Supreme Court of NSW Court of Appeal

Decisions Reserved as at 12 May 2023

	Number	Case Name	Heard	Issues	Judgment Below
1	2021/204042	Dwyer v Volkswagen Group Pty Ltd	30/03/2022	TRADE PRACTICES – the appellant brought representative proceedings on behalf of some 83,000 persons who purchased Volkswagen vehicles in which a Takata driver side airbag was installed between 2007 and 2018 – the appellant claimed that his vehicle was not of acceptable quality because, by reason of the installation of the Takata airbag, the vehicle was not free from defects and was not safe – primary judge found in favour of the respondent – whether primary judge erred in failing to find that the appellant's vehicle was not of acceptable quality at the time of the supply to the appellant, within the meaning of s 54 of the Australian Consumer Law – whether primary judge erred as to certain factual findings – whether primary judge erred by importing a negligence or fault standard into a strict liability regime – whether primary judge erred by rejecting certain expert evidence – whether primary judge ought to	*Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715

				have held that the appellant was entitled to damages under s 272 of the ACL	
2	2022/65750	Creak v Ford Motor Company of Australia Ltd	10/08/2022	CONTRACT – Appellant entered into a deed of settlement with the Respondent – under the deed the Appellant accepted inter alia that he would cease production and supply of a range of Ford vehicles and parts that are not manufactured with the authority of the Respondent or its related bodies corporate – Respondent sought injunctive relief against the Appellant for breach of a settlement of proceedings – primary judge found that deed of settlement was valid and the Appellant was bound by its terms – primary judge found that Appellant had failed to adhere to the terms of the deed – primary judge entered judgment for the Respondent – whether primary judge erred in construing the deed of settlement – whether primary judge erred in finding that the restraint of trade doctrine did not apply to the deed – whether primary judge erred in finding it was open to the Respondent to recover damages which it had incurred in other proceedings – whether primary judge erred in making orders for injunctive relief	*Ford Motor Company of Australia Limited v Tallevine Pty Ltd (as trustee for Thornleigh Trading Trust) (in liq)* [2022] NSWSC 83
3	2022/134465	Verde Terra Pty Limited v Central Coast Council	1/09/2022	LAND AND ENVIRONMENT – development consent for golf course and waste management facility in 2008 – subsequent consent orders made for remediation of land in 2014 – application for alteration of 2008 development consent – whether there is an existing or approved development on the site - whether further EIS required - whether development was within meaning of cl 35 of Schedule 3 of Environmental Planning and	*Verde Terra Pty Ltd v Central Coast Council; Central Coast Council v Environment Protection Authority (No 9)* [2022] NSWLEC 29

				Assessment Regulation 2000	
4	2021/252548	Macquarie Units Pty Ltd v Sunchen Pty Ltd	21/09/2022	EQUITY – equitable remedies – recission in aid of rights at law –Second Appellant is director and shareholder of Third Appellant – Second Respondent is director and shareholder of First Respondent – Second Appellant and Second Respondent entered into a joint venture to purchase and develop three resort business at Cairns, Queensland – Second and Appellant and Second Respondent incorporated Third Respondent for purposes of funding joint venture – on incorporation of Third Respondent, 50% of issued share capital was held by Third Appellant with the remaining 50% held by the First Respondent – Third Appellant's shares subsequently transferred to First Appellant, which is another company controlled by Second Appellant – issue arise as to Second Appellant's ability to meet his share of the financing obligations for the joint venture prior to the purchase of the relevant assets at Cairns – First Respondent subsequently acquired 50% of First Appellant's shares in Third Respondent in order to reduce Appellants' burden of financing obligation – purchase of the Cairns assets by Third Respondent was completed – Second Appellant provided no funds to the joint venture personally – Second Respondent arranged for transfer to First Respondent of First Appellant's remaining 25% shareholding in Third Respondent for nil consideration pursuant to compulsory acquisition clause in	*Nassif v Sun* [2021] NSWSC 990

				Third Respondent's Shareholders' Agreement – transfer of shares executed without proper authority – Appellants commenced proceedings seeking declarations that share transfer was void and of no effect, and liable to be rescinded in equity – in the alternative, Appellants sought equitable compensation – Respondents contended that Appellants had no standing to bring proceedings, that Shareholders' Agreement granted right to enact transfer, that Appellants had unclean hands, and that defence of laches applied – primary judge found in favour of Respondents and dismissed Appellants' claims with costs – whether primary judge erred in finding that share transfer had been carried into legal effect – whether primary judge erred in upholding defence of laches – whether primary judge erred in various findings of fact, including that value of shares was not established	
5	2022/123736	Flanagan v Bernasconi	18/10/2022	TORT (Professional negligence) – The Respondent provided the Appellant with insurance brokering services in respect of insurance products – in 2012 the Appellant took out a homeowner's insurance policy with Vero – in 2013 the swimming pool at the Appellant's property was substantially damaged – the Appellant made a claim on the Vero policy with respect to the pool damage – the claim was rejected on the basis that the policy excluded events involving swimming pools – the primary judge found that the pool damage occurred as a result of the swimming pool having been left empty and defects in the	*Flanagan v Bernasconi* [2022] NSWSC 381

				pool valves – the primary judge held that the Appellant had failed to take reasonable precautions in circumstances where she left the swimming pool empty and did not take steps to repair or refill the swimming pool – whether the primary judge erred in failing to find that the policy the Appellant would have obtained but for the Respondent's breach of duty would have responded to the pool damage that was the subject of the Appellant's claim – whether the primary judge erred in failing to find that the Respondent bore the burden of proof as to whether the damage was caused by a defect in an item or a failure to take reasonable precautions – whether the primary judge erred in finding that the loss was caused by a defect in an item – whether the primary judge gave insufficient weight to effect of heavy rain on pool damage – whether the primary judge erred in finding that the Appellant failed to take reasonable precautions – whether the primary judge erred in concluding that the cross-respondent would have taken out insurance cover of a kind that did not contain the exclusion that appeared in the Vero policy – Whether primary judge erred in making various factual findings, failed to take into account evidence, or gave insufficient weight to evidence – Whether primary judge erred in finding hat the cross-respondent was not reckless	
6	2022/14029	Carpenter v Morris	24/10/2022	CONTRACT – Partnership – First Appellant and First Respondent extracted granite from the Grandee Quarry – From 1996 to 2003, quarrying undertaken for a business	*Carpenter v Morris* [2021] NSWSC 1700

