

REAL PROPERTY UPDATE SEMINAR PAPER

To: Legalwise Seminars

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A. CAVEATS

Cui v Salas-Photiadis [2024] NSWSC 1280

Facts

1. On 12 April 2024, the plaintiff entered into a contract to purchase a home on Wentworth Avenue, Blakehurst (**Property**) from the second defendant.
2. In order to complete the purchase, the plaintiff borrowed funds from Westpac who agreed to lend on the basis it was granted a mortgage over the Property. The second defendant borrowed money from the first defendant pursuant to a loan agreement and granted an unregistered mortgage to the first defendant.
3. On 20 May 2024, the first defendant lodged a caveat against the Property. That caveat identified the first defendant's interest in the Property as a "charge" granted under a loan agreement. The charge was a reference to an unregistered mortgage that secured a loan from the first defendant to the second defendant.
4. No participant in the PEXA workspace noticed that the first defendant's caveat had been lodged. The parties proceeded towards settlement. On the day of settlement all of the usual settlement steps occurred. However, the following day, Westpac received a requisition from Land Registry Services informing them that the transfer and mortgage could not be registered because of the first defendant's caveat.
5. The plaintiff commenced proceedings seeking an order under s 74MA of the *Real Property Act* 1900 (NSW) that the caveat be withdrawn by the first defendant.
6. The principal issue before Hmelnitsky J was whether the caveat had "substance" within the meaning of s74MA of the *Real Property Act*.

Does the caveat have substance?

7. The plaintiff submitted that the caveat had no substance because it was invalid for two reasons.
8. The *first* reason was said to be the failure to sufficiently specify the nature of the equitable estate or interest claimed by the first defendant.



9. The *second* concerned the effect of the *Home Building Act* 1989 (NSW).

Does the caveat sufficiently specify the first defendant's interest?

10. Hmelnitsky J commenced with section 74F(5)(b)(v) of the *Real Property Act* which requires that a caveat must, relevantly, specify: ¹

“the prescribed particulars of the legal or equitable estate or interest, or the right arising out of a restrictive covenant, to which the caveator claims to be entitled.”

Clause 7 of the *Real Property Regulation* 2019 (NSW)

11. Hmelnitsky J had regard to the requirement in clause 7 of the *Real Property Regulation* 2019 (NSW) which provides that a caveat lodged under s 74F of the *Real Property Act* “*must specify the particulars set out in Schedule 2 in relation to the estate or interest to which a caveator claims to be entitled*”. ²

The particulars in Schedule 2

12. Hmelnitsky J noted that:³

a. Item 1 in Schedule 2 requires that the caveat must specify:

“*Particulars of the nature of the estate or interest in land claimed by the caveator*”.

b. Item 4 of Schedule 2 requires a caveator who claims as “*mortgagee, chargee or covenant chargee*” to include a statement of the amount of the debt charged on the land if readily ascertainable.

c. Item 10 of Schedule 2 states that a caveat need not specify whether the estate claimed is legal or equitable, nor how the estate ranks in priority to other claims.

¹ Cui v Salas-Photiadis [2024] NSWSC 1280 at [28].

² Ibid at [29].

³ Ibid at [29], [30].



Plaintiff's argument regarding misdescription of caveatable interest

13. The caveatable interest specified in the caveat was that of a “charge”. The plaintiff contended that the first defendant’s real interest was that of an equitable mortgage and, as such, not within the expression “Charge” as defined in the *Real Property Act*.⁴

Decision of Hmelnitsky J on the first issue

14. Hmelnitsky J rejected the plaintiff’s argument on the basis that it was not inaccurate to refer to a “Charge” because an equitable charge may sometimes take the form of an equitable mortgage.⁵ His Honour observed that this was not an error of misdescription such as simply specifying in a caveat that the interest is no more than an “equitable interest”.⁶
15. His Honour held that the reference to a “Charge” in the caveat was to be understood by reference to the interest created by the loan agreement and not by reference to the definition of “Charge” as defined in the *Real Property Act*.⁷

Is the caveat invalid by reason of the Home Building Act?

16. The plaintiff argued that the loan agreement attracted the operation of s 7D of the *Home Building Act* because it was an agreement which, in substance, purported to give a person a legal estate in land to secure the performance of (i.e. payments under) a residential building contract.⁸
17. Section 7D of the *Home Building Act* provides that:

Interests in land under contract

- (1) *A contract does not give the holder of a contractor licence or any other person a legal or equitable estate or interest in any land, and a provision in a contract or other agreement is void to the extent that it purports to create such an estate or interest.*

⁴ Cui v Salas-Photiadis [2024] NSWSC 1280 at [31].

⁵ Ibid at [33]; an equitable charge may take the form of either an equitable mortgage or of an equitable charge not by way of mortgage: Ibid at [34].

⁶ Ibid at [35].

⁷ Ibid at [38].

⁸ Ibid at [40].



- (2) Accordingly, the holder of a contractor licence or any other person may not lodge a caveat under the Real Property.

Decision of Hmelnitsky J on the second issue

18. Hmelnitsky J held that “an agreement which purports to grant security for the payment of the consideration payable under a contract to do residential building work is an “other agreement” within the meaning of s7D of the Home Building Act.”⁹
19. In other words, an agreement (or deed) which governed a party’s obligations to make payments under a construction contract was sufficiently broad to capture fall within the meaning of a contract “or other agreement” within the language of section 7D of the *Home Building Act*. His Honour reached this conclusion having regard to s 7D read with s 6 as a whole and in the light of the overall statutory purpose as revealed by the language of the *Home Building Act* as a whole.¹⁰
20. Consequently, s 7D operates to make the agreement (whether in the form of a deed or otherwise) unenforceable to the extent it purports to secure the payment for residential building work.¹¹

Is the caveat invalid by reason of s 7D?

21. Hmelnitsky J held that the loan agreement and mortgage created a valid and enforceable equitable mortgage in favour of the defendant to secure the repayment of loans other than the amounts due and payable under the construction. However, this did not mean that the caveat itself was invalid. His Honour held that the equitable mortgage (or charge) secures only part of the indebtedness under the Loan Agreement.
22. However, Hmelnitsky J held that the description in the caveat of the first defendant’s purported equitable estate or interest in the Property remained correct (or sufficiently correct).¹² Accordingly, the caveat was not invalid.

⁹ Cui v Salas-Photiadis [2024] NSWSC 1280 at [47].

¹⁰ Ibid at [47].

¹¹ Ibid at [49].

¹² Ibid at [54].



Geneville Constructions Pty Ltd v Odisho-Benjamin [2024] NSWSC 290

Facts

23. In 2016, Geneville Constructions Pty Limited (**Builder**) carried out residential building work pursuant to a building contract for the Benjamins (**Owners**) at a residential property at Carlingford. The building contract contained a clause 31 which gave the builder an entitlement to a charge over the Carlingford property to secure payment of the amount ordered by the NSW Civil and Administrative Tribunal.
24. A dispute ensued between the Owners and the Builder. In proceedings before the Tribunal, the Owners were ordered to pay \$137,000 as a judgment debt.
25. In 2021, the Builder lodged a caveat over the Owner's property to secure the judgment debt. The Builder claimed a caveatable interest described simply as "fee simple".
26. A lapsing notice was served, and the Builder applied to extend the caveat pursuant to s74K of the *Real Property Act*. The sole issue raised on the application for the extension of the caveat was the form of the caveat.

Description of the caveatable interest

27. Schedule 1 in the form described the estate or interest claimed by the caveator as "fee simple". The space to identify the instrument by virtue of which the estate or interest is claimed was left blank.
28. However, the facts by virtue of which the estate or interest is claimed were set out in an attachment which made clear that the interest claimed was a charge in accordance with cl 31 of the building contract, not ownership in fee simple.
29. The Owner contended that the interest claimed in the caveat was not correctly described and the Builder contended that when the caveat was read as a whole, it was clear that the Builder was claiming a charge in accordance with clause 31 of the building contract, not ownership in fee simple.¹³

¹³ Geneville Constructions Pty Ltd v Odisho-Benjamin [2024] NSWSC 290 at [20].

Decision of Parker J

30. Parker J emphasized the importance of complying with the requirements of Regulation 1 of the *Real Property Regulation* 2019.¹⁴ Regulation 1 which is found in Schedule 2, prescribes the particulars to be specified in caveats of the type before the Court and it provides:

“Particulars of the nature of the estate or interest in land claimed by the caveator.”

