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REAL PROPERTY CASES 2022

A REVIEW OF REAL PROPERTY CASES AT FIRST INSTANCE AND ON APPEAL DECIDED IN NEW SOUTH WALES FROM JANUARY TO DECEMBER 2022

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J & Z Holding (Aust) Pty Ltd v Vitti Pty Ltd

[2022] NSWSC 1718

Coram: Lindsay J

Court: Supreme Court of New South Wales

Date: 20 December 2022

LAND LAW — Conveyancing — Options – Put and call option – Classification of a payment as an option fee or a deposit – Payment properly characterised as an option fee for full consideration – Not recoverable as a deposit upon the contract coming to an end otherwise than by completion

Facts:

These proceedings concerned a dispute regarding whether an option fee, paid by the plaintiff to the defendants for the defendants' grant of a call option, could be characterised as a conventional deposit recoverable by the plaintiff. The option fee was in relation to a contract, where the plaintiff was the prospective purchaser and the defendants where the prospective vendors of a property in Ultimo, which came to an end between the parties. As such, the claim by the plaintiff was for relief in relation to returning the 'deposit' on restitutionary grounds.

The parties had both purported to terminate the contract by way of acceptance of repudiatory conduct on the part of the other. The defendants purported to terminate the contract based on a failure of the plaintiff to complete the contract in accordance with a notice to complete. The plaintiff then disputed the validity of the notice to complete, and purported to terminate the contract on the basis that the defendants had wrongfully repudiated the contract.

The plaintiff contended that, having rescinded the contract for the defendants' repudiation, it was entitled to recover the deposit which it had paid under the contract. Further, the plaintiff contended that the deposit, being 20% of the purchase price, was a 'penalty' which the defendants were not entitled to retain. The defendants contended that they are entitled to the disputed sum, as it represented an option fee paid to them for their grant of a call option to the plaintiff.

The plaintiff's statement of claim also sought declarations to the effect that the defendants' notice to complete was not valid, the defendants did not validly terminate the contract, and the contract was validly terminated by the plaintiff.

Decision:

Lindsay J held that the disputed sum was not to be characterised as a conventional deposit, but as a credit, for the call option fee paid to the defendants as the price for their grant, and extension, of a call option to the plaintiff. As such, the 'deposit' could not be characterised as a penalty and the plaintiff had no entitlement to recover the disputed sum on a claim for restitution. Accordingly, the plaintiff's statement of claim seeking recovery of the disputed sum was dismissed.

Further, it was found that the defendants had wrongfully terminated the contract, for the plaintiff's non-compliance with a notice to complete which was held the be invalid. As such, Lindsay J found that this constituted a repudiation by the defendants of their obligations under the contract, and that the contract came to an end when the plaintiff accepted such repudiatory conduct by putting an end to the contract.

Clough v Breen & Anor

[2022] NSWSC 1759

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 19 December 2022

REAL PROPERTY – EASEMENTS – dispute in relation to the use of various easements for the use of an inclinator, the supply of services, giving rights-of-way, and other related easements – between the plaintiff and the defendants who are neighbours – interlocutory orders made in August 2022 pending determination of final issues – the early determination of some issues to reduce the number of disputes between the parties considered – whether early determination of some of the issues is possible – of the issues isolated one is identified as capable of early determination, as to whether a CCTV camera is authorised by Easement I to be positioned on the plaintiff's land.

Facts:

These proceedings concerned ongoing dispute between the parties in relation to multiple issues. Specifically, this judgment related to the construction of the terms of the easement and some uncontested facts relating to a fixture on the easement. The parties were the registered proprietors of two adjacent pieces of land, whereby multiple easements control the use of the land. The easement in dispute in these proceedings, was an easement for services (**Easement I**).

The issue in question related to whether the defendants were entitled to install and maintain a CCTV camera within Easement I. The defendants contended that Easement I entitled them to maintain such the CCTV camera that one of the defendants had installed on the plaintiff's property, as the purpose of the camera falls under the definition of "domestic services" pursuant to the *Conveyancing Act 1919* (NSW) (***Conveyancing Act***). The plaintiff contended that the defendants had no right to keep the camera there and that it was entitled to remove it.

Decision:

Slattery J held that the CCTV camera did not quality as a “domestic service” within the meaning of the *Conveyancing Act*. As such, it was found that the CCTV camera was an impermissible fixture placed upon Easement I, which was a trespass, and that the plaintiff was at liberty to remove the CCTV camera.

Vedam Enterprises Pty Ltd v Xpress Fuel Australia Pty Ltd

[2022] NSWSC 1756

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 19 December 2022

EQUITY – Equitable remedies – relief against forfeiture – leases - interlocutory injunctions to restrain termination of leases and possession of eight service station sites operated by different plaintiffs – whether serious questions to be tried that lessee plaintiffs entitled to relief against forfeiture - where asserted breaches relate to termination of exclusive fuel supply agreements with first defendant – where plaintiffs' claim that fuel supply agreements terminated due to supply failures by first defendant – whether clauses relied on by landlords as giving rise to rights to forfeit and re-enter protect landlords interests – whether landlords will suffer loss from the breaches of leases – balance of convenience – adequacy of undertaking as to damages

Facts:

These proceedings concerned an application for interlocutory relief seeking to restrain the second to fifth defendants (**Lessor Defendants**) from terminating leases and taking possession of eight sites used by six of the fourteen plaintiffs (**Lessee Plaintiffs**) to conduct eight retail service station businesses in NSW, Queensland and Victoria. The Lessee Plaintiffs, who were not related companies, each operated one or two of the eight service stations from sites leased from the Lessor Defendants. The first defendant and the Lessor Defendants were related companies.

The Lessee Plaintiffs purported to terminate exclusive trade and fuel supply agreements with the first and second defendants, in circumstances where they were acquiring fuel from third-party suppliers. The issue was whether the Lessor Defendants were entitled to terminate seven of the service station leases for fundamental breach, and rely on breach notices that asserted the right to re-enter the sites. The breach notices led to the plaintiffs commencing these proceedings, seeking urgent interlocutory and final relief.

The Lessee Plaintiffs contended that they were entitled to relief against forfeiture of the leases.

Further, they contended that the lease terms relied on by the Lessor Defendants, being rights to terminate, were not necessary for the protection of their legitimate business interests. As such, Lessee Plaintiffs contended that interlocutory relief should be granted in enabling them to continue operating their service station businesses.

The Lessor Defendants opposed the application for interlocutory relief and contended that the Lessee Plaintiffs did not establish a serious question to be tried, and the balance of convenience outweighed the grant of interlocutory relief. This was predominantly due to the first defendant being exposed to financial risk under agreements with the third-party fuel supplier.

Decision:

Henry J held that there was a greater risk of injury and prejudice to the Lessee Plaintiffs if interlocutory relief was not granted than to the Lessor Defendants if the interlocutory relief was refused. It was accepted that there were serious questions to be tried and that the discretionary factors raised by the defendants did not warrant refusing to grant interlocutory relief in favour of the plaintiffs. As such, it was satisfied that the Lessee Plaintiffs were entitled to interlocutory relief.

Westpac Banking Corporation v Glynn

[2022] NSWSC 1770

Coram: Beech-Jones CJ

Court: Supreme Court of New South Wales

Date: 15 December 2022

SUMMARY JUDGMENT – possession of land – no question of principle

Facts:

These proceedings concerned a claim for possession of land located in Mandalong (**Property**), based upon default in payment of loan amounts said to have been owed under a mortgage. The plaintiff sought possession of the Property pursuant to a mortgage the defendant had entered into, for the purposes of securing two loan accounts.

A provision to the mortgage between the parties indicated that, if there was a failure to make an outstanding payment that continued for at least 7 days, the plaintiff may notify of the failure. Further, if such a failure continued for at least 31 days following service of the notice, then the plaintiff is entitled to take possession of the Property.

The plaintiff contended that the defendant was in default for a period of at least 7 days, and it served a notice on the defendant in accordance with the time period stipulated by the mortgage. Given the unremedied default within the required time period, the plaintiff contended that a right to possession had arisen. The defendant filed a defence containing material that was said to be entirely irrelevant to the proceedings.

Decision:

Having considered the defendant's defence, Beech-Jones CJ was satisfied that there was no arguable defence to the plaintiff's claim for possession of the Property. Accordingly, judgment

was entered for the plaintiff, and the defendant was ordered to pay the plaintiff's costs of the proceedings.

Rowe v Kincumber Nautical Village Pty Ltd (No.3)

[2022] NSWSC 1701

Coram: Garling J

Court: Supreme Court of New South Wales

Date: 15 December 2022

CIVIL PROCEDURE — Representative proceedings — Proceedings commenced by plaintiff with statutory right of appeal from a decision of the Appeal Panel of the NSW Civil and Administrative Tribunal — No other group member exercised statutory right — Orders made dismissing the plaintiff's appeal — Parties agreed that consequential orders should be made binding the group members — Orders made under ss 177 and 179 of the Civil Procedure Act 2005 (NSW)

LEASES AND TENANCIES — Legislation protecting tenants — Residential (Land Lease) Communities Act 2013 (NSW)

Facts:

These proceedings concerned an appeal against a decision of the Appeal Panel of the NSW Civil and Administrative Tribunal (**NCAT**).

Garling J found unfavourably to the plaintiff in a principal judgment dated 27 October 2022, in which leave was granted to appeal NCAT's decision. The subject of such proceedings related to various site agreements between the parties, and the provisions for an annual adjustment of costs and expenses. It was also ordered in the principal judgment that the plaintiff's appeal be dismissed, and the plaintiff pay the defendant's costs. Further, the parties were to provide short minutes of order in relation to whether the dismissal of the plaintiff's claim was binding on the group members, other than the plaintiff.

This judgment dealt with the competing sets of short minutes of order provided by each party, largely due to the fact that the plaintiff was exercising a statutory right to appeal which only he had exercised. As such, the remaining group members did not exercise their statutory right to appeal with respect to the NCAT proceedings, and as such, the group members were bound to the dismissal of the claim.

The defendant contended that the dismissal of the plaintiff's claim did not create any estoppel in favour of the defendant with respect to any related findings of contested fact and conclusions. Accordingly, the defendant sought a determination that the NCAT Appeal Panel did not err in law, and that the term relating to the site fee increase, within the site agreement between the parties, was fixed.

Decision:

The court agreed with the orders sought by the defendant, for the purposes of providing clarity in order to avoid further disputes between the parties. It was held that the judgment bound each of the group members who were also applicants in the NCAT proceedings against the defendant.

Lee v YOUth OK Pty Ltd (No. 2)

[2022] NSWSC 1691

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 9 December 2022

LEASES AND TENANCIES – first defendant in breach of lease and gives possession of property – calculation of damages for the balance of the term – lease requires the plaintiff to do "every reasonable thing to mitigate loss" – whether the plaintiff has done every reasonable thing to mitigate her losses and to release premises repossessed from the first defendant – term of lease allows the plaintiff to recover reasonable legal costs from the default – whether the plaintiff entitled to indemnity costs under the lease.

COSTS - whether indemnity costs should be awarded under the provisions of the lease – whether interest on costs should be awarded.

Facts:

The plaintiff was the registered proprietor of two parcels of land in Sydney (**Property**). Through an unregistered lease, the plaintiff demised the Property to the first defendant for a term of three years. The second defendant, the principal of the first defendant, guaranteed the obligations of the first defendant under the lease.

The plaintiff brought these proceedings against the defendants for possession of the Property, recovery of rental arrears, damages under the lease, and for the loss of the balance of the lease term. The plaintiff contended that it terminated the lease by notice, on the grounds of non-payment of rent and a security deposit required by the lease. Further, the plaintiff claimed a notional re-entry into the Property for the purposes of calculating mesne profits.

The main issue in these proceedings, following a principal judgment, was whether indemnity costs should be awarded under the provisions of the lease, and further, whether interest on costs should be awarded. Further, the issue was whether the plaintiff had reasonably mitigated against its loss and realise the Property repossessed from the first defendant.

Decision:

The court ordered that the damages be reduced, and an order for interest on costs was made. However, it was held that there was no conduct on the part of the defendant that would warrant an award of indemnity costs against them.

Application of Chrissie Group Pty Ltd

[2022] NSWSC 1711

Coram: Meek J

Court: Supreme Court of New South Wales

Date: 8 December 2022

MORTGAGES — Payment in Court — First registered mortgagee sells four properties following default by mortgagor, pays surplus funds into Court and identifies five potential claimants in respect of the funds — Application for payment out by unregistered mortgagee

REAL PROPERTY — Registration of interests — Series of lenders lodge caveats in respect of unregistered loan and mortgage interests — Applicant's interest as unregistered mortgagee is 'secured' by lodgement of caveat — Applicant establishes interest is created first in time and lodged in priority to four other potential claimants — Applicant entitled to payment out of entirety of surplus funds

PRACTICE — Appearance — Procedure — Representation of company by director — Directors of several potential claimants seek to bind their companies — Uniform Civil Procedure Rules 2005 (NSW) rr 7.1(2) considered

Facts:

These proceedings concerned an application for payment out by the claimant, for proceed of sale funds of several properties, that were paid into the court by The Trust Company, the plaintiff in the proceedings.

The claimant and the fifth respondent in the proceedings entered into a contract for sale, whereby the claimant was the vendor. The fifth respondent then entered into a loan agreement with plaintiff, which was secured by a registered mortgage over the properties. The fifth respondent required additional funds, and accordingly sought a loan, in the nature of vendor finance, from the claimant. Thereafter, the fifth respondent as mortgagor and the claimant as mortgagee entered into a mortgage over the properties. The mortgage was not registered, however, the claimant secured its interest arising from the loan agreement and mortgage by way of a caveat lodged over the properties. About a year later, the plaintiff issued notices of default and demand, eventually obtained possession of the properties, and then sold the

properties. The sum for which the properties were sold exceeded the amount owing to the plaintiff at the time.

The claimant contended that the fifth respondent was in default under the loan agreement, and as such, asserted priority over the fifth respondent to the funds.

Decision:

Meek J was satisfied that the matters which the claimant was required to make out were indeed established, and as such, the claimant was entitled to the relief it sought, being the funds plus interest.

Indigenous Land and Sea Corporation v Anderson

[2022] NSWSC 1650

Coram: Griffiths AJ

Court: Supreme Court of New South Wales

Date: 7 December 2022

LAND LAW – Claims for possession of lands in New South Wales and Queensland by registered proprietor – Where lands required for divestment purposes pursuant to plaintiff's statutory functions – Challenge to Court's jurisdiction by first defendant

LAND LAW – Adverse possession – Required period of possession – Where first and second defendants claim to have occupied and possessed the lands since 2002 – Consensual occupation until 2019 – Claim of adverse possession rejected

NATIVE TITLE – Federal Court consent determination in force regarding Queensland land – Common law native title claim in respect of NSW land – Freehold and perpetual leases – No determination made in respect of existence of native title rights and interests in NSW land – Any assumed native title rights and interests in NSW land found to have been extinguished

CROSS-VESTING SCHEME – Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) – One parcel of land in Queensland – Court's cross-vested jurisdiction not contested

Facts:

These proceedings concerned a claim by the plaintiff for the possession of two parcels of lands in NSW and Queensland (**Lands**). The Supreme Court dismissed a cross-claim brought by the defendant, seeking judgment for possession of the Lands and the removal of the plaintiff from the land titles registers in NSW and Queensland in respect of the Lands.

The plaintiff purchased the Lands and thereafter, in accordance with its statutory functions, made a grant of the Lands to Ngurampaa Ltd. The terms of the deeds of grant required Ngurampaa Ltd to transfer the Lands back to the plaintiff in the event that it was wound up. Numerous years later, Ngurampaa Ltd was wound up by an order of the Supreme Court, and thereafter, the plaintiff again became the registered proprietor of the Lands.

The defendants, the directors of Ngurampaa Ltd prior to its winding up, had been in possession of the Lands. The plaintiff requested vacant possession of the Lands from the

defendants, upon becoming registered proprietor, in order to carry out works on the Land, make grants of the Lands, etc. as part of its divestment process.

Upon the defendants' non-compliance with its request for vacant possession, the plaintiff then commenced these proceedings.

Decision:

Griffiths AJ found that the plaintiff had a right of exclusive possession, further, that this entitled the plaintiff to judgment for possession of the lands. In this respect, it was found that the plaintiff's right to exclusive possession prevailed over any native title rights and interests at common law, that were contended by the defendants. Further, in relation to the defendant's claim of adverse possession, the court found that the defendants' occupation of the land fell far short of the 12 years required in both NSW and Queensland for a claim based on adverse possession to succeed. Accordingly, the court granted leave to the plaintiff to issue a writ of possession.

Australian Secured & Managed Mortgages Pty Ltd v Horizon Hotels Pty Ltd

[2022] NSWSC 1647

Coram: Henry J

Court: Supreme Court of New South Wales

Date: 6 December 2022

CONTRACTS – construction and interpretation – whether precondition for payment of fees to the second plaintiff under Introducer Mandate Agreement satisfied – where precondition provided for payment of fees if offer of finance within 10% of indicative interest rate (of 2% per month) – where loan did not proceed – where Loan Offer provides for standard and concessional interest rates – whether fees are payable to the first plaintiff under Loan Offer – fees payable to first and second plaintiffs

EQUITY – estoppel by convention – whether plaintiffs estopped from enforcing contractual entitlement to payment of fees based on common assumption relating to security – no common assumption – claim fails

EQUITY – declaratory relief – form of declarations – whether declarations should be made that defendant's land charged for payment of fees – declarations made

REAL PROPERTY – caveats – equitable charges – where Introducer Mandate Agreement and Loan Offer grant equitable charges over defendant's land to secure payment of fees – whether caveats should be extended until payment of fees or further order of the Court – caveats extended

Facts:

These proceedings concerned an application by the plaintiffs to recover a sum of money from the defendant, pursuant to an Introducer Mandate Agreement (**Agreement**), which involved sourcing an offer of finance from the first plaintiff, by way of a loan, to the defendant (**Loan Offer**). The individual appointed to source the offer, the second plaintiff, was a mortgage broker who arranged finance for borrowers, whilst the first plaintiff was a business who provided mortgage finance for borrowers.

The plaintiffs contended that, on the proper construction of the Agreement and Loan Offer, a sum, comprising establishment and brokerage fees, was payable to them jointly and severally. In addition, the plaintiffs contended that a further sum, comprising administration, commitment and legal fees (collectively, **Sums**), was payable to the first plaintiff, even though a loan was

never advanced to the defendant. The plaintiffs also argued that the Sums claimed were secured by charges over two properties owned by the defendant, and further, that the caveats the plaintiffs had lodged over the properties ought to have been extended until such Sums had been paid by the defendant.

Alternatively, the plaintiffs contended that, pursuant to the final page of the Loan Offer (**Further Term**), the defendant was liable to pay the Sums in accordance with its undertaking to pay expenses and to indemnify the first plaintiff against all costs and charges involved.

The defendant denied that the Sums were payable, and further, that the caveats did not secure the plaintiffs any interest in the properties. This was contended on the basis that the precondition for the payment of the Sums (comprising the fees under the Agreement) was not triggered, and that the first plaintiff was not a 'lender' under the Loan Offer. As such, the defendant contended that the plaintiffs had not established it had incurred the Sums, and further, that the parties operated under a common assumption that gave rase to an estoppel, precluding any entitlement to the payment of the Sums to the plaintiffs.

Decision:

Were the fees payable to the second defendant under the Agreement?

Henry J did not accept the defendant's submission that the Loan Offer had not met the precondition for payment of the Sums. Further, it was held that irrespective of whether or not the first plaintiff was the 'lender' under the Loan Offer, the obligation on the second defendant under the Agreement was to procure a written offer of finance from a lender, which was found to include the letter of offer sent by the first plaintiff. Accordingly, the Court was satisfied that the second plaintiff had established an entitlement to be paid the amount claimed by the defendant.

Were the Sums payable to the first plaintiff under the Loan Offer?

The Court was not persuaded by the first plaintiff's submission that it was the 'lender' for the purposes of the Loan Offer. This was because, upon proper construction of the Loan Offer, it referenced that the Loan Offer was to be advanced by the first plaintiff's lender; a separate and distinct entity to the first plaintiff.

Further, the Court did not accept the defendant's submission that there was no binding contract between the first plaintiff and the defendant, on the basis that the first plaintiff cannot be specified as a 'lender'. As such, the better construction of the Loan Offer was found to be a binding agreement between the parties, pursuant to which the first plaintiff procured its nominee, a lender, to provide a loan. Accordingly, Henry J held that, even as a party to the Loan Offer, the first plaintiff did not establish that it had any entitlement to recover the Sums from the defendant.

However, in accordance with the first plaintiff's alternative claim relying upon the Further Term, the Court was satisfied that the first plaintiff was contractually entitled to a portion of the Sums claimed. As such, it was held that the defendant was liable to pay the first plaintiff and the second plaintiff the Sums, pursuant to the Further Term and the Agreement, respectively.

Estoppel

It was also held that the defendant's contention, that the plaintiffs were precluded from enforcing their rights to claim payments of the Sums based on an estoppel, failed on the basis that there was no common assumption.

