

NSW COURT OF APPEAL

A YEAR IN REVIEW: 2020

Introduction

This publication seeks to gather in a single, hyperlinked document, all of the decisions delivered by the New South Wales Court of Appeal in the course of 2020, together with speeches delivered by the Chief Justice and members of the Court of Appeal in 2020.

The publication is designed to allow a reader quickly to identify recent decisions delivered by the Court of Appeal in a given area of legal interest with greater specificity than simply by reference to generalised catchwords such as “Administrative law” or “Contract”, for example. Each of the decisions digested contains detailed catchwords with a hyper-link to the full text of the decision. It is hoped that this will provide a valuable resource for judges, practitioners, litigants, academics and students.

It is proposed that an annual review of cases will be prepared and that, in due course, a compendium of recent decisions of the New South Wales Court of Appeal similar to that so valuably compiled by Justice RA Hulme in the area of criminal law (see [A Criminal Chronicle 2010-2020](#)) will also be able to be published.

In 2020, the NSW Court of Appeal delivered 361 judgments. Of these 361 judgments, approximately 79.7% were delivered within 3 months of hearing, and approximately 48.1% were delivered within 4 weeks of hearing.

For all cases with a substantive hearing listed in 2020, on average it took 5.1 months from the date that the appeal proceedings were commenced to the date of the hearing before the Court of Appeal.

In relation to new appeals, leave applications and summonses for judicial review, there were 346 new cases filed in the Court of Appeal during the year. This was down from 366 cases during 2019. Of these new matters filed, 60.4% were from decisions of the Common Law and Equity Divisions of the Supreme Court of New South Wales (down from 61.7% in 2019); 24.6% were from decisions of the District Court of New South Wales (up from 23.8% in 2019) and 8.7% were from decisions of the New South Wales Civil and Administrative Tribunal (**NCAT**) (up from 2.7% in 2019). Appeals from NCAT directly to the Court of Appeal lie where a judicial officer participates in the NCAT decision. A small number of appeals and applications for judicial review were from decisions of the Land and Environment Court, the Workers Compensation Commission and the Industrial Relations Commission of New South Wales.

In addition to Acting Justices of Appeal Emmett and Simpson, a number of judges from the divisions of the Supreme Court were invited to sit ad hoc on certain appeals to the Court of Appeal from the District Court and NCAT. Preston CJ of LEC also joined the bench in a number of appeals in relation to Land and Environment Court matters. It should also be noted that a number of justices of appeal sat at first instance in both the Equity and Common Law Divisions of the Court in the course of the year.

Due to the COVID-19 pandemic, a significant number of appeals during 2020 were conducted virtually, using Cisco WebEx or Microsoft Teams.

In the course of 2020, the Court of Appeal also maintained and regularly updated its website, which can be found [here](#). This website includes sections on:

- Practice and Procedure in the Court of Appeal which includes links to the relevant practice note, legislation, regulations and rules together with sections dealing with “Common procedural and preliminary issues” and “Sources of New South Wales Court of Appeal Jurisdiction”. This part of the website can be found [here](#);
- Judicial review and the Court of Appeal’s supervisory jurisdiction. This part of the website can be found [here](#);
- The *Civil Liability Act 2002* (NSW) which is a detailed annotation of the Act provides summaries of significant decisions of the High Court of Australia, the Court of Appeal and other intermediate appellate courts in relation to specific sections of the Act. These annotations are regularly updated and a link to this part of the website can be found [here](#).
- the Court of Appeal’s Decisions of Interest Bulletin, which is published on a fortnightly basis and which contains decisions of interest from the Court of Appeal, as well as decisions of interest from other Australian intermediate appellate courts, Asia-Pacific courts and other international courts. The latest decisions of interest bulletin can be found [here](#).

Finally, although the number of public speaking engagements for members of the Court of Appeal was less than usual in 2020 due to the COVID-19 pandemic, a number of lectures were still delivered by the Chief Justice and judges of appeal. The latest speeches, as well as the speeches archive, can be found [here](#). Speeches delivered in 2020 by the Chief Justice and judges of appeal are listed at the end of this document.

15 April 2021

The Hon Justice A. S. Bell
President, Court of Appeal
Supreme Court of New South Wales

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1. Adoption

Meaning of “Aboriginal child”

[Hackett \(a pseudonym\) v Secretary, Department of Communities and Justice \[2020\] NSWCA 83](#)

ADOPTION – “Aboriginal child” - whether necessary to identify ancestor who was a member of Aboriginal race, identified as Aboriginal and was recognised by Aboriginal community - consideration of text, context and purpose of s 4 of Adoption Act 2000 (NSW) - sufficient to show child was descended from people who lived in Australia before British colonisation - Fischer v Thompson (Anonymised) [2019] NSWSC 773 disapproved

2. Administrative law (judicial review)

Applications under Crimes (Appeal and Review) Act 2001 (NSW) Pt 7

[Clark v Attorney General of New South Wales \[2020\] NSWCA 70](#)

ADMINISTRATIVE LAW – judicial review – application under s 78 Crimes (Appeal and Review) Act 2001 for an inquiry into the applicant’s convictions and sentences for child sexual offences – decision to refuse to consider or otherwise deal with the application – applicant seeking to contradict conclusions reached in exercising that power – whether decision entailed vitiating error

[Dacich v Director of Public Prosecutions \(NSW\); Kennedy v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 313](#)

CRIME – sentence – application for inquiry under *Crimes (Appeal and Review) Act 2001* (NSW), Pt 7 – application for stay of sentence – power to stay sentence – *Supreme Court Act 1970* (NSW), s 23

[Li v Attorney General for New South Wales \[2020\] NSWCA 302](#)

ADMINISTRATIVE LAW – Where application for inquiry under *Crimes (Appeal and Review) Act 2001* (NSW), Pt 7 dismissed – Whether decision to dismiss application involved error – Whether failure to consider arguments made in support of application – No question of principle

Application for extension of time

[Barrett v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 270](#)

JUDICIAL REVIEW – procedure – time limits –summons filed out of time in Court of Appeal – application to review District Court judgment – applicant legally represented when plea

entered – extension of time to appeal to District Court refused – application for judicial review out of time – timely but invalid notice of appeal – public interest in finality – no arguable case of jurisdictional error – Uniform Civil Procedure Rules 2005 (NSW), r 59.10

[Mack Fleet Pty Ltd v Transport for NSW \[2020\] NSWCA 149](#)

PRACTICE AND PROCEDURE – judicial review – application out of time – whether application had merit warranting extension of time – Uniform Civil Procedure Rules 2005 (NSW), r 59.10(1)

Application for review of order as to costs

[Riva NSW Pty Ltd v Mark A Fraser & Christopher P Clancy t/as Fraser Clancy Lawyers \[2020\] NSWCA 210](#)

JUDICIAL REVIEW – application for judicial review of orders that the applicant pay costs on an indemnity basis – appeal to the District Court against decision of Costs Review Panel – application for relief refused on discretionary grounds – proceedings extraordinarily protracted, amount in question not large and other discretionary reasons given for refusing relief

Attempt to reopen dismissed application

[Dacich v Director of Public Prosecutions \(NSW\); Kennedy v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 346](#)

JUDICIAL REVIEW – application to review numerous matters related to criminal prosecutions – need to identify decisions – need to identify grounds – repetition of grounds previously dismissed – abuse of process

PRACTICE AND PROCEDURE – repeat application for judicial review – reopening dismissed application – whether frivolous and vexatious – Uniform Civil Procedure Rules 2005 (NSW), r 13.4

Error of law on face of the record

[JE v Secretary, Department of Communities and Justice \(No 2\) \[2020\] NSWCA 243](#)

ADMINISTRATIVE LAW – judicial review – appeal from Children’s Court to District Court –

whether error of law on the face of the record or jurisdictional error established – no error made out

Irrelevant and relevant considerations

[Ghosh v Medical Council of New South Wales \[2020\] NSWCA 122](#)

ADMINISTRATIVE LAW — Ground of review other than procedural fairness — Irrelevant and relevant considerations — Findings of fact – Where obvious and innocent explanation not considered in circumstances where findings were grave, devastating and infected the whole decision – Error established

Jurisdictional error

[Ballas v Department of Education \(State of NSW\) \[2020\] NSWCA 86](#)

ADMINISTRATIVE LAW – judicial review – whether primary judge and Delegate of the Registrar of the Workers Compensation Commission misconstrued the role of the Registrar – whether Delegate’s decision contained jurisdictional error – whether Delegate failed to consider that approved medical specialist took into account irrelevant considerations and failed to take into account relevant considerations – whether Delegate erred in deciding that which matters were relevant to the categories in the Psychiatric Impairment Rating Scale was a matter of discretion

[Bangura v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 138](#)

JUDICIAL REVIEW – crime – review of judgment of District Court on appeal from Local Court – jurisdictional error – no tenable ground

[Barrett v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 270](#)

JUDICIAL REVIEW – criminal proceedings – review of appeal to District Court – guilty plea entered in Local Court – application to traverse plea on appeal – application for leave to appeal out of time – application dismissed – whether arguable case of jurisdictional error

[Commissioner of Police, New South Wales Police Force v Zisopoulos \[2020\] NSWCA 236](#)

ADMINISTRATIVE LAW – judicial review of decisions of Industrial Relations Commission relating to removal of officer from NSW Police Force – whether IRC erred in law and failed to exercise jurisdiction whilst undertaking statutory task of review under s 181E of the *Police Act 1990* (NSW) – whether IRC misapplied s 181F(2) concerning onus of proof – legal,

tactical and evidential burdens of proof considered – where decision was not affected by jurisdictional error

[Dacich v Director of Public Prosecutions \(No 2\) \[2020\] NSWCA 298](#)

APPEAL AND REVIEW – District Court – criminal jurisdiction – sentence appeal from Local Court – judicial review of appeal judgment – privative provision – need to establish jurisdictional error – procedural unfairness – refusal of adjournment application in district Court – existence of application for review of refusal of legal aid

[Gazecki v McCabes Lawyers Pty Ltd \[2020\] NSWCA 98](#)

JUDICIAL REVIEW – review of dismissal of appeal to District Court – grounds of review – whether errors of law on the face of the record limited to non-jurisdictional errors of law

[Jankovic v Director of Public Prosecutions \[2020\] NSWCA 31](#)

ADMINISTRATIVE LAW – judicial review of decision of the District Court dismissing appeal from the Local Court against conviction – review not available unless jurisdictional error established – where function of the District Court was to conduct appeal by way of rehearing “on the basis of” the evidence in the Local Court – where the District Court made a central finding of fact for which there was no basis in the Local Court evidence – whether error of law – whether jurisdictional error

[JE v Secretary, Department of Communities and Justice \(No 2\) \[2020\] NSWCA 243](#)

ADMINISTRATIVE LAW – judicial review – appeal from Children’s Court to District Court – whether error of law on the face of the record or jurisdictional error established – no error made out

[Kirby v Dental Council of NSW \[2020\] NSWCA 91](#)

ADMINISTRATIVE LAW – whether reviewable error of law – jurisdictional error – whether NCAT constructively failed to exercise jurisdiction

[Mack Fleet Pty Ltd v Transport for NSW \[2020\] NSWCA 149](#)

JUDICIAL REVIEW – jurisdictional error – refusal of District Court judge to submit a question of law to the Court of Criminal Appeal – whether power coupled with duty to exercise power on request – whether request stated a question of law – challenge to determination of judge that no question of law raised

[Voicu v The Owners-Strata Plan No 1624 \[2020\] NSWCA 52](#)

JUDICIAL REVIEW – remedies – materiality – review of appeal of costs assessment – incorrect application of repealed statute – application of the correct statute would have led to the same order – whether error jurisdictional – refusal of relief on discretionary grounds

Refusal to submit question to Court of Criminal Appeal

[Forrest v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 162](#)

JUDICIAL REVIEW – jurisdictional error – refusal of District Court judge to submit a question of law to Court of Criminal Appeal – nature of power – whether coupled with duty to exercise power on request – failure to identify question of law – appeal concerned with inferences drawn from facts – whether condition of engagement of power a jurisdictional fact

[Jankovic v Director of Public Prosecutions \[2020\] NSWCA 31](#)

ADMINISTRATIVE LAW – judicial review of decision of the District Court refusing to submit a question for determination by the Court of Criminal Appeal – whether refusal on erroneous basis that the question was obviously baseless was constructive refusal to exercise jurisdiction – whether jurisdictional error

[Mack Fleet Pty Ltd v Transport for NSW \[2020\] NSWCA 149](#)

CRIMINAL LAW – appeal – procedure – appeal from Local Court to District Court – appeal dismissed – request to judge to submit question of law to Court of Criminal Appeal – request declined – requirement to identify a question of law – *Criminal Appeal Act 1912* (NSW), s 5B

JUDICIAL REVIEW – jurisdictional error – refusal of District Court judge to submit a question of law to the Court of Criminal Appeal – whether power coupled with duty to exercise power on request – whether request stated a question of law – challenge to determination of judge that no question of law raised

Remedies

[Voicu v The Owners-Strata Plan No 1624 \[2020\] NSWCA 52](#)

JUDICIAL REVIEW – remedies – materiality – review of appeal of costs assessment – incorrect application of repealed statute – application of the correct statute would have led to the same order – whether error jurisdictional – refusal of relief on discretionary grounds

Representation of children and young persons in judicial review proceedings

[JE v Secretary, Department of Communities and Justice \(No 2\) \[2020\] NSWCA 243](#)

PRACTICE – representation of children and young persons in judicial review proceedings – common interest with Secretary – nature of appropriate representation in such cases

Review of verdict of acquittal

[SafeWork NSW v BOC Limited \[2020\] NSWCA 306](#)

CRIME – work health and safety – application for judicial review of verdict of acquittal – risk of death or serious injury to other persons – conduct of employee in the course of his duties – prosecution of employer – employer acquitted due to dishonesty of employee – attempt by prosecutor to review acquittal – Work Health and Safety Act 2011 (NSW), s 19(2)

JUDICIAL REVIEW – supervisory jurisdiction – acquittal – principle of double jeopardy – application for judicial review in supervisory jurisdiction of the Supreme Court by prosecutor following acquittal – circumstances in which the Court’s jurisdiction to review an acquittal is engaged

Where applicant seeks to review sentencing decision

[Dacich v Commissioner of Corrective Services \[2020\] NSWCA 359](#)

JUDGMENTS AND ORDERS – sentence of imprisonment – whether warrant for commitment required in addition to court order – s 62 Crimes (Sentencing Procedure) Act 1999 considered

JUDGMENTS AND ORDERS – sentence of imprisonment – judicial review sought – release on bail – stay of execution of order – ss 69A-D Supreme Court Act 1970 considered

[Dacich v Director of Public Prosecutions \(No 1\) \[2020\] NSWCA 297](#)

JUDICIAL REVIEW – adjournment – criminal proceedings – review of sentence appeal – applicant on bail – protracted procedural history – requirement for finality in criminal proceedings – claim to have lodged internal appeal from refusal of legal aid – bona fides of attempts to obtain legal representation – circumstances in which court may vacate hearing – *Legal Aid Commission Act 1979* (NSW), s 57

[Dacich v Director of Public Prosecutions \(No 2\) \[2020\] NSWCA 298](#)

APPEAL AND REVIEW – District Court – criminal jurisdiction – sentence appeal from Local Court – judicial review of appeal judgment – privative provision – need to establish jurisdictional error – procedural unfairness – refusal of adjournment application in district Court – existence of application for review of refusal of legal aid