31. His Honour considered that it was fatal to the Builder’s application to extend the caveat that the Builder’s *“claimed interest identifies a completely different interest from that which it actually has”*.¹⁵

32. Accordingly, the application to extend the caveat was dismissed.

¹⁴ *Geneville Constructions Pty Ltd v Odisho-Benjamin* [2024] NSWSC 290 at [29].

¹⁵ *Ibid* at [29].

B. COMMERCIAL LEASES

United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd [2024] NSWCA 97

Facts

33. On 1 July 2016, the lessee entered into a lease to operate a service station on the Pacific Highway at North Arm Cove. On 31 May 2018, the respondent, Coastal Service Centres Pty Ltd (**Lessor**) entered into a contract to buy the property, subject to various leases, including the lease to the lessee.
34. On 31 July 2018, a fire destroyed the buildings, but not the fuel pumps and tanks. Following the fire and further negotiations, the sale settled on 20 June 2019.
35. Following the fire, the lessee briefly halted trading before resuming business in December 2018 using demountable buildings.
36. Pursuant to clause 8.2.3 of the lease, the lessor was entitled to serve on the lessee a notice if satisfied that the fire damage made repairs “impracticable or undesirable”, with the effect that the lessor could then terminate the lease on 14 days’ notice. On 18 January 2022, the lessor served a clause 8.2.3 notice of termination.
37. The lessor commenced proceedings for rent recovery and by a cross-claim the lessee challenged the validity of the termination notice and thus the entitlement of the lessor to terminate the lease.

Decision at first instance

38. Peden J dismissed the lessee’s cross-claim challenging the validity of the termination notice.

Issues decided on appeal

39. The issues decided on appeal were whether the clause 8.2.3 notice was served by the lessor: (i) within a reasonable time; (ii) acting reasonably, and (iii) acting in good faith.



Decision of the Court - (Basten AJA, White and Harrison JJA agreeing) dismissing the appeal

whether the clause 8.2.3 notice was served by the lessor within a reasonable time

40. There was no dispute that the clause 8.2.3 notice needed to be served within a reasonable time. However, it was disputed whether a reasonable period ran from the event causing damage to the property (as contended by lessee) or from the date that the lessor formed the opinion triggering the entitlement to serve the notice (as contended by the lessor).¹⁶
41. Basten AJA accepted the lessee's contention that the lessor had to form a view about whether the damage made repairs "impracticable or undesirable" and also give notice within a reasonable time after the occurrence of the damage.¹⁷

whether the lessor acted within a reasonable time in assessing the practicability of rebuilding the premises

42. Basten AJA rejected the lessee's contention that the lessor unreasonably delayed in deciding whether to issue the clause 8.23 notice of termination. His Honour accepted that it was not until the lessor knew the abated rent that it was able to determine the additional revenue it would earn if it rebuilt the leased premises. Once it knew its legal entitlement in that respect, the lessor had acted promptly to assess the situation and give notice to the lessee once it determined that rebuilding was not practicable or desirable.¹⁸
43. Basten AJA held that the focus must be on reaching a state of mind; not merely considering the issues.¹⁹ In determining reasonableness, the terms of cl 8.2.3 did not invoke a standard of objective reasonableness, but rather the exercise of a power in good faith based upon the subjective belief of the lessor.²⁰

¹⁶ United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd [2024] NSWCA 97 at [36].

¹⁷ Ibid at [40].

¹⁸ Ibid at [42].

¹⁹ Ibid at [37], [45]-[48].

²⁰ Ibid at [56], [102]-[106].



44. Basten AJA held that if a reasonableness standard were to be applied, it was satisfied.²¹

whether the clause 8.2.3 notice was served by the lessor acting in good faith

45. Basten AJA held that the lessor was not required to take the lessee's interests into account when issuing the clause 8.2.3 notice.²² Nor was the lessor required to engage in an analysis of building costs and rental income that utilised the best information in hindsight but rather to conduct an analysis that was rational and genuine at the time of consideration.²³
46. Basten AJA held that the lessee failed to (i) provide any expert evidence regarding building estimates, (ii) challenge the respondent's own experience and expertise in the field and (iii) challenge the credit findings made by the trial judge about the respondent. Accordingly, the genuineness of the respondent's analysis could not be overturned.²⁴

²¹ United Petroleum Pty Ltd v Coastal Service Centres Pty Ltd [2024] NSWCA 97 at 113]-[116], [147], [154].

²² Ibid at [102], [104], [111].

²³ Ibid at [105], [127]-[128], [144].

²⁴ Ibid at [129].

Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024]

VSCA 46

Facts

47. The lessor owned a three-level commercial building in Fitzroy, Melbourne. The applicant, lessee leased the middle level of the Building (**Premises**) for use as an office.
48. In January 2020, the lessee put the lessor on notice that there may be structural issues with the Building and, in March 2020, provided the lessor with a consulting engineer's report which recommended further investigations by a structural engineer.
49. In November 2020, the lessor obtained its own report from the same consulting engineer, who again recommended further investigations by a structural engineer. The lessor did not undertake any investigations in response to either report.
50. The lessee contended that because of the lessor's inaction concerning the potential structural issue, the lessee breached:²⁵
 - a. the obligation in cl 14.4(a) of the Lease to 'maintain the Building in a structurally sound condition (**maintenance covenant**), which the lessee contended included an obligation on the lessor to carry out investigations to confirm whether the Building was structurally sound, having been put on notice of a potential structural issue; and
 - b. the obligation in cl 14.1 not to interrupt the lessee's quiet enjoyment of the Premises during the term (**quiet enjoyment covenant**). The lessee contended a breach arose by the uncertainty as to whether or not the Building was structurally sound, which was caused by the lessor's failure to carry out the required investigations.
51. The lessee asserted these alleged breaches constituted a repudiation of the Lease and evincing the lessor's unwillingness to perform the maintenance covenant in order to terminate the Lease. The lessee purported to accept the lessor's repudiation on 3

²⁵ Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024] VSCA 46 at [2].



March 2021. As a result, the lessee vacated the Premises at about that time and ceased paying rent.

52. The lessor denied the alleged breaches and asserted that, by purporting to terminate the Lease, the lessee had itself repudiated the Lease. On 18 March 2021, the lessee purported to accept that repudiation.
53. In May 2021, the lessee commissioned a structural engineer to inspect the Premises. In April 2022, the structural engineer provided an expert report which concluded that there were in fact no structural issues of the kind complained of by the lessee.
54. The lessor sued in the County Court claiming damages for lost rent. The lessee filed a defence and counterclaim relying on the alleged breaches as establishing the lessor's repudiation and claiming damages, including for relocation costs and an amount it had drawn down from a bank guarantee following termination of the Lease. The lessee also claimed restitution of rent paid during the period it alleged it could not occupy the Premises on the basis that there had been a total failure of consideration.

Decision at first instance

55. The primary judge allowed the lessor's claim and awarded it damages of \$345,521.33 and dismissed the lessee's counterclaim.

Issues decided on appeal

56. Ground 1 of the appeal involved the determination of two issues:²⁶
 - a. whether the obligation in cl 14.4 of the lease to "maintain the building in a structurally sound condition" required the lessor, as at 3 March 2021, to carry out investigations to confirm that the building was in a structurally sound condition.
 - b. whether the lessee validly terminated the lease on the basis of the lessor's breach of the obligation to "maintain the building in a structurally sound condition".

²⁶ Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024] VSCA 46 at [61].



Decision of the Court - (Walker, Lyons and Whelan JJA allowing ground 1 of the appeal)

57. The Court of Appeal allowed the appeal in respect of proposed ground 1, set aside the orders made by the judge in favour of the lessor below and ordered that the lessor pay the lessee damages of \$85,000.

Consideration of ground 1

58. The Court of Appeal considered that the proper construction of the obligation in cl 14.4 of the lease to “maintain the building in a structurally sound condition” is to be construed by what would a reasonable businessperson in the position of the parties have understood the maintenance covenant to mean in light of the objective circumstances surrounding the Lease and the commercial purpose and objects to be achieved by it? ²⁷

59. The Court of Appeal approved of Brereton J’s expression in *Seiwa v Owners Strata Plan 35042* [2006] NSWSC 1157 (**Seiwa**)²⁸ of the content of a duty to maintain, whether the duty is statutory or contractual as representing the current law in Australia.

