

The logo for actlaw society, with 'act' in orange, 'law' in white, and 'society' in grey, all in a sans-serif font, set against a dark blue rounded rectangle.

**actlaw**  
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# 2024 Intensive Conference

**BRINGING THE BALANCE**

13 – 14 MARCH 2024 | NOVOTEL CANBERRA

The logo for actlaw society, with 'act' in orange, 'law' in white, and 'society' in grey, all on a dark blue background.

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A photograph of several smooth, rounded stones of various colors (brown, grey, red) stacked on top of each other, balancing precariously. The background is a soft, light blue sky.

# Recent Property Law Cases

**PRESENTED BY DANIELLE MILDREN**

Terracon Legal

Decorative geometric patterns at the bottom of the slide, including a blue and white zigzag pattern on the left and a white and orange striped pattern on the right.



# INTRODUCTION & OVERVIEW

## Recent decisions:

- Commissioner for ACT Revenue v Leemhuis Investments Mitchell Pty Ltd (Appeal) [2023] ACAT 83
- GLDT Pty Ltd ATF the George Lemezina Discretionary Trust v Commissioner for ACT Revenue [2023] ACAT 50
- Shields v Natlaw Pty Ltd & Anor (Civil Dispute)[2023] ACAT 44
- Jolley v Construction Occupations Registrar [2023] ACAT 65
- Laundry Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited [2023] HCA 6
- Empire Global Developments Pty Ltd v Chalman (Residential Tenancies) [2024] ACAT 15



# When is a declaration of trust a dutiable transaction?

## ***Commissioner for ACT Revenue v Leemhuis Investments Mitchell Pty Ltd (Appeal) [2023] ACAT 83***

- Two corporate trustees (**AUL** and **PSL**) entered into a partnership for the purpose of acquiring commercial investment properties, which were held by a different entity (**LIM**) controlled by the same natural persons (who were father and son)
- AUL and PSL had appointed LIM as manager, to manage the partnership and act as their agent for the purposes of the partnership agreement
- The partners decided to dissolve the partnership and sell 2 of the 4 units held by LIM, with PSL to receive the cash proceed of the sales, and AUL to retain all of the interest in the remaining units
- The Commissioner determined that the simultaneous sale of the two units and dissolution of the partnership constituted an oral declaration of trust by LIM in favour of AUL and sought to recover duty (pursuant to Chapter 2 of the Duties Act), penalty tax, and interest



# When is a declaration of trust a dutiable transaction?

- On appeal, the Tribunal agreed that there had been a change in beneficial ownership, but disagreed that the transaction was a declaration of trust
- After considering the terms of the Partnership Agreement and the nature of the transaction, the Tribunal determined that:
  - it was not a fixed trust (as the Agreement provided for a change in respective interests);
  - it was never intended that LIM would be the beneficial owner of the property; and
  - LIM held the beneficial interest at all times for AUL as a bare trust.
- The transaction was not a dutiable transaction because no declaration of trust had been made by a person in whom dutiable property was vested.



# When is a declaration of trust a dutiable transaction?

- The statutory test for whether there has been a 'declaration of trust' was stated as being:
  1. a declaration (other than by will or testamentary instrument)
  2. that identified property is vested, or to be vested, in the person making the declaration;
  3. is, or is to be, held in trust;
  4. beneficial owner / person entitled to appoint the property may not have assented to the declaration.
- A declaration of trust need not be in writing for the purposes of the Duties Act



# Landholder duty – relevant acquisition, or declaration of trust?

*GLDT Pty Ltd ATF the George Lemezina Discretionary Trust v Commissioner for ACT Revenue [2023] ACAT 50*

## **Facts**

- Unit trust scheme with substantial landholdings (40 properties)
- Under the trust deed, each beneficial owner was entitled to 50% of the property proceeds on winding-up
- Trust deed amended to provide for beneficial interest in 20 of 40 specific properties each (being 49.82% and 50.18% respectively of all property held by the unit trust)
- Commissioner determined:
  - the amendment was an acquisition of a significant interest in a landholder; and
  - the arrangement amounted to a 'tax avoidance scheme' (resulting in significant penalties on top of duty and interest)



# Landholder duty – relevant acquisition, or declaration of trust?

## Decision

- The acquisition of beneficial interests in specific properties did not trigger landholder duty liability because each entity already had a 50% entitlement, meaning their proportionate liability remained materially unchanged
- The correct test for a relevant acquisition of a significant interest is a comparison of the unitholder's entitlement before and after the transaction, which might show that:
  - The person acquired an additional significant interest; or
  - The person acquired, in aggregation with their pre-existing interests, a significant interest; or
  - The person acquired a further interest in addition to a pre-existing significant interest.
- As none of these events had occurred, there was no relevant acquisition.





