
Court of Appeal
Supreme Court
Sydney

# Decisions of Interest

24 April 2023 – 7 May 2023

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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# New South Wales Court of Appeal Decisions of Interest

**Negligence: workplace injury; vicarious liability**

***Mt Owen Pty Ltd v Parkes*** **[2023] NSWCA 77**

**Decision date:** 26 April 2023

Brereton and Kirk JJA and Basten AJA

In 2017, Mr Kemp, Mr Parkes and a third worker, all of whom were employed by Titan Technicians Enterprise Pty Ltd ("Titan"), were undertaking maintenance on a bulldozer at a coal mine, owned and operated by Mt Owen Pty Ltd ("Mt Owen"). Mr Parkes' leg was crushed when Mr Kemp dropped the blade of the bulldozer suddenly. Mr Parkes claimed damages against Mt Owen and Titan. Mr Parkes commenced proceedings in the Supreme Court claiming that Mt Owen was vicariously responsible for Mr Kemp's negligence and that Mt Owen breached its duty of care to Mr Parkes. Mt Owen asserted that Titan was vicariously liable, and that Titan breached its duty of care and was at least partly responsible for any damages payable. The primary judge found that: Mr Kemp was the employee of Mt Owen *pro hac vice* and that it was vicariously liable for Mr Kemp's negligence; that both Mt Owen and Titan breached their own duties of care to Mr Parkes; and apportioned liability as to 60% for Mr Kemp's negligence (for which Mt Owen was responsible) and 40% to be shared equally by Mt Owen and Titan. Mt Owen appealed the finding of liability; Titan cross-appealed the attribution of liability ascribed to it.

**Held:** dismissing the appeal and allowing the cross-appeal

- The trial judge correctly found that there can be no dual vicarious liability in two principals for the acts of a negligent individual; and that while an employer is vicariously liable for the negligent act of an employee undertaken within the scope of his or her employment, the employer may not be the legal employer of the worker: [32], [33]. Where a worker is undertaking work on the premises of, and under direction from another party, the transfer of control may lead to a shift of liability from the legal employer to the "host employer" under "exceptional circumstances". Modern labour hire arrangements and the statutory regulation of workplace safety may more readily lead to such a finding, depending on the nature and extent of control over a worker: [41], [48]. Mt Owen's authority to give directions and orders to workers conferred by cl 5.1 of the purchase orders issued for labour hire, the detailed safety requirements set out in Mt Owen's "job safety analysis" (JSA), and evidence that Mr Kemp was subject to direction by Mt Owen's supervisors, demonstrated a transfer of control to Mt Owen: [56]-[61].

- The finding of negligence against Titan was based on the supposed inadequacy of Mt Owen's JSA. Reasonable care did not require that the JSA specifically restate a requirement which was already adequately stated in a procedure applicable to the task, that there be no equipment movement while personnel were within the footprint during oil testing: [17]. It was not proved that, but for that omission, the accident would not have occurred: [22]. In dissent, Basten AJA considered that the legal employer owed a non-delegable duty of care to the worker, the content of which is dependent upon the circumstances in which it is engaged: [74]-[81]. Titan should have been alert to errors and omissions in the JSA, such that there was no error in finding Titan liable: [84]. Since both Titan and Mt Owen had the relevant legal authority to impose constraints on the activities of Titan's workers equal responsibility may be attributed to both: [85].

## Contracts: real estate agents; commission

***Freedom Development Group Pty Limited v D'Ettorre Properties Pty Limited T/as D'Ettorre Real Estate*** **[2023] NSWCA 81**

