawal of the caveats. Therefore, the Court adjourned the proceedings to make final orders of the remaining issues in the proceedings.

Wassell v Ken Carr Bobcat & Tipper Hire Pty Ltd

[2021] NSWSC 1415

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 3 November 2021

CORPORATIONS — Contracts — Formalities — Statutory assumptions — Whether documents were properly executed to bind the defendant company — Where the plaintiffs argued that they were entitled to rely upon the assumptions in s 129 of the Corporations Act with respect to the purported proper execution of documents by two directors of the defendant — Where the apparent signatures of the two directors had been forged and every apparent communication between the plaintiffs, their agent and the defendant had been fraudulently undertaken by a person who had no authority to act in any way on behalf of the defendant — Whether the plaintiffs had dealings with the defendant for the purpose of s 128 of the Act — Where the Court found that the plaintiffs were not entitled to rely on the assumptions in s 129 because the plaintiffs had no dealings with the defendant — Where the Court held that the plaintiffs have failed to establish that the defendant is precluded from denying that it is bound by the documents

EQUITY — Equitable interests in property — Priority disputes — Earlier legal interest — Where the plaintiffs claimed that they had an equitable interest in property in circumstances where their registered mortgage did not on its proper construction and in the events which had happened secure the advance made by the plaintiffs — Where the plaintiffs' interest in the defendant's property was created by the fraud of a third party — Where the plaintiffs argued that the defendant's conduct disentitled it from asserting its priority as the registered proprietor of the property over the plaintiffs' equitable interest — Whether the earlier legal interest of the defendant would lose its priority to the later equitable interest of the plaintiffs — Where the Court found that the plaintiffs have not established that the defendant lost its entitlement to priority as the registered proprietor

LAND LAW — Torrens title — Compensation for loss of interest in land — Torrens assurance fund — Where the plaintiffs claimed that, in the event the Court found that the registered mortgage was not effective to secure the amount advanced and that their later equitable interest did not have priority over the defendant's legal interest, they are entitled to be paid compensation from the Torrens assurance fund on the basis of s 129(1)(e) of the Real Property Act — Whether the loss or damage that the plaintiffs would suffer would be as a result of the operation of the Act — Where the Registrar-General submitted that the plaintiffs are not entitled to compensation because the loss or damage would arise from the plaintiffs conduct rather than as a result of the operation of the Act — Where the plaintiffs argued that the Court should conclude that the plaintiffs will suffer loss as a result of fraud in that they will be deprived of an estate or interest in the property as a consequence of fraud — Where the Court found that the loss or damage that the plaintiffs will suffer is not as a result of the Act — Where the Court held that the plaintiffs' claim for compensation from the Torrens assurance fund must be dismissed

LAND LAW — Torrens title — Exceptions to indefeasibility — Fraud — Where the plaintiffs claimed that they had a registered mortgage over the defendant's property — Where the registered mortgage was procured by the fraud of a third party — Whether the plaintiffs' registered mortgage was indefeasible — Where the Court found that the mortgage in effect did not secure any money — Where the Court held that the plaintiffs' registered mortgage was indefeasible but that because it secured nothing, the defendant is entitled to an order that the mortgage be discharged

Facts:

These proceedings concerned David Ian Wassell and Ya Jun Jiang Wassell ('**the plaintiffs**') seeking judgement for possession of certain land at Thornton ('**the Property**'), as well as leave to issue a writ of possession. Ken Carr Bobcat & Tipper Hire Pty Ltd ('**the defendant**') was the registered proprietor of the Property.

The plaintiffs commenced proceedings against the defendant to enforce a mortgage purportedly granted by the defendant to them to secure repayment of $185,000 that the plaintiffs asserted they had loaned to the defendant for six months under a written loan agreement. The plaintiffs pleaded the defendant was indebted to them for around $187,500, and that they had taken the relevant steps required by law to entitle them to exercise their power of sale under the mortgage. Further, in the event that the Court found that the registered mortgage was not effective to secure the amount advanced and that their later equitable interest did not have priority over the defendant's legal interest, the plaintiffs submitted that they were entitled to compensation from the Torrens Assurance Fund under s 129(1)(e) of the *Real Property* Act 1900 (NSW)

The defendants contested this in their defence by denying that any of the documents relied upon by the plaintiffs were valid on the basis that they had not been executed by the defendant and had been fraudulently executed by a person called Anthony Lyons. In turn, the plaintiffs responded by pleading that Anthony Lyons was the agent of the defendant, and the defendant armed Mr Lyons with apparent authority to deal with the Property. The facts that premised this claim centred upon the allegation that the defendant, at the request of Mr Lyons, provided the original certificate of title for the Property.