APPEAL AND REVIEW – District Court – criminal jurisdiction – appeal from Local Court – whether appeal against conviction – form of notice of appeal – Crime (Appeal and Review) Act 2001 (NSW), s 14

APPEAL AND REVIEW – District Court – criminal jurisdiction – sentence appeal from Local Court – procedural unfairness – alleged incompetence of legal representative – failure to obtain psychologist’s report for application under Mental Health (Forensic Provisions) Act 1990 (NSW), s 32

APPEAL AND REVIEW – District Court – criminal jurisdiction – sentence appeal from Local Court – pre-sentence custody – failure to take into account under Crimes (Sentencing Procedure) Act 1999 (NSW), s 24

[Dacich v Director of Public Prosecutions \(NSW\); Kennedy v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 313](#)

CRIME – sentence – application for inquiry under Crimes (Appeal and Review) Act 2001 (NSW), Pt 7 – application for stay of sentence – power to stay sentence – Supreme Court Act 1970 (NSW), s 23

JUDGMENTS AND ORDERS – application for judicial review – custodial sentence of full time imprisonment – challenge to lawfulness of imprisonment – applicant on bail pending determination of judicial review proceedings – fresh application for judicial review filed while on bail – whether fresh application effected statutory stay – application out of time – Supreme Court Act 1970 (NSW), s 69C(4)

[Dacich v Director of Public Prosecutions \(NSW\); Kennedy v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 346](#)

JUDICIAL REVIEW – application to review sentence imposed by district Court – operation of statutory stay – stay following grant of bail – *Supreme Court Act 1970 (NSW)*, ss 69, 69A, 69C

[Hay v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 75](#)

JUDICIAL REVIEW – application for judicial review of District Court decision resentencing applicant on an appeal from the Local Court – whether unreasonable for District Court to have taken into account specific deterrence – *Minister for Immigration and Citizenship v Li* – whether District Court failed to consider alternatives to custodial sentence and whether sentence of imprisonment should be served by way of an ICO

Where applicant subject to vexatious proceedings order

[Klewer v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 69](#)

ADMINISTRATIVE LAW – judicial review – applicant subject to vexatious proceedings order – whether applicant required leave under the Vexatious Proceedings Act 2008 (NSW) to institute an appeal to the District Court against her convictions and sentences in the Local Court - whether applicant required leave under the Vexatious Proceedings Act to commence judicial review proceedings in the Court of Appeal in circumstances where she did not require leave to commence proceedings in the court whose decision was the subject of the application for judicial review

3. Administrative law (other)

Administrative tribunals

[Dyldam Developments Pty Ltd v The Owners – Strata Plan 85305 \[2020\] NSWCA 327](#)

ADMINISTRATIVE LAW – Jurisdiction – Civil and Administrative Tribunal – whether the Tribunal has jurisdiction to review an occupation certificate whilst exercising its jurisdiction under the *Home Building Act 1989* (NSW) – whether review of the occupation certificate collateral to the proceedings – capacity of the Tribunal to engage in collateral review of administrative action – where statutory scheme provides Land and Environment Court jurisdiction to remedy or restrain a breach of the *Environmental Planning and Assessment Act 1979* (NSW)

[Ghosh v Health Care Complaints Commission \[2020\] NSWCA 353](#)

ADMINISTRATIVE LAW – particular administrative bodies – NSW Civil and Administrative Tribunal – complaint by Health Care Complaints Commission about medical practitioner under Health Practitioner Regulation National Law – power of Tribunal to order that a complaint be heard on the papers – where National Law required notice of time and place of inquiry to be given – where National Law entitled practitioner to attend the inquiry – where National Law applied despite any provision in Civil and Administrative Tribunal Act

ADMINISTRATIVE LAW – particular administrative bodies – NSW Civil and Administrative Tribunal – complaint by Health Care Complaints Commission about medical practitioner under Health Practitioner Regulation National Law – where Tribunal did not afford practitioner procedural fairness – where Tribunal erred in relation to its consideration of certain complaints – where Tribunal failed to give adequate reasons for its conclusions concerning certain complaints

[Minister for Education and Early Childhood Learning v Zonneville \[2020\] NSWCA 232](#)

ADMINISTRATIVE LAW – administrative tribunals – scope of authority of the NSW Civil and Administrative Tribunal to dismiss proceedings as vexatious – where respondent sought review of a decision determining his application for access to information held by a government agency – where respondent persisted in allegations of misconduct against

officers of the agency after those allegations had been dismissed by the Tribunal – relevance of history of making similar allegations in other proceedings – where Tribunal's decision dismissing proceedings as vexatious overturned by Appeal Panel – whether Appeal Panel erred in regarding persistence in claims that were bad in law as being outside the scope of the collateral purpose principle – whether Appeal Panel erred in declining to have regard to previous litigation brought by the respondent

Habeas corpus

[Dacich v Commissioner of Corrective Services \[2020\] NSWCA 359](#)

ADMINISTRATIVE LAW – writ of habeas corpus – to whom writ should be directed – who has custody of prisoners in correctional centres – whether prosecutor entitled to appear

Hearing rule

[Ghosh v Medical Council of New South Wales \[2020\] NSWCA 122](#)

ADMINISTRATIVE LAW — Hearing rule — Rules of evidence — Examination and cross-examination – Second aspect of the rule in *Browne v Dunn* (1894) 6 R 67 – Whether Tribunal erred in failing to have regard to the circumstance that evidence not accepted by Tribunal went unchallenged by cross-examination

Procedural fairness

[Dacich v Director of Public Prosecutions \(No 2\) \[2020\] NSWCA 298](#)

APPEAL AND REVIEW – District Court – criminal jurisdiction – sentence appeal from Local Court – judicial review of appeal judgment – privative provision – need to establish jurisdictional error – procedural unfairness – refusal of adjournment application in district Court – existence of application for review of refusal of legal aid

[Mohareb v Palmer \(No 2\) \[2020\] NSWCA 324](#)

CIVIL PROCEDURE — Hearings — Procedural fairness – expansion of orders as compared to those sought – making an order in terms not foreshadowed during or after the hearing – no opportunity for parties to be heard

[Riva NSW Pty Ltd v Mark A Fraser & Christopher P Clancy t/as Fraser Clancy Lawyers \[2020\] NSWCA 210](#)

CIVIL PROCEDURE – directions by primary judge concerning non-parties to notice of motion including legal representatives – directions required their conduct to be brought to attention of regulatory, prosecutorial and disciplinary authorities – relevant persons not given an opportunity to be heard – denial of procedural fairness – declaration made as to invalidity of the subject directions

[Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd \[2020\] NSWCA 50](#)

ADMINISTRATIVE LAW – denial of procedural fairness – whether common law right to procedural fairness excluded by statute – Environmental Planning and Assessment Act 1979 (NSW) Sch 5 – legislative intent plain

[Windsor v Health Care Complaints Commission \[2020\] NSWCA 110](#)

ADMINISTRATIVE LAW – hearing rule – whether Tribunal failed to afford procedural fairness – whether Tribunal failed to address appellant’s evidence and arguments – whether two-stage hearing process required

4. Animals

Animal cruelty

[Will v Brighton \[2020\] NSWCA 355](#)

ANIMALS - Cruelty to animals – consideration of the element of “intention of inflicting severe pain” in s 530(1) of Crimes Act 1900 (NSW) - defences to offence of serious cruelty to animals under s 530(2) of the Crimes Act 1900 (NSW) – meaning of “pest animals” – meaning of “in the course of or for the purposes of extermination of pest animals” – whether animal killed was a “pest animal” within the meaning of s 530(2) of the Crimes Act – whether killing of animal was “in the course of or for the purposes of extermination of pest animals” – statutory context – context includes other legislation addressing cruelty to animals

[Young v Royal Society for the Prevention of Cruelty to Animals New South Wales \[2020\] NSWCA 360](#)

ANIMALS — prevention of cruelty to animals — private prosecution under Prevention of Cruelty to Animals Act — guilty verdict — charges subsequently dismissed under Mental Health (Forensic Provisions) Act 1990 (NSW), s 32

5. Appeals

Appeal by way of rehearing

[Wany v DPP \[2020\] NSWCA 318](#)

APPEALS — Nature of appeal — Appeal by way of rehearing — sentence appeal pursuant to ss 11 and 17 of the *Crimes (Appeal and Review) Act 2001* — de novo hearing — requirement that judge engage in fresh sentencing task — where judge adopted lower court's reasoning – whether judge failed to engage in task imposed by s 17 — whether constructive failure to exercise jurisdiction

Attempt to re-agitate issues previously put

[Wang v State of New South Wales \(No 2\) \[2020\] NSWCA 64](#)

APPEALS – notice of motion seeking to reverse result of application for leave to appeal – impermissible attempt to re-argue application

[Wang v State of New South Wales \(No 3\) \[2020\] NSWCA 148](#)

APPEALS – notice of motion by Wang seeking to reverse result of application for leave to appeal – attempt to re-agitate arguments previously put – notice of motion of same character previously dismissed – order to the effect of that made in *Teoh v Hunters Hill Council*

Burden of proof

[Carnemolla v Arcadia Funds Management Ltd \[2020\] NSWCA 308](#)

APPEAL – burden of proof – elements of claim – evidence that floor safe when surface dry – failure of plaintiff to prove water on floor – weight of evidence did not support claim – admitted fact – inspection system adequate – no error in fact-finding

Challenge to factual findings

[Dalati v Brown \[2020\] NSWCA 322](#)

CIVIL PROCEDURE — leave to appeal – where proposed appeal turns upon findings of fact – where findings based on primary judge's assessment of credibility – no issue of principle or question of public importance – leave refused

[Magann v The Trustees of the Roman Catholic Church for the Diocese of Parramatta \[2020\] NSWCA 167](#)

APPEAL – procedure to be followed when primary findings of fact challenged – obligation to comply with UCPR r 51.36(2) in relation to factual challenges – need for precise and accurate references to evidentiary record

[Saad v Volvo Finance Australia Pty Ltd \[2020\] NSWCA 282](#)

APPEALS – challenge to findings of fact – credibility of witnesses – basis for interfering with adverse credibility findings – admissions against interest – use of aerial photography to locate vehicles – all vehicles together – defendant’s admission of control of one vehicle – defendant’s offer to deliver all five vehicles for a fee or purchase vehicles

Competency of appeal

[Bobolas v Waverley Council \(No 2\) \[2020\] NSWCA 315](#)

APPEALS – leave to appeal – summons seeking leave filed over three months earlier and no steps taken since – no identification of any ground upon which the proposed appeal might succeed – failure without adequate explanation to comply with Court’s directions – summons dismissed for want of prosecution

[Donaldson v State of New South Wales \[2020\] NSWCA 329](#)

APPEALS – application for leave to appeal – proposed appeal incompetent – appeal from refusal of earlier application for leave to appeal – appeals limited to appeals from judgments in a Division

[French v Bremner \(No 2\) \[2020\] NSWCA 211](#)

PRACTICE AND PROCEDURE – appeal and cross-appeal – failure to prosecute with due despatch – application to dismiss cross-appeal – non-compliance with directions for filing submissions – indulgences granted by extending dates – submissions filed by extended date – Uniform Civil Procedure Rules 2005 (NSW), r 12.7

PRACTICE AND PROCEDURE – appeal and cross-appeal – cross-appeal – procedural irregularity – notice of cross-appeal to commence proceedings against non-appellant – proceedings lacking in merit – whether frivolous, vexatious or an abuse of process – Uniform Civil Procedure Rules 2005 (NSW), r 13.4

[Lukaszewicz v Polish Club Ltd \[2020\] NSWCA 99](#)

CIVIL PROCEDURE — Court of Appeal — Competency of appeal – where purported appeal and cross appeal commenced as of right – where only the availability of declaratory and injunctive relief in issue on appeal – where leave to appeal required by s 101(2)(r) of the Supreme Court Act 1970 (NSW)

[Qin v He \[2020\] NSWCA 275](#)

CIVIL PROCEDURE — Court of Appeal — appeal from District Court determination of appeal from costs assessment of review panel — no right of appeal from District Court to Supreme Court under *District Court Act 1973* (NSW) — no question of principle

Constitution of Court

[Hosking v Extend N Build Pty Ltd \(No 2\) \[2020\] NSWCA 107](#)

JUDGMENTS AND ORDERS – Court of Appeal – practice and procedure – constitution of court – where parties failed to provide short minutes of order to give effect to appeal judgment – where one member of original Court of Appeal bench no longer a member of the Court – whether appropriate to reconstitute new bench – appropriate form of order in relation to unfair preference – Corporations Act 2001 (Cth), 588FF(1)(a)

Determination of separate question

[Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller \[2020\] NSWCA 102](#)

APPEAL – determination of separate question – whether operators of Facebook pages published material posted by third parties – scope of separate question – findings going beyond scope of question

Interlocutory appeals

[Burton v Babb \[2020\] NSWCA 331](#)

APPEALS — application for leave to appeal —interlocutory orders – issue of principle identified – application of rr 6.24, 6.29 UCPR – joinder and removal of parties – leave to appeal granted in respect of joinder of the State and removal of named defendants

[Chubb Insurance Australia Ltd v Giabal Pty Ltd; Catlin Australia Pty Ltd v Giabal Pty Ltd \[2020\] NSWCA 309](#)

APPEAL – application for leave to appeal – interlocutory decision joining insurers – whether insurers’ entitlement to disclaim liability “beyond argument” – no determination of insurers’ liability – inutility of interlocutory appeal – leave refused

[Sayed v National Australia Bank \[2020\] NSWCA 334](#)

APPEALS – appeal from final judgment – review of interlocutory judgments – interlocutory judgments refusing amendments to pleadings

[Storey v Commissioner of Police, NSW Police Force \[2020\] NSWCA 225](#)

PRACTICE AND PROCEDURE – interlocutory appeal – refusal of trial judge to permit the administration of interrogatories – judicial review proceeding – stay of trial sought pending determination of appeal – judgment below reserved – interrogatories directed to one ground of review – likelihood of grant of leave

Jurisdiction to hear appeals

[Gao v Perry \[2020\] NSWCA 15](#)

COURTS - jurisdiction - proceedings between former de facto partners in Supreme Court concerning ownership of property – primary claim in equity – alternative claim under Family Law Act 1975 (Cth) – primary judge upholds claims in equity and makes contingent findings under Family Law Act – defendant files appeal confined to challenging orders based in equity – plaintiff/respondent files notice of contention based on Family Law Act contingent findings – whether appeal lay to Court of Appeal – whether even if appeal required to be instituted in Court of Appeal, notice of contention required its transfer to Family Court – prohibition on instituting and determining certain appeals in Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 7 construed and applied – appeal transferred to Family Court

Permanent stay of proceedings

[Gorman v McKnight \[2020\] NSWCA 20](#)

APPEAL – whether permanent stay of proceedings should be granted – civil claims arising from alleged sexual assaults up to 40 years ago – where alleged perpetrator dead but had been charged with regard to some of the underlying complaints prior to his death – where perpetrator had admitted some of the acts but asserted that they were consensual – where each of the plaintiffs was a minor at the time of the alleged assaults

Review of order of single judge of appeal

[Hassan v Sydney Local Health District \(No 2\) \[2020\] NSWCA 356](#)

APPEAL – practice and procedure – issue of subpoenas – application to review decision of single judge – no issue of principle

[Michael Wilson & Partners, Limited v Emmott \[2020\] NSWCA 245](#)