711 Hogben Pty Ltd v Anthony Tadros – Relief Against Forfeiture and Costs

[2022] NSWSC 1653

Coram: Hammerschlag CJ

Court: Supreme Court of New South Wales

Date: 5 December 2022

EQUITY – LANDLORD AND TENANT – relief against forfeiture of lease – where tenants have obtained a substantial verdict for damages against the Landlord – where Landlord terminated the lease for the tenants' failure to pay rent – whether relief should be refused on the basis that the tenants will be unable to pay future rent or may reasonably be expected to be unable to do so – whether relief has utility – whether delay by tenants in obtaining an Occupation Certificate for the premises is a factor against them obtaining relief against forfeiture – HELD – relief against forfeiture should be granted – COSTS – whether tenants should be deprived of their costs because the verdict they obtained fell significantly short of what they claimed – whether the tenants should pay their costs of the application for relief against forfeiture – HELD – the tenants succeeded and costs should follow the event – the tenants should have their costs of the relief against forfeiture application because it was one part of the wider contest and the Court should not depart from the usual rule that costs relating to particular issues not be excised or dealt with separately.

Facts:

These proceedings concerned an application by the tenants for relief against forfeiture of a lease and costs, in relation to a long-running dispute between the parties, being a landlord and its tenants. Prior to these proceedings, judgment was entered in favour of the defendants, being the tenants.

The plaintiff contended that relief ought to have been refused as it would have been more probable than not that the defendants will not obtain service approval and will not trade, and therefore, be unable to pay rent. Further, it was contended by the plaintiff that relief would have no utility in circumstances where the premises are unused and untenanted.

The defendants argued that their breach, in paying rent to the plaintiff, was caused by the plaintiff's breach, which was failing to carry out works to render the premises fit for use as a childcare centre. As such, the defendants sought to be restored to their tenancy, in paying the

rent and discharging their other obligations even though they did not obtain an occupation certificate or service approval.

Decision:

Hammerschlag CJ held that the defendants were entitled to relief against forfeiture of the lease, given that the defendant's breach in not paying rent was caused by the plaintiff's breach. As such, the plaintiff was ordered to pay the defendant's costs of the proceedings, on the basis upon the usual rule that costs follow the event.

Kennedy v Kennedy

[2022] NSWSC 1637

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 30 November 2022

LAND LAW – possession of land – claim by registered proprietor against a trespasser – summary judgment given

Facts:

These proceedings concerned the plaintiff seeking judgment for the possession of land. The plaintiff was the sole registered proprietor of the land, whilst the defendant (a former spouse of the plaintiff) had occupied the land for around 2 years, despite notices to vacate.

The plaintiff sought a declaration that the defendant had no right to enter, occupy or remain on the land, and further, an order that the defendant be permanently restrained from entering or remaining on the property. In addition, the plaintiff sought an order that the defendant give possession of the land, and finally, sought leave to issue a writ of possession. The defendant was unresponsive to any of the claims raised by the defendant, despite being served with the notice of motion.

Decision:

Judgement was entered for the plaintiff for possession of the land, leave was granted to the plaintiff in relation to issuing a writ to enforce the judgement of the Court, and finally, the defendant was ordered to pay the costs of the proceedings.

Jowett v Wade

[2022] NSWSC 1636

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 30 November 2022

LAND LAW – possession of land – claim by registered proprietor against a trespasser – summary judgment given

Facts:

The plaintiff was the executor of a will, which had given in equal shares a property to the plaintiff and another individual, being the mother of the first defendant (**other beneficiary**) The defendants in the proceedings were residing in the property for a period of time, however, it was believed that they were still residing in the premises despite multiple notices to vacate which had been issued. The plaintiff had issued these proceedings seeking possession of the land. The defendants claimed that there was harassment on the part of the plaintiff in relation to the defendants' occupation of the property.

The first defendant contended that the defendants no longer reside at the property, and that the other beneficiary was residing at the property. However, the other beneficiary did not respond to a notice to occupier which was issued upon her. The defendants did not appear to resist the making of an order for possession of the property.

Decision:

Given that the notice to occupier had been served and not responded to by the other beneficiary, Davies J found that judgment ought to be given in favour of the plaintiff. As such, possession of the land was granted to the plaintiff. Further, the defendants were ordered to pay the plaintiff's costs.

Eva Joy Ambrus v Lee Ellen Buchanan

[2022] NSWSC 1628

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 29 November 2022

REAL PROPERTY – co-ownership – application for appointment of trustees for sale pursuant to s 66G of the Conveyancing Act 1919 (NSW) – where defendants oppose appointment of trustees on grounds of hardship or unfairness and also rely on promissory estoppel, alleged breach of fiduciary duty and alleged unconscionability – where land is owned by 13 co-owners as tenants in common and plaintiff holds a 1/56th share – where co-owners adopted a practice of occupying different areas of the land and independently improved those areas without any planning approvals – mere hardship or unfairness not a basis to refuse application – no other basis for refusal of s 66G order established – orders made appointing trustees for sale

Facts:

These proceedings concerned an application for the appointment of trustees to hold the whole of a property on statutory trust for sale. The plaintiff and the twelve defendants were co-owners of the Land, whereby the plaintiff held a 1/56th share, and the defendants collectively owned 98.21% of the property.

The defendants opposed to the order and contended that the plaintiff be precluded from applying for such an order based on fiduciary duties said to have been owed to the defendants and by the doctrine of promissory estoppel. Further, or in the alternative, the defendants opposed the plaintiff's application on the basis that the plaintiff would receive an 'unconscionable benefit' if the property were sold by trustees, and the sale proceeds were distributed between the co-owners pursuant to their respective interests in the property. Finally, the defendants contended that the sale of the property by trustees would cause hardship to the defendants.

Decision:

Williams J held that there are limited grounds in which the Court will decline to make an order concerning the appointment of trustees. Such grounds include where the order would be inconsistent with a proprietary right, a contractual or fiduciary obligation, or an equitable or conventional estoppel against the application. As such, the court held that there was no general jurisdiction to refuse the application on the basis of hardship of unfairness, grounds in which the defendants relied upon. Accordingly, the defendants' opposition of the plaintiff's application failed, and an order was made to appoint the trustees for sale of the property.

Smith v Owners – Strata Plan No. 3004

[2022] NSWSC 1599

Coram: Mitchelmore J

Court: Supreme Court of New South Wales

Date: 28 November 2022

LAND LAW – strata title – owners corporation –maintenance and repair of common property – breach of obligation to maintain and repair common property – whether lost rental income was reasonably foreseeable consequence of breach – whether lot owners failed to mitigate loss by not renting out unit on lot

Facts:

The plaintiffs were the owners of a unit (**Unit**) as tenants in common, whilst the defendant was the owners corporation for the property of which the Unit is one. These proceedings arose from a dispute between the parties, in which the plaintiff claimed that the defendant had breached an obligation to maintain and repair common property.

The plaintiffs' claim in the Local Court against the defendant included a claim for loss of rent a period of around 3.5 years. Magistrate Farnan accepted that the damages for loss of rent were reasonably foreseeable, however, it was found that the plaintiffs had failed to mitigate their loss. This operated to reduce the extent of the loss to which the Magistrate considered the plaintiffs were entitled, and as such, limited such loss to a period of three months.

The plaintiffs appealed the Local Court's decision, and contended that the loss of rent was reasonably foreseeable loss suffered by them, as a result of the defendant's breach. Further, the plaintiffs contended that the Magistrate construed the words "reasonably foreseeable loss" as meaning whether or not it was actually unreasonable, for the defendant not to have foreseen the relevant loss.

The defendant contended that the plaintiffs incurred loss because of their unauthorised works to the common property, or alternatively, for their failure to repair and maintain the defect.

Decision:

The Court held that the plaintiffs' claim be dismissed, as the Magistrate approached the assessment of damages appropriately: the plaintiffs failed to mitigate their loss. Further, Mitchelmore J found that there was nothing dangerous which made the Unit unlettable, and as such, the plaintiffs' made a commercial decision to leave it empty whilst the remedial works were carried out. Accordingly, the plaintiffs were ordered to pay the defendant's costs.

Novelly v Tamqia Pty Ltd

[2022] NSWSC 1607

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 24 November 2022

LEASES AND TENANCIES — Repairs, maintenance and alterations — Obligation to repair and maintain — Where expedited proceedings concern three year and one month lease of a residential penthouse — Where substantial parts of the plaintiff's case no longer pressed at the hearing due to defendant's undertakings — Where balance of the case concerned specific performance of landlord's repair covenants in respect of internal lift maintenance, some lights, a pool heater, fridge, barbeque and panel door — Where no breaches established — Where damages would be for loss of amenity — Where damages would be an adequate remedy and specific performance would be refused

Facts:

These proceedings concerned a claim from the plaintiff in relation to his landlord, being the defendant, breaching a residential lease of premises located at The Hyde, Sydney. The issues for determination included whether the defendant had breached its obligation to:

1. Enter into contracts for lift maintenance;
2. To check all lights in ensuring that they were in working order within 45 days of the commencement of the lease;
3. To keep various items in reasonable repair; and
4. If any breaches are found, whether specific performance ought to be ordered, compelling the defendant to comply with its promises.

Decision:

Issue 1: Internal lift maintenance

The Court held that the plaintiff failed to demonstrate any ongoing breach of the lease requirement to maintain or service the lift once every 3 months. As such, it was held that any

historical breach causing loss would, at most, be loss of amenity, which could be adequately compensated with damages rather than an order for specific performance.

Issue 2: Lights

The Court did not consider that a breach of the obligation, to ensure that the lights were in working order, was established by the plaintiff. Similarly to the above, Peden J found that damages for loss of amenity would be an adequate remedy on this issue at most.

Issue 3: Reasonable repair of various items

Peden J held that there was no breach of the obligation to repair on the defendant's part, in relation to any of the various items, including a pool heater, barbeque, fridge, retractable door and lights. As such, the Court held that even if there was a breach, damages for loss of amenity were an adequate remedy.

Accordingly, the plaintiff's claims for specific performance were dismissed. In relation to costs, it was found that, whilst some of the issues between the parties were resolved by undertakings, such undertakings were only proffered just before, during and after the hearing. In addition, Peden J did not consider that the parties ought to have required the Court to determine the 'trivial matters' that were finally pressed. In such circumstances, each party was ordered to pay their own costs.

ACN 063 346 707 Pty Ltd (formerly known as South Passage Pty Ltd) v Douglas James Marshall

[2022] NSWSC 1597

Coram: Kunc J

Court: Supreme Court of New South Wales

Date: 21 November 2022

EQUITY — Equitable fraud — Sham transactions

LAND LAW — Torrens title — The register — Correction of the register — Real Property Act 1900 (NSW), s 138

Facts:

These proceedings concerned the plaintiff, being the registered proprietor of a farming property, alleging that three dealings (a lease, a mortgage and a variation of a mortgage) purportedly granted to the first defendant over the property, whilst the plaintiff was operated by another individual, were shams and therefore void or of no effect. The plaintiff sought consequential orders that the second defendant cancel the recording on the folio for the property of those purported dealings, as well as a caveat lodged by the first defendant.

The plaintiff contended that the lease, mortgage and variation of mortgage are shams in the sense set out by Leeming JA in *Lewis v Condon; Condon v Lewis* [2013] NSWCA 204, including an intention to deceive. The defendant failed to defend the proceedings in any way.

Decision:

The Court was satisfied that the lease, mortgage and variation of mortgage was a sham, in that, they were never intended to have been of any legal effect. It was found that such dealings were brought into existence with a deceptive intention, by giving an appearance that the first defendant had a registerable interest in the property. It followed that the dealings were void

and of no legal effect, and further, that the first defendant had no caveatable interest in the property. Finally, an order for indemnity costs was made in favour of the plaintiff.

Proietti v Proietti

[2022] NSWCA 234

Coram: Mitchelmore JA, Basten AJA, Griffiths AJA

Court: New South Wales Court of Appeal

Date: 17 November 2022

APPEALS – procedural fairness – property – proceedings commenced by summons for the appointment of trustees under s 66G of the Conveyancing Act 1919 (NSW) – where self-represented defendant consented to directions in Online Court, and made no applications prior to hearing – where large parts of defendant's affidavit struck out – whether lack of pleadings or mediation constituted denial of procedural fairness – whether "further hearing" should have been granted – call for "substantive guidance" from Court – no denial of procedural fairness

EVIDENCE – affidavit evidence – proceedings for the appointment of trustees under s 66G of the Conveyancing Act 1919 (NSW) – where large parts of defendant's affidavit struck out, including based on speculation as to deceased's state of mind about change to will – whether statement made by deceased's former solicitor, that he did not change will, relied upon to prove that fact – no applicable exception to hearsay rule – evidence properly rejected or treated as submissions

APPEALS – bias rule – actual or apprehended – proceedings for the appointment of trustees under s 66G of the Conveyancing Act 1919 (NSW) – where primary judge described case as "unremarkable" but for defences raised – where defendant alleged actual and apprehended bias based, principally, on findings against him "on nearly every single issue" – Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 42; [2011] HCA 48 – no actual or apprehended bias demonstrated

LAND LAW – co-ownership – statutory trust for partition – appointment of trustees – where defendant resisted orders for the sale of real property under s 66G of the Conveyancing Act 1919 (NSW) based on promissory estoppel and contract – where primary judge made finding of fact, based on credibility, that there was no agreement between parties not to sell before 2023 – where defendant relied on absence of evidence in text messages with plaintiff concerning pre-2023 sale – no sound foundation for challenge to finding on appeal

LAND LAW – co-ownership – statutory trust for partition – appointment of trustees – where defendant resisted orders for the sale of real property under s 66G of the Conveyancing Act 1919 (NSW) based on proprietary estoppel – where defendant alleged plaintiff owed duty to disclose change to will, removing clause allowing plaintiff continued residency for four years after deceased's death – where defendant already knew about change, but had subsequent "realisation" that change occurred due to improper pressure applied by plaintiff – "realisation" amounted to no more than speculation

APPEALS – from finding of fact – admission of further evidence – where foreshadowed evidence would not assist appellant given assumption made by primary judge that the fact the subject of the further evidence was proved

Facts:

These proceedings concerned an appeal brought by the appellant against orders that appointed trustees to sell a property in Marsfield (**Property**). The respondent is the appellant's brother. By way of their mothers last will made (**Will**), the entire estate was devised and bequeathed upon trust to be divided equally between the parties, including the Property. An unsigned copy of a previous will contained a stipulation absent from the Will, which allowed the appellant to live at the Property for four years after her death.

The appellant was residing in the Property once the probate of the Will was granted, and thereafter, the parties become co-owners of the Property, and further, the appellant paid rent to the respondent.

First Instance:

Around 2 years after this time, the respondent sought orders that trustees be appointed to sell the Property. The appellant resisted such orders upon the basis of proprietary estoppel, promissory estoppel, and contract. The primary judge struck out large portions of the appellant's affidavit evidence, due to it containing speculation as to the parties' mother's state of mind with respect to altering her will. Judgment was made in favour of the plaintiff, and it was held that the trustees for sale of the Property be appointed

The Appeal:

The appellant appealed against the primary judge's making of orders on four grounds, being, denials of procedural fairness, bias on the part of the primary judge, and errors of law with respect to his Honour's dismissal of the arguments that the appellant raised in response to the respondent's application. The appellant also sought to adduce further evidence to substantiate those defences. Further, the appellant sought that the proceedings against him be dismissed, and the costs order set aside.

Decision:

The Court dismissed the appeal and held that the appellant was not denied procedural fairness in any of the respects that he argued. The Court found that there was no substance in any of the grounds of appeal to the decision of the primary judge, or the fairness of the process by which his Honour came to make the primary decision. It was held that the appellant's evidence was properly rejected or treated as submissions by the primary judge, including the speculation evidence in relation to his mother's motivation to change her previously communicated position by way of her Will. The Court also held that there was no actual or apprehended bias. Finally, it was ordered that the appellant pay the respondent's costs.

Markovsky v Teplitsky

[2022] NSWCA 228

Coram: Macfarlan JA

Court: New South Wales Court of Appeal

Date: 9 November 2022

REAL PROPERTY — application to extend operation of caveats — s 74K Real Property Act 1900 (NSW) — no reasonable basis for existence of interest claimed in caveats — no alternative arguable interest suggested

Facts:

These proceedings concerned an application for an appeal brought by the appellant, as executory of the estate of her late husband, for an order extending the operation of four caveats relating to properties in which her late husband and the defendant claimed interests. The appeal proceedings relate to a deed in which the appellant's late husband and the defendant were parties.

First Instance:

In the proceedings in the Equity Division brought by the appellant, she sought a declaration that the deed was valid and binding. As such, the appellant sought orders that certain shareholdings and properties referred to in the deed be transferred to her as executor. The primary judge held that the deed was valid and binding, but otherwise dismissed her claim on the basis that the deed did not require the transfer of shares and properties that the appellant sought. Accordingly, the primary judge held that the deed contemplated a continuing relationship between the parties, and not a severance of the parties' interests by the transfer of such shares and properties to one or the other.

Decision:

The Court held that the primary judge's conclusion was correct. In considering the four caveats in question, it was held that the terms of the deed did not indicate any intent to create a charge in favour of the appellant's interests. Accordingly, the Court found that there was no proper basis to extend the operation of the caveats, and as such, the appellant's notice of motion was dismissed with costs.

Yin v Li; Li v Jiang

[2022] NSWSC 1512

Coram: Williams J

Court: Supreme Court of New South Wales

Date: 7 November 2022

REAL PROPERTY – dispute arising out of oral agreement for sale and purchase of property – dispute about terms of oral agreement, including price – where vendor disputes the price stated in the transfer that was registered and claims that the purchaser forged his signature on the transfer or, alternatively, procured his signature by unconscionable conduct – where expert evidence of forensic document examiner is inconclusive

CONTRACTS – alleged oral loan agreements – no question of principle

Facts:

These proceedings concerned a vendor, Mr Li, and a purchaser, Ms Jiang, entering into an oral agreement for the sale and purchase of an apartment (**Property**). The vendor then disputed the purchase price that was registered in the transfer of the Property to the purchaser, alleging that the purchase price was not the true price agreed upon by the parties and that his signature was forged.

Ms Yin was the plaintiff in proceeding commenced in 2018 (**2018 proceeding**) and the second defendant in proceeding commenced in 2020 (**2020 proceeding**). Mr Li was the defendant in the 2018 proceeding and the plaintiff and cross-defendant in the 2020 proceeding. Ms Jiang was the first defendant and the cross-claimant in the 2020 proceeding. The 2018 and 202 proceedings arose out of the oral agreement made for the sale of the Property.

In the 2018 proceeding, Ms Yin sought to recover a loan of $95,000 that she claims to have made to Mr Li, for the purpose of putting Mr Li in sufficient funds to facilitate the settlement of the sale of the Property to Ms Jiang, in circumstances where the amount required to discharge Mr Li's mortgage exceeded the amount that Ms Jiang contended she was required to pay on settlement. Mr Li denied that the payment of $95,000 was a loan.

There was also a dispute regarding the purchase price agreed upon between the vendor and the purchaser of the Property, In the 2020 proceeding, Mr Li contended that a price of $1.5 million was agreed upon, and claimed that $685,000 of that price remained outstanding. The principal relief sought by Mr Li was a declaration that he has an equitable charge over the Property to secure payment of such outstanding amount. Ms Jiang, as purchaser, contended that the purchase price was $1.07 million, and as such, claimed that she had paid the whole sum. Ms Jiang's cross-claim sought to recover a loan of $159,700 that she claims to have made to Mr. Li.

Decision:

Williams J held that Ms Yin succeeded on her claim in the 2018 proceeding, Mr Li failed on his claims in the 2020 proceeding, and Ms Jiang succeeded on her cross-claim in the 2020 proceeding.

The Court found that Mr Li agreed to sell and Ms Jiang agreed to purchase the Property for a fair market value price during their conversation. The market value was subsequently determined to be $1.07 million, and thereafter, Mr Li confirmed his acceptance of the valuation amount as the price of the Property and signed the transfer on that price. As such, Mr Li's evidence that he agreed to a price of $1.5 million for the transfer of the Property to Ms Jiang was rejected. Further, Williams J held that that it was inherently plausible that Mr Li did sign the transfer stating the market value price of the property. As such, Mr Li's contention that the signature on the transfer was not his signature was rejected.

Given it was found that Ms Jiang had paid the whole of the purchase price of the Property, Mr Li's claim in the 2020 proceeding, relating to a declaration that he had an equitable charge over the Property to give effect to a vendor's lien securing payment of unpaid purchase money, failed.

Bolinger v Bell (No 2); The Estate of Colin Bell

[2022] NSWSC 1495

Coram: Hallen J

Court: Supreme Court of New South Wales

Date: 3 November 2022

CIVIL PROCEDURE – Cross-vesting – Protracted family law proceedings transferred from Family Court of Australia to Supreme Court where there are Probate proceedings and family provision proceedings – Way in which to deal with the different proceedings in the Supreme Court – Separate proceedings, each seeking different relief and involving the same estate – Order that proceedings be heard consecutively

FAMILY LAW – PROPERTY – Application for interim property orders by notice of motion filed by Applicant, the wife of the deceased – Respondent, who is the interim administrator of deceased's estate opposes application – Family law matter cross-vested to Supreme Court – Associated Probate and family provision order also sought – Limits on evidence as untested – Estate has the capacity to meet interim property order – Whether it is in the interests of justice to make an interim property order – Whether any interim property order by way of partial property settlement – Security for repayment agreed to be provided by applicant

Facts:

This judgment concerned different proceedings involving the estate of Mr Bell (**deceased**), who died testate, leaving property in New South Wales. The wife of the deceased (**plaintiff**) was appointed by the deceased as his attorney under an Enduring Power of Attorney, and filed an application for an interim property order. However, the child of the deceased who was also appointed by the deceased as his attorney (**defendant**), opposed such an application. As such, the issue in these proceedings was whether it was in the interests of justice to make an interim property order.

These proceedings involved various actions between the parties, and were said to be hard-fought and somewhat complex in circumstances where their disputes had been ongoing for 3 almost 3 years. This concerned family law proceedings, probate proceedings and family provision proceedings. As such, this judgment dealt with the way in which to deal with the various and separate proceedings, where each party was seeking different relief in relation to the same estate.

