



Supreme Court of NSW Court of Appeal

Decisions Reserved as at 15 March 2024

	Number	Case Name	Heard	Issues	Judgment Below
1	2022/334264; 2022/334409; 2022/335502; 2022/336236	Arch Underwriting v CIMIC; Zurich v CIMIC; Chubb Insurance v CIMIC; Berkely Insurance v CIMIC	22/09/2023	INSURANCE – the Australian Federal Police instituted various proceedings against CIMIC and some of its officers – CIMIC sought a declaration that various insurers (including the appellant) were severally liable to indemnify it for the costs expended and damages for their failure to indemnify pursuant to the 2011 Primary Policy between CIMIC, AIG and the appellant – the primary judge held that the proper construction of clause 5.3 of the 2011 Primary Policy is that payment for a clause 5.3 claim is made under the 2011 Primary Policy but applying the 2010 policy terms, including the 2010 Limit of Liability, without regard to payments made paid pursuant to the 2010 policy – the primary judge held that CIMIC was entitled to access the financial limit of liability of the 2011 Primary Policy, which is not the actual remaining limit under the 2010 policy – whether primary judge erred in finding that CIMIC was entitled to indemnity from the	<i>CIMIC Group Limited v AIG Group Limited</i> [2022] NSWSC 999

				appellant under clause 5.3 of the 2011 Primary Policy identified, notwithstanding that the limits of the indemnity under the 2010 first excess policy had been exhausted	
2	2023/93737; 2023/93752	Wild v Meduri	19/10/2023	<p>SUCCESSION – the deceased left a professionally drawn will dated 2009 (the 2009 will) and six surviving adult children – four of the children brought proceedings making different probate and trust claims which were heard concurrently – Dominic and John (the first and second respondents) propounded the 2009 will, while Rose (the appellant) asserted that the 2009 will was not a valid will – alternatively Dominic and John sought a declaration that a property was held on trust by the estate for them – the primary judge held that the deceased had capacity to make the 2009 will and thus it was not strictly necessary to decide the trust issue – notwithstanding the primary judge was satisfied that Dominic and John had made out their claim for a trust arising out of their reliance on their parents’ promises that they would have beneficial ownership of the property which gave rise to a proprietary estoppel in their favour against the estate of the deceased – whether the deceased had testamentary capacity to make the 2009 will – whether the deceased knew and approved the contents of the 2009 will – whether the primary judge erred in evaluating and giving weight to various lay and expert evidence – whether the primary judge denied procedural fairness to the appellant by reason of the extent, nature and frequency of his Honour’s</p>	<i>Wild v Meduri</i> [2023] NSWSC 113

				interventions in the cross-examination of the appellant and witnesses called by the appellant – whether the property is held on trust for Dominic and John as tenants in common in equal shares.	
3	2023/203814	Rabah Enterprises Pty Ltd v LCM Operations Pty Ltd	3/11/2023	ADMINISTRATIVE LAW (judicial review) – appellant was tried in the District Court and convicted of one count of a conspiracy to import a commercial quantity of a border-controlled drug precursor with the intention of the substance being used to manufacture a controlled drug – applicant was sentenced to 12 years imprisonment – appellant applied for an inquiry into his conviction pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 – primary judge dismissed the application – whether primary judge erred in his jurisdiction by performing an administrative task which was not within his judicial capacity – whether primary judge erred in law by not applying relevant principles.	Application of Huy Huynh under Part 7 of the Crimes (Appeal and Review) Act 2001 for an Inquiry [2020] NSWSC 1356
4	2023/291528	Lendlease v Pallas	29/11/2023	CIVIL PROCEDURE - Representative proceedings – Notice of Motion removed by Ball J in the Commercial List to the Court of Appeal for the Court to determine a question of the Supreme Court's power pursuant to sections 175(1), 175(5) and 176(1) of the Civil Procedure Act 2005 (NSW) or otherwise to approve a notice to Group Members of the right to register to participate in any settlement, or to opt out of the proceedings where notice contains particular notation challenging correctness of Wigmans v AMP Ltd (2020) 102 NSWLR 199 in light of Parkin v Boral Ltd (2022) 291 FCR 116.	