CIVIL PROCEDURE — Court of Appeal — Review of order of single judge of appeal — Notice to produce — Ambit of documents — Whether oppressive or vexatious

Statutory threshold to bring an appeal

[C & E Critharis Constructions Pty Ltd v Cubic Metre Pty Ltd \[2020\] NSWCA 348](#)

APPEALS – leave to appeal – whether leave required – monetary threshold of \$100,000 under s 101(2)(r) *Supreme Court Act* – amount in issue \$99,999 – strictly no right of appeal – closeness of sum in issue to the threshold relevant to discretion to grant leave

[Feldman v Polaris Media Pty Ltd as Trustee of the Polaris Media Trust t/as The Australian Jewish News \[2020\] NSWCA 56](#)

CIVIL PROCEDURE — Court of Appeal — Leave to appeal – whether appeal incompetent – notice of appeal – application filed out of time – where no application has been made for an extension of time or explanation given – no evidence appeal involves matter at issue of value of \$100,000 or more

[Gaynor v Attorney General of New South Wales \[2020\] NSWCA 48](#)

APPEAL – Leave to appeal – whether matter at issue amounting to or of the value or involving \$100,000 or more – need for party seeking to appeal to demonstrate that jurisdictional threshold satisfied

[Lukaszewicz v Polish Club Ltd \[2020\] NSWCA 99](#)

CIVIL PROCEDURE — Court of Appeal — Competency of appeal – where purported appeal and cross appeal commenced as of right – where only the availability of declaratory and injunctive relief in issue on appeal – where leave to appeal required by s 101(2)(r) of the *Supreme Court Act 1970* (NSW)

[Price v Price \[2020\] NSWCA 312](#)

APPEAL – application for leave to appeal from a costs order – amount in issue substantially less than \$100,000 – proper administration of justice required a grant of leave

Summary dismissal of proceedings

[Charan v Commonwealth Bank of Australia \[2020\] NSWCA 13](#)

APPEAL – application for leave to appeal from summary dismissal of proceedings – proceedings dismissed because rights to sue vested in applicants’ trustees in bankruptcy, and because of earlier litigation – no basis for grant of leave – in any event, any appeal would lie to Federal Court by reason of s 7(5) of Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)

[Dickson v Commissioner, Australian Federal Police \[2020\] NSWCA 125](#)

CIVIL PROCEDURE – summary dismissal – fraud or abuse of process in obtaining restraining order – property suspected of being proceeds of crime – subsequent forfeiture as result of convictions – Uniform Civil Procedure Rules, r 13.4(1)

Supervisory jurisdiction

[Hallaby v Harris \[2020\] NSWCA 12](#)

APPEAL – leave to appeal – judgment in supervisory jurisdiction – review of refusal to award costs of unsuccessful prosecution – applicant’s focus on decision under review, not judgment under appeal – need to show error in judgment under appeal – issues raised not subject of judgment under appeal – scope of judicial review where tribunal not satisfied of preconditions to power to award costs

Time for commencing appeals

[Randren House Pty Ltd v Water Administration Ministerial Corporation \[2020\] NSWCA 14](#)

APPEALS - time for commencing appeal - orders made dismissing applicants’ claims - costs orders made months later - whether time for appeal only ran from costs orders - whether applicants should have an extension of time - whether applicants had sufficiently explained delay - extension of time for appeal refused

6. Associations and Clubs

Racing clubs

[Racing New South Wales v Fletcher \[2020\] NSWCA 9](#)

ASSOCIATIONS AND CLUBS – particular bodies – racing clubs – power of Stewards to use information – where information obtained in exercise of a power under rules of racing – where exercise of power expressed to be for a specific stated purpose – whether use of information limited to that purpose

7. Banking & Finance

Code of Banking Practice

[Gooley v NSW Rural Assistance Authority \[2020\] NSWCA 156](#)

BANKING AND FINANCE – Code of Banking Practice, cll 2.2, 25.1 and 25.2 – whether breach of obligation to exercise care and skill of a diligent and prudent banker – whether breach of obligation to try to help borrower to overcome financial difficulties with a credit facility – no question of principle

Guarantee and Indemnity

[Trent v Bolton \[2020\] NSWCA 268](#)

GUARANTEE AND INDEMNITY – rights of guarantor to contribution from co-guarantors – whether payments by guarantor to principal debtor made under guarantee or as a loan to principal debtor – Mahoney v McManus (1981) 180 CLR 370 – primary judge’s findings of fact capable of supporting his conclusion

Misleading or deceptive conduct

[Gooley v NSW Rural Assistance Authority \[2020\] NSWCA 156](#)

BANKING AND FINANCE – *Australian Securities and Investments Commission Act 2001* (Cth), ss 12CB and 12DA – whether in varying term of credit facility bank engaged in misleading or deceptive or unconscionable conduct – whether in making loan bank engaged in unconscionable conduct – no question of principle.

National Credit Code

[Gooley v NSW Rural Assistance Authority \[2020\] NSWCA 156](#)

BANKING AND FINANCE – National Credit Code – whether loan “unjust” credit contract within s 76(1) – whether bank failed to respond to hardship notices as required by s 72(4) – whether National Credit Code applied – where the predominant purpose for which credit was provided or was intended to be provided was not a Code purpose – no question of principle.

Unconscionable conduct

[Gooley v NSW Rural Assistance Authority \[2020\] NSWCA 156](#)

BANKING AND FINANCE – *Australian Securities and Investments Commission Act 2001* (Cth), ss 12CB and 12DA – whether in varying term of credit facility bank engaged in misleading or deceptive or unconscionable conduct – whether in making loan bank engaged in unconscionable conduct – no question of principle.

8. Building & Construction

Breach of contract

[C & E Critharis Constructions Pty Ltd v Cubic Metre Pty Ltd \[2020\] NSWCA 348](#)

CONTRACTS – remedies – damages – sub-contractor breached contract with builder by supplying and installing materials unfit for purpose – builder paid in full by proprietors and no prospect of it rectifying work – builder not exposed to risk of liability to proprietors – builder did not prove that it suffered loss

Limitation period

[Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd \[2020\] NSWCA 303](#)

BUILDING AND CONSTRUCTION – limitation period – limitation period for actions arising out of defective building work more than ten years after completion of work – limitation period originally contained in s 109ZK of *Environmental Planning and Assessment Act 1979* – section renumbered as s 6.20 – as originally enacted, s 109ZK applied only prospectively – defendant's building work done before enactment of s 109ZK – whether limitation period applied to building work done before section enacted – whether s 6.20 replaced s 109ZK – whether limitation period applied to loss of the kind alleged by the plaintiff

Negligence

[Owners of Strata Plan No 30791 v Southern Cross Constructions \(ACT\) Pty Ltd \(in liquidation\) \[2020\] NSWCA 199](#)

BUILDING AND CONSTRUCTION — Negligence — Miscellaneous forms of negligent conduct — Right of support — Application of *Conveyancing Act 1919* (NSW) s 177 and common law — Whether loss of support caused damage to adjoining property

Occupation certificate

[Dyldam Developments Pty Ltd v The Owners – Strata Plan 85305 \[2020\] NSWCA 327](#)

BUILDING AND CONSTRUCTION – Occupation Certificate – whether document purporting to be an interim occupation certificate authorised use and occupation of the whole of the building – where running of limitation period for breach of a statutory warranty under the *Home Building Act* contingent on such authorisation – whether occupation certificate issued in contravention of s 109H(2) of the *Environmental Planning and Assessment Act* invalid

Payment claim

[Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd \[2020\] NSWCA 63](#)

BUILDING & CONSTRUCTION – appeals – payment claim referred for adjudication – where available reference date under construction contract – Building and Construction Industry Security of Payment Act 1999 (NSW) – where adjudicator determined entitlement to payment claim by reference to an unavailable reference date – jurisdictional error – where available reference date under contract not the reference date addressed by the adjudicator – whether adjudication determination also involved a denial of natural justice

[TFM Epping Land Pty Ltd v Decon Australia Pty Ltd \[2020\] NSWCA 93](#)

BUILDING AND CONSTRUCTION – claim for progress payment – reference date – whether claim with respect to an available reference date – inclusion of three days' interest accruing after reference date – whether claim invalid – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13(7) and (8)

BUILDING AND CONSTRUCTION – claim for progress payment – service of claim – supporting statement – requirements for valid supporting statement – consequence of failure to serve valid statement – whether payment claim invalid

BUILDING AND CONSTRUCTION – claim for progress payment – variations – whether sums claimed under the contract or for quantum meruit – whether the claim invalid if amounts not owing under the contract – statutory scheme for adjudication of payment claim disputes – Building and Construction Industry Security of Payment Act 1999 (NSW), ss 14 and 15(4)

[TFM Epping Land Pty Ltd v Decon Australia Pty Ltd \[2020\] NSWCA 118](#)

BUILDING AND CONSTRUCTION - Building and Construction Industry Security of Payments Act 1999 (NSW) - builder served payment claim - developers failed to serve payment schedule - builder obtained judgment pursuant to Act - developers' appeal from judgment dismissed - proceedings based on construction contract pending in Technology and Construction List - late filing of cross-claim by developers - no explanation for late filing of cross-claim - developers seek further stay of judgment pending determination of main proceedings - developers claimed that they would be wound up if no stay were ordered and the cross-claim would not be adjudicated - primary judge dismissed application for a stay -

whether any error of principle - whether principles in a “Grosvenor stay” applicable - Grosvenor Constructions (NSW) Pty Ltd v Musico [2004] NSWSC 344 considered - whether developers had demonstrated basis for stay of execution - leave to appeal refused

Restitution

[Roude v Helwani \[2020\] NSWCA 310](#)

RESTITUTION — *Quantum meruit* – whether necessary to establish “objective standard” or “market rate” for value of work performed – whether invoices prepared by builder capable of being evidence of reasonable remuneration – where unreasonableness of invoices denied by builder – where appeal confined to a question of law

Right to suspend work

[Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd \[2020\] NSWCA 25](#)

BUILDING AND CONSTRUCTION – construction contracts – *Building and Construction Industry Security of Payment Act 1999* (NSW) – whether right to suspend work validly exercised – whether unpaid interest on late payment of “scheduled amount” forms part of the scheduled amount – the definition of “scheduled amount” does not include interest payable under s 11 on the unpaid amount of a progress payment unless that amount is included in a “scheduled amount”

Scheduled amount

[Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd \[2020\] NSWCA 25](#)

BUILDING AND CONSTRUCTION – construction contracts – *Building and Construction Industry Security of Payment Act 1999* (NSW) – whether right to suspend work validly exercised – whether unpaid interest on late payment of “scheduled amount” forms part of the scheduled amount – the definition of “scheduled amount” does not include interest payable under s 11 on the unpaid amount of a progress payment unless that amount is included in a “scheduled amount”

Statutory warranties

[Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor \[2020\] NSWCA 358](#)

BUILDING AND CONSTRUCTION – Contract – *Home Building Act 1989* (NSW) – Statutory warranties – whether contract confined to negotiated scope of works or expanded to include

other works by virtue of the implied statutory warranties – whether building in breach of statutory warranties

9. Civil procedure

Amici curiae

[Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller \[2020\] NSWCA 102](#)

CIVIL PROCEDURE – appearance – amici curiae – intervention by non-parties – non-party media companies who operate Facebook pages in similar circumstances to the applicant news companies – whether intervention appropriate – non-parties raising issues beyond the proposed appeal

Appeal books

[Pittmore Pty Ltd v Chan; Chan v Tan \[2020\] NSWCA 344](#)

COSTS – appeal books – unnecessary reproduction of thousands of pages already reproduced in appeal books – whether special order as to costs warranted

Application for expedition and stay

[Windsor v Health Care Complaints Commission \(No 2\) \[2020\] NSWCA 18](#)

APPEAL – application for expedition and stay – no issue of principle

Application for leave to appeal

[Bobolas v Waverley Council \(No 2\) \[2020\] NSWCA 315](#)

APPEALS – leave to appeal – summons seeking leave filed over three months earlier and no steps taken since – no identification of any ground upon which the proposed appeal might succeed – failure without adequate explanation to comply with Court's directions – summons dismissed for want of prosecution

[Burton v Babb \[2020\] NSWCA 331](#)

APPEALS — application for leave to appeal — interlocutory orders – issue of principle identified – application of rr 6.24, 6.29 UCPR – joinder and removal of parties – leave to

appeal granted in respect of joinder of the State and removal of named defendants

[Burton v Secretary, Department of Communities and Justice \[2020\] NSWCA 68](#)

APPEAL – application for leave – challenge to decision to refuse summary dismissal of proceedings – no appellable error in decision – leave refused

[Choi v University of Technology Sydney \(No 2\) \[2020\] NSWCA 342](#)

APPEAL – application for leave to appeal – no issue of principle

[Choi v University of Technology Sydney \(No 3\) \[2020\] NSWCA 343](#)

APPEAL – application for leave to appeal – no issue of principle or question of public importance identified

[Chubb Insurance Australia Ltd v Giabal Pty Ltd; Catlin Australia Pty Ltd v Giabal Pty Ltd \[2020\] NSWCA 309](#)

APPEAL – application for leave to appeal – interlocutory decision joining insurers – whether insurers’ entitlement to disclaim liability “beyond argument” – no determination of insurers’ liability – inutility of interlocutory appeal – leave refused

[Clarke v Herrick \[2020\] NSWCA 71](#)

APPEAL – application for leave to appeal – appeal from summary dismissal of amended claim – where original claim alleging republications subject to defences of absolute privilege – where amended claim alleging only original publication time barred – whether summary dismissal on the basis of amended pleading involved error or was procedurally unfair – leave refused

[CM v Minister for Families, Communities and Disability Services \[2020\] NSWCA 347](#)

APPEALS — Leave to appeal — *parens patriae* jurisdiction — where Secretary of the Department of Communities and Justice had assumed care responsibility for applicant’s child — care proceedings part-heard in the Children’s Court — finding by primary judge that the applicant had not established exceptional circumstances to justify interfering with orders made by Children’s Court — whether applicant established any issue of principle, question of general public importance or injustice such as to warrant a grant of leave to appeal

[Corcoran v Far \[2020\] NSWCA 140](#)

CIVIL PROCEDURE — Court of Appeal — Leave to appeal – No error which goes beyond merely arguable – No issue of principle or question of public importance – Leave refused

[Coshott v Commonwealth Bank of Australia \[2020\] NSWCA 279](#)

APPEALS – leave – where proceedings summarily dismissed – whether party using employed solicitor is entitled to recover costs – no question of principle – whether declaration sought hypothetical – unchallenged factual findings – whether injustice if leave refused

[Craig v Johnson \[2020\] NSWCA 278](#)

APPEAL – application for leave to appeal refused – subpoena issued to solicitor only caught documents produced in response to earlier subpoena and already ruled to be the subject of legal professional privilege – applicants had opportunity to seek leave to appeal against earlier decision but did not

[CXZ v Children’s Guardian \[2020\] NSWCA 338](#)

APPEALS — Application for leave to appeal — principles to be applied in determining whether a person poses a risk to the safety of children under s 18 *Child Protection (Working with Children) Act 2012* (NSW) – application of principles stated in *M v M* – whether allegations are to be assessed by three-step process – whether lingering doubt to count against applicant – whether Tribunal failed to consider accumulated weight of allegations – held, issue of principle raised – leave to appeal granted

[Dalati v Brown \[2020\] NSWCA 322](#)