60. In *Seiwa* Brereton J formulated the duty to maintain as follows:

the duty to maintain involves an obligation to keep the thing in proper order by acts of maintenance before it falls out of condition, in a state which enables it to serve the purpose for which it exists ... not only to attend to cases where there is a malfunction, but also to take preventive measures to ensure that there not be a malfunction.

61. The Court of Appeal considered that a duty to maintain has a pre-emptive or preventive element and is not enlivened only once the thing required to be maintained falls into disrepair.²⁹ In this way, a duty to maintain is to be distinguished from a duty to repair, which arises only upon the occurrence of a defect whereas a duty to maintain is continuous. Importantly, the Court of Appeal held at [84] that:

While a duty to maintain may not prescribe the particular means of maintaining something, it does not follow that there is no obligation to carry out any maintenance until the relevant thing falls into disrepair.

²⁷ *Brotherhood of St Laurance v Sarina Investments Pty Ltd* [2024] VSCA 46 at [73].

²⁸ The obligation to maintain in *Seiwa v Owners Strata Plan 35042* [2006] NSWSC 1157 arose under s 62 of the *Strata Schemes Management Act 1996* (NSW).

²⁹ *Ibid* at [84].



62. Further, the Court of Appeal considered it was significant that the parties included the maintenance covenant and the repair covenant in distinct subclauses. The Court of Appeal held that the fact that there are two separate obligations disclosed an objective intention that those obligations are not the same.³⁰
63. Finally, the Court of Appeal considered that an additional factor distinguishing a duty to maintain from a duty to repair is that, generally, a lessor's duty to repair is only enlivened upon being put on notice of a defect whilst a duty to maintain may be pre-emptive in nature.³¹
64. The Court of Appeal went on to observe that a duty to maintain a complex structure like an office building might operate differently relative to different parts of that structure. This means that some parts of a building, such as an elevator, may require regular maintenance, while others, such as a concrete slab, would not normally be expected to require a 'programme' of maintenance. Structural issues may be difficult to detect and it may not always be clear whether there is a need for repair works. As a result, the content of any duty to maintain will vary in each context, as will the form of maintenance required.³²
65. Applying these principles led the Court of Appeal to conclude that:³³
- a. the lessee had a reasonable concern that there was, or was a risk of, a structural defect at the Building on the basis of the issues with the building and the expert engineering reports; and
 - b. the lessor was put on notice of these concerns; and
 - c. in those circumstances, the maintenance covenant included an obligation on the lessor to obtain expert reports so that the judge below erred in finding otherwise.

³⁰ Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024] VSCA 46 at [85].

³¹ Ibid at [85].

³² Ibid at [86].

³³ Ibid at [87].

66. In construing the maintenance covenant the Court of Appeal stated that the relevant question is not whether a duty to maintain carries with it a general obligation to obtain expert reports..., but whether in the circumstances of this case, [the lessor] was required to undertake investigations in response to being put on notice of a possible structural defect.³⁴
67. Having framed the issue for determination the Court of Appeal went on to find that the lessor was required to undertake investigations in response to being put on notice of a possible structural defect.³⁵
68. The Court of Appeal held³⁶ that once it is accepted that the maintenance obligation includes preventive measures, and that these measures vary in the circumstances of each case, these preventive measures may include investigating reasonably suspected defects. This may require obtaining expert reports in appropriate circumstances to determine whether remedial works are required. This does not require reading additional words into the maintenance covenant; rather, this obligation is inherent to a duty to maintain.
69. The Court of Appeal held³⁷ that the maintenance covenant would require investigation if a landlord is reasonably on notice of a problem and a reasonable person in the position of the landlord seeking to maintain the building would investigate it. It is sufficient to enliven the maintenance covenant if the landlord is on notice of a reasonably-based concern as to the structural soundness of the building.
70. The Court of Appeal held³⁸ that a reasonable businessperson would expect that the maintenance covenant would oblige the lessor to conduct further investigations in response to the lessee's reasonable concern that there was, or was a risk of, a structural defect in the Building.

³⁴ Ibid at [89].

³⁵ Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024] VSCA 46 at [90].

³⁶ Ibid at [91].

³⁷ Ibid at [92].

³⁸ Ibid at [93].



71. The Court of Appeal held that to comply with the maintenance covenant in these circumstances the lessor was obliged, within a reasonable time after receipt of the first engineering report to investigate those reasonable concerns.³⁹ Instead, in response to being put on notice of possible structural defects, the lessor failed to undertake any further investigations until the Lease was terminated. And it only obtained a report from a structural engineer after the litigation was underway.⁴⁰

Breaches of the maintenance covenant by the lessor constituted repudiation

72. The Court of Appeal held that the lessor's breach of the maintenance covenant constituted repudiation.⁴¹ The Court of Appeal summarised the test for repudiation as:⁴²

A repudiatory breach entitles a party to terminate where the other party breaches an essential term of the contract in any way or breaches a non-essential or intermediate term in a sufficiently serious way. Whether a term is essential depends on the intention of the parties expressed by the language of the contract in the context of its commercial purpose.

73. The Court of Appeal concluded⁴³ that it was unnecessary to decide whether the maintenance covenant was an essential term of the Lease because the lessor's conduct constituted a sufficiently serious breach of a non-essential or intermediate term so as to amount to a repudiatory breach.

The breaches justified termination of the lease by the lessee

74. The Court of Appeal concluded the lessor's breach of the maintenance covenant was sufficiently serious to justify termination for two reasons.
75. *First*, the maintenance covenant was of high importance. It related to the structural soundness, and therefore safety, of the Premises for which the only permitted use was as a commercial office.⁴⁴
76. *Second*, the lessor's breach was significant and subsisted for a substantial duration. The breach commenced after the lessor had a reasonable opportunity to consider and respond to the first engineering report provided on 18 March 2020. The breach continued until 3 March 2021, when the lessee terminated the Lease.⁴⁵

³⁹ Ibid at [96].

⁴⁰ Ibid at [97].

⁴¹ Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024] VSCA 46 at [98].

⁴² Ibid at [98].

⁴³ Ibid at [99].

⁴⁴ Ibid at [101].



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⁴⁵ Ibid at [102].

⁴⁶ Ibid at [103].



77. Further, the Court of Appeal held that the consequence of the breach was also significant as by March 2021, the lessee could not have had any comfort that the lessor would remedy its breach in failing to investigate the structural soundness of the Building.⁴⁶ The Court of Appeal considered it relevant that the lessee was under the OH&S obligation, which the lessor was made aware of, at least in general terms, from July 2020.⁴⁷
78. Therefore, the Court of Appeal held that in all of these circumstances, the lessee was entitled to accept the lessor's repudiation and terminate the Lease on 3 March 2021.⁴⁸
79. Accordingly, the Court of Appeal found that the lessee was not liable to the lessor for breach of contract and is itself entitled to damages of \$85,000 consisting of an early termination fee paid by the lessee to its internet service provider and the lessor's drawdown of the lessee's bank guarantee.⁴⁹

⁴⁶ Ibid at [103].

⁴⁷ Brotherhood of St Laurance v Sarina Investments Pty Ltd [2024] VSCA 46 at [102].

⁴⁸ Ibid at [103].

⁴⁹ Ibid at [107].

Cao v ISPT Pty Ltd [2024] NSWCA 188

Facts

80. The appellants were guarantors of a tenant's obligations under a three year Lease which had commenced on 1 October 2019. The tenant ran a large restaurant in a shopping centre in the Sydney CBD which was owned by the respondents.
81. The tenant's restaurant closed on 23 March 2020 when the first of a series of State COVID-19 public health orders came into effect. It never re-opened. The tenant went into liquidation in May 2021.
82. The respondents sued the appellants for outstanding arrears of rent and other amounts owing under the Lease. The appellants defended the claim on the basis that the Lease was frustrated from 23 March 2020 onwards.

Decision at first instance

83. The appellants' argument was rejected at first instance by Nixon J, and the appellants were ordered to pay the respondents the sum of \$4,231,033.06.

Issues decided on appeal

84. There were two main issues on appeal.
85. *First*, whether a special condition requiring the tenant to open the restaurant for business was rendered incapable of performance by the public health orders, such that the contract was frustrated.
86. *Second*, whether the Lease was otherwise frustrated because compliance with the public health orders made the business unviable.