The plaintiff submitted that it was appropriate to exercise jurisdiction to make an interim order in this case, including the plaintiff's need for support, the care she provided the deceased during his lifetime, and the ability of the deceased's estate to provide some financial support pending the final hearing. In respect of the hearing, the plaintiff submitted that the interests of justice required the need for the evidence which overlap in the proceedings to be determined once, rather than repetitively in different courts. The basis for such a submission was that there was considerable overlap of significant contests of fact regarding various matters, and that an application for interim property orders may be necessary for convenience.

The defendant submitted that the plaintiff's application be dismissed primarily on the basis that the plaintiff had failed to identify upon which of the legal bases her application ought to have proceeded. Further, the defendant submitted that the plaintiff had failed to discharge her onus to establish the threshold requirements for an interim order on the balance of probabilities.

Decision:

Hallen J was satisfied that it was appropriate to exercise the power to make an interim property order, as it was in the interests of justice to do so in favour of the plaintiff. It was accepted that the plaintiff would be unable to meet her expenses in circumstances where her earning capacity was somewhat limited, and accordingly, an interim property order was justified. As such, it was ordered that the plaintiff would receive an amount of $750,000, by way of an interim property order. It was also ordered that the sum be subject of security so that, if necessary, it could be recovered.

Harriette & Co Pty Ltd v Platine Property Development Pty Ltd

[2022] NSWSC 1536

Coram: Chen J

Court: Supreme Court of New South Wales

Date: 1 November 2022

CIVIL PROCEEDINGS – Interlocutory applications – Real property

LAND LAW — Mortgages — Statutory power of sale under Real Property Act 1900 (NSW)

Facts:

These proceedings concerned the defendants seeking an order that the plaintiff be restrained for 17 days from requesting to have the Court make orders in a consent judgment that was signed by the parties, by way of an interlocutory injunction.

The plaintiff had commenced proceedings seeking to recover money alleged to have been outstanding pursuant to a loan agreement between the plaintiff and the first defendant, and guaranteed by the second and third defendants. Following the commencement of proceedings, an in principle settlement was reached by the parties, which the plaintiff and the second and third defendants executed as a deed of settlement. A term of the deed included that a failure to comply with the requirements of the deed constituted an act of default, conferring an entitlement upon the plaintiff to file a consent judgment without any further notice to the defendants.

The agreed position of the parties, that payment was required on a particular day, was not carried out by the defendants. The plaintiff considered such a failure to be an act of default, and took steps to enforce rights conferred upon it under the settlement deed. The defendants did not contest that the plaintiff was entitled to file a consent judgment. Rather, the defendants argued that they are entitled to final relief, contending that the term of the settlement deed and the consent judgment were void and unenforceable by reason of the doctrine against

penalties. Further, the defendants contended that they were entitled to relief against forfeiture, and finally, that the plaintiff is not entitled to exercise the power of sale under ss 57 and 58 of the *Real Property Act 1900 (NSW).*

Decision:

Chen J held that the balance of convenience favoured the relief sought by the defendants, and as such, the 17-day injunction sought by the defendants was granted. It was found that the shortness of the period of the order negated any possible hardship that the plaintiff may have suffered.

Goldfish Bar and Restaurant Pty Ltd v Roche Group Pty Ltd

[2022] NSWSC 1481

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 31 October 2022

LEASES AND TENANCIES – commercial lease – construction – right of tenant to quiet enjoyment over leased part of property – reservations – right of landlord to use or grant rights of occupation to the property for "any purpose" – property used for music concerts and events – right of landlord to hold "concerts or other events" – access to the premises restricted – meaning of "year" – calendar year – reasonable notice for cancelling events – reasonable notice for notifying events

Facts:

These proceedings concerned a dispute regarding the interpretation of a commercial lease entered into by a tenant (**plaintiff**) and landlord (**defendant**), with the premises being the Roche Estate, located in the Hunter Valley (**Property**). The lease contained a standard clause granting the plaintiff with rights of quiet enjoyment and possession of the premises without interruption or disturbance from the defendant. However, this was subject to certain reservations, which entitled the defendant to use the common areas and restrict access to the leased areas. Particularly, the defendant was entitled under the lease to hold concerts or other events on the Property for up to four days each year, during which access to the Property by the general public may be restricted.

The defendant sought to conduct around nine concerts on the Property over the 12 months, as a result of the cancellation of previous events during the COVID-19 pandemic. Thereafter, the plaintiff brought a claim seeking orders that the defendant be prevented from conducting more than four events in the year, in accordance with the terms of the lease. The issues for the Court's determination included what constituted a reasonable period of cancellation, and further, whether the defendant had already exhausted its four-day event limit under the lease.

The Court noted that, if the event was not cancelled within a reasonable period of time, then the cancelled event would still have counted towards the limit under the lease.

Decision:

Parker J held that the defendant's cancelling of multiple events 4 to 5 days beforehand could not be constituted a reasonable period of cancellation, and due two events being cancelled without reasonable notice to the plaintiff, the defendant had already exhausted its 4-day event limit. As such, pursuant to the lease, the Court restrained the defendant from holding any further events in that year or any subsequent calendar year, as long as the lease remained on foot.

Rowe v Kincumber Nautical Village Pty Ltd

[2022] NSWSC 1378

Coram: Garling J

Court: Supreme Court of New South Wales

Date: 27 October 2022

LEASES AND TENANCIES — Legislation protecting tenants — Residential (Land Lease) Communities Act 2013 (NSW) — Site agreements — Whether site agreement provided that site fees payable under it be increased in accordance with the Act — Whether site fee increase clause constituted a "fixed method" — Whether site fee increase clause constituted a "fixed calculation"

Facts:

These proceedings concerned an appeal against a decision of the Appeal Panel of the NSW Civil and Administrative Tribunal (**NCAT**). The subject of such proceedings related to various site agreements between the parties, and the provisions for an annual adjustment of costs and expenses.

First Instance:

In the NCAT proceedings, various members of a group whose members comprised lessees or former lessees of sites in a residential community caravan park commenced proceedings in NCAT. Each of the group members brought individual and separate proceedings in NCAT. The claim concerned the defendant's increase of the site fees, which was said to be contrary to *Residential (Land Lease) Communities Act* 2013 (**RLLC Act**). Subsequently, the NCAT Appeal Panel heard the defendant's appeal. The principal issue on the appeal was whether the fee increase complied with ss 65 and 66 of the RLLC Act.

The Appeal Panel took the view that, properly construed, the fee increase was a fixed method for increasing site fees, which could not be challenged due to the operation of s 66(7) of the RLLC Act. As such, each of the proceedings were dismissed by the Appeal Panel. However,

only Mr Rowe (**plaintiff**) lodged an appeal to the Court, whilst the other group members did not exercise their right of appeal.

The Appeal:

The plaintiff contended that the NCAT Appeal Panel erred in law in its construction of the RLLC Act. As such, the issue for determination was whether the site fee increase term can be a "fixed calculation" within the meaning of s 65 of the RLLC Act.

The plaintiff submitted that, properly construed, the RLLC Act only permits "fixed calculations" that have effect of increasing site fees by reference to a proportion of the variation of external factors, which are objectively determined. Further, the plaintiff submitted that the fee increase is not a fixed calculation because any increase in costs is not definitely ascertainable. The defendant submitted that the Appeal Panel made no error of law in coming to its decision, as it properly followed orthodox principles of statutory construction in applying the terms of the statute to the circumstances of this case.

Decision:

Garling J rejected the plaintiff's arguments and held that the fee increase clause was a fixed calculation under the RLLC Act, and as such, agreed with the conclusions reached by the NCAT Appeal Panel. Accordingly, the plaintiff's appeal as dismissed, and the plaintiff was ordered to pay the defendant's costs. Further, the parties were ordered to provide short minutes of order in relation to whether the dismissal of the plaintiff's claim was binding on the group members, other than the plaintiff.

Aravanis and Roy in their capacity as the Trustees of the property of Lynettte Blackburn, a Bankrupt v Cunningham

[2022] NSWSC 1429

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 20 October 2022

LAND LAW – possession of land – where one registered proprietor made bankrupt – where no defence to claim

Facts:

These proceedings concerned an application by the plaintiffs for the possession of land to enable the administration of a bankrupt estate. The plaintiffs were the trustees in bankruptcy, whilst the first and second defendants were the registered proprietors of a property in Randwick (**Property**).

The second defendant was an individual who was the subject of a financial management order made in favour of NSW Trustee and Guardian, who applied to be appointed as the second defendant's tutor in these proceedings. As such, NSW Trustee and Guardian were granted orders that the second defendant is not required to carry on the proceedings, provided that they had conduct of the matter.

The other individual occupying the Property was the first defendant. These proceedings were served on the first defendant, however, no appearance nor defence was filed by the first defendant. The second defendant did not oppose the order for possession.

Decision:

In those circumstances, the Court entered judgment for the plaintiff for the possession of the Property, and granted leave to the plaintiff to issue a writ of possession to enforce the

judgment of the Court. The first defendant was ordered to pay the plaintiff's costs of the proceedings.

Community & Corporate Lifesavers Pty Ltd v Rodney William Norris

[2022] NSWSC 1428

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 20 October 2022

LAND LAW – possession of land – default under mortgage – where default admitted – where defence discloses no defence to the claim for possession

Facts:

These proceedings concerned an application by the plaintiff for the possession of land in Guilford (**Property**). The plaintiff entered into a loan agreement with a third-party company for a loan of $340,300. Under the loan agreement, the guarantor of the company's obligations was the defendant, who was the sole director of the company.

Subsequently, a mortgage was entered into to secure the loan, whereby the defendant was the mortgagor. The loan was not repaid by the required date or at all. Thereafter, proceedings were commenced by the plaintiff, and the defendant filed a defence which set out a number of personal difficulties that he had, causing his inability to repay the loan when it was due.

The plaintiff then sought that the defence be struck out, in the alternative that summary judgment be given for the plaintiff. The defendant had accepted that the loan and mortgage was entered into, that the advances were made, and that the money had not been repaid.

Decision:

In circumstances where the defendant did not provide any documentary evidence supporting his contentions, and did not point to any other defence to the claim for possession, the Court held that the plaintiff was entitled to summary judgment for possession of the Property.

Liu v Al Maha Pty Ltd

[2022] NSWSC 1427

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 20 October 2022

LAND LAW – possession of land – pursuant to a mortgage – where no dispute that specified secured sum is owing – where dispute concerns plaintiff's right to include other amounts in the secured moneys – judgment for possession given – disputed amounts to be the subject of evidence

Facts:

These proceedings concerned an application by the plaintiff for the possession of land in Homebush (**Property**) and judgment in the sum of $257,308.32, being the amount of a debt under a mortgage provided by the defendant to the plaintiff. The mortgage secured the amount concerned following earlier proceedings, whereby the plaintiff successfully claimed outstanding commissions from the defendant. The mortgage arose as a result of an unsuccessful appeal by the defendant against such judgment. The plaintiff sought security for costs, and the defendant agreed to the mortgage securing the $257,308.32 sum.

The defendant filed a defence, however, no defence was provided to the plaintiff's claim for possession, and did not dispute that the sum is owing to the plaintiff. As such, there were further amounts of money that were disputed by the defendant, being pre-judgment interest, post-judgment interest on the judgment debt from the earlier proceedings, and costs.

Decision:

Davies J entered judgment for the plaintiff with respect of possession of the Property, however, held that it was not appropriate that judgment be given for the $257,308.32 sum, as the plaintiff had claimed further amounts. It was held that a judgment of such an amount would foreclose

the plaintiff from pursuing other amounts. Accordingly, Davies J ordered the parties to file evidence in relation to the additional amounts sought by the plaintiff.

Norris v Friend

[2022] NSWSC 1416

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 20 October 2022

REAL PROPERTY – transfer of land pursuant to intergenerational transfer – whether transfer was conditional on defendant transferee permitting plaintiff transferor to live on the land and farm it for the rest of the plaintiff's life – whether an estoppel arises from conversations between plaintiff and defendant before transfer – whether transfer effected for the purposes of a joint farming endeavour – factual bases of plaintiff's claims held not to be established

Facts:

These proceedings concerned three parcels of rural land located in Trewilga (**Land**) that were previously owned by the plaintiff, but had later been transferred to the defendant, being the plaintiff's nephew.

The plaintiff claimed that the defendant undertook to take the transfer of the Land, subject to an arrangement whereby the defendant agreed that he would allow the plaintiff to remain in possession of the Land for the entirety of this life. As such, the plaintiff claimed that he had an entitlement to equitable relief against the defendant on three bases, as follows:

1. The transfer was a conditional gift;
2. By reason of a representation made by the defendant that the plaintiff could live on the Land, and the plaintiff's reliance upon such representations, the defendant was estopped from denying the existence of a life interest in favour of the plaintiff; and
3. A trust arises in favour of the plaintiff.

The plaintiff's claims were denied by the defendant, particularly, that he agreed to allow the plaintiff to reside on the property for his lifetime. As such, the central issue was whether the transfer of the Land was subject to the arrangement alleged by the plaintiff.

Decision:

Darke J concluded that the transfer of the Land was not subject of the arrangement as alleged by the plaintiff, that is, that the plaintiff was able to stay on the land for his lifetime. This was because the existence of such an arrangement was not corroborated by any documentary evidence, as well as the credibility of the plaintiff as a witness. As such, the plaintiff's claim to equitable relief was rejected, and the plaintiff was ordered to pay the defendant's costs of the proceedings.

AMP Capital Investors Limited v Willis Australia Limited

[2022] NSWSC 1415

Coram: White J

Court: Supreme Court of New South Wales

Date: 19 October 2022

LEASES AND TENANCIES – renewals and options – characterisation of option – whether conditional contract or irrevocable offer – whether condition waived

LEASES AND TENANCIES – rent and outgoings – construction and interpretation – whether context required that the definition of base rent would not apply

Facts:

These proceedings concerned a lease agreement between the plaintiff, being the landlord, and the defendant as tenant, for Level 15 and Level 16 of a premises in Pitt Street, Sydney. However, Level 15 included one suite only, and the balance of Level 15 was leased to a third-party company (**Third-Party Company**). The lease was for a term of six years, and included an option of renewal for a period of four years as well as a further option for the defendant to take a lease of the balance of Level 15 for four years.

Pursuant to the plaintiff's lease with the Third-Party Company, the plaintiff gave notice to the Third-Party Company that the defendant had exercised its option to acquire the additional space on Level 15. The Third-Party Company vacated that area. Thereafter, the defendant gave notice to the plaintiff that it withdrew its notice regarding the expanded premises, however, did not withdraw its notice regarding a new lease of the existing premises. The plaintiff did not accept that the defendant was entitled to withdraw its notice, and as such, asserted that the defendant was required to take up the option to acquire the additional space for a four-year term. The defendant denied that it was bound to do so.

The plaintiff sought declarations to the effect that the defendant exercised an option to take a lease of the expanded premises on Level 15, or in the alternative, sought a declaration that

the defendant was estopped from denying that the lease agreement came into existence. In this sense, the plaintiff sought an order for specific performance. Accordingly, the central issue in these proceedings was whether, by service of the notice, the defendant exercised its option to take a lease of the expanded premises on Level 15.

The defendant contended that it did not accept the offer, as it did not deliver a bank guarantee to the plaintiff, and therefore, did not satisfy the requirements of the lease agreement. The plaintiff submitted that, although it was not required to grant a new lease of the expanded premises if the tenant was in breach, this did not mean the defendant had not exercised its option to expand at the end of the lease term, which was exercised by the giving of notice. The plaintiff also pleaded that, if its construction of the lease were not accepted, the defendant was nonetheless obliged to enter into the lease on the grounds of equitable or conventional estoppel. In this case, a dispute arose as to what rent is payable.

Decision:

White J concluded that the defendant had exercise the option under the lease agreement, and as such, was bound to take the new lease, as it was found that the plaintiff was entitled to waive particular conditions of the lease. In light of such a conclusion, the plaintiff's estoppel case did not arise. Accordingly, the plaintiff was entitled to its costs of the proceedings.

Lee v YOUth OK Pty Ltd

[2022] NSWSC 1356

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 17 October 2022

LEASES AND TENANCIES – termination – grounds for – two parcels of land demised by the plaintiff to the first defendant – obligations of the first defendant under the lease guaranteed by the second defendant – plaintiff sues for possession of the property, for arrears of rental to the date of termination, and for damages either under the terms of the lease or at common law – first defendant gives possession of the property to the plaintiff during the proceedings – first defendant claims that rent is not payable under the lease because the property did not comply with certain notices to demolish structures on the property that had been issued by the local council under the Environmental Planning and Assessment Act 1979 (EPA Act) – whether the terms of the lease allow for non-payment of rent by the tenant upon breach of the lease – whether non-payment of rent was the breach of an essential term of the lease – calculation of damages under the lease for the period after the tenants vacated the property – whether the Retail Leases Act 1994 applies to the lease – to the lease come within the operation of the Retail and Other Commercial Leases (COVID-19) Regulation 2020.

MISLEADING AND DECEPTIVE CONDUCT – misrepresentation – negligent – pre-contractual misrepresentation – defendants/cross-claimants allege that either by the plaintiff/cross-defendant making positive statements as to local council approvals, or by the non-disclosure of a non-approved structure on the property, that the plaintiff/cross-defendant engaged in misleading and deceptive conduct, inducing the first defendant/cross-claimant to lease the property – whether the cross-defendant engaged in misleading or deceptive conduct – whether the cross-claimants were induced by the cross-defendant's misleading or deceptive conduct to lease the property – if misleading and deceptive conduct were established, whether the cross-claimants have suffered loss or damage.

CONTRACTS – termination – frustration – self-induced frustration – whether the latent non-compliance of leasehold property with notices issued under the EPA Act constitutes frustration of the contract represented by the lease – whether the doctrine of frustration applies to leases – whether the cross-defendant ought to have known the property was non-compliant – whether intervention by the local council causing building works to cease but not otherwise prevent the use of the property, amounts to frustration of the contract represented by the lease.

RESTITUTION — expenditure by tenant on the fit out of the premises – tenant claims landlord unjustly enriched at the expense of the tenant by the tenant's expenditure on the fit out – whether a claim in restitution available to the tenant or whether it is covered by the contract represented by the lease – whether a clause in the lease allowing the landlord to take ownership of anything not removed from the premises by the tenant, displaces any right of the tenant to restitution for expenditure on fit out of the premises.

Facts:

The plaintiff was the registered proprietor of land in Newport (**Property**) which was demised to the first defendant, by way of an unregistered lease, for a term of 3 years. The second defendant, being the principal of the first defendant, guaranteed the obligations of the first defendant under the lease.

The plaintiff claimed she had terminated the lease by notice on the grounds of non-payment of rent and non-payment of a security deposit required by the lease. The plaintiff also claimed a notional re-entry into the premises for the purposes of calculating mesne profits. As such, she brought these proceedings against the defendants for a declaration that the lease had been validly terminated, recovery of rental arrears said to have been due up to the alleged date of termination, for damages under the lease and for loss of the balance of the lease term. The first defendant remained in physical possession of the Property until the proceedings commenced, so possession of the Property was not in issue.

The defendants resisted the plaintiff's claim on the basis that the first defendant's obligation to pay rent when the Northern Beaches Council (**Council**) issued stop work orders preventing the refurbishment of the premises, to enable them to be used as a community youth centre. The defendants maintained, by way of their cross-claim, that they had been induced to enter the lease due to the plaintiff's misleading and deceptive conduct. They contended that the plaintiff actively mispresented to the defendants that no improvements had been made to the Property which had not been authorised by the Council. Alternatively, the defendants contended that the plaintiff had engaged in misleading and deceptive conduct by silence, through failing to disclose that there were unapproved works on the Property. The first defendant also pleaded that the lease was frustrated, and that it was entitled to restitution, and also made a claim for unconscionable conduct.

Decision:

Slattery J held that the plaintiff was wholly successful and was entitled to recover her costs of the proceedings. As such, the claims pleaded by the defendants failed, whereby the Court concluded that the plaintiff did not engage is misleading and deceptive conduct in relation to the Council requirements. Further, the defendants' unconscionable conduct case was also not made out, as it was found the claim had no basis. Accordingly, a declaration was made that the first defendant breached an essential term of the lease by failing to pay rent, and as such, the plaintiff validly terminated the lease.

Kaye v The Owners – Strata Plan No 4350

[2022] NSWSC 1386

Coram: Basten AJ

Court: Supreme Court of New South Wales

Date: 14 October 2022

LAND LAW – strata title – common property – two by-laws to obtain rights to exclusive use and enjoyment of common property – first proposal offered repairs and maintenance – second proposal offered monetary compensation – other lot owners concerned about noise, loss of privacy, lack of compensation, floodgates for applications – whether refusal of first proposal unreasonable under Strata Schemes Management Act 2015 (NSW), s 149(1) – Tribunal not required to weigh interests in determining whether refusal unreasonable – other lot owners entitled to have regard to own interests and rely on experience and beliefs

LAND LAW – strata title – Strata Schemes Management Act 2015 (NSW), s 149(2) – s 149(2) considerations addressed to whether to order making of by-law – proponents' rights and expectations not to be weighed against other lot owners' interests

COSTS – party/party – appeal from NCAT Appeal Panel – finding of special circumstances – no mandatory considerations – unsuccessful appeal and fact of legal representation permissible considerations – finding of complexity – Tribunal's power to award costs absent special circumstances – Civil and Administrative Tribunal Act 2013 (NSW), ss 35, 60 – Civil and Administrative Tribunal Rules 2014 (NSW), rr 38 and 38A

Facts:

These proceedings concerned an appeal brought from a decision of an Appeal Panel of the NSW Civil and Administrative Tribunal (**NCAT**). The plaintiffs were the registered owners of a lot of a strata property (**Property**), which was connected to a private roof terrace and situated over another lot in the Property, and common property.