# Solicitor's duty of care

## ***Shields v Natlaw Pty Ltd & Anor (Civil Dispute) [2023] ACAT 44***

### **Facts**

- Purchasers bought a house that they later discovered had exterior cladding containing asbestos
- The Contract contained a building report that confirmed no assessment had been made regarding the presence of asbestos
- The Contract also contained an asbestos information sheet and other disclaimers regarding asbestos
- File note referred to a discussion of the building report, with the solicitor advising that they are not a structural engineer and unable to advise on structural aspects and suitability, and that the purchaser was responsible for making further enquiries
- Purchasers alleged that their solicitors had been negligent in giving advice on the risk of asbestos



# Solicitor's duty of care cont'd

## Decision

- The solicitor's duty of care did not extend to insisting that the purchasers obtain an asbestos report – general warnings about potential risks, and drawing attention to contract documents, was sufficient
- The scope of the duty of care was not altered by the fact that the purchasers were first-home buyers or the age of the property
- Conveyancing lawyers primarily focus on legal aspects of a property transaction – expertise in construction matters is not required or expected



# Nominee liability for rectification orders

## ***Jolley v Construction Occupations Registrar [2023] ACAT 65***

- Registrar issued rectification order to the applicant for building work done by the construction company (of which he was appointed as nominee in accordance with the requirements of the COLA)
- The applicant argued (unsuccessfully) that it was not appropriate for a rectification order to be made against him because:
  - He did not personally carry out the building work
  - He had implemented supervision systems to ensure the company complied with the relevant requirements
  - It would be unfair and disproportionate, relative to his personal degree of fault, for him to be wholly liable (noting that the passage of time since completion of the works meant no claims could be pursued against any subcontractors)



# Nominee liability for rectification orders

## Decision

*As to the first reason, we are satisfied that in each case, Mr Jolley's contravention was a contributing cause of the defects in question, whilst recognising that in a practical sense primary responsibility for the failure to carry out work in compliance with the requirement of section 42 of the Building Act and to ensure that the completed building met the relevant performance requirements of BCA – 2011 lay with Chase.*

*Nevertheless, the statutory scheme provides for Mr Jolley to be personally responsible for the defects caused by the non-compliant work done by Chase. **The fact that he did not do the work himself is irrelevant. He was responsible to supervise the work to ensure that it did comply** [322]*



# Nominee liability for rectification orders cont'd

## Decision

- Supervision systems had failed – the building did not comply with the relevant performance requirements
- The defects had first become apparent when it was still available to the construction company to enforce its contractual rights against the contractors that had completed the defective works
- The construction company resolved to wind up voluntarily prior to the expiration of any limitation periods
- *“the well-worn saying applies – ignorance of the law is no excuse ... if [the applicant] failed to obtain appropriate advice before taking on the role of nominee, he has no one to blame but himself. If he was given incorrect advice, his remedies may lie elsewhere.”* [328]



# Ordinary course of business

## ***Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited [2023] HCA 6***

### **Facts**

- Contract for the sale of The Quarryman's Hotel (Pymont, NSW) between Laundry Hotels (Quarry) Pty Limited (Seller) and Dyco Hotels Pty Limited (Buyer) dated 31 January 2020.
- Staged completion to occur on 30 and 31 March 2020, during which period a NSW public health order restricted the operation of pubs to the sale of takeaway food and beverages only.
- Clause 50.1 of the contract stated that for the period between exchange and completion the Seller was required to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner".
- Seller complied with the public health order (failure to comply would have constituted a criminal offence), operated The Quarryman's to the extent that it could, within the confines of the public health order.
- Prior to Completion, the Buyer indicated to Seller that Completion would not be able to occur because the Seller was not ready, willing and able to complete the contract, arguing that clause 50.1 had not been complied with.
- Seller served a notice to complete, followed by a notice of termination after the Buyer failed to comply.
- Buyer commenced proceedings arguing that the contract had been frustrated, or in the alternative, that the Seller was not entitled to issue a notice to complete and subsequently terminate the contract – this conduct was a repudiation of the contract by the Seller that had been validly accepted by the Buyer.