**Decision date:** 26 April 2023

Gleeson, Leeming and Kirk JJA

Freedom Development Group Pty Limited entered into a non-exclusive agency agreement with D'Ettorre Properties Pty Limited ("DRE") in 2019 in relation to the sale of two properties which entitled DRE to commission if "the purchaser is effectively introduced by [DRE]". The sole director of DRE, Mr D'Ettorre, introduced Mr Criola and Mr Ben Ingham to the properties. Mr Ben Ingham was the sole director of IFM Wansey Road Pty Ltd ("IFM"), the purchasing entity. In 2020, Mr Fernon (the second appellant), a director of Freedom, represented to Mr D'Ettorre that he had a buyer who will pay $11.3m (the first representation). Negotiations with IFM fell through. In 2020, a second agent, Mr Ippolito, conveyed to Mr Fernon an offer of $10.35m from Mr John Ingham. Binding sale contracts and nomination deeds were exchanged between Freedom and Wansey Road Randwick Pty Ltd ("WRR") as trustee for the Wansey Rd Randwick Trust ("the Trust"), of which John and Ben Ingham were directors. Ben Ingham personally guaranteed WRR's obligations under the nomination deeds. At Mr D'Ettorre's request, Mr Fernon told him that "the buyer is Johnny" (the second representation). DRE commenced proceedings in the District Court asserting that it was entitled to commission because the ultimate sale was due to Mr D'Ettorre's introduction of Ben Ingham. Alternatively, DRE sought damages against Freedom and Mr Fernon on the basis that the first and second representations of Mr Fernon were misleading or deceptive in contravention of s 18 of the Australian Consumer Law ("ACL"). The primary judge found that DRE was entitled to the commission, that Mr Fernon's second representation was misleading or deceptive, and entered judgment against Freedom and Mr Fernon in the amount of the commission of $154,275. The first representation was not pressed. Freedom and Fernon appealed that decision.

**Held:** allowing the appeal

- To establish an "effective introduction" of "the purchaser" entitling DRE to commission there must be a sufficient causal nexus between the introduction of the purchaser and the ultimate sale of the property, which is a question of fact: [35]-[43]. A causal nexus cannot be inferred from DRE's introduction of Ben Ingham to the properties in 2019 and the ultimate sale in 2020 to a company in its capacity as a trustee, nominated by John Ingham, merely because Ben Ingham was a director of the actual purchaser or gave a guarantee in the nomination deeds. Ben Ingham's distinct positions as a director and guarantor of the actual purchaser were not commensurate with him having an ownership interest directly or indirectly in the actual purchaser. Nor was there any evidence that Ben Ingham was a beneficiary of the Trust: [46]-[61].

- Although the first representation had a tendency to lead Mr D'Ettorre into error in believing that the prospective purchaser would need to substantially increase the price offered to secure the properties, DRE is not permitted to raise a new case with respect to causation which was not pleaded or run at trial: [68]-[77]. The second representation as to the identity of the actual purchaser was necessarily qualified and incomplete given Mr Fernon's statement that this was all he wanted to say as he did not want to jeopardise the settlement. The second representation did not have the tendency to lead Mr D'Ettorre into error. He was an experienced real estate agent who understood that the identity of the purchaser was being kept confidential until settlement: [78]-[83].

**Succession: probate; testamentary capacity**

***Lim v Lim* [2023] NSWCA 84**

**Decision date:** 1 May 2023

Bell CJ, Kirk JA and Griffiths AJA

Mrs Lam died in 2019 at 89 years old. She had executed a will a month before her death at a conference with a solicitor assisted by a Mandarin-English interpreter. Mrs Lam's first language was Hainanese. At Mrs Lam's request, the proposed disposition in the will was explained to three of her children before she executed it. The will left the residue of her estate in equal shares to four of her children. A previous will, made in 2011, had made significantly greater provision for one of her children, Boon (the respondent). Neither will made provision for an estranged daughter, Rose. Boon was one of the children to whom the will was explained, but he made no protest to it. The 2019 will was admitted to probate in common form. Boon commenced proceedings in the Supreme Court on the basis that Ms Lam lacked testamentary capacity, and that she did not know or approve of the contents of the will due to an alleged medical condition, language difficulties and hearing difficulties. The primary judge revoked the 2019 will, and admitted the 2011 will to probate in solemn form. A significant factor in that decision was the lack of apparent reason for the change in disposition made to Boon, who (with his wife) had lived with and provided care for Mrs Lam. His Honour also made reference to the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The executor, Mrs Lam's other son (Sony), appealed from that decision.