5	2023/222134	AIDZAN Pty Ltd (in liq) v K&A Laird (NSW) (in liq)	5/12/2023	<p>EQUITY – the proceedings arose out of the 2018 collapse of the respondent (KAL) following the third appellant's (PL) management of KAL as its sole director between 2009-2017 – KAL's liquidator commenced proceedings against PL for breach of directors' duties and fiduciary duties – KAL operated its business on its Tattersall Property until 1990, where it moved to a property in Sunnyholt – the first appellant (Aidzan) had acquired the Sunnyholt Property as trustee for PL's superannuation fund – KAL and Aidzan had entered into a facility agreement with a third party lender to fund the acquisition – Aidzan leased the Sunnyholt Property to KAL, and KAL moved its business to the Sunnyholt Property – KAL paid Aidzan excess rent, beyond the terms of the lease (Surplus Rent) – KAL claimed that it was the beneficial owner of the Sunnyholt Property, due to PL's alleged breaches of directors' duties, and that its proceeds and Surplus Rent were held on trust for KAL – KAL further claimed that PL pay compensation to KAL for his failure as a director to recover rent from the Tattersall Property whilst it was left vacant from 1990 until its sale in 2017 – KAL also claimed PL breached fiduciary duties by causing KAL to pay \$1m to a superannuation account that PL was the beneficiary of (PL Superannuation Payment) – the primary judge found in favour of KAL – whether the primary judge erred as to certain factual findings regarding the attribution of PL's knowledge to KAL– whether the primary judge erred in</p>	<p>K. & A. LAIRD (N.S.W.) Pty Ltd (In Liquidation) v AIDZAN Pty Ltd (In Liquidation) in its own capacity and in its capacity as trustee of the Peter Laird Trust, the Peter Alan Laird Property Trust (known as the PAL Property Trust) and the Aidzan Superannuation Fund [2023] NSWSC 603</p>
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				failing to find that the claims were statutorily time barred – whether the primary judge erred in failing to find that PL had reduced the amount owed to KAL regarding the PL Superannuation Payment	
6	2023/198364	NSW v Cullen	8/12/2023	TORTS (negligence) – in January 2017 the respondent attended an Invasion Day rally as a spectator – during the rally, a physical altercation occurred leading to police officers attempting to arrest a participant in the rally (Williams) – in the course of the altercation, the respondent was knocked over and struck her head, suffering significant injury – the respondent alleged that the police owed her a duty of care that they had breached – the respondent further alleged that the arrest of Williams was unlawful and that the respondent was the victim of an assault and battery – the primary judge held that the action in negligence was successful and judgment was entered in favour of the respondent – whether the primary judge erred in finding that the police officers owed the respondent a common law duty of care – whether the primary judge erred in finding that the police officers breached a duty of care – whether the primary judge erred in failing to find that the exercise of force by the police officers was reasonable given their special statutory power – whether the primary judge erred in finding that there was a causal link between certain conduct of the police officers and the respondent's injuries.	Cullen v State of New South Wales [2023] NSWSC 653
7	2023/277802	Bluth v Boyded Industries	12/02/2024	PROFESSIONAL NEGLIGENCE (legal) – the appellants (HWLE) acted as solicitors for the	Boyded Industries Pty Ltd v Bluth & Ors [2023] NSWSC 915