				conducted by Second Appellant in partnership with Second Respondent – Second Appellant extracted granite from the Quarry from 2003 to 2014 – Granite mined at Quarry falls into two categories in terms of its grade, being first and second grade rock, there being greater demand for the former – Quarry situated on two adjacent parcels of land upon which granite boulders, overburden, and other material extracted from the land or disturbed during quarrying operations were piled (Stockpiles) – Stockpiles largely consisted of second grade rock – Under mining agreement First Respondent entitled to quarry, remove and sell the granite, and required to pay annual rent plus royalties in respect of the two lots – Proceeds of the sale of granite was distributed in various ways, including in order to make monthly payments to First Respondent, the amount of which varied from month to month – Appellants sought an order requiring repayment of 50% of those monthly payments as money had and received – Appellants claimed for breach of an oral quarrying agreement with the Respondents insofar as First Respondent failed to make payment to Appellants in respect of certain sales, and in respect of sales made from the Stockpile – Appellants claimed First Respondent repudiated oral agreement insofar as he was not ready, willing or able to perform his obligation to sell the Stockpile due to his lack of authority to do so without permission of the owners of the lots on which the Stockpile is situated – Whether primary	

				judge erred in failing to order damages with respect to monthly payments – Whether primary judge erred by failing to apply Commonwealth v Amann Aviation (1991) 174 CLR 64 in respect of damages vis-à-vis the Stockpiles – Whether primary judge erred in allowing the difficulty in assessing damages bar all relief to the Appellants with respect to the Stockpiles – Whether primary judge erred in making various factual findings – Whether primary judge erred in rejecting certain evidence – Whether primary judge erred in failing to imply a term into the agreement – Whether primary judge erred in failing to find that the Appellants were entitled to damages for breach of contract, or quantum meruit for the work done in exposing he rock faces for future mining	
7	2022/35553	Farriss v Axford	3/11/2022	TORTS (negligence) – First appellant is the lead guitarist in the band INXS – First appellant hired a boat through the third respondent belonging to the first respondent – First appellant sustained injuries to his left hand as a result of an accident on the boat – Appellants allege that the injuries were caused by the respondents' failure to take care – Primary judge held that there was no failure by the respondents to warn or instruct because the first appellant was aware of the relevant matters prior to the accident – Primary judge found that the exercise of reasonable care on the part of the respondents did not require any of them to arrange for additional componentry to be installed prior to the accident because the	*Farriss v Axford (No 3)* [2022] NSWSC 20

				probability that harm would occur if care was not taken was low – Whether primary judge erred by failing to find that the respondents ought to have taken precautions and that failure was a breach of their duties of care which caused the appellants' loss – Whether primary judge erred by failing to find that the respondents breached their duty of care by failing to warn or instruct the first appellant which caused the appellants' loss – Whether primary judge erred by failing to find that the respondents breached the statutory guarantee in s 61 of the Australian Consumer Law which caused the appellant's loss	
8	2022/144781	Synergy Scaffolding Services Pty Ltd v Alelaimat	11/11/2022	WORKERS COMPENSATION – Personal injury – The First Respondent was paid by DJ's Scaffolding Pty Limited (represented by the Second Respondent) for work as a sub-contracting truck driver delivering and collecting scaffolding materials to the Appellant – The First Respondent was injured when he was struck by a falling scaffolding bench caked in cement while he assisted in dismantling scaffolding he had been directed to collect – Appellant alleged that the proceedings were statute barred by the Limitation Act 1969 (NSW) – Primary judge held that claim was not statute-barred, insofar as it was unclear that the First Respondent knew that his injury was caused by the fault of the Appellant, as opposed to DJ Scaffolding – The First Respondent alleged that the Appellant should be considered to be in the position of his employer and to owe the Respondent a non-delegable duty of care –	*Alelaimat v Synergy Scaffolding Services (No 3)* [2022] NSWSC 536

				The Appellant conceded that it owed the First Respondent a duty of care, however alleged that it had not assumed the role of employer and was not responsible for the system of work on the site – Primary judge found that the Appellant owed a duty of care to the First Respondent to ensure that the system of work for dismantling the scaffolding was safe, that the Appellant breached that duty, and that therefore the Appellant was liable in damages – Primary judge awarded various heads of damages amounting to $1,356,533.39 – Whether primary judge erred in failing to find that the First Respondent's claim was statute barred – Whether primary judge erred in finding that the Second Respondent was not liable to the First Respondent in negligence – Whether primary judge ought to have held that the Appellant was not liable to pay damages in respect of medical expenses paid for by the Second Respondent – Whether primary judge erred in failing to find contributory negligence against the First Respondent – Whether primary judge erred in finding a causal link between the accident and the resultant level of disability – Whether primary judge's award for non-economic loss was manifestly excessive	
9	2022/92292	The Cleaning Doctor NSW Pty Ltd v Fonseca	23/11/2022	EQUITY – Trusts – Second Appellant was registered proprietor of a property in Bardwell Valley, the deposit for the sale of which was paid by the Second Respondent, with the remainder financed by a loan from Perpetual Trustees Victoria Ltd, secured by a registered mortgage over the property – Second	*The Cleaning Doctor NSW Pty Ltd v Fonseca* [2022] NSWSC 253 (Williams J)

