



Supreme Court of NSW Court of Appeal

Decisions Reserved as at 25 February 2022

	Number	Case Name	Heard	Issues	Judgment Below
1	2021/5136	Twigg v Twigg	19/03/2021	EQUITY – first appellant director of corporate trustee used money borrowed on security over the corporate trustee’s assets to acquire a number of properties for himself and caused trust funds to be distributed to himself – claims brought for breach of fiduciary duties or knowing receipt of trust property – primary judge found in favour of respondents – whether primary judge erred in certain factual findings – whether primary judge made findings not based on or contrary to the evidence – whether primary judge erred in finding that respondents had established the existence of a dishonest intent on the part of first appellant – whether primary judge erred in failing to find that the claims of the respondents were statute barred by operation of s 21 of the Limitations of Actions Act 1958 (Vic) – whether primary judge erred in failing to find that the doctrine of laches barred the grant of proprietary relief in favour of	Twigg v Twigg (No 4); Lambert v Twigg Investments Pty Ltd (No 3) [2020] NSWSC 1159; Twigg v Twigg (No 5); Lambert v Twigg Investments Pty Ltd (No 4) [2020] NSWSC 1782; Twigg v Twigg (No 6); Lambert v Twigg Investments Pty Ltd (No 5) [2020] NSWSC 1856

				respondents – whether primary judge erred in his application of tracing principles	
2	2020/00310603; 2020/00310609; 2020/00310590; 2020/00311015; 2020/00311016; 2020/00311017	Clancy v Plaintiff D; Clancy v Plaintiff A; Clancy v Plaintiff C; Bird v Plaintiff C; Bird v Plaintiff D; Bird v Plaintiff A	19/07/2021	TORTS (other) – first appellant owned 99% of shares in second appellant, which was a childcare centre – third respondent who worked at childcare centre was arrested and charged with two offences after a child made disclosures about him – “B” and “D” made disclosures about third respondent with police investigations resulting in criminal charges laid against him in relation to “B”, but none were laid in relation to “D” – “A” and “C” are “B” and “D”’s mothers respectively and also pursued claims for breach of contract due to childcare’s failure to provide quality childcare and to ensure that children were safe and adequately cared for – primary judge found in favour of “A”, “B”, “C” and “D” – whether primary judge erred in concluding that disclosures made by the four children and the admissions of third respondent were admissible as tendency evidence – whether primary judge erred in finding that “Child 1” was unavailable to give evidence – whether primary judge erred in finding that third respondent’s admissions were admissible	Plaintiff A and B v Bird; Plaintiff C v Bird; Plaintiff D v Bird [2020] NSWSC 1379

				<p>against appellants – whether primary judge erred as to certain factual findings – whether primary judge erred in finding that appellants were negligent – whether primary judge erred in finding that appellants created and enhanced the risk of abuse which materialised – whether primary judge erred as to findings on vicarious liability – whether primary judge erred as to findings on a breach of duty of care – whether primary judge erred as to findings on breach of contract – whether primary judge erred as to the award of damages</p>	
3	2020/234084	Muriniti v Kalil	25/08/2021	<p>COSTS – underlying proceedings concerned claims in defamation, in which the defendant was at all times represented by the appellants – first respondent alleged that the appellants exhibited serious incompetence in their legal representation, and provided inadequate defences with respect to the claim of defamation – primary judge made personal costs orders against appellants – whether primary judge erred in not applying the correct test with respect to a finding of liability relating to serious incompetence pursuant to s 99 of the Civil Procedure Act 2005 (NSW) – whether primary judge erred by failing to provide adequate reasons – whether primary judge erred in not finding that the respondents were motivated by an improper collateral purpose in making the personal costs application – whether primary judge erred as to certain factual findings – whether primary judge erred by taking into account irrelevant considerations – whether primary judge erred</p>	Kalil v Eppinga [2020] NSWDC 407

				by failing to take into account relevant considerations – whether primary judge erred by denying the appellants procedural fairness – whether primary judge erred by failing to consider submissions made on behalf of the appellants – whether primary judge’s conduct and reasons gave rise to a reasonable apprehension of bias	
4	2021/194026; 2021/197122	State of New South Wales v Kaiser	21/09/2021	CRIME – appellant sought orders that the respondent be made the subject of an extended supervision order pursuant to the Crimes (High Risk Offenders) Act 2006 (NSW) – issue as to whether, for the purpose of the application of s 5B(b) of the Act, the appellant had shown that the respondent was a “supervised offender” – primary judge held that the respondent was not a supervised offender – whether primary judge erred in finding that the respondent was not a “supervised offender”	State of New South Wales v Kaiser [2021] NSWSC 646
5	2021/159930	Starr v Miller	22/11/2021	SUCCESSION – deceased suffered a stroke before making the will in dispute – issue as to testamentary capacity – primary judge held that the deceased did have testamentary capacity – whether primary judge erred as to certain factual findings – whether primary judge erred in finding that the deceased knew and approved of the contents of the will – whether primary judge erred as to his findings on testamentary capacity	Starr v Miller [2021] NSWSC 426