**Held:** allowing the appeal

- The nature and strength of the evidence required to establish a fact depends on the nature of that fact and on the context in which it is sought to prove the fact. In a probate case serious allegations may be made, involving fraud, manipulative conduct or the like. For such allegations application of the *Briginshaw* principle is required. Applying the principle in such cases reflects the conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct so that such a finding should not lightly be made. However, it is not the case that whenever a question is raised on the facts as to testamentary capacity or knowledge and approval that that will necessarily involve such serious allegations or inherently unlikely matters. No issue in this case called for application of the *Briginshaw* principle: [21]-[24].

- Mrs Lam had one asset of any significance, a house, and given her determination to make a new will and to ensure her three children present at the conference understood what she was doing, there is good reason to infer she had the capacity to understand the extent of her property. Her choice to exclude Rose and to make equal provision for her other four children, despite being warned of possible family provision claims, manifests a purposeful consideration of the main potential objects of her bounty, and demonstrates her capacity to consider that issue. So, too, does the fact that she had her proposed disposition explained to her children prior to executing the will. The medical evidence does not suggest that she was unlikely to have sufficient cognition at the time to address these issues. Neither the fact that Mandarin was not Mrs Lam's main language, nor the fact that she was not wearing hearing aids despite her significant hearing impairment, suggests that she lacked capacity properly to understand what was occurring on that day: [116]-[117]. For the same reasons, it cannot be said that she did not know or approve the contents of the will: [119].

## Corporations: managed investment schemes

***Spicer Thoroughbreds Pty Ltd v Stewart*** **[2023] NSWCA 82**

**Decision date:** 2 May 2023

Leeming and Mitchelmore JJA and Griffiths AJA

Spicer Thoroughbreds bought racehorses and then on-sold fractional interests in them to investors. It remained involved with those horses as a race "concierge", liaising with owners, trainers and race organisers. In 2018, Spicer Thoroughbreds sold Mr Stewart 10% interests in two racehorses and a 15% interest in a third. For all three horses, a registration certificate appointed the director of Spicer Thoroughbreds as "managing owner". Under the rules of racing and a co-owners' agreement, the managing owner made day to day decisions about the horses. However, some decisions, like whether to geld, required co-owner agreement. All three horses were entrusted to third-party trainers. In 2019, one horse was permanently retired due to injury. In 2020, the other two racehorses were gelded. Mr Stewart complained and began demanding his money back. None of the horses earned significant winnings. Mr Stewart commenced proceedings in the Supreme Court alleging that, with each horse, Spicer Thoroughbreds was operating an unregistered managed investment scheme, in violation of s 601ED(5) of the *Corporations Act 2001* (Cth). If so, Mr Stewart had a statutory entitlement to claim his money back, subject to a discretion. The primary judge found that the schemes were managed investment schemes and did not escape the registration requirement by function of an exception for "small-scale offerings", which was inapplicable. However, the primary judge considered it neither just nor equitable to allow Mr Stewart to claim his money back.

**Held:** allowing the appeal

- The schemes were not managed investment schemes within the meaning of s 9(a) of the *Corporations Act 2001* (Cth): [48]. Although the purpose of the acquisition of the interest in a racehorse was to make money, in the form of prizemoney or from resale or putting the horse to stud, the potential for a co-owner to make money was not a result of the operation of the scheme it was simply an aspect of the co-owner's property rights in the racehorse: [49]-[52]. No part of the contributions were pooled or used in a common enterprise, except insofar as Mr Stewart in his capacity as co-owner would permit each horse to participate in horse-racing: [73]. As the primary judge found, Spicer Thoroughbreds had no ongoing involvement in training or racing the horses: it was not the operator of a scheme to advance a common enterprise: [69]. Likewise, it was not established that the co-owners had day to day control: [76].
- If the schemes had been managed investment schemes, the Court would have found, like the primary judge, that the "small-scale offering" exception in s 1012E(6) and (7) was inapplicable, because there was no proof that the number and value of interests in the scheme were less than 20 and $2 million in any year: [86]-[88].

