

SHORT PARTICULARS OF CASES
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**SHAND v R&B INVESTMENTS PTY LTD AS TRUSTEE FOR THE
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ERNST & YOUNG (A FIRM) ABN 75 288 172 749 v
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KAIN v R&B INVESTMENTS PTY LTD AS TRUSTEE FOR THE
R&B PENSION FUND & ORS (S146/2024)**

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 89

Date of judgment: 5 July 2024

Special leave granted: 7 November 2024

Three related appeals have been brought against the judgment of the Full Court of the Federal Court of Australia (“FCAFC”) given on 5 July 2024: *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89. Accordingly, the appeals are to be heard together, with *Kain v R&B Investments Pty Ltd as Trustee for the R&B Pension Fund & Ors* (S146/2024) as the lead appeal.

The first and second respondents (“class action applicants”) brought separate securities class action proceedings against the third respondent (“Blue Sky”), a company in liquidation, some of Blue Sky’s former directors (the appellant in S143/2024 and the appellant in S146/2024), and Blue Sky’s former auditor (the appellant in S144/2024). The sixth to ninth respondents (“the insurers”) were later joined to the proceedings. On 24 March 2023, the two class action proceedings were consolidated. As part of the consolidation process, the class action applicants entered into a “cooperative litigation protocol” (“the protocol”) and two firms of solicitors, Banton Group and Shine Lawyers, who each acted for one of the class action applicants in the separate class action proceedings, entered into a “consolidation agreement” (“the agreement”). The protocol and agreement negotiated arrangements for the conduct and funding of the class action upon consolidation. Following consolidation of the proceedings, both firms were granted leave to be jointly named as solicitors on the record for the class action applicants.

Clause 5.1 of the protocol provided that legal costs and disbursements would be shared among the class action applicants and group members on a costs-equalisation basis and that “*Banton and Shine be further remunerated for their risks in funding the legal costs and disbursements by payment of such percentage of the Resolution Sum [(the sum recovered as a result of the consolidated proceeding)] as may be approved by the Court*”. The class action applicants filed an interlocutory application seeking orders to issue an opt out notice informing group members, *inter alia*, as to the basis on which remuneration for the funding and conduct of the proceedings would be sought. When presented with the opt out notice, Lee J of the Federal Court of Australia reserved the following question to the FCAFC:

Is it a licit exercise of power, pursuant to statutory powers conferred within Part IVA of the Federal Court of Australia Act 1976 (Cth), or otherwise, for the Court, upon the settlement or judgment of a representative proceeding, to make an order (being a “common fund order”, as that term is

defined in Davaria Pty Ltd v 7-Eleven Stores Pty Ltd [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22]–[30]) which would provide for the distribution of funds or other property to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding? (“the reserved question”).

The appellants contended in the Federal Court that the Federal Court is bereft of power to make any form of “common fund order” (“CFO”) providing for the distribution of funds or other property to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of a class action (“Solicitors’ CFO”). The FCAFC amended the reserved question by deleting parts (being those parts underlined above) in order to make clear the limitations of the FCAFC’s inquiry (“the amended reserved question”).

The appellants’ contentions in the FCAFC as to want of power to make a Solicitors’ CFO could be grouped into four categories: (1) the High Court’s decision in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 is to be understood as precluding the making of a CFO either as a matter of power, or a matter of preference, let alone a Solicitors’ CFO; (2) a Solicitors’ CFO could never be “just” because it creates a conflict of interest which is impermissible having regard to the fiduciary character of both the solicitor’s relationship with its client (and the solicitor and the applicants’ relationship with group members) and/or professional obligations; (3) a Solicitors’ CFO could never be “just” because either it, or the contract which requires the applicants to apply for it, “is inconsistent with” or involves a breach of section 183 of the *Legal Profession Uniform Law* (NSW) and/or rule 12.2 of the *Australian Solicitors’ Conduct Rules 2015* (NSW); and (4) that a Solicitors’ CFO could never be “just” because it is contrary to a public policy against contingency-based fees for lawyers, notwithstanding the abolition of maintenance and champerty.