Decision of the Court of Appeal - (Kirk JA, Meagher JA and Griffiths AJA agreeing), dismissing the appeal

As to special condition 4:

87. Special condition 4 required that the business open during specified trading hours. The public health orders did not prevent the tenant from opening the Premises as a



takeaway business during the trading hours identified in the special condition. Thus the special condition was not incapable of being complied with.⁵⁰

As to whether the Lease was otherwise frustrated

88. The Court of Appeal rejected the appellants arguments that the lease was frustrated essentially for two reasons.

89. *First*, the Court of Appeal held that the risk of disruption to the tenant's business by external events, including governmental action, was allocated to the tenant under the Lease.⁵¹ Clause 49 of the lease provided as follows:

49. Tenant's risk

The tenant's property, the tenant's use or occupation of the premises and the Centre and the conduct of or ability to use the premises for the purposes described in Item 13 are each at the tenant's own risk....

90. That prevented a finding of frustration. The risk of business interruption caused by government restrictions in response to a human pandemic may not have been in the parties' minds, but the possibility of such restrictions was far from being unknown, and the express allocation of risk should be given effect according to its terms.⁵²

91. *Secondly*, the Court of Appeal rejected the appellant's argument that compliance with the public health orders would have transformed the tenant's restaurant business on the Premises to a radically different business.⁵³ The Court of Appeal held that the public health orders did not create a radical or fundamental change in what had been contracted for in any event.⁵⁴ The Court of Appeal held that at no time was the restaurant precluded from operating altogether, albeit that it was significantly disrupted. For example, as at 1 July 2020, the restaurant could have operated at 80% of dine-in capacity, at that time the Lease had 2 years and three months to run.⁵⁵

⁵⁰ Cao v ISPT Pty Ltd [2024] NSWCA 188 at [43].

⁵¹ Ibid at [51].

⁵² Ibid at at [52]-[59].

⁵³ Ibid at [62].

⁵⁴ Ibid at [66].

⁵⁵ Ibid at [66].



92. The Court of Appeal held that assessing frustration is a practical matter. It is not to be approached in a one-sided fashion, focusing just on restrictive measures enacted in response to the pandemic without also taking account of governmental measures introduced to aid businesses through the crisis e.g. Jobkeeper.⁵⁶

Application of principles of the law of frustration

93. The Court of Appeal held that:
- a. a finding of frustration involves issues of degree; it is not lightly made.⁵⁷
 - b. the doctrine of frustration applies if some supervening circumstance renders the context of performance of a contract so different from what the parties had assumed as to render the contract a fundamentally or radically different thing from what had been contracted for. It does not apply if the supervening event is a risk for which one or other party had assumed responsibility under the contract.⁵⁸
 - c. the test looks to the effect of the supervening event on performance of the contractual obligations and enjoyment of the contractual rights. That does not preclude consideration of the effects on a business being carried out by the party, and frustration can arise even where the contractual obligations could still largely be performed. Frustration may occur as a result of creeping or gradual change.⁵⁹
 - d. any frustration will be taken to crystallise at some particular point taking account of what was known to the parties at the time. However, subsequent events might throw some light on the reasonable probabilities at the time.⁶⁰

⁵⁶ Cao v ISPT Pty Ltd [2024] NSWCA 188 at [64] - [71].

⁵⁷ Ibid at [29].

⁵⁸ Ibid at [24].

⁵⁹ Ibid at [36].

⁶⁰ Ibid at [23]-[38].

C. EASEMENTS

Theunissen v Barter [2025] NSWCA 50 (31 March 2025)

Facts

94. This case involves a dispute between neighbours over the scope of three easements which burden the property owned by the respondent and benefit the adjoining land owned by the appellants.
95. The appellants live on the back lot (Lot 1). Lot 1 is a battle-axe block which is located to the rear of, and at a higher elevation than, Lot 2. Lot 1 includes a thin strip of land to the north of Lot 2 – on the left as one looks towards the two lots – which contains steps leading up to the house located on Lot 1. There is a relatively large garden area located behind the house on Lot 1. The houses are connected at the boundary where the roof of the respondent’s home connects with the steps at the front of the appellants’ home.
96. The respondent’s house on Lot 2 is three storeys (excluding the rooftop), the bottom of which contains two garages with separate doors.
97. Three easements burdened the respondent’s land:
- a. A right of carriageway, located on a strip of the driveway on Lot 2 (**Right of Carriageway**);
 - b. An easement for parking, located within the garage on Lot 2 (**Parking Easement**); and
 - c. An easement for recreation, located on the rooftop terrace of the respondent’s house on Lot 2 (**Recreation Easement**).
98. A paved driveway approximately 15.5 metres in length runs between Euryalus Street and the respondent’s house, leading to two garages located side by side which have separate doors next to each other and sit immediately below the appellants’ house. The driveway is a ‘bottleneck’ which is only wide enough for one car to enter and exit and then widens towards the two garage doors.

99. From the garage there are 48 stairs leading up to the appellants' property.
100. The roof of the respondent's house is burdened by the Recreation Easement is flat and approximately 78 square metres in size. It overlooks the driveway and Euryalus Street, and has views over Middle Harbour.
101. The terrace formed by this rooftop area is surrounded by a wall topped with metal railings, which runs across the northern, western and southern sides of the terrace. To the west, the terrace overlooks the driveway on Lot 2 and has views over the street and Middle Harbour. The appellants' home is located on the eastern side of the terrace. There are short steps on the southern segment of that side of the terrace leading up to a small entryway outside glass sliding doors (the entryway and doors form part of Lot 1).
102. There is an openable skylight on the roof which is surrounded by protective metal railings. One side of the railings can be opened. Below the skylight is a hallway on the top floor of the respondent's house. The respondent can currently access the rooftop by attaching a foldable metal ladder to the skylight from her hallway to ascend the ladder, through the skylight and onto the roof. There are no other ways for the respondent to access the rooftop from her property.

Decision at first instance

103. Three of the easements burdening Lot 2 in favour of Lot 1 were in dispute at first instance. Apart from the Recreational Easement, those were a right of carriageway which is located on a strip of the driveway on Lot 2, and an easement for parking which is located within part of the garage area on Lot 2.
104. Richmond J found for the respondent in relation to the Right of Carriageway and Parking Easement. These two easements were not in issue on the appeal.

Principal issues decided on appeal

105. The principal issues decided on appeal were as follows:



- a. whether the primary judge erred in holding that on the proper construction of the Recreation Easement the rights granted to the dominant⁶¹ owner were not exclusive and, in that regard, whether and to what extent physical characteristics of the tenements could be taken into account (ground 1);
- b. whether the Recreation Easement would be invalid if construed as granting such exclusive rights (raised by the respondent); and
- c. if the rights were not exclusive, whether the primary judge erred by holding that the servient owner was entitled to use the area at the same time as the dominant owner (ground 2).

Decision of the Court of Appeal - The Court held (Kirk JA, Mitchelmore JA and Griffiths AJA agreeing), allowing the appeal.

Ground 1: construction of the Recreation Easement

106. The appellants asserted that the primary judge erred by finding that, on the proper construction of the Easement, the rights granted to the dominant owner did not import a right of exclusive or sole use of the easement area for the identified purposes.⁶²
107. Kirk JA held that the task of construing an easement is to be undertaken as follows [citations omitted]:⁶³

Construction of an easement created by a written instrument involves determining the intention of the party or parties to the grant in light of the text, context and purpose of the instrument, assessed from the perspective of a reasonable person in the position of the party or parties, and in light of admissible evidence. There may be only one relevant party as an easement might be created by a unilateral act, for example when an easement is created as part of a subdivision. As addressed further below, the High Court held in *Westfield* that “rules of evidence assisting the construction of contracts inter partes, of the nature explained by authorities such as *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, did not apply to the construction of the Easement” at issue there (at [37], citation omitted). The statement was addressed to rules of evidence relevant to contractual interpretation, not to the basic approach to construction of the legal document.

⁶¹ The dominant tenement is the land that benefits from an easement, while the servient tenement is the land burdened by that easement

⁶² *Theunissen v Barter* [2025] NSWCA 50 at [26].

⁶³ *Ibid* at [27].

Terms of the Recreation Easement

108. The appellants sought to rely not only on the terms of the Recreation Easement and the Deposited Plan but also on certain physical characteristics of the site.

