GREENWAY CHAMBERS

GAMBLING WITH YOUR PROPERTY RIGHTS: A REVIEW OF RECENT CASES IN PROPERTY LAW

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Seminar Notes[1]

Introduction

1 In a recently concluded series of cases arising out of a property development in Lane Cove, the NSW Supreme Court and Court of Appeal were required to examine a number of important aspects of property and procedural law, ranging from indefeasibility under the Torrens Title system, to caveats and the concept of legal tender under sale of land contracts: see Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24, Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 247, Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 1129 and Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2016] NSWSC 1248.

2 This paper discusses those decisions and their implications for practice.

The facts

3 MV Developments (Lane Cove) Pty Ltd (in liquidation) (the ***Company***) purchased a number of adjoining properties in Lane Cove and developed the 'Aurora' apartments on the land (the ***Development***).

4 The Company borrowed money from, and granted registered mortgages to, Westpac Banking Corporation, Win Mezz No. 75 Pty Ltd and Win Senior No. 123 Pty

Ltd (the ***Mortgagees***). The Mortgagees were paid in full by the sale of lots in the development and the mortgages were discharged.

5 A number of other entities, including Gold Stone Capital Pty Ltd (***Gold Stone***) and Ta Lee Investments Pty Ltd (***Ta Lee***), asserted that the Company had also borrowed money from them and granted to them equitable interests in the Development.

6 Ta Lee claimed that in 2011, the Company borrowed $1.5 million from it, and pursuant to a Deed of Loan and Guarantee (the ***Deed***), granted security in the form of a 'right to caveat' on the title of the Development. On 23 June and 4 August 2015, Ta Lee lodged two caveats over the title to all of the strata lots in the Development.

7 On 29 June 2012, Bradley and Mark Lum entered into contracts for sale with the Company to purchase lots 49 and 50 in the Development. They released their 'deposits', being the majority of the purchase prices, to the Company for its use in funding the Development. In 2015, the Lums lodged caveats over lots 49 and 50.

8 On 15 April 2015, Mr Antonios entered into a contract for sale with the Company to purchase lot 34 in the Development. Mr Antonios paid the entire purchase price for lot 34 by various means, as discussed in detail below, as a 'deposit' and released it to the Company for its use in funding the Development. On 6 June 2016, Mr Antonios lodged a caveat over lot 34.

9 Another purchaser, Erica Yuan, claimed that she also held an equitable interest in lot 34 as purchaser under a contract for sale that was entered into before Mr Antonios' contract. Ms Yuan also lodged a caveat over lot 34.

10 On 26 June 2015, the Company was placed into voluntary administration, and Andrew Barnden and Robert Moodie were appointed as the administrators. On 31 August 2015, the Company went into liquidation and Mr Barnden and Mr Moodie were appointed as the liquidators (the ***Liquidators***).

11 In 2015, the administrators, as they then were, issued lapsing notices to the Lums. The Lums commenced proceedings shortly thereafter to extend the operation of their caveats and for specific performance of the contracts for sale of lots 49 and 50.

12 In September 2016, Darke J handed down judgment in Lum v M V Developments (Lane Cove) Pty Limited (in liquidation) [2016] NSWSC 1248, ordering specific performance of the contracts. The Court also ordered the Liquidators to pay the

Lums' costs, in consequence of the Liquidators' unreasonable conduct of the proceedings.

13 Ta Lee and Gold Stone subsequently filed cross-claims asserting priority of their respective equitable interests, joining to the proceedings the other asserted equitable interest holders for each of the relevant lots, including Mr Antonios. Mr Antonios filed his own cross-claim seeking specific performance of his purchase contract with the Company. Ms Yuan also filed a cross-claim seeking similar relief to Mr Antonios in relation to lot 34.

14 The proceedings were set down for a further hearing before Emmett AJA in December 2017. Ultimately, neither Ms Yuan nor Gold Stone pressed their claims for priority in relation to lot 34.

15 Emmett AJA handed down judgment in Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 247 in March 2018. Emmett AJA held that Ta Lee did not have an equitable interest in lot 34 and ordered that the Company transfer lot 34 to Mr Antonios. The Company subsequently provided a Transfer to Mr Antonios, Ta Lee and Gold Stone provided withdrawals of their caveats, and the Transfer was registered.