			<p>respondent – in 2017, the respondent entered into a deed (the Deed) with various corporate entities (the companies) – the Deed granted the respondent a call option to purchase a lot which formed part of a larger parcel of land owned by the companies (the Land) – the Deed prohibited the respondent from causing a caveat to be registered on any part of the Land – the prohibition was an agreed essential term – under the Deed, if the companies transferred ownership of the land to another entity or did not register the relevant Strata documents, the respondent would be entitled to a payment of \$3.5 million from the companies – representatives of the respondent learned that the companies intended to sell the Land – HWLE, on behalf of the respondent, lodged a caveat against the title to the Land – the companies terminated the Deed on the basis that the respondent had breached an essential term – the respondent sued HWLE for professional negligence – causation was disputed at trial – the primary judge found that HWLE’s negligence had caused the respondent’s loss – whether the primary judge erred in finding that the respondent would have rescinded the deed when the Strata documents were not registered, and therefore erred in finding that the appellants’ breach of duty caused loss – whether the primary judge erred in finding that the guarantor under the Deed and the companies were willing and able to pay \$3.5 million.</p>	
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8	2023/257859	Hadden v Inline	19/02/2024	<p>CONTRACTS – applicant is the director and shareholder of a number of companies – respondent issued 6 invoices to the applicant in respect of work it had performed for him and his companies – primary Judge found the applicant was liable to pay the invoices as a matter of contract or on the basis of quantum meruit - whether the primary Judge erred in concluding the applicant was contractually liable to the respondent – whether the primary Judge erred in finding that the applicant was personally responsible for the fees of various corporate entities.</p>	<p>Inline Partners Pty Ltd v Hadden [2023] NSWDC 273</p>
9	2023/231566	Secretary, Department of Justice v Stewart	21/02/2024	<p>WORKERS COMPENSATION – the respondent was employed as a prison officer for the appellant, during which he suffered a physical injury – the appellant accepted liability and paid compensation – the respondent later filed a claim for a mental injury (the injury) resulting from the employment, to which the appellant accepted liability – the proceedings concern a dispute between the parties as to the respondent's pre-injury weekly earnings and whether the period where the respondent received compensation for the first injury should be included – in a June 2022 decision, the PIC determined that it should not be included – on appeal, the Deputy President held that reg 8E of the Workers Compensation Regulation 2016 (NSW) applied to exclude the period of leave taken whilst receiving compensation payments – whether the Deputy President erred in the construction of reg 8E.</p>	<p>Secretary, Department of Communities and Justice v Stewart [2023] NSWPCPD 35 (available on Austlii, not Caselaw)</p>

10	2023/265994	Creative Academy v White Pointer	21/02/2024	<p>CONTRACTS – the proceedings concerned a claim by the respondents against the appellants for a debt owed under a 2017 oral contract entered into between the second respondent (Hedley, a director of the first respondent) and the seventh appellant (Larcombe, a director of the first appellant) where the respondents would source childcare sites for the first appellant (CAG) for a fee – no written agreement was entered into, but Hedley would invoice CAG for the first respondent’s (WIP) consultancy services – CAG created special purpose vehicles to enter into the leases (being the second to sixth appellants, the SPVs) – in 2020, Larcombe emailed Hedley a “settlement agreement” between the first respondent (WIP) and CAG, which noted CAG was entitled to a refund of fees paid where sites did not proceed – Hedley refused to sign the settlement agreement – whether the primary judge erred in finding an oral agreement was made between the parties – whether the primary judge erred in finding that there was no binding settlement agreement – whether the primary judge erred as to the finding that there was no binding settlement agreement between the parties – whether the primary judge erred as to the application or interpretation of the Property and Stock Agents Act 2002 (NSW) and Agents Act 2003 (ACT) where the respondents did not hold a real estate agent licence – whether the primary judge erred as to certain factual findings – whether the primary judge erred as</p>	White Pointer Investments Pty Ltd v Creative Academy Group Pty Ltd [2023] NSWSC 817
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				to her findings on mistaken belief – whether the primary judge erred in finding that the respondents had no entitlement to seek restitution – whether the primary judge erred as to her conclusion on the respondents’ entitlement to their fees.	
11	2023/302494	Berejiklian v ICAC	27/02/2024	ADMIN LAW (judicial review) – the plaintiff was the Premier of NSW – the Defendant (ICAC) prepared a report regarding her involvement with the then member of Parliament for Wagga Wagga (Mr Maguire) in June 2023 (the Report) which was then provided to the Legislative Council and Legislative Assembly – ICAC found that the plaintiff engaged in serious corrupt conduct through exercising her official functions in relation to funding awarded to institutions in Mr Maguire’s electorate (the funding decisions) while in an undisclosed relationship with Mr Maguire – the plaintiff seeks an order quashing the “serious corrupt conduct” findings made in the Report – whether the assistant commissioner prepared the Report outside her authority under the Independent Commission Against Corruption Act 1988 (NSW) (ICAC Act) – whether ICAC fell into jurisdictional error by finding that the plaintiff was influenced by her relationship with Mr Maguire without any probative evidence – whether ICAC made an error of law in finding that the plaintiff’s relationship with Mr Maguire was capable of amounting to an interest capable of giving rise to a conflict of interest – whether ICAC erred by making findings regarding the plaintiff’s duties as Premier –	ICAC report to the President of the Legislative Council and the Speaker of the Legislative Assembly titled Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel), June 2023

