



Supreme Court of NSW Court of Appeal

Decisions Reserved as at 22 April 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	<i>Twigg v Twigg (No 4); Lambert v Twigg Investments Pty Ltd (No 3)</i> [2020] NSWSC 1159; <i>Twigg v Twigg (No 5); Lambert v Twigg Investments Pty Ltd (No 4)</i> [2020] NSWSC 1782; <i>Twigg v Twigg (No 6); Lambert v Twigg Investments Pty Ltd (No 5)</i> [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	<i>Plaintiff A and B v Bird; Plaintiff C v Bird; Plaintiff D v Bird</i> [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>	<p><i>Kalil v Eppinga</i> [2020] NSWDC 407</p>

				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”	<i>State of New South Wales v Kaiser</i> [2021] NSWSC 646
5	2021/167145	Canterbury-Bankstown Council v Payce Communities Pty Ltd	7/12/2021	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	<i>Payce Communities Pty Ltd v Canterbury-Bankstown Council</i> [2021] NSWSC 331; <i>Payce Communities Pty Ltd v Canterbury-Bankstown Council (No 4)</i> [2021] NSWSC 558

				contract	
6	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
7	2021/199600	Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd	15/02/2022	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	<i>Boulos Holdings Pty Ltd v Edwin Davey Pty Ltd</i> [2021] NSWSC 689

				<p>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>	
8	2020/361418	Rinehart v Rinehart	16/02/2022	<p>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</p>	<p><i>Hancock v Rinehart</i> [2020] NSWSC 1853</p>

9	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	<i>Reid v Commonwealth Bank of Australia</i> [2021] NSWDC 225
10	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 those terms	<i>Peter Holmes Investments Pty Ltd v S&C Nicola Pty Ltd</i> [2021] NSWSC 1174

11	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
12	2019/110615	Nyunt v First Property Holdings Pte Ltd	4/03/2022	ADMINISTRATIVE LAW (other) – refusal to set aside registration of judgments under <i>Foreign Judgments Act 1991</i> (Cth) – whether respondent had submitted to jurisdiction of Singapore Courts – whether Joint Venture Agreement properly construed included a submission to the jurisdiction of Singapore Courts – whether Singapore Courts had jurisdiction when the facts particularised were already the subject of litigation in Myanmar – whether applicant had adequate notice of proceedings in order to defend – whether enforcement of judgment contrary to public policy	<i>First Property Holdings Pty Ltd v Nyunt</i> [2019] NSWSC 249

13	2021/235929	Sun v Chapman	11/03/2022	SUCCESSION – the appellant sought a family provision order in the proceedings below, on the basis that she was the alleged de facto partner of the deceased – an issue arose as to whether the appellant and the deceased were in a de facto relationship at the time of his death – primary judge found in favour of the respondent – whether primary judge erred in failing to find that the appellant and the deceased were in a de facto relationship at the time of his death – whether primary judge erred in failing to find that there were factors which warranted the making of the application by the appellant, in circumstances where the primary judge found that the appellant and deceased were living in a close personal relationship at the time of his death	<i>Sun v Chapman</i> [2021] NSWSC 955
14	2021/165193	Zong v Wang	14/03/2022	TRADE PRACTICES – in 2018, discussions took place between first appellant and respondent concerning a proposed boating business venture – respondent alleged that first appellant made six representations to him which were misleading or deceptive within the meaning of s 18 of the ACL – primary judge found in favour of respondent – whether primary judge erred in determining that the first appellant’s representations were made in “trade or commerce” – whether primary judge erred by incorrectly making findings in relation to certain representations which had not been pleaded by the respondent – whether primary judge erred in his findings as to reliance and causation – whether primary judge erred as to the assessment of damages	<i>Wang v Zong</i> [2021] NSWDC 181