The plaintiffs proposed a by-law at several owners corporation meetings which granted them rights of exclusive use and enjoyment of the roof common property, in exchange for repairing and maintaining the waterproof membrane in the roof. Alternatively, the plaintiffs proposed that the repairs and maintenance would be undertaken by the owners corporation, however the plaintiffs would pay a sum in consideration for the rights. Such proposals were not passed

at any meeting. Other lot owners raised various concerns, including noise, loss of privacy, lack of compensation and floodgates for applications to enclose common property.

NCAT Proceedings:

The plaintiffs commenced proceedings in NCAT and submitted that the refusals to pass the by-laws were unreasonable. NCAT disagreed, and held that the refusals by the owners corporation were not unreasonable. On appeal, the NCAT Appeal Panel held that errors were made on first instance, including a failure to address the refusal of the first proposal, however, was not satisfied that the refusals were unreasonable.

Decision:

On appeal to the Supreme Court, Basten AJ held that the Appeal Panel made no error in law in holding that the refusals were not unreasonable. In determining whether the owners corporation's refusal of the plaintiffs' proposals were unreasonable, it was found that the Appeal Panel was not required to disregard concerns which were not established objectively. Accordingly, it was held that the other lot owners were entitled to have regard to their own interests as to how the plaintiffs' proposed by-laws would affect them. As such, the appeal was dismissed.

Fisher v Degnan

[2022] NSWCA 202

Coram: Macfarlan JA, Kirk JA, Basten AJA

Court: New South Wales Court of Appeal

Date: 11 October 2022

CONTRACTS — Contracts requiring written evidence — Statute of frauds — Contract said to record agreement for sale of land — Family arrangement — Construction — Whether contract was an agreement for sale of land — Whether a clause headed "Recitals" was an operative provision — Whether contract a note or memorandum of agreement

APPEALS — Point not taken below — Whether point taken below — Whether claim, though pleaded, proceeded on a different basis at trial

Facts:

These proceedings concerned an appeal brought from a decision of Lindsay J, awarding the respondent equitable compensation for their receipt of the net proceeds of a sale of land held by the appellants on trust for the respondent. The first appellant was the daughter of the respondent.

The appellants became the registered proprietors of land in Sawtell (**Land**). The parties had contemplated that the respondent would live in the existing lot on the Land, and the appellants would subsequently build and live in a second lot behind the first. Thereafter, the respondent's late husband transferred $250,000 into an account held by the appellants, and a loan agreement was executed between the parties (**Deed**). The Deed had stated that the loan was for the purpose of assisting the purchase of one of the two properties located on the Land.

First Instance:

The lot in which the respondent had been residing was then sold to a third-party for $485,000, and thereafter, the respondent commenced proceedings. The primary judge found in favour of the respondent, as the Deed was construed as an agreement for purchase by the

respondent of the lot from the appellants. As such, it was held that the sum constituted payment for one lot in a proposed subdivision of the property and that the respondent was entitled to equitable compensation for her share of the property which had been sold by the appellants. As the sum of $250,000 having been repaid, judgment was entered in favour of the respondent in the sum of $264,748.07, being the balance of the proceeds of sale of the subdivided Land.

The Appeal:

The appellants then appealed the primary judge's decision, and the issue on appeal was whether the Deed could support the agreement for the purchase of the land relied upon by the primary judge.

Decision:

Macfarlan JA and Basten AJA found that it could, whilst Kirk JA found that it could not. Macfarlan JA stated that the deed supplemented an existing agreement between the parties, and express the view that the Deed imposed an obligation on the appellants to use the $250,000 towards the purchase of the lot on the Land. As such, His Honour reasoned that that the parties' execution of the Deed resulted in the appellants promising they would utilise the money for the purchase, which constituted an agreement of the appellants, for consideration, to sell the front lot on the Land to the respondent.

Basten AJA was of the view that the terms upon which the $250,000 was paid were the subject of a pre-existing agreement, the terms of which may be derived from a particular clause in the Deed. His Honour explained that the agreement was an intrafamily transaction for subdivision of the Land and transfer of the front lot, and further, that dealing with the Deed as a note or memorandum would be inconsistent with the way in which it was dealt with at trial.

In dissent, Kirk JA reasoned that, due to the way in which the matter was run on trial and on appeal, the Court was confined to considering whether the Deed included a contract for the sale of the Land. As such, Kirk JA was of the view that the language contained in the Deed was more directed to what the appellants can put the loaned sum towards, and is not the language of sale.

The appeal was therefore dismissed.

Urban Fortune Global Ltd v Deicorp Projects (Partridge Ave) Pty Ltd

[2022] NSWSC 1352

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 10 October 2022

CONTRACT – commercial contracts – agreements to negotiate – informal written agreement for purchase of ten properties, specifying price and settlement period – purchase subject to due diligence – special purpose vehicle to be nominated by purchaser – parties obliged to use "all reasonable endeavours to agree the terms of a Contract for Sale" during due diligence period – construction – enforceability – obligation on vendor to make offer – failure to incorporate nominated special purpose vehicle – breach

REAL PROPERTY – options – formal requirements – Division 9 of Part 4 of the Conveyancing Act – whether informal written agreement an option over the properties – whether land "residential property"

Facts:

These proceedings concerned a commercial contract in which the plaintiffs claimed to have been entitled to purchase a group of properties owned by the defendant in Castle Hill (**Properties**). There was no formal contract for sale of the Properties, however, the plaintiffs relied upon an informal written agreement between the first plaintiff and the defendant. The first plaintiff and the second plaintiff were related entities, whereby the second plaintiff was the special purpose vehicle, which was incorporated to be the purchaser of the Properties. The first plaintiff was a due diligence company.

The validity and contractual enforceability of the informal agreement was in dispute between the parties. The agreement provided for a due diligence period, during which the parties were to use their best endeavours to negotiate the terms of a contract for sale. Once a proposed contract was prepared by the defendant's solicitors, the plaintiffs' solicitors notified the defendant's solicitors that the plaintiffs wished to proceed with the purchase. A few days later, the defendant's solicitors advised that the defendant no longer wished to proceed with the sale, and the relations between the parties broke down thereafter.

The plaintiffs contended that the defendant was bound to execute and exchange contracts on the sale of the Properties in favour of the second plaintiff as purchaser. The plaintiff also claimed damages if specific performance was not available, in the amount of around $90 million.

The informal agreement upon which the plaintiffs relied was purportedly signed by the defendant. The defendant denied this, and contended that even if it was, the agreement did not give rise to an enforceable contractual obligation to sell the Properties. Further, the defendant contended that, even if the agreement did create enforceable obligations to sell the Properties, then it was still invalid as a result of failure to comply with provisions of the *Conveyancing Act 1919*, which apply to options for the purchase of residential property.

In the course of closing submissions, given that the defendant had commenced construction work on the Properties, the plaintiffs indicated that they no longer pressed orders for specific performance. The plaintiffs accepted that it would be impractical to decree a sale at that stage, and as such, the plaintiffs pressed for damages in lieu of specific performance. Therefore, it was necessary for the Court to determine whether the plaintiffs were originally entitled to specific performance. Further, the plaintiffs claimed that if they were not entitled to such damages, they claimed damages at law for breach of contract.

Decision:

Parker J found that the defendant's only obligation was to make an offer, which did not require the defendant to proceed with a contract. This was on the basis that first plaintiff did not validly nominate any special purpose vehicle, being the second plaintiff, and accordingly, the defendant's obligation was not triggered. Therefore, it was held that there was no breach by the defendant of any enforceable obligation, so therefore, the specific performance and damages claims of the contract failed.

Castle v Achdjian

[2022] NSWSC 1340

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 4 October 2022

REAL PROPERTY – easements – extinguishment of easements – Cross-Claim seeking extinguishment of right of carriageway pursuant to Conveyancing Act 1919 (NSW) s 89(1) on the grounds of obsolescence, impediment of reasonable user of servient tenement, or abandonment – where right of carriageway has never been used as a means of vehicular access to the dominant tenement – where several obstructions have been erected on right of carriageway – where evidence suggests that right of carriageway has been used historically only as a footway – whether right of carriageway obsolete in circumstances where Council approval for construction of a driveway is very unlikely to be given – whether it is possible to reasonably enjoy servient tenement while right of carriageway subsists – whether acts or omissions of previous dominant owners evinced an intention to abandon right of carriageway in whole or in part – held that right of carriageway not obsolete, inconsistent with reasonable use of servient tenement, or abandoned in whole or in part – held further that dominant owners would suffer a substantial injury if right of carriageway were extinguished – defendants to be ordered to remove obstructions placed on right of carriageway without dominant owners' assent

Facts:

These proceedings concerned a right of carriageway to two adjoining properties in Hornsby, being the plaintiffs' and defendants' property. The plaintiffs' property, being the property benefitted, backs onto the rear of the defendants' property, being the property burdened. The defendants had owned and lived in their property for over 20 years, whilst the plaintiffs started living in their property in 2021.

The right of carriageway had not been used for some time, as it had been blocked by fences at each end. Although, evidence was submitted that the plaintiffs' predecessors in title's children (**Ryan children**) occasionally made use of it whilst their parents were the owners of the plaintiffs' property. The plaintiffs' property was marketed in 2020 as having the easement, and as such, once the plaintiffs purchased the property, they made it known to the defendants that they were interested in making use of it. Several letters were exchanged between the parties' solicitors in relation to the same.

The plaintiffs commenced these proceedings seeking a declaration that the defendants had impeded or restricted the plaintiffs' rights in respect of the easement, and further, an injunction restraining the defendants from continuing to impede or restrict such rights. The plaintiffs also sought orders requiring the defendants to remove the fences that obstructed the easement and interfered with the plaintiffs' reasonable enjoyment of the property.

By way of its cross-claim, the defendants contested the plaintiffs' claims on the basis that the easement had been abandoned by the plaintiffs' predecessors in title, and claimed it was liable to be extinguished under s 89 of the *Conveyancing Act 1919*. In this regard, the defendants argued that the easement had not been used for at least 20 years. The defendants claimed in the alternative that, if the easement had not been wholly abandoned, that it was abandoned insofar as it included rights to use it as a footway.

Decision:

Darke J accepted that the evidence regarding Ryan children's use of the easement for some time, and as such, was not satisfied that the plaintiffs' predecessors in title may have reasonably considered to have abandoned the easement. The defendants' other claim relation to partial abandonment were also not made out on a similar basis. As such, the defendants' cross-claim was dismissed.

In relation to the plaintiffs' claim Darke J held that the fences traversing the easement amounted to an obstruction of the easement, and found that declaratory relief to that effect was appropriate. Further, the Court was satisfied that a mandatory injunction be made requiring the defendants to take steps to remove such obstructions. The defendants were ordered to pay the plaintiffs' costs of the proceedings.

Bao v Li

[2022] NSWSC 1335

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 30 September 2022

EQUITY — Trusts and trustees — Express trusts — Intention to create — Statute of Frauds — Requirement of writing — Part performance — No question of principle

CONTRACTS — Formation — Conditional promises — Whether contract labelled "draft agreement" is subject to contract or binding

Facts:

These proceedings concerned a dispute relating to the beneficial ownership of two properties in Sydney. The first defendant was the registered proprietor of a property in North Ryde (**North Ryde Property**) which was leased out. The first defendant was also the registered proprietor of a property in St Ives (**St Ives Property**), in which the first defendant either lived in or leased out.

The plaintiff claimed that he entered into a written agreement with the first defendant, and her then partner, the second defendant. Pursuant to the agreement, the plaintiff agreed to contribute 50% of the cash that was necessary beyond any loan for the purchase, holding, and development costs of the North Ryde Property, in return for 50% of the profits of sale of the developed property. The plaintiff contended that he had never intended to take ownership of the North Ryde Property, and simply sought to invest his money. As such, the plaintiff sought orders that the North Ryde Property be sold, and an account be taken to determine his entitlement, including his contribution of $457,346.20.

The second defendant accepted that the agreement was binding on him, and by way of a cross-claim, pleaded that the first defendant, as the legal owner, held the properties on express trust, or alternatively, constructive or resulting trust, for him. The first defendant

submitted in defence that, the agreement with the plaintiff was only ever a draft, and in any event, solely binds the plaintiff and the second defendant. Further, the first defendant contended that the Court impose a remedial trust in relation to both properties, based on the second defendant's contributions to the purchases. In this regard, the first defendant accepted that the second defendant contributed at least $1.087 million to the purchase of the two properties and the redevelopment of the North Ryde Property.

As such, the primary issue in these proceedings was whether the first and second defendant intended that the first defendant would hold the properties on trust for the second defendant.

Decision:

Peden J found that the plaintiff and second defendant had succeeded in their claims. As such, the Court was satisfied that the first defendant agreed to hold the St Ives Property and North Ryde Property on express trust for the second defendant. Accordingly, the first defendant's defence failed. The Court also found that the plaintiff was entitled to 50% net profit of the North Ryde Property, and both the plaintiff and the second defendant be reimbursed their financial contributions, pursuant to the agreement

McLachlan v Alameddine

[2022] NSWSC 1292

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 26 September 2022

LAND LAW – possession of land – claim by executors against an occupier – defendant asserts that deceased promised he would leave the property to her – no defence pleaded to claim for possession – defence struck out – judgment for possession

Facts:

These proceedings concerned a claim by the plaintiffs for the possession of land, who were the registered proprietors of land in Erskineville (**Property**) in their capacity as executors of an estate.

The defendant had supposedly lived at the Property for a considerable number of years, and claimed to have done so by agreement with the deceased, without any arrangement as to payment, rent or otherwise. Demands were made for her to vacate the Property in order for the executors to administer the estate, and when she did not do so, these proceedings were commenced.

The defendant filed a defence, which states that the defendant believed that the deceased would leave her the house by way of his will, as well as various statements alleged to have been made to a similar effect. The defence also detailed the money the defendant claimed to have expended on the Property, including utility bills, repairs and replacements. The defence did not disclose any defence to a claim for possession of the Property.

Decision:

Given that the defendant did not defend the plaintiff's claim for possession of the Property, Davies J struck out the defence and an order for possession was made.

Commonwealth Bank of Australia v Watts

[2022] NSWSC 1291

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 26 September 2022

LAND LAW – possession of land – default under loan agreement and mortgage – where agreement reached after proceedings commenced for consent judgment to be held in escrow on conditions – where defendant breached conditions – plaintiff entitled to judgment for possession

Facts:

These proceedings concerned a claim by the plaintiff for the possession of land in Western Australia (**Property**), based on a breach of a loan agreement and mortgage which provided security for the loan agreement. Pursuant to the loan agreement, an amount of $463,936 was lent by the plaintiff to the defendant. The defendant filed a defence, however, did not disclose a defence to the claim.

The parties entered into negotiation discussions, the defendant signed a consent judgment giving possession of the Property, on an arrangement whereby such a judgment would be held in escrow on a number of conditions. Such conditions included the defendant was to:

1. Make payments to the plaintiff of $4,000 per month;
2. Provide to the plaintiff a complete statement of his financial position with supporting documents evidencing his ability to resolve the arrears within a reasonable period and to maintain a payment plan; and
3. Make no further defaults under the loan agreement of mortgage.

If the above conditions were satisfied, it was agreed between the parties that the plaintiff would then review the defendant's circumstances. However, if such conditions were not complied

with, the plaintiff would proceed with enforcement of its claim. Nonetheless, the defendant's payments appeared to be irregular, and a statement of financial position was not provided.

Decision:

Davies J was satisfied that, by his failure to pay the amounts of $4,000 regularly and to provide a statement of his financial circumstances, the defendant breached the arrangement between the parties. In such circumstances, it was held that the plaintiff was entitled to possession of the Property.

Norris (a pseudonym) v Brooks (a pseudonym) (No 2)

[2022] NSWSC 1278

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 21 September 2022

FAMILY LAW — property — marriage — adjustment of property interests — consequential orders to be made in respect of former matrimonial home — substantial intervening period between expert valuation of property and judgment — whether just and equitable to make orders on basis of expert valuation or to make orders putting property to auction

Facts:

A principal judgment was delivered in these proceedings dated 17 June 2022, whereby the key issue was an application by the plaintiff for orders under s 79 of the *Family Law Act 1975* (Cth) altering the interests of the plaintiff and defendant to their matrimonial property (**Property**). The plaintiff in the proceedings was the husband, and the defendant was the wife. The parties agreed that the Property should be divided into two pools, whereby only pool 1 was to be divided between the parties. The Property in pool 1 was to be divided between them in the proportion 52.5% in favour of the wife and 47.5% in favour of the husband.

The Property was valued at $3.8 million in 2021 by way of a formal valuation undertaken by the joint expert valuer appointed by the parties. Given that the value of residential properties in the Sydney market changed substantially over an 18-month period, the central issue in these proceedings was whether the plaintiff's share in the pool 1 assets ought to have been determined on the basis that the Property had a value of $3.8 million, or valued by way putting the Property to public auction.

The plaintiff's submitted that the Court make orders that will have enabled the value to be determined by a public auction. The defendant submitted that the proceedings were conducted on the basis that the parties accepted the Property had a value of $3.8 million, and

as such, the Court's final orders be made on the basis that the plaintiff is entitled to a 47.5% share in that value.

Decision:

Robb J found that the preferable course was for the Court to order that the Property be put to public auction, as there was an extreme level of antipathy between the parties and the Court was not confident that the parties would have cooperated in the sale of the Property. As such, the Court held that the only way to avoid the possibility of further disputation is to allow the market to determine the Property's value.

Kitanovski v Ibrahim

[2022] NSWSC 1232

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 14 September 2022

REAL PROPERTY – caveats – withdrawal of caveats – application pursuant to section 74MA of the Real Property Act 1900 (NSW) – where caveats preventing completion of a specifically enforceable contract for the sale of land – where the purchase price for the land is well below market value – where completion of the contract at the price listed would prejudice caveators' claimed charges over the vendor's land – whether there is a serious question to be tried with respect to caveators' claimed interests – whether balance of convenience favours continuation of the caveats – whether withdrawal of caveats should occur subject to a condition that the purchaser pay into Court the difference between the contract price and the market value of the property – held that caveats should be withdrawn subject to such a condition.

Facts:

These proceedings concerned a residential property in Yowie Bay (**Property**). The plaintiff, as purchaser, sought orders in the nature of specific performance in respect to a contract for sale of land with the second defendant, as vendor.

The plaintiff also sought orders pursuant to s 74MA of the *Real Property Act 1900* (NSW) that caveats, lodged by the first and third defendant, be withdrawn to enable the completion of the contract for sale. Such orders were resisted by the caveators, primarily on the basis that the purchase price under the contract was significantly below the prevailing market value of the property. Given there was no opposition to the specific performance case, the question requiring the Court's determination was whether the caveats should be maintained or removed.

The plaintiff resided in the Property for around 10 years, and contended that she does not have a formal lease with the owner of the Property, the second defendant in these proceedings.

The third defendant, being the Commissioner of Taxation, lodged the caveat that is the subject of these proceedings as a result of the registered proprietor of the Property being liable to pay a total amount in excess of $16,600,000. By way of the caveat, the third defendant claimed an interest of an unregistered mortgagee in respect of the Property.

The second defendant had entered into a loan agreement with the first defendant, in respect of a principal sum of $2,900,000, that provided for a charge over the Property in favour of the first defendant. The loan agreement further provided that the second defendant consented to the first defendant lodging a caveat over the Property. However, the first defendant's caveat, being the subject of these proceedings, was lodged after the third defendant's caveat. By way of the caveat, the first defendant claimed an equitable interest in the Property.

The plaintiff and second defendant entered into a contract for the sale of the Property, however, the contract had not completed due to several caveats lodged over the Property.

Decision:

The plaintiff's claim for specific performance

Darke J granted the plaintiff's claim for specific performance, given that the contract for sale was valid and the plaintiff had paid the deposit and requisite stamp duty. The impediment to completion was the second defendant's failure to take steps to be in a position to pass legal title free of any mortgage or other relevant interest.

The plaintiff's claim for the removal of the caveats

The Court found that there was a serious question to be tried in relation to both caveats. In assessing the balance of convenience, it was accepted that the plaintiff was a bona fide purchaser and that she herself had not acted in any improper manner in relation to the contract. However, the Court found that the contract sale was for "below market consideration", and further, that the second defendant failed to authorise the sale with the third

defendant. In these circumstances, Darke J indicated that the removal of the first and third defendant's caveats would cause substantial prejudice to be suffered, and therefore, the balance of convenience would be in favour of continuation of the caveats.

However, the plaintiff submitted that, if the Court found against the plaintiff on the question of whether sale was at an undervalue, the plaintiff would be willing to submit to a condition of relief, that she pay into Court the difference between the market value of the property, as found by the Court, and the contract price. It was further submitted that such a payment would operate as a form of alternative security, and put the caveators in the position they would have been in, had the property been sold at the time of the contract.

In respect to this submission, Darke J held that the imposition of such a condition upon relief altered the assessment of the balance of convenience, and provided the plaintiff pay any surplus proceeds into the Court, the balance of convenience would be in favour of removal of the caveats.