Ultimately, the FCAFC rejected each of the appellants’ contentions and answered “yes” to the amended reserved question.

The first and second respondent have filed a notice of contention, and the Association of Litigation Funders of Australia seek leave to intervene in the proceedings in support of the first and second respondent.

The grounds of appeal in S143/2024 are:

- The Full Court erred in answering “yes” to the varied reserved question in order 1 of the Orders dated 5 July 2024 as:
 - a. it would not be a “licit” exercise of power pursuant to s 33V or s 33Z(1)(g) of the *Federal Court of Australia Act 1976* (Cth) (“the FCA Act”) for the Court to make a so-called “common fund order” (“CFO”); and
 - b. it would not be a “licit” exercise of power pursuant to s 33V or s 33Z(1)(g) of the FCA Act for the Court to make a CFO providing for the distribution of funds from a judgment or settlement sum to a solicitor who had conducted the proceeding, otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding.

The ground of appeal in S144/2024 is:

- The Full Court erred in finding that it would be a licit exercise of power under Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the Court, upon settlement of, or judgment in, a representative proceeding, to make a common fund order that would provide for the distribution of funds to a solicitor who had conduct of the proceeding, otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding.

The ground of appeal in S146/2024 is:

- The Full Court erred in answering “yes” to the following question reserved to it under s 25(6) of the *Federal Court of Australia Act 1976* (Cth):
 - 1) *Is it a licit exercise of power, pursuant to statutory powers conferred within Pt IVA of the Federal Court of Australia Act 1976 (Cth) for the Court, upon the settlement or judgment of a representative proceeding, to make an order (being a “common fund order”, as that term is defined in Davaria Pty Ltd v 7-Eleven Stores Pty Ltd [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22] – [30]) which would provide for the distribution of funds to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding?*

HELENSBURGH COAL PTY LTD v BARTLEY & ORS (S119/2024)

Court appealed from: Full Court of the Federal Court of Australia
[2024] FCAFC 45

Date of judgment: 5 April 2024

Special leave granted: 5 September 2024

The first to twenty-second respondents are former employees (collectively, “the former employees”) of the appellant (“the employer”) who worked at a coal mine. The twenty-third respondent is the Fair Work Commission (“FWC”).

In June 2020, the former employees were made redundant due to a restructure of the mine’s workforce at the beginning of the COVID-19 pandemic. Some of the work performed at the mine was undertaken by contractors and the contractor workforce was also reduced. The former employees applied to the FWC to challenge their dismissals on the basis that they had been ‘unfairly dismissed’ pursuant to Part 3-2 of the *Fair Work Act 2009* (Cth) (“the FW Act”).

Unfair dismissal is defined in section 385 of the FW Act as any dismissal from employment that is harsh, unreasonable, or unjust and is not a genuine redundancy. Genuine redundancy is defined in s 389, and relevantly a person’s dismissal cannot be a genuine redundancy if, pursuant to s 389(2), it would have been reasonable in all the circumstances for the person to be redeployed. The former employees contend that it would have been reasonable for their employer to have redeployed them to roles being performed by contractors. This appeal concerns what “in all the circumstances” means, whether the FWC is permitted to consider whether the employer could have made changes to its business to create or make available a position for an otherwise redundant employee, and whether the correct standard of appeal was applied.

This matter has had a lengthy litigation history however ultimately, the FWC found in favour of the former employees, holding that the dismissals were not genuine redundancies in circumstances where it was reasonable for the employer to reduce the work available to contractors and redeploy the former employees to undertake that work. On a second appeal to the Full Bench, the FWC applied the appellate standard set out in *House v The King* (1936) 55 CLR 499, concluding that as the nature of the decision was discretionary, it could only be successfully challenged on appeal if it was shown that the discretion was not exercised correctly.

