



Supreme Court of NSW Court of Appeal

Decisions Reserved at 27 September 2019

	Number	Case Name	Heard	Issues	Judgment Below
	NUMBER	CASE NAME	HEARD	ISSUES	Judgment Below
1	2018/302102	Deigan v Fussell	5/02/2019	CONTRACT – respondent and James Lockrey were parties to a contract for the sale of land – completion did not take place as prescribed by contract – Lockrey subsequently died – contract permitted rescission on behalf of Lockrey’s estate following his death – appellant, not having obtained probate, served notice of rescission – after probate granted, appellant served a further notice of rescission – primary judge found contract had not been rescinded and ordered specific performance – whether primary judge erred in finding appellant did not have authority to issue first notice of rescission not having obtained probate – whether primary judge erred in failing to find first notice was effective as it was issued in appellant’s capacity as Lockrey’s solicitor – whether primary judge erred in finding appellant took advantage of a breach of contract by Lockrey’s estate by issuing second	Fussell v Deigan [2018] NSWSC 1419

				notice of rescission	
2	2018/89704	Kabic v AAI Ltd t/as GIO	15/03/2019	TORTS (negligence) – appellant fell while working as a labourer and suffered injuries – appellant was employed by Caringbah Formwork Pty Ltd, a labour hire company – Caringbah had hired out appellant to respondent, a sub-contractor at the building site – appellant brought claims in negligence against principal contractor on the site, Caringbah and the respondent – appellant succeeded in claim against respondent – respondent established significant contributory negligence – whether primary judge erred in making an excessive reduction for contributory negligence – whether primary judge erred in failing to provide adequate reasons for assessment of contributory negligence – whether primary judge erred in failing to consider and apply certain sections of the Civil Liability Act 2002 (NSW) in assessing contributory negligence – whether primary judge erred in failing to apply relevant common law principles – whether primary judge erred in certain factual findings – whether primary judge erred in assessment of damages for past and future economic loss	Kabic v Workers Compensation Nominal Insurer (No 4) [2018] NSWSC 330
3	2018/251066 2019/51685	Feldman v Polaris Media Pty Ltd as trustee of the Polaris Media Trust t/as The Australian Jewish News	20/05/2019	DEFAMATION – appellant brought proceedings in defamation in relation to a series of articles reporting on evidence given by him to the Royal Commission into Institutional Responses to Child Sexual Abuse published by first respondent and written by second respondent – respondents denied articles conveyed imputations alleged	Feldman v Polaris Media Pty Ltd [2018] NSWSC 1035

				and pleaded a number of defences – primary judge found in favour of respondents – whether primary judge erred in finding defence of honest opinion made out – whether primary judge erred in assessment of reasonableness for the purpose of the defence of statutory qualified privilege – whether primary judge erred in finding defence of contextual truth made out – whether primary judge erred in making certain factual findings – whether appellant was denied procedural fairness	
4	2018/348248	Croft v Sanders	3/06/2019	SUCCESSION – appellants and first respondent’s father executed a will which excluded his wife and favoured first respondent over appellants – father subsequently died – respondents sought probate of deceased’s will – appellants argued will was invalid for want of testamentary capacity on the basis that deceased suffered from delusions and hallucinations at the time of making his will – primary judge found deceased had testamentary capacity and ordered probate be granted to respondents – whether primary judge erred in finding deceased had testamentary capacity – whether primary judge erred in making certain factual findings – whether primary judge failed to give sufficient reasons	Re Estates Croft, deceased [2018] NSWSC 1303
5	2018/393798	Silversea Cruises Australia Pty Ltd v Abellanoza	1/07/2019	EQUITY – respondent's wife was employed by appellant in accounting department – appellant alleged that respondent’s wife defrauded appellant of over \$3.5 million by transferring money to accounts in her name and in joint name of her and respondent – primary judge found	Silversea Cruises Australia Pty Ltd v Mary Ann Abellanoza and Anor [2018] NSWSC 1565