Australian Mortgage Finance Services Pty Ltd v Murabito

[2022] NSWSC 1226

Coram: Meek J

Court: Supreme Court of New South Wales

Date: 9 September 2022

REAL PROPERTY — Possession of land — Application to stay execution of writ for possession — hearsay evidence of possible funding to pay judgment debt — Registered proprietors being two of three applicants are both bankrupt — Payment of judgment debt would not entitle any of applicants to possession of property which had vested in the respective trustees in bankruptcy — No evidence of extent of indebtedness of bankrupts' estates — No evidence trustees in bankruptcy aware of application or had given or promised to give any licence to applicants to remain in property — Application based on asserted health and hardship grounds — Attempts to secure alternative accommodation —Application on a Friday dismissed in context where mortgagee would request Sheriff not to act on writ until Monday afternoon

PRACTICE AND PROCEDURE — Initial ex parte application — Undertaking as to damages proffered by applicant without disclosure that he and another applicant were undischarged bankrupts — Material nondisclosure of a matter impacting upon decision to make stay ex parte prior to urgent contested stay application — Fact of bankruptcy ought to have been disclosed

Facts:

These proceedings concerned an application by the first and second defendants, being the occupants of a property in Five Dock (**Property**), in which the plaintiff is the mortgagee of the Property. In September 2021, on the application of the plaintiff, Darke J entered into a default judgment against the defendants, in favour of the plaintiff, for possession of the Property. Judgment was also entered for a monetary amount said to be around $74,000. An application to set aside the default judgment was declined thereafter.

Subsequently, a writ of possession was issued, giving notice to the defendants that they must vacate the Property by 8 September 2022. On 7 September 2022, the defendants sought to urgently stay the writ of possession in respect of the property.

In the context of dealing with the matter, Meek J was only then made aware of the fact that the first and second defendants were undischarged bankrupts, and it was indicated that this

fact ought to have been disclosed to the Court on an ex parte application for orders to stay the writ of possession. The non-disclosure of the bankruptcy of the defendants was declared a very serious matter.

Decision:

It was held that, given the defendants were undischarged bankrupts, the Property being vested in the Trustees in Bankruptcy meant that neither defendants had any right to possession of the Property. Accordingly, there was no legal basis demonstrated for the defendants to occupy or remain in possession of the Property. As such, the defendants' notice of motion was dismissed with costs.

Harkin v Harkin

[2022] NSWSC 1212

Coram: Meek J

Court: Supreme Court of New South Wales

Date: 9 September 2022

REAL PROPERTY — Application by owner of one-third share as tenant in common for possession of land and leave to issue but stay for a period a writ of execution — Motion in substance an application for summary judgment for part of final relief sought in statement of claim — Motion dismissed

CIVIL PROCEDURE — Application for summary judgment — A party who seeks judgment for possession of property should ordinarily provide the Court as part of the evidence in support of the application with a copy of a title search for the property at least so the Court is aware of potentially any other relevant interests that are recorded or noted on the register

REAL PROPERTY — Co-ownership — effect of an order under s 66G Conveyancing Act 1919 (NSW) on the rights of a co-owner

SUCCESSION — Probate — Failure by executrix to administer estate for 5 years — Failure of executrix to lodge transmission application in respect of the deceased's two-third's share as tenant in common — Executrix alleges plaintiff has inhibited administration

PRACTICE — Estates — Duty of the parties involving contested applications before the Court for relief to assist the Court by providing a copy of the Grant of Probate or Letters of Administration, inventory of property and details of administration

PRACTICE — Duty of the parties to assist the Court to further the overriding purpose of just, quick and cheap resolution of real issues in the proceedings — Parties ought to reflect upon real issues and benefits to be obtained from facilitating the overriding purpose so that ideally the assistance given to the Court, pursuant to the duty to assist, is given willingly not begrudgingly — Parties directed to consult with view to seeking if agreement can be reached to revoke grant and permit appointment of independent administrator

Facts:

These proceedings concerned the estate of the late Helen Shaw. The deceased was survived by her three children, being the plaintiff and the defendants. The plaintiff was the owner of a property in Charmhaven (**Property**) jointly with the deceased, and further, the Will divided her estate equally between the parties of the proceedings. The first defendant was occupying the Property.

In the plaintiff's capacity as executor of the estate, the plaintiff commenced proceedings against the first defendant, seeking to obtain possession of the whole of the Property. This was contended on the basis that the first defendant had not taken any steps to advance the estate. The plaintiff further contended that, due to illegal and anti-social activities occurring in the Property, there was a genuine concern that the first defendant's occupation pf the property would cause damage to the Property.

The defendants opposed the relief sought, indicating that the deceased's Will gave them a share of the property or proceeds of sale of the Property. Further, the defendants contended that the plaintiff had done nothing for five years to progress or advance his claims disputing the deceased's Will, or to otherwise propound a case for relief that he is entitled to the entirety of the deceased's interest in the property.

Decision:

Meek J refused the order for possession sought by the plaintiff, and directed the parties to consult an independent administrator to take over the estate administration.

Shogroup Hotels Pty Ltd v Harris Street Holdings Pty Ltd

[2022] NSWSC 1119

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 24 August 2022

CONTRACTS – interpretation – lease – deed of variation of lease – where deed provided that the lessor and lessee are to "meet to discuss and agree" upon reductions to rent in circumstances where COVID-19 lockdowns affected the lessee's business – where lessor and lessee negotiated pursuant to the deed but were unable to agree upon a rent reduction – whether the obligation to "discuss and agree" is unenforceable as an agreement to agree – whether the uncertainty and incompleteness inherent in the obligation may nevertheless be overcome by the "machinery" provisions contained in the dispute resolution provisions of the lease – held that the mere failure of the parties to reach an agreement is not a dispute that falls within the scope of the dispute resolution provisions – held that obligation to "discuss and agree" rent reductions pursuant to the deed is unenforceable as an agreement to agree

Facts:

These proceedings concerned a registered lease of a hotel in Pyrmont (**Property**) and an associated deed, entered into between the plaintiff, as lessee, and the defendant, as lessor. The deed was entered into following the outbreak of the COVID-19 pandemic, and set out the terms upon which relief was given to the plaintiff in respect of its payment obligations under the lease. Following the prevalence of COVID-19, the plaintiff was heavily impacted from trading from the premises, enlivening the relief provided for in the deed.

Thereafter, the parties discussed the rent relief, and it was noted that if there was a delay or failure to negotiate, then the parties would require expert determination, pursuant to the dispute resolution clause of the lease. The parties subsequently engaged in a mediation process, however, no agreement was reached with respect to the rent relief.

There construction question that the Court was required to determine in accordance with the deed, was whether the failure of the parties to reach a conclusion on rent relief constituted a dispute under the lease, so that the dispute resolution provision applied.

The plaintiff submitted that the failure to reach an agreement regarding rent relief was to be regarded as a dispute. The defendant contended that the parties' failure to reach an agreement exhausted the operation of the dispute resolute clause, and there was otherwise no dispute as to the obligation to pay rent which remained pursuant to the lease.

Decision:

Darke J agreed that the mere failure of the parties to reach an agreement, pursuant to a provision of the deed, did not give rise to a dispute regarding the operation of the deed. As such, it was held that the failure to agree meant that no additional rent reduction came into existence in the manner provided for. It followed that the plaintiff's claims for relief were not made out, and accordingly, the Court ordered that the proceedings be dismissed with costs.

NSW Trustee and Guardian v Obeid (No 2)

[2022] NSWSC 1117

Coram: Schmidt AJ

Court: Supreme Court of New South Wales

Date: 23 August 2022

CIVIL PROCEDURE — Cross-claim — plaintiff is registered proprietor of property forfeited to Crown as the result of orders made under Criminal Assets Recovery Act 1990 (NSW) — property sold — defendant claims interest in property and pursues order disgorging proceeds of sale

EQUITY — Trusts and trustees — Resulting trust — defendant's claimed payment for property unsupported by evidence — necessary intention for defendant to acquire equitable interest unsupported by evidence — Jones v Dunkel inferences — beneficial interest in property not established

EQUITY — Trusts and trustees — Constructive trusts — registered proprietor a volunteer — no prior notice of claimed interest — indefeasibility of title — Real Property Act 1900 (NSW), s 42 — after-acquired notice of claimed equitable interest does not defeat registered title of volunteer — whether claimant can pursue in personam remedy against registered proprietor — whether statutory remedy available under Criminal Assets Recovery Act 1990 (NSW), ss 22, 23, 25

Facts:

The plaintiff brought these proceedings in 2020, seeking possession of a property in Heckenberg (**Property**), which the first defendant occupied. Thereafter, the first defendant voluntarily surrendered possession of the property. What remained to be determined in these proceedings were issued arising under a cross-claim filed by the second defendant, in which he claimed he had an equitable interest in the Property.

The second defendant's brother purchased the property in 2007. In 2011, the NSW Crimes Commission obtained a restraining order against him, and in 2017, Harrison J made assets forfeiture and unexplained wealth orders against the second defendant's brother. Pursuant to such orders, the Property was forfeited to the Crown. As such, the second defendant contended that the plaintiff held the Property on constructive trust to the second defendant. Further, with respect to earlier proceedings in which it was held that the plaintiff's title to the

Property was indefeasible, the second defendant contended that Harrison J was incorrect in his conclusion. Both in those proceedings and in these, it was accepted that before the plaintiff became the registered proprietor of the Property, the plaintiff did not have notice of the second defendant's claimed equitable interest.

Decision:

The Court was not persuaded that Harrison J failed to consider the case advanced by the second defendant in its cross-claim. It was held that the evidence did not support the conclusion that the second defendant ever had the intention on which the claimed interest in the Property depends, and as such, there was no suggestion that there was ever a trust. Accordingly, the second defendant's cross-claim was dismissed with costs.

Fobupu Pty Ltd v Hawatt

[2022] NSWSC 1089

Coram: Lonergan J

Court: Supreme Court of New South Wales

Date: 15 August 2022

LAND LAW – possession of land – default on mortgage – where first defendant is bankrupt – mortgagee entitled to possession – leave granted to issue writ of possession – no point of principle

Facts:

These proceedings concerned the plaintiff seeking judgment against the defendants for the possession of property and payment of a loan with interest. The defendants were the registered proprietors of the property as tenants in common in equal shares. Pursuant to a loan agreement, the plaintiff agreed to loan $1.5 million to the defendants, with the loan being secured on the property by a registered mortgage. The loan was not repaid by the defendants.

A notice was delivered to the defendants which stated that unless the notice was complied with within 1 month, the plaintiff proposed to exercise its power of sale over the property. Thereafter, the plaintiff commenced proceedings seeking possession and judgment in an amount to be fixed by the Court at final hearing, plus costs.

A defence was filed by the first defendant, which asserted that the plaintiff was aware the defendants' ability to repay the loan was contingent on sales from a building construction project in Mosman. Further, the first defendant contended that the inability to repay the loan was due to delays in the project, and as such, the loan agreement was frustrated by COVID-19 related delays. By way of an amended defence, the first defendant raised substantive defences, including that there were representations made by the plaintiff to the first defendant that he was not required to repay the loan until completion of the development.

Sometime thereafter, the first defendant filed for bankruptcy, and the trustee informed the Court that he did not oppose to the relief sought by the plaintiff, and further, that the first defendant did not press the defences in its amended defence.

Decision:

It was held that the plaintiff was entitled to obtain possession of the property and exercise its powers of sale. It was also ordered that the plaintiff was entitled to judgment, interest and costs.

Meridian Energy Australia Pty Ltd v Chief Commissioner of State Revenue

[2022] NSWSC 1074

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 12 August 2022

TAXES AND DUTIES — Landholder duty — Landholdings — Threshold value — Whether Power Stations located on land were landholdings within the meaning of the Duties Act 1997 (NSW) — Whether Power Stations were fixtures or innominate sui generis property

TAXES AND DUTIES — Dutiable transactions — Dutiable value — Property — Whether methodology in SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue (2021) 113 ATR 24; [2021] NSWSC 395 applicable

TAXES AND DUTIES — Dutiable transactions — Dutiable property — Goods — Whether Power Stations could be characterised as "goods"

Facts:

These proceedings concerned a Duties Notice of Assessment made by the defendant in respect of the acquisition by the plaintiff of 100% of the shares in GSP Energy Pty Ltd (**GSP**) for over $160 million. GSP was the operator or lessee of the land on which three hydro-electric power stations were situated in New South Wales.

Pursuant to the *Duties Act 1997* (NSW), landholder duty is paid on the acquisition of entities with land holdings valued at more than $2 million. The dispute in these proceedings was whether the threshold value of land holdings, being the hydro-electric power station, was exceeded. The dispute concerned the nature of GSP's interest in the power station, or the appropriate characterisation of such power stations, being either fixtures, chattels, or *sui generis* property.

The plaintiff contended that GSP's interest in the power stations, which it acquired as a result of the acquisition, was innominate *sui generis* property interest, which could neither be classified as land nor as goods. It was conceded by the plaintiff that, at one stage, the power

stations formed part of the freehold on which they were situated, and as such, embedded in the land. However, the plaintiff submitted that the effect of a statutory vesting order was to sever the power stations from the land, and as such, this created an innominate *sui generis* property interest held in gross.

The defendant contended that the power stations were tenants' fixtures forming part of the leased land, and that the effect of the vesting orders was to transfer the existing assets of the tenant of the leased land to the future tenant.

Decision:

Ward CJ found that the terms of the statutory vesting orders, and the identification of the various interests being vested in GSP pursuant to such orders, made clear that there was a statutory severance of the power stations from the land in where they were situated. As such, the Court held that the power stations did not meet the description of land, but rather were conveyed to GSP as an innominate *sui generis* property interest. Therefore, the Court concluded that the Duties Notice of Assessment ought to be set aside in whole.

Clough v Breen & Anor

[2022] NSWSC 1026

Coram: Slattery J

Court: Supreme Court of New South Wales

Date: 1 August 2022

REAL PROPERTY – EASEMENTS – a complex and protracted dispute in relation to the use of easements for the use of an inclinator, the supply of services, giving rights-of-way, and other related easements – dispute has been a perennial subject of litigation between the plaintiff and the defendants who are neighbours – hearing in May 2022 – proceedings relisted in July 2022 as a result of further incidents – whether interlocutory orders should be made pending determination of the final issues, and if so what should be the form of those interlocutory orders – what is the best course for quelling the parties dispute in the near term, consistent with their respective rights under the easements.

Facts:

These proceedings concerned ongoing dispute between the parties, who were neighbours, in relation to multiple issues. This judgment related to an easement dispute with regard to an inclinator, which serviced the plaintiff and defendants' properties. The inclinator is physically located on the plaintiff's property but is accessible by the defendants under the terms of one of the easements, at multiple points along the long common boundary between the parties' properties. Multiple easements exist on the properties, however, only three are in dispute in these proceedings. These three easements including an easement for a right of access using the inclinator and associated easement for services (**Easement A**), a further easement for services (**Easement I**) and an easement to permit an encroaching structure to remain (**Easement J**).

The plaintiff commenced these proceedings which pleaded issues of trespass to her property, nuisance, breach of the easements, and consequential relief. The defendants' pleadings raise issues of upgrading the inclinator, the nature of their entitlement to use the inclinator, and the need for a regime of management to regulate the easements. Accordingly, this judgment sought to resolve a set of interlocutory issues before final judgment.

Decision:

The Court decided to make various interlocutory orders, and costs were reserved. Some of the orders have been set out as follows:

A Sinking Fund: Parties required a sinking fund to meet all regular maintenance liabilities for the inclinator.

Planned Work on Services to Properties: A regime for quarterly access to the easement for a fortnight, to undertake planned work on these services, with each party having a week within the fortnight reserved for access to the easement for this purpose.

Routine Maintenance Work on the Inclinator: The plaintiff was permitted to continue to engage contractors to undertake the routine maintenance of the inclinator, however she would be limited in that function by having to obtain the prior consent of the solicitors for the defendants.

Unexpected Repair or Maintenance Work on the Inclinator: Any emergency work will need to be engaged by the party using the inclinator, and otherwise through the plaintiff, but on terms requiring her to keep the defendants fully informed as to the progress of the work.

General Restraints: The Court imposed general restraints, including arranging for any third-party expert, engineer, tradesperson, or worker to undertake any work on the easements.

18 Woodville Holding Pty Ltd v Hua Cheng International Holdings Group Pty Ltd (in liq) (No 2)

[2022] NSWSC 947

Coram: Ball J

Court: Supreme Court of New South Wales

Date: 19 July 2022

LAND LAW — Torrens title — Exceptions to indefeasibility — Unregistered tenancy — Whether s 42(1)(d) of the Real Property Act 1900 (NSW) protects the interest of a tenant in possession under an unregistered tenancy exceeding three years — Whether registered interest of mortgagee prevails over unregistered interests of tenants in possession

LAND LAW — Torrens title — Exceptions to indefeasibility — Fraud — Whether taking an assignment of mortgage with alleged knowledge of a tenant's unregistered interest but refusing to be bound constitutes statutory fraud

LAND LAW — Torrens title — Unregistered interests — Existence of unregistered interests — Whether second to fifth defendants have an equitable interest commensurate with the availability of specific performance where purchase price has been paid

Facts:

These proceedings concerned the plaintiff seeking orders for possession of units in a mixed residential and commercial development in Hurstville (**Development**), which were being occupied by the second to fifth defendants (**Active Defendants**). In response, the Active Defendants have filed cross-claims in which they seek specific performance of contracts they say they entered into to purchase the Development. Whether the plaintiff was entitled to the relief it sought or whether the Active Defendants was entitled to the relief it sought largely turned on whether the plaintiff's interest as registered mortgagee of the Development takes priority over the interests claimed by the Active Defendants. There was also a question of whether the plaintiff was entitled to rely on breaches of the mortgage before it took an assignment of it.

The plaintiff also sought an order for possession against the first defendant, which was the developer of the Development and was in liquidation, although, remained the registered proprietor of the units.

In August 2009, the fourth and fifth defendant entered into a contract to purchase off the plan unit in the Development. In April 2013, the second defendant had recently started working as a real estate agent, which was the agent for the sale of the plan of units in the Development. In September 2013, the third defendant entered into a contract to purchase a unit in the Development, and thereafter, the second defendant entered into a contract to purchase another unit. The first defendant arranged to obtain financing for the Development from Super Vision Resources Pty Ltd (**Super Vision**), which was obtained under a loan agreement.

Three years later, Super Vision issued a notice of an event of default in respect to the first defendant's failure to pay interest and advisory fees. As second notice was served by Super Vision to the first defendant in relation to its multiple failures, including to repay principal, interest, advisory fees and its failure to ensure the settlement of the sale of each unit. In April 2017, the fourth and fifth defendants lodged a caveat over their unit, claiming a legal and equitable interest.

Thereafter, the second and third defendants commenced proceedings against the first defendant, Super Vision and a number of other parties. The second and third defendants sought an interlocutory injunction restraining any dealings in the units, and seeking an order for specific performance of the contracts of sale for such units. The second and third defendants also lodged a caveat over their respective units. The proceedings were ultimately dismissed.

Super Vision then agreed to assign the Development to the plaintiff, whilst the Active Defendants claimed an interest in their respective units.

Decision:

Ball J held that the first, second and third defendants give the plaintiff possession of the units in the Development, and as such, leave be granted for the plaintiff to issue a writ for possession. Orders to a similar effect were made in relation to the first, fourth and fifth defendants giving possession of their units to the plaintiff. As such, the cross-claims filed by the second to fifth defendants were dismissed with costs.

H.T.H. Nominees Pty Ltd atf Hudson Property Trust v Secure Parking Pty Ltd

[2022] NSWSC 931

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 12 July 2022

LAND LAW – lease – lease of a car park – construction of lease – dispute regarding Lessee's payment of rent – where cl 21.1 of the lease entitled the Lessee to a reduction in Base Rent where its business was materially adversely affected by reason of any law, policy or action of an authority – where Lessee invoked cl 21.1 to claim reduction in rent due to effect of COVID-19 Public Health Orders – where Lessor refused to recognise Lessee's entitlement to reduction in rent under cl 21.1 – where Lessee tendered payments of reduced rent in good faith, though calculated incorrectly – whether payment of reduced rent amounted to breach of the lease or repudiation of the lease – whether dispute resolution mechanism in the lease prevented the Lessor from terminating the lease until procedure had been complied with – held that the Lessee did not breach the lease or repudiate it by paying reduced rent in good faith – held that Lessor was not entitled to terminate the lease in any event until dispute resolution process had been complied with – Lessor held not to be entitled to loss of bargain damages

CONTRACTS – repudiation – where Lessor re-entered demised premises for Lessee's alleged failure to pay rent in accordance with the lease – where Lessor not entitled to re-enter and terminate lease – where conduct of Lessor amounted to a repudiation of the lease – Lessee held to be entitled to accept repudiation and thereby terminate the lease – Lessor entitled to recover amount of rent outstanding as at date of termination of lease

Facts:

These proceedings concerned a registered lease of a car park in Sydney, whereby the plaintiff was the lessor and the defendant was the lessee. The plaintiff was the trustee of Hudson Property Trust, which entered into the lease in that capacity, pursuant to a deed, following the resignation of the former trustees of the trust and the appointment of the plaintiff as trustee. Both parties contended that the lease was terminated, however, they differ as to when and how the termination was effected.

The plaintiff claimed that it terminated the lease by exercising a right to re-enter and repossess the premises, such a right arising from either a breach by the defendant concerning payment of rent, or repudiation of the lease by the defendant. The defendant claimed that the plaintiff

was not entitled re-enter and repossess the premises, and further, that the conduct of the plaintiff constituted a repudiation of the lease, which the defendant accepted, therefore effecting a termination of the lease.

The plaintiff commenced proceedings seeking damages against the defendant for the amount of rent claimed to have been outstanding as at the date of termination, and for loss of the bargain upon termination for breach by the defendant, or following the defendant's repudiation.