# Australian Intermediate Appellate Decisions of Interest

**Discovery; Defamation**

***Poland v Hedley*** **[2023] WASCA 69**

**Decision date:** 2 May 2023

Quinlan CJ, Murphy and Beech JA

The second respondent ("Fairfax") operated an internet news service and employed the first respondent (Ms Hedley) and the third respondent (Mr Hondros). In 2019, Mr Poland attended a meeting with Mr Grainger, Mrs Grainger, and one other person. The meeting was recorded. Mr Hondros deposed that he was contacted by a regular confidential source ("Source A"), who sent a copy of that recording to Mr Hondros. Mr Hondros and Ms Hedley spoke with another confidential source ("Source B") who said they had attended and recorded the meeting. Mr Hondros said that if he were to disclose the purpose for which the recording was made, it would disclose the identity of Source B. The media parties published two articles based on the meeting. Mr Poland commenced proceedings in the Supreme Court alleging that the articles were defamatory and alleging the tort of conspiracy. The primary judge declined to order inspection of the pre-publication advice and dismissed the application for the inspection of audio recordings made by Source B on the basis of the newspaper rule and s 21I of the *Evidence Act*. The primary judge also dismissed an application to compel the media parties to answer interrogatories that would disclose the identity of Source A. Mr Poland appealed that decision.

**Held:** granting leave to appeal and allowing the appeal

- The test for waiver focuses on whether there is inconsistency between the conduct of the client and the maintenance of confidentiality in the communication which is the subject of the claim for privilege: [76]. By pleading that they had sought and obtained legal advice and acted in accordance with that advice in relation to the publication of the articles, the media parties necessarily opened that advice to scrutiny. This was inconsistent with the maintenance of the confidentiality which the privilege was designed to protect: [78]. An express disclaimer of an intention not to waive privilege will be of no avail in these circumstances: [79]-[80]. Confidentiality cannot be resuscitated by deleting the plea: [82]. Where the legal advice remains relevant to issues in the proceedings, once waiver of privilege is established, an order for inspection should follow: [83]-[84].

- Deciding whether the interests of justice require disclosure of a confidential source at the interlocutory stage, despite the newspaper rule, requires consideration of how the information was obtained, including whether it was obtained by lawful means: [93].

- The media parties had conducted their case in a way which has materially and substantially impinged upon the confidentiality of Source B, such that their identity could easily be inferred. Therefore, the relevant issue was whether it was necessary in the interests of justice to preclude Mr Poland from having access to the record discovered by the media parties of their communications with Source B on the basis of the newspaper rule: [97]-[100]. Given the circumstances in which the recording was obtained, it is prima facie relevant to the issue of whether the media parties and the other respondents knowingly communicated a private conversation and thereby to Mr Poland's causes of action in conspiracy, both of which pointed against the application of the newspaper rule: [103]-[104]. The primary judge did not err in upholding the confidentiality of Source A because the pleading of Source A does not relate to the defence of qualified privilege and it is not necessary in the interests of justice to disclose their identity at this procedural point: [107].

**Trade Marks: infringement; Consumer Law: misleading and deceptive conduct**

***Henley Constructions Pty Ltd v Henley Arch Pty Ltd*** **[2023] FCAFC 62**

**Decision date:** 28 April 2023

Yates, Rofe and McElwaine JJ

Mr Sarkis is the sole director and shareholder of Henley Constructions. Mr Sarkis and Henley Constructions commenced proceedings in the Federal Court alleging that Henley Constructions had: infringed the respondent's registered trade marks under s 120(1) of the *Trade Marks Act 1995* (Cth); and contravened certain provisions of the Australian Consumer Law (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) ("ACL") and the *Trade Practices Act 1974* (Cth). The respondent alleged that, in respect of the former, Mr Sarkis was a joint tortfeasor, and in respect of the latter, Mr Sarkis was liable as a person involved in those contraventions. The primary judge granted declarations in respect of Henley Constructions' trade mark infringements and contraventions of the ACL, and Mr Sarkis's involvement. His Honour dismissed Henley Constructions' cross-claim, restrained the appellants from engaging in specified conduct, and ordered that the appellants take all steps necessary to transfer certain domain names to the respondent. On 17 March 2022, the primary judge made costs orders. The applicant appealed those decisions. The respondent cross-appealed on the single ground that the primary judge erred in finding that Henley Constructions had not used the sign 1300HENLEY as a trade mark.