6	2021/140048; 2021/83984	Alexandrova v Owners of Strata Plan 87265; Owners of Strata Plan 87265 v Saaib	2/12/2021	<p>BUILDING & CONSTRUCTION – dispute as to construction of 11 townhouses located in Marrickville – respondent brought claims against the appellant on the basis that she was liable for the costs of rectifying defects in the building works, on the basis that she engaged in misleading or deceptive conduct in contravention of s 18 of the ACL – the conduct alleged to be misleading or deceptive was an implied representation that the appellant was authorised by the builder to submit documents to obtain home warranty insurance for the Marrickville property, when she was in fact not so authorised – respondents alleged that her misleading or deceptive conduct was a material cause of the issuance of the home warranty insurance and construction of the defective Marrickville property – primary judge found in favour of the respondent and awarded damages exceeding \$3.4 million – whether primary judge erred in holding that the appellant engaged in conduct that was misleading or deceptive – whether primary judge erred in holding that s 18 of the ACL was applicable, in circumstances where the relevant conduct occurred prior to the ACL coming into operation – whether primary judge erred in finding that there were representations by the appellant as to actual authority – whether primary judge erred as to certain factual findings – whether primary judge erred as to findings on causation, reliance and loss – whether primary judge erred as to the calculation of damages</p>	The Owners – Strata Plan No 87265 v Saaib; The Owners – Strata Plan No 87265 v Alexandrova [2021] NSWSC 150
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7	2021/175402	Transport for NSW v Eureka Operations Pty Ltd	3/12/2021	<p>LAND & ENVIRONMENT – the appellant compulsorily acquired land in which the respondent held a leasehold interest in Dubbo – the respondent was offered compensation pursuant to s 66 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) but objected to the amount of compensation offered – primary judge determined compensation in the sum of over \$633k – whether primary judge erred in the assessment of compensation – whether primary judge erred by failing to apply the test in <i>Spencer v Commonwealth</i> (1907) 5 CLR 418</p>	Eureka Operations Pty Ltd v Transport for New South Wales [2021] NSWLEC 41
8	2021/167145	Canterbury-Bankstown Council v Payce Communities Pty Ltd	7/12/2021	<p>BUILDING AND CONSTRUCTION – building variations for construction of library – acceptance of expert evidence – whether variations properly incurred - failure to consistently require that a variation to be in writing notwithstanding a finding that they should be so – failure to apply consistently a methodology to assessing damages - failing to include GST in calculation of amount owing – whether evidence to support 10% margin on costs by builder – whether award to respondent was more than entitled under the contract</p>	Payce Communities Pty Ltd v Canterbury-Bankstown Council [2021] NSWSC 331; Payce Communities Pty Ltd v Canterbury-Bankstown Council (No 4) [2021] NSWSC 558

9	2021/234658	Franklin v Director of Public Prosecutions (NSW)	1/02/2022	JUDICIAL REVIEW (other) – refusal of request to state case to Court of Criminal Appeal under s5B of <i>Criminal Appeal Act 1912</i> – matter previously heard in Court of Appeal in Franklin v DPP {2021} NSWCA 83 and remitted to District Court - whether denial of procedural fairness – whether admissibility of evidence a question of law	Lower court decision not available on Caselaw
10	2021/183151	Li v Liu	7/02/2022	TRADE PRACTICES – whether primary judge erred as to certain factual findings – whether primary judge erred by failing to find that a certain representation was made in trade or commerce – whether primary judge erred by failing to find that the respondents engaged in misleading or deceptive conduct – whether primary judge failed to find that the appellants suffered loss as a result of the representation	Lower court decision not available on Caselaw
11	2021/261838	Petch v Director of Public Prosecutions (NSW)	8/02/2022	ADMINISTRATIVE LAW (judicial review) – primary judge dismissed the appellant’s appeal against his conviction – whether primary judge committed jurisdictional error by failing to address a substantial argument relied on by the appellant – whether primary judge committed jurisdictional error by failing to provide adequate reasons for rejecting the expert evidence relied on by the appellant – whether primary judge erred by failing to apply the correct onus and standard of proof	Lower court decision not available on Caselaw

12	2021/295887	Fordyce v Leung	10/02/2022	PROCEDURE – whether primary judge erred by refusing an application to set aside a judgment which was allegedly invalid, illegal or unenforceable – whether primary judge denied the appellant procedural fairness and natural justice – whether primary judge displayed actual or perceived bias	Lower court decision not available on Caselaw
13	2021/256723	Marlin Brands Australia Ltd v Brando Aust Holdco Pty Ltd	11/02/2022	PROCEDURE – joinder of party – whether mistake in name of party – order backdated to avoid effect of limitation clause in contract – whether power to backdate engaged	Brando Aus Holdco Pty Ltd v Shayne [2021] NSWSC 998
14	2021/157058	Hrdavec v New South Wales	15/02/2022	TORTS (other) – malicious prosecution and false imprisonment – evidence – whether evidence supported finding that prosecutor believe that a sexual assault had occurred – whether prosecutor had made honest mistake in misrepresenting information supplied by co-accused – failure to consider effect of complainant’s withdrawal of her allegation – assessment of damages	Hrdavec v State of New South Wales [2021] NSWSC 560