				respondent did not have knowledge of receipt of fraudulent payments – whether primary judge erred in failing to find respondent knowingly dealt with monies obtained by dishonest means – in the alternative, whether primary judge erred in failing to find respondent knowingly dealt with moneys obtained by dishonest means when he withdrew \$20,000 from account – whether primary judge erred in failing to find respondent was personally liable to account to appellant as a constructive trustee	
6	2018/332235	Antov v Bokan	2/07/2019	EQUITY – appellant’s grandmother died in 2014 – deceased left a will by which she appointed first respondent, one of her daughters, as executor and made first respondent her sole beneficiary – appellant claimed an entitlement to a property owned by the deceased on the basis of representations allegedly contained in a Power of Attorney and “Contract for a Gift” allegedly executed by the deceased in 2009 – primary judge dismissed appellant’s claim – whether primary judge erred in finding “Contract for a Gift” was not an authentic document – whether primary judge erred in finding a presumption of undue influence applied – whether primary judge erred in finding appellant had not detrimentally relied on the representations alleged such as to ground an estoppel	Antov v Bokan [2018] NSWSC 1474
7	2018/271187	The Council of Trinity Grammar School v Anderson	11/07/2019	TORTS (other) – Limitation of action – claim against school for damages arising from sexual abuse by teacher on student in 1974 – student abused other than on school grounds – refusal of permanent stay – effect of law of non-	Anderson v The Council of Trinity Grammar School [2018] NSWSC 1633

				delegable duty is capable of applying to criminal acts – whether primary Judge took into account the burden that arose by the lapse of time – whether fair trial available – whether matters not raised and conceded by respondent taken into account – whether ability of applicant to pay damages was a relevant factor – whether finding that applicant did not make adequate enquiries as to whether evidence was available to defend proceedings	
8	2019/8426	DeBattista v Minister for Planning and Environment	19/07/2019	LAND & ENVIRONMENT – appellant owns two parcels of land in area administered by second respondent – second respondent sought to amend local environmental plan to lower maximum permitted height for development on appellant’s land – appellant sought withdrawal of proposal on the basis of a reasonable apprehension of bias on the part of second respondent and that appellant had been denied procedural fairness – primary judge found question of apprehended bias did not arise but that, in any event, such an apprehension was not established, but that second respondent conducted a defective community consultation process – whether primary judge erred in finding second respondent’s decision-making was one of a political and policy nature rather than an administrative nature – whether primary judge erred in failing to find a reasonable apprehension of bias on the part of second respondent – whether primary judge erred in not ordering that costs follow the event	DeBattista v Minister for Planning and Environment [2018] NSWLEC 202
9	2019/167819	Burton v Office of the	22/07/2019	TORTS (other) – applicant was charged with offences under	Burton v The Office of

		Director of Public Prosecutions		Children and Young Persons (Care and Protection) Act 1998 (NSW) and Court Suppression and Non-Publication Orders Act 2010 (NSW) – applicant sought damages in respect of an alleged collateral abuse of process – respondent sought summary dismissal of proceedings or that applicant’s pleadings be struck out – primary judge summarily dismissed proceedings – whether primary judge erred in dismissing proceedings	the Director of Public Prosecutions [2019] NSWDC 120
10	2019/119541	Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd	24/07/2019	NEGLIGENCE (professional) - separate question – damages caused by reliance on valuation of property – whether action statute barred – whether primary Judge erred in not permitting separate questions to be answered – whether erred in refusal application on basis of estimate of two weeks when both parties put it as no more than two days – whether erred in determining that question was not discrete - whether effect of s 56 of the Civil Procedure Act 2005 and s 191 of Evidence Act 1995 meant that the separate question could be determined by documentary evidence to confine the issue	Lake Maintenance (NSW) Pty Limited v Todd Hadley Pty Limited & Ors [2019] NSWSC 297
11	2019/9352	Barkat v Roads and Maritime Services	31/07/2019	LAND & ENVIRONMENT – respondent compulsorily acquired land owned by appellants for the purpose of WestConnex – respondent offered appellants compensation in the sum of \$3,095,590 for market value and disturbance – appellants objected to respondent’s offer, seeking \$23,213,219.04 – respondents alleged that compensation payable should be \$3,267,110.27 – primary judge ordered respondent to pay appellants \$4,622,684.95	Barkat v Roads and Maritime Services [2018] NSWLEC 209