				Appellant transferred the Bardwell Valley property to the Second Respondent who discharged the mortgage obtained by the Second Appellant and took out a mortgage in his own name – Second Appellant alleged that First Respondent was to hold the property on trust for him – Second Appellant alleged in the alternative that a resulting trust was presumed from the transfer of the Bardwell Valley property to the Second Respondent for no or "false" consideration – Second Respondent transferred the property in 2015 to Goodman Court Pty Ltd – Second Appellant alleged that this constituted a breach of the trust – Primary judge found no express trust, and no implied or resulting trust – Primary judge found no proprietary estoppel – Primary judge found that consideration was paid by virtue of the discharge of the mortgage – First Appellant alleged that the First and Second Respondents withdrew $2,695,078 from its bank account in the period of 2009 to 2012 – Second Appellant claimed to be entitled to repayment of the money as money had and received and claimed damages for fraud, deceit and misleading or deceptive conduct, and damages for conversion – Primary judge found that First Appellant was not the legal and beneficial owner of the money in the account but rather of a chose in action – Primary judge found that the First Appellant failed to discharge its onus of proving that the withdrawals from the account were made without the authority of the First Appellant – Whether primary judge erred in failing to find	

				that the Bardwell Valley property was held on trust for the Second Appellant by the Second Respondent – Whether primary judge impermissibly reversed the burden of proof with respect to the First Appellant's claims – Whether primary judge erred in making various factual findings	
10	2022/114516	Resilient Investment Group Pty Ltd v Barnet	24/11/2022	CORPORATIONS – winding up - tax refund after placed into liquidation – refund arose out of "tax offsets" as first respondent was an "R&D entity" for purposes of relevant tax legislation – whether refund was a circulating asset which required employee entitlements to be satisfied first – whether certain identified employees were employees of first respondent rather than second respondent	*In the mater of Spitfire Corporation Ltd (in liquidation) and Aspirio Pty Ltd (in liquidation)* [2022] NSWSC 340
11	2022/96995	Taylor & Wilkinson v Stav Investments Pty Ltd	1/12/2022	CONTRACT – Breach of contract and misleading and deceptive conduct – First Appellant was founder, director and CEO of Yatango Mobile – Second Appellant was Chief Financial Officer and company secretary of Yatango Mobile – Yatango Mobile was an online reseller of mobile phone plans provided to Yatango Mobile on a wholesale basis by Optus – Sales were made through an online platform promoted as unique which allowed users to customise their mobile phone plans – The directors of the Respondents in each matter were approached to invest in Yatango's business – In 2013 each of the Respondents were incorporated and entered into share sale agreements with Yatango Mobile for $750,000 – In 2014 the Respondents each invested a further $262,500 in Yatango Mobile – First and	*Stav Investments Pty Ltd v Taylor; LK Investments Pty Ltd v Taylor* [2022] NSWSC 208

				Second Appellant gave personal warranties as to the ownership of the intellectual property used in Yatango Mobile's business – Respondents alleged that First and Second Appellants made representations as to IP Ownership, Yatango Mobile's assets, the valuation of the Yatango Mobile business, and the roll-up of the Respondents' shares in Yatango mobile --Yatango Mobile went into liquidation in 2015 – Respondents complained as to breaches of the warranties given by Appellants – Respondents complained of misleading and deceptive conduct and that, but for the misleading or deceptive representations, the Respondents would not have entered into the share sale agreements – Whether primary judge erred in finding a no transaction case – Whether primary judge failed to provide sufficient reasoning for the conclusion that there was a no transaction case – Whether primary judge failed to take into account evidence in reaching conclusion that there was a no transaction case – Whether primary judge erred in concluding that the business of Yatango Mobile was not a going concern because it did not own the intellectual property — Whether primary judge erred in assuming that the claims made by the respondent extended beyond the contractual warranty claim – Whether primary judge erred in categorising the "Pre-Contract Roll-Up Representations" as a representation as to a future matter – Whether primary judge erred in finding that Respondent would not have entered into share sale agreements but for the	

				Pre-Contract Roll-Up Representations	
12	2022/219923	Jaken Properties Australia Pty Limited v Naaman	7/02/2023	EQUITY – Trusts – Subrogation – The First Appellant was the trustee of the Sly Fox Trust – The initial trustee of the Sly Fox Trust was Jaken Property Group Pty Ltd (JPG), now in liquidation – In 2016, the Respondent obtained a judgment in the Supreme Court for $3.4 million against JPG – The Court determined that JPG was entitled to be indemnified from the assets of the Sly Fox Trust and that the Respondent was subrogated to JPG's right of indemnity – Second Appellant alleged that there was little or nothing of the assets in the Sly Fox Trust available to satisfy the judgment debt – Respondent alleged that to the extent that the Trust was unable to meet the debt, this was brought about by the Second Appellant directly or indirectly causing the First Appellant to enter into impermissible transactions – Respondent alleged that First Appellant, as successor trustee of the Sly Fox Trust, owed a fiduciary duty to JPG not to deal with the assets of the Trust in a way that diminished JPG's right of indemnity – Respondent alleged that he was subrogated to JPG's right to enforce that fiduciary duty – Respondent alleged that the Second Appellant was the de facto and shadow director of the First Appellant and the architect of the impugned transactions – Respondent alleged that the First Respondent undertook various transfers of land or properties for no commercial purpose and for no consideration – Primary	*Jake Properties Australia Pty Ltd v Naaman* [2022] NSWSC 517

				judge held that the impugned transactions were impermissible and in breach of trust – Whether primary judge erred in holding that the Respondent was entitled to sue the First Appellant as successor trustee of the Sly Fox Trust for breach of fiduciary duty by the First Appellant to JPG, and the Second, Third, Fourth, Fifth, Sixth and Seventh appellants for knowing assistance – Whether primary judge erred in finding that various transfers of land were voidable transactions – Whether primary judge erred in making various factual findings – Whether primary judge erred in finding that the First Appellant breached orders made by Rein J by consent on 18 June 2014 – Whether primary judge erred in making declarations	
13	2022/83362	Gan v Xie	7/02/2023	TRADE PRACTICES – misrepresentations made to invest in an investment trading platform trading virtual investments – appellant unable to with withdraw investment - whether erred in finding that the "MFC line platform" was not a pyramid scheme with meaning of s45 of Australian Consumer Law (ACL) – whether credit findings were infected by mistaking the Mandarin translator with the interpreter at trial – whether erred in failing to dispense with notice regarding tendency and coincidence evidence – whether erred in not admitting conduct after 2016 as tendency evidence - evidence	*Lower Court decision not available on CaseLaw*
14	2022/261766	The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in	13/02/2023	EQUITY - Rectification - Appellant is a real estate agent retained by the First Respondent to sell apartments in a development in Carlingford - The Appellant sold 317 apartments and received $10 million in	*The Property Investors Alliance Pty Ltd v CBB Project Pty Ltd (in liq)* [2022] NSWSC 1081