15	2021/199600	Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd	15/02/2022	<p>CONTRACT – dispute arising out of a contract for the sale of land in Pymont between the respondent vendor and the appellant purchaser – at issue was special condition 44 of the Contract, which stipulated that if the appellant lodged a new development application in respect of the property and received a credit or allowance in respect of any contribution otherwise payable under s 94 of the <i>Environmental Planning and Assessment Act 1979</i> (NSW), then the appellant was obliged to pay the respondent an amount equal to any such allowance or credit – the respondent brought a claim under this special condition for some \$660k, to which the appellant denied liability – appellant brought cross-claim against the respondent alleging unconscionable conduct in contravention of s 21 of the ACL – primary judge found in favour of respondent and dismissed the appellant’s cross-claim – whether primary judge erred in the characterisation of the respondent’s breach under the contract – whether primary judge erred by holding that the appellant’s loss was not caused by and was too remote from the respondent’s breach of the contract – whether primary judge erred as to her findings on mitigation – whether primary judge erred as to the assessment of damages</p>	Boulos Holdings Pty Ltd v Edwin Davey Pty Ltd [2021] NSWSC 689
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16	2020/361418	Rinehart v Rinehart	16/02/2022	PROCEDURE – access to trust documents - delivery up of Bankruptcy transcripts – whether erred in carving out transcripts from production – whether duty of former trustee to co-operate with successor extended to the transcripts – whether erred in dispensing with requirement until after conclusion of arbitration	Hancock v Rinehart [2020] NSWSC 1853
17	2021/188808	Insurance Australia Ltd t/as NRMA Insurance	17/02/2022	ADMINISTRATIVE LAW (other) – judicial review of proper officer of State Insurance Regulatory Authority – refusal of SIRA to refer to review panel for medical assessment – whether proper officer mistook function – whether erred in holding that where there is conflicting medical opinion, there must be reasonable cause to suspect that medical assessment is incorrect – whether proper officer decided issues that ought to have determined by review panel	Marsh v Insurance Group Ltd [2021] NSWSC 619
18	2021/226863	Pridgeon v Medical Council of New South Wales	18/02/2022	DISCIPLINARY – whether proceedings used for purpose other than on which it was conferred – whether suspension warranted when it found there were no performance complaints – whether erred in not considering the applicant's presumption of innocence	Pridgeon v Medical Council of NSW [2021] NSWCATOD 89

19	2021/199371	Cavanagh v Manning Valley Race Club Ltd	18/02/2022	TORTS (negligence) – whether primary judge erred by failing to consider and identify the scope and content of the respondent’s duty of care to the appellant – whether primary judge erred as to certain factual findings – whether primary judge erred by failing to provide adequate reasons – whether primary judge erred in failing to find that the nature and conditions of the appellant’s work created a foreseeable risk of injury – whether primary judge gave insufficient weight to certain expert evidence	Lower court decision not available on Caselaw
20	2021/163352	Reid v Commonwealth Bank of Australia	22/02/2022	PROCEDURE – summary dismissal – deed of release - resolution of dispute by sale of applicant’s property by respondent – property vandalised prior to settlement with purchaser - respondent allowed \$370,000 as adjustment – whether respondent negligently allowed property to be damaged – whether deed ought to be set aside – whether primary Judge failed to consider pleading – whether denial of procedural fairness in not allowing applicant to seek to amend pleading	Reid v Commonwealth Bank of Australia [2021] NSWDC 225
21	2021/288698	S&C Nicola Pty Ltd v Peter Holmes Investment Pty Ltd	23/02/2022	CONTRACT – issue as to the construction of a partnership agreement entered into between the parties relating to the development of residential properties in the Northern Beaches – primary judge found in favour of the respondent’s construction and made relevant orders and declarations to that effect – whether the primary judge erred as to the construction of the partnership agreement – whether the primary judge erred in making orders in circumstances where the respondent had not sought final orders or declarations in	Peter Holmes Investments Pty Ltd v S&C Nicola Pty Ltd [2021] NSWSC 1174

				those terms	
22	2022/17218	Irlam v Byrnes	24/02/2022	TORTS (negligence) – appellant brought proceedings in negligence and battery against the respondent over a motor vehicle incident – primary judge found in favour of respondent – whether primary judge erred by admitting or having regard to certain evidence – whether primary judge erred as to certain factual findings – whether primary judge erred as to the assessment of contributory negligence	Lower court decision not available on Caselaw
23	2022/240205	Flowers v New South Wales	24/02/2022	TORTS (other) – malicious prosecution – procedural fairness – whether erred in not admitting relevant evidence – failure to permit amendments – bias – whether erred in determining evidence as a transcript problem rather than perjury – whether State tampered with evidence	Flowers v State of New South Wales (No 5) [2021] NSWSC 887