CIVIL PROCEDURE — leave to appeal – where proposed appeal turns upon findings of fact – where findings based on primary judge’s assessment of credibility – no issue of principle or question of public importance – leave refused

[Donaldson v State of New South Wales \[2020\] NSWCA 329](#)

APPEALS – application for leave to appeal – proposed appeal incompetent – appeal from refusal of earlier application for leave to appeal – appeals limited to appeals from judgments in a Division

[GR v Secretary, Department of Families, Disabilities and Community Services \[2020\] NSWCA 79](#)

PRACTICE AND PROCEDURE – appeal – application for leave to appeal – interlocutory orders – parens patriae jurisdiction – repeated applications by parent – conditions of listing of further applications in Equity Division – further listing refused – interlocutory relief sought

in nature of final relief

[Golden v V'landys \[2020\] NSWCA 120](#)

CIVIL PROCEDURE – application for leave to appeal against decision striking out statement of claim and dismissing proceedings – claims for judicial review largely an attempt to relitigate issues dealt with in previous proceedings – remainder long out of time and lacking utility

[Hassan v Sydney Local Health District \(No 2\) \[2020\] NSWCA 356](#)

APPEAL – practice and procedure – issue of subpoenas – application to review decision of single judge – no issue of principle

[Herbert v NSW Land and Housing Corporation \[2020\] NSWCA 80](#)

APPEAL – application for leave to appeal – proposed appeal from appeal on question of law under Civil and Administrative Tribunal Act 2013 (NSW), s 83(1) – where appeal grounds without merit – where arguable errors by Tribunal not relied on in proposed grounds of appeal – where those errors not raised before Tribunal or likely to have been material to outcome – leave refused

[Iannella v NSW Trustee & Guardian \(as executor of the estate of the late Anna Stirans\) \[2020\] NSWCA 96](#)

APPEALS – leave to appeal – Local Court judgment in small amount – parties' costs exceeded amount in issue – successful appeal would lead to retrial – no case of sufficient injustice to warrant grant of leave

[James v Australia and New Zealand Banking Group Ltd \[2020\] NSWCA 101](#)

CIVIL PROCEDURE – Court of Appeal – leave to appeal – dismissal – lack of issue of principle, question of general public important or an injustice to the applicant going beyond merely arguable

[Johnston v The Greens NSW \[2020\] NSWCA 357](#)

APPEALS – leave to appeal – utility – where substantive dispute concerns Greens list of nominees for election already held – whether any utility in considering whether list of nominees determined consistently with party constitution – whether dispute likely to recur – whether any errors sufficiently arguable to justify leave

[Kuzminski v Accent Blinds Australia Pty Ltd \[2020\] NSWCA 150](#)

CIVIL PROCEDURE – primary judge’s reasons for judgment striking out plaintiff’s claim revealed intention to permit plaintiff to re-plead – by apparent oversight leave to re-plead not given in formal orders – plaintiff sought leave to appeal – proper course was instead to approach primary judge for order granting leave – duty of defendant to cooperate to ensure orders reflected judge’s intention – s 56(3) *Civil Procedure Act 2005* (NSW) referred to

[Lukaszewicz v Polish Club Ltd \[2020\] NSWCA 99](#)

CIVIL PROCEDURE — Court of Appeal — Leave to appeal – where the provision of declaratory relief alone as a result of a finding of oppression– where underlying controversy between the parties has been quelled – whether substantive injustice arises if primary judgment allowed to stand – whether issue of principle or public importance that is more than merely arguable if declaratory relief given is allowed to stand

[Makowski v Legal Profession Admission Board \[2020\] NSWCA 305](#)

APPEALS — Leave to appeal – where applicant sought judicial review of decisions that were not the operative decisions – where primary judge found no error in original decisions – whether injustice that is reasonably clear – whether issue of principle – whether question of general public importance – application for leave to appeal dismissed

[Massarani v Kriz \[2020\] NSWCA 252](#)

CIVIL PROCEDURE – application for leave to appeal from decision dismissing action for defamation summarily – contest as to basis for primary judge’s decision – whether proposed appeal provided the occasion for appellate consideration of the decision in *Bleyer v Google Inc* – where pleading admittedly deficient – relevance of considerations of proportionality to discretion to grant leave to replead

[McClellan v Horswill \[2020\] NSWCA 30](#)

CIVIL PROCEDURE — Court of Appeal — Leave to appeal – whether leave to appeal be granted where applicant denied an adjournment before the primary judge leading to the matter proceeding to determination in the applicant’s absence – the applicant did not establish a case which goes beyond merely arguable – no issue of principle or question of public importance – leave refused

[Mendonca v Legal Services Commissioner \[2020\] NSWCA 84](#)

APPEAL – application for leave to appeal – proposed appeal from order dismissing summons for judicial review – decision of the Legal Services Commissioner not to conduct an internal review of a decision of the Law Society to close a complaint against a solicitor – power to conduct a review at the “absolute discretion” of the Commissioner – no arguable error identified in primary judge’s decision to dismiss the summons

[MIR Holdings Pty Ltd v Marina Square Retail Pty Ltd \[2020\] NSWCA 286](#)

APPEALS – leave to appeal – application for leave – relief sought inappropriate on an interlocutory appeal in the absence of necessary and proper parties

[Mohareb v Harbour Radio Pty Ltd \[2020\] NSWCA 231](#)

APPLICATION FOR LEAVE TO APPEAL – COSTS — security for costs – Uniform Civil Procedure Rules 2005 (NSW), r 42.21 – inherent jurisdiction of Supreme Court – reluctance to make orders against natural person – delay in making application – applicant bankrupt – evidence of funds transferred to overseas bank account in applicant’s name – applicant evasive and untruthful about transferred funds – applicant’s history of non-payment of court orders – where applicant has a history of failure to comply with costs orders

[Mohareb v Saratoga Marine Pty Ltd \[2020\] NSWCA 235](#)

APPEALS – application for leave to appeal – where submissions in support of application for leave to appeal were oppressive – where submissions were in flagrant breach of procedural rules under Uniform Civil Procedure Rules 2005 (NSW) – where application for leave did not raise issue of principle, question of public importance or a reasonably clear injustice

[Pham v State of New South Wales \[2020\] NSWCA 143](#)

CIVIL PROCEDURE – Court of Appeal – Leave to appeal – Where issue sought to be raised on appeal was not appropriately identified at trial – Not demonstrated that the primary judge fell into error rising above merely arguable – Leave refused

[Price v Price \[2020\] NSWCA 312](#)

APPEAL – application for leave to appeal from a costs order – amount in issue substantially less than \$100,000 – proper administration of justice required a grant of leave

[RD Miller Pty Ltd v Roads and Maritime Services NSW \[2020\] NSWCA 241](#)

APPEAL – interlocutory decisions to strike out pleadings and refuse leave to amend pleadings – application for leave to appeal – claim for compensation for loss of access to

controlled access road – statutory construction of Pt 4, Div 5 of *Roads Act 1993* – entitlement to compensation – access restricted or denied as a result of road “becoming” controlled access road – meaning of phrase “as a result of the road becoming” a controlled access road – whether road becomes controlled access road by the event of the Minister’s order declaring road to be a controlled access road or by a “course of conduct” – assessment of compensation – “market value of land” – whether *Pointe Gourde* principle applies in assessment of compensation

[Rinehart v Rinehart \[2020\] NSWCA 221](#)

JUDGMENTS AND ORDERS – orders concerning interim indemnification of previous trustee for costs of delivery of trust documents to new trustee – whether orders final or interlocutory – orders expressly stated to be subject to any further order – exercise of discretion by primary judge in case management and the working out of earlier orders – no final determination of the issues by primary judge – no utility in granting leave to appeal

[Ritson v Commissioner of Police, NSW Police Force \[2020\] NSWCA 5](#)

APPEAL – application for leave to appeal from a refusal of leave to appeal from a discretionary decision of the Local Court – no issue of principle

[Salih v Emirates \[2020\] NSWCA 215](#)

APPEALS – leave – applicant injured thumb when opening overhead compartment on international airlight – whether occurrence of injury was an “accident” within meaning of Art 17, Montréal Convention 1999 – *Civil Aviation (Carriers’ Liability) Act 1959* (Cth) s 9E – no question of principle – proposed appeal wholly concerned with factual findings – whether findings glaringly improbable – leave to appeal refused

[Tanious v NSW Land and Housing Corporation \[2020\] NSWCA 35](#)

APPEALS – leave to appeal under Supreme Court Act 1970 (NSW) s 101(2)(r) - appeal against primary judge’s refusal to grant leave to appeal against decision of NSW Civil and Administrative Tribunal – primary judge refused leave for failure to identify questions of law on appeal as required by Civil and Administrative Tribunal Act 2013 (NSW) s 83(1) – no error in primary judge’s reasons for refusing leave – application for leave to appeal dismissed

[Trent v Bolton \[2020\] NSWCA 268](#)

APPEALS – leave to appeal – assertion that primary judge erroneously relied on affidavits verifying pleadings as evidence – trial conducted with a “level of informality” and involved self-represented parties – findings of fact open to judge – no question of principle warranting a grant of leave

[Wang v State of New South Wales \[2020\] NSWCA 21](#)

APPEALS – application for leave to appeal against refusal of leave for tutor to conduct proceedings without engaging a solicitor – UCPR r 7.14(2)

[Wecker v Davison \[2020\] NSWCA 264](#)

CIVIL PROCEDURE — Court of Appeal — Leave to appeal – no issue of principle – leave refused

[Wilson v Chan & Naylor Parramatta Pty Ltd atf Chan & Naylor Parramatta Trust \[2020\] NSWCA 62](#)

APPEAL – requirement of leave – many proposed grounds of appeal – question whether NCAT had power to make costs order in proceedings based on federal law of general importance – although question not raised at first instance, question would arise between the same parties when costs order was sought to be enforced – no other question warranting grant of leave

[Zepinic v Chateau Constructions \(Aust\) Ltd \[2020\] NSWCA 291](#)

APPEAL – applicant for leave to appeal subject to vexatious proceedings order – application falling within scope of the order – no leave sought or granted under *Vexatious Proceedings Act 2008* (NSW) to institute application for leave to appeal – application to be dismissed by reason of that fact – application would in any event have been refused

[Zepinic v Malanos \[2020\] NSWCA 293](#)

APPEAL – applicant for leave to appeal subject to vexatious proceedings order – application falling within scope of the order – no leave sought or granted under *Vexatious Proceedings Act 2008* (NSW) to institute application for leave to appeal – application to be dismissed by reason of that fact – application would in any event have been refused

Application to adjourn

[Choi v University of Technology Sydney \(No 1\) \[2020\] NSWCA 341](#)

PRACTICE AND PROCEDURE – application for adjournment – no persuasive reason or basis to adjourn – application dismissed

Application to amend notice of appeal

[Baba v Sheehan \[2020\] NSWCA 361](#)

CIVIL PROCEDURE – Court of Appeal – Application for leave to amend notice of appeal to add additional ground alleging invalid appointment of trustee – Where issue not raised before primary judge – Where no practical utility in agitating ground in circumstances where validity of subsequent appointment of same trustee unchallenged – Where application not made until day of hearing – Leave refused

[Feldman v Nationwide News Pty Ltd & Ors \[2020\] NSWCA 200](#)

CIVIL PROCEDURE – Application for leave to further amend notice of appeal – Whether new issues raised by the proposed amendments – Whether respondents prejudiced by proposed amendments – no issue of principle

[Superannuation & Corporate Services Pty Ltd v Turner \[2020\] NSWCA 246](#)

AMENDMENT – appeal – notice of appeal – whether new ground of appeal should be permitted – late attempt to rely upon constraint in granting relief contained in *Contracts Review Act*, s 6(2) – amendment refused

Application for stay of garnishee pending appeal

[McEvoy v Wagglens Pty Ltd \[2020\] NSWCA 330](#)

APPEAL – stay – application for stay of garnishee pending appeal – appeal from judgment in Division on appeal from Local Court – respondent seeking to enforce costs orders – garnishee order issued – whether application for leave had reasonable prospects of success – small amount relative to statutory threshold for appeal as of right – no statement of specific grounds – likelihood of success leading to reversal of costs orders – evidence of non-recoverability if payments obtained

Application for stay of hearing and orders

[Bobolas v Waverley Council \[2020\] NSWCA 201](#)

APPEAL – application for order staying the hearing of judicial review proceedings in the Land and Environment Court – no basis demonstrated for appellate intervention in respect of a matter of practice and procedure

[Classic Bet \(NSW\) Pty Ltd & anor v KRM \(Vic\) Pty Ltd & anor; Kay v KRM \(Vic\) Pty Ltd \[2020\] NSWCA 6](#)

CIVIL PROCEDURE – Court of Appeal – application for stay pending appeal – no issue of principle – where limited evidence – conditional stay granted

[Coleman v Health Care Complaints Commission of NSW \[2020\] NSWCA 337](#)

CIVIL PROCEDURE – stay of proceedings – applicant a medical practitioner facing disciplinary proceedings in Tribunal and pending criminal proceedings – both proceedings to deal with the same alleged misconduct – application of *Zhao* (2015) 255 CLR 46 – applicant would suffer prejudice if disciplinary proceedings not stayed until criminal proceedings resolved – applicant’s registration as a medical practitioner suspended – delay in resolving disciplinary proceedings a relevant but not critical factor

[Dacich v Director of Public Prosecutions \(NSW\); Kennedy v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 313](#)

JUDGMENTS AND ORDERS – custodial sentence – application for special leave to appeal to High Court – application for stay – criteria for grant of special leave – whether exceptional circumstances – *Judiciary Act 1903* (Cth), s 35A

[Doyle v Commissioner of Police \(No 3\) \[2020\] NSWCA 240](#)

APPEAL – stay of execution – informal application for stay pending application for leave to appeal – whether issue already decided by Court of Appeal – whether already decided on remitter from Court of Appeal – whether subsequent High Court authority confirmatory of position – whether prospect of success and balance of convenience favoured a stay – application refused – orders made permitting access to seized item, subject to undertakings, for limited purpose of permitting Commissioner to be heard as to the grant of injunctive relief

[Grant v Grant \[2020\] NSWCA 328](#)

APPEALS – procedure – stay pending appeal – argument that appeal will be stultified if enforcement of judgment permitted – stay granted on terms providing reasonable protection to respondent

[Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd \[2020\] NSWCA 27](#)

APPEAL – application for stay – doubts about financial position of both appellant and respondent – stay ordered subject to payment of judgment sum into court within 14 days

[Mendonca v Tonna \[2020\] NSWCA 224](#)

PRACTICE AND PROCEDURE – application for stay – stay of orders of primary judge – application to reopen judgment dismissing appeal – application to rely on evidence not proffered at trial or on appeal relating to credibility of respondent

PRACTICE AND PROCEDURE – application for stay – stay of orders of primary judge – application for special leave to appeal to High Court of Australia – whether stay necessary to protect subject-matter of proposed appeal – whether substantial prospect that special leave to appeal will be granted

[Michael Wilson & Partners Limited v Emmott \[2020\] NSWCA 139](#)

CIVIL PROCEDURE – Court of Appeal – stay of orders – application for stay of orders requiring payment of costs thrown away on the occasion of a late adjournment application and security for the costs of the appeal – stay sought pending resolution of application in the United Kingdom to vary freezing order – where respondent consents to the variation of the order to the extent necessary to permit the appellant to comply with the orders sought to be stayed – stay sought pending the end of crisis measures in Kazakhstan to address the COVID-19 coronavirus pandemic