16 Ta Lee then appealed the decision of the primary judge. This appeal was dismissed: Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24.

Indefeasibility and stays

Indefeasibility and personal equities

17 After the decision in Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 247 was handed down, orders were made by consent requiring the property to be transferred from the vendor (MV Developments) to the purchaser (Mr Antonios). Ta Lee did not negotiate any agreement with Mr Antonios to the effect that his interest would be subject to any appeal relating to Ta Lee's interest; it did not seek a stay of the orders. As noted above, Ta Lee simply withdrew its caveat and allowed the Transfer to Mr Antonios to be registered.

18 In the subsequent appeal by Ta Lee, an additional argument was therefore advanced by Mr Antonios arising out of the provisions of s 42 of the *Real Property Act* 1900 (NSW) (***RP Act***).

19 It was argued that, as a result of the registration of the Transfer and the fundamental premise of indefeasibility of title under the Torrens Title system of title-by-registration, Mr Antonios held title to lot 34 absolutely free from all other estates and interests that were not recorded on the Register. This was argued to be the case regardless of the ultimate outcome of the appeal: Hanson Construction Materials Pty Ltd v Roberts [2016] NSWCA 240 at [52] (Sackville AJA, Beazley P and Payne JA agreeing); Bahr v Nicolay (No 2) (1988) 164 CLR 604, 652-653 (Brennan J); Leros Pty Ltd v Terara Pty Ltd (1992) 174 CLR 407, 418-419 (Mason CJ, Dawson and McHugh JJ).

20 Ta Lee attempted to argue that its claim to a proprietary right survived as an *in personam* right which it could assert against Mr Antonios; however, Mr Antonios did not grant any *in personam* rights to Ta Lee, whether pursuant to an agreement or otherwise: Breskvar v Wall (1971) 126 CLR 376, 384-385 (Barwick CJ). Ta Lee's alleged unregistered interest in the property burdened the *Company's* title in the property, pursuant to an agreement entered into by the Company and Ta Lee (i.e. the Deed). That title had been extinguished upon registration of the Transfer.

21 The Court of Appeal (Bathurst CJ, Beazley P and Macfarlan JA) agreed with Mr Antonios. It held that s 42 of the RP Act was definitive:[2]

> [64] No case of fraud was alleged, and nor was it suggested that any of the exceptions to the indefeasibility conferred by registration applied. In particular, it was not alleged that the following exception in s 42(1)(a) applied:
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> > "the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land …"
>
> [65] The presence of a caveat does not fall within this exception and, in any event, Ta Lee removed the caveat as required by the order made by the primary judge.
>
> [66]… At a practical level, to maintain that case such that Mr Antonios' interest as the legal and beneficial owner of Lot 34 was subject to Ta Lee's claimed interest, it was necessary for Ta Lee to challenge the primary judge's order requiring MV Developments to specifically perform the contract for the sale of Lot 34. MV Developments did not challenge that order before it was complied with.
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> …
>
> [73]… Ta Lee has removed the caveats it had lodged on the title. In doing so, it did not have any agreement with Mr Antonios that his registered title be subject to its

[2] Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24.

> equitable charge if it successfully challenged the declaration that it did not have an equitable interest in Lot 34.
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> [74] Nor did Ta Lee seek a stay of the primary judge's order for specific performance so as to preserve its position should this Court determine that it had an equitable interest in Lot 34. The consequence of that, in our opinion, is that, pursuant to the Real Property Act, s 42(1), Mr Antonios holds his registered interest in Lot 34 free from any interest claimed by Ta Lee.
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> …
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> [77]… whilst the principle of indefeasibility does not prevent the enforcement of a personal equity against a registered proprietor: see Bahr v Nicolay (No 2) (1988) 164 CLR 604; [1988] HCA 16, there is no evidence in the present case of any conduct of Mr Antonios, such as the giving of an undertaking or the making of a promise to Ta Lee, which would have given rise to such an equity against him.