The employer then appealed to the Full Court of the Federal Court of Australia (Katzmann and Snaden JJ, Raper J). The Full Court found no error in the Full Bench’s decision and its application of the *House v The King* standard. The Full Court held that s 389(2) should be interpreted broadly and assessed according to “what would have been” reasonable. This authorises an inquiry as to the possibility of redeployment and whether there were measures that an employer could have taken, apart from dismissing the employee. The Full Court held that the FWC has the authority to examine all relevant factors when assessing redeployment options, including the employer’s reliance on contractors, and redeployment does not necessarily require a role to be vacant.

In this appeal, the employer submits the Full Court erred by considering “in all the circumstances” in the abstract as this reasoning impermissibly permits the FWC to stand in the shoes of the employer and decide which workers (whether they be employees or engaged by external contractors) ought to have been dismissed. The employer says the correct analysis is to look within the business at the time of dismissal, after any restructure, and if there is no available position to which they could reasonably be redeployed within that business (or that of an associated entity), then that is the end of the matter. The employer says the application of the discretionary standard caused the wrong question to be asked and says the correctness standard should have been applied, arguing that there is one legally permissible answer to the question posed by ss 385(d) and 389(2).

The former employees contend that s 389(2) is a beneficial provision to encourage redeployment where it would be reasonable in all the circumstances. They say this requires a hypothetical analysis of the employer’s business looking forward to whether the employee *could* have been redeployed to another job, position, or task; and if so, whether this *would* have been reasonable having regard to all the circumstances. They contend there does not need to be a vacant position in the enterprise for redeployment to be “reasonable in all the circumstances”. They say further that the employer never sought to appeal previously on the correctness standard.

The grounds of appeal are:

- The Full Court erred in:
 - (a) construing s 389(2) of the *Fair Work Act 2009* (Cth) as authorising the Fair Work Commission to inquire into whether the employer could have made alternative changes to its enterprise, including by terminating other operational or staffing arrangements, so as to create or make available a position to which an otherwise redundant employee could reasonably have been redeployed;
 - (b) failing to construe s 389(2)(a) of the FW Act as directed to “the employer’s enterprise” as it existed as at the date of the dismissal (rather than the enterprise as it could have existed if the employer had determined to respond differently to the changes in the operational requirements of the enterprise which gave rise to the redundancy).
- The Full Court erred in finding that the determination required to be made under s 385(d) and s 389(2) of the FW Act was a “discretionary” decision which can be interfered with on appeal only in accordance with the test in *House v The King*.
- The Full Court erred in failing to find that the decisions of the FWC ([2022] FWCFB 166 and [2021] FWC 6414) were affected by jurisdictional error.

VALUER-GENERAL VICTORIA v WSTI PROPERTIES 490 SKR PTY LTD (M96/2024)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2024] VSCA 157

Date of judgment: 4 July 2024

Special leave granted: 7 November 2024

This appeal concerns the land located at 490 St Kilda Road, Melbourne (“the Land”), upon which stands a historical building known as “Landene”. The appellant is the government authority responsible for statutory valuations in Victoria. The respondent is the owner of the Land. At issue is the proper construction of the definition of “improvements” in section 2(1) of the *Valuation of Land Act 1960 (Vic)* (“the VLA”), and the meaning of the words “*but in so far only as the effect of the work done or material used increases the value of the land and the benefit is unexhausted at the time of the valuation*”. Section 2(1) defines the circumstances in which work or material constitutes an “improvement” for the purposes of determining the site value of land within the meaning of the VLA. This appeal turns on whether Landene was to be treated as an “improvement” for the purpose of assessing the site value of the Land under the VLA.

Landene was constructed in 1897 and is one of the few remaining historical buildings in the surrounding area. The Land is zoned “Commercial 1” under the Port Phillip Planning Scheme and is subject to a number of design and development overlays, and a site-specific heritage overlay which prevents the demolition of Landene. The respondent purchased the Land in August 2019 for \$8.25 million and extensively renovated the interior for use as a private art and antiques gallery.