				whether ICAC erred by finding that the plaintiff had engaged in conduct which was a breach of public trust – whether ICAC fell into jurisdictional error by misconstruing the ICAC Act’s provisions regarding corrupt conduct and dishonesty – whether ICAC fell into jurisdictional error by finding that the Ministerial Code imposed disclosure obligations on the plaintiff – whether ICAC erred in finding that the plaintiff had engaged in conduct involving the exercise of her official functions.	
12	2023/217399	Quarry Street v Minister	28/02/2024	ADMIN LAW (judicial review) – Aboriginal land claim – Crown land (the Land) was subject to a claim lodged by the second and third respondents (the Land Councils) under the Aboriginal Land Rights Act 1983 (NSW) (the Act) to the first respondent (the Minister) – the land had been the subject of a special lease which was granted to the Paddington Bowling Club Ltd (the Club) in 1962 until its expiry in 2010 – a new registered lease was then granted to the Club, for a period of 50 years (the Lease) – in 2018, the Lease was ultimately assigned to the appellant, with the Crown’s consent – in 2021, the Minister transferred the Land to the Land Councils under the Act – the appellant sought judicial review of the Minister’s decision, claiming that he had misconstrued s 36(1) of the Act, that the Land had been used lawfully when it was leased out, and that he had denied the appellant procedural fairness – the primary judge held that none of the grounds were established – whether the primary judge erred	Quarry Street Pty Ltd v Minister Administering the Crown Land Management Act 2016 [2023] NSWLEC 62

				in failing to find that the Minister's decision was affected by jurisdictional error.	
13	2023/309899	Oliveri Legal v Cassegrain	29/02/2024	<p>CONTRACT – in 2008, the appellant law firm was engaged by Mr Cassegrain, a director of the respondent company, to act for him in proceedings heard in the Supreme Court – on behalf of both himself and the respondent, Mr Cassegrain signed a document purporting to indemnify and guarantee all legal fees incurred by the appellant in acting for Mr Cassegrain (the Agreement) and a costs agreement with an estimate of costs of \$33,000 – in 2009, the appellant prepared a retainer agreement, which Mr Cassegrain signed both in his personal capacity and as a director of the respondent (the Retainer) – Mr Cassegrain accrued significant legal fees, with many invoices from 2011 onwards going unpaid – Mr Cassegrain entered bankruptcy in September 2015 – the appellant sought to enforce the guarantee against the appellant and claimed payment of the unpaid legal fees – the primary judge held that Mr Cassegrain did not have authority to bind the respondent to the Agreement – the primary judge separately held that, if the respondent were bound, the Agreement was valid only as an indemnity and not as a guarantee, and that the claims under the indemnity were both time-barred and unenforceable as contrary to public policy – whether the primary judge erred in failing to find that Mr Cassegrain had ostensible authority to sign the Agreement – whether the primary judge erred in failing to find that the respondent was bound by the</p>	Oliveri Legal Pty Ltd v Cassegrain Tea Tree Oil Pty Ltd (No 2) [2023] NSWSC 1082