22 Normally, if an alleged secured creditor holds an interest which was created by the registered proprietor, then it will survive in any proceeds of sale: Pepper Finance Corporation Limited v Maloney [2013] NSWSC 890 at [51]-[52] (Hallen J); Re Murrell; Ex parte Official Trustee in Bankruptcy (1984) 57 ALR 85 at [13], [16] (Smithers J); Residential Housing Corporation v Esber & Ors [2011] NSWCA 25 at [103]-[104], [156] (Campbell JA, Macfarlan and Sackville AJJA agreeing), [202]-[204] (Sackville AJJA); Palmer v Talijancich [2019] NSWSC 838 at [29] (Pembroke J). This will ordinarily mean that it is unnecessary for the alleged secured creditor to attempt to make any claim against a subsequent registered proprietor.

23 However, the difficulty for Ta Lee in the Antonios case was that the personal equity it claimed had been granted by the Company, not by Mr Antonios. Had there been any proceeds from the settlement, it would have survived and attached to those proceeds. However, Mr Antonios was a third party, his title to the property was newly-created, and he therefore took free of any prior interests in consequence of s 42 of the RP Act. Unfortunately for Ta Lee, because Mr Antonios had already paid the entire purchase price before the Company went into external administration, there were no further proceeds of sale on settlement.

24 The Court of Appeal's reasoning on this point was enough to dispose of the appeal (as being of no utility), although the Court also considered the other issues dealt with by Emmett AJA at first instance.

25 Practically speaking, there are a number of options available to an aggrieved claimant of a proprietary interest should it wish to preserve that interest pending an

appeal. As noted by the Court of Appeal, it was open to Ta Lee to negotiate an undertaking or promise from Mr Antonios to preserve its alleged equity. (Ta Lee did request that Mr Antonios give such an undertaking, but Mr Antonios declined to do so.) Alternatively, it could have sought a stay of the primary judge's orders.

Stays

26 An application for leave to appeal, or an appeal, to the Court of Appeal, does not operate as a stay of proceedings of the decision at first instance, or invalidate any intermediate act or proceedings: UCPR r 51.44(2). However, the Court of Appeal (or the primary judge) may order that the decision below or the proceedings under the decision be stayed: UCPR r 51.44(1).

27 Generally, an application for a stay pending appeal is first made to the primary judge; if required, a subsequent application may then be made to the Court of Appeal.

28 In Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685 at 693-695, the Court of Appeal set out a number of key considerations for stay applications, including the following:

(a) the onus is upon the applicant to demonstrate a proper basis for a stay which will be fair to all parties;
(b) the mere filing of an appeal does not demonstrate an appropriate case or discharge the onus;
(c) the Court has a discretion involving the weighing of considerations such as balance of convenience and the competing rights of the parties;
(d) where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the Court may refuse a stay;
(e) where there is a risk that the appeal will prove abortive if the appellant succeeds and a stay is not granted, the Court will normally exercise its discretion in favour of granting a stay.

29 Consideration of these principles should be made as soon as possible after judgment is given and, ideally, before any orders are made giving effect to a judgment, in order to preserve any rights or interests that cannot be resurrected by a successful appeal. It will be necessary to determine what relief is available to a successful appellant in order to determine whether an urgent application for a stay of the judgment ought to be made.

Rights to caveat and proprietary rights

30 In some circumstances, a contractual right to lodge a caveat will give rise to a proprietary right in land; typically this can occur where it has been granted in conjunction with an obligation on the part of the land owner to pay money to the grantee, thereby giving rise to an implication that an equitable charge has been granted to secure the payment of that money: Troncone v Aliperti (1994) 6 BPR 13,291; Bellisimo v JCL Investments Pty Ltd [2006] NSWSC 1260; Taleb v National Australia Bank (2011) 82 NSWLR 489 at [60]; Application of Commonwealth Bank of Australia [2014] NSWSC 279 and Aged Care Services Pty Ltd v Kanning Services Pty Ltd (2013) 86 NSWLR 174.

