



## Supreme Court of NSW Court of Appeal

### Decisions Reserved at 15 June 2018

	Number	Case Name	Heard	Issues	Judgment Below
1	2016/345890	Pentelow v Bell Lawyers Pty Ltd	10/08/2017	ADMINISTRATIVE LAW (judicial review) – the applicant, a barrister, sued the respondent in the Local Court to recover the costs of legal work carried out on the respondent’s instructions – stay of proceedings in Local Court set aside on appeal to Supreme Court – judgment and costs ordered in applicant’s favour – applicant subsequently brought appeal to District Court against determination of costs review panel pursuant to Legal Profession Act 2004 (NSW), ss 382 and 384 – whether primary judge erred in holding applicant could not recover for professional work she had undertaken in herself conducting the proceedings – whether primary judge erred in finding that the “Chorley exception” does not apply to barristers in New South Wales	Pentelow v Bell T/as Bell Lawyers [2016] NSWDC 186
2	2016/386053	State of New South Wales v Thomlinson	13/09/2017	TORTS (other) – respondent and his friends visited licenced premises in Manly in December 2011 – respondent forcibly ejected from club by police – respondent brought proceedings against the State of New South Wales alleging assault, battery,	Charles Henry Thomlinson v The State of New South Wales [2016] NSWDC 369

				unlawful arrest, false imprisonment and malicious prosecution – State of New South Wales admitted vicarious liability for conduct of relevant police officers pursuant to Law Reform (Vicarious Liability) Act 1983 (NSW), s 9B(2) – primary judge awarded the respondent damages in the sum of \$147,796 for assault, battery and false imprisonment – whether primary judge erred in finding that assault and battery had been made out – whether primary judge erred in failing to find that police were lawfully acting to effect occupier's revocation of respondent's licence to remain on premises – whether primary judge erred in failing to find that police were lawfully exercising power under Liquor Act 2007 (NSW), s 77 – whether primary judge should have found that conduct of police involved lawful and reasonable use of force and that search and transport of respondent was lawful – whether primary judge erred in approach to fact-finding	
3	2017/93694	State of New South Wales v Le	31/10/2017	TORTS (other) – false imprisonment – detention of concession card holder to verify entitlement to use concessional Opal Card – where holder did not produce photo identification – whether regulation 77C of Passenger Transport Regulation 2007 entitled authorised officer to detain passenger - whether authorised officer entitled to detain until radio check verified entitlement – whether authorised officer entitled to detain on suspicion that concession card was stolen	Le v State of New South Wales [2017] NSWDC 38
4	2017/168664 2017/168769	Gunasegaram v Blue Visions Management Pty Limited; Blue Visions Management v	17/11/2017	TORTS (other) – Blue Vision carries on business providing project management and planning services – allegation two former employees of Blue Vision, Mr	Blue Visions Management Pty Limited v Chidiac [2017] NSWSC 255

		Chidiac		Chidiac and Mr Gunasegaram, diverted business opportunities from Blue Vision to a company they had incorporated, Aspire Corporation – Blue Vision brought proceedings against Mr Chidiac and Mr Gunasegaram, alleging breach of fiduciary duty and tort of deceit, and against Aspire Corporation, alleging accessory or vicarious liability – primary judge dismissed claims against Mr Chidiac and Aspire Corporation, but found Mr Gunasegaram liable in deceit – whether primary judge erred by “reformulating” a set of representations said to have been made by Mr Gunasegaram but not pleaded by Blue Vision – whether primary judge erred in assessment of damages	
5	2017/112808	Frangieh v Deputy Commissioner of Taxation	2/02/2018	TAX – Deputy Commissioner brought a claim against the appellant for unpaid tax, penalties and interest – appellant brought a cross-claim, alleging misfeasance in public office, abuse of process and breach of duty to act in good faith – cross-claim arises out of actions of the Deputy Commissioner’s employees in bringing claim against appellant – Deputy Commissioner’s claim against appellant dismissed by consent – primary judge dismissed cross-claim – whether primary judge erred in finding that the Deputy Commissioner was the wrong defendant and was not vicariously liable for the acts of public officers – whether primary judge erred in finding that an action alleging misfeasance requires conscious maladministration in the sense of actual bad faith – whether primary judge made certain factual errors – whether primary judge erred in failing to find that Australian Taxation Office debt recovery officers have	Deputy Commissioner of Taxation v Frangieh (No 3) [2017] NSWSC 252

				a duty to consider whether exercising debt recovery functions is oppressive in the circumstances	
6	2017/247071 2017/251043	Cisera v Cisera Holdings Pty Limited	13/02/2018	EQUITY – discretionary family trust established for the benefit of the appellants’ family – by its terms, trust due to vest on 1 January 2024 – at that point, two of the beneficiaries will be aged 13 and 15 – application under s 81 of the Trustee Act 1925 (NSW) to extend the vesting date of the trust – primary judge held that the application did not meet the requirements of s 81 and dismissed it – whether the decision of the Court of Appeal in Re Dion Investments PL (2014) 87 NSWLR 753; [2014] NSWCA 367 was incorrect – whether the decision in Re Dion Investments did not otherwise prevent the making of an order or did not apply in this case – whether primary judge erred in approach to the Court’s reasoning in Re Dion Investments – whether primary judge erred in approach to construing “transaction” within the meaning of s 81 – whether primary judge erred in finding that expedience in the management or administration of the trust property did not extend to deferring the vesting of the trust – whether primary judge erred in interpreting the fixed period as the maximum intended life of the trust	Cisera v Cisera Holdings Pty Ltd [2017] NSWSC 960
7	2017/275951	Isaac v Dargan Financial Pty Ltd	21/02/2018	CONTRACT – appellant is a mortgage broker who worked as an independent contractor for the respondent from 8 August 2012 to 30 November 2016 – in December 2016, the defendant commenced work as a broker at another mortgage broking business – respondent brought claim alleging that the appellant was in breach of	Dargan Financial Pty Ltd ATF The Dargan Financial Discretionary Trust (trading under “Home Loan Experts”) v Nassif Isaac [2017] NSWSC 1077