				– whether primary judge failed to apply proper valuation principles in determination of market value – whether primary judge erred in making certain factual findings – whether primary judge took into account irrelevant considerations or failed to take into account relevant considerations	
12	2019/11223	Gordon v Lever	5/08/2019	REAL PROPERTY – appellants and respondents own neighbouring properties near a river – appellants sought an easement for a right of carriageway over respondents’ land – primary judge concluded that easement should be granted but only when river crossing was impassable and directed parties to draft terms of easement accordingly – appellants appealed – Court of Appeal remitted proceedings to primary judge – primary judge imposed easement subject to terms proposed by respondents, including limiting use to when river crossing was impassable – whether primary judge erred in imposing respondents’ proposed terms to the extent that they affected land not owned by parties to the proceedings and which was not the subject of the proceedings – whether primary judge erred in finding that for much of the year, river crossing was an alternative route – whether primary judge failed to consider whether use of appellants’ land would not be inconsistent with public interest	Gordon and Anor v Lever [2018] NSWSC 1888
13	2018/324176; 2018/334329	Loder v Bolton; Stoltenberg v Bolton	6/08/2019	DEFAMATION – respondent, a former mayor, brought proceedings against appellant in respect of allegedly defamatory social media posts alleging respondent was	Bolton v Stoltenberg [2018] NSWSC 1518

				corrupt and dishonest – appellant argued matters complained of were not published – appellant also relied on defences of common law qualified privilege and statutory qualified privilege – primary judge found in favour of respondent – whether primary judge erred in finding certain imputations were made out – whether primary judge erred in finding a post removed shortly after it was posted was published – whether primary judge erred in determination of extent of publication – whether primary judge erred in finding respondent was identified by posts – whether primary judge erred in rejecting appellant’s defences of common law qualified privilege and statutory qualified privilege – whether primary judge erred in making certain factual findings	
14	2019/174341	Vok v Director of Public Prosecutions (NSW)	7/08/2019	ADMINISTRATIVE LAW (judicial review) – Local Court found applicant guilty of offence of contravening apprehended violence order – applicant appealed – primary judge upheld conviction – whether primary judge erred in upholding conviction – whether primary judge failed to take into account certain evidence – whether primary judge’s decision was unreasonable – whether primary judge failed to give adequate reasons – whether applicant was denied procedural fairness	Decision not available on Caselaw
15	2019/96083;2019/96084	Glenfyne International Holding Ltd v Glenfyne Farms International AU Pty Ltd (in liq); Glenfyne	14/08/2019	CORPORATIONS – second appellant proposed a resolution at a meeting of the first respondent’s creditors to appoint two particular liquidators – resolution failed – second respondent was appointed liquidator of first respondent –	In the matter of Glenfyne Farms International AU Pty Ltd (in liquidation); In the

		International Ltd v GI Commercial Pty Ltd (in liq)		appellants sought an order replacing second respondent with their preferred liquidators – primary judge dismissed appellants’ application – whether primary judge erred in failing to order proposed resolution be taken as having passed pursuant to Corporations Act 2001 (Cth), Sch 2, s 75-43 – whether primary judge erred in finding Corporations Act, Sch 2, s 90-15 requires a failure on the part of the liquidator to be replaced – whether primary judge erred in taking into account certain evidence – whether primary judge failed to take into account relevant considerations	matter of GI Commercial Pty Ltd [2019] NSWSC 161
16	2019/56113	Rodny v Weisbord	20/08/2019	SUCCESSION – appellant and first respondent’s mother made a will in 1997 – in 2008, she took steps to make a new will – drafts were prepared, but no executed will was found after her death – 2008 will was more favourable to respondents – probate of 1997 will was granted to appellant – respondents sought a declaration under Succession Act 2006 (NSW), s 8 that 2008 will constituted the deceased’s last will and testament and an order revoking probate granted to appellant of 1997 will – primary judge found in favour of respondents – whether primary judge erred in finding there was a “document” purporting to state deceased’s testamentary intentions as required by s 8 – whether primary judge erred in finding deceased intended 2008 will to form her will – whether primary judge erred in making certain factual findings – whether primary judge erred in assessment of credibility of certain witnesses – whether primary judge failed to give	Weisbord v Rodny; Rodney v Weisbord [2018] NSWSC 1866