# Ordinary course of business cont'd

## NSW Supreme Court Decisions

*At first instance:* Contract had not been frustrated by Covid-19 and health orders, Seller had carried on the business within the confines of the law, Seller was entitled to serve a notice to complete and terminate

*On Appeal:* public health order was a supervening event that would render the Seller's compliance with clause 50.1 illegal, Seller's obligation under clause 50.1 was therefore suspended. Service by the Seller of a notice to complete was done at a time where it was not "ready, willing and able" to complete, and therefore was a repudiation of the contract



# Ordinary course of business cont'd

## High Court decision

- the obligation to "carry on the Business in the usual and ordinary course" contained an inherent requirement to do so only in accordance with the law.
- Court noted it was "not necessary to do more than construe clause 50.1 in its context". Considered objectively from the position of the reasonable businessperson the Seller "was to carry on the Business in the manner it was being conducted at the time of the contract to the extent that doing so was lawful".
- Proper construction of clause 50.1 meant it "could never extend to an obligation on the Vendor to act illegally".





# Ordinary course of business cont'd

## Summary

### 1. *Operation of the business must be lawful*

The requirement to operate a business in "the usual and ordinary course as regards its nature, scope and manner" includes a fundamental requirement that the operation of the business must be lawful. This does not need to be explicitly stated or even implied, but exists inherently.

### 2. *Significant change of circumstances between exchange and the Date for Completion does not mean the contract cannot be completed*

Parties should carefully consider their obligations and how they are to continue to operate within the confines of the law and contract before taking action that could be considered repudiation of the contract.

### 3. *Consider the potential risks of events that may occur prior to completion in any transaction*

A buyer might consider providing for termination of a contract where a supervening event or material adverse change affects the value of the asset being sold, the operation of the business, or prevents the business from being sold as a going concern.



# When is a rent increase excessive?

## ***Empire Global Developments Pty Ltd v Chalman (Residential Tenancies) [2024] ACAT 15***

### **Facts**

- On 16 August 2023, the landlord (Empire Global) served a notice on the tenant under section 64B of the *Residential Tenancies Act 1997* to increase the rent from \$425.00 per week to \$510.00 per week, being an increase of \$85.00 per week or 20%.
- Landlord relied on subsections 68 (4) (c) (outgoings) and 68 (4) (g) (comparable rents) of the Act to justify the rent increase in excess of the prescribed amount, arguing that three of its costs increased and that those increases - interest on borrowing costs, rates paid to the ACT Government and electricity and power costs paid to ACTEW AGL - were part of the justification for the excessive rent increase proposed.
- The landlord's expenses related to the whole building (100+ residential units, commercial businesses and parking spaces) all owned by the landlord



# When is a rent increase excessive?

## Decision

- *Interest*: Landlord cost, not a cost that relates to the premises.
- *Rates and electricity*: costs or outgoings relating to the building, not to the premises (tenant paid for services and utilities connected to the premises)
- *Rental rates for comparable premises*: Section 68 (4) of the Act does not require the ACAT, in determining what is an allowable increase in rent, to determine a market rental for the premises, only to consider “the rental rates for comparable premises”, which ACAT considered to be \$450-\$510 per week.
- *Impact of rent increase on tenant*: the catch all provision of section 68 (4) (i) might in certain circumstances allow the ACAT to consider the personal circumstances of tenants however the tenant’s evidence did not indicate hardship or special needs



# When is a rent increase excessive?

## Decision cont'd

*History of rental costs:* Rent had increased by a total of \$25 / week or 6.25% in the 2.5 yrs the tenant had occupied the premises. Section 68 (4) (b) requires the ACAT to consider the history of the rental costs of the premises to the tenant. A 20% increase in rent is a very large increase for a tenant to pay on an ongoing basis.

**Held:** An increase in rental for the premises of \$35.00 per week or about 8% is just and is allowed.



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