				<p>contract and his equitable duty of confidence to the appellant in relation to the retention and continued use of the respondent's client list while at the new business – respondent also claimed that the defendant was in breach of contract for any attempt to approach or accept approaches by the respondent's clients within 18 months after terminating employment with the respondent – primary judge found that the appellant had breached agreement with the respondent and his equitable duty of confidence – whether trial judge erred in finding that the restraint of trade imposed by the agreement between the respondent and the appellant was reasonable in its application following the termination of the agreement and for a period of 18 months from the termination – whether primary judge erred in failing to find that the restraint of trade clauses were not cartel provisions within the meaning of s 44ZZRD of the Competition and Consumer Act 2010 (Cth) – whether primary judge erred in finding that the appellant breached the agreement by approaching or accepting approaches from customers of the respondent – whether primary judge erred in finding that the respondent was entitled to an injunction restraining use of confidential information – whether primary judge erred in construing “confidential information” within the meaning of the agreement – whether primary judge erred in finding that the client list retained by the appellant was or contained copyright of the respondent</p>	
8	2017/117381 2017/117390	Avopiling Pty Ltd v Workers	23/02/2018	TORTS (NEGLIGENCE) – appellant company was operating a pile driver on a	Bosevski v Avopiling Pty Ltd [2016] NSWSC 1893

		Compensation Nominal Insurer		<p>construction site when third party was injured – injured party was an employee of respondent company – injured party brought claim against appellant alleging that it breached its duty to take reasonable care for his safety – appellant brought cross-claim against respondent – primary judge found that appellant was negligent in failing to take precautions to ensure the safe operation of the pile driver – primary judge found that respondent did not have requisite knowledge of the risk of harm to amount to negligence – whether primary judge erred in finding that the respondent was not negligent – whether primary judge erred in characterising the risk of harm for the purposes of the Civil Liability Act 2002 (NSW), s 5B – whether primary judge erred in making certain factual findings – whether primary judge erred in not making a finding of contributory negligence by the injured party – whether primary judge erred in not apportioning liability between the appellant and respondent pursuant to the Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5 and the Workers Compensation Act 1987 (NSW), s 151Z – whether primary judge erred in assessment of damages</p>	
9	2017/94319	LNE Cunneen & Co Pty Limited v Blackburn	27/02/2018	<p>CONTRACTS – appellant alleged that, pursuant to a verbal contract with the respondents, it provided accounting and business advisory services in return for 10% of the profits of their businesses and a 10% share of the growth in capital value of the assets of the businesses – primary judge found that there was a contract under which the appellant provided services and was entitled to be remunerated by way of</p>	<p>LNE Cunneen &amp; Co Pty Ltd v Allan Vincent Blackburn [2017] NSWSC 73; LNE Cunneen &amp; Co Pty Ltd v Allan Vincent Blackburn [2017] NSWSC 677</p>

				10% profit share but which was terminable at will and terminated in 2013 – whether primary judge erred in finding that appellant was not entitled to 10% share of capital growth	
10	2017/234980	Hosking v Extend n Build Pty Ltd	1/03/2018	CORPORATIONS – first and second appellants are liquidators of Evolvebuilt Contracting Pty Ltd, the third appellant – Evolvebuilt subcontracted to perform work for Built NSW Pty Ltd – Evolvebuilt then subcontracted its work to eight secondary subcontractors – Evolvebuilt became unable to pay the secondary subcontractors and requested that Built pay them directly – the first and second appellants brought an action seeking to recover the payments made to the eight secondary subcontractors as unfair preferences under s 588FA of the Corporations Act 2001 (Cth) – primary judge found that the payments made to the secondary subcontractors were not “received from the company” within the meaning of s 588FA – whether primary judge erred in finding that payments were not “received from the company” – whether primary judge erred in not following Commissioner of Taxation v Kassem & Secatore (2012) 205 FCR 156 and Burness, In the Matter of Denward Land Pty Limited [2009] FCA 893	In the matter of Evolvebuilt Pty Limited [2017] NSWSC 901
11	2017/295123	Lavender v Director of Fisheries Compliance	6/03/2018	CONSTITUTION - judicial review – appeal from Local Court to District Court – prosecution under Fisheries Management Act 1994 (NSW) – effect of arrangement with Commonwealth under Fisheries Act 1952 (Cth)- whether State Officers had jurisdiction beyond the low water mark	Ralf Lavender v NSW Department of Industry; Jack Lavender v NSW Department of Industry [2017] NSWDC 236