109. Kirk JA held that:⁶⁴

a reasonable person in the position of the parties would conclude that the Easement grants the dominant owner the *exclusive* use and enjoyment of the servient tenement for the purposes of recreation and enjoyment and as a balcony, terrace or garden.

110. His Honour reached this conclusion taking into account several factors. However, it appears the most significant was that “*the natural reading of the Easement in the context of the DP is that the servient owner had no ready means of accessing the rooftop area. That fact would offer significant support to the argument that the rights of use and enjoyment of the rooftop area were exclusive.*”⁶⁵

whether and to what extent it is permissible to take account of physical characteristics i.e. extrinsic evidence beyond the term of the grant

111. Kirk JA considered issues as to whether physical characteristics can be taken into account, what sort of characteristics, and as at what time, that is, whether at the time of the grant or the time of the hearing before the court.

112. Kirk JA held that:⁶⁶

When construing a registered easement it is permissible to take into account relevant physical characteristics of the servient and dominant tenements, and the surrounding land, at the time of the grant which were reasonably ascertainable by a third party at that time. The significance (if any) of those characteristics will depend upon the particular case. The characteristics which may be considered are the broad and reasonably enduring characteristics, not fine details of the land or of its fixtures. Relevant sources generally would include, for example, what can be observed from outside the properties along with publicly available maps. It would not include material that could have been ascertained by searches under freedom of information laws. It is not necessary to determine whether in some exceptional cases features not visible from the boundary may be taken into account.

113. Kirk JA held that the fact the use by the respondent of the rooftop area might impact the privacy of the appellants on the dominant tenement” was a physical characteristic

⁶⁴ Theunissen v Barter [2025] NSWCA 50 at [51].

⁶⁵ Ibid at [47].

⁶⁶ Ibid at [108].



that provided significant reinforcement to the conclusion that it was intended that the dominant tenement have the benefit of the exclusive use and enjoyment of the servient tenement for the purposes of recreation and enjoyment and as a balcony, terrace or garden. As the house on Lot 1 opened onto a confined terrace area which no-one else could access, at least readily meant that reasonable people would contemplate a space of that kind “as being private and secure for the benefit of the dominant tenement”.⁶⁷

Whether the Recreation Easement would be invalid if construed as granting such exclusive rights

114. The respondent submitted that if the Recreation Easement was construed in the manner sought by the appellants then the Recreation Easement would be invalid as that construction would restrict the respondent to the right to enter the rooftop terrace for the purpose of repairing it.⁶⁸

115. Kirk JA helpfully articulated an overarching statement of principle in relation to invalidity as follows.⁶⁹

Drawing these various statements of principle together, the following may be said. Every easement prevents some ordinary use of the servient tenement, perhaps to a very significant extent. The question is whether a putative easement substantially deprives the servient owner of proprietorship or legal possession to such an extent as to be inconsistent with ownership. That assessment is a matter of fact and degree. That assessment involves considering the physical area affected by the putative easement by reference to the servient tenement as a whole. The greater the proportionate area affected, the more likely that the restriction cannot be characterised as an easement. The assessment also involves considering the effect of the easement on the rights of the servient owner with respect to the burdened land. Those rights are positive: what the servient owner may do on and with the land. They are also negative: what the servient owner may require the dominant owner not to do on the easement area; or, put conversely, the extent of the positive rights held by the dominant owner. If there is a complete transfer of the servient owner’s rights, as in *Bursill Enterprises*, the instrument cannot be an easement. Anything less than that is a question of degree. That the instrument grants a sole right to the dominant owner to use the subject area for some particular purpose (as opposed to having exclusive possession for all purposes) does not of itself establish that the easement is invalid.

⁶⁷ *Theunissen v Barter* [2025] NSWCA 50 at [116].

⁶⁸ *Ibid* at [118].

⁶⁹ *Ibid* at [140].



116. Kirk JA rejected the respondent's submission by finding that:

- a. The [Recreation] Easement, construed in the manner sought by the appellants, grants the dominant owner sole use of the rooftop terrace for a significant purpose, being recreation and enjoyment and as a balcony, terrace or garden. However, it is not a grant of exclusive possession for all purposes.⁷⁰
- b. Here, the dominant owner's exclusive set of rights (on the construction adopted above) is also limited. They do not encompass other use of the airspace such as for building or storage. The servient owner retains negative rights to restrict what the dominant owners may do in the affected area.⁷¹
- c. the servient owner has the right to access sunlight through the skylight, as protected from interference by the dominant owner;⁷²
- d. The [Recreation] Easement benefits the dominant owner above the surface of the rooftop.⁷³ The servient owner has substantial benefit from the land area covered by the [Recreation] Easement, being the ability to use the airspace below. That very space is where the respondent has her three storey house. Furthermore, as noted, the servient owner has the benefit of accessing unobstructed sunlight through the skylight.⁷⁴
- e. In this context it cannot be said that the servient owner has been substantially deprived of proprietorship or legal possession to such an extent as to be inconsistent with ownership of the servient tenement. The area affected by the [Recreation] Easement (as a proportion of the property) is significant but limited. Even over that area the servient owner retains substantial positive and negative rights.⁷⁵

⁷⁰ Theunissen v Barter [2025] NSWCA 50 at [141].

⁷¹ Ibid at [143].

⁷² Ibid at [144].

⁷³ Ibid at [147].

⁷⁴ Ibid at [148].

⁷⁵ Ibid at [149].



Deering v Attard [2024] NSWSC 1604

Facts

117. Two neighbours were in dispute about a strip of land approximately 2.9 metres wide which runs along and on either side of the boundary between their properties and runs from the front of each property on Sunshine Parade for approximately 28 metres towards the rear of each.
118. That strip of land had been used for many years as a driveway by owners and occupants of No. 109 and No. 107.
119. The plaintiff sought orders pursuant to section 88K of the Conveyancing Act 1919 (NSW) imposing:
- a. an easement benefitting No. 109 and burdening No. 107 in respect of the 1.5 metre wide strip of the shared driveway that is located on No. 107, and a
 - b. a reciprocal easement benefitting No. 107 and burdening No. 109 in respect of the 1.4 metre wide strip of the shared driveway that is located on No. 109, with each easement conferring a right of carriageway on the dominant tenement.

Principles regarding the application of s88K of the Conveyancing Act

120. Section 88K of the Conveyancing Act provides:
- (1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.
 - (2) Such an order may be made only if the Court is satisfied that—
 - (a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and
 - (b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900 can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and



- (c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

....

Decision of Williams J

121. The applicant for an order imposing an easement under s 88K bears the onus of demonstrating that the proposed easement is “reasonably necessary” for the effective use of the applicant’s land.⁷⁶
122. The requirement of reasonable necessity can still be satisfied even in circumstances where the applicant’s land could be effectively used without the grant of the easement sought. This requires the Court to consider the alternative methods by which the use of the applicant’s land could be achieved. The use with the proposed easement must be at least substantially preferable to the use without the easement.⁷⁷
123. It is relevant to have regard to “the historical context of use of the land, both of the dominant and servient tenements”.⁷⁸
124. The Court must also consider the effect that the proposed easement would have on the proposed servient tenement.⁷⁹
125. If the imposition of the easement is determined to be reasonably necessary within the meaning of s 88K(1), the Court will ordinarily proceed to make an order imposing the easement if it is satisfied of the matters in s 88K(2).⁸⁰
126. However, even if satisfied of those matters, the Court retains a discretion as to whether to make the order, as counsel for the plaintiff in this case accepted. That discretion is to be exercised “having regard to the purpose of the section, which might be summarised as facilitating the reasonable development of land whilst ensuring that just compensation be paid for any erosion of private property rights”.⁸¹

⁷⁶ Deering v Attard [2024] NSWSC 1604 at [53].

⁷⁷ Ibid at [53].

⁷⁸ Ibid at [54].

⁷⁹ Ibid at [54].

⁸⁰ Ibid at [55].

⁸¹ Ibid at [55].