15	2021/173153	Williams v Fraser	17/03/2022	MEDICAL NEGLIGENCE – undiagnosed congenital pars defect – radiologist failed to report of existence of defect – where appellant subsequent work alleged to have cause deterioration of her condition – whether no damage following breach of duty – whether primary Judge failed to address that condition would have stabilised with appropriate exercise – whether loss of chance	<i>Williams v Fraser</i> [2021] NSWSC 416
16	2021/195267	Morris v Leaney	18/03/2022	TORTS (negligence) – the appellants were the registered proprietors of property located in Kings Creek, NSW – in 2014, the appellants decided that they would develop their property to accommodate their growing family and their desire to have a “forever home” – the appellants brought proceedings against the respondent architect, in respect of an alleged breach of duty of care and misleading or deceptive conduct, as they alleged that he led them to believe that they could build their dream home within their financial limits – primary judge found in favour of respondent – whether primary judge erred in finding that the appellants suffered no loss – whether primary judge erred as to certain factual findings	<i>Morris v Leaney</i> [2021] NSWDC 224

17	2021/87464	Joldzic v Patrick	21/03/2022	<p>MOTOR ACCIDENTS – appellant was struck by the respondent’s vehicle in a motor accident in 2012, to which the respondent admitted that she breached her duty of care to the appellant – however, from about February 2016, the appellant suffered from an atypical psychotic disorder – issue arose as to whether by reason of her involvement in the motor vehicle accident in 2012, the appellant suffered personal injury in the form of mental harm and, if she did, whether any mental harm caused by that accident led to her current predicament – primary judge awarded the appellant damages in the sum of just under \$44k – whether primary judge erred in the quantum of damages assessed – whether primary judge erred in finding that the appellant’s incapacity would have come about independently of the motor vehicle accident – whether primary judge erred in failing to find that the appellant’s incapacity for employment in the future was caused by the psychological impact of the accident</p>	<i>Joldzic (bht Joldzic) v Patrick</i> [2021] NSWDC 55
18	2021/299083	Centuria Property Funds Ltd v Thorn Australia Pty Ltd	24/03/2022	<p>CONTRACT – the respondent sought declaratory relief to the effect that it had not entered into a binding lease or agreement for lease, as lessee, with the appellants, as lessors, in respect of certain commercial premises in Eveleigh – underlying issue as to whether the respondent had delivered certain deeds so as to become bound by them – primary judge found in favour of respondent – whether primary judge erred as to certain factual findings – whether primary judge erred as to the construction of the relevant</p>	<i>Thorn Australia Pty Ltd v Centuria Property Funds Ltd</i> [2021] NSWSC 1217

				agreement	
19	2021/181818	Chisak v Presot	25/03/2022	<p>SUCCESSION – issue as to whether the deceased lacked testamentary capacity when making her will – primary judge found in favour of the respondents – whether primary judge erred as to certain factual findings – whether primary judge erred in finding that the deceased had capacity – whether primary judge erred in relying on certain evidence – whether primary judge erred by failing to take into account certain evidence – whether primary judge failed to give adequate reasons in preferring the evidence of one expert over that of another expert – whether primary judge erred in not considering whether suspicious circumstances existed – whether primary judge erred in finding that the appellant was not an eligible person pursuant to s 57(1)(e) of the <i>Succession Act 2006</i> (NSW) – whether primary judge erred by failing to make adequate provision for the proper maintenance, education or advancement in life of the appellant</p>	<i>Chisak v Presot</i> [2021] NSWSC 597