				without legislative or executive constitutional authority – whether fisheries officers had authority to act – whether Fisheries Management (Abalone Share Management Plan) Regulation 2000 was an impermissible exercise of sovereignty or eminent domain over Australian waters – whether regulation was validity made – whether Act contravenes s123 of the Constitution by altering the limits of the State	
12	2017/279966	Mastronardo v Commonwealth Bank of Australia	9/03/2018	<p>CONTRACT – first appellant is a property developer and is married to second appellant – appellants owe the respondent significant sums of money under a loan facility and as guarantors of loans made to Remo Corporation Pty Ltd (in liq) – for many years first appellant worked for his father, who founded Remo Corporation – first appellant and his father were both directors – a dispute arose as to the first appellant’s share in the business and the first appellant and his father agreed to separate their interests – this agreement encompassed division of liabilities to the respondent – following this division, the respondent required that the loan facilities be refinanced – the loan facility contained a provision the effect of which was that the bank would release a property as support for it, conditional upon their being no event of default – the appellants brought an action claiming that the respondent repudiated this release provision and that they suffered damage as a consequence – appellants also claim that the respondent’s conduct was unconscionable in contravention of s 12CB(1) of the Australian Securities and Investments Commission</p>	<p>Carmelo Adriano Mastronardo v Commonwealth Bank of Australia trading as BankWest [2017] NSWSC 1052</p>

				Act 2001 (Cth) – primary judge found that the respondent was not bound by the release provision because there had been events of default – primary judge also dismissed claim under s 12CB(1) – whether primary judge erred in finding that the first respondent’s conduct was not unconscionable within the meaning of s 12CB(1) – whether primary judge erred in finding that the appellants had not suffered any loss or damage as a result of the first respondent’s repudiation of the release provision and unconscionable conduct – whether primary judge erred in finding that the first respondent continued to have an entitlement to interest – whether primary judge erred in not vacating the hearing	
13	2017/218387	Lowe v Kladis	14/03/2018	REAL PROPERTY – respondent made a development application for the construction of a driveway connecting his property to the street – first appellant is the proprietor of the neighbouring property and second appellant is the proprietor of a property adjacent to the first appellant – local council consented to the development application – respondent brought proceedings to require the appellants to execute the consent – primary judge ordered that appellants consent to a revised development application – whether primary judge erred in finding that the appellants were compelled by law to give consent under s 49(1) of the Environmental Planning and Assessment Regulations 2000 (NSW) as owners of land to which the development application related – whether primary judge erred in failing to find that the development application involved an unreasonable interference with the	Kladis v Lowe (No 3) [2017] NSWSC 815

				appellants' rights and enjoyment as owners of the relevant properties – whether primary judge erred in finding that the orders proposed were appropriate and reasonable – whether primary judge erred in failing to impose a condition that the respondent undertake to make vehicular access available to the first appellant's property	
14	2017/313665	Cellarit Pty Limited Cawarra Holdings Pty Limited	15/03/2018	CONTRACT – appellant operates business selling wine and respondents operate businesses producing wine – dispute arose as to the terms on which the appellant sold the respondents' wine and respondents commenced proceedings – primary judge found in favour of the respondents – whether primary judge erred in finding that a binding oral agreement was made in 2006 between the appellant and the respondents which included a term that the appellant would charge each of the respondents a 15% commission on wine sales – whether primary judge erred in finding that the appellant's printed standard terms did not form part of the agreement between the parties – whether primary judge erred in finding that the oral agreement was not varied in the period October 2008 to May 2016 – whether primary judge erred in finding that the respondents paid the appellant's invoices under protest – whether primary judge erred in finding that the appellant was not entitled to rely on a defence of common law estoppel by convention	Lower court decision not on Caselaw
15	2017/203555	Elkerton v Milecki	20/03/2018	CONTRACT - contract between rabbi and synagogue – whether contract incorporated provisions of "Halacha" as a system of religious Jewish Law and "Hazakah" as a tenet of Halcha into the agreement –	In the matter of South Head & District Synagogue (Sydney) (Administrators appointed) [2017] NSWSC 823

				whether R employment could not be terminated other than by “adjudgment” by a Din Torah in accordance with Halacha- whether Hazakah capable of being applied by a NSW Court – whether it applied as a choice of law which was invalid, void or could not be given effect as a matter of Australian law	
16	2017/290523	Nock v Maddern	22/03/2018	CONTRACT – admission made in context of settlement negotiation – where R stated that beginning point of settlement negotiations was sum stated in spreadsheet – whether that concession was an admission that a debt was owed – limitations – whether representations in email revived earlier debts which were statute barred – whether acceptance of new agistment arrangements	Lawrence Nock v Robert Maddern [2017] NSWDC 216
17	2017/3002892017/301075	Lordianto v Commissioner of the Australian Police; Commissioner of the Australian Federal Police v Fernandez	23/03/2018	ADMINISTRATIVE LAW (other) – Commissioner of the Australian Federal Police brought proceedings against the respondent under s 49(1) of the Proceeds of Crime Act 2002 (Cth) seeking an order that certain property of the respondent be forfeited to the Commonwealth – respondent resisted the application and, in the alternative, sought an order for compensation under s 77 of the Proceeds of Crime Act – primary judge found that the conditions for an order under s 49(1) were made out but exercised her discretion under s 49(4) and declined to make the order on the basis that it was not in the public interest – whether primary judge erred in finding that funds in question were not the proceeds of an offence or offences – whether primary judge erred in concluding that she should exercise her discretion under s 49(4) – whether primary	Commissioner of the Australian Federal Police v Fernandez [2017] NSWSC 1197; Commissioner of AFP v Lordianto [2017] NSWSC 1196