		liquidation)		commission, with some $18 million outstanding -Appellant brought proceedings to recover the sum owed, and the Respondent failed to file a Commercial List Reply - Appellant applied for summary judgment; Hammerschlag J (as his Honour then was) gave judgment in favour of the Appellant for $18 million with interest - Respondent sought to set aside the statutory demand for the judgment sum - In May 2022, the Respondent went into liquidation, and the Appellant sought leave under s 500(2) of the Corporations Act 2001 (Cth) to proceed against the Respondent - Appellant sought rectification of the agency agreement on the basis of mutual mistake and a declaration that, under the terms of that agreement, it has an equitable charge over 27 unsold apartments – The liquidator of the Respondent opposed the relief sought and contended that any equitable charge would be void for illegality pursuant to s 49(1) of the Property and Stock Agents Act 2002 (NSW) - Primary judge dismissed Appellant's claim for rectification - Primary judge held that the caveat clauses in the agency agreement did not grant an implied equitable charge - Whether primary judge erred in failing to find that the agency agreement created an equitable charge - Whether primary judge erred in failing to find that the Appellant and the Respondent had a common intention that the monies secured by the charge included commissions for units previously sold by the Appellant - Whether	

				primary judge erred in declining to draw a Jones v Dunkel inference - Whether primary judge erred in drawing an inference against the Appellant that it did not adduce into evidence notes or drafts of the agency agreement	
15	2022/119549	Tzavaras v Tzavaras & Sons Pty Ltd	14/02/2023	CONTRACT – an issue arose in the proceedings below as to the construction of a mortgage document, in relation to what currency the principal and interest was payable in – a further issue arose as to whether the mortgage was invalid, as an issue arose as to whether the lender unconscionably exploited the borrowers – primary judge found in favour of the respondent – whether the primary judge erred by denying the appellants procedural fairness and the right to be heard – whether primary judge erred as to certain factual findings – whether primary judge erred by rejecting certain evidence	*In the matter of Tzavaras & Sons Pty Ltd* [2022] NSWSC 359
16	2022/314994	DXC Eclipse Pty Ltd v Wildsmith	15/02/2023	CONTRACT – restraint of trade - non-competition covenant in securities purchase agreement - whether erred in reading down reference to “Microsoft Dynamics 365 technologies” to April 2018 rather than future versions of software – whether erred in disregarding the reference to “future, successor or derivative products, services or technologies” in construing covenant – whether business of Will Thirty Three Pty Ltd was competitive with the Sable 37 business – whether business of Sentient Dynamics was competitive with the Sable 37 business – whether covenant against solicitation of	*Lower court decision not available on Caselaw*

				employees was unreasonable -	
17	2022/383325	Next Generation (NSW) Pty Ltd v State of New South Wales	6/03/2023	LAND & ENVIRONMENT – the appellant sought a declaration that Part 4 of Chapter 9 of the Protection of the Environment Operations (General) Regulation 2022 (NSW) (the Regulation) was invalid and of no effect – the primary judge held that the appellant had not established that the Regulation was in excess of the legislation power or regulation making power – whether the primary judge erred in failing to conclude that the Regulation was invalid	*The Next Generation (NSW) Pty Ltd v State of New South Wales* [2022] NSWLEC 138
18	2022/363122	Khatib v Director of Public Prosecutions	6/03/2023	ADMINISTRATIVE LAW – judicial review of District Court following appeal from Local Court – jurisdictional error – procedural fairness – failure to give reasons for being satisfied beyond reasonable doubt that complainant did not consent alleged touching – whether erred in giving direction under s293A of Criminal Procedure Act 1986 (NSW) as to inconsistencies – whether magistrate put words into the mouth of the complainant – failure to afford opportunity to speak – whether alleged touching met legal definition of sexual touching under s61HB of Crimes Act 1900 - bias	*Lower Court decision not on Caselaw*
19	2022/299298	Hartnett v Bell; Hartnett v Deakin-Bell	7/03/2023	PROFESSIONAL NEGLIGENCE (legal) – The Appellant (a solicitor) charged his (now deceased) mortgagee client (the First Respondent) $288,601.03 for acting in uncontested possession proceedings to enforce a $30,000 mortgage – the Second Respondent as mortgagor (on behalf of the estate of his deceased mother) brought a	*Bell v Hartnett Lawyers (No 3)* [2022] NSWSC 1204

				claim that the Appellant ought to be ordered to disgorge or pay back what are said to be excessively charged legal fees that were borne by the Second Respondent as mortgagor – the primary judge considered this an appropriate case for the Court to exercise its inherent supervisory jurisdiction to require the Appellant to pay to the Second Respondent the sum of $311,356.47 – whether the primary judge erred in holding that the supervisory jurisdiction of the Court extended to empowering the Court to order the Appellant to pay the mortgagor an amount which represented the difference between the undisputed amount paid by the mortgagee to the Appellant and the amount of costs which were assessed between the mortgagee and mortgagor in separate proceedings – whether the primary judge's discretion miscarried	
20	2022/142224	Khattar v Fayad; Fayad v Khattar	9/03/2023	CONTRACTS – Interpretation and termination – Following the settlement of probate proceedings concerning the estate of the Appellant's late brother, the Respondents alleged that the Appellant had an obligation under a Deed of Agreement to cause Hills Shoppingtown Pty Ltd to complete a development owned by it, including the strata sub-division and to transfer the unencumbered interest in 20 Units in the development to a trust known as the GK3 Trust which, under the Agreement, would eventually be controlled by the Respondents – The Trust was not a party to the Deed – The Respondents alleged that the Appellant did not do so and was thus in breach of her	*Khattar v Hills Shoppingtown Pty Ltd (subject to a Deed of Company Arrangement)* [2022] NSWSC 363

				obligations under the agreements – A Deed of Acknowledgement was executed following the failure to transfer the Units to the Trust pursuant to which the Appellant acknowledged her breach and agreed to pay monthly payments and organise the transfer of the Units – The development was not completed, nor was the strata plan registered, nor were the Units transferred to the Trust – The Respondents treated the breaches as repudiatory, accepted the repudiation and elected to terminate the Deed of Agreement – The Respondents sought to recover damages for loss of bargain struck under the Deed of Agreement under which the Units had an agreed value of $15 million – Whether primary judge erred in finding that debate about what was to be included in the deceased's estate was at the heart of the probate proceedings – Whether primary judge erred as to the proper construction of the Deed of Agreement – Whether primary judge erred in finding that the Appellant had breached the Deed of Agreement – Whether primary judge erred in finding that it was open to the Respondents to accept the repudiation – Whether primary judge erred in finding that the Respondents, as opposed to the Trust, suffered loss and damage – Whether primary judge erred in finding that the Appellant did not raise the contention that the proceedings were improperly "construed" (sic: constituted) – Whether primary judge erred in making various factual findings	