The defendant brought a cross-claim which is based upon a deed of licence that was entered into by the defendant as licensor, Hudson Pacific Group (**HPG**) as licensee, and the former trustees of the Hudson Property Trust as guarantor. The deed of licence concerned 50 parking bays within the car park that is the subject of the lease. The defendant sought to recover outstanding licence fees from both HPG and the plaintiff. HPG and the plaintiff denied that they were liable to pay such a sum, on the basis of an alleged oral agreement, or estoppel, to the effect that the licence fees did not become payable until the defendant had paid, in full, the rent payable under the lease.

Decision:

It was found that the plaintiff evinced an intention no longer to be bound by the lease by re-entering the premises and claiming to terminate the lease. As a results of this conduct, that conveyed a disavowal of the whole contract, it was open to the defendant to accept the repudiation and thereby terminate the contract. Further, it was held that the defendant remained under an obligation to continue making monthly payments of rent, within reasonable time and in good faith, and such payment should have been made when the plaintiff took possession of the car park. As such, the plaintiff's conduct in re-entering was not based upon any failure to pay the rent, and the plaintiff's claim for damages in the nature of loss of bargain damages failed. Given that a sum of rent was still outstanding, Darke J entered judgment in favour of the plaintiff for that amount, together with interest. The statement of claim was

otherwise dismissed, and the plaintiff was ordered to pay the defendant's costs of the cross-claim.

Zele v Clark

[2022] NSWSC 925

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 11 July 2022

REAL PROPERTY – specific performance – contract for the purchase of residential property – enforceability – vendor alleges contracts exchanged without his authority – vendor refusing to complete – hardship – futility – two registered mortgages over the property – caveats over the property – specific performance ordered

Facts:

These proceedings concerned a residential property in Wyong (**Property**), whereby the plaintiffs were the purchasers under a written contract for sale of land, and the defendant was the vendor under the contract. The plaintiffs brought these proceedings for specific performance before the Court on an expedited basis.

Following a failure by the defendant to comply with a notice of completion pursuant to the contract, a notice to complete was issued, however thereafter withdrawn. The plaintiffs relied on a notice to complete and provided for completion to take place. A caveat was also lodged by the plaintiffs to reflect their interests as purchasers. The defendant raised two broad objections to the plaintiffs' application for specific performance, being that the contract was unenforceable, or alternatively, that the Court refuse specific performance and remit the plaintiffs to a claim for damages at common law.

In submitting that the contract was unenforceable, the defendant contended that his conveyancer had exchanged contracts on his behalf without his authority. Further, the defendant asserted that the deposit was paid late, and as such, the contract was rendered unenforceable. However, the defendant produced no evidence in relation to such contentions. In relation to the defendant's second point, although there was a delay in paying the deposit, it was fully paid, which did not render the contract unenforceable.

The defendant then disputed the plaintiffs' application for specific performance under three bases. Firstly, he submitted that damages would be an adequate remedy, in circumstances where the Property had no peculiar value, was not being used for business purposes and other properties would be suitable to the plaintiffs. However, Parker J indicated that it was no answer for the defendant to contend that other similar properties would equally suit the plaintiffs' requirements, and as such, his first point failed. The defendant's second point was that the completion of the contract would involve him hardship, however, such submissions were unsupported by any evidence, and therefore failed.

The defendant's third point was that specific performance would be futile in circumstances where the Property was allegedly encumbered by debts, which well exceeded the amount of the purchase price. In circumstances where there were two registered mortgages and multiple caveats on title of the Property, the defendant contended that it would not be possible to complete the sale, and therefore specific performance ought to have been refused.

Decision:

Parker J was not satisfied that the order for specific performance was futile, and it was held that there was no reason as to why to the mortgagees would not cooperate with the sale. In regard to the various secured creditors, even if there were issues regarding priority between the caveators, the Court found that such issues were not required to be determined in these proceedings as they were not an obstacle to the completion of the sale of the Property. Accordingly, the Court concluded that the contract was valid and enforceable, and that specific performance be granted. A declaration and orders were made to that effect.

Rima Abood v Chakib Carlo Gabrielle

[2022] NSWSC 912

Coram: Hammerschlag CJ in Eq

Court: Supreme Court of New South Wales

Date: 8 July 2022

REAL PROPERTY – Conveyancing Act 1919 (NSW) s 66G(1) – application for the appointment of trustees for the sale of property – where parties are co-owners and the first defendant seeks to assert that the plaintiff has no beneficial interest in the property and holds it on trust for him in circumstances where, in breach of directions of the Court, he has served no evidence and the Court declines his application to adjourn the hearing – HELD – no basis established for not making the order – trustees for sale appointed.

Facts:

These proceedings concerned an application for the appointment of trustees for sale of a property in Condell Park (**Property**), pursuant to s 66G(1) of the *Conveyancing Act 1919* (NSW). The plaintiff and the first defendant were siblings, who acquired the Property as tenants in common in equal shares. The first defendant's assertion was that the plaintiff made no contribution to the acquisition or maintenance of the Property, had no beneficial interest in it, and held her interest exclusively for the first defendant.

Following a judgment obtained against him in the District Court of New South Wales, the first defendant was made bankrupt. As such, the second defendant was appointed his trustee in bankruptcy. The plaintiff sought for the Property to be sold and had made numerous requests of first defendant that this occur, to which the first defendant continually objected. This was corroborated by evidence put forward by the plaintiff.

Decision:

Hammerschlag CJ in Eq found that there was no basis for a finding that it would be inequitable to make the orders the plaintiff sought, as the first defendant had not established any basis in

that regard. Given that the plaintiff was a co-owner of the Property, and the first defendant had failed to establish proprietary right, contract, fiduciary duty or estoppel inconsistent with her entitlement to the order, the first defendant's cross-summons was dismissed with costs.

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Fasako Pty Ltd v TianyD Beauty & Hairdressing Australia Pty Ltd

[2022] NSWCA 112

Coram: White JA, Basten AJA

Court: New South Wales Court of Appeal

Date: 1 July 2022

APPEALS – leave to appeal – interlocutory judgment – proposed appeal from refusal of leave to appeal from NCAT Appeal Panel – constrained approach to grant of leave for third level of appeal – primary judge found no error of law more than merely arguable – failure to consider submissions –

LEASES AND TENANCIES – enforceability of commercial lease – breach of condition – landlord's obligation to keep building in sound structural condition – breach – alleged inadequacy of water pump and pipes to provide fire protection

Facts:

These proceedings concerned an application for leave to appeal from a Supreme Court judgment, which refused leave to appeal from a decision by the Civil and Administrative Tribunal (**NCAT**) Appeal Panel. The applicant was the owner of a building in Sydney, who entered into a lease with the first respondent. The second respondent was the director of the first respondent, who guaranteed the first respondent's obligations under the lease.

The first respondent served a notice of termination on the application, on the basis that the premise's water pumps could not provide a flow rate for the fire sprinkler system that complied with safety standards. Thereafter, the applicant commenced proceedings against the first and second respondent in NCAT to enforce the lease. The first respondent filed a cross-claim that sought damages for breach of the lease. The Tribunal member found in favour of the applicant.

The first respondent sought leave to appeal to the NCAT Appeal Panel, in which the appeal was allowed. The Appeal Panel found that the applicant had breached the lease, pursuant to a provision which provided that the building must be kept in "sound structural condition", which allowed the first respondent to terminate the lease.

The Supreme Court refused the applicant's leave to appeal. The primary judge held that, although the termination notice did not explicitly refer to the relevant provision of the lease, it referred to the applicant's failure to rectify the fire pumps. It was found that the correct question for determination was whether an inadequate fire protection system breached the obligation to keep the property in "sound structural condition". As such, the primary judge did not overturn the factual findings made by the NCAT Appeal Panel with respect to the breach.

Decision:

The Court of Appeal in these proceedings refused the applicant leave to appeal from the Supreme Court judgment. It was found that the applicant failed to raise any errors of law, which were capable of being substantiated, identify the relevant questions of law, and also failed to articulate how the primary judge ought to have decided differently on such issues. Accordingly, the applicant was ordered to pay the costs of the respondents.

Olde English Tiles Australia Pty Ltd v Transport for New South Wales

[2022] NSWCA 108

Coram: Ward P, Gleeson JA, Mitchelmore JA. Basten AJA, Preston CJ of LEC

Court: New South Wales Court of Appeal

Date: 28 June 2022

LAND LAW – compulsory acquisition of land – compensation – compensable interests in land – bare licence to occupy land terminable at will by owners – interest had no market value – meaning of "privilege over, or in connection with, land" – claim for compensation for losses attributable to disturbance – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 4, 59

STATUTORY INTERPRETATION – definition of "interest" in land – interest included "privilege over, or in connection with, land" – reliance on statutory context – consistency of meaning – reliance on object to provide compensation – statute using language of ownership – interest able to be divested, extinguished or diminished by acquisition

STATUTORY INTERPRETATION – precedent – challenge to earlier decisions of Court of Appeal – whether court comfortably satisfied reasoning in earlier decisions wrong – Hornsby Council v Roads and Traffic Authority of New South Wales (1997) 41 NSWLR 151 – Dial A Dump Industries Pty Ltd v Roads and Maritime Services (2017) 94 NSWLR 554; [2017] NSWCA 73 considered

STATUTORY INTERPRETATION – extrinsic materials – legislative history – substantial amendments made without changing effect of precedent

Facts:

These proceedings concerned an appeal by the appellant against a Land Environment Court decision, which found that it had no compensable interest in land that was compulsorily acquired.

In February 2018, Roads and Maritime Services compulsorily acquired a parcel of land in Camperdown (**Land**). The registered owners of the Land were also the sole directors and shareholders of the appellant company. The appellant occupied the Land in accordance with a bare licence terminable at will by the owners. Offers of compensation were put forward to the appellant and its directors, pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). Both the appellant and its directors commenced separate proceedings that were heard together in the Land and Environment Court, seeking compensation. The primary

judge awarded $10 million compensation to the directors of the appellant, for the market value of the Land, legal costs and valuation fees. However, the primary judge dismissed the appellant's claim for loss attributable to disturbance, on the basis that it did not have a compensable interest in the Land, as its bare licence had no market value and was terminable at will by the registered owners.

On appeal, the appellant challenged the finding that it had no compensable interest, and submitted it had a "privilege over, or in connection with, the land", which was the primary issue for determination.

Decision:

The Court of Appeal held that the plaintiff was not entitled to compensation for losses attributable to disturbance, as it did not have a compensable interest in the acquired Land. It was found that the terms "interest in land" must be construed consistently within the statutory context, and must be a legally enforceable interest for the privilege to be divested, extinguished or diminished by the acquisition, which would only then be compensable. Given that the appellant's licence was terminable at will, the plaintiff did not obtain a legally enforceable interest. Accordingly, the appeal was dismissed with costs.

Zioukin v Lang

[2022] NSWSC 823

Coram: Basten AJ

Court: Supreme Court of New South Wales

Date: 21 June 2022

APPEALS – leave to appeal – appeal from Appeal Panel of NCAT – appeal on question of law – grounds – ground to be more than merely arguable – whether reasons adequate – whether plaintiff denied procedural fairness

CIVIL PROCEDURE – application by plaintiff to vacate hearing – late medical certificate – chronic illness – pro forma certificate – nature and history of proceedings – cost and inconvenience to respondent - whether proceedings futile

LEASES AND TENANCIES – residential tenancy agreement – holding over period – notice of termination without reasons – whether retaliatory notice – tenant evicted whether relief available in NCAT

Facts:

This judgment dealt with a late and informal application by the plaintiff to vacate the hearing of this application for leave to appeal. The plaintiff in these proceedings appealed to the Supreme Court following a decision of the Civil and Administrative Tribunal (**NCAT**) Appeal Panel. The NCAT proceedings related to a 12-month residential tenancy agreement, entered into between the plaintiff and the defendant, Sue Lang, in 2015.

Thereafter, the defendant served a termination notice on the plaintiff in order to obtain possession of the residential premises rented by him, which required vacation. The plaintiff failed to vacate the premises, following which the defendant filed an application seeking an order for possession. An order terminating the tenancy agreement was made, granting an order for possession in favour of the defendant.

The plaintiff appealed to the NCAT Appeal Panel on 22 grounds. The plaintiff claimed that his landlord wished to sell the property and had sought access for herself or her agent to show to

show prospective purchasers the property, without proper notice. The plaintiff's refusal to provide access was said to be the motivation for the service of the termination order. In refusing access, the plaintiff's case was that he was relying upon a right under the residential tenancy agreement. However, none of the plaintiff's grounds of appeal were made out, and as such, the Appeal Panel refused leave to appeal.

Decision:

Basten AJ rejected the plaintiff's application and dismissed the plaintiff's summons seeking leave to appeal from the decision of the NCAT Appeal Panel. The Court found that the plaintiff's consistent seeking of adjournment of these proceedings in relation to health problems imposed a significant burden on the respondent. Basten AJ held that there was no reasonably arguable case in any of the proposed grounds of appeal. In the absence of at least one ground with real prospects of success, rather than being merely arguable, the Court dismissed the plaintiff's application for vacation of the hearing date, as well as the plaintiff's summons, and ordered that the plaintiff pay the defendant's costs.

City Gym Sydney Pty Ltd v Saipan Holdings Pty Ltd

[2022] NSWSC 699

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 30 May 2022

LAND LAW – leases – obligation to make good – where roof of demised premises in state of disrepair and prone to leaking – where roof damaged by hailstorm – where lessor obliged to make good, including by rectifying roof pursuant to an insurance claim to be made by lessor - where lessee claims obligation to make good requires complete replacement of roof – where lessor claims obligation to make good may be discharged by works of lesser scope – held that obligation to make good requires complete replacement of roof – damages not an adequate remedy – held that declarations and orders should be made compelling replacement of roof

Facts:

These proceedings concerned a sublease of a gymnasium property in Darlinghurst (**Property**), whereby the plaintiff was the sublessee and the second defendant was the sublessor. The first defendant was the owner of the property, and acknowledged to the plaintiff that it was bound by the terms of the sublease. The parties were in dispute regarding the defendants' obligations to make good, repair and maintain and the premises, particularly relating to the roof of the building and its air-conditioning system.

The plaintiff alleged that the defendants have breached such obligations, causing it to suffer loss and damage. As such, the plaintiff claimed various forms of relief, including declaratory relief, orders requiring certain works to be undertaken, and damages. The defendants denied that the plaintiff was entitled to any of the relief it claimed, however, it seemed to have been accepted by the defendants that the make good obligation in respect of the roof had not been discharged. In this regard, however, the defendants contended that this was a result of breaches of the sublease by the plaintiff, in unreasonably withholding its consent to the carrying out of works, and in unreasonably denying access to the premises for that purpose.

Decision:

It was held that the language of the sublease obliged the lessor, within a reasonable time after commencement of occupation under the sublease, to rectify the leaking roof in accordance with an insurance claim to be made by the Lessor for the replacement of the entire roof. Darke J found that the nature of the contemplated insurance claim, being for a replacement of the entire roof, serves to give content to the ambit of the rectification obligation. As such, it was held that a reasonable businessperson in the position of the parties to the sublease would have understood the expression to mean rectification in accordance with a claim for the replacement of the entire storm damaged roof. As such, the plaintiff was successful in establishing that the obligation was one to effect a replacement of the entire roof within a reasonable time after the commencement of occupation, pursuant to the sublease.

Accordingly, the Court found it was appropriate to give declaratory relief to the plaintiff to that effect, and further, that damages was not an adequate remedy. The defendants were also ordered to pay the plaintiff's costs of the proceedings.

West Asset Holdings Pty Limited v Sara Investments (NSW) Pty Limited

[2022] NSWSC 674

Coram: Lindsay J

Court: Supreme Court of New South Wales

Date: 27 May 2022

CONTRACTS — Remedies — Specific performance

LAND LAW — Conveyancing — Options — Call options

Facts:

These proceedings concerned an application by the first plaintiff for specific performance of a contract for the purchase of a warehouse in Lidcombe (**Property**), from the first defendant, created upon the first plaintiff's exercise of a call option. The original agreement of the parties was that the purchase price payable by the first plaintiff was to be $7.5 million, however, the first plaintiff contended that such an arrangement was later changed to a purchase price of $7.385 million.

In October 2019, the parties executed and exchanged a Put and Call Option and a Licence Agreement, and the first plaintiff duly paid to the first defendant $375,000 as the first instalment of an option fee payable. The second instalment of the option fee was also paid, whereby the total option fee was $750,000 (equivalent to 10% of $7.5 million). The first defendant had the benefit of the option fee since payment and sought to retain it.

A Memorandum of Lease contemplated as between the second plaintiff and the first defendant was never formally exchanged. The parties proceeded upon the common assumption that the memorandum of lease could not be exchanged until the second defendant surrendered its lease. As events transpired, the second defendant was reluctant to surrender its lease because the defendants had experienced trouble in locating alternative premises. Thereafter, the first plaintiff duly exercised the call option granted to it in the Put and Call Option. The

defendants' disputed the correctness of the contract price of $7.385 million and insisted that the correct contract price was $7.5 million.

The first plaintiff commenced proceeding seeking an order for specific performance of the contract for purchase against the first defendant, and damages against the defendants. The defendants sought reciprocal relief, including a declaration that the first plaintiff had not validly exercised its call option, declarations that the first defendant was entitled to retain the option fees paid by the first plaintiff, and orders for rectification of the Put and Call Option, so as to provide that the Property was sold for $7.5 million rather than $7.385 million.

Decision:

Although the first defendant disputed the first plaintiff's claim to have duly exercised its call option, Lindsay J was satisfied that the option was duly exercised. Further, the Court was satisfied that the first plaintiff was at all material times ready, willing and able to complete its obligations under the contract, created upon exercise of its call option. Accordingly, first plaintiff was entitled to an order that the contract be specifically performed.

Darzi Group Pty Ltd v Nolde Pty Ltd (No 2)

[2022] NSWSC 643

Coram: Robb J

Court: Supreme Court of New South Wales

Date: 23 May 2022

LEASES AND TENANCIES — retail leases — retail shop lease — whether to make declaration that defendant lessor unable to take "prescribed action" as defined in Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) against plaintiff lessee in respect of any shortfall in rent plaintiff otherwise obliged to pay to defendant for period of two months

Facts:

A principal judgment was delivered in these proceedings dated 28 June 2021, whereby the parties were required to prepare draft short minutes of order to give effect to the reasons for judgment. The Court made orders which included a declaration that the plaintiff had validly exercised the option to renew the lease between the parties. Further, an order was made that the defendant specifically perform its agreement to grant a new lease.

To put the matter in its proper perspective, the dispute between the parties arose out of the fact that the lease required the plaintiff to pay monthly rent of $12,546.74, however, there was a shortfall of $20,846.41 in the months of May and June 2020. That amount was the subject of the continuing dispute.

The parties were unable to agree as to what orders should be made in relation to the plaintiff's failure to pay rent in the amount required by the lease, as a result of the restaurant being closed due to the COVID-19 pandemic. The plaintiff sought, by way of a further amended statement of claim, to revise its prayers for relief. Specifically, the plaintiff sought that the Court make an additional declaration, that the defendant is unable to take any prescribed action against the plaintiff in respect of the shortfall in rent that the plaintiff was otherwise obliged to pay to the defendant.

The defendant opposed that the Court make the additional declaration sought by the plaintiff, and submitted that the Court make orders dismissing the plaintiff's application with costs.

Decision:

Robb J held that there was a real prospect that, if the declaration sought by the plaintiff was not made, a relatively trivial issue between the parties would have been enlivened, which would likely lead to further legal disputation. Further, the Court noted that it found in favour of the plaintiff's pleaded allegation, that the defendant refused to renegotiate the rent under the lease. The defendant did not attempt before the end of the hearing and the delivery of the principal judgment to reverse its stance and to renegotiate with the plaintiff in good faith. As such, the Court found that the declaration sought by the plaintiff was appropriate, and made a declaration to that effect. Further, an order that the defendant pay the plaintiff's costs of the application was made.

Lenferna v Torane

[2022] NSWSC 635

Coram: Parker J

Court: Supreme Court of New South Wales

Date: 18 May 2022

REAL PROPERTY – specific performance – contract for the purchase of residential property – vendors refusing to complete – purchasers fail to pay all of the deposit on time – vendors decide to terminate but fail to communicate termination – purchasers pay balance of deposit – vendors refuse to complete – hardship – vendors not having alternative accommodation – specific performance ordered

Facts:

These proceedings concerned an application for specific performance of a contract for the purchase of land in Box Hill (**Property**). The plaintiffs were a married couple who entered into the purchase contract with the defendants, who were also a married couple. The defendants were occupying the Property, however, the plaintiffs sought to use it as their home.

The contract price was $1.5 million with a 10% deposit. The plaintiffs paid 0.25% of the purchase price, however, did not pay the balance of the deposit on the date as required by the contract. The conveyancer acting for the defendants agreed to give the plaintiffs an extension, whereby the plaintiffs then paid a further amount, bringing the amount paid up to 5% of the purchase price.

The decision by the defendants' conveyancer to give the plaintiffs an extension of time to pay the deposit was not authorised by the defendants themselves. Rather, the first defendant gave written instructions that the contract was terminated, which was never passed on to the plaintiffs. Following the balance of the deposit being paid by the plaintiffs, the defendants refused to complete the contract.

The defendants submitted that they had manifested an intention to terminate the contract on the basis that the plaintiffs' failure to pay the full deposit as required by the terms of the contract. However, it was accepted that unless this termination was communicated to the plaintiffs, it could not affect their entitlement to enforce the contract. Given that the conveyancer never communicated the defendants' instructions to the plaintiffs, there were no termination defence available. The defendants attempted to resist the specific performance application by arguing another three points, being that there was a lack of repudiation by the defendants, damages were an inadequate remedy, and hardship, all of which were not made out.