				<p>judge erred in failing to find that the respondent bore the onus of establishing that s 49(4) was applicable and satisfied – whether primary judge erred in certain factual findings</p> <p>ADMINISTRATIVE LAW (other) – Proceeds of Crime Act 2002 (Cth) – amounts restrained suspected to be proceeds of “structuring offence” under Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) - whether A did not acquire property when funds credited to their bank accounts – whether s330(4)(a) could apply to an innocent party who acquired property from a transaction – whether a “third party” is a person wholly from the property constituting the proceeds of crime – whether transfers in Indonesia did not constitute sufficient consideration for the equivalent amounts deposited in Australia – whether applicants had established that they had no reason to suspect the property was proceeds of crime – costs</p>	
18	2017/316471	Mehmet v Carter	27/03/2018	<p>CONTRACT – separate question – purchase of property that included Aboriginal objects on the subject land - where Aboriginal objects are deemed to be property of the Crown – whether existence constitutes a defect of title – whether vendor’s miscalculation of interest amounted to a repudiation of the contract</p>	Mehmet v Carter [2017] NSWSC 1067
19	2017/206372	Gower v State of New South Wales	3/04/2018	<p>WORKERS COMPENSATION – dismissal of claim for work injury damages because A was time-barred under s151D of the Workers Compensation Act 1987 (NSW) – extension of time of nine and a half years sought but refused – whether R suffered material prejudice – whether legal advisers were prevented by operation of</p>	Lower court decision not available on Caselaw

				<p>law giving notice of claim prior to assessment of whole person impairment – whether finding plainly to when R provided a statement to A’s solicitor – where ground of prejudice found as to unavailability of witnesses considered when no evidence led by R on point – whether A’s expert report incorrectly rejected on basis of factual assumptions but uncontroversially correct – whether fair trial possible</p>	
20	2018/24893	Potkonyak v Legal Services Commissioner	5/04/2018	<p>DISCIPLINARY PROCEEDINGS – a number of allegations of unsatisfactory professional conduct and professional misconduct were made against the appellant concerning his conduct in the course of child custody proceedings – complaints resulted in two sets of proceedings in the Tribunal – Tribunal found the appellant guilty of professional misconduct – following subsequent hearing, Tribunal ordered that the appellant be removed from the roll – whether the orders of the Tribunal are void on the grounds they are based on the obiter of judicial officers who conducted the proceedings the subject of the complaints – whether the Tribunal failed to give adequate reasons for its findings of professional misconduct – whether the appellant was denied procedural fairness – whether the Tribunal failed to consider the provisions of the Children and Young Persons (Care and Protection) Act 1998 (NSW), s 90 – whether the Tribunal erred in accepting certain information as correct – whether the Tribunal erred in failing to allow the appellant to admit certain evidence – whether the Tribunal’s reasons gave rise to reasonable apprehension of bias</p>	<p>Legal Services Commissioner v Potkonyak (No 3) [2018] NSWCATOD</p>

21	2017/205467	The Owners - Strata Plan No 66375 v King	6/04/2018	<p>BUILDING &amp; CONSTRUCTION – appellant is the Owners Corporation in respect of a mixed residential and commercial strata development – development involved the conversion of a warehouse owned by the respondents – builder of the development is now in liquidation – appellant brought a claim for various defects – issue of whether the respondents are liable for defects on the basis that they were “developers” within the meaning of s 3A of the Home Building Act 1989 (NSW) and, if they were, whether their liability extends to defects that are the subject of the claim – primary judge found that the respondents were not developers and dismissed claim – whether primary judge erred in finding that the appellant had not discharged its onus in establishing that the respondents signed the underlying construction contract – whether primary judge erred in failing to find that the respondents were “developers” within the meaning of the Home Building Act 1989 (NSW) – whether primary judge erred in finding that even if the respondents had been “developers” of the property, they were not liable to the appellant for the defects alleged – whether primary judge erred in certain findings with respect to the alleged defects</p>	The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2) [2017] NSWSC 739
22	2017/187102	Fagin v Australian Leisure and Hospitality Group Pty Ltd	11/04/2018	<p>LAND AND ENVIRONMENT – appellant lives near a hotel operated by the respondent – live and recorded music is played in an outdoor beer garden at the rear of the hotel – appellant brought proceedings seeking an order that the respondent comply with the terms of a development consent granted in 2006 which contained a prohibition as to “live or</p>	Sally-Anne Maree Fagin v Australian Leisure and Hospitality Group Pty Limited [2017] NSWLEC 59

				<p>recorded music or amplified sound” – primary judge found that consent was no longer operational as it had lapsed and therefore respondent was not bound by it – whether primary judge was biased – whether primary judge erred in certain factual findings regarding works undertaken on the property – whether primary judge erred in construction of s 95(4) of the Environmental Planning and Assessment Act 1979 (NSW) – whether primary judge erred in approach to determining whether a consent had lapsed - whether primary judge erred in construing scope of development consent – whether primary judge erred in finding development consent had lapsed</p>	
23	2017/242343	<p>Coles Supermarkets Australia Pty Ltd v Ready Workforce Pty Ltd</p>	11/04/2018	<p>WORKERS COMPENSATION – recovery of workers compensation payments under s151Z(d) of Workers Compensation Act 1987 – worker employed by a related administration company to R - where primary Judge found R’s role on A’s site was limited, but consistent with being the actual employer – whether s151Z engaged – whether injury was caused by A’s negligence – cross-appeal – quantum – apportionment – adequacy of reasons- CONTRACT – breach – R liable for any default on part of sub-contractor – whether erred in finding that related company was not a subcontractor when it was a separate legal entity</p>	<p>Lower court decision not available on Caselaw</p>
24	<p>2018/66655 2018/66660 2018/71811 2018/71862</p>	<p>Attorney General for New South Wales v Gatsby; Attorney General for New South Wales v Johnson</p>	12/04/2018	<p>CONSTITUTION – Civil and Administrative Decisions Tribunal – matter between the residents of different States – Gatsby was a tenant and a resident of Queensland at time of application – Gatsby was a landlord and resident of Queensland at time of</p>	<p>Johnson v Dibbin; Gatsby v Gatsby [2018] NSWCATAP 45</p>