21	2022/248686	Bronger v Greenway Health Centre Pty Ltd	14/03/2023	LAND AND ENVIRONMENT – Civil Enforcement – The Appellant sought declarations and consequential orders to restrain the use and occupation by the Respondent of a lot in the Greenway Plaza shopping complex – The Appellant alleged that the Respondent was operating a retail pharmacy (that is, a shop) in breach of s 4.3 of the Environmental Planning and Assessment Act 1979 (NSW) and the conditions of the complying development certificate – Primary judge concluded that the Appellant did not prove that the Respondent was conducting a retail pharmacy – Whether primary judge erred in finding that the subject premises were not a shop and were therefore not prohibited as commercial premises under the Fairfield LEP 2013 – Whether primary judge erred in failing to find that the subject premises were used contrary to the restriction to a "medical pharmacy" in the Occupation Certificate and were thus being used contrary to ss 6.9(1)(a) or 6.3(2) of the Environmental Planning and Assessment Act 1979 (NSW) – Whether primary judge erred in finding that the repealed Pt 4A, as opposed to Pt 6, of the Environmental Planning and Assessment Act 1979 (NSW) applied to the Occupation Certificate – Whether primary judge erred in not finding that the use of the subject premises as a shop was independent of the "medical centre" use in accordance with the reasoning in Baulkham Hills Shire Council v O'Donnell (1990) 69 LGERA 404 – Whether primary judge erred in failing to apply the	*Bronger v Greenway Health Centre Pty Ltd t/as Greenway Plaza Pharmacy* [2022] NSWLEC 91

				reasoning as to dual purposes in Abret Pty Limited v Wingevarribee Shire Council (2011) 180 LGERA 343 – Whether primary judge erred in making various factual findings	
22	2022/246531	Owners of Strata Plan 92450 v JKH Para 1 Pty Ltd	15/03/2023	BUILDING AND CONSTRUCTION – separate questions answered – external cladding installed on residential unit block said to be combustible - whether failure to establish breaches of s18B(1)(b), 18B(1)(c) or 18B(1)(e) of Home Building Act 1989 (NSW) – whether erred in not finding that cladding was combustible for the purposes of AS1530.1 – whether failed to establish loss – whether breach de minimis	*Strata Plan 92450 v JKN Para 1 Pty Ltd* [2022] NSWSC 958
23	2022/312270	Blue Op Partners Pty Ltd v De Roma	16/03/2023	TORTS (Negligence) – Personal Injury – Occupiers liability – The Respondent was injured when she tripped over the uneven margin of a sunken utility pit lid on the footpath – The Respondent claimed that the sunken configuration and heigh discrepancy of the utility pit was a trip hazard for pedestrians – The Respondent sought damages for personal injury, alleging public liability against the Appellant, being the Ausgrid Operation Partnership – The Appellant alleged that the injuries occurred as a result of the materialisation of an obvious risk within the meaning of ss 5F and 5G of the Civil Liability Act 2002 (NSW) – The Appellant alleged that the Respondent was contributorily negligent – Primary judge found that the Appellant was liable in negligence – Primary judge assessed damages in the sum of $354,142.38 with a discount for contributory negligence of 20% -- Whether primary judge	*Lynda Gabriel de Roma v Inner West Council & Ausgrid Operator Partnership* [2022] NSWDC 425

				erred in placing weight on certain evidence – Whether primary judge erred in finding that the Appellant owed the Respondent a duty of care in circumstances where her harm was suffered from an obvious risk as defined in s 5F of the CLA – Whether primary judge erred in finding that the duty of care extended to warning pedestrians of height differentials of between 6mm to 10mm – Whether primary judge erred in finding that the duty of care was breached – Whether primary judge erred in finding in the absence of evidence that the Appellant ought to have been aware of the difference in surface heights – Whether primary judge erred in finding in the absence of evidence that the burden of taking precautions was small – Whether primary judge erred in finding that causation was established	
24	2022/273229	Chief Commissioner of State Revenue v Meridian Energy Australia Pty Ltd	21/03/2023	TAX- Landholder duty- Dutiable transactions - Respondent sought a review pursuant to s 97(1)(a) of the Taxation Administration Act 1996 (NSW) of an assessment made by the Appellant in respect of the acquisition by the Respondent of 100% of the shares in GSP Energy Pty Ltd (GSP) for over $160 million - The amount of duty was $7,979,740 calculated on land holdings and goods valued by the Appellant in the amount of $145 million -GSP was the operator of three hydro-electric power stations in NSW and the lessee of the land on which the power stations were situated - GSP's access to the water required for the operation of the power stations was pursuant to Water Agreements entered into	*Meridian Energy Australia Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 1074

				with the State Water Corporation - Respondent contended that the interest in the power stations which it acquired was an innominate sui generis property interest created by a statutory vesting order that could neither be classified as land nor goods, and thus the leases were worth less than $2 million, and accordingly were not a relevant acquisition -Appellant contended that the power stations where fixtures, and therefore part of the leased land which would thus have a value greater than $2 million - Primary judge concluded that the power stations were an in nominate sui generis interest in land and that the leases were thus not a relevant acquisition - Whether primary judge erred in finding that power stations were an innominate sui generis property interest - Whether primary judge ought to have found that the power stations were fixtures - Whether, alternatively, primary judge should have found that those parts of the power stations installed prior to the vesting order were goods and the parts installed after the vesting order were fixtures - Whether primary judge erred as to the allocation of the residual value of the water agreements	
25	2022/260573	Caterjian v Parfit Investments Pty Ltd	24/03/2023	LAND LAW-Action for possession of land - First Respondent was a provider of finance and Second Respondent was its director - Respondents alleged First Respondent loaned the First Appellant $250,000 pursuant to a facility agreement for the purpose of a business investment - Respondents alleged that Second Appellant executed a written	*Parfit Investments Ptv Ltd v Caterjian* [2022] NSWSC 1093