				<p>Agreement – whether the primary judge erred in failing to find that the respondent was liable to pay amounts owing either under the Agreement or due to an estoppel – whether the primary judge erred in finding that the appellant had conceded that if the Agreement only operated as an indemnity then it only applied to the claim under the Retainer.</p>	
14	2023/294430	<p>Kimberly Developments v Bale</p>	8/03/2024	<p>PROCEDURE – the respondent owned land in Forest Lodge, Sydney (the Land) which was sold by her father to the first appellant in 2011 at a gross undervalue – in June 2022, Ward P set the sale aside as unconscionable, such that the first appellant had held the Land as constructive trustee for the respondent's father, and after his death, the respondent, and was accountable for rent it had received over the period, but made an allowance for an amount paid to discharge a mortgage; expenses reasonably incurred in the maintenance of the Land; and interest – the primary judge heard submissions on the adjustments and allowances for the repayments – the primary judge found that the first appellant was not entitled to the higher interest rate allowance – the primary judge rejected certain claims for expenses incurred by the first appellant – the primary judge rejected the first appellant's submissions as to interest regarding order 9 of Ward P's judgment – whether the primary judge erred in disallowing a claim for interest on the expenses claimed – alternatively, whether the primary judge erred in failing to offset the expenses claimed against rent receipts –</p>	<p>Bale v Kimberley Developments Pty Ltd (No 3) [2023] NSWSC 973</p>

				whether the primary judge erred in failing to apply the correct interest rate – whether the primary judge erred in making evidentiary findings as to costs incurred by the first appellant.	
15	2023/271139	United v Coastal	12/03/2024	<p>CONTRACT – the appellant leased part of a property near Newcastle (the property) pursuant to a lease commencing on 1 July 2016 (the lease) – the lease contained three five-year options to renew – in July 2018, a fire destroyed a building on the property – the respondent became the registered proprietor of the property in June 2019 – the appellant and respondent became involved in a dispute involving the underpayment of rent, a purported exercise of the option to renew the lease by the appellant, and a communicated intention to terminate the lease by the respondent – some matters were settled by the parties in January 2022 – several issues remained to be determined, relating to the purported exercise of the option to extend the lease, and a notice served by the respondent asserting that they were entitled to terminate the lease as the fire damage was such as to make repair “impractical or undesirable” (the Notice of Consideration) – the primary judge held that the Notice of Consideration had been validly issued and that the respondent therefore had a right to terminate the lease, and that the renewal of the lease was effective – whether the primary judge erred in concluding that the Notice of Consideration could be given at any time after the damage had occurred – whether the primary judge</p>	<p>Coastal Services Centres Pty Ltd v United Petroleum Pty Ltd [2023] NSWSC 1010</p>

				<p>erred in finding that the obligation on the landlord to act “reasonably” is limited to subjective reasonableness – whether the primary judge erred in concluding that the respondent undertook a rational, informed and genuine assessment when deciding to issue the Notice of Consideration – whether the primary judge erred in evidentiary findings relating to the assessment of the estimated costs of the rebuild and estimated extra tenant income – whether the primary judge erred in finding that the assessment of rebuild costs and extra tenant income was a genuine assessment.</p>	
16	2023/255864	McDonald v Mak Constructions	12/03/2024	<p>BUILDING AND CONSTRUCTION – parties entered into a contract for renovations and additions to the applicant’s residence – respondent terminated the contract when the works were not complete – applicant commenced NCAT proceedings seeking damages for defective works – respondent obtained adjudication certificate for \$232,925 – NCAT proceedings transferred to the District Court – respondent succeeded in NOM seeking a stay of the District Court proceeding pending payment of the adjudication debt - whether the primary Judge’s discretion miscarried – whether the primary Judge erred in her findings in respect of the Building and Construction Industry Security of Payment Act 1999 (NSW).</p>	Kylie McDonald & Anor v Mak Constructions & Building Services Pty Ltd
17	2023/297678	Mandoukos v Allianz	13/03/2024	<p>ADMIN LAW (judicial review) – the appellant was involved in a motor vehicle accident whereby he sustained injuries to his knee and cervical spine, but his insurance claims for</p>	Mandoukos v Allianz Australia Insurance Limited [2023] NSWSC 1023