127. Thus, the question posed by s 88K(1) is whether the proposed easement burdening No. 107 is reasonably necessary for the effective use of No. 109.⁸²
128. Williams J found that plaintiff failed to discharge his onus of establishing that reasonable necessity, for the following reasons.⁸³
- a. an alternative driveway could be constructed on the plaintiff's land;
 - b. the plaintiff considered that the cost of constructing a new driveway on his own property is higher than what he would hope to pay, and he wishes to avoid incurring that cost.
129. Williams J held that:⁸⁴
- a. this meant the test for reasonable necessity was not satisfied as reasonable necessity in the context of s 88K(1) means something more than desirability or preferability over the alternative means of access.
 - b. before the Court will make an order under s 88K imposing an easement, the evidence must demonstrate "considerable advantage" for the plaintiff in obtaining the proposed easement compared to developing the alternative means of access, so that the use of the plaintiff's land with the proposed easement is at least substantially preferable to use without the easement.
 - c. the proposed orders under s 88K involve an appropriation of the defendant's property for the benefit of the plaintiff's land, albeit with the benefit of a proposed reciprocal easement burdening the plaintiff's land for the benefit of the defendant's land, but which the defendant does not want.⁸⁵
130. Williams J also considered the effect of the proposed easement on the defendant's land as a basis to conclude that the easement is not a matter of reasonable necessity within the meaning of s 88K(1).⁸⁶

⁸² Deering v Attard [2024] NSWSC 1604 at [56].

⁸³ Ibid at [60].

⁸⁴ Ibid at [60].

⁸⁵ Ibid at [60].

⁸⁶ Ibid at [61].



131. Williams J held that given that the shared driveway directly abuts the defendant's residence, the proposed easement would expose the present and future owner of and occupants of No. 107 to an ongoing risk of interference with their reasonable use and enjoyment of No. 107 due to noise, light and vibration caused by vehicles using the shared driveway, depending on the frequency and times of use of the shared driveway and the manner in which the vehicles in question are driven along the shared driveway.⁸⁷

Section 88K(2) of the Conveyancing Act

Public interest

132. Williams J held that:

- a. the question posed by s 88K(2)(a) is whether the Court is satisfied that the use of No. 109 with the benefit of the proposed easement will not be inconsistent with the public interest.⁸⁸
- b. if it had been necessary to address s 88K(2), her Honour would have been satisfied, in the absence of any evidence to the contrary, that the continued use of No. 109 as a residential dwelling but with the benefit of the proposed easement would not be inconsistent with the public interest.⁸⁹

Compensation

133. Williams J held that the question posed by s 88K(2)(b) is whether the Court is satisfied that the defendant, as the owner of No. 107, can be adequately compensated for any loss or other disadvantage that will arise from the imposition of the proposed easement burdening No. 107 and benefitting No. 109.⁹⁰

⁸⁷ Deering v Attard [2024] NSWSC 1604 at [61].

⁸⁸ Ibid at [68].

⁸⁹ Ibid at [69].

⁹⁰ Ibid at [70].



Reasonable attempts to obtain the easement

134. The question posed by s 88K(2)(c) is whether the Court is satisfied that all reasonable attempts have been made by the plaintiff to obtain the proposed easement, or an easement having the same effect.⁹¹
135. Williams J held that the plaintiff's two attempts were NOT reasonable attempts because they were based on an erroneous claim and because they failed to engage with the issue raised by the defendant concerning the interference with his use and enjoyment of his own property by reason of the manner in which the shared driveway was being used.⁹²

Residual discretion

136. Williams J stated that if she had found that the imposition of the proposed easement was reasonably necessary for the effective use of the plaintiff's land, and if I had been satisfied of each of the matters in s 88K(2), her Honour:⁹³

“...would have exercised the residual discretion not to make an order imposing the proposed easement because I would not have considered that it was consistent with the policy of s 88K to make orders appropriating the defendant's property by imposing the easement at the suit of the plaintiff whose own evidence demonstrated his complete lack of care or regard for the defendant's entitlement to the reasonable use and enjoyment of his own land without unreasonable interference from persons using the proposed easement for the purpose of vehicular access to the plaintiff's residence.

⁹¹ Deering v Attard [2024] NSWSC 1604 at [70].

⁹² Ibid at [83].

⁹³ Ibid at [86].

D. MORTGAGES

Commercial N Pty Limited v Huang & Ors [2024] NSWSC 23

Facts

137. The Defendants found themselves in financial difficulty. They obtained a short term loan from a lender of last resort “Commercial N”. The defendants defaulted on their loan with the lender. The lender sued the defendants to recover the outstanding principal of \$430,000 together with interest of \$3,187,486.90 (less \$6,412.06 already paid calculated at a rate of 70.72% per annum from 17 October 2019 to 17 November 2022).
138. The Defendants conceded the principal was owing but sought to defend the claim for interest on the basis it was a penalty on the basis it was disproportionate to any real loss or damage that might have been incurred by the lender and therefore unenforceable.
139. The Defendants contended that the relevant interest clause namely (cl 5.12(b)(i)) was a penalty because that sub-clause operates on a default (namely, when the Debtor fails to pay interest) so that interest becomes payable at a “Higher Interest Rate” compounding monthly. The Defendants argued that the Higher Interest Rate compounding monthly could not be justified as the interest rate increased by a factor of almost 400% on default (from 0.35% to 1.36%) which the defendants contended was extravagant, excessive and out of all proportion.⁹⁴

Principles regarding the application of the law of penalties

140. The onus of proving that a stipulation amounts to a penalty lies with the party asserting it.⁹⁵
141. In deciding whether a clause is liable to be set aside as a penalty. Two questions must be answered.
142. *First*, whether the penalty doctrine applies to the loan transaction. For it to apply, there must exist in the contract a collateral stipulation which, upon the failure or non-

⁹⁴ Commercial N Pty Limited v Huang & Ors [2024] NSWSC 23 at [198].

⁹⁵ Ibid at [204].



occurrence of a primary stipulation, imposes upon the defendants an additional detriment to the benefit of the plaintiff.⁹⁶

143. *Second*, whether the collateral stipulation is properly characterised as penal and, if it is, what the consequences might be.⁹⁷
144. The test of whether a particular provision is punitive or penal in character is not whether the sum stipulated would be considered to be merely disproportionate compared to the likely damage, but whether it has been demonstrated to be extravagant or unconscionably disproportionate.⁹⁸

Henry J rejected the Defendants claim that the clause was a penalty

145. Henry J rejected the Defendants contention that the interest clause was a penalty due to the distinction between provisions in agreements, such as a mortgage or a guarantee, which incentivise prompt payment and clauses which increase the rate of interest upon failure to make prompt payment, where the latter may be held to be a penalty clause and the former are not.⁹⁹
146. In this case, the relevant the primary contractual obligation was to pay the Higher Interest Amount, with the differential interest structure providing for a lower concessional rate of interest whilst there was no default, rather than operating to penalise the Defendants for breach.¹⁰⁰
147. This meant the liability to pay interest at the Higher Interest Rate compounding monthly in cl 5.12(b) did not impose an additional or different contractual liability that arises upon the non-observance of the primary contractual obligation to pay the Higher Interest Amount, but rather, the Higher Interest Rate is payable because the reduced rate has not been paid punctually.¹⁰¹
148. Further, the Defendants did not lead any evidence to suggest that the application of the interest provisions under cl 5.12(b) gives rise to a different outcome or higher amount than would be payable if applying the formula under cl 5.5 to ascertain the Higher Interest Amount.¹⁰² No evidence was led to address whether the Higher Interest

⁹⁶ Commercial N Pty Limited v Huang & Ors [2024] NSWSC 23 at [206].

⁹⁷ Ibid at [206].

⁹⁸ Ibid at [224].

⁹⁹ Ibid at [213].

¹⁰⁰ Ibid at [216].

¹⁰¹ Ibid at [217].

¹⁰² Ibid at [217].



GREENWAY CHAMBERS

Rate was commensurate with the interest protected by the bargain or was extravagant and unconscionable by itself.¹⁰³

149. Whilst the Court accepted that the amount of interest is seemingly extravagant, out of all proportion or unconscionable due to the operation of the capitalisation/compounding factor applied to the Higher Interest Rate of 70.72% per annum, those clauses were not contractual penalties.¹⁰⁴

¹⁰³ Commercial N Pty Limited v Huang & Ors [2024] NSWSC 23 at [221].

¹⁰⁴ Ibid at [221].