				adequate reasons	
17	2018/382846	Kirby v Dental Council t/as Dental Council of NSW	22/08/2019	DISCIPLINARY – suspension of practice on conditions – procedural fairness – reasonable apprehension of bias of Council members because of their prior involvement in steps leading up to decision of Dental Council of New South Wales – whether applicant needed to prove that Council members had assumed ownership of the outcome in decision to take action – whether they were the “moving force” behind the Council’s decision – whether erred in correct characterisation of earlier decision to take action against applicant as “administrative or ministerial” – nature of rehearing taken by Council under s150 of Health Practitioner Regulation National Law (NSW) – whether genuine rehearing took place before NCAT	Kirby v Dental Council of New South Wales [2018] NSWSC 1869
18	2019/189027	Wigmans v AMP Ltd	26/08/2019	PROCEDURE – representative proceedings – multiplicity of proceedings – where later commenced representative proceedings were selected as the appropriate vehicle for resolution of group member’s claims - whether commencement of subsequent proceedings an abuse of process – whether later proceedings ought to have been stayed unless it earlier proceedings were a “clearly inappropriate vehicle” – whether erred in using a “multi-factorial” analysis – whether erred in concluding that later commenced proceedings produced a better return at such an early stage of proceedings	Wigmans v AMP Ltd [2019] NSWSC 603
19	2018/393849;	Wang v State of NSW	27/08/2019	TORT (other) – wrongful arrest and unlawful detention –	Wang v State of NSW

	2019/160203			arrest for the purpose of signing an interim apprehended violence order (IAVO) – where warrant issued because police used old address and did not use RMS’s records to locate current address - whether alternative to arrest ought to have been considered in bringing applicant before Court - delay of two years in delivery of reserved decision – finding that applicant could communicate in English – no reasons given for rejecting evidence that applicant could not understand English – finding that applicant did not press claim for wrongful arrest contrary to applicant’s written submissions – failure to engage with submissions	[2018] NSWDC 375
20	2019/73624; 2019/157255	The GEO Group Australia Pty Ltd v O'Connor	27/08/2019	TORTS (negligence) – respondent was assaulted by other inmates while on remand – respondent brought proceedings in negligence against appellant, the managers of the correctional centre – primary judge found appellant was negligent in failing to take sufficient precautions against risk of harm – whether primary judge erred in finding appellant breached its duty of care by failing to segregate and/or transfer respondent – whether primary judge erred in finding segregation and/or a transfer could have been ordered – whether primary judge failed to have adequate regard to Civil Liability Act 2002 (NSW), s 5C – whether primary judge erred in making certain factual findings	O'Connor v GEO Group Australia Pty Ltd [2019] NSWSC 202
21	2018/368925	Scone Race Club Ltd v Cottom	29/08/2019	TORTS (negligence) – respondent suffered personal injury while emptying garbage bins on appellant’s premises – respondent brought proceedings in negligence against	Decision not available on Caselaw

				<p>appellant – primary judge found in favour of respondent – whether primary judge erred in finding appellant breached its duty of care to respondent – whether primary judge erred in finding the risk of injury was foreseeable – whether primary judge erred in finding burden of taking precautions was low in the absence of evidence – whether primary judge erred in failing to find respondent’s procedure for emptying the bins was contrary to the established system of work – whether primary judge erred in finding respondent was not contributorily negligent – whether primary judge erred in assessment of damages – whether primary judge erred in assessment of whether respondent mitigated his loss – whether primary judge erred in making certain factual findings, including the weight the respondent was lifting at the time of his injury</p>	
22	2019/234753	Boensch v Somerville Legal Pty Ltd	2/09/2019	<p>ADMINISTRATIVE LAW (judicial review) – applicant appealed to the District Court against a costs assessment made by second respondent – appeal was dismissed for want of prosecution – applicant sought to set aside order dismissing his appeal – primary judge declined to set aside order – whether primary judge applied the wrong test in determining whether to set aside order – whether primary judge erred in finding applicant failed to comply with certain orders, including orders requiring him to file evidence and submissions and costs orders – whether primary judge erred in finding applicant did not have an arguable substantive case – whether primary judge erred</p>	Decision not available on Caselaw

				in exercise of discretion	
23	2019/72722	Croghan v Blacktown City Council	3/09/2019	LAND AND ENVIRONMENT – costs of valuation proceedings - applicant ordered to pay indemnity costs after offer of compromise not accepted – whether UCPR 42.15 applied to disentitle applicant from costs – whether failed to “otherwise order” when the “follow the event” principle is expressly disapplied in Class 3 proceedings – whether “event” for the purposes of the rule is success in the proceedings rather than the quantum received	Croghan v Blacktown City Council [2019] NSWLEC 2
24	2019/193139	Drama Unit Pty Ltd v Fearndale Holdings Pty Limited (administrator appointed)	10/09/2019	REAL PROPERTY – appellant and first respondent entered into a lease over land owned by first respondent – first respondent served notices to remedy several breaches on appellant – first respondent subsequently purported to terminate lease on the basis of appellant’s failure to remedy breaches – respondents sought a declaration that first respondent had validly and effectively terminated lease – respondents also sought to recover outstanding rent and outgoings – primary judge made declaration sought and entered judgment for respondents for outstanding rent and outgoings – whether primary judge erred in failing to find notices to remedy breach were invalid for failing to specify time for compliance – whether primary judge erred in construction of lease – whether primary judge erred in finding respondents entitled to rent and outgoings	In the matter of Fearndale Holdings Pty Limited [2019] NSWSC 645
25	2019/228385	Kay v Playup Australia Pty	11/09/2019	CONTRACT – construction – whether deferred payments had become due and payable – whether obligation to pay	Playup Australia Pty Ltd