[Mr D v Ms P \[2020\] NSWCA 255](#)

APPEAL – application for stay of primary judgment – part of judgment unchallenged – partial stay ordered

[Snell v Glatis \[2020\] NSWCA 78](#)

PRACTICE AND PROCEDURE – stay of judgment pending appeal – capacity of appellant to pay debt – net worth in illiquid form – liquidation of personal assets during COVID-19 pandemic – short delay pending hearing of appeal – creditor a US citizen – stay of buy-out orders – conditions of stay

[Wallis v Rudek \[2020\] NSWCA 61](#)

JUDGMENTS AND ORDERS — Court of Appeal – whether order requiring vacant possession be stayed pending the resolution of appeal proceedings – COVID-19 pandemic – no issue of principle

Application to remove a party from proceedings

[Sayed v National Australia Bank \[2020\] NSWCA 88](#)

CIVIL PROCEDURE — Court of Appeal — Procedure — Application to remove a party from proceedings

Application to remove matter to High Court

[French v Bremner \[2020\] NSWCA 77](#)

CIVIL PROCEDURE – federal jurisdiction – application to remove matter to High Court – whether Judiciary Act 1903 (Cth), s 40(2) engaged – failure of respondent to file appearance in High Court – summary judgment sought in default of appearance – removal to the High Court not ordered

Application to reopen by non-party

[Lianos v Order of AHEPA NSW Inc \(No 3\) \[2020\] NSWCA 340](#)

APPEALS – reopening application by non-party – stay of orders pending determination of reopening application – extension of stay granted by court making orders – admissibility of further evidence

Application to reopen judgment dismissing appeal

[Mendonca v Tonna \(No 3\) \[2020\] NSWCA 332](#)

CIVIL PROCEDURE – application to reopen judgment dismissing appeal – where application relies in part on “further” evidence not led at trial or on appeal – no issue of principle

Application to set aside subpoena

[GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd \[2020\] NSWCA 266](#)

CIVIL PROCEDURE – subpoenas – application to set aside – documents to be produced

claimed to be the subject of legal professional privilege – whether privilege waived by conduct

Application to vacate hearing date

[Charlton v National Australia Bank Ltd \[2020\] NSWCA 237](#)

CIVIL PROCEDURE — Court of Appeal — procedure — application to vacate hearing date — no question of principle

[Dacich v Director of Public Prosecutions \(No 1\) \[2020\] NSWCA 297](#)

JUDICIAL REVIEW – adjournment – criminal proceedings – review of sentence appeal – applicant on bail – protracted procedural history – requirement for finality in criminal proceedings – claim to have lodged internal appeal from refusal of legal aid – bona fides of attempts to obtain legal representation – circumstances in which court may vacate hearing – *Legal Aid Commission Act 1979* (NSW), s 57

[French v Bremner \[2020\] NSWCA 77](#)

CIVIL PROCEDURE – application to vacate hearing date – COVID-19 pandemic – appellant with chronic medical condition living in the country – difficulty in coming to Sydney to prepare court books and seek legal advice – date fixed in absence of appellant through no fault on his part

[Herbert v New South Wales Land and Housing Corporation \[2020\] NSWCA 74](#)

CIVIL PROCEDURE – application to vacate hearing date – termination of residential tenancy agreement – effect of COVID-19 pandemic – whether moratorium on rental tenancy evictions – Residential Tenancies Regulation 2019 (NSW), Pt 6A

[Johnson v MacKinnon \[2020\] NSWCA 258](#)

CIVIL PROCEDURE – application to vacate hearing date

[Wardy v NSW Trustee and Guardian \(No 2\) \[2020\] NSWCA 271](#)

CIVIL PROCEDURE – Court of Appeal – application to vacate hearing

Additional evidence on appeal

[French v Bremner \[2020\] NSWCA 299](#)

PROCEDURE – additional evidence on appeal – fresh and further evidence – requirement that evidence could not have been obtained with reasonable diligence at trial – application in substance refused

Assignment to Court of Appeal

[Mohareb v Kelso \[2020\] NSWCA 105](#)

CIVIL PROCEDURE – Court of Appeal – application – assignment to the Court of Appeal for the punishment of contempt of the Court – assignment to the Court of Appeal of such matters as are necessary or convenient for the discharge of functions of the Court – notice of motion remitted to the Common Law Division of the Supreme Court

Bias

[Alexandria Landfill Pty Ltd v Transport for NSW \[2020\] NSWCA 165](#)

CIVIL PROCEDURE – apprehension of bias – apprehension alleged to arise solely from outcome of case and reasons for judgment – impermissible approach

[Burton v Babb \[2020\] NSWCA 331](#)

CIVIL PROCEDURE — Jury — Availability of jury trial — Interests of justice – where plaintiff alleged apprehended bias on the part of judicial officers – where first defendant is “well known in legal circles” and second defendant is “high profile” – held, no reasonable apprehension of bias – application for leave to appeal refused

[Clark v Attorney General of New South Wales \(No 2\) \[2020\] NSWCA 135](#)

PRACTICE AND PROCEDURE – bias rule – whether judge who sat on an appeal from the applicant’s conviction disqualified from sitting on judicial review proceeding

PRACTICE AND PROCEDURE – bias rule – whether reasons for final judgment can be relied on to sustain allegation of apprehended bias – whether reasons disclose actual bias

[Feldman v Nationwide News Pty Ltd \[2020\] NSWCA 260](#)

COURTS AND JUDGES – Apprehended bias – Application for recusal – where primary judge said to have raised voice towards counsel – where judge apologised for raising voice – whether outcome of hearing could bear on allegation of apprehended bias

[Kirby v Dental Council of NSW \[2020\] NSWCA 91](#)

ADMINISTRATIVE LAW – bias rule – actual or apprehended – apprehended – where apprehended bias alleged on basis of interest incompatible with role – whether primary judge erroneously considered notion of degree of closure of mind

[Kostov v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 94](#)

PROCEDURE – bias – application for disqualification for apprehended bias – where judge formerly retained by a particular law firm on behalf of a particular client – where client and law firm alleged to be involved in procurement of vexatious proceedings order – where no basis for allegation made out – consideration of principles concerning apparent bias in circumstances where judge formerly acted for a particular client or was retained by a particular law firm

[Mohareb v Booth \[2020\] NSWCA 49](#)

PRACTICE AND PROCEDURE – procedural fairness – bias – actual or apprehended – other proceedings affected – other parties not heard – whether allegations should be resolved

[Mohareb v Palmer \[2020\] NSWCA 323](#)

PRACTICE AND PROCEDURE – recusal application – reasonable apprehension of bias – appeal from vexatious proceedings order – presiding judge having sat on prior appeal and leave application characterised as vexatious – reliance on transcript – other member of the earlier court dismissive of applicant's case

[Quach v New South Wales Civil and Administrative Tribunal \[2020\] NSWCA 214](#)

JUDGMENTS AND ORDERS – Court of Appeal – bias – apprehended bias on the ground of prejudgment – where members of the Court sat on previous unsuccessful applications by the applicant

[Studholme v Rawson \[2020\] NSWCA 76](#)

APPEAL – grounds – order of consideration – bias – effect on trial – need to address first

BIAS – prejudgment – trial judge expressed views based on filed evidence – views expressed to counsel in chambers – reliance on statements in judgment – reliance on overriding purpose in Civil Procedure Act 2005 (NSW), Pt 6 – acquiescence or waiver – statements revealing legal error, not prejudgment

[Windsor v Health Care Complaints Commission \[2020\] NSWCA 110](#)

ADMINISTRATIVE LAW – bias rule – where Tribunal member ineligible to sit – where fresh Tribunal empanelled – where fresh Tribunal rejected submissions of medical practitioner – whether Tribunal affected by actual or apprehended bias

Effect of power of attorney

[Windsor v Health Care Complaints Commission \(No 1\) \[2020\] NSWCA 16](#)

APPEAL – whether power of attorney from party confers right to appear on behalf of the party – Notice of Motion dismissed

Extension of time to commence appeal

[Bauskis v Wainhouse & Ors \[2020\] NSWCA 17](#)

CIVIL PROCEDURE – application for extension of time to file summons seeking leave to appeal – application refused – no issue of principle

[Eshow v Zaia \[2020\] NSWCA 10](#)

APPEAL – extensions of time to file Notices of Appeal refused – no arguable basis for appeals from judgments awarding damages for defamation and finding contempt for breach of injunction against further publication – whether sealed copy of orders required to be served for purposes of contempt proceedings

[Gersbach v Gersbach \[2020\] NSWCA 153](#)

PROCEDURE – appeals – extension of time – application for extension of more than a year to bring appeal – applicant mentally unwell – poor prospects of success – change of position by respondent during previous year – more than usual prejudice in responding to appeal – extension refused

[Naidu v State of New South Wales \[2020\] NSWCA 147](#)

APPEALS – leave – extension of time – appeal from Workers Compensation Commission refusing substantial extension of time to appeal from arbitrator's decision – requirement of "exceptional circumstances" in order to grant extension – Deputy President found exceptional circumstances not established – Deputy President considered appeal not fairly arguable – no basis for grant of leave to bring a further appeal made out

Freezing orders

[Gwe v Commissioner of the Australian Federal Police \[2020\] NSWCA 247](#)

PROCEEDS OF CRIME – Freezing orders – *Proceeds of Crime Act 2002* (Cth) – application to exclude property from restraining order – whether frozen property was acquired in circumstances that would not arouse a reasonable suspicion that property was proceeds of an offence – whether exclusion order should have been made in relation to the property – where applicant had provided sufficient consideration and did not have actual knowledge that the property constituted proceeds of an offence – significance of failure to cross-examine – whether inferences sought to be drawn available in the absence of cross-examination

[Gwe v Commissioner of the Australian Federal Police \(No 2\) \[2020\] NSWCA 350](#)

PROCEEDS OF CRIME – award of costs – whether “all costs” should be awarded to the appellants who succeeded in securing an order that certain property be excluded from a freezing order

[Super Vision Resources Ltd v AC Holdings Co Pty Ltd \[2020\] NSWCA 244](#)

CIVIL PROCEDURE – appeal from decision dismissing claim to have sales transactions declared void – where respondents gave undertakings in the nature of freezing orders to preserve the moneys the subject of the appeal – application by respondents for release of funds for legal expenses and living expenses of company director

Informal directions hearings

[Studholme v Rawson \[2020\] NSWCA 76](#)

PRACTICE AND PROCEDURE – open justice – holding “informal directions hearings” in chambers – no access for public – absence of parties – no record of conversation – risk of participants becoming witnesses – practice decried

Jury trial

[Burton v Babb \[2020\] NSWCA 331](#)

CIVIL PROCEDURE — Jury — Availability of jury trial — Interests of justice – where plaintiff alleged apprehended bias on the part of judicial officers – where first defendant is “well

known in legal circles” and second defendant is “high profile” – held, no reasonable apprehension of bias – application for leave to appeal refused

Legal incapacity

[Macura v Sarasevic & Anor \[2020\] NSWCA 119](#)

CIVIL PROCEDURE — Parties — Persons under legal incapacity — Tutors – whether appellant under legal incapacity for the purposes of r 7.14 Uniform Civil Procedure Rules 2005 (NSW) – where appellant represented by a tutor before the primary judge – whether to dispense with the requirement for proceedings to be commenced or carried on by a tutor – where change in appellant’s circumstances since the appointment of a tutor by the primary judge

Litigants in person

[Mohareb v Saratoga Marine Pty Ltd \[2020\] NSWCA 235](#)

PROCEDURE – litigants in person – unrepresented litigants – importance of adhering to length, content and form requirements for written submissions as set out in Uniform Civil Procedure Rules 2005 (NSW) – importance of adhering to procedural rules to ensure costs to parties are proportionate to complexity of subject matter in dispute – no special rules or treatment for litigants in person

Necessary and proper parties

[Burton v Babb \[2020\] NSWCA 331](#)

CIVIL PROCEDURE — Parties — Joinder of defendant — whether necessary party – application by State of New South Wales to be joined as party to action in which the State admitted vicarious liability in relation to torts pleaded against defendants – no conclusion that State ought to have been joined by plaintiff as a party – held, not necessary for resolution of all matters for State to be joined

[MIR Holdings Pty Ltd v Marina Square Retail Pty Ltd \[2020\] NSWCA 286](#)

CIVIL PROCEDURE – parties – necessary and proper – where third-party lessees of premises not joined to proceedings for relief against forfeiture brought by earlier lessees

Notice of appearance

[Herbert v New South Wales Land and Housing Corporation \[2020\] NSWCA 74](#)

CIVIL PROCEDURE – appearance – failure to file notice of appearance – Uniform Civil Procedure Rules 2005 (NSW), rr 51.5; 6.9; 6.11

Notices to admit

[Super Vision Resources Ltd BVI Registered No 1810534 v AC Holdings Co Pty Ltd \[2020\] NSWCA 319](#)

CIVIL PROCEDURE – notices to admit – where formal admission made by the transferring party that transfer made with intent to defraud – whether admission binding on other parties to proceeding against whom intent to defraud must be proved

Notices to produce

[Michael Wilson & Partners Limited v Emmott \[2020\] NSWCA 139](#)

CIVIL PROCEDURE – Court of Appeal – notice to produce – where served by appellant when the prosecution of the appeal is stayed – where served on a party who objects to the jurisdiction of the Court – whether respondent has submitted to the Court’s jurisdiction or waived his right to object to jurisdiction by seeking costs, security for costs and an order relieving him of the obligation to comply with the notice to produce

[Sayed v National Australia Bank \[2020\] NSWCA 88](#)

CIVIL PROCEDURE — Court of Appeal — Procedure — Notice to produce — Application to restrain further notices to produce

Pleadings

[Sayed v National Australia Bank \[2020\] NSWCA 334](#)

CIVIL PROCEDURE – pleadings – requirement for particularity – conclusory statements in pleadings alleging collusion, fraud and gross negligence by mortgagee in exercise of power of sale

Procedural fairness

[Alexandria Landfill Pty Ltd v Transport for NSW \[2020\] NSWCA 165](#)

CIVIL PROCEDURE – procedural fairness – judge expressed preference for one expert over another allegedly on the basis of material not in evidence – finding held properly based on evidence

[Coffs Harbour City Council v Noubia Pty Ltd \[2020\] NSWCA 142](#)

CIVIL PROCEDURE – hearings – procedural fairness – judge preferring evidence of one expert over another – earlier role of expert addressed during proceedings – basis of preference based on earlier role – no unfairness

[Riva NSW Pty Ltd v Mark A Fraser & Christopher P Clancy t/as Fraser Clancy Lawyers \[2020\] NSWCA 210](#)

CIVIL PROCEDURE – directions by primary judge concerning non-parties to notice of motion including legal representatives – directions required their conduct to be brought to attention of regulatory, prosecutorial and disciplinary authorities – relevant persons not given an opportunity to be heard – denial of procedural fairness – declaration made as to invalidity of the subject directions

Pseudonym orders

[DRJ v Commissioner of Victims Rights \[2020\] NSWCA 136](#)

PROCEDURE - pseudonym orders under *Court Suppression and Non-publication Orders Act 2010* (NSW) - requirement to take into account public interest in open justice - requirement to specify basis and duration - requirement that order be necessary - contrast with orders under *Civil and Administrative Tribunal Act 2013* (NSW) s 64

Refusal of special leave application

[Sydney Local Health District v Macquarie International Health Clinic Pty Ltd \[2020\] NSWCA 274](#)

PROCEDURE – where orders for possession made pending further order – consequence of refusal of special leave application – whether refusal of application for special leave had the effect of lifting stay of orders made by Court of Appeal – whether stay of orders needed to be expressly lifted by Court of Appeal

Removal of parties

[Burton v Babb \[2020\] NSWCA 331](#)

CIVIL PROCEDURE — Parties — Removal of parties – where primary judge ordered removal of two named defendants under r 6.29 UCPR after joinder of State – held, joinder of State did not mean that named defendants ceased to be necessary or proper parties

Representative proceedings

[Brewster v BMW Australia Ltd \[2020\] NSWCA 272](#)

REPRESENTATIVE PROCEEDINGS – separate question – whether Supreme Court has power pursuant to s 173 of the *Civil Procedure Act 2005* (NSW) to make an order requiring unfunded group members to pay an amount to that funder out of the proceeds of any settlement by way of return on expenditure, commission or other similar remuneration to the funder? – whether appropriate to answer the question prior to any settlement having been reached and without knowledge of terms of settlement or orders proposed to be made by the Court following settlement – whether the question determined by decision of High Court of Australia in *BMW Australia Ltd v Brewster* (2019) 94 ALJR 51; [2019] HCA 45 – different factual context of that decision – answer to separate question posed not obviously answered by majority judgments in that decision.

[Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru \(Aust\) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co \(Australia\) Pty Ltd; Coates v Mazda Australia Pty Ltd; Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia \[2020\] NSWCA 66](#)

CIVIL PROCEDURE – representative proceedings – Part 10 Civil Procedure Act – group members – s 183 – interlocutory order made to facilitate settlement at proposed mediation – registration of group members – group members who did not register barred from receiving any settlement amount – order that group members barred from bringing subsequent proceedings against defendant – power to make order

CIVIL PROCEDURE – representative proceedings – Part 10 Civil Procedure Act – group members – s 183 – registration of group members – group members who did not register barred from receiving any settlement and from bringing subsequent proceedings against defendant – whether discretion to make order miscarried

[Stewart v Uber Technologies Incorporated \[2020\] NSWCA 208](#)

CROSS VESTING – group proceedings – where similar class action proceedings pending in Supreme Court of Victoria against same defendants/respondents – where concern about operation and continuing efficacy of tolling provision in s 182 of Civil Procedure Act 2005 (NSW) in the event that proceedings cross vested to Supreme Court of Victoria – where risk of prejudice to group members – where undertakings given to negative prejudice

[Wigmans v AMP Ltd \[2020\] NSWCA 104](#)

Submissions

[McEvoy v Wagglens Pty Ltd \[2020\] NSWCA 330](#)

PRACTICE AND PROCEDURE – appeal – submissions – application for waiver of rule limiting length of summary of argument – straightforward factual case – no basis for lengthy submissions

[Mohareb v Saratoga Marine Pty Ltd \[2020\] NSWCA 235](#)

PROCEDURE – litigants in person – unrepresented litigants – importance of adhering to length, content and form requirements for written submissions as set out in Uniform Civil Procedure Rules 2005 (NSW) – importance of adhering to procedural rules to ensure costs to parties are proportionate to complexity of subject matter in dispute – no special rules or treatment for litigants in person

Tutors

[JE v Secretary, Department of Communities and Justice \[2020\] NSWCA 123](#)

PRACTICE – parties – supervisory jurisdiction – review of orders made by District Court dismissing appeal from Children's Court – whether sibling of child should be joined to appeal – whether child the subject of the appeal required tutor – joinder refused, requirement for tutor dispensed with

[Macura v Sarasevic & Anor \[2020\] NSWCA 119](#)

CIVIL PROCEDURE — Parties — Persons under legal incapacity — Tutors – whether appellant under legal incapacity for the purposes of r 7.14 Uniform Civil Procedure Rules 2005 (NSW) – where appellant represented by a tutor before the primary judge – whether to dispense with the requirement for proceedings to be commenced or carried on by a tutor – where change in appellant's circumstances since the appointment of a tutor by the primary

judge

Variation to interlocutory orders

[GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd \[2020\] NSWCA 266](#)

CIVIL PROCEDURE – variations to interlocutory orders – often preferable to approach first instance judge again rather than seek leave to appeal

10. Commissions of Inquiry

Royal Commission into Institutional Response to Child Sexual Abuse

[Feldman v Nationwide News Pty Ltd \[2020\] NSWCA 260](#)

COMMISSIONS OF INQUIRY – Royal Commission into Institutional Responses to Child Sexual Abuse – Where transcript and video of appellant’s evidence to Royal Commission admitted in aid of a defence to an action for defamation – Whether s 6DD of the *Royal Commissions Act 1902* (Cth) prevents admission of such evidence – Whether s 6DD only precludes admission of evidence given in a Royal Commission in order to establish civil or criminal liability of person who gave such evidence

Powers of a commissioner under Royal Commissions Act 1923 (NSW)

[Attorney General for New South Wales v Melco Resorts & Entertainment Limited \[2020\] NSWCA 40](#)

COMMISSIONS OF INQUIRY – inquiry established under Casino Control Act 1992 (NSW) – whether conferral of powers and authorities of a commissioner under the Royal Commissions Act 1923 (NSW) included power to compel testimony or production of documents irrespective of claim of legal professional privilege – meaning of s 143A of Casino Control Act – whether a witness summoned by or appearing before the person presiding at an inquiry entitled to claim legal professional privilege

11. Constitutional Law

Chapter III of the Commonwealth Constitution

[Lawrence v State of New South Wales \[2020\] NSWCA 248](#)

CONSTITUTIONAL LAW – Commonwealth Constitution – Chapter III – *Terrorism (High Risk Offenders) Act 2017* (NSW) – whether the Act is constitutionally invalid – involuntary

detention of a citizen by the State – preventative detention orders – whether the Act directs the Supreme Court as to the manner of the exercise of its jurisdiction – judicial discretion – whether the Act creates procedural unfairness – whether the Act is inconsistent with the institutional integrity of the Supreme Court as a repository of federal jurisdiction

Civil and Administrative Tribunal Act 2013 (NSW) Pt 3A

[Gaynor v Attorney General of New South Wales \[2020\] NSWCA 48](#)

CONSTITUTIONAL LAW – whether Part 3A of Civil and Administrative Tribunal Act 2013 (NSW) unconstitutional – whether, notwithstanding Part 3A, NCAT invested with federal jurisdiction – whether Part 3A entails discrimination contrary to s 117 of the Commonwealth Constitution

Federal jurisdiction

[French v Bremner \[2020\] NSWCA 77](#)

CONSTITUTIONAL LAW – federal jurisdiction – jurisdiction of Supreme Court to make order which could be made by a Justice of the High Court sitting in chambers – whether Judiciary Act 1903 (Cth), s 17 engaged – jurisdiction of High Court to control its business – Constitution, s 73

Judicial power

[Wilson v Chan & Naylor Parramatta Pty Ltd \[2020\] NSWCA 213](#)

CONSTITUTIONAL LAW — Judicial power — Whether decision of the NSW Civil and Administrative Tribunal as to its jurisdiction was an exercise of the judicial power of the Commonwealth – Nature of the anterior jurisdiction of the Tribunal to consider its authority to decide

CONSTITUTIONAL LAW — Judicial power — Whether the Tribunal has power to order costs consequential on a dismissal or transfer of proceedings for want of Federal jurisdiction – Whether power to make such an order outside of the State’s legislative competence to confer on the Tribunal– Whether making such an order would occasion the Tribunal impermissibly exercising the judicial power of the Commonwealth

Operation of State law

[Herbert v New South Wales Land and Housing Corporation \[2020\] NSWCA 74](#)

CONSTITUTIONAL LAW – operation of State law – whether inconsistent federal law – Government policy not a law – no notice given to Attorneys General – Judiciary Act 1903 (Cth), s 78B – Constitution, s 109 – no inconsistency

State Constitution

[DRJ v Commissioner of Victims Rights \(No 2\) \[2020\] NSWCA 242](#)

CONSTITUTIONAL LAW - State Constitution - extra-territorial operation of legislation - power to provide for - drafting techniques - desirability of providing explicit legislative guidance as to intended territorial reach of laws

12. Contract

Agency agreement

[Al Maha Pty Ltd v Liu \[2020\] NSWCA 108](#)

CONTRACT – agency agreement – entitlement to commission – agency agreement drafted by client – client an experienced property developer – agreement did not comply with Property, Stock and Business Agents Act 2002 (NSW), s 55 – agent sued to recover unpaid commission – whether discretion under s 55A available and should be exercised

Breach of contract

[Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd \[2020\] NSWCA 25](#)

CONTRACT – Breach of Contract – whether ‘show cause notice’ was validly issued in circumstances where the power to issue the notice was conferred on the principal’s representative – where principal was involved in the principal’s representative’s decision to issue the notice – notice validly issued as principal’s representative gave adequate and proper consideration to issuing the notice and it would be inconsistent with the principal’s right to see that its representative acts properly if it could not be involved in the decision

[DIF III – Global Co-Investment Fund L.P v DIF Capital Partners Limited \[2020\] NSWCA 124](#)

CONTRACT – admitted breach of contract – causation of loss where alleged that, had proper due diligence been undertaken, an investment would not have been made – whether trial judge erred in holding that no damage was suffered by reason of breach of contract

[Lawrence v Cianzar \[2020\] NSWCA 89](#)

CONTRACTS – Breach of contract – Consequences of breach – Right to termination – No specific performance

[Macquarie International Health Clinic Pty Ltd v Sydney Local Health District \[2020\] NSWCA 161](#)

CONTRACTS – breach of contract – consequences of breach – right to termination – where Notices of Default and Notices of Termination issued – whether non-compliance with the Notice of Default gave the right to terminate the agreement – notices under s 129 *Conveyancing Act 1919* (NSW) – reasonable time under the Notice to remedy default

[Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd \[2020\] NSWCA 234](#)

CONTRACTS – breach of contract – whether force majeure clause excused the appellant’s breaches – appellant bore the onus of establishing the applicability of the clause – clause provided an exception to, rather than a qualification of, the appellant’s promises

Certainty

[GC NSW Pty Ltd v Galati \[2020\] NSWCA 326](#)

CONTRACTS – formation – intention to create legal relations – uncertainty and incompleteness – owners of three contiguous parcels of land dealt with development group in relation to proposed sale of land for redevelopment – where put and call option deeds entered into – where one owner entered into separate deed for the purchase back of five developed lots – where agreement reached on various matters between parties’ agents at later meeting – whether intention to create legal relations at later meeting – whether terms of agreement at meeting were void for uncertainty and incompleteness

Construction and interpretation

[C & V Engineering Pty Ltd v Hamilton & Marino Builders Pty Ltd \[2020\] NSWCA 103](#)

CONTRACTS — Construction — Interpretation — whether contract formed pursuant to the appellant’s offer or the respondent’s counter-offer – whether the proper construction of the contract required supply of building materials and services at a price per unit as required or at a fixed sum – where quantity of units required unknown at the time of contracting – where context and businesslike construction militate against fixed sum

[HDI Global Specialty SE v Wonkana No. 3 Pty Ltd \[2020\] NSWCA 296](#)

CONTRACTS – Construction – Interpretation – Where exclusion clause in insurance policy referred to particular legislation “and subsequent amendments” – Whether replacement legislation a “subsequent amendment”

CONTRACTS – Construction – Principles – Correction of mistakes by construction – Where policy includes a reference to repealed legislation – Whether parties may be taken to have known of repeal and replacement of repealed legislation as part of surrounding circumstances – Whether reference absurd or clear mistake – Whether reference to be construed as reference to replacement legislation in light of surrounding circumstances

[James Adam Pty Ltd v Fobeza Pty Ltd \[2020\] NSWCA 311](#)

CONTRACTS - construction - mistake - whether mistake can be corrected by construction - contract for sale of proposed lot defined by reference to sketch plan - vendor obliged to procure subdivision in accordance with sketch plan - sketch plan showed area of 2001m² - purchaser entitled to rescind if registered plan contained area of 2100m² or more - whether literal meaning of language created absurdity or inconsistency - whether objective intention self-evident - consideration of relationship between construction and rectification - consideration of the term “rectification”

[Kay v KRM \(Vic\) Pty Ltd;; Classic Bet \(NSW\) Pty Ltd v Kay & Ors \[2020\] NSWCA 92](#)

CONTRACTS — Construction — Interpretation –whether proper construction required that when a liability was incurred under the clause it was incurred collectively by all three promisees regardless of the promisees’ contribution to that liability – whether proper construction of the phrase ‘collectively and individually, as the case may be’ was akin to joint and several liability – where value of the liability was contingent on calculating the commissions earned by each promisee individually - where the promisees’ dealings resulted in an unequal contribution to the total size of the liability incurred

CONTRACTS — Construction — Interpretation – whether promise by seller to indemnify the buyer against liabilities incurred by the company prior to completion was also a promise to the company – where liability potentially incurred prior to completion but not acquitted in final settlement calculations

CONTRACTS — Construction — Interpretation – whether a contract to pay commission on Net Cash generated by introduced clients created a liability upon entry into the contract – where at the time of entry no clients had been introduced – where numerous contingencies must eventuate for a liability to crystallise

CONTRACTS — Construction — Interpretation – whether email correspondence amounted to a Notice of Proposed Change of Control pursuant to the contract – where emails not expressed to be such a notice – where context in which the emails were sent militated against the conclusion that they were contractual notices

[Motor Yacht Sales Australia Pty Ltd v Blann \[2020\] NSWCA 349](#)

CONTRACTS — Construction — Interpretation – whether contract for sale of a vessel with an annexed marina berthing agreement form a single agreement – whether special condition

to contract for sale imposes an obligation to rent a marina berth for a fixed term – whether special condition is inconsistent with an implied right to terminate on notice arising from the standard terms of the annexed marina berthing agreement – primacy between inconsistent terms

[Pittmore Pty Ltd v Chan; Chan v Tan \[2020\] NSWCA 344](#)

CONTRACTS – construction – whether mistake in written agreement can be rectified by construction – inconsistency concerning right to terminate on face of document – primacy given to handwritten amendments

[Segal v Sharma \[2020\] NSWCA 314](#)

CONTRACTS – construction and interpretation – where agreement as to “commercial arrangements” to apply to radiology practice conducted through corporate trustee of unit trust – where units held by doctors’ discretionary trusts – whether doctors liable to pay shortfall in event business runs at loss – whether loss had to be based on audited financial accounts – no question of principle

[White Constructions Pty Ltd v PBS Holdings Pty Ltd \[2020\] NSWCA 277](#)

CONTRACT – contractual interpretation – whether warranties in a multi-party deed were made in favour of all parties to the deed or only one party

Damages

[Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd \[2020\] NSWCA 234](#)

CONTRACTS – damages – whether damages for wasted expenditure or reliance damages can only be awarded where it is impossible to quantify expectation damages – *Amann Aviation* 174 CLR 64 – Court may award reliance damages where the evidence does not establish any loss of profits – evidence not sufficient to discharge appellant’s onus of proving it unlikely respondent would have earned sufficient revenue to cover its costs over the term of the contract

[Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor \[2020\] NSWCA 358](#)

CONTRACTS – Remedies – Damages – where loss claimed would have been suffered if contract had been properly performed