20	2021/282503	Amaca Pty Ltd v Cleary	29/03/2022	<p>TORTS (negligence) – the deceased was employed by the appellant between 1962 and 1964 at its Camellia factory and plant – whilst the appellant conceded that the deceased developed asbestos related pleural plaques, it disputed the claims for compensation for lung cancer and asbestosis injuries – primary judge found in favour of the respondent – whether the primary judge erred by failing to accept certain expert evidence – whether the primary judge erred as to certain factual findings</p>	<p><i>Roseanne Cleary as the Legal Personal Representative of the Estate of the late Fortunato (aka Frank) Gatt v Amaca Pty Ltd [2021] NSWDDT 5</i></p>
21	2021/204042	Dwyer v Volkswagen Group Pty Ltd	30/03/2022	<p>TRADE PRACTICES – the appellant brought representative proceedings on behalf of some 83,000 persons who purchased Volkswagen vehicles in which a Takata driver side airbag was installed between 2007 and 2018 – the appellant claimed that his vehicle was not of acceptable quality because, by reason of the installation of the Takata airbag, the vehicle was not free from defects and was not safe – primary judge found in favour of the respondent – whether primary judge erred in failing to find that the appellant’s vehicle was not of acceptable quality at the time of the supply to the appellant, within the meaning of s 54 of the Australian Consumer Law – whether primary judge erred as to certain factual findings – whether primary judge erred by importing a negligence or fault standard into a strict liability regime – whether primary judge erred by rejecting certain expert evidence – whether primary judge ought to have held that the appellant was entitled to damages under s 272 of the ACL</p>	<p><i>Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia [2021] NSWSC 715</i></p>

22	2021/293686	Trustees for the Roman Catholic Church for the Diocese of Lismore v GLJ	31/03/2022	PROCEDURE – dismissal of permanent stay – where applicant has no records nor access to senior persons who could provide instructions – where conduct alleged was not the grooming of males but a single sexual assault against a female – whether applicant unable to meaningfully engage with the claim for vicarious liability – application of <i>The Council of Trinity Grammar School v Anderson</i> [2019] NSWCA 292.	<i>GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore</i> [2021] NSWSC 1204
23	2021/257944	MP Water Pty Ltd v Veolia Water Australia Pty Ltd	4/04/2022	CONTRACT- declaration - construction of “step-in” right in a long term services agreement – notice given in exercise of that right - whether applicant entitled to give notice – whether gave power to applicant to direct the respondent as to its operations rather than operate the facility	<i>MP Water Pty Ltd v Veolia Water Australia Pty Ltd (No 3)</i> [2021] NSWSC 1023
24	2021/210509	Shepherd v State of NSW	5/04/2022	TORTS (other) – assault – shoulder charge by police officer - whether the primary judge failed to give proper weight to certain evidence – whether the primary judge erred by failing to give adequate reasons – whether the primary judge erred by making certain factual findings in the absence of evidence	Lower court decision not available on Caselaw

25	2021/269258	Dogramaci v DPP	5/04/2022	ADMINISTRATIVE LAW (judicial review) – whether appellant was denied the opportunity to cross-examine a particular witness – whether appellant was denied justice – whether primary judge displayed bias towards appellant	Lower court decision not available on Caselaw
26	2021/321969	Secretary, Dept of Communities and Justice v KH	6/04/2022	ADMINISTRATIVE (other) – judicial review sought of orders made in <i>Children and Young Person (Care and Protection) Act 1998</i> (NSW) – whether misconstrued requirement in s83(5) that there be a “realistic possibility of restoration within a reasonable period” – whether failed to apply s9(1) in consideration the safety, welfare and well-being of child being paramount – whether taking into account alleged denial of procedural fairness in Children’s Court	<i>KH v Secretary, Department of Communities and Justice</i> [2021] NSWDC 498
27	2021/240231	Massoud v Nationwide News Pty Limited	12/04/2022	DEFAMATION – appellant was suspended and dismissed from his employment as a journalist for a statement that he made to an 18-year-old cadet – the appellant brought proceedings against the respondent media organisations for misquoting what he said in otherwise factually correct reports – primary judge found in favour of the respondents – whether primary judge erred in his findings as to imputations and contextual imputations – whether primary judge erred in upholding the defence of justification – whether primary	<i>Massoud v Radio 2GB Sydney Pty Ltd; Massoud v Fox Sports Australia Ltd; Massoud v Commonwealth Broadcasting Corporation Pty Ltd; Massoud v Nine Digital Pty Ltd; Massoud v Nationwide News Pty Ltd</i> [2021] NSWDC 336