				guarantee of the First Appellant's obligations - Appellants granted a second mortgage over their property in Bexley to secure their obligations under the facility agreement and under a guarantee and indemnity agreement - Respondents alleged that First Appellant defaulted on payment of the principal and interest due under the facility agreement - Respondents sought possession of the Bexley property in order to exercise power of sale - Alternatively, Respondents sought restitution of the principal sum and interest - By cross-claim Appellants disputed that the advance was made and that the Second Appellant was bound by her guarantee; and alleged unconscionable conduct and/or misleading and deceptive conduct - Primary judge held that Respondents were entitled to judgment for possession in order to exercise its power of sale - Whether primary judge erred in making various factual findings – Whether primary judge erred in failing to find that the manner in which the advance was made discharged the Second Appellant's obligations in accordance with the principles in Ankar Ply Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549 at [11] - Whether primary judge erred in failing to find that the Respondents had engaged in unconscionable conduct	
26	2022/222755	Akrawe v Culjak	28/03/2023	REAL PROPERTY – Contract for the sale of land – The First Appellant entered into a contract for sale with the Respondents in 2020 following auction – The contract provided for completion on the 42nd day after the date of the contract, this date was extended twice –	*Culjak v Akrawe* [2022] NSWSC 949

				The Respondents served a Notice to Complete, however settlement did not take place on that date – The time for completion was extended a third time – Settlement did not take place – The Respondents served a Notice of Termination upon the First Appellant – The Respondents sought a declaration that the contract was duly terminated and an order that they are entitled to the deposit of $155,000 – The First Appellant denied the validity of the Notice of Termination – The Appellants sought an order that the contract be specifically performed by cross-claim – Primary judge held that the Notice of Termination was valid, and that the Respondents were entitled to recover the deposit – Primary judge dismissed the cross-claim – Whether primary judge erred in making various factual findings – Whether primary judge erred in failing to order that the contract be specifically performed – Whether the errors in factual findings caused the primary judge to misapply the discretionary power granted by s 55(2A) of the Conveyancing Act 1919 (NSW)	
27	2022/181653	Ling v Pang	30/03/2023	EQUITY – The First Appellant is the wife of a director of the Second Appellant – The Respondent is an accountant and Justice of the Peace – The First Appellant's husband entered into an agreement with one Mr Zhuang by which the husband loaned to Mr Zhuang $900,000 for a term of one year with a fixed interest rate of 30% per annum to invest in a commercial development in Roselands The First Appellant's husband was advised to	*Ling v Beyond Developments Group Pty Ltd* [2022] NSWSC 685

				conduct due diligence and a credit check but did not do so – The loan moneys were advanced before the loan agreements were signed or guarantees provided – Executed versions of the loan agreements were provided, purportedly signed by Mr Zhuang and his wife, Ms Liping Wang – The Respondent purportedly witnessed the signature of Ms Wang – The Respondent could not recall whether he witnessed the signatures in question, and Ms Wang denied that she signed those documents – At the conclusion of the loan term, a demand for the payment of the loan moneys and interests was issued – Mr Zhuang made a payment of $100,000 to the Second Appellant – Beyond developments went into liquidation – Appellants brought a claim against Ms Wang for repayment of the loan moneys – Appellants brought a claim against the Respondent for knowing concern in misleading and deceptive conduct; misleading and deceptive conduct; and breach of duty of care – Primary judge was not satisfied that the signatures were authentic and dismissed the claims against the Respondent – Whether primary judge erred in finding that the signatures of the Respondent were placed on the documents by someone else – Whether primary judge erred in making various factual findings – Whether primary judge erred in finding Mr Zhuang was not in the Respondent's camp for the purposes of Jones v Dunkel (1959) 101 CLR 298 – Whether primary judge gave inadequate reasons –	

				Whether primary judge erred in finding that the appellants did not suffer loss rom their reliance on the Respondent's signature on the loan agreements	
28	2022/265558	Kalloghlian v Mitry Lawyers Pty Ltd	31/03/2023	COSTS – dismissal of motion seeking costs against applicant's lawyer under s99 of Civil Procedure Act 2005 (NSW) – whether evidence established a prima facie case that order should be made – whether irrelevant factors taken into account – whether alleged failure to plead cause of action amounts to gross negligence or improper conduct – adequacy of reasons	*Kalloghlian v Mitry Lawyers Pty Ltd* (No 2) [2022] NSWSC 1071
29	2022/370857	Soulos v Pagones; Soulos v Soulos; Kristallis v Soulos; Kristallis v Pagones	6/04/2023	SUCCESSION – the deceased was survived by her four children (James, Maria, Dennis and Nick), 12 grandchildren and several great-grandchildren – the deceased left an estate of some $35.8 million comprising all forms of property – much of the property was held by two companies, Esperia Court Pty Ltd (Esperia) and A&R Management Pty Ltd (A&R) – by her last will the deceased left each child property and shares in Esperia, although the deceased gifted Nick all management shares in Esperia and the major interest of all members of Esperia in a winding up of Esperia – disputes as to particular parcels of land and corresponding entitlements to shares in Esperia and A&R arose between the children of the deceased – Maria brought a claim for Esperia to be wound up in oppression proceedings against the deceased's estate, Nick and John (Nick's son) – claims as to family provision orders were brought by each of James, Maria and Dennis	*Re Estate Soulos* [2022] NSWSC 1507