				<p>application - whether NCAT was exercising administrative or judicial power under Residential Tenancies Act 2010 (NSW) – whether Appeal Panel had jurisdiction to determine that it was a “court of a State” for the purposes of Ch III and s39 of Judiciary Act 1903 (Cth) – whether erred in determining that it was such a Court – whether it ought to have concluded it was not such a Court and that it did not have jurisdiction</p>	
25	2017/322488	<p>Cro Travel Pty Ltd v Australia Capital Finance Management Pty Ltd</p>	19/04/2018	<p>CONTRACT – respondent is a finance company which lent money to an exporter to purchase goods for export – exporter engaged the appellant company, a freight forwarder, to arrange shipment of its products – in the course of shipping these products, appellant created documents which had the characteristics of a bill of lading – exporter provided these to the respondent as security for the borrowings – when exporter defaulted on its obligations it was found that the bills of lading were not valid securities – respondent brought action for misleading and deceptive conduct under the Australian Consumer Law and breach of warranty of authority with respect to the issuing of the bills of lading and the representations they carried – primary judge found that both claims were made out – whether primary judge erred in finding that the appellant represented that each bill of lading was an instrument providing an entitlement to obtain delivery of the goods – whether primary judge erred in certain factual findings regarding the bills of lading – whether primary judge erred in finding that the appellant engaged in false and misleading conduct within the meaning of s</p>	<p>Australia Capital Financial Management Pty Limited v Freight Solutions (Vic) Pty Limited [2017] NSWDC 279</p>

				18 of the Australian Consumer Law – whether primary judge erred in finding that a breach of warranty by the appellant was the cause of the respondent's loss	
26	2017/226085	Mal Owen Consulting Pty Limited v Ashcroft	23/04/2018	PROFESSIONAL NEGLIGENCE (Legal) – recovery of debt – delay in bringing proceedings – debtor subsequently become bankrupt - whether evidence supported finding that debtor's financial situation was no better in 2010 than 2013 – whether erred in excluding possibility that debt could be extinguished by a loan in 2010 – whether likelihood on the evidence that debt would have paid if commenced 2006	Lower Court decision not on Caselaw
27	2017/283893	Bruce v Apex Software Pty Limited	27/04/2018	TORTS (negligence) – appellant sustained injuries when she tripped on the lip of a concrete paved surface outside an aged care facility operated by the respondent – appellant brought claim in negligence for damages – primary judge found that respondent did not breach its duty of care and dismissed claim – whether primary judge erred in failing to sufficiently define the respondent's duty of care – whether primary judge erred in finding that the respondent had not breached its duty of care – whether primary judge erred in approach to certain expert evidence – whether primary judge erred in assessment of risk posed by the particular pavers – whether primary judge erred in finding that the height differential between the pavers was an “obvious risk” – whether primary judge erred in assessing standard of care ascribed to the appellant	Bruce v Apex Software Pty Limited trading as Lark Ellen Aged Care [2017] NSWDC 237
28	2018/65030	Commissioner for Corrective Services v Liristis	8/05/2018	ADMINISTRATIVE LAW (other) – declaratory relief – applicant in custody – access to computer equipment to receive a fair trial – access unsupervised - whether R	Liristis v State of New South Wales [2018] NSWSC 39

				ought to have approached District Court first for relief – whether decision unduly affects prison management – whether proper order was for Commissioner to reconsider decision rather than mandatory order to provide unrestricted laptop	
29	2017/288082	Kempsey Shire Council v Five Star Medical Centre Pty Limited	11/05/2018	TORTS (negligence) – respondent sued the appellant for property damage to an aircraft owned by the respondent – damage occurred when aircraft was landing at Kempsey Aerodrome and collided with a kangaroo – appellant is the local government authority and owns the aerodrome – kangaroos had been identified as a safety concern for a period of 10 years prior to the accident – primary judge found that the appellant had breached its duty of care and was liable for the damage incurred – whether primary judge erred in holding that the risk of an aircraft colliding with a kangaroo was not an obvious risk within the meaning of the Civil Liability Act 2002 (NSW) – whether primary judge erred in finding that the pilot of the respondent’s aircraft did not know of the risk – whether primary judge erred in the characterisation of the considerations relating to breach and s 5B of the Civil Liability Act – whether primary judge erred in finding that the appellant should have taken certain actions – whether primary judge erred in construction of s 42 of the Civil Liability Act – whether primary judge failed to consider certain evidence – whether primary judge erred in finding a causal connection between the breaches found and the harm incurred	Five Star Medical Centre Pty Limited v Kempsey Shire Council [2017] NSWDC 250
30	2017/184756 2017/184762	Anthony Cummings Thoroughbreds Pty	16/05/2018	DEFAMATION – appellants sued the respondents for defamation in relation to	Cummings v Fairfax Digital Australia & New Zealand