Deeds of release

[Gardiner v Laing O'Rourke Australia Construction Pty Ltd \[2020\] NSWCA 151](#)

DEEDS – deed of release – construction – express terms of deed – whether deed of release relating to the settlement of complaints relating to discriminatory conduct discharged liabilities arising out of workers' compensation legislation – where entitlement to sue under workers compensation legislation expressly preserved

Dependent and independent obligations

[Kay v Playup Australia Pty Ltd \[2020\] NSWCA 33](#)

CONTRACTS – Construction – Interpretation – Dependent and independent obligations – Whether 'clear words' are required to find a relation of independency between obligations

Dispute resolution clause

[Inghams Enterprises Pty Limited v Hannigan \[2020\] NSWCA 82](#)

CONTRACT – dispute resolution clause – clause contemplating court proceedings in some circumstances and arbitration proceedings in other circumstances – proper construction of the clause – whether a claim for damages for breach of contract “concerned” a “monetary amount payable and/or owed” “under” the agreement

CONTRACT – construction and interpretation – multi-tiered dispute resolution clause – principles applicable to construction of dispute resolution clauses

[Lepcanfin Pty Ltd v Lepfin Pty Ltd \[2020\] NSWCA 155](#)

CONTRACT – dispute resolution clauses – expert determination clause – separate Expert Determination Agreement entered into – whether expert exceeded her mandate in determining that clause in a Development Deed was a penalty – construction of ambit of separate Expert Determination Agreement – when one party to dispute initially accepted that penalty issue fell within scope of Expert Determination Agreement and then resiled from that fact – whether party estopped from resiling from initial position – whether other issues sought to be raised in Commercial List proceedings but which had not been the subject of expert determination could be litigated – whether primary judge erred in staying litigation of those issues

Entitlement to commission

[Norton Property Group Pty Ltd v Ozzy States Pty Ltd \(in liq\) \[2020\] NSWCA 23](#)

CONTRACT - real estate agent buyers agreement - entitlement to commission - agreement between property developer and real estate agent - agent to acquire options over seven contiguous parcels of land - options acquired over some of land - options never exercised by developer - agent rendered invoices for commission as options acquired - some invoices paid - whether agent entitled to commission for obtaining options which were never exercised

[Outerbridge trading as Century 21 Plateau Lifestyle Real Estate v Hall \[2020\] NSWCA 205](#)

CONTRACTS – real estate agent agreement – non-exclusive agents – entitlement to commission – buyer introduced by first agent who then left for holidays when prospect of a sale appeared lost – buyer contacted second agent to look for other properties – sale then revived and completed – whether the first agent was the, or an, effective cause of the sale of the property – mere introduction of the buyer to the property is insufficient – appeal dismissed

Expert determination clause

[Lepcanfin Pty Ltd v Lepfin Pty Ltd \[2020\] NSWCA 155](#)

CONTRACT – dispute resolution clauses – expert determination clause – separate Expert Determination Agreement entered into – whether expert exceeded her mandate in determining that clause in a Development Deed was a penalty – construction of ambit of separate Expert Determination Agreement – when one party to dispute initially accepted that penalty issue fell within scope of Expert Determination Agreement and then resiled from that fact – whether party estopped from resiling from initial position – whether other issues sought to be raised in Commercial List proceedings but which had not been the subject of expert determination could be litigated – whether primary judge erred in staying litigation of those issues

Formation

[GC NSW Pty Ltd v Galati \[2020\] NSWCA 326](#)

CONTRACTS – formation – intention to create legal relations – uncertainty and incompleteness – owners of three contiguous parcels of land dealt with development group in relation to proposed sale of land for redevelopment – where put and call option deeds entered into – where one owner entered into separate deed for the purchase back of five developed lots – where agreement reached on various matters between parties' agents at

later meeting– whether intention to create legal relations at later meeting – whether terms of agreement at meeting were void for uncertainty and incompleteness

CONTRACTS – formation – whether deed which provided for purchase back of five lots abandoned by parties – whether purchaser entitled to damages for breach of deed – where primary judge left undetermined possible basis for finding damages for breach of deed – damages claim remitted for the determination

Good faith obligation

[Macquarie International Health Clinic Pty Ltd v Sydney Local Health District \[2020\] NSWCA 161](#)

CONTRACTS – construction – context – whether party was in default of its obligations under the agreement – whether party had certain powers under the agreement – whether a discretion provided under the agreement was subject to a good faith obligation

Intention to create legal relations

[GC NSW Pty Ltd v Galati \[2020\] NSWCA 326](#)

CONTRACTS – formation – intention to create legal relations – uncertainty and incompleteness – owners of three contiguous parcels of land dealt with development group in relation to proposed sale of land for redevelopment – where put and call option deeds entered into – where one owner entered into separate deed for the purchase back of five developed lots – where agreement reached on various matters between parties’ agents at later meeting– whether intention to create legal relations at later meeting – whether terms of agreement at meeting were void for uncertainty and incompleteness

Misleading or deceptive conduct

[James v Australia and New Zealand Banking Group Ltd \[2020\] NSWCA 101](#)

CONTRACTS – grounds for setting aside – misleading or deceptive conduct – non-disclosure of information – relevance of actual or constructive knowledge of silent party as to complainant’s beliefs – relevance of undisclosed beliefs of complainant

[Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd \[2020\] NSWCA 223](#)

CONTRACTS — Misleading conduct under statute — Misleading or deceptive conduct — Representations — Loss — Causation and remoteness

CONTRACTS — Misleading conduct under statute — Remedies — Measure of damages — Where loss of opportunity

Mistakes

[James Adam Pty Ltd v Fobeza Pty Ltd \[2020\] NSWCA 311](#)

CONTRACTS - construction - mistake - whether mistake can be corrected by construction - contract for sale of proposed lot defined by reference to sketch plan - vendor obliged to procure subdivision in accordance with sketch plan - sketch plan showed area of 2001m² - purchaser entitled to rescind if registered plan contained area of 2100m² or more - whether literal meaning of language created absurdity or inconsistency - whether objective intention self-evident - consideration of relationship between construction and rectification - consideration of the term “rectification”

[Pittmore Pty Ltd v Chan; Chan v Tan \[2020\] NSWCA 344](#)

CONTRACTS – construction – whether mistake in written agreement can be rectified by construction – inconsistency concerning right to terminate on face of document – primacy given to handwritten amendments

EQUITY – rectification – whether contract should be rectified in equity if mistake incapable of being corrected by construction

Oral contracts

[French v Bremner; Bremner v French \[2020\] NSWCA 339](#)

CONTRACT – oral contracts concerning debt, joint venture to exploit inventions and rural properties – primary judge rejected claims in contract – no claim advanced in equity for partnership or breach of fiduciary duty – such claim renounced by senior counsel appearing at trial – no error in primary judge declining to address such claim – no error in rejection of oral contracts – appeal dismissed

Principles of construction

[Lawrence v Ciantar \[2020\] NSWCA 89](#)

CONTRACTS – Construction – Interpretation – Principles of construction of commercial contracts

Rectification

[James Adam Pty Ltd v Fobeza Pty Ltd \[2020\] NSWCA 311](#)

CONTRACTS - construction - mistake - whether mistake can be corrected by construction - contract for sale of proposed lot defined by reference to sketch plan - vendor obliged to procure subdivision in accordance with sketch plan - sketch plan showed area of 2001m² - purchaser entitled to rescind if registered plan contained area of 2100m² or more - whether literal meaning of language created absurdity or inconsistency - whether objective intention self-evident - consideration of relationship between construction and rectification - consideration of the term “rectification”

Registered lease

[MIR Holdings Pty Ltd v Marina Square Retail Pty Ltd \[2020\] NSWCA 286](#)

REAL PROPERTY – landlord and tenant – agreements for lease – breach – *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) – where tenants in arrears before the relevant “prescribed period” – leave to appeal refused in circumstances where all necessary and proper parties not joined in proceedings

[Spotlight Pty Ltd v Fatseas Investments Pty Ltd \[2020\] NSWCA 132](#)

CONTRACTS – registered lease – where leased premises damaged as a result of water overflowing from box gutters on roof – where lessee covenanted to maintain and repair leased premises and to regularly clean and clear gutters, drains and downpipes – where installation of decorative grates and gauze in box gutters was a cause of damage to leased premises – whether the installation of grates and gauze constituted a breach of lessee’s covenants – whether lessor entitled to indemnity

Remedies

[C & E Critharis Constructions Pty Ltd v Cubic Metre Pty Ltd \[2020\] NSWCA 348](#)

CONTRACTS – remedies – damages – sub-contractor breached contract with builder by supplying and installing materials unfit for purpose – builder paid in full by proprietors and no

prospect of it rectifying work – builder not exposed to risk of liability to proprietors – builder did not prove that it suffered loss

[Kay v Playup Australia Pty Ltd \[2020\] NSWCA 33](#)

CONTRACTS – Remedies – Penalty – Doctrine extends beyond payment of a stipulated sum of money to deprivation of contractual rights – Application to deprivation of the benefit of restraint clause and warranties

[Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor \[2020\] NSWCA 358](#)

CONTRACTS – Remedies – Damages – where loss claimed would have been suffered if contract had been properly performed

Rescission

[Scott v Ennis-Oakes \[2020\] NSWCA 239](#)

LAND LAW – Conveyancing – Contract for sale – Rescission – Respondent wished to rescind contract – Appellants did not consent to proposed rescission and maintained contract was “still on foot” – Appellants elected to affirm contract rather than terminating and seeking loss of bargain damages – Appellants sought orders for specific performance – Respondent subsequently entered into a Scheme of Arrangement Deed and sought to rescind the contract on this basis – Appellants sought loss of bargain damages – Whether contract came to an end because of supervening circumstances – Whether appellants entitled to loss of bargain damages at the time when respondent terminated contract on basis of entering into Scheme of Arrangement

Show cause notice

[Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd \[2020\] NSWCA 25](#)

CONTRACT – Breach of Contract – whether ‘show cause notice’ was validly issued in circumstances where the power to issue the notice was conferred on the principal’s representative – where principal was involved in the principal’s representative’s decision to issue the notice – notice validly issued as principal’s representative gave adequate and proper consideration to issuing the notice and it would be inconsistent with the principal’s right to see that its representative acts properly if it could not be involved in the decision

Take out notice

[Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd \[2020\] NSWCA 25](#)

CONTRACT – Breach of Contract – whether ‘take out notice’ was validly issued where its validity was contingent on the principal’s representative being satisfied that the default that was the subject of the ‘show cause notice’ had not been remedied or the contractor had otherwise failed to show cause – not shown that the principal’s representative failed to give adequate and proper consideration to the issues – not shown that the principal’s representative did not possess the relevant satisfaction

Unjust contracts

[Magann v The Trustees of the Roman Catholic Church for the Diocese of Parramatta \[2020\] NSWCA 167](#)

APPEAL – standard of appellate review in relation to finding that a contract is unjust or not unjust within the meaning of the Contracts Review Act 1980 (NSW).

CONTRACTS – deed of settlement and release relating to claims of alleged historical child sex abuse – where appellant signed deed releasing respondents from any liability in respect of claims – whether litigation needed to be on foot for deed of release to be effective – whether primary judge erred in determination of separate question that the deed extinguished liability of the respondents.

CONTRACTS – unjust contracts – Contracts Review Act 1980 (NSW) – whether primary judge erred in not holding that a deed of settlement relating to claims of alleged historic child sex abuse was unjust

[Superannuation & Corporate Services Pty Ltd v Turner \[2020\] NSWCA 246](#)

CONTRACTS – unjust contracts – *Contracts Review Act 1980* (NSW) – where respondent employed by the appellant as an accountant – where respondent resigned following bullying and harassment in the workplace – respondent contacted the appellant’s clients – where no covenant not to compete and no restraint of trade – appellant claimed respondent misused client information and contact list – where appellant made overbearing threats of litigation including criminal prosecution – deed of settlement and release entered into – where clause provided that respondent pay ‘agreed fee’ to appellant – whether deed was unjust in the circumstances – *Contracts Review Act* ss 7 and 9(2) – challenge to discretionary decision to refuse to enforce the deed

Variation of contract

[Gooley v NSW Rural Assistance Authority \[2020\] NSWCA 156](#)

CONTRACTS – variation – whether term of credit facility varied – whether variation supported by adequate consideration – where difference in obligations capable of benefiting either party – contract effectively varied – whether bank repudiated contract in maintaining that term varied

Waiver

[Inghams Enterprises Pty Limited v Hannigan \[2020\] NSWCA 82](#)

CONTRACT – waiver – whether commencement of earlier court proceedings seeking declarations as to breach of contract resulted in waiver of right to submit claim for damages for breach of contract to arbitration

13. Corporations

Aboriginal corporation

[Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation \[2020\] NSWCA 144](#)

CORPORATIONS – Aboriginal corporation – implied actual authority – where CEO of corporation not director – where CEO instructed solicitor to accept offer of new lease – where Board of Aboriginal corporation had not in fact accepted offer of new lease – where Board had not delegated authority to CEO to bind it to new lease – whether CEO had implied actual authority to bind Aboriginal corporation

CORPORATIONS – Aboriginal corporation – ostensible authority – whether CEO held out by Aboriginal corporation as having authority to accept offer of new lease – distinction between agent's authority to communicate Board's decision and authority to make decision – whether CEO had ostensible authority to bind Aboriginal corporation

Court appointed liquidators

[Aardwolf Industries LLC v Tayeh \[2020\] NSWCA 301](#)

CORPORATIONS – leave to commence action against court-appointed liquidators – governing principles – relevance of lengthy and inadequately explained delay

Directors' duties

[Kay v KRM \(Vic\) Pty Ltd;; Classic Bet \(NSW\) Pty Ltd v Kay & Ors \[2020\] NSWCA 92](#)

CORPORATIONS — Directors and officers — Directors' duties — Duty to act in good faith in the best interests of company – whether failure to cause company to issue a contractual notice to defer the incurrence of a liability was a breach of duty – whether company sustained loss for the purposes of a statutory action for damages

Implied actual authority

[Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation \[2020\] NSWCA 144](#)

CORPORATIONS – Aboriginal corporation – implied actual authority – where CEO of corporation not director – where CEO instructed solicitor to accept offer of new lease – where Board of Aboriginal corporation had not in fact accepted offer of new lease – where Board had not delegated authority to CEO to bind it to new lease – whether CEO had implied actual authority to bind Aboriginal corporation

Meeting of members

[Primary Securities Limited v Aurora Funds Management Limited \[2020\] NSWCA 230](#)

CORPORATIONS — Meeting of members of listed scheme called by members — Requirement of s 252D Corporations Act that a meeting be called “in the same way - so far as is possible - in which meetings of the scheme's members may be called by the responsible entity” – whether notice of meeting required to identify members calling the meeting

CORPORATIONS — Meeting of members — Notice — whether proper notice given to directors and auditor of incumbent responsible entity – where some unitholders not given proper notice – whether defects substantive or procedural irregularities

CORPORATIONS — Meeting of members — Effect of defect or irregularity — whether procedural irregularity causing substantial injustice – requirements for the making of orders under ss 1322(2) and 1322(4) Corporations Act

Misleading or deceptive conduct

[Primary Securities Limited v Aurora Funds Management Limited \[2020\] NSWCA 230](#)

CORPORATIONS — Misleading or deceptive conduct — whether explanatory memorandum accompanying notice of meeting misleading by omission – whether reasonable expectation to disclose matters of suspicion