				– the primary judge made orders that the four sets of proceedings be heard together with evidence in each set of proceedings to be evidence in each other set of proceedings so far as may be material – the primary judge made orders that each child of the deceased receive 125 of the 500 management shares in Esperia – the primary judge made an order that James receive 1,000 shares in Esperia given to Nick – the primary judge made orders inter alia that Nick and John hold their interest in certain property on trust for Esperia and that they be required to retire as directors of Esperia – whether the primary judge erred in finding that adequate provision for the proper maintenance, education or advancement in the life of James had not been made in the will of the deceased for the purpose of s 59 of the Succession Act 2006 (NSW)	
30	2022/336144	United Resource Management Pty Ltd v Par Recycling Services Pty Ltd	14/04/2023	CONTRACT – agreement to separate waste from recycled collections in commingled containers – dispute as to failure to make payments - whether "implied agreement" could be terminated by reasonable notice – whether erred in finding misleading or deceptive conduct in relation to the Somersby Supply Agreement – whether offer would have been but for that conduct – whether loss suffered – whether an agreement on more favourable terms would have been entered – whether common mistake as to 2011 agreement was such that the parties were bound by the "implied agreement" – whether the appellant was unjustly enriched – whether failure to call	Par Recycling Services Pty Ltd v United Resource Management Pty Ltd [2022] NSWSC 1269

				witness gave rise to a Jones v Dunkel inference of 2011 agreement coming to an end	
31	2022/318549	Walker Corporation Pty Ltd v Owners of Strata Plan 61618	14/04/2023	ADMINISTRATIVE LAW (other) – termination of appointment of strata managing agent for Finger Wharf at Woolloomooloo under the Strata Schemes Management Act 2015 by three owner corporations (OC) – Strata Management Statement (SMS) for development covered 7 OC's - whether article 8.11 of SMS required the same strata manager for all OCs – whether prohibition binding on all OCs – whether article 8.11 created an implied negative stipulation – whether registration of SMS under Real Property Act 1900 caused it to operate as a deed – whether OC had power to terminate strata manager	*Walker Corporation Pty Ltd v The Owners - Strata Plan No 61618* [2022] NSWSC 1246
32	2022/355914	Chen v Kmart Australia Ltd	14/04/2023	TORTS (other) – damages – scarring and effect on young person - assessment of non-economic loss under s16 of Civil Liability Act 2022 – whether failed to take into account the trauma of the incident, resulting surgeries and recuperation – whether failed to take into account ongoing pain	*Decision not on Caselaw*
33	2022/223074	One T Development Pty Ltd v Krejci	20/04/2023	CORPORATIONS - judicial advice to liquidator – advice given that liquidator is entitled to treat property of company is beneficially owned by company in liquidation – whether erred in providing advice when interest in property was contested – whether erred in ignoring evidence of other potential interests in property – whether effect was to make a binding determination as to beneficial ownership of property – evidence	*In the matter of ENA Development Pty Ltd (in liq)* [2022] NSWSC 919

34	2022/295461	Wojciechowska v Secretary, Department of Communities and Justice	24/04/2023	CONSTITUTION – proceedings pending in NCAT concerning Government Information (Public Access) Act 2009 - applicant a resident of Tasmania - whether Tribunal can exercise jurisdiction – whether President of NCAT erred in exercising functions under s52 of Civil and Administrative Tribunal Act 2013 to reconstitute Appeal Panel	*Wojciechowska v Secretary, Department of Communities and Justice* [2022] NSWCATAP 226
35	2022/370624	AD (Ducker) v State of New South Wales	26/04/2023	TORTS (other) – trespass, false imprisonment, misfeasance in office – applicant arrested after a fight in carpark between new partners of separated mother and father whilst exchanging children for approved access – children of applicant placed into custody of father following arrest - relevance of state of mind of police officer when arresting applicant – whether police officer's decision to arrest was unreasonable – whether arrest was proportional – whether s6 of Police Act 1990 permitted a police officer to remove applicant's children and place them with the father contrary to a Family Court order – whether applicant's consent to enter house was given under duress – whether erred by failing to express a notational view on damages	*AD v State of New South Wales* [2022] NSWDC 546
36	2022/333016	Jacups v Fidelity Fund Management Committee of the Law Society of New South Wales	28/04/2023	DISCIPLINARY PROCEEDINGS – the appellant made a claim on the Fidelity Fund for money he alleged was received by his former solicitor (Mr Knaggs) as trust money – the respondent wholly disallowed the appellant's claim – the primary judge held that the hearing was a de novo hearing – whether the primary judge erred in failing to have regard to the overall merits of the case –	*Jacups v The Fidelity Fund Management Committee of the Law Society of NSW (No 2)* [2022] NSWSC 1375

				whether the primary judge erred in failing to conduct a hearing de novo – the primary judge held that there was no default within the meaning of s 219 of the Uniform Law and it was more probable than not that all of the trust money was properly disbursed and did not involve any default – whether the primary judge failed to make various findings – whether the primary judge erred in characterising the payments of Mr Knaggs	
37	2022/75969	Stellar Vision Operations Pty Limited v Hills Health Solutions Pty Ltd	1/05/2023	CONTRACT – Interpretation – Joint Venture – Appellant and respondent entered into informal agreement for the supply of Patient Entertainment Systems (PESs) to hospitals in the Western Sydney Local Health District (WSLHD) – Parties did not enter into formal joint venture agreement or formal contract governing WSLHD project – WSLHD tender was awarded to Questek Australia Pty Ltd, which was subsequently acquired by the respondent – WSLHD contract was eventually put into the respondent's name alone – Parties provided an undertaking by which they agreed to honour the "intent of the previous discussions between Questek and Stellar Vision" with respect to the WSLHD contract – Following two unsuccessful demonstrations of the PESs the respondent ended the arrangement with the appellant, and utilised the services of another company for the WSLHD contract – Appellant alleged that the respondent held 50% of the interest in, and profits generated by, the WSLHD contract on trust for the appellant – Alternatively appellant alleged that the circumstances of the	*Stellar Vision Operations Pty Ltd v Hills Health Solutions Pty Ltd* [2022] NSWSC 144