31 Whether or not this will occur in a particular case will, however, depend on the particular facts in question. It is no longer the case that the existence of language conferring a right to caveat will give rise to a *presumption* of an equitable interest; what is required in each case is a construction of the contractual terms as a whole, in accordance with general principle: Taleb v National Australia Bank (2011) 82 NSWLR 489 at [60]; Aged Care Services Pty Ltd v Kanning Services Pty Ltd (2013) 86 NSWLR 174; Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24 at [97]-[98]; cf. Troncone v Aliperti (1994) 6 BPR 13,291.[3]

32 The Deed contained a right to caveat (albeit poorly expressed) granted to Ta Lee by the Company in the context of an agreement by Ta Lee to loan funds for the development. The relevant term provided:

> 7.2 Consequences of default. In addition to and without prejudice to any rights the Lender may have under or pursuant to this Agreement or any other rights, remedies, power and privileges provided by or available in law, at any time after an Event of Default has occurred (whether or not it subsists or continues), the Lender may also:
>
> > (a) Lodge and maintain a caveat on the titles to the Aurora Site or the consolidated title for the Aurora Site until such time the Lender receives full payment of all moneys payable to the Lender under or pursuant to this Agreement;…

[3] The general principles applicable to contractual construction are referred to in Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165 at [40]; Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 at [35].

33 In the earlier case of Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2016] NSWSC 1248, Ta Lee had conceded that the Lums' interest in lots 49 and 50 had priority to any interest Ta Lee might have; it otherwise did not participate in the dispute. In the case of Mr Antonios, Ta Lee again conceded that it did not have priority; however, it sought to attack the validity of the purchase contract itself (i.e. in circumstances where the Company took no active role in the proceedings, Ta Lee effectively sought to step into its shoes and contest the existence and/ or enforceability of the purchase contract).

34 This gave rise to some standing issues, which were ultimately not directly resolved. Instead, the Court determined the substantive issues, finding that Ta Lee's loan documentation was insufficient to give rise to a proprietary interest. Emmett AJA held that the mere existence of a 'right to caveat' in a contract was not enough to imply the conferral of a proprietary interest in land, holding (at [84]-[88]):[4]

> [A] commercial purpose [for the inclusion of this language inconsistent with the conferral of a proprietary interest] might be gleaned in the sense that, by lodging a caveat, Ta Lee would be assured of being notified if there were any intended dealings with the Aurora Site…
>
> The existence of such a right, however, may suggest that the person entitled to lodge a caveat was intended to have an interest that would support a caveat. Thus, it is a general principle of construction of a grant that *cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit*…
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> In order to determine whether the Ta Lee Deed conferred a right to create a proprietary interest, it must be construed in the light of the whole of its terms including its objects. There can be no general principle that an instrument granting authority to lodge a caveat in connection with an obligation to pay money must be construed as conferring a proprietary right in relation to the property that is to be the subject of a caveat…
>
> The commercial reason for a provision such as that under consideration is not necessarily limited to the advantage of having an equitable interest such as a charge. There may be perceived to be a real advantage in having a caveat in operation, thereby impeding the registered proprietor's dealings with the property without notice to the creditor…
>
> The Ta Lee Deed speaks of "security" in the guarantee provisions, which involve the provision of guarantees by both Mr Fong and MV Aust. It would have been very simple for the author of the Ta Lee Deed to include an express provision for the

[4] Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 247.

> grant of security in the form of a charge over lots in the proposed strata plan if that was intended. I have referred above to the acknowledgment in the recitals to the Ta Lee Deed that the relationship between Ta Lee and the Company was to be simply that of creditor and debtor. While that provision may have been intended to negate the possibility that the Company and Ta Lee were engaged in a joint venture or the possibility that Ta Lee had any beneficial interest in the Development, it also tends to negate any suggestion that security in the nature of a charge might have been intended. Having regard to the somewhat unusual terms of the arrangement between Ta Lee and the Company, I do not consider that the Ta Lee Deed, coupled with the lodging of the caveats, created an equitable charge in favour of Ta Lee.

35 The Court of Appeal agreed with Emmett AJA.[5]

36 This outcome is a timely reminder to practitioners acting for lenders who wish to obtain security for loan moneys. It is critical to ensure that the contractual language used makes clear that the conferral of a proprietary interest is intended. This can, most obviously, be achieved by using language apposite to the grant of a charge or mortgage, rather than the more amorphous concepts arising from the grant of a right to caveat (or even a 'caveatable interest': Bellisimo v JCL Investments Pty Ltd [2009] NSWSC 1260 at [11], [18] (White J)).