The plaintiffs alleged that the defendant was estopped from denying its obligation to deliver the original certificate of title to the plaintiffs in return for the principal amount advanced by it on settlement, or from denying the validity of the loan agreement and the mortgage. Although this allegation was indicated by the Court to be out of place as a particular to an estoppel claim, it was relied upon by the plaintiffs as a basis for a claim that, by reason of their possession of the certificate of title for the Property, they had an equitable mortgage by deposit of title deed.

It was made clear that the transaction documents were forged by Mr Lyons, and that the whole of the circumstances that led to the loan being made and the transaction documents forged was an elaborate plot engaged in by Mr Lyons to cause the amount of the advance to be paid into a bank account controlled by Mr Lyons. Consequently, the transaction documents were void and of no effect, and did not give rise to a valid loan repayable by the defendant. Mr Lyons pleaded guilty in relation to the forgery.

The transaction

In light of this finding, the plaintiffs sought to rely on a statutory entitlement to assume that the transaction documents had been fully executed by the defendant, in circumstances where the apparent signatures of the two directors had been forged and every apparent communications between the plaintiffs, their agent and the defendant had been fraudulently undertaken by Mr Lyons. The effect of the plaintiff's submissions was that an assumption under s 129(5) of the *Corporations Act 2001* (Cth) could be made, where the dealings relied upon were fraudulent, as well as where the purported signatured were forged.

Claim for compensation under the Torrens Assurance Fund

The plaintiff also claimed that they were entitled to be paid compensation on the basis that s 129(1)(e) of the *Real Property Act* applied, in that, they constituted a "person having been deprived of land… as a consequence of fraud". It has been established that Mr Lyons procured the loan transaction by fraud and that he forged the transaction documents including the mortgage. Consequently, although as a result of the mortgage having been registered against the title to the Property, the mortgage was indefeasible by the operation of s 42 of the *Real Property Act*, as the mortgage had been construed not to secure repayment of any debt by the defendant, and as the other transaction documents including the loan agreement were void because they were forgeries, the indefeasible mortgage did not secure any debt. As a result, the defendant was entitled to an order that the mortgage be discharged.

The Registrar-General ('**the third defendant**') submitted that the plaintiffs were not entitled to compensation because the loss or damage that they had suffered had arisen from their having paid the mortgage monies to Mr Lyons, rather than the defendant, under forged transaction documents that did not impose any obligation on the defendant to repay the debt.

Decision:

The loan agreement

The Court indicated that the dealings with the company required by s 128(1) must be actual or real dealings engaged in by an agent of the company who has appropriate authority to undertake negotiations in respect of the relevant transaction on behalf of the company. Therefore, the requisite dealings would be absent where the negotiations relied upon as dealings were fraudulent and entirely unauthorised. Consequently, the Court held that the plaintiffs had failed to establish that the defendant was precluded from denying that it was bound by the loan agreement. As the plaintiffs had not established that they were entitled to enforce the loan agreement against the defendant, it was not necessary to determine whether the loan agreement created a debt owed by the defendant to the plaintiffs that was secured by the mortgage registered against the title to the Property.

Claim for compensation under the Torrens Assurance Fund

The Court indicated that there was only one case of the loss suffered by the plaintiffs, which was disbursing the loan monies to Mr Lyons and not the defendant, when the mortgage only obliged the defendant to repay the loan if the loan had actually been made to the defendant. As such, the Court noted that both the act of paying the money to Mr Lyons and the drafting of the mortgage were acts of the plaintiffs and their agents, and had nothing to do with the operation of the *Real Property Act.* Therefore, the plaintiff's claim for compensation from the Torrens Assurance Fund was also dismissed.