				judge erred as to the assessment of damages	
28	2022/20519	Clark v Attorney General of NSW	14/04/2022	<p>ADMINISTRATIVE LAW (judicial review) – crime – appeal and review – application pursuant to s 78 of the <i>Crimes (Appeal and Review) Act 2001</i> (NSW) – on 26 June 2009, Applicant was convicted of one count of doing an act with one count of doing an act with intent to pervert the course of justice contrary to s 319 of the <i>Crimes Act 1900</i> (NSW) and one count of aggravated sexual intercourse with a child between 14 and 16 years of age contrary to s 66C(4) of the <i>Crimes Act 1900</i> (NSW) – Applicant’s appeal against conviction dismissed in 2011 – in October 2017, Applicant made application under s 78 of the <i>Crimes (Appeal and Review) Act 2001</i> (NSW) for a review of his convictions – that application was dismissed – application for judicial review of that decision was subsequently also dismissed – Applicant brought a fresh application for review of his convictions pursuant to s 78 – Applicant contended that his convictions ought to be referred for inquiry by a judicial officer on various bases – that Crown withheld evidence</p>	<p><i>Application by Peter Frederick Clark pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) [2021] NSWSC 1364</i></p>

				and misdirected jury – that jury verdicts were inconsistent and/or unreasonable – that convictions on counts relating to single event offended rule against double jeopardy – judge dismissed application for review – whether judge fell into jurisdictional error – by proceeding on misapprehensions of fact and law – by failing to address arguments put by Applicant	
29	2021/286249	Bryant v Quinn	19/04/2022	CONTRACT – the respondent uncle sued his appellant niece for the repayment of monies in excess of \$100,000 – the appellant claimed that the monies were a gift, and were not provided to her by way of loan – primary judge found in favour of respondent – whether primary judge erred as to certain factual findings – whether primary judge erred by making findings on the basis of a conditional gift, which had not been pleaded by the respondent – whether primary judge erred by denying the appellant procedural fairness	<i>Quinn v Bryant</i> [2021] NSWDC 570
30	2021/189912	Nitopi v Nitopi	21/04/2022	SUCCESSION – the appellant and respondent were respectively daughter and son of the deceased – the respondent alleged that the appellant took unconscientious advantage of the deceased, who was suffering a special disadvantage of which the appellant ought to have known – primary judge found in favour of the respondent – whether primary judge erred as to certain factual findings – whether primary judge erred in concluding that since the appellant had notice of the deceased's special	<i>Estate of Nitopi (No 2)</i> [2021] NSWSC 748

				disadvantage, there was an equitable presumption that she unconscientiously took advantage of the opportunities presented by that disadvantage – whether primary judge erred in finding that constructive notice or notice less than actual notice of the special disadvantage was sufficient – whether primary judge erred by making findings not available on the evidence	
31	2020/257794	Nashco Pty Ltd v Yang	21/04/2022	<p>CONTRACT – the appellant is a fabricator of metal building materials and, between July 2018 and October 2019, supplied these goods to Grand Metal Pty Ltd pursuant to a contractual arrangement – in the proceedings below, Grand Metal claimed damages from the appellant arising out of the appellant’s failure to allow it to purchase goods on credit up to \$1,400,000, which Grand Metal claimed was a breach of an implied term of the contract – by cross-claim, the appellant sought to recover from Grand Metal and also from the respondent guarantors the balance that it contended was owing to it by Grand Metal, totalling some \$940,000 – primary judge held that the appellant’s claims against the respondent guarantors be dismissed – whether primary judge erred in not giving full effect to the guarantees – whether primary judge erred in his interpretation of the deed of assignment – whether primary judge erred in failing to give reasons</p>	<i>Grand Metal Pty Ltd v Nashco Pty Ltd</i> [2021] NSWSC 1005