Priorities

37 As explained above, the cross-claims in the proceedings asserted competing equitable interests. Emmett AJA was not required to determine the order of priority of the equitable interests claimed by Ta Lee and Mr Antonios, because Ta Lee conceded that Mr Antonios's equitable interest took priority to its equitable interest. Instead, Emmett AJA held that Ta Lee's right to caveat was not a proprietary interest at all.

38 It is worth noting that equitable interests of equal merit are given priority in the chronological order in which they were created. However, in the case of equitable interests with unequal merits, the general rule that 'the earlier in time has the better equity' may be displaced by 'postponing conduct': see Heid v Reliance Finance Corp Pty Ltd (1983) 154 CLR 326.

[5] Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24 at [103]-[105], [112]. The Court of Appeal also held that the contractual language permitting the lodgement of a caveat did not extend to the strata title lots, but related only to the former development lots: at [106]-[111].

39 As set out above, a secondary purpose of caveats is to alert anyone who searches the Register to equitable interests. A failure to lodge a caveat *may* be considered postponing conduct if the failure allows another to take an equitable interest in the same property without notice of earlier interests.

40 Ta Lee asserted that its equitable interest was created under the Deed in 2011. Mr Antonios' equitable interest was created on 15 April 2015. Ta Lee did not lodge caveats on the title to lot 34 until June and August 2015. In those circumstances, Ta Lee properly accepted that if Mr Antonios held an equitable interest in lot 34, his interest took priority to Ta Lee's.

41 It is suggested that, although the primary purpose of a caveat is injunctive, consideration should also be given to postponement, when advising whether or not to lodge a caveat in order to protect equitable interests.

42 Consideration should also be given to any contractual prohibition on lodging caveats. The contracts for the sale of lots in the Development contained a term prohibiting purchasers from lodging caveats. Such terms do not invalidate the statutory right to lodge a caveat; however, they may be relevant to the balance of convenience in assessing whether or not a caveat should be extended following the issue of a lapsing notice. If an equitable right is at risk, lodging a caveat will usually be the preferred course, as any breach of contract resulting from this may not give rise to a right of termination or rescission and only result in a claim for (nominal) damages.

Legal tender

43 One of the more colorful aspects of the M V Developments litigation was that Mr Antonios, a professional poker player, had paid the sum due under the purchase contract in the form of cash in brown paper bags, casino chips, electronic funds transfers to a related entity of the vendor and the forgiveness/ conversion into equity of third party loans (made by Mr Antonios to Mr Fong, the sole director of the Company).

44 It was uncontentious that these payments had been made, that they were purportedly made as a 'deposit' (albeit of the entire purchase price) under the purchase contract, and that they had been released by Mr Antonios for the use of the Company in completing the Development.

45 Ta Lee relied upon clause 2.4 of the standard terms in the contract for sale to argue that these forms of payment were not permitted under the contract and should therefore be ignored for the purposes of assessing whether payment had been made. Clause 2.4 provides:

> The purchaser can pay any of the deposit only by unconditionally giving cash (up to $2,000) or a cheque to the depositholder or to the vendor, vendor's agent or vendor's solicitor for sending to the depositholder.

46 This rather unmeritorious argument was not dealt with by the primary judge, in circumstances where his Honour viewed the case as having been conducted on the basis that, as a matter of practicality, the payment of casino chips was 'equivalent' to the payment of money: Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 247 at [13]. The Court of Appeal dealt with this issue more directly, rejecting Ta Lee's argument on the basis that the Company had directed or agreed that payments be made in this way and had subsequently provided Mr Antonios with the keys to the property: Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24 at [160], [164]-[175].