Winau Australia Pty Ltd v LCC Property Development Pty Ltd

[2021] NSWSC 612

Coram: Rein J

Court: Supreme Court of New South Wales

Date: 26 May 2021

EQUITY — Equitable remedies — Injunctions — Property sold pursuant to a purported first mortgage on the mistaken assumption that the mortgage secured amounts advanced — Proceeds of the sale of the property paid into Court — Previous hearing in this Court on a separate question, the outcome of which was that the purported first mortgage did not secure the amounts advanced — Agreement reached by the parties prior to the hearing of the separate question identifying to whom the proceeds of the sale of the property were to be paid following the Court's judgment in respect of the separate question — In light of the Court's judgment on the separate question, pursuant to the parties' agreement, the amounts held in Court were to be paid to the former registered proprietor of the property — New claims made pursuant to a purported second mortgage — Purported second mortgagees sought an interlocutory injunction requiring the former registered proprietor to place the proceeds of sale of the property in a bank account and restraining the former registered proprietor from encumbering or making any withdrawal or transfer from that account — Held: The undertaking proffered by the Applicants on the Motion was ineffective — Consideration of the relative strengths and weaknesses of the parties respective claims and defences — Applicants did not have a strong case on estoppel and the Respondents had, at the very least, reasonable prospects on their case that the second mortgagees could not resile from their agreement in respect of the funds — Proceeds of sale of the property to be released to the former registered proprietor of the property, with a requirement that it give the Applicants on the Motion 14 days' notice of its intention to disburse those funds to its unitholders

Facts:

These proceedings concerned an application for injunctive relief, restraining 183 Eastwood ('**the third plaintiff**') from disbursing monies that had been paid into Court, save by placing such funds in a single bank account held in the name of the third plaintiffs or its solicitors on behalf of the third plaintiff. The applicants on the motion, the third to fifth defendants, also sought an order restraining the third plaintiff from encumbering or making any withdrawal or transfer from that account.

Briefly, these protracted proceedings involved a dispute between a former registered proprietor of real property, Mr Chan ('**the second defendant**') an alleged fraudster who purported to be the sole director, secretary and shareholder of that corporate registered proprietor, and mortgagees who mistakenly believed they were dealing with the sole authorised officer of the corporate registered proprietor ('**the applicants**').

The applicants advanced three primary submissions which can be summarised as follows:

1. Firstly, the applicants have a strong prima facie claim under the second mortgage to the proceeds of sale;
2. Secondly, if the proceeds of sale were to be paid out of the court to the third plaintiff, they would be distributed to the unit holders in the Eastwood Unit Trust and therefore:
    a. The security granted to the second mortgagees would be destroyed, and their claim rendered futile;
    b. The money might otherwise be irrecoverable from the third plaintiff if the second mortgagees succeed because it is unlikely that the fund could be reconstituted by the third plaintiff; and
    c. The subject matter of the action by the second mortgagees would be lost
3. Thirdly, the balance of convenience favoured the orders sought in the motion.

The submissions raised in defence can be summarised as follows:

1. Firstly, the second mortgagees should not be permitted to advance any new claim based on the second mortgage and should not be granted any interlocutory relief preventing the distribution of funds;
2. As the second mortgagees' claim was, at its highest, an in personam claim for unliquidated damages, the applicants should not be granted the injunctive relief sought; and
3. There was no evidence before the Court which suggested that the third plaintiff would dissipate the proceeds of sale upon its receipt of same, nor that if the proceeds of sale were remitted to the third plaintiff, a judgment obtained by the applicants against the third plaintiff would be rendered nugatory.

Decision:

The Court indicated that the absence of an effective undertaking would be sufficient to preclude the grant of injunctive relief, even if the second mortgagees had a strong prima facie case, but that was not the position. Accordingly, Rein J found that the money held in the Court account be paid out to the third plaintiff. However, there was one limitation that was placed upon the transfer of funds to the third plaintiff, in that, if the third plaintiff intended to distribute any of the funds to the unitholders of the Eastwood Unit Trust, it was required to give the third to fifth defendants 14 days of such intention.