E. SALE OF LAND

Bavulo Pty Limited v Zhang Property Pty Limited [2025] NSWCA 9

Facts

150. A purchaser and a vendor entered a contract for the sale and purchase of land for a strata title unit in Strathfield (**Contract**). The date for completion was set as 3 July 2023. As the sale was to occur subject to an existing tenancy, the vendor was required to provide a notice of attornment “at least 2 business days before the date for completion”.
151. A notice of attornment is a formal notification to a tenant informing them of a change in property ownership and directing them to pay future rent to the new landlord, effectively acknowledging the new owner as their landlord: see s125 of the *Conveyancing Act*.
152. On 3 July 2023, the purchaser’s solicitors informed the vendor that settlement could not occur on time due to a lack of funds. The next day, the vendor issued a notice to complete and, following the purchaser’s non-compliance with the timetable in that notice, it terminated the contract.

Decision at first instance

153. The purchaser sued the vendor seeking specific performance of the contract for the sale of land. Peden J rejected the purchaser’s claim.

Issues decided on appeal

154. The only issue on the appeal, was whether the vendor was disentitled from issuing the notice to complete because of its failure to provide a notice of attornment in accordance with cl 24.4.3.

Decision of the Court of Appeal - (Griffiths AJA, Payne and McHugh JJA agreeing) dismissed the appeal

155. Griffiths AJA held that a party is not entitled to issue a notice to complete where:¹⁰⁵

¹⁰⁵ Bavulo Pty Limited v Zhang Property Pty Limited [2025] NSWCA 9 at [32].



- a. it has failed to carry out a condition precedent to completion;
 - b. it is not willing and/or able to perform any remaining executory obligations; and
 - c. it must not have breached the contract in such a way so as to give rise to a right in the other party to terminate.
156. Griffiths AJA held that the obligation to provide a notice of attornment under clause 24.4.3 of the Contract was not something that was related, in the sense of a condition precedent, to completion of the sale.¹⁰⁶
157. Griffiths AJA held that this reasoning was supported by the fact that the Contract contemplated the possibility of the provision of a notice of attornment after completion and imposed a separate obligation on the vendor to pay to the purchaser any rent monies received by the vendor after completion.¹⁰⁷ Nor did the Contract make time of the essence with respect to the service of the notice of attornment so as to give the counterparty a right to terminate.¹⁰⁸
158. Griffiths AJA contrasted the position of a failure to provide a notice of attornment with a vendor's failure to provide a certificate under s 184 of the *Strata Schemes Management Act 2015* (NSW) (**SSMA**) at least seven days before completion, which rendered invalid its notice to complete.¹⁰⁹ Griffiths AJA noted that a certificate under s 184 of the SSMA authorises specified persons (including the owner of a lot or a person authorised by such an owner) to obtain from the owners corporation in a strata scheme a certificate in respect of various matters, including in relation to the amount of any regular periodic contributions for a particular lot and whether there were any unpaid contributions.¹¹⁰ Further, Griffiths AJA noted that a vendor's obligation to provide such a certificate no less than seven days prior to completion is a condition precedent to completion as purchaser of a lot would become jointly and severally liable for unpaid financial contributions.¹¹¹

¹⁰⁶ *Bavulo Pty Limited v Zhang Property Pty Limited* [2025] NSWCA 9 at [38].

¹⁰⁷ *Ibid* at [38].

¹⁰⁸ *Ibid* at [38].

¹⁰⁹ *Ibid* at [34].

¹¹⁰ *Ibid* at [34].

¹¹¹ *Ibid* at [35].

F. STRATA LAW

Owners Corporation SP6534 v Elkhouri; Owners Corporation SP6534 v Perpetual Corporate Trust Ltd [2024] NSWCA 279

Facts

159. Mr Elkhouri was a lot owner in a strata title apartment building located at Point Piper in Sydney. He owned the penthouse apartment situated on levels 5 and 6 of the building. Mr Elkhouri died in 2019. As a result, claims were brought on behalf of his estate by his executors and in separate proceedings by Perpetual as mortgagee in possession.
160. The relevant parts of the common property are the balconies and rooftop spaces on and above levels 5 and 6 (the **Exclusive Use Areas**), which are the levels occupied by Lot 11. The balconies and rooftop spaces afforded spectacular views of Sydney Harbour.
161. Mr Elkhouri and the Owners Corporation had various claims against each other. These were resolved by a deed of settlement, which provided for the Owners Corporation to pass a new by-law. This became by-law 30, which granted the owner of Lot 11 the right of exclusive use and enjoyment of certain parts of the common property, being the level 5 and level 6 balconies and rooftop spaces. However, those areas were practically accessible only through Lot 11.
162. By par 30.3, the continuation of the exclusive use rights after 23 May 2018 (**Sunset Date**) was conditional on various matters, including the owner of Lot 11 completing certain works in the exclusive use areas by the Sunset Date. Paragraph 30.3 provided:
- The Granted Rights cease on the day after the Sunset Date, unless the owner of Lot 11 has fully complied before that time with the Critical Obligations. For this purpose time is of the essence.
163. By par 30.7, in the event that the owner of Lot 11 failed to complete that work, the Owners Corporation could complete the work and was given certain rights of reimbursement, damages and indemnity against the owner of Lot 11.

Decision at first instance

164. The executors and Perpetual sought declarations under ss 139 and 149 of the SSMA to remove clause 30.3 so that By-law 30 continued to operate in a way that the Granted Rights remained in the hands of Lot 11. They contended the loss of rights was analogous to forfeiture of the exclusive use rights lost as a result of cl 30.3.
165. The Owners Corporation cross claimed to recover the cost of rectifying defects to the common property.
166. Elkaim AJ found that Mr Elkhouri had not completed the necessary works by the Sunset Date; that the Owners Corporation was entitled to recover certain costs and liabilities pursuant to par 30.7; and that the Executors and Perpetual were liable to pay certain special levies.
167. However, Elkaim AJ also found that par 30.3 was “unjust” within the meaning of s149(1)(c) of the *Strata Schemes Management Act 2015 (NSW) (SSMA)*. The obligations imposed on Lot 11 will remain and the absence of exclusive rights will makes no practical difference to the enjoyment by the balance of the owners of their respective units.
168. Elkaim AJ remitted the matter to the NSW Civil and Administrative Tribunal for it to make orders about paragraph 30.3 arising out of the declaration.
169. The Owners Corporation appealed, and the executors and Perpetual cross-appealed.

Principal issues decided on appeal

170. The principal issues decided on appeal were:
 - a. whether the Supreme Court of New South Wales had jurisdiction to declare that par 30.3 was unjust;
 - b. whether par 30.3 was unjust within the meaning of s 149(1)(c) of the SSMA;
and



- c. whether the primary judge erred by awarding the Owners Corporation monetary sums without making findings, including as to causation, necessary to establish its entitlement.

**Decision of the Court of Appeal - (Ward P at [1]; McHugh JA at [2]; Griffiths AJA at [338])
Substantially allowing the appeal**

Whether par 30.3 was unjust within the meaning of s 149(1)(c) of the SSMA

171. McHugh JA first considered the proper construction of “unjust” within the meaning of s 149(1)(c) of the SSMA.

149 Order with respect to common property rights by-laws

- (1) The Tribunal may make an order prescribing a change to a by-law if the Tribunal finds —

...

- (c) on application made by any interested person, that the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property are unjust.

172. McHugh JA held that what must be found “unjust” under s 149(1)(c) of the SSMA are “the conditions of a common property rights by-law relating to the maintenance or upkeep of any common property”.¹¹² McHugh JA further held that in order to come within s 149(1)(c), par 30.3 must itself be or contain “*conditions ... relating to maintenance or upkeep*”.¹¹³

173. McHugh JA observed that:

- a. The SSMA does not define the word “unjust”.¹¹⁴
- b. Section 149(1)(c) of the SSMA does not refer to unjust maintenance or upkeep. It refers to unjust conditions. The condition must relate to maintenance or upkeep. But once that criterion is met, the question is whether the condition is in some way unjust.¹¹⁵

¹¹² Owners Corporation SP6534 v Elkhouri; Owners Corporation SP6534 v Perpetual Corporate Trust Ltd [2024] NSWCA 279 at Ibid at [119].

¹¹³ Ibid at [123].

¹¹⁴ Ibid at [127].