				relationship between the parties gave rise to an express trust – Appellant alleged that the informal joint venture relationship gave rise to fiduciary obligations – Appellant alleged that respondent breached the undertaking provided, and repudiated the agreement entered into by the parties – Appellant alleged that the respondent ought to be estopped from resiling from the undertaking – Primary judge dismissed all of the appellant's claims and ordered that it pay the respondent's costs – Whether primary judge erred in holding that the parties were not in a fiduciary relationship – Whether primary judge erred in law as to the test for imputing a fiduciary relationship – Whether primary judge erred in holding that the undertaking did not create a binding and enforceable obligation – Whether primary judge erred in holding that the respondent did not hold 50% of the interest in the WSLHD tender on trust for the appellant – Whether primary judge failed to address the contention that the respondent held its interest in the WSLHD tender on trust for itself and the appellant irrespective of the position between the appellant and Questek – Whether primary judge erred in rejecting the appellant's estoppel claims – Whether primary judge erred as to the quantification of damages – Whether primary judge erred in relying on a paragraph of an expert report not admitted into evidence – Whether primary judge erred in making various factual findings	
38	2022/342349	Atanaskovic v Birketu Pty Ltd	1/05/2023	COSTS – declaration made as to costs entitlement during pending cost assessment	*Birketu v Castagnet* [2022] NSWSC 1435

				of party & party costs - whether unincorporated law firm can recover costs performed by employed solicitor – whether previous right to recover derived from the now abrogated Chorley exception	
39	2022/326111	He v Kure	3/05/2023	EQUITY – Oral Loan Agreement – The Respondent sought a monetary judgment for $1,804,117.84 (plus interest) in respect of loans allegedly made by the Respondent to the Appellant which were not repaid, and moneys alleged to have been misappropriated by the Appellant – Primary judge found that the Respondent had loaned the Appellant $633,744.57 in 2008, repayable upon two months' notice, which remained unpaid – Primary judge found that the Respondent loaned the Appellant a further $312,000 in 2009, which remained unpaid – Primary judge found that the Respondent loaned the Appellant a further sum of $159,738 later in 2009, which remained unpaid – Primary judge found that the entitlement to recover the sums loaned was not extinguished by the Limitation Act 1969 (NSW) ss 14 and 63 – Primary judge held that the Respondent was precluded from maintaining his claim for equitable compensation for the alleged misappropriations on the basis that he made the claim more than six years after it first became available to him – Primary judge entered judgment for the Respondent in the sum of $1,105,513.04 – Whether primary judge erred in finding that each of the three loans remained unpaid – Whether primary judge erred in finding that the Appellant bore	*Kure v He* [2022] NSWSC 1240

				the onus to prove that the first loan had been repaid – Whether the primary judge erred in holding that the first loan was in fact a loan – Whether primary judge erred in finding that entitlement to recover each of the three loans was not barred by the Limitation Act 1969 (NSW) – Whether primary judge failed to give adequate reasons for the cost orders made	
40	2022/303307	Anderson v State of New South Wales; Perri v State of New South Wales	4/05/2023	TORT – false imprisonment, assault and battery – strip search by police officers of applicant when a minor – proceedings dismissed after limitations defence – whether exemption for "child abuse" in s6A of Limitations Act 1969 applied – whether violation of child's privacy an abuse – whether the "Capable Persons" had taken reasonable steps to ascertain the fact mentioned in s50(1)(c) – whether ought to have known that injury was sufficiently serious to justify bring an action	*Anderson v State of New South Wales* [2022] NSWDC 435
41	2022/341	Ranclose Investments Pty Ltd v Leda Management Services Pty Ltd	4/05/2023	PROCEDURE – dismissal of proceedings after non-payment of security for costs – whether UCPR 42.21(3) is inconsistent with s1335 of the Corporations Act 2001 – whether power under UCPR 42.21 enlivened – whether erred in dismissing amended statement of claim – whether erred in ordering security for costs – whether failed to take into account that applicant was a trustee with no assets COSTS – whether erred in ordering costs of the dismissal of cross-claim - whether failed to take into account an undertaking not to pursue a cross-claim	*Ranclose Investments Pty Ltd v Leda Management Services Pty Ltd* [2021] NSWDC 651

42	2022/386060	Cappello v Homebuilding Pty Ltd	8/05/2023	COSTS – judicial review of District Court following appeal from costs assessor – whether erred in finding that applicant carried any liability to pay costs in the absence of proof that it had paid the legal costs – whether liability conditional on applicant first paying the legal costs	*Cappello v HomeBuilding Pty Ltd* [2022] NSWDC 725
43	2022/375624	Willis Australia Ltd v AMP Capital Investors Ltd	11/05/2023	REAL PROPERTY – the respondent as landlord and the appellant as tenant entered into a lease for the premises for a term of 6 years including an option of renewal for a period of 4 years and further option for the appellant to take a lease of expanded premises for four years – the appellant gave two notices by letter to the respondent to advise that the appellant wanted a new lease for the term specified in cl 18 of the lease and a new lease for expanded premises – the appellant subsequently gave notice to the respondent that it withdrew its notice regarding the expanded premises referred to in cl 20.3 of the lease – the respondent did not accept that the appellant was entitled to withdraw its notice and sought declarations that the appellant exercised an option to take a lease of the expanded premises – the primary judge held that the appellant had exercised the option under cl 20.4 and was bound to take the new lease – whether the primary judge erred in finding that the appellant had exercised an option to take a lease over the premises – whether the primary judge erred in finding that cl 20.4 of the lease was to be construed as a conditional contract and that cl 20.4(d)-(e) were capable of being	*AMP Capital Investors Limited v Willis Australia Limited* [2021] NSWSC

				waived by the landlord – whether the primary judge erred in finding that the appellant no longer contended that it was entitled to withdraw its notice to the landlord	
44	2022/344622	Demex Pty Ltd vMcNab Building Services Pty Ltd	12/05/2023	BUILDING & CONSTRUCTION – the parties entered into a subcontract by which the appellant agreed to undertake remediation works – the appellant claimed an amount for work completed and the respondent challenged the amounts claimed – an adjudication determination was made in favour of the appellant against the respondent under s 22 of the Building and Construction Industry Security of Payment Act 1999 (NSW) – the respondent sought a declaration that the determination was void and an order that it be quashed – the primary judge held that the respondent was denied procedural fairness because it was a realistic possibility that if the adjudicator had disclosed that he would apply a conversion factor to the determination and allowed the respondent to make submissions as to that approach the respondent could have dissuaded him from taking that approach – whether the primary judge erred in determining that the second respondent had denied the first respondent procedural fairness – whether the primary judge erred in determining that the denial of procedural fairness was material	*McNab Building Services Pty Ltd v Demex Pty Ltd* [2022] NSWSC 1441