On 1 January 2020 and 1 January 2021, the Land was valued pursuant to the VLA. On both occasions, the Land returned a site value of \$6.2 million. The respondent objected to the two site valuations on the basis that they were too high. The appellant disallowed the objections, resulting in the respondent applying to the Victorian Civil and Administrative Tribunal (“VCAT”) for a review of the appellant’s decision to disallow the objections. VCAT agreed with the respondent that the returned site valuations were too high and made orders reducing the site value for each year to \$2.925 million. The appellant appealed VCAT’s decision to the Court of Appeal on the ground that VCAT erred in its construction of the provisions of the VLA that governed the determination of the site value of the Land.

In the Court of Appeal, the appellant submitted that Landene was not an improvement because the value of the Land with the building was less than the value of the Land without the building. In contrast, the respondent contended that the relevant question was whether the improvements enhanced the Land’s value compared with its natural state and that such enhancement could be satisfied so long as a purchaser had a use for the improvements – that is, the improvement did not require an actual increase in monetary value. The Court of Appeal did not accept either approach, but accepted a proposition advanced by both parties that the test requires a “comparison to the hypothetical unimproved ‘natural’ state of the Land”. The Court of Appeal proceeded to hold that whether there is the requisite increase in value is to be assessed as at the date the work was done or materials used. Whether Landene was an improvement of the Land was therefore reduced

to two distinct questions – 1) did Landene increase the value of the Land at the time of construction in 1897; and 2) was its benefit unexhausted at the time of the valuations in that it continued to serve a variety of economic purposes. The Court of Appeal answered both questions in the affirmative, and while granting leave to appeal, ultimately dismissed the appeal. The appellant now appeals to this Court.

The appellant submits that the Court of Appeal’s construction of the relevant parts of the VLA is inconsistent with the ordinary and natural meaning of the statutory text, legislative history and prior authority particularly in relation to the meaning of “increases the value of the land” and “the benefit is exhausted”. The appellant submits that the construction which should be adopted by this Court is that work done or material used on and for the benefit of land will be improvements but in so far only as the effect of those works or that material increases the value of the Land as at the valuation date; and in contrast, work or material which reduces rather than enhances the Land’s value is not an improvement. The respondent submits that the appellant’s construction of the VLA is incorrect and contends that the appellant’s definition of improvements depends on s 2(1) being read as a single composite phrase, which in the respondent’s submission does not follow from the ordinary language of the statute.

The grounds of appeal are that the Court of Appeal:

- erred in construing the definition of “improvements” in s 2(1) of the VLA as requiring that the effect of the work done or material used increased the value of the land “at the time the work is actually done or the material is used”; and
- ought to have found that the definition requires that the effect of the work done or material used increases the value of the land at the time of the valuation.

MJZP v DIRECTOR-GENERAL OF SECURITY & ANOR
(S142/2023)

Date writ of summons filed: 15 November 2023

Date special case referred to Full Court: 4 June 2024

The plaintiff is a carriage service provider within the meaning of the *Telecommunications Act 1997* (“the TA”). The first defendant (“the Director-General”) has filed a submitting appearance. The second defendant is the Commonwealth of Australia (“the Commonwealth”). This proceeding concerns the validity of section 46(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“the AAT Act”) and whether it infringes on Chapter III of the Constitution. Section 46(2) of the AAT Act relevantly applies to appeals instituted in the Federal Court of Australia (“FCA”) where a certificate under s 39B(2) of AAT Act has been issued such that the FCA “shall... do all things necessary to ensure that the matter is not disclosed to any person other than a member of the court as constituted for the purpose of the proceeding”.

In 2019, the Department of Home Affairs requested that the Australian Security Intelligence Organisation (“ASIO”) assess and produce a security assessment in respect of the plaintiff in connection with s 315A of the TA. ASIO furnished an adverse security assessment (“ASA”) which was accompanied by a “statement of grounds”. If the ASA stands, it will affect the plaintiff’s commercial interests. The plaintiff sought a merits review before the AAT.