**Held:** allowing the appeal in part and allowing the cross-appeal

- The primary judge erred in finding that the Henley Constructions mark and the 818 mark were substantially identical: [147], [151]. The 818 mark is a composite mark. Although the word component HENLEY is a prominent feature in both marks, an overall impression of identity between the two does not emerge: [152]-[154].

- The primary judge did not err in finding deceptive similarity in relation to various impugned logos, domain names, social media hashtags and names: [156], [181]. The relevant question is whether, notwithstanding the differences between the marks, an impugned mark is deceptively similar to the registered mark, such that the impugned mark so nearly resembles the registered mark that it is likely to deceive or cause confusion: [166]. The primary judge correctly applied the doctrine of imperfect recollection and the impressions of persons on viewing the impugned marks: [171]-[175]. The primary judge correctly considered the Infringing Signs in the context in which they were used and was satisfied that they were used by Henley Constructions as branding for its construction services: [189].

- The defence in s 124 of the Trade Marks Act applies to the infringements of the 2016 registered marks by Henley Constructions' use of the HENLEY CONSTRUCTIONS mark. Section 124 asks whether the infringer used the infringing mark before the date of registration of the registered mark or the date of first use of that mark (whichever is earlier): [205]-[207]. Section 7(1) applies to both registered and unregistered marks and cannot be used in establishing the defence under s 124: [217]-[221]. The primary judge correctly found that the respondent had a reputation in the "Henley" brand, in finding that the respondent had a sufficient reputation in the name Henley as at February 2007 and in finding that the evidence of Mr Boyer was evidence of consumer confusion: [237]-[238], [264], [269].

- The primary judge erred in finding that consumers would see Henley Constructions' use of 1300HENLEY as only a telephone number and not also as a sign designating the trade source of Henley Constructions' building and construction services: [301]. 1300HENLEY is deceptively similar to the 820 mark and Henley Constructions' use of 1300HENLEY contravened the ACL. Mr Sarkis was a joint tortfeasor in respect of Henley Constructions' infringing use of 1300HENLEY as a trade mark and Mr Sarkis was involved in Henley Constructions' contravention of the ACL by reason of its use of 1300HENLEY: [303]-[305].

# Asia Pacific Decision of Interest

**Damages; Misrepresentation**

***PGG Wrightson Real Estate Limited v Routhan*** **[2023] NZCA 123**

**Decision date:** 24 April 2023

**Court**: New Zealand Court of Appeal

Gilbert, Mallon and Wylie JJ

In 2010, Mr Routhan, as a trustee of the Kaniere Family Trust, purchased a dairy farm from Cooks Stud Farms Ltd for $2.8 million. PGG Wrightson Real Estate Ltd acted as Cooks Farms' agent. The Trust's purchase was said to be induced by misrepresentations made by PGG as to the average production from the Farm over the preceding three years. The Trust did not achieve the represented production level at any time. The Trust was forced to sell the Farm and a separate run-off property in 2020 at a loss. The Trust commenced proceedings in the High Court in 2018 for misleading conduct under s 9 of the *Fair Trading Act 1986* (NZ), negligence, negligent misrepresentation and deceit. The primary judge found that the misleading statement as to production levels was the most potent misleading statement; the misleading conduct claim was proved; PGG owed the Trust a duty of care which was breached; a disclaimer that PGG was not responsible for the accuracy and completeness of the information did not protect PGG from liability; the misleading conduct claim was not time barred; recoverable losses were comprised of the loss of equity in the properties through the forced sale in 2020, and the loss of investment in capital improvements on the Farm; and contributory negligence was 20%. The claim in deceit was dismissed. PGG appealed that decision and the Trust cross-appealed.

**Held:** allowing the appeal and dismissing the cross-appeal

- The primary judge correctly found that Mr Daly's failure to check with Mr Cook to confirm the listing information was correct prior to agreement for sale and purchase being entered into was negligent but did not constitute deceit: [82]-[87]. *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729 is distinguishable because Mr Daly honestly believed the statement about farm production was correct at the time he made it and he did not become aware at any stage prior to settlement of the agreement for sale and purchase that the statement was false: [83]-[86]. The primary judge correctly concluded that the disclaimer did not protect PGG from liability for misrepresenting the historical production achieved on the Farm: [88].