Decision:

Parker J held that the plaintiffs had a clear right to specific performance of the contract, and a declaration was made to the same effect.

Koprivnjak v Koprivnjak

[2022] NSWSC 586

Coram: Peden J

Court: Supreme Court of New South Wales

Date: 16 May 2022

EQUITY — Trusts and trustees — Resulting trusts — Purchase money trusts

EQUITY — Trusts and trustees — Resulting trusts — Presumption of advancement

EQUITY — Trusts and trustees — Constructive trusts — Common intention

Facts:

These proceedings concerned a property in Shoal Bay (**Property**), in which the defendant was the registered proprietor until December 2020. The defendant is the daughter of the plaintiff in these proceedings. Both parties claimed the net proceeds of sale, being $475,589.13.

In 2018, the plaintiff asked the defendant to transfer the Property into the names of the plaintiff and his then wife. The defendant did not do so, prompting the plaintiff to lodge a caveat to protect what he said was his interest in the Property. In 2019, following Family Court divorce proceedings, the parties agreed that the Property should be sold, and the money be held pending a determination as to the true owner. To enable the sale, the defendant issued a lapsing notice to remove the caveat.

The plaintiff commenced proceedings to obtain an order extending the caveat and preventing the sale, despite the agreement to sell. Those proceedings were subsequently dismissed, and the plaintiff was ordered to pay the defendant's costs on an indemnity basis. Thereafter, the plaintiff commenced these proceedings, claiming that the defendant held 25% of the Property on trust for the plaintiff, as he alleged contributed $75,000 toward the purchase price. He also claimed a constructive trust in relation to the remaining 75% of the Property, on the basis that

was the common understanding of the parties, and by reason of his contributions to the mortgage and property maintenance. Should no trust be found, the plaintiff's alternative case was that he is entitled to enforce the covenants in the mortgage and have $75,000 plus interest repaid, together with a sum of money for the improvements that he made to the Property.

The defendant resisted the plaintiff's claim primarily on the bases that there was no intention that the Property be held on trust, and instead, the parties are bound to the mortgage. Further, the defendant submitted that the plaintiff was not entitled to any sum for improvements to the property.

Decision:

The Court found that there was no documentary record or other evidence in which the plaintiff told the defendant she would be holding the property on trust for the plaintiff. As such, the plaintiff's case failed.

Misthold Pty Ltd v NSW Historic Sites and Railway Heritage Company Pty Ltd (No 2)

[2022] NSWSC 561

Coram: Payne JA

Court: Supreme Court of New South Wales

Date: 11 May 2022

LEASES AND TENANCIES — Default and termination — Right to possession — whether plaintiff entitled to possession of land — where defendant had leased land pursuant to leases which were surrendered or expired — where plaintiff had issued notices to quit

CIVIL PROCEDURE — Parties — Joinder — joinder of any occupier of land the subject of claim for possession — opportunity to provide evidence and submissions as to relief in relation to the land

CONSUMER LAW — Misleading or deceptive conduct — Representations — whether pleaded representations were made — whether pleaded representations were misleading or deceptive — where pleaded representations either were not made or, if made, were not misleading or deceptive

CONSUMER LAW — Unconscionable conduct — Unconscionable conduct within the meaning of the unwritten law — whether defendant / cross-claimant suffered from special disadvantage — no special disadvantage proved

CONTRACTS — Express terms — Pre-contractual statements — Representations — whether pleaded representations made — where the pleaded representations either were not made or, if made, were reflected in the contract executed by the parties

CONTRACTS — Formation — Agreement — Uncertainty and incompleteness — where arrangement negotiated by parties was subject to agreement and omitted essential matters — no contract in terms pleaded by cross-claimant for reason of incompleteness

CONTRACTS — Remedies — Damages — Loss or damage — whether cross-claimant suffered compensable loss or damage — where cross-claimant alleges to have suffered loss through a “fire sale” of railway items below market value and loss of option to purchase land — loss not proved
CONTRACTS — Remedies — Specific performance — where orders sought by cross-claimant would require continued superintendence by the Court — where specific performance of alleged agreement is contingent on matters dependent on the sole discretion of the cross-claimant — order for specific performance refused

EQUITY — Unconscionable conduct — Special disability or disadvantage — whether defendant / cross-claimant suffered from special disadvantage — where defendant / cross-claimant did not obtain independent financial or legal advice where such advice was available to it — whether threat by plaintiff / cross-defendant to exercise contractual right under lease created a special disadvantage — special disadvantage not proved

ESTOPPEL — Estoppel by convention — Mutual assumption — where parties undertook acts in performance of an executed agreement and conducted their affairs on the basis that the

agreement was binding — defendant / cross-claimant estopped from denying that the agreement was binding

ESTOPPEL — Promissory estoppel — whether cross-defendant estopped from denying that it would do certain acts in exchange for the cross-claimant surrendering its rights under a lease — where pleaded representations were not proved and insufficiently clear to support estoppel — cross-claimant did not act or refrain from acting on basis of belief induced by cross-defendant's representations — estoppel not made out

Facts:

These proceedings concerned an application by the plaintiff for the possession of land in North Rothbury (**Land**), whereby the Land was being occupied by the defendant. The plaintiff's claim was that the defendant failed to comply with the plaintiff's demands that the defendant deliver possession of the land to the plaintiff.

The defendant resisted the claim for possession by reference to alleged unconscionable conduct on the part of the plaintiff. The defendant, by way of a cross-claim, also sought specific performance of an agreement it alleged to have reached with the plaintiff relating to the establishment of a railway museum on the Land. The defendant also sought a declaration that a Deed of Agreement for Surrender of Leases (**Deed**) was voidable, such that the parties were discharged from further performance under the Deed, and that two leases between the parties remained on foot. The defendant also claimed equitable damages, as well as damages under the Australian Consumer Law (**ACL**). In the alternative, the defendant sought damages, a declaration that the plaintiff was estopped from denying that the plaintiff would do certain things in relation to establishing the railway museum, or equitable compensation.

In 2007, the parties entered into a long-term lease for the occupation of the Land, that included access to the main northern railway line running from Sydney. The defendant intended on curating and operating a train museum on the Land. In 2012, the parties commenced negotiations in relation to alternative commercial arrangements for the continued occupation of the Land. The most favourable scenario was said to be the plaintiff buying out the remainder

of the lease, and the defendant would sell or relocate its train museum. Thereafter, the Deed was executed.

The defendant's claim for unconscionable conduct was that the plaintiff was precluded from relying upon the terms of the Deed, because to do so would amount to unfair pressure, that would force the defendant to surrender its contractual rights and nullify its option to purchase the Land.

Decision:

Payne JA was not persuaded that there was any unconscionable conduct by the plaintiff in pointing out that it proposed to exercise a contractual right it had been granted under the lease. In this regard, the plaintiff was entitled that if the Deed was not signed, the plaintiff proposed to issue a relocation notice, as it was entitled to do so under the lease. As such, the defendant's submissions was rejected that it would be unconscionable for the plaintiff to rely upon the terms of the deed. Further, the Court was not satisfied that any of the submissions raised by the defendant by way of its cross-claim were made out.

Accordingly, the plaintiff was entitled to an order for possession of the Land, and judgment was entered in favour of the plaintiff. Costs were also awarded in favour of the plaintiff.

ASIL Foundation (Lending) Pty Ltd v Blue Mountains Development Pty Ltd

[2022] NSWSC 480

Coram: Black J

Court: Supreme Court of New South Wales

Date: 22 April 2022

LAND LAW — Conveyancing — Contract for sale — Deposit — where deposit is secured by way of mortgage over another property — where the contract for sale is terminated by the purchaser in response to the vendor's purported notice of termination despite failing to have provided a land tax certificate

MORTGAGES AND SECURITIES — Mortgages — Duties, rights and remedies of mortgagor — Repayment — whether the obligation to repay the mortgage is dependent on the deposit being owed under the contract

ESTOPPEL — Estoppel by convention — Mutual assumption — whether an acknowledgement contained in the mortgage of receipt of a sum establishes an estoppel by convention

Facts:

The plaintiff commenced these proceedings seeking a declaration that a mortgage between the plaintiff and the defendant, in respect of land at Allawah (**Allawah Property**), is valid and binding, as well as orders for judicial sale of the Allawah Property. Further, the plaintiff sought judgment against the defendant in the sum of $500,000, an order that the defendant give the plaintiff possession of the Allawah Property, as well as leave to issue a writ of possession for the Allawah Property.

By way of its cross-claim, the second cross-claimant and the defendant sought a declaration that the second cross-claimant validly terminated the contract for the purchase of land in Keiraville (**Keiraville Property**), relief in respect of a provision in the contract that the deposit of $500,000 be forfeited to the plaintiff if it validly terminated the contract, and a declaration that the mortgage secured no indebtedness to the plaintiff.

In 2019, the plaintiff as vendor and the second cross-claimant as purchaser entered into a contract for the sale and purchase of the Keiraville Property. it was common ground that the

second cross-claimant was not required to pay the deposit of $500,000 on entry into the contract. On the same date, the plaintiff and the second cross-claimant entered into a Heads of Agreement, and the defendant executed a mortgage over the Allawah Property.

The plaintiff claimed that the defendant's offer was that, if the plaintiff entered into the contract, the defendant would pay the plaintiff the sum of $500,000 as a debt due and payable. Further, the plaintiff claimed that such a payment would be secured by the mortgage, should the $500,000 not have been paid by a certain date. In response to this, the defendant pleaded that it never received any money from the plaintiff, the mortgage was granted to secure the payment of the $500,00 deposit payable under the contract and the contract was never completed and validly terminated by the second cross-claimant. In those circumstances, the defendant submitted that there was no debt owing by the defendant or second cross-claimant to the plaintiff. As such, the primary issue was whether the obligation to repay the mortgage was dependent on the deposit being owed under the contract.

Decision:

Black J did not accept the plaintiff's claim that an unconditional obligation to pay the $500,00 deposit arose under the mortgage. As such, it was held that there was no amount payable, and the plaintiff's claim was dismissed with costs.

G & G Mikhael Pty Ltd v Chalak (No 2)

[2022] NSWSC 529

Coram: Dhanji J

Court: Supreme Court of New South Wales

Date: 12 April 2022

LAND LAW – possession of land – notice of motion – stay sought pending hearing of appeal – summary judgment for plaintiff – no summary dismissal of cross-claim by defendant – whether the appeal has reasonable prospects of success – whether the balance of convenience favours the grant of a stay – personal circumstances – arguable case has been shown – stay granted

Facts:

The defendant was the applicant of a notice of motion, by which it sought that orders made by Dhanji J on 18 February 2022 be stayed pending the completion of the appeal process in another set of proceedings. In the alternative, the defendant sought that the orders made by Dhanji J be stayed for two months following this motion. The applicant is the defendant in substantive proceedings and also the applicant for leave to appeal in the Court of Appeal. The respondent to the motion is the plaintiff in the substantive proceedings and the respondent to the application for leave to appeal. The orders made on 18 February 2022 including an order for summary judgment and a writ for possession in favour of the plaintiff.

The defendant sought that the orders be stayed on the basis that he was residing in the property with his wife and three children, that the children attend local schools and they had no other source of accommodation. He further stated that he has been suffering from particular health difficulties and states that he is currently dependent on a Centrelink benefit.

Decision:

The Court considered the balance of convenience with respect to the personal circumstances of the defendant, noting that it was a significant matter for a family to have their home sold

from under them. As such, it was held that the balance of convenience did ultimately favour the granting of a stay.

Merl by her Tutor Helga Jenkins v Andrew Merl

[2022] NSWSC 434

Coram: Campbell J

Court: Supreme Court of New South Wales

Date: 12 April 2022

LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – residential tenancy agreements – validity of lease where property co-owned by joint tenants – lease agreement entered into by only one joint tenant

Facts:

These proceedings concerned the plaintiff claiming judgment for the possession of land, leave to enter a writ of possession and costs. This was heard by the Duty Judge on an urgent basis as a contract for the sale of the land with vacant possession had been exchanged. The defendant resisted the claim for possession, contending that he was in lawful occupation of the land under a residential tenancy agreement. The validity of such a lease was the substantial issue in these proceedings, in circumstances where the lease was only granted by one of a number of co-owners.

The plaintiff submitted that, where the validity of a residential tenancy agreement is the sole substantive issue, the expression contained in s 119 of the *Residential Tenancies Act 2010* (NSW) did not apply. In other words, the expression "a residential tenancy agreement" in s 119 was to be understood as meaning a valid residential tenancy agreement duly made according to law. In this regard, the plaintiff argued that a lease granted by one only of two joint tenants was not valid.

Decision:

The Court found that the contract was void as there was no intention by the parties to enter into legal relations. Further, the Court accepted the plaintiff's submissions that a joint tenancy

lease could only be validly granted by all the co-owners. Accordingly, the defendant was found to have no title justifying its possession of the property, and therefore, the plaintiff was entitled to an order for possession.

Hong v Gui

[2022] NSWSC 431

Coram: Black J

Court: Supreme Court of New South Wales

Date: 12 April 2022

TAXES AND DUTIES — Land tax — Conveyancing — Clearance certificate.

LAND LAW — Conveyancing — Contract for sale — Settlement requirements.

CONTRACTS — Termination — Repudiation of contract — where the vendor failed to provide a land tax certificate but sought completion — where the purchaser failed to respond to communications by the vendor to advance completion — where the vendor terminated the contract on the basis of the purchaser's repudiation — where the purchaser denies the vendor's right of termination and subsequently terminates the contract on the basis of the vendor's repudiation — whether purchaser or vendor repudiated the contract

Facts:

These proceedings concerned the plaintiff seeking a declaration that the first defendant was not entitled to terminate a contract for the sale of a property in Point Piper (**Property**). The plaintiff also sought that the first defendant's termination of the contract repudiated that contract, and further, that the plaintiff validly terminated the contract and is entitled to the return of a deposit paid to the second defendant. The plaintiff also sought an order that the first or second defendant pay her the amount of that deposit, together with interest.

By way of a cross-claim, the first defendant sought a declaration that he validly terminated the contract and that is was entitled to retain part of the deposit that was paid by the plaintiff. Further, the first defendant sought an order for payment of the balance of the deposit and interest on that sum. The plaintiff contended that she was unable to complete the purchase, as required by the first defendant's notice to complete, due to her lack of funds to do so. As such, the question before the Court was whether the first defendant's termination of the contract was valid.

Decision:

Black J found that the key factual element for determining this matter was the time in which the land tax certificate was provided. It was found that the first defendant's termination of the contract was not a repudiation of it that could be accepted by the plaintiff. As such, the first defendant had not repudiated the contract by his attempt to terminate it based on his misunderstanding of the position as to service of the land tax certificate. As such, the plaintiff did not validity terminate the contract. When the first defendant affirmed the contract, he properly terminated it, and as such, was entitled to receive the unpaid balance of the deposit. Therefore, the plaintiff's claim for relief was dismissed, and the first defendant succeeded in his cross-claim for the balance of the deposit and interest. The plaintiff was ordered to pay the costs of the proceedings.

Abdi v Abdi

[2022] NSWSC 423

Coram: Ward CJ in Eq

Court: Supreme Court of New South Wales

Date: 12 April 2022

EQUITY — Trusts and trustees — Resulting trusts — Presumption of advancement – Whether evidence establishes intention of the parties at the time the property was purchased – Whether evidence establishes contribution made towards the purchase of the property – Whether constructive trust arose on the same facts

Facts:

These proceedings concerned a dispute between members of the Abdi family in relation to the sale of a property in Croydon (**Property**), that was formerly the Abdi family home. The Court appointed Nabil Abdi as the tutor for the plaintiff for the purpose of bringing these proceedings against the first and second defendants. The plaintiff was diagnosed with dementia and lacked capacity to manage her own affairs.

In 1980, the Property was acquired by all three parties. The tutor, on behalf of the plaintiff, alleged that the second defendant did not contribute to the purchase price of the Property, and further, that the second defendant did not own a third of the Property. the first and second defendant denied such allegations, and argued that the second defendant contributed a sum toward the deposit. On that basis, it was argued that the second defendant owned one-third of the Property.

In 2012, the plaintiff executed an enduring power of attorney in favour of her sons, the tutor Nabil, and the second defendant. Shortly after the plaintiff and first defendant moved into a nursing home, the Property was sold. Both pension payments were paid into a joint account, until 2020, after which date only the plaintiff's pensions was paid into that account. The first defendant made substantial withdrawals from that account, prompting Nabil to propose to the

second defendant that the plaintiff's pension and share of the sale proceeds be paid into a separate account. The second defendant consented, as co-attorney, to the opening of a separate account. In these circumstances, the Court indicated that there was no need to formally appoint a manager in relation to the plaintiff's financial affairs.

Decision:

In respect of the issue as to the beneficial ownership of the Property, Ward CJ was not satisfied as to the amount of contribution paid by the second defendant to the purchase price. As such, the Court considered that neither the first or second defendant intended that the second defendant should have one-third legal unconditional interest in the Property. Rather, the Court found that the intention at the relevant time was that the Property was to be treated as the family home. Accordingly, the Court held that the second defendant held his interest in the Property on resulting trust for the plaintiff and first defendant equally. Further, the Court ordered that the first defendant pay Nabil's costs of the proceedings as tutor for the plaintiff.

Samuel v Daher; Daher v Samuel

[2022] NSWSC 421

Coram: Black J

Court: Supreme Court of New South Wales

Date: 4 April 2022

LAND LAW — Conveyancing — Contract for sale — Certificates and inspections — LAND LAW — Conveyancing — Contract for sale — Deposit — LAND LAW — Conveyancing — Contract for sale — Rescission — COSTS — Party/Party — Exceptions to general rule that costs follow the event — Offers of compromise/Calderbank offers — where contract for sale did not annex a swimming pool compliance certificate — whether s 52A(4) of the Conveyancing Act 1919 (NSW) avoids a special condition purporting to vary the requirement to annex a swimming pool certificate — whether the purchaser validly rescinded the contract — whether deposit should be returned to the purchaser — whether indemnity costs should be ordered where a Calderbank offer was made

Facts:

Two proceedings were heard together in this matter. In the first proceedings, Mr and Ms Samuel were the plaintiffs seeking a declaration that they validly rescinded a contract for sale of a property in Kingsgrove (**Property**). Mr and Ms Samuel also sought a declaration that a special condition of the contract, relating to a swimming pool. was void and of no effect, and further, an order that the deposit they paid to the second defendant, be repaid to them.

Mr and Ms Samuel rescinded the contract, shortly after the contract had been executed, on the basis that the contract did not annex a copy of the swimming pool compliance certificate, non-compliance certificate or occupation certificate, although the property had a completed swimming pool. The key issue in these proceedings is whether such a rescission was effective. Mr Daher did not oppose to the declarations sought by Mr and Ms Samuel.

In the second proceedings, Mr Daher was the plaintiff seeking declatory relief that the Mr and Ms Samuel (the defendants in these proceedings) had repudiated the contract, and for damages. However, such claims were no longer pressed, and the proceedings were dismissed by consent.

Decision:

In relation to the first proceedings, Black J was satisfied that, on the uncontested facts, it was appropriate for the declarations sought by Mr and Ms Samuel to be made. It was held that a failure to provide the certificate prior to settlement of the contract meant that a right to rescind the contract arose. As such, a declaration was made that the special condition relating to the swimming pool was void and of no effect. The deposit was also ordered to be released. Further, the Court ordered that that Mr Daher pay the costs of Mr and Ms Samuel, on an indemnity basis.

McWilliam v Hunter

[2022] NSWSC 342

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 28 March 2022

REAL PROPERTY – easements – unreasonable interference with an easement – where the plaintiffs seek declaratory and injunctive relief to restrain the defendants from building above right of carriageway – where proposed construction would impose a height limit of 2.8 metres over the right of carriageway – where height limit would preclude certain types of vehicles from using right of carriageway – held that the proposed interference with the right of carriageway was a real and substantial interference – held that the easement should not be modified under section 89(1) of the Conveyancing Act 1919 (NSW) to effect a height limitation – injunctive relief granted to prevent the defendants' proposed development

Facts:

These proceedings concerned a right of carriageway on adjoining property in Scotts Head, which burdened the defendants' land (**Lot A**) and benefited the plaintiffs' land (**Lot B**). The defendants were joint owners of Lot A, and the plaintiffs were the joint owners of Lot B. The easement provided the only existing means of vehicular access to Lot B.

The dispute between the parties arose in circumstances where the defendants proposed to undertake development on Lot A, involving the erection of a structure which would sit above the easement driveway, thereby restricting the height in which the easement could be used. The development consent, issued by the local council, imposed conditions which included that the structure allow a clearance height over the easement of 2.8 metres.

The plaintiffs sought a declaration that the proposed development would constitute an unlawful obstruction of the plaintiff's reasonable current and future use of the easement. Further, the plaintiffs sought an injunction to restrain the defendants from commencing the construction. The defendants resisted the plaintiffs' claims, and by way of a cross-claim, sought an order pursuant to s 89(1)(c) of the *Conveyancing Act 1919* (NSW) to modify the easement, such

that it be limited in height to 2.8 meters. The defendants submitted that the dimensions of the easement, being 3.05 wide, and the circumstances at the time Lot B was created (being a small single garage), should lead to the conclusion that only vehicles that would be accommodated by that single garage were contemplated for use of the easement. In this regard, the defendants contended that such a modification to the easement would not substantially injure the plaintiffs, as the proposed development would still allow the plaintiffs to access the garage on Lot B.