				<p>compensation of those injuries were largely rejected by the first respondent (the insurer) – the appellant sought judicial review of a decision of the third respondent (Dr Assem) and a decision of a delegate of the second respondent (the delegate), which had refused the appellant’s application for review of Dr Assem’s assessment – the primary judge held that there was no error in Dr Assem’s assessment, and resultantly, there was no error demonstrated by the delegate – whether the primary judge erred in finding that Dr Assem was not legally required to consider the consequences of the appellant’s surgery – whether the primary judge erred in failing to consider that the nature and consequences of injury formed part of the “injury” – whether the primary judge erred in differentiating between the concepts of “injury” and “condition” – whether the primary judge erred in treating the absence of specific evidence as decisive against the appellant’s claim for relief – whether the primary judge erred in treating the dismissal of the application for judicial review of Dr Assem’s as necessarily dispositive of the orders sought regarding the delegate’s decision.</p>	
18	2023/259476; 2023/259477	Sinclar v Balanian; Sinclair v Burns Bay Services	14/03/2024	<p>CONTRACT – in February 2021, two related proceedings were commenced: the first, by the second appellant (FJS) against Burns Bay Services (matter 2021/20942), and the second by FJS, the first appellant (Fiona Sinclair), and the late John Sinclair against the first respondent (Ashod Balanian) and second respondent (Launch Partners) (matter</p>	Fiona & John Sinclair Pty Ltd v Burns Bay Services Pty Ltd [2023] NSWSC 789

				<p>2021/179061) – the claims arose out of a digital commodity investment fund business that Mr Sinclair, Mr Balanian and BBS were involved in – the parties attended a mediation in April 2022 without their lawyers in attendance – a document entitled “Deed of Release & Indemnity, Settlement of Proceedings” (the Deed) was signed by Fiona Sinclair, Penelope Richards (on behalf of John Sinclair as the executor and trustee of his estate) and Mr Balanian as directors of FJS, BBS and Launch Partners, and not separately as individual parties – in August 2022, Mr Balanian and Launch Partners sought a declaration under s 73 of the Civil Procedure Act 2005 (NSW) that both proceedings had been settled in accordance with the Deed and that the proceedings be dismissed – FJS sought to have the Deed declared as void and unenforceable – the primary judge found that the object of the Deed was to seek to resolve all issues in both proceedings in a single settlement – the primary judge granted the declaratory relief sought by Mr Balanian and Launch Partners – whether the primary judge erred in finding that the Deed was a binding contract – whether the primary judge erred in finding that a counterparts clause in the Deed should be discounted – whether the primary judge erred in having regard to the subjective intention of Fiona Sinclair – whether the primary judge erred in reasoning that the description of the Deed as a “deed” was objectively to be understood as referring to a document which was not a deed – whether</p>	
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				the primary judge erred in relying on irrelevant subsequent conduct and discounting relevant subsequent conduct.	
19	2023/258319	Jackson v Furner	15/03/2024	<p>TORTS (negligence) – on 18 January, the respondent attended an open house inspection at a property owned by the first and second appellants (the property) – the respondent slipped and fell on the property’s driveway, sustaining an injury – the respondent brought proceedings in negligence against the appellants – the third appellant is the real estate agent engaged by the first and second appellants to sell the property – the respondent contended that remedial works performed on the driveway, including painting it, had rendered the driveway dangerously slippery – the primary judge made an award of \$1.5 million in damages to the respondent – whether the primary judge erred in her findings regarding the evidence of the second appellant – whether the primary judge erred in her findings regarding the paint used by the first appellant – whether the primary judge erred in failing to find that the appellants had discharged their duty owed to the respondent – whether the primary judge erred in failing to find that the appellants were unaware that there was a risk of harm – whether the primary judge erred in attributing evidence given by the second appellant to the fourth appellant – whether the primary judge erred in finding that the risk of falling was foreseeable to the appellants.</p>	Furner v Jackson [2023] NSWSC 914