		Limited v Fairfax Digital Australia & New Zealand Pty Limited		three articles published by Fairfax Digital over the internet and in The Age – articles reported on a legal dispute involving the first appellant, a racehorse trainer, and his company, the second appellant – primary judge entered judgment for the respondents – whether primary judge erred in failing to find that certain imputations pleaded were carried and defamatory of either the first or second appellant – whether primary judge erred in finding that pleadings in the legal proceedings the subject of the articles were “public documents” for the purposes of s 28 of the Defamation Act 2005 (NSW) – whether primary judge erred in finding that the three articles were fair reports of the legal proceedings and therefore the respondents could rely on the defence provided by s 28 – whether primary judge erred in finding that matters of defeasance under s 28(3) had not been proved – whether primary judge erred in determining that the publication of the articles on certain other websites was not a republication for which the respondents were liable	Pty Limited; Cummings v Fairfax Media Publications Pty Limited [2017] NSWSC 65
31	2018/8397 2018/9678	Amaca Pty Limited v Raines	17/05/2018	TORTS (other) – first respondent contracted mesothelioma and sought damages from appellant and second respondent – issue as to whether the first respondent was entitled for damages for loss of capacity to provide gratuitous domestic services under s 15B of the Civil Liability Act 2002 (NSW) – at the time of first respondent’s diagnosis, he was providing care to wife and adult son – Tribunal found in favour of first respondent – whether Tribunal erred in admitting certain expert evidence – whether Tribunal erred in failing to carry out its own	Raines v Amaca Pty Ltd & Seltam Pty Limited [2017] NSWDDT 1

				assessment of damages – whether Tribunal erred in failing to give adequate reasons for its decision – whether Tribunal erred in finding that the first respondent’s provision of passive care to his son was a need for a services	
32	2017/292822	Scenic Tours Pty Ltd v Moore	17/05/2018	TRADE PRACTICES - CONSUMER LAW – all-inclusive five-star luxury cruise along European rivers – where cruise substantially disrupted by flooding – representative actions – answers to questions - whether breach of consumer guarantees - meaning of “services” in particular factual context - damages for distress and disappointment – effect of s 275 Australian Consumer Law – construction – whether terms and conditions permitted significant variation of itinerary	Moore v Scenic Tours Pty Limited (No.3) [2017] NSWSC 1555
33	2017/262699 2017/262706	Simoes v Kell Campbell Pty Ltd	21/05/2018	TORTS (negligence) – appellant was injured in a motor vehicle accident and brought claim against the respondent – primary judge dismissed claim – whether primary judge erred in treatment of expert medical evidence regarding appellant’s injury – whether primary judge erred in treatment of certain evidence regarding the circumstances of the accident – whether primary judge erred in admitting certain evidence without considering whether it was an admission influenced by oppressive conduct within the meaning of s 84(1)(a) of the Evidence Act 1995 (NSW) – whether primary judge erred in failing to allow the appellant to adduce certain evidence in support of his case – whether primary judge erred assessment of damages	Lower court decision not on Caselaw
34	2017/331772	Hanna v Raoul	23/05/2018	CONTRACT – respondent was registered proprietor of an estate in fee simple, subject	Raoul (by his tutor Karamihas) v

				<p>to a mortgage – respondent executed a deed of arrangement and transfer which had the effect that the title was registered to the appellant as to a life estate and the respondent as to an estate in remainder – house located on the property was destroyed by fire – dispute arose regarding the respective entitlements of the appellant and respondent to the proceeds of an insurance policy over the property – issue of the respondent’s capacity at the time of the transfer – primary judge found that the respondent lacked capacity and that at common law the deed and transfer would be void – primary judge further found that the deed and transfer were liable to be set aside in equity for unconscionable conduct – whether primary judge erred in finding the respondent lacked capacity – whether primary judge erred in relying on incorrect inferences – whether primary judge erred in finding that the respondent had not received legal advice prior to entering the deed and transfer – whether primary judge erred in finding that the transaction was unconscionable – whether primary judge erred in finding that the transaction was unjust pursuant to the Contracts Review Act 1980 (NSW)</p>	Hanna [2017] NSWSC 728
35	2017/335183	Professional Investment Services Pty Ltd v Shawyer	24/05/2018	<p>ORTS (other) – misleading and deceptive conduct – limitations – respondents brought claim against appellant company alleging breach of duty of care and misleading and deceptive conduct – appellant claimed that proceedings were statute barred – primary judge held that respondents could bring claim – whether primary judge erred in determining the date on which the respondents’ causes of action</p>	Lower court decision not on Caselaw

				accrued – whether primary judge erred in failing to find that action for breach of duty was barred by s 14(1)(b) of the Limitation Act 1969 (NSW) – whether primary judge erred in failing to find that respondents' cause of action alleging misleading and deceptive conduct was barred by s 12GF(2) of the Australian Securities and Investments Commission Act 2001 (Cth)	
36	2017/383432	Hunter Quarries Pty Limited v Mexon	25/05/2018	WORKERS COMPENSATION – crush injuries following excavator tipping over - claim for compensation based on deceased being unconscious for several minutes between injury and death - whether expression “permanent impairment” used in s65 & 66 of Workers Compensation Act 1967 (NSW) includes an impairment so serious that death will follow within a short period of time	Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger [2017] NSWSC 1587
37	2017/298772	Sanpoint Pty Ltd v V8 Supercars Holdings Pty Limited	25/05/2018	CONTRACT – V8 Supercars Championship structured so that to be entitled to participate, each team must hold a Racing Entitlement Contract (REC) in respect of each car entered – number of teams able to participate limited – appellant held an REC and wished to retire from participation – this was effected through the appellant surrendering its REC to the first respondent, who then had authority to sell it by tender – tender process in relation to the appellant's REC yielded no bids and REC was sold for a price of \$20 000 on the basis that its market price was nil – appellant challenged the legitimacy of this process – respondents sought declaration that appellant had no rights under the REC – appellant brought cross-claim alleging that first respondent breached the terms of the REC in its manner of sale – primary judge	V8 Supercars Holdings Pty Ltd v Sanpoint Pty Ltd [2017] NSWSC 1043