The AAT Act contains provisions designed to allow information which would generally be excluded from court proceedings, as it would attract public interest immunity from production, in the AAT. Under ss 39A and 39B(2), the Minister for Home Affairs may certify that evidence or submissions proposed to be adduced or made is of such a nature that disclosure would be contrary to the public interest because it would prejudice security or the defence of Australia. The Minister issued three certificates under ss 39A and 39B(2), certifying that the disclosure of certain information in the statement of grounds would be contrary to the public interest. The AAT affirmed the decision to issue the ASA and provided “open” reasons to the plaintiff and the Director-General, while also providing “closed” reasons to the Director-General. The plaintiff appealed the AAT decision to the FCA on questions of law. Under the AAT Act, the AAT is required to send to the FCA all documents that were before the AAT that are in connection with the proceeding to which the appeal relates, which includes information that is the subject of the Minister’s certificates and to which the plaintiff has no access.

The plaintiff submits that s 46(2) infringes on the Constitution on the basis that it requires the FCA to depart from the “general rule” of procedural fairness to an extent that is more reasonably necessary to protect a compelling and legitimate public interest. The plaintiff contends that s 46(2) substantially impairs the institutional integrity of the FCA and requires the FCA to exercise the judicial power of the Commonwealth in a manner inconsistent with the nature of that power. The plaintiff seeks leave to argue that the High Court decision in

SDCV v Director-General of Security (2022) 277 CLR 241¹ (where this Court found that s 46(2) did not infringe on Chapter III of the Constitution) be reopened and overruled as there is no *ratio decidendi* that can be extracted from the reasoning in that case, and the decision provided no binding statement on the proper construction on s 46(2). The plaintiff seeks to raise an argument which it says was not put in *SDCV* regarding proportionality. The plaintiff disagrees with the interveners' submissions that *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 and *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 also stand as authority against the plaintiff's position, but in the alternative seek leave to re-open and overrule those decisions to the extent necessary. The plaintiff submits that as s 46(2) is invalid, the FCA should not follow the result in *SDCV* when determining the pending appeal in the FCA brought by the plaintiff upon the AAT's decision to affirm the ASA. The plaintiff contends that the reasoning of any dissenting judges (Gageler J as His Honour then was, Gordon and Edelman JJ) in *SDCV* is to be disregarded and only the reasons of the plurality (Kiefel CJ, Keane and Gleeson JJ) are relevant for consideration.

The Commonwealth submits that s 46(2) is not invalid, does not infringe on Chapter III of the Constitution, and the decision in *SDCV* where a majority of the Court upheld the validity of s 46(2) provides a complete answer to the plaintiff's case and should not be reopened. However, if the Court decides to reopen *SDCV*, the plaintiff's challenge should be rejected as s 46(2) does not give rise to any practical injustice having regard to the statutory scheme as a whole, or alternatively, to the extent s 46(2) requires the FCA to depart from the general rule that a party should know the case put against it, that is reasonably necessary for the achievement of a legitimate purpose.

This case raises the question of whether the Court should re-visit the *SDCV* decision to resolve any uncertainty arising from the reasons given as to the constitutional validity of s 46(2) of the AAT Act. Although the AAT Act has been repealed, s 46(2) of the AAT Act will continue to govern the plaintiff's case under the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth).

The plaintiff has filed a notice of a constitutional matter. The Attorneys-General for the States of Queensland, Western Australia, New South Wales and Tasmania are intervening in support of the Commonwealth.

Chief Justice Gageler ordered that the following questions of law in the form of a Special Case be referred for consideration by a Full Court:

- Is s 46(2) of the AAT Act invalid on the basis that it infringes Chapter III of the Constitution?
- Who should pay the costs of the Special Case and of the proceeding?