¹¹⁵ Ibid at [149]



174. McHugh JA held that the word “unjust” in s 149(1)(c) invokes a general and inherently variable standard that requires an evaluative assessment of the conditions of a common property rights by-law relating to the maintenance or upkeep of common property.¹¹⁶
175. McHugh JA held that the evaluative assessment that something is “unjust” requires consideration of relevant circumstances. The difficulty is that s 149(1)(c) does not state the scope of the circumstances which may or must be considered — in particular, whether they extend beyond the terms of the strata scheme and the by-law itself.¹¹⁷
176. McHugh JA concluded that, depending on the respect in which the particular conditions were said to be unjust, and to whom they were said to be unjust, the matters to be taken into account for the purposes of the evaluative judgment required by s 149(1)(c) are not limited to what is inherent in the by-law.¹¹⁸
177. McHugh JA held that in determining whether a condition is unjust, it may be relevant to consider whether it provides any practical benefit. But the Owners Corporation has a legitimate interest in having the right to future use of the balconies and rooftop free of Lot 11’s exclusive use rights.¹¹⁹

Whether par 30.3 was unjust based on matters inherent in the by-law

178. McHugh JA held that par 30.3 was not unjust within the meaning of s 149(1)(c), because of the limited nature and scope of the grant under the by-law.¹²⁰ Paragraph 30.5 expressly referred to par 30.3. It was one of the terms on which the grant was made.¹²¹

There is nothing intrinsically unjust about granting a right (in this case, the extension of the rights of exclusive access in perpetuity) only upon the satisfaction of certain reasonable conditions. Nor would there be anything intrinsically unjust in granting a right on the basis that it may be terminated in the event that conditions are not satisfied.

¹¹⁶ Owners Corporation SP6534 v Elkhouri; Owners Corporation SP6534 v Perpetual Corporate Trust Ltd [2024] NSWCA 279 at [139].

¹¹⁷ Ibid at [140].

¹¹⁸ Ibid at [155].

¹¹⁹ Ibid at [189].

¹²⁰ Ibid at [193].

¹²¹ Ibid at [193].



GREENWAY CHAMBERS

Whether par 30.3 was unjust having regard to extrinsic circumstances

179. McHugh JA held that par 30.3 was not an unjust condition because:¹²²

It was not unjust to Mr Elkhouri as the owner of Lot 11 that par 30.3 had the consequence that his exclusive use rights were not extended when he failed to perform his par 30.7 obligations. That consequence was part of the price he expressly agreed to pay, in return for obtaining real benefits. In the circumstances of the present case, to the extent that community standards inform the question whether par 30.3 is an “unjust” condition, I think they require that the owner of Lot 11 be held to their bargain. [emphasis added]

¹²² Colman v The Owners – Strata Plan 61131 [2025] NSWSC 63 at [200]



Colman v The Owners – Strata Plan 61131 [2025] NSWSC 63 (Kirk J)

Facts

180. “The Palladium” located at 102 Miller Street in Pyrmont, Sydney, comprised of 279 strata lots. Mr Gary Colman, the plaintiff, owns Lot 147 in the building. That lot comprises an apartment on level 10 and a rooftop area on level 11, being an eastern and western terrace which are linked by a corridor. Over the following two years, through to late 2021, the Colmans caused further “extensive alterations” to be made to both common and lot property on the terraces which “significantly altered the common property of the rooftop terrace”.
181. In September 2021 Mr Colman lodged an application in the NSW Civil and Administrative Tribunal seeking, relevantly:
- a. an order under s 126 of the *Strata Schemes Management Act 2015* (NSW (**SSMA**)) that the defendant approve identified works (including the Relevant Works);
 - b. damages under s 232 of the SSMA for alleged breach by the defendant of its maintenance and repair duties under s 106, which encompassed a claim for the costs of carrying out the Relevant Works;
 - c. and, albeit not clearly articulated, a finding that the works either were in fact approved under by-law 44 of the Strata Plan or should have been so approved by the strata committee.

Decision of the Tribunal and Appeal Panel

182. The Tribunal, constituted by Senior Member Sarginson, dismissed Mr Colman’s application. The Appeal Panel refused leave to the extent required and otherwise dismissed the appeal.



Decision of Kirk J (sitting at first instance)

Can consent can be given retrospectively to works already undertaken by an owner?

183. The relevant parts of s 126 *Strata Schemes Management Act 2015* (NSW) are as follows:

126 Orders relating to alterations and repairs to common property and other property

(1) **Order requiring owners corporation to carry out work on common property**
The Tribunal may, on application by a lessor of a leasehold strata scheme or an owner of a lot in a strata scheme, order the owners corporation to consent to work proposed to be carried out by an owner of a lot if the Tribunal considers that the owners corporation has unreasonably refused its consent and the work relates to any of the following—

- (a) minor renovations or other alterations to common property directly affecting the owner's lot,
- (b) carrying out repairs to common property or any other property of the owners corporation directly affecting the owner's lot.

(2) **Order consenting to owner's work on owners corporation property**
The Tribunal may, on application by a lessor of a leasehold strata scheme or an owner of a lot in a strata scheme, make an order (a work approval order) approving of minor renovations or alterations or repairs already made by an owner to common property or any other property of the owners corporation directly affecting the owner's lot if the Tribunal considers that the owners corporation unreasonably refused its consent to the minor renovations or alterations or repairs.

184. Kirk J held that both owners corporations and the Tribunal may give retrospective approval to minor renovations, alterations or repairs already carried out by an owner to common property directly affecting the owner's lot. However, the Tribunal is not authorised to grant such approval under s 126(2) unless it has first been sought by the owner from the owners corporation in the manner relevantly required for the type of work at issue.¹²³

Whether consent of the owner's corporation is needed to be able to claim for repairs - s106 SSMA

185. Section 106 of the SSMA provides as follows:

106 Duty of owners corporation to maintain and repair property

¹²³ Colman v The Owners – Strata Plan 61131 [2025] NSWSC 63 at [90].



- (1) An owners corporation for a strata scheme must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
- (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
- ...
- (5) An owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner.

186. Kirk J held that a lot owner cannot claimed damages or compensation under s 106(5) or other provisions in the of the SSMA for work undertaken by a lot owner to repair common property, which have not been approved in the required manner (either prospectively or retrospectively) by the owners corporation or the Tribunal.¹²⁴

187. Kirk J held that as no such approval had been granted to Mr Colman to undertake the Relevant Works he could not claim the cost of undertaking those works pursuant to s 106(5) of the of the SSMA.¹²⁵

Summary of conclusions

12 Kirk J reached the following conclusions on the operation of the SSMA:

- (1) There is no reason why the special resolution referred to in s 108(2) could not take the form of a special resolution passing a by-law (see below at [78]). Where approval is sought under s 108 in that way, the fact that a failure to pass the by-law might be capable of challenge under s 149 does not preclude an application being made to the Tribunal under s 126(2).¹²⁶
- (2) An owners corporation may decide to undertake repairs to common property without the need for an ordinary or special resolution passed at a general meeting, and it may authorise a lot owner to carry out such repairs by the same decision-making process.¹²⁷

¹²⁴ Colman v The Owners – Strata Plan 61131 [2025] NSWSC 63 at [134].

¹²⁵ Ibid at [134].

¹²⁶ Ibid at [100].

¹²⁷ Ibid at [79]-[80].



- (3) The Tribunal is authorised under s 126(2) retrospectively to approve works already undertaken.¹²⁸ Similarly, the various powers an owners corporation has to give approval for work on common property (being those expressed in ss 108 and 110 and implicit in s 106) can also be taken to extend to giving approval to work already done.¹²⁹
- (4) The Tribunal is not empowered to make a works approval order under s 126(2) unless the relevant type of approval has first been sought from the owners corporation.¹³⁰
- (5) It is possible for there to be a constructive refusal of consent attracting the operation of s 126(2) even though no formal decision has been taken by the owners corporation in its relevant emanation.¹³¹
- (6) Insofar as damages or compensation can be claimed under s 106(5) or other provisions for work undertaken by a lot owner to repair common property (where it is not necessary to decide here if such damages can be claimed), then they cannot be claimed for works which have not been approved in the required manner (either prospectively or retrospectively) by the owners corporation or the Tribunal.¹³²

¹²⁸ Ibid at [82]-[83].

¹²⁹ Ibid at [84]-[87].

¹³⁰ *Colman v The Owners – Strata Plan 61131* [2025] NSWSC 63 at [88]-[89].

¹³¹ Ibid at [94]- [96].

¹³² Ibid at [127]-[134].