47 This outcome is unsurprising:

(a) clause 2.4 protects the parties from unwillingly being burdened with large amounts of cash or other unwanted forms of payment. For example, neither party can be *required* to accept the security risks and logistical problems presented by handling large amounts of cash. As clause 2.4 exists for the benefit of the purchaser and vendor, it should be construed beneficially;

(b) the clause does not say what is to happen if the purchaser seeks to pay the deposit in a form other 'than by unconditionally giving cash (up to $2,000) or a cheque'. That issue is addressed, instead, by clause 2.5;

(c) the effect of clause 2.5 is that a failure to comply with clause 2.4 provides the vendor with a right to terminate. Importantly, that right must be exercised in order to bring the contract to an end; termination for breach of contract is not automatic. Clause 2.5 also expressly provides that the right to terminate is lost when the deposit is paid in full;

(d) in relation to the third party loans and electronic funds transfers, Mr Antonios was entitled to rely upon the indoor management rule in his dealings with the vendor: Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146, 154–155 (Mason CJ); ss 128 and 129 of the *Corporations Act* 2001 (Cth);

(e) the Company did not terminate the contract with Mr Antonios; rather, it accepted these forms of payment and, in some cases, positively requested or directed them. It also confirmed, in writing, the receipt of payment in full.

48 It is clear enough that payment of a deposit in a manner not expressly contemplated by a sale of land contract is capable, on the vendor's election, of being accepted: see, for example, Statewide Developments Pty Ltd v Higgins.[6] That being said, practitioners ought to ensure that any payment that does not strictly answer to the contractual requirement is authorised in writing by the counterparty.

Jones v Dunkel

49 In the course of its judgment, the Court of Appeal in the Antonios case discussed the principles applicable to Jones v Dunkel inferences. As the possibility of such inferences often arises in litigation (and is something to keep in mind when making forensic decisions about which evidence to adduce before a court), it is worthwhile reflecting upon these principles.

50 There are a number of potentially available adverse inferences which may be drawn against a party, including:

(a) Jones v Dunkel interferences, which permit a Court to infer that the evidence of a missing witness expected to have been called by a party 'would [if called] not help [that party's] case';[7]
(b) Ferrcom inferences, which permit a Court to infer, where a party has failed to call evidence-in-chief from one of its witnesses on a particular topic, that the party 'fears to do so… [being] some evidence that such examination in chief would have exposed facts unfavourable to the party';[8]
(c) documentary inferences, which apply Jones v Dunkel/ Ferrcom reasoning to documents and other pieces of evidence.[9]

51 Practitioners often get very excited about the possibility of adverse inferences. However, in practice, they are often non-events, and if drawn, typically serve only to

[6] [2011] NSWCA 35; (2011) 15 BPR 29,195 at [8] (Sackville AJA, Macfarlan JA and Handley AJA agreeing). See also, for example, cll 2.6, 2.7 and 2.8 of the standard terms of the sale of land contract.
[7] Jones v Dunkel (1959) 101 CLR 298, 321.
[8] Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389, 418 (Handley JA) (quotations/ citations omitted); Evans v Levy [2011] NSWCA 125, [43] (Young JA, Campbell JA and Sackville AJA agreeing); Zaccardi v Caunt [2008] NSWCA 202, [27] (Campbell JA, Allsop P and Barr J agreeing).
[9] Katsilis v Broken Hill Pty Co Ltd (1977) 18 ALR 181 at 196-198 (Barwick CJ).

reinforce conclusions arrived at by a court, rather than dictating what those conclusions should be.

52 This is illustrated by the Antonios case, in which the primary judge noted that even if adverse inferences had been drawn against Mr Antonios as contended for by Ta Lee, that would not have impacted the Court's assessment of the evidence: Lum v M V Developments (Lane Cove) Pty Limited (in liq) [2018] NSWSC 247 at [53]. The most that such inferences can do is establish that the missing evidence would not have assisted a party's case; however, if that party's case is established by other evidence, this is an irrelevance. Conversely, an adverse inference drawn against a party with a strong case cannot make an opposing party's weak case any stronger.

53 The drawing of an adverse inference is discretionary: Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24 at [136]-[137]. There are typically two broad elements of analysis required in relation to the drawing of an adverse inference:

(a) a determination of whether or not a witness falls within a party's 'camp' (or, in the case of evidence, is of a kind which would be expected to be available to that party);
(b) whether or not there is a sufficient explanation for the failure to call the witness (or evidence). If there is a sufficient explanation, there is no basis to draw an adverse inference: Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24 at [137]-[138].