				found that first respondent did not breach the REC and appellant did not suffer any recoverable loss – primary judge made orders sought by respondents – whether primary judge erred in failing to find that first respondent breached the terms of the REC inasmuch as it failed to ensure the sale was for the most advantageous price possible – whether primary erred in failing to find that tender process was in breach of the REC – whether primary judge erred in certain factual findings – whether primary judge erred in finding that appellant was precluded from making certain claims – whether primary judge erred in failing to find that the appellant had established loss	
38	2018/77589	Minister for Local Government v Blue Mountains City Council	28/05/2018	LAND AND ENVIRONMENT – interim injunction granted on ex parte basis restraining Minister from making a suspension decision under s438K of Local Government Act 1993– whether requisite intention to suspend can only be formed when Minister already holds the reasonable belief required by s438I – whether second notice incorporated by reference the reasons given in the first notice – whether notice on its face did not indicate that s438I had received the attention that was required – whether failed to consider whether proceeding premature as a suspension decision had not been made	Blue Mountains Council v Minister for Local Government [2018] NSWSC 183
39	2017/383389 2018/47791	Hakea Holdings Pty Ltd v Louisiana Properties Pty Limited	28/05/2018	LAND & ENVIRONMENT – first appellant and first respondent own adjacent lots in a subdivision – a condition of appellant’s development consent required that there be an emergency access road which would run over the first respondent’s lot – road constructed by second appellant under instructions from first appellant – first	Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd [2017] NSWLEC 37; Louisiana Properties Pty Ltd v Hakea Holdings Pty Ltd (No 2) [2017] NSWLEC 147

				<p>appellant commenced proceedings seeking an order that first respondent grant an easement for the purpose of the road – first respondent brought cross-claim seeking damages for trespass arising from the construction of the road and a sum for the cost of removal and revegetation of land occupied by the road – easement granted in favour of the first appellant – primary judge found that road was constructed beyond the terms of the easement and awarded damages and sum sought to first respondent – following subsequent hearings, primary judge ordered the removal of the road by the appellants – whether primary judge erred in holding that the construction of the road was properly characterised as the erection of a ‘building’ – whether primary judge erred in holding that the removal of vegetation to construct the road was in breach of the development consent and s 76 of the Environmental Planning and Assessment Act 1979 (NSW) – whether primary judge erred in admitting new evidence following the delivery of the first judgment – whether primary judge erred in failing to consider and give proper weight to certain material facts – whether primary judge erred in construction of right of access – whether primary judge erred in finding that the appellants trespassed on the first respondent’s lot</p>	
40	2017/228655	Council of the Law Society of New South Wales v Levitt	31/05/2018	<p>DISCIPLINARY PROCEEDINGS – in response to complaints made against the respondent, the Council of the Law Society made two separate decisions to the effect that there was a reasonable likelihood that the respondent would be found by the Civil and Administrative Tribunal to have</p>	Levitt v Council of the Law Society of New South Wales [2017] NSWSC 834

				<p>engaged in professional misconduct – Council resolved that proceedings be instituted in the Tribunal against the respondent – respondent commenced proceedings challenging these decisions – primary judge found that the Council had failed to consider the disposal of the complaints pursuant to s 540 of the Legal Profession Act 2004 (NSW) and quashed the decisions – whether primary judge erred in construction of s 537 and s 540 of the Legal Profession Act – whether primary judge erred in finding that the absence of reference to s 540 in the Council’s reasons resulted in jurisdictional error – whether primary judge erred in finding that the Council failed to consider whether there was a reasonable likelihood of the Tribunal concluding that the respondent was guilty of some lesser course of conduct – whether primary judge erred in finding that the Council failed to take into account exculpatory material advanced by the respondent</p>	
41	2018/117785	LSKF Holdings Pty Limited v Shield Lifestone Holdings Pty Limited	31/05/2018	<p>CONTRACT – illusory consideration - funding agreement subject to 50% interest in company - whether funding promise in shareholding agreement illusory because of control of nominee director – whether obligation of director to act in good faith for the company saves the funding promise – meaning of “may” in relation to the provision of funding</p>	Shield Lifestone Holdings Pty Limited v LSKF Holdings Pty Limited [2018] NSWSC 335
42	2017/307239	Carbone v Metricon Homes Pty Ltd	1/06/2018	<p>CONTRACT – respondent is a company in the business of selling house and land packages – appellant owned property for which there was a proposed subdivision that would create thirty residential lots – appellant and respondent entered into thirty</p>	Metricon Homes Pty Ltd v Carbone [2017] NSWDC 256