The Special Case was considered by the Full Court sitting in Canberra on 12 and 13 December 2024. At the conclusion of the second day, the Court adjourned the matter and directed the filing of further submissions by the parties to

¹ This case concerned the cancellation of a visa on character grounds pursuant to s 501(3) of the *Migration Act 1958* (Cth) in consequence of an ASA certified by the Director-General on behalf of ASIO.

clarify the construction of s 46(2) of the AAT Act regarding the mechanisms available to the FCA to provide procedural fairness in an appeal, and the source of its power to refuse to admit certified material into evidence.

Having considered the post-hearing submissions of the plaintiff and the second defendant, the Court has relisted the matter for further oral hearing. The parties are to be prepared to address the subject matter of the post-hearing submissions, focusing on the construction of s 46 of the AAT Act and on the source or sources of the asserted power of the FCA to refuse to accept the tender of certified matter.

EVANS & ANOR v AIR CANADA ABN 29094769561
(S138/2024)

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2024] NSWCA 153

Date of judgment: 21 June 2024

Special leave granted: 10 October 2024

In July 2019, an aircraft operated by the Respondent flying from Vancouver to Sydney encountered severe turbulence and suddenly dropped. The Appellants were passengers on the flight. They allege that they sustained spinal and psychological injuries as a result of the incident.

In June 2021, the Appellants commenced Supreme Court proceedings against the Respondent, seeking damages under Article 17 of the Convention for the Unification of Certain Rules of International Carriage by Air, done at Montreal on 28 May 1999 (“the Convention”), a treaty incorporated into Australian law by section 9B of the *Civil Aviation (Carriers Liability) Act 1959* (Cth).

Art 17(1) of the Convention provides that the carrier is liable for a passenger’s bodily injury caused by an accident on board an aircraft. Art 21(1) provides that a carrier cannot exclude or limit its liability for damages under Art 17(1) that do not exceed a certain calculable sum (“the Sum”) (approximately \$224,000). Art 21(2) then provides that a carrier is not liable under Art 17(1) for damages exceeding the Sum where the carrier proves that such damage was not due to its negligence or other wrongful act or omission. Art 25 provides that a carrier may stipulate that its contract of carriage be subject to higher limits of liability than those provided for in the Convention or to no limits of liability whatsoever.

In the Supreme Court proceedings, the Respondent pleaded that the limitation prescribed in Art 21 applied to the Appellants’ damages claims. The Appellants replied that the Art 21 limitation did not apply, since the Respondent’s International Passenger Rules and Fares Tariff (“the Tariff”) provided, in rule 105(C)(1)(a), that where the Convention applied, there were no financial limits in respect of bodily injury. That provision however followed r 105(B)(5), which provided that the liability rules in the Convention were fully incorporated and prevailed over any inconsistent provisions in the Tariff.

On 12 December 2023, Rothman J, in answering a question referred for separate determination, held that r 105(C) of the Tariff had the effect that, were the Supreme Court to assess compensatory damages for each of the Appellants in an amount higher than the Sum, the Appellants would be entitled to recover such higher sums from the Respondent even if the latter could prove that the damages were not due to its negligence or other wrongful act or omission. This was after holding that r 105(C) constituted a stipulation for the purposes of Art 25 of the Convention.

An appeal by the Respondent was unanimously allowed by the Court of Appeal (Leeming and Payne JJA, Griffiths AJA). Their Honours held that r 105(C)(a) of the Tariff did not waive the partial defence created by Art 21(2) of the Convention. This was after having regard to the history of the Convention and reading the Tariff

as a whole, in light of its purpose and object. Their Honours noted the descriptive language of r 105(C), as opposed to the more particular language of waiver (of certain defences and liability limitations prescribed in other treaties) contained in other provisions of the Tariff, and found that the purpose of r 105(C) was compliance with notification requirements under regulatory regimes, including that of the Federal Government of Canada. Furthermore, any conflict posed by r 105(C)(1) would be overcome by the Convention liability rules prevailing, pursuant to r 105(B)(5) of the Tariff.