Decision:

Darke J held that the imposition of the 2.8m height limit, in accordance with the defendants' proposed development, would amount to a substantial interference with the reasonable use and enjoyment of the easement. This was concluded on the basis that it would reduce, to an appreciable extent, the range of vehicles that would be able to traverse the easement, including tall vehicles. It was held that such a reduction would significantly impede the way the easement might be reasonably enjoyed. Noting that the plaintiffs did not own any vehicles that would be precluded from using the easement, the Court's decision accounted for any future circumstances of the plaintiffs, or the future owners of Lot B, in choosing to make use of the land in that way. As such, an injunction restraining the defendants from proceeding with the development was issued, and declaratory relief was not appropriate in addition.

Mellos in his capacity as trustee of the bankrupt estate of Rui Yu v Jin Yu (No 2)

[2022] NSWSC 341

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 25 March 2022

LAND LAW - possession of land – where estate of registered proprietor sequestrated – claim for possession by bankruptcy trustee – where bankrupt has no standing to appear – where no defence demonstrated

Facts:

Prior to 2020, Mr Jin Yu (**defendant**) and Ms Pan were the registered proprietors as joint tenants of a property in Bondi Junction (**Property**). In 2021, the Federal Circuit Court of Australia made a sequestration order against the defendant and Ms Pan, whereby Mr Nick Mellos was appointed the sole trustee of both of the parties' bankrupt estates (**Trustee**). As a result of the bankruptcies, the shares of the bankrupts in the Property vested in the Trustee. The defendant has continued to reside in the Property, and the Trustee sought orders for possession of the Property.

In 2022, Davies J made orders in relation to another unit in the Property, which had previously been owned by Mr Rui Yu, a bankrupt. The defendant was also the ooccupier of this unit in the Property.

In these proceedings, the defendant sought further time to obtain money with a view to having his bankruptcy annulled and paying out the petitioning creditor. The evidence discloses that since bankruptcy proceedings were taken in the Federal Circuit Court in 2021, the defendant sought a number of adjournments to give time for a transfer of funds from China to avoid his estate being sequestrated. Subsequently, in this Court, adjournments were sought to enable the funds to be transferred from China, however, no such funds were forthcoming. Even if

such funds were obtained by the first defendant, the Court indicated that it would not provide an answer to the claim for possession.

Decision:

By reason of the fact that the defendant was bankrupt, the Court held that he did not have any right to appear in defending the present proceedings. As such, the defendant's defence to the claim for possession of the Property was struck out, and the Court entered judgment for possession.

Yang Bai v Watson Elite Pty Ltd

[2022] NSWSC 318

Coram: Darke J

Court: Supreme Court of New South Wales

Date: 23 March 2022

REAL PROPERTY – securities – rights of a subsequent encumbrancer as against a prior encumbrancer – rights to enforce rights and equities of mortgagor against mortgagee – where plaintiff held an equitable charge over the property – where defendant held a registered mortgage over the property – whether the principle that a subsequent mortgagee can enforce the mortgagor's rights or equities against a prior mortgagee applies in the case of an equitable charge and a registered mortgage – plaintiff held to have standing to enforce mortgagor's rights and equities against the defendant

MORTGAGES – equity of redemption – clogs on the equity of redemption – where mortgage contained an option for the mortgagee to purchase the mortgaged property following failure of mortgagor to repay – whether the option to purchase constituted a clog on the mortgagor's equity of redemption – whether the option to purchase was penal in nature – whether the option to purchase was unfair and unconscionable

Facts:

The plaintiff commenced these proceedings seeking relief against three defendants, arising from dealings concerning land in Thornleigh (**Land**). The Land was the subject of a residential development undertaken by the first defendant, involving a strata subdivision of the Land. The second defendant was a director of the first defendant.

In 2017, the plaintiff's wife entered into an "off the plan" contract with the first defendant to purchase a lot in the proposed strata plan. The deposit and remaining instalments were paid in accordance with the contract, and as such, the entire purchase price was paid.

Thereafter, the plaintiff's wife and the first defendant entered into a Deed of Rescission and Release (**Deed**), which provided for their contract to be rescinded in consideration of the first defendant and the plaintiff entering into a contract for sale on the same terms. The Deed contained a direction to the first defendant to apply to the new contract the deposit that had

already been paid under the initial contract. The plaintiff and the first defendant entered into the contract for sale on the same terms as the earlier contract.

In 2020, the first defendant entered into a loan agreement with the third defendant, and the first defendant also granted a mortgage to the third defendant in relation to a lot on the Land. However, the first defendant failed to repay the loan from the third defendant as required by the agreement. The third defendant then exercised the option to purchase, and took steps to transfer the lot to itself, which prompted the first defendant to lodge a caveat.

Once the caveat lapsed, the plaintiff lodged his own caveat against the title to the lot. The first defendant and the plaintiff entered into a Deed of Indemnity, whereby the first defendant agreed to indemnify the plaintiff in respect of the lodgement of his caveat. On the same day, the second defendant gave a warranty to the plaintiff that the first defendant would have sufficient funds to fulfill its loan obligations to the third defendant, and would cause that loan to be repaid in full. The third defendant, as the registered proprietor of the lot, caused a lapsing notice to be served in respect of the plaintiff's caveat. Ultimately, this prompted the plaintiff to commence these proceedings.

The lot was sold in 2021 to third parties for a price of $900,000. Following settlement of the contract, an amount of $104,326.33 was paid into Court, funds in which were the subject of the competing claims of the plaintiff and the third defendant.

The plaintiff served a Notice of Termination in respect of the contract for sale, stating that the first defendant had failed to comply with a Notice to Complete, and that the contract was thereby terminated for breach. Default judgment was entered in favour of the plaintiff against the first defendant in the sum of $1,111,999.50, which remained unsatisfied. The first defendant had since been placed into liquidation. As such, it remained for the Court to determine the plaintiff's claims against the second and third defendants.

The claim against the third defendant

The primary focus of this claim was upon the $104,326.33 that was paid into Court following the sale of the lot on the Land. Whilst the plaintiff accepted that the third defendant was entitled to recover all amounts properly due to it under its mortgage, the plaintiff contended that the third defendant was not otherwise entitled to the proceeds of the sale. The plaintiff claimed that he was entitled to such proceeds. The foundation of this claim was a contention that the option to purchase, contained in the third defendant's mortgage, was void as a clog on the equity of redemption. In the alternative, the plaintiff contended that the option to purchase was void because it was unfair and unconscionable. Further, the plaintiff contended that the registered proprietorship did not confer an indefeasible title upon the third defendant, and in this regard, sought to invoke an *in personam* claim against the third defendant rather than the fraud exception to indefeasibility.

The claim against the second defendant

The plaintiff's claim against the second defendant was for a breach of warranty, and that had the warranty been complied with, the mortgage to the third defendant would have been redeemed. As such, the plaintiff contended that the first defendant would have been able to complete its contract to sell the lot to the plaintiff. Further, the plaintiff alleged that he suffered loss by reason of the breach of warranty, in the amount $900,000, as the value of the property, less any recovery made from the third defendant.

Decision:

The claim against the third defendant

Darke J found that the option to purchase was not relevantly unfair and unconscionable. The third defendant became entitled to exercise the option, as the first defendant had not repaid all amounts payable under the loan agreement. It followed that the plaintiff's claim, that the option to purchase was void, or that there was a personal equity against the third defendant

which impeached its title as registered proprietor, were not made out. The Court found that the money paid into the Court be paid to the third defendant, and that the plaintiff pay the third defendant's costs of the proceedings.

The claim against the second defendant

Further, Darke J found that the plaintiff was entitled to succeed against the second defendant. The Court indicated that it was clear the second defendant provided the warranty, and that such warranty was given in connection with the Deed of Indemnity entered into between the plaintiff and first defendant. As such, it was held that the plaintiff's loss, by reason of the breach of warranty, was $900,000, and judgment was entered for the plaintiff against the second defendant in that amount, together with interest. Accordingly, the second defendant was ordered to pay the plaintiff's costs of the proceedings.

Westpac Banking Corporation v Vij

[2022] NSWSC 297

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 18 March 2022

LAND LAW – possession of land – where defendant is bankrupt – where no defence disclosed in defence filed – defence struck out

Facts:

The plaintiff commenced these proceedings seeking possession of four properties, on the basis of a default under loan agreements and mortgages given over the four properties in favour of the plaintiff. The defendant was the registered proprietor of all the properties. The defendant filed a defence, claiming, amongst other things, that he had attempted to sell one of the properties to pay the arrears, however did not disclose any defence to the claim made.

There were lengthy delays in these proceedings as a result of the repeated referral by the defendant of the matter to the Australian Financial Complaints Authority (**AFCA**). AFCA resolved the matter in the plaintiff's favour on more than one occasion. Since the matter had been referred to AFCA, the defendant had his estate sequestrated.

Decision:

Given that the plaintiff sought only possession of the properties, it did not appear that the defendant would have a right to appear to defend the proceedings by reason of his bankruptcy. As such, the defence was struck out, and it was ordered that, in the event that no further defence was filed, the plaintiff was entitled to move for default judgment.

Huang v The Owners Strata Plan 7632 t/as The Owners Strata Plan 7632

[2022] NSWSC 194

Coram: Rothman J

Court: Supreme Court of New South Wales

Date: 2 March 2022

APPEAL – NCAT – leave to appeal – principles – appeal on question of law, with leave – leave refused – no issue of principle or of general importance – no error of law

ADMINISTRATIVE LAW – jurisdiction of NCAT – strata titles – broad jurisdiction – importance of finality – alleged denial of procedural fairness – none disclosed

STATUTORY INTERPRETATION – Strata Schemes Management Act 2015 (NSW) – common property – alteration of definition of boundary between lots – common property on upper surface of floor, inner surface of wall and under surface of ceiling – cosmetic work still on common property – rights and obligations of owners corporation

Facts:

These proceedings concerned an appeal from a decision of the NSW Civil and Administrative Tribunal (**NCAT**) Appeal Panel. The plaintiffs were the owners of a lot in a strata plan, whilst the defendant was the Owners Corporation of the strata plan. The defendant's claim concerned renovations of two bathrooms in the plaintiffs' unit, which interfered with the common property of the defendant and was the case of a leak affecting other lots. NCAT's decision involved an order that the plaintiffs remove the unlawful common property works and pay the defendant's costs of the proceedings.

The Court first established that the appeal could only be heard in relation to a question of law, and as such, that it had no jurisdiction to hear the appeal on a question of fact, or review the merits of the decision. In those circumstances, the Court noted they could not engage with many of the grounds argued by the plaintiffs, which essentially did not adduce any evidence as to why the claim was wrongfully determined at first instance.

The plaintiffs appealed from the decision at first instance to the NCAT Appeal Panel on six grounds. The primary issue in the appeal was whether the renovations, being the tiles and

waterproofing, could be considered as common property. The Court held that the renovations undertaken by the plaintiffs were not merely cosmetic work, which was permitted to be completed without the approval of the defendant. It was found that, even if the tiling could be considered cosmetic work, it was still deemed as common property.

Decision:

Accordingly, the plaintiffs did not demonstrate that there was an error of law to be determined, and as such, leave to appeal was refused and the proceedings were dismissed. The plaintiffs were ordered to pay the defendant's costs of the proceedings.

Mellos in his capacity as trustee of the bankrupt estate of Rui Yu v Jin Yu

[2022] NSWSC 169

Coram: Davies J

Court: Supreme Court of New South Wales

Date: 25 February 2022

LAND LAW – possession of land – where registered proprietor is bankrupt – right of trustee to obtain possession

Facts:

Until March 2020, Mr Rui Yu was the registered proprietor of a property in Bondi Junction (**Property**). In the same month, the Federal Circuit Court of Australia made a sequestration order against Mr Yu, and the plaintiff was appointed the sole trustee of the bankrupt estate of the bankrupt. As such, the Property was vested in the plaintiff, subject to a registered mortgage to HSBC Bank, and thereafter, was recorded as the registered proprietor of the Property.

The Property was occupied by the defendant, Mr Jin Yu, who filed a defence, however, it did not contain any pleadings in any ordinarily accepted sense and did not disclose any defence to the claim made by the plaintiff.

Decision:

The Court was satisfied that there was no defence to the claim by the plaintiff, who was the registered proprietor of the Property. As such, the defence was struck out, and the plaintiff was entitled to possession of the Property.

Woolworths Group Ltd v Gazcorp Pty Ltd

[2022] NSWCA 19

Coram: Bathurst CJ, Bell P, Meagher JA

Court: New South Wales Court of Appeal

Date: 24 February 2022

CONTRACTS – termination – abandonment – agreement for lease executed in 2008 – period of years during which landlord did not perform works under the agreement – performance by landlord not insisted upon during this period – where certain rights under the agreement for lease expired during this period – where development consent allowing for project contemplated by agreement was due to lapse in February 2014 – where parties made no specific reference to agreement after April 2012 – whether agreement was abandoned

CONTRACTS – termination – frustration – agreement for lease – where landlord agreed to carry out works to construct shopping centre and to grant lease of part of shopping centre to tenant – development consent obtained – where parties contemplated incorporation of department store into shopping centre – where development application for incorporation of department store refused – whether agreement for lease was varied to incorporate plans for department store

CONTRACTS – termination – frustration – agreement for lease – landlord to perform works for construction of shopping centre development – where those works were authorised by and subject to a development consent obtained in 2008 – where parties operated under common assumption that landlord would be able to carry out works lawfully in accordance with development consent – neither party responsible under agreement for maintaining that state of affairs – development consent lapsed in 2014 prior to commencement of works – works subsequently unable to be performed lawfully – whether agreement frustrated – whether lapse of development consent resulted in a "radical difference" in circumstances of performance – whether landlord responsible for lapse of development consent

LEASES AND TENANCIES – default and termination – abandonment – agreement for lease executed in 2008 – period of years during which landlord did not perform works under the agreement – where performance not insisted upon – where certain rights under the agreement expired during this period – where development consent allowing for project contemplated by agreement was due to lapse in February 2014 – where parties made no specific reference to agreement after April 2012 – whether agreement was abandoned – whether by conduct and correspondence parties mutually intended that contract was not to be performed

Facts:

These proceedings concerned an appeal brought by the appellant from orders made in the Supreme Court declaring that an Agreement for Lease (AFL) between the appellant and respondent was no longer on foot. The respondent was a property development company.

In 2008, the parties entered into the AFL in relation to a proposed commercial development in Green Square, Sydney. The respondent agreed to build the development, which included a premises for a supermarket on the lower ground level. The appellant agreed to enter into a lease of such premises when construction was complete. Development consent had already been obtained in relation to the proposed development.

Thereafter, the parties discussed the prospect of including a Big W store in the Green Square development. A fresh development application was lodged, which included the Big W store in the building plans. Such discussions resulting in delays to the construction, and the respondent requested that the appellant agree to an extension to the completion deadline. The appellant agreed to extend various building deadlines, subject to the respondent agreeing a number of other variations of the AFL. One of such variations included to change the definition of the works to be completed by the respondent under the AFL, to refer to the new building plans between the parties. A dispute arose as to the legal effect of such correspondence.

The development application was refused by the Land and Environment Court of New South Wales, whilst the development consent remained in place. The respondent lodged a further development application, however, the plans within the application were significantly different from those originally contemplated by the parties, pursuant to the AFL. Such alterations included the location and the configuration of the proposed plans. Although this application was approved, the development consent eventually expired, without any building works having commenced at that stage.

In 2016, the parties discussed a new arrangement for the lease in relation to the development, whereby a dispute arose between the parties as to whether or not the AFL remained on foot. The respondent contended that the AFL had been abandoned, and as such, that there was no existing agreement between the parties. The appellant asserted that the AFL remained in force.

First Instance:

The respondent commenced proceeding seeking multiple declarations, including a declaration that the AFL had been terminated and was no longer in force. The appellant lodged a cross-claim seeking a declaration to the opposite effect. The primary judge found that the AFL had been varied by the parties, and as a result it was frustrated when the initial development application was refused by the Land and Environment Court. As such, it was held that the respondent was not able to lawfully carry out the works specified in the AFL, and the primary judge made a declaration that the AFL was no longer on foot. Alternative findings were also made.

Decision on appeal:

The appellant sought to appeal the decision of the primary judge, and the three key issues on appeal included whether the AFL was either varied, abandoned or frustrated. On the first issue, of whether the AFL was varied, the Court of Appeal upheld the finding of the primary judge, and found that the AFL had been varied when the appellant agreed to extend the building deadlines, subject to the respondent agreeing to the variations of the AFL, including the Big W store. As such, the varied AFL was not void for uncertainty. Further, the Court held that, as a result of the Land and Environment Court's refusal of the development application, it was accepted by both parties that the respondent's ability to perform the varied AFL was frustrated. Accordingly, it was upheld that the AFL was discharged by frustration.

G & G Mikhael Pty Ltd v Chalak

[2022] NSWSC 191

Coram: Dhanji J

Court: Supreme Court of New South Wales

Date: 18 February 2022

LAND LAW – possession of land – notice of motion - summary judgment sought in relation to statement of claim - summary dismissal sought with respect to cross-claim – orders sought made – costs

Facts:

These proceedings concerned the plaintiff seeking summary judgment in relation to its statement of claim, as well as summary dismissal with respect to a cross-claim filed by the defendant. The substantive proceedings sought orders for possession of land in Chipping Norton (Property), leave to issue a writ of possession, judgment for the plaintiff against the defendant in the amount of $1,712,971, and costs. The motion for summary judgment seeks all such relief claimed and that the cross-claim be dismissed.

The background of the dispute was, according to the plaintiff's evidence, the defendant approached him with a proposal, indicating that he had obtained the Property. Further, it is alleged that the defendant had obtained development approval to demolish the existing dwelling and build three properties, being a one-bedroom townhouse, a two-bedroom townhouse, and a double storey four-bedroom house. Ultimately, the parties reached an agreement with respect to a loan, whereby the defendant obtained a $700,000 loan from the plaintiff, with an interest rate of 7%. The defendant mortgaged the Property as security for the loan, and the mortgage had the result that, in the event of default under the loan, the plaintiff can take possession of the Property and obtain judgment in the amount owed to the plaintiff.

Accordingly, the five key issues within the application for summary judgment included whether there was an enforceable mortgage in place, whether the defendant was in default, the relief available, the amount of principal owing, and the amount of interest owing.

Decision:

Dhanji J held that there was a mortgage in place and that the mortgage was enforceable. In those circumstances, the Court found that there was no reason why the plaintiff, given the absence of any real dispute, should not have judgment in its favour for possession in accordance with the terms of the mortgage, together with judgment and interest. In relation to the second issue, the Court held it was beyond contest that the defendant was in default under the mortgage. In response to the third issue, Dhanji J found that the plaintiff was entitled to the relief sought, being a total of $1,033,064 in relation to the fourth issue, and 7% interest, in relation to the fifth issue.

Makowska v St George Community Housing Ltd

[2022] NSWCA 5

Coram: Meagher JA, Payne JA, N Adams J

Court: New South Wales Court of Appeal

Date: 7 February 2022

ADMINISTRATIVE LAW — judicial review — requirement to demonstrate jurisdictional error or error of law on the face of the record — no error demonstrated

ADMINISTRATIVE LAW — remedies — discretionary factors — where statutory right of appeal not availed of — absence of satisfactory explanation — avoidance of need to obtain leave to appeal — whether relief should be refused on discretionary grounds

LEASES AND TENANCIES — concurrent lease — relationship between concurrent lessee and tenant under current lease — assumption of obligations to tenant by concurrent lessee

Facts:

The applicant was the tenant of premises operated by the first respondent. The first respondent became the landlord of the applicant's unit when it entered into a concurrent lease of the premises with the former landlord of the premises, the Land and Housing Corporation (**LAHC**).

In 2018, the applicant commenced proceedings against the LAHC in the New South Wales Civil and Administrative Tribunal (**NCAT**), seeking compensation for alleged breaches of the *Residential Tenancies Act 2010* (NSW) (**the Act**). Those proceedings concluded following the entry of consent orders, requiring the LAHC to comply with s 50(3) of the Act, amongst other things.

Thereafter, the applicant brought two further sets of proceedings against the LAHC, on the basis of alleged failures by the LAHC to comply with the consent orders. Both proceedings were dismissed, however, it was found that the second proceedings was dismissed on an incorrect basis; that the same issues arose as the first set of proceedings, and as such, did

not account for alleged incidents on different dates. Subsequently, the applicant successfully appealed to the NCAT Appeal Panel against the dismissal of the second proceeding, and the matter was remitted to NCAT for determination.

In 2019, NCAT made orders removing the LAHC as the respondent, and adding St George Community Housing Ltd in its place. As a result of an internal administrative error, the respondent failed to attend the hearing of the remitted matter, and orders for compensation were entered in its absence. Thereafter, the application sought to register the compensation order as a judgment. However, in response to an application filed by the respondent, NCAT set aside the compensation order, and the applicant was unsuccessful in her appeal against NCAT's decision.

NCAT refused an application by the application to re-join the LAHC as a respondent in the proceedings, however, the NCAT Appeal Panel upheld the applicant's subsequent appeal against NCAT regarding the refusal to re-join the LAHC. On the same date, the Appeal Panel affirmed NCAT's findings that the respondent was not liable to pay compensation to the applicant.

Court of Appeal Decision:

In 2021, the application sought judicial review in the Supreme Court in relation to the Appeal Panel's decision. Subsequent orders were made, transferring the matter to the Court of Appeal. The issue before the Court was whether the applicant had demonstrated any jurisdictional error or error of law in relation to the Appeal Panel's decision, in which it was found that the applicant had failed to establish any such error. Accordingly, the application for judicial review was dismissed.