

RECENT DEVELOPMENTS

NEW SOUTH WALES

ORDERS MADE UPON BREACH OF FIDUCIARY DUTY *

Say-Dee Pty Ltd v Farah Constructions Pty Ltd (No.2) [2005] NSWCA 469 (Mason P, Giles and Tobias JJA)

Joint venture – Fiduciary duties – Constructive trusts-Orders

Following its decision in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (see case note published in (2005) 24 ARELJ 262) in which it decided that the recipients (second to sixth respondents) of the adjoining properties to the property to be originally developed by the partnership (“*Adjoining Properties*”) held their interests in the Adjoining Properties in constructive trust for the partnership, the New South Wales Court of Appeals made the following orders after the parties could not agree on the orders:

- the second to sixth respondents not to incur further liability (except as to interest) to any mortgagee in relation to the Adjoining Properties;
- any liability of the second to sixth respondents to pay monies borrowed or secured against the Adjoining Properties remain their responsibility and shall keep the appellant indemnified against any such claim;
- receivers to be appointed and legal title in the Adjoining Properties and the property originally held by the partnership (collectively the “*Properties*”) to be vested in them;
- broad powers granted to the Receivers to manage and dispose of the Properties;
- all assets, power or possession (including books, records etc..) of the Partnership in the possession of any party to be delivered to the receivers within 28 days of the order;
- upon the sale of the Properties and the discharge of any debt of the partnership, the net profit or loss of the partnership to be determined by an Associate Judge of the Supreme Court;
- a just allowance (if any) payable to the second respondent on account of his entrepreneurial skills and effort in acquiring the Adjoining Properties to be determined by the Associate Judge;
- costs of referral to the Associate Judge to be paid by the first respondent;
- profit or loss of the partnership to be divided between the appellant and the first respondent by the Associate Judge in the following manner:
 - the just allowance (if any) to be paid to the second respondent;
 - after deducting that amount, half of the balance to be paid to the appellant (if there is a loss, half of the loss to be paid by the appellant);

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- the remaining half to be paid to the first respondent (if there is a loss, half of the loss to be paid by the first respondent).
- receivers entitled to be remunerated as soon as funds are available out of the net proceeds of the sale of the Properties;
- receivers to dissolve the partnership once net profit or loss of the partnership divided between the appellant and the first respondent;
- all caveats lodged by or on behalf of the party to be withdrawn;
- respondents to pay appellant's costs.

The orders are instructive in setting out the type of orders that can be obtained in the breach of fiduciary duties situation.

QUEENSLAND

MINING COMPENSATION APPEALS*

Under the *Mineral Resources Act 1989* (Qld) (the MRA), a party aggrieved by a compensation determination made by the Queensland Land and Resources Tribunal has a right of appeal on questions of both law and fact.¹ Several recent decisions of the Tribunal have highlighted the need to approach mining compensation appeals with care. This note discusses some of the issues that may arise in compensation appeals in Queensland.

Instituting an appeal

A party may appeal against either a determination of compensation or a review of compensation. An appeal is heard by a Tribunal panel, may deal with questions of both law and fact and is “final and conclusive”.² The procedure for commencing an appeal involves some notable differences to the usual appeal procedures. Section 282(2) of the MRA sets out three steps for instituting an appeal:

- (a) lodging in the tribunal, written notice of appeal which shall include the grounds of appeal; and
- (b) serving copies of the notice of appeal on the mining registrar and each other party; and
- (c) giving security (approved by the registrar of the tribunal) for the costs of the appeal.

Each of these steps must be taken within 20 business days of the determination at first instance. The first step of lodging a notice of appeal is straightforward enough. The second step of effecting service on the mining registrar and other parties is also uncontroversial, although it should be noted that service must occur within the 20 business day time period.

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¹ Section 282. If only questions of law are raised an appeal may be available under the *Land and Resources Tribunal Act* s 67; see *Land and Resources Tribunal v Schmidt* [2005] QCA 195.

² *Mineral Resources Act 1989*, s 282.