The grounds of appeal include:

- The Court of Appeal erred in construing Arts 17, 21 and 25 of the Convention, in particular in treating r 105C(1)(a) of the Tariff as merely a form of consumer notification as distinct from a term of the contract of carriage.
- The Court of Appeal erred in construing the literal and contextual meaning of the Respondent's contract of carriage, set out in the Tariff by reference to previous and inapplicable treaties, and subsequent and inconclusive regulations of another State, namely Canada.

The Respondent has filed a Notice of Contention, contending that the Court of Appeal erroneously failed to determine whether Art 25 of the Convention, insofar as it permits a carrier to stipulate "higher limits of liability" or "no limits of liability whatsoever", can be utilised by a carrier to waive a partial defence that would otherwise be available to it (such as that which is provided for under Art 21(2) of that convention).

LA PEROUSE LOCAL ABORIGINAL LAND COUNCIL
ABN 89136607167 & ANOR v QUARRY STREET PTY LTD
ACN 616184117 (S121/2024)

Court appealed from: Court of Appeal of the Supreme Court of
New South Wales
[2024] NSWCA 107

Date of judgment: 10 May 2024

Special leave granted: 5 September 2024

In December 2016, the Second Appellant (New South Wales Aboriginal Land Council) made a land claim under section 36 of the *Aboriginal Land Rights Act 1983* (NSW) (“the ALR Act”) for various Crown land reserves within the boundaries of the First Appellant. One such reserve was a site known as the Paddington Bowling Club (“the Club”).

At the time of the Second Appellant’s claim, the Club was leased from the State of New South Wales by CSKS Holdings Pty Ltd (“CSKS”) but was unoccupied. CSKS paid rent to the State but was not operating the Club for the purpose permitted under the lease, which was use of the site for community and sporting club facilities and tourist facilities. The bowling greens were not maintained, and the clubhouse had fallen into disrepair.

In February 2018, the lease was assigned from CSKS to the First Respondent, on conditions including an acknowledgement by the First Respondent that the lease was subject to potential termination, in the event of a transfer of the Club under the ALR Act after the determination of a pending land claim.

In December 2021, the Minister for Planning and Public Spaces (being the Minister Administering the Crown Land Management Act 2016, the Second Respondent, “the Minister”) determined the Second Appellant’s claim in respect of certain reserves, which included a grant in respect of the Club (“the Decision”).

The First Respondent subsequently commenced proceedings in the Land and Environment Court of New South Wales, impugning the Decision on grounds including that the Minister had failed to consider a submission relating to one of the necessary criteria under the ALR Act. That criterion was s 36(1)(b), which required that claimable Crown land be “not lawfully used or occupied”, the First Respondent having submitted to the Minister that at the time of the land claim the Club was “used” by the Crown for the purposes of letting and obtaining income. On 9 June 2023, Preston CJ dismissed the proceedings. His Honour inferred that the Minister had considered the submission, but there was no evidence that the Minister had rejected the submission as a matter of law (so as to amount to jurisdictional error).

The Court of Appeal (White, Adamson and Stern JJA) unanimously allowed an appeal by the First Respondent, quashed the Decision, and ordered the Minister to refuse the Second Appellant’s land claim in respect of the Club. Their Honours considered that “not lawfully used or occupied” in s 36(1)(b) of the ALR Act was not a composite expression and that “used”, properly construed separately, was a protean term that did not necessarily connote physical acts. Concurrent with a

tenant's physical use of leased land was a landlord's use of the land by deriving rent from it. Their Honours held that the State's leasing of the Club to CSKS was a "use" of the land within the meaning of s 36(1)(b) and that the Decision therefore involved an error of law.

The sole ground of appeal is:

- The Court of Appeal erred in concluding that the Minister was required to find that the land claimed by the Appellants was not "claimable Crown lands" for the purposes of s 36(1) of the *Aboriginal Land Rights Act 1983* (NSW).