- The primary judge correctly rejected the limitation defence. The Trust was entitled to rely on the correctness of the information it was given by PGG. Its focus post-settlement was on the causes of the underperformance, not realising that the represented historical production was false: [93]-[94]. PGG is liable in both negligence and for breach of the *Fair Trading Act*: [99]. The primary judge did not err in finding that the Trust would not have entered into the agreement had it not been misled about the historical production level: [106].

- The losses caused by the forced sale of the properties in 2020 were the consequence of the decisions made by the Trust post-purchase: [124]-[125]. There are no other difficulties telling against the correctness of the damages awarded: [126]. The Trust faced no impediment to selling either or both of the properties at any time until the forced sale. Therefore, loss was assessed at the date of the transaction: [134]. The recoverable loss was $300,000, being the estimated difference in purchase price based on the difference between actual production in the year prior to purchase and the figure supplied by PGG: [145]-[148]. The Trust was not contributorily negligent: [150].

# International Decision of Interest

## Vicarious Liability

***Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*** **[2023] UKSC 15**

**Decision date:** 26 April 2023

**Court:** United Kingdom Supreme Court

Lord Reed, Lord Hodge, Lord Briggs, Lord Burrows, Lord Stephens

In 1984, Mr and Mrs B began attending services of the Barry Congregation. There, they befriended Mark Sewell, his wife, and their children. In 1989, Mark Sewell began abusing alcohol and appeared depressed. He began flirting with Mrs B and confiding in her. Concerned, Mrs B spoke to Mark Sewell's father who was also an elder. He explained that Mark was suffering from depression and needed support. Mr and Mrs B continued supporting him. On 30 April 1990, the families returned to Mark and Mary's house after participating in church activities and Mark Sewell raped Mrs B. On 2 July 2014, Mark Sewell was convicted of raping Mrs B and seven counts of indecently assaulting two other individuals and was sentenced to 14 years' imprisonment. Mrs B commenced an action for damages for personal injury, including psychiatric harm, against the Watch Tower and Bible Tract Society of Pennsylvania, a charitable corporation that supports the worldwide religious activities of the Jehovah's Witnesses, and the Trustees of the Barry Congregation, alleging that they were vicariously liable for the rape. The trial judge found in favour of Mrs B and awarded general damages of £62,000. The Court of Appeal upheld that decision. The Trustees of the Barry Congregation appealed that decision.

**Held:** allowing the appeal

- There are two stages of the inquiry, both of which have to be satisfied to find vicarious liability: [58(i)]. The first stage is whether the relationship between the defendant and the tortfeasor was one of, or akin to, employment: [58(ii)]. This stage involves considering features of the relationship that are similar to, or different from, a contract of employment: [58(ii)]. The relationship between the Jehovah's Witness organisation and Mark Sewell was akin to employment because: he was carrying out work on behalf of, and assigned to him by, the Jehovah's Witness organisation; he was performing duties which were in furtherance of the aims of the Jehovah's Witness organisation; there was an appointments process to be made an elder and a process by which a person could be removed as an elder; and there was a hierarchical structure into which the role of an elder fitted: [65]-[67].

- Stage two asks whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment: [58(iii)]. This stage is not satisfied because: the rape was not committed while Mark Sewell was carrying out any activities as an elder; the primary reason the offence took place was that Mark Sewell was abusing his position as a close friend of Mrs B; it was unrealistic to suggest that Mark Sewell never took off his "metaphorical uniform" when dealing with members of the Barry Congregation; although Mark Sewell's role as an elder was a "but for" cause of Mrs B's continued friendship, this is insufficient to satisfy the close connection test; the rape was not an objectively obvious progression from what had gone on before; and other factors, such as the role played by Mark Sewell's father, were not relevant: [74]-[79].

- Consideration of the policy of enterprise liability that underpins vicarious liability confirms that there is no convincing justification for the Jehovah's Witness organisation to bear the cost or risk of the rape committed by Mark Sewell: [82].