		Limited		was postponed until applicant had satisfied certain obligations owed by respondent in relation to completion – whether respondent had waived the need for performance of obligations	v Kay [2019] NSWSC 771
26	2019/160119	Allianz Australia Insurance Limited v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCOM0430	12/09/2019	INSURANCE – a road worker was injured when hit by a passing car – worker received damages from the company building the road – company was insured under two policies issued by appellant and respondent respectively – appellant paid the claim – appellant sought contribution from respondent – primary judge found respondent was not obliged to contribute – whether primary judge erred in interpreting each policy independently of the other policy – whether primary judge erred in construction of policies	Allianz Insurance Australia Limited v Certain Underwriters at Lloyd's of London subscribing to policy number B105809GCOM0430 [2019] NSWSC 453
27	2019/157415	Director of Public Prosecutions v Hamzy	12/09/2019	ADMINISTRATIVE LAW (judicial review) – first respondent was convicted and sentenced in Local Court for assaulting a law enforcement officer – first respondent appealed – primary judge set aside conviction and sentence and permanently stayed proceedings – whether primary judge erred in permanently staying proceedings – whether primary judge had regard to irrelevant considerations	Decision not available on Caselaw
28	2019/89863	State of New South Wales v Shepherd	17/09/2019	TORTS (other) – respondent brought proceedings against appellant alleging he suffered personal injury due to the conduct of a constable – primary judge found in favour of respondent – whether primary judge erred in finding constable's conduct caused respondent's injuries – whether primary judge erred in finding force used by constable was not reasonably necessary – whether primary	Decision not available on Caselaw

				judge erred in finding Civil Liability Act 2002 (NSW), s 43A did not apply – whether primary judge erred in failing to apply Civil Liability Act, ss 52, 53 and 54 – whether primary judge erred making certain factual findings – whether primary judge failed to give adequate reasons – whether primary judge failed to give proper weight to certain evidence – whether appellant was denied procedural fairness – whether primary judge erred in assessment of damages	
29	2019/147143	Fuller v Avichem Pty Ltd	17/09/2019	TORTS (negligence) – appellant brought proceedings in negligence against respondent employer in respect of a workplace injury – primary judge found respondent was negligent and awarded appellant damages for past and future economic loss – whether primary judge erred in finding appellant had some residual earning capacity – whether primary judge erred in assessing discount to be applied for vicissitudes in determining future economic loss – whether primary judge erred in failing to award damages for long service leave – whether primary judge erred in taking into account certain expert evidence	Fuller v Avichem Pty Ltd trading as Adkins Building & Hardware Supplies [2019] NSWDC 114; Fuller v Avichem Pty Ltd trading as Adkins Building & Hardware Supplies [2019] NSWDC 125
30	2019/165599	Fields Group Pty Limited v Wilson Security Pty Ltd	24/09/2019	CONTRACT – appellant entered into a contract with Commonwealth to provide security services pursuant to Indigenous Procurement Policy – appellant entered into a subcontract with respondent to supply additional security services to carry out Commonwealth contract – respondent made an oral commitment to subcontract to appellant security work under other contracts of	Fields Group Pty Ltd v Wilson Security Pty Ltd [2019] NSWSC 475

				<p>respondent – all subcontracts were subsequently terminated – appellant brought proceedings against respondent alleging breach of contract – respondent cross-claimed seeking payment of its unpaid invoices – primary judge dismissed contractual claim and found respondent entitled to amount of its unpaid invoices – whether primary judge erred in determination of scope and terms of respondent’s commitment – whether primary judge erred in finding appellant’s equitable set off defence failed – whether appellant was denied procedural fairness – whether primary judge erred in making or failing to make certain factual findings</p>	
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