				Deeds of Put and Call options in relation to the thirty lots – a dispute arose between the parties and the respondent commenced proceedings seeking orders that it was entitled to a refund of nine call option fees as the draft plan of subdivision was not registered by the specified sunset date – respondent also sought orders that it was entitled to three other call option fees in circumstances where third parties had entered into contracts to purchase lots – primary judge entered judgment for the respondent – whether primary judge erred in holding that on a proper construction of the deeds the appellant was bound to refund the respondent the nine call option fees	
43	2017/350684	Commonwealth Steel Company Limited v BHP Billiton Marine & General Insurance Limited	5/06/2018	INSURANCE – respondent agreed to indemnify appellant against all sums for which the appellant became liable for personal injury sustained by any employees in its immediate service – policy provided that the respondent was to “pay the excess of \$125,000 (indexed in accordance with attached Stability Clause) ultimate net loss in respect of each disaster ... up to a further \$920,000 in respect of each and every disaster – dispute arose as to whether the stability clause applied to the deductible of \$125,000, with the effect that it would now be a sum of \$1,060,750 – primary judge found that the stability clause applied to the deductible and not the ultimate policy limit – whether primary judge erred in construction of indemnity policy – whether primary judge erred in relying on circumstances and events external to the contract in construing its terms – whether primary judge erred in failing to find that	Commonwealth Steel Company Limited v BHP Billiton Marine & General Insurance Limited [2017] NSWSC 1445

				stability clause applied to the upper limit of the policy and not the deductible	
44	2017/277335 2017/361555	Moloney v Roads and Maritime Services; Melino v Roads and Maritime Services	7/06/2018	<p>LAND AND ENVIRONMENT – compulsory partial acquisition of cane farm land – compensation under Land Acquisition (Just Terms Compensation) Act 1991 – whether full disturbance claim available on partial acquisition – whether cost of building a replacement dwelling can be claimed separately when assessed on the “before and after” method – whether additional loss of profits claim is not available as a matter of valuation principle</p> <p>LAND &amp; ENVIRONMENT – land owned by the late Costanzo Melino subject to compulsory acquisition as part of project to expand Pacific Highway to a dual carriageway – proceedings commenced to determine the amount of compensation to be awarded pursuant to the Land Acquisition (Just Terms) Act 1991 (NSW), s 55 – primary judge upheld certain claims and rejected others – whether primary judge erred in deciding not to award compensation for disturbance pursuant to s 55(d) – whether primary judge erred in law in failing to address the appellant’s claim pursuant to s 55(1)(c) – whether primary judge erred by implying a limitation not found in the text of s 59(1)(c) – whether primary judge erred in failing to make findings of fact as to the “actual use” of land as required by s 59(1)(f)– whether primary judge erred in consideration of s 59(1)(f) by focusing on the word “user” and not “use” – whether primary judge erred in refusing to award compensation pursuant to s 59(1)(f) – whether primary judge erred in assessing</p>	<p>Moloney v Roads and Maritime Services (No 2) [2017] NSWLEC 68</p> <p>Michele Melino and three others in their capacity as executors of the Estate of the late Costanzo Melino v Roads and Maritime Services [2017] NSWLEC 118</p>

				sum of compensation awarded	
45	2017/219608	Carlewie Pty Ltd v Roads and Maritime Services	13/06/2018	LAND AND ENVIRONMENT – compensation for compulsory acquisition of property under Land Acquisition (Just Terms Compensation) Act 1991 - double counting of adjustments - procedural fairness – evidence – whether erred in applying a discount for contamination, fire safety works and heritage conservation works when using comparable sale transactions as a method of land valuation – whether erred in considering a single transaction evidencing land valuation – whether wrongly took into account impact of local roads proposal when such proposal was inconsistent with existing zoning of site – whether compensation for land tax was available for period after compulsory acquisition – whether payment of stamp duty was available	Carlewie Pty Ltd v Roads and Maritime Services [2017] NSWLEC 78
46	2017/382506	GWM Goldmining Pty Ltd v Frerk	14/06/2018	PROCEDURE – security for costs – rejection of affidavit as to contributing conduct as to impecuniosity – failure to consider that same issues would be run at trial for non-corporate co-plaintiffs and would not add significantly to costs of trial	Decision not on Caselaw
47	2017/268697	Health Care Complaints Commission v Sultan	15/06/2018	DISCIPLINARY PROCEEDINGS – respondent is a doctor who works in a hospital – following a shift one evening, he visited a former patient with whom he had developed a friendly relationship – respondent undertook an examination of the patient, during the course of which he developed an erection – at this point, respondent moved away from the patient and the patient removed herself – the respondent was charged with indecent assault under s 61L of the Crimes Act	Health Care Complaints Commission v Sultan [2017] NSWCATOD 47

				<p>1900 (NSW) and was acquitted – Health Care Complaints Commission brought proceedings seeking findings of unsatisfactory professional conduct and professional misconduct under ss 139B(1) and 139E of the Health Practitioner Regulation National Law 2009 (NSW) – Tribunal made finding of unsatisfactory professional conduct but was not satisfied that professional misconduct had been established – whether Tribunal erred in law or fell into jurisdictional error in failing to apply the correct legal test for professional misconduct under s 139E – whether Tribunal erred in law or fell into jurisdictional error in failing to have regard to a relevant consideration – whether Tribunal erred in law or fell into jurisdictional error in failing to make findings regarding certain complaints – whether Tribunal fell into jurisdictional error because its findings were unreasonable, irrational or illogical – whether Tribunal fell into jurisdictional error in failing to have regard to certain evidence</p>	
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