54 As a matter of discretion, it is also relevant to inquire into whether or not the drawing of an adverse inference would have any utility; that is, whether or not the witness (or evidence) might have been expected to add anything of substance to the evidentiary landscape: Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24 at [137].

Costs in the liquidation context

55 A costs order made against a company in liquidation, in litigation properly brought by a liquidator, may be paid by the company as an expense of the liquidation under s 556(1) of the *Corporations Act*; however, if the costs were improperly incurred, the costs order may not be paid out of the assets of the company: Hypec Electronics v Mead [2004] NSWSC 731 at [122]-[124] per Campbell J.

56 The Court has power to control and review the conduct of liquidators under ss 477(6) and 536 of the *Corporations Act*. This includes jurisdiction to make personal costs orders against liquidators, whether or not they are named as parties to the proceedings: Hypec Electronics v Mead [2004] NSWSC 731 at [53], [56], [108]; Mead v Watson As Liquidator for Hypec Electronics [2005] NSWCA 133; s 98 of the Civil Procedure Act 2005 (NSW).

57 In AMC Commercial Cleaning (NSW) v Coade [2013] NSWSC 332, Rein J held (at [5], citing Silvia v Brodyn Pty Ltd (2007) 25 ACLC 385; [2007] NSWCA 55) that where proceedings are brought by a liquidator and are unsuccessful, the liquidator will ordinarily be subject to a personal costs order. Although (as explained in that case) the position is somewhat different where the liquidator is a defendant, the question is one of substance and not form.

58 In the Lum proceedings, Darke J held that the Lums were forced to commence the proceedings (to address the Liquidators' action in issuing lapsing notices) and were in effect the defendants in the proceedings. Darke J also considered that there was no proper basis for correspondence from the Liquidators' solicitors stating that they intended to 'ignore the contracts' and that the Liquidators had thereby acted unreasonably. In the circumstances, Darke J ordered the Liquidators to pay the Lums' costs of the proceedings.

59 Similarly, the Liquidators' solicitors sent a letter to Mr Antonios, stating that they intended to ignore his contract.

60 On 14 November 2017, the Liquidators entered into a deed with Ta Lee and Gold Stone, under which the Liquidators were permitted to draw from the assets of the Company their unpaid remuneration of $1.2 million; in addition, Ta Lee was paid $2 million, Gold Stone was paid $445,000 and the Company agreed to provide assistance to Ta Lee to prosecute its cross-claim against Mr Antonios. Significantly, the Company agreed to submit to Ta Lee's cross-claim and agreed not to submit to Mr Antonios's cross-claim.

61 Emmett AJA, at [102] to [104] of his judgment, stated the relevant principles for personal costs orders against liquidators as follows:

> If the company in liquidation is unsuccessful in such proceedings, an order for costs will generally be made against the Company. However, an order for costs will not generally be made against the liquidator personally, unless the liquidator has acted unreasonably…

> In such a case, the liquidator will generally be entitled to an indemnity from the assets of the company, unless the liquidator has acted unreasonably…
>
> Further, in a case where the liquidator of a company in liquidation is not the moving party in proceedings but, by his action, the liquidator has forced a party to take proceedings to enforce a right to which the party is clearly entitled, it may be appropriate to treat the liquidator as the moving party and not as a defendant. In such a case, there will be no unfairness in requiring the liquidator personally to pay that other party's costs.

62 At [117], Emmett AJA held that the Liquidators agreeing under the Deed to submit to Ta Lee's cross-claim and not to submit to Mr Antonios's cross-claim was unreasonable and resulted in Mr Antonios incurring costs in the proceedings. In effect, the Liquidators bound themselves by the Deed to ensure that the proceedings with Mr Antonios would not (or could not) be resolved. At [120], Emmett AJA held that it was unreasonable for the Liquidators to reject an offer of compromise made by Mr Antonios. In those circumstances, Ta Lee and the Liquidators were ordered to pay Mr Antonios's costs of the proceedings.

63 Costs orders against companies in liquidation may be of little benefit to the recipients. However, liquidators are likely to hold professional indemnity insurance that will respond.

64 If it is considered that liquidators are acting unreasonably in litigation, notice of any intention to seek costs orders against them should be given early to increase the likelihood of obtaining such orders if the conduct continues.

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