Young v Richmond Valley Council (No 2)

[2021] NSWSC 525

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 12 May 2021

CIVIL PROCEDURE – summary disposal – plaintiff claims title by adverse possession over parcels of land said to be owned by the Crown – parcels of land vested in local Council as public roads – plaintiff's claim against second defendant State of New South Wales bound to fail – proceedings summarily dismissed against second defendant

Facts:

These proceedings concerned Gary Young ('**the plaintiff**') claiming that he had possessory title to three areas of land located in Irvington. The claimed land were part of a Crown grant in 1857 in favour of a Mr Clark Irving. The plaintiff commenced proceedings against the Richmond Valley Council ('**the first defendant**') and the State of New South Wales ('**the second defendant**'), which was later added as a party into the proceedings via an Amended Statement of Claim.

The Court had already determined an application for summary dismissal, brought by the first defendant. On that occasion, the Court declined to summarily dismiss the proceedings against the it because the evidence did not go quite so far as to show that it was almost certain that the plaintiff's claim would fail. That conclusion rested in part upon some lack of clarity about the historic ownership of the claimed lands, which the evidence showed was owned by the second defendant.

The second defendant sought the dismissal of the proceedings against it on the grounds that no reasonable cause of action was disclosed against it. In the alternative, the second defendant sought an order that the Amended Statement of Claim be struck out insofar as it concerns it. The primary submission of the second defendant was that the plaintiff's claim could not possibly succeed against it because none of the claimed land was in the ownership of the second defendant.

The plaintiff contested that position, and alleged that all the claimed land was Crown land owned by the State. The plaintiff's claim proceeded on the basis that the claims lands were roads made pursuant to statute, and that the lands were therefore Crown lands when the road closured were effected in 1963.

Decision:

Darke J was unable to accept the plaintiff's contention, as there was no evidence of any subsequent transfer of ownership of the lands from the local Council to the Crown, whether by way of agreement or otherwise. Moreover, there Darke J held that there was no evidence that any of the roads were later closed pursuant to the *Roads Act 1902* or indeed any other statutory provision. In such circumstances, the roads remained vested in fee simple in the Council, and the Court concluded that the plaintiff's claims to have possessory title to any of the lands were, as against the State, untenable.

It followed that the Court ordered that the proceedings be dismissed as against the second defendant, and that the plaintiff pay the second defendant's costs of the proceedings.

Zhou v Li

[2021] NSWSC 527

Coram: Rees J

Court: Supreme Court of New South Wales

Date: 12 May 2021

LAND LAW – application to extend caveat – no issues of principle.

Facts:

These proceedings concerned an application to extend a caveat lodged by Wenliang Zhou ('**the plaintiff**') over a property in Epping owned by Aus Ray International Pty Ltd ('**the second defendant**'). The sole director and shareholder of the second defendant was Qiang Li ('**the defendant**') who was the plaintiff's nephew.

The dispute involved a loan between the parties. The plaintiff contended that he was approached by the defendant for an amount between $2 million and $3 million to purchase a property for development. According to the plaintiff, the defendant asserted that in the event that he could not repay the loan, that the land would be used as security. The defendant agreed that he asked the plaintiff for a loan to complete the purchase of the Epping property, but otherwise denied that the land would be used for security. The plaintiff contended that the bulk of the loan had been repaid, with some $300,000 plus interest outstanding. The defendant also contended that he paid various expenses at the direction of the plaintiff, in respect of another property owned by the plaintiff in Burwood, which were offset against the loan. The plaintiff denied such an arrangement.

The plaintiff commenced these proceedings against the defendants in respect of three business dealings, bone of those being to recover the balance of the loan in respect of the Epping property. the plaintiff lodged a caveat on the Epping property, describing the caveatable interest as a lien arising from a loan agreement between the plaintiff and the defendant for monies that went towards the purchase of the land. The defendants requested that the caveat be withdrawn, noting that the caveat was holding up the bank's review of the second defendant's banking facilities then underway.

Decision:

Rees J was satisfied that there was a serious question to be tried as to whether the plaintiff had an interest in the land arising from his conversations with his nephew. Further, the balance of convenience also favoured the extension of a caveat. The defendant's initial concern that the existence of a caveat would delay the bank's review of the second defendant's banking facilities had proved unfounded.

The balance of convenience further favours the plaintiff as her offered to secure the usual undertaking as to damages by a charge to be secured over a property valued at some $450,000. The plaintiff's connection with the owner of the land was not known, however the plaintiff considered he had a sufficient connection with the company to prevail upon it to register such a charge.