Oppression

[Snell v Glatis \(No 2\) \[2020\] NSWCA 166](#)

CORPORATIONS – oppression – remedies – compulsory buy-out or winding up – many instances of oppressive conduct over many years – companies not actively trading – principal assets real estate and loans – primary judge ordered compulsory buy-out – appellant required to pay \$66 million within 30 days – appellant elderly and unwell – relevance of inability to pay – forensic decision not to adduce evidence of financial circumstances – subject to pecuniary orders remedying particular items of oppression, winding up ordered

[Snell v Glatis \(No 3\) \[2020\] NSWCA 267](#)

CORPORATIONS – oppression – formulation of orders – special orders as to liquidators' costs – applicability of post-judgment interest – whether entitlement of successful plaintiff should be secured by charge – whether surplus should be distributed in accordance with shareholders agreement

Ostensible authority

[Left Bank Investments Pty Ltd v Ngunya Jarjum Aboriginal Corporation \[2020\] NSWCA 144](#)

CORPORATIONS – Aboriginal corporation – ostensible authority – whether CEO held out by Aboriginal corporation as having authority to accept offer of new lease – distinction between agent's authority to communicate Board's decision and authority to make decision – whether CEO had ostensible authority to bind Aboriginal corporation

Voluntary administration

[Lianos v Order of AHEPA NSW Inc \(No 2\) \[2020\] NSWCA 304](#)

CORPORATIONS — voluntary administration — Legal proceedings — moratorium on legal proceedings against company under administration — administrators appointed after publication of reasons but before final orders made — section 440D *Corporations Act 2001* (Cth) — whether making orders a step in proceedings requiring leave — application for leave under s 440D — whether proposed orders of successful appellant reflect reasons given for appeal

Winding up

[ACN 004 410 833 Ltd \(formerly Arrium Limited\) \(in liq\) v Michael Thomas Walton \[2020\] NSWCA 157](#)

CORPORATIONS – Winding up – Public examinations of directors, officers and others – Application to set aside summons to attend court and be examined - Whether the purpose

for which the examination was sought was foreign to the purpose for which powers to order an examination and production of documents were conferred

[Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd \(in liq\) & Courtenay House Capital Trading Group Pty Ltd \(in liq\) \(No 2\) \[2020\] NSWCA 117](#)

INSOLVENCY – unregistered managed investment scheme – Ponzi scheme – winding up – freezing order on companies’ bank accounts – whether investors who deposited funds into bank account after freezing order was made should be treated differently in terms of distribution of limited funds compared to investors who deposited funds into bank account prior to freezing order – whether deposits made into bank account after freezing order should be treated differently as such deposits could be separately identified and had not been dissipated – consideration of lowest intermediate balance rule and pari passu distribution – relevance of ability to trace – principles of hotchpot

[Drama Unit Pty Ltd v Fearndale Holdings Pty Ltd \(Administrator Appointed\) \[2020\] NSWCA 1](#)

CORPORATIONS – winding up – whether valid application under s 459G of Corporations Act 2001 (Cth) – where period for compliance with statutory demand has expired – where no extension of period for compliance sought or obtained – no utility in attempting to have statutory demand set aside

[Hillsea Pty Ltd v Joseph; Mclvor v Joseph \[2020\] NSWCA 55](#)

CORPORATIONS – Winding up on just and equitable ground – where directors planned to place company into liquidation in any event

[Snell v Glatis \(No 2\) \[2020\] NSWCA 166](#)

CORPORATIONS – oppression – remedies – compulsory buy-out or winding up – many instances of oppressive conduct over many years – companies not actively trading – principal assets real estate and loans – primary judge ordered compulsory buy-out – appellant required to pay \$66 million within 30 days – appellant elderly and unwell – relevance of inability to pay – forensic decision not to adduce evidence of financial circumstances – subject to pecuniary orders remedying particular items of oppression, winding up ordered

[Ziegler as trustee for the Doris Gayst Testamentary Trust v Cenric Group Pty Ltd \[2020\] NSWCA 85](#)

CORPORATIONS – winding up – leave to appeal from decision setting aside a statutory demand – Corporations Act 2001 (Cth) s 459G – where offsetting claim to retention monies

founded on contractor's acceptance of owner's repudiation of construction contract – whether affidavit “supported” the s 459G application – whether necessary for supporting affidavit to contain the legal basis of the claim – challenge to primary judge's factual finding that affidavit supported the s459G application – whether injustice demonstrated

14. Costs

Calderbank letters

[Coffs Harbour City Council v Polglase \[2020\] NSWCA 265](#)

COSTS - plaintiff succeeded against Council and Trust but failed against State and grandparents - trial judge declined to make *Bullock* or *Sanderson* order in respect of State's and grandparents' costs - whether error in failing to find that Council caused plaintiff to join other parties - non-acceptance of *Calderbank* letter - whether trial judge erred in making partial indemnity costs order

[Gordon v Lever \(No 3\) \[2020\] NSWCA 44](#)

COSTS – discretion as to variation of costs order – Calderbank letter

Costs assessment

[Gazecki v McCabes Lawyers Pty Ltd \[2020\] NSWCA 98](#)

CIVIL PROCEDURE – time – extension of time – costs assessment – statutory appeal to District Court from determination of review panel – application for leave to appeal was filed 30 days late – whether primary judge erred in law in declining to grant an extension of time

COSTS – party/party – appeals – appeal from costs assessment – nature of appeal from review panel to District Court – Legal Profession Uniform Law Application Act 2014 (NSW), s 89(1)

[Gilmore Finance Pty Ltd v Aesthete No 3 Pty Ltd \[2020\] NSWCA 114](#)

COSTS – costs assessment – successful appeal to District Court under s 89 Legal Profession Uniform Law Application Act 2014 (NSW) – application for judicial review – where asserted jurisdictional error in District Court failing to conduct appeal “by way of rehearing” – where application brought out of time – where interests of justice do not favour extension of time – application dismissed

[J and E Vella Pty Limited v Hobson \(No 2\) \[2020\] NSWCA 256](#)

COSTS — Costs assessment — Determination — Gross sum costs order — Conflict between assessment of costs undertaken by solicitor of party entitled to costs and expert costs consultant — \$36,000 in dispute — Where no objection taken to solicitor's affidavit evidence, and he was not cross-examined — Where some arguments raised on appeal relate to unchallenged orders not the subject of appeal

[Qin v He \[2020\] NSWCA 275](#)

CIVIL PROCEDURE — Court of Appeal — appeal from District Court determination of appeal from costs assessment of review panel — no right of appeal from District Court to Supreme Court under *District Court Act 1973* (NSW) — no question of principle

[Voicu v The Owners-Strata Plan No 1624 \[2020\] NSWCA 52](#)

COSTS – appeal – cost assessment – costs assessment appeal – repealed Legal Profession Act 2004 (NSW) applied instead of Legal Profession Uniform Law Application Act 2014 (NSW) – effect of savings provisions – Interpretation Act 1987 (NSW), s 30

Costs of proceedings at first instance

[Racing New South Wales v Fletcher \(No 2\) \[2020\] NSWCA 67](#)

COSTS – appeals – costs of proceedings at first instance – where judgment overturned on appeal – whether successful appellant's conduct as defendant invited litigation so as to disentitle it to costs at first instance – whether respondent had partial success as plaintiff at first instance on issue of substance – whether proceedings of "public importance" so as to warrant departure from ordinary rule that costs follow the event – no departure justified – respondent ordered to pay costs of proceedings at first instance

Definition of "proceedings"

[Voicu v The Owners-Strata Plan No 1624 \[2020\] NSWCA 52](#)

WORDS AND PHRASES – "proceeding" – "proceedings to which the costs relate commenced" – Legal Profession Uniform Law Application Regulation 2015 (NSW), cl 59

General rule that costs follow the event

[Carolyn Deigan as executrix for the estate of the late James Boyd Lockrey v Barnard James Fussell \(No. 2\) \[2020\] NSWCA 60](#)

COSTS — Appeals — whether Court should make order as to costs of the proceedings below where no order was made by the primary judge – where on appeal the Court was not informed of the reason for not making an order as to costs at the time of the principal judgment – cost should follow the event – no issue of principle

[Haertsch v Whiteway \(No 2\) \[2020\] NSWCA 287](#)

COSTS — Party/Party — General rule that costs follow the event — Application of the rule and discretion – Family provision proceedings – Where plaintiff successful at first instance but lost on appeal – Whether to make no order as to costs of first instance and appeal proceedings

[Johnston v The Greens NSW \[2020\] NSWCA 357](#)

COSTS – party/party – exceptions to general rule that costs follow the event – public interest – where proceedings had a “public interest” element – whether arguable error in primary judge declining to make no order as to costs

[Mendonca v Legal Services Commissioner \(No 2\) \[2020\] NSWCA 145](#)

COSTS — party/party — appeals — general rule that costs follow the event applied

[Price v Price \[2020\] NSWCA 312](#)

COSTS – party/party – rule in UCPR r 42.1 that costs prima facie follow the event – orders made by consent without contest or hearing as to the merits – no event for the purposes of UCPR r 42.1 – respondents’ commencement of proceedings precipitous – applicant did not act unreasonably – no order made as to first instance costs

[Racing New South Wales v Fletcher \(No 2\) \[2020\] NSWCA 67](#)

COSTS – appeals – costs of proceedings at first instance – where judgment overturned on appeal – whether successful appellant’s conduct as defendant invited litigation so as to disentitle it to costs at first instance – whether respondent had partial success as plaintiff at first instance on issue of substance – whether proceedings of “public importance” so as to warrant departure from ordinary rule that costs follow the event – no departure justified – respondent ordered to pay costs of proceedings at first instance

[Silversea Cruises Australia Pty Ltd v Abellanoza \(No 2\) \[2020\] NSWCA 37](#)

COSTS – party/party – general rule that costs follow the event – appeal upheld in part – whether issues severable – partly successful appellant to pay bulk of respondent’s costs

COSTS – party/party – exceptions to general rule that costs follow the event – offers of compromise – whether failure to accept offers unreasonable – offers not specifying costs consequences of non-acceptance – offers to discontinue appeal if entitlement to trial costs foregone

COSTS – party/party – exceptions to general rule that costs follow the event – recovery limited to \$20,000 –total amount payable to multiple defendants exceeded \$500,000 – Uniform Civil Procedure Rules 2005 (NSW), r 42.34 not engaged

[Wright v Apthorpe \[2020\] NSWCA 300](#)

COSTS — Party/Party — General rule that costs follow the event — Discretion – No presumption or default rule as to the basis of the award of costs

STATUTORY INTERPRETATION – r 42.2 of Uniform Civil Procedure Rules 2005 (NSW) – whether s 98(1) of Civil Procedure Act 2005 (NSW) confines the judicial discretion in awarding costs – whether a judge must take as a starting point that costs are to be assessed on the ordinary basis and justify any departure from that position

Indemnity costs

[Coffs Harbour City Council v Polglase \[2020\] NSWCA 265](#)

COSTS - plaintiff succeeded against Council and Trust but failed against State and grandparents - trial judge declined to make *Bullock* or *Sanderson* order in respect of State’s and grandparents’ costs - whether error in failing to find that Council caused plaintiff to join other parties - non-acceptance of *Calderbank* letter - whether trial judge erred in making partial indemnity costs order

[Mendonca v Tonna \(No 3\) \[2020\] NSWCA 332](#)

COSTS – ordinary or indemnity – offer of compromise – result less favourable to offeree – whether rejection of offer unreasonable – no issue of principle

[Small v Phillips \(No 3\) \[2020\] NSWCA 24](#)

CIVIL PROCEDURE – Court of Appeal – Costs orders – Costs orders for proceedings in the exercise of protective jurisdiction – Whether the appellant’s costs should be paid on the ordinary basis or the indemnity basis.

[Voicu v The Owners-Strata Plan No 1624 \[2020\] NSWCA 52](#)

COSTS – appeal to District Court – indemnity costs ordered – incorrect law relied on by successful party – correct law resulted in same substantive order – costs of successful party

Offers of compromise

[Martinez as trustee for Martinez HWL Practice Trust as representative of the partners trading as HWL Ebsworth Lawyers v Griffiths as trustee for the Griffiths HWL Practice Trust \(No 2\) \[2020\] NSWCA 42](#)

COSTS – appeals – offers of compromise – where respondent (plaintiff) achieved a result on appeal no less favourable than his rejected offer of compromise – where application of UCPR r 42.14 as modified by r 51.48(1) engaged – where appellant’s rejection of offer unreasonable – where respondent’s “favourable” judgment, measured by reference to that offer, also represented a successful outcome to appellant (defendant) in the appeal – discretion to “order otherwise” in relation to costs of appeal, both before and after making of offer

[Mendonca v Tonna \(No 3\) \[2020\] NSWCA 332](#)

COSTS – ordinary or indemnity – offer of compromise – result less favourable to offeree – whether rejection of offer unreasonable – no issue of principle

[Ryan v Workers Compensation Nominal Insurer \(No 2\) \[2020\] NSWCA 129](#)

COSTS – offer of compromise – small offer made by defendant shortly after recovery proceedings commenced in District Court pursuant to Workers Compensation Act 1987 (NSW) s 151Z(1)(d) – motor vehicle accident many years earlier – ample time to investigate – defendant ultimately successful in Court of Appeal – whether offer of compromise amounted to genuine compromise – significance of important evidence emerging later in litigation

“Order otherwise” as to costs

[Keynes Capital Global Limited v Guo \(No 2\) \[2020\] NSWCA 336](#)

COSTS – whether costs of an application for leave to appeal in relation to a question of discovery should be ordered to be paid forthwith – where application for leave to appeal unsuccessful – whether an “order otherwise” under Uniform Civil Procedure Rules 2005 (NSW) r 42.7 was necessary and, if so, criteria by reference to which it may be made.

Ordinary costs

[Mendonca v Tonna \(No 3\) \[2020\] NSWCA 332](#)

COSTS – ordinary or indemnity – offer of compromise – result less favourable to offeree – whether rejection of offer unreasonable – no issue of principle

[Small v Phillips \(No 3\) \[2020\] NSWCA 24](#)

CIVIL PROCEDURE – Court of Appeal – Costs orders – Costs orders for proceedings in the exercise of protective jurisdiction – Whether the appellant’s costs should be paid on the ordinary basis or the indemnity basis

Partial success of a party

[Doyle v Commissioner of Police \(No 5\) \[2020\] NSWCA 345](#)

COSTS – partial success of appellants on appeal – determination of costs of appeal and re-exercise of discretion as to costs at trial – second appellant not originally joined to proceedings at trial – first appellant played no role in proceedings after hearing of principal appeal – successful point not raised until first day of trial – whether global order as to costs, or orders relating to particular aspects of the litigation, should be made

Party/party costs

[Haertsch v Whiteway \(No 2\) \[2020\] NSWCA 287](#)

COSTS — Party/Party — General rule that costs follow the event — Application of the rule and discretion – Family provision proceedings – Where plaintiff successful at first instance but lost on appeal – Whether to make no order as to costs of first instance and appeal proceedings

[Johnston v The Greens NSW \[2020\] NSWCA 357](#)

COSTS – party/party – exceptions to general rule that costs follow the event – public interest – where proceedings had a “public interest” element – whether arguable error in primary judge declining to make no order as to costs

COSTS – party/party – multiple parties – whether arguable error in allowing multiple sets of costs to defendants with similar interests

[Lee Environmental Planning Pty Ltd v Reulie Land Co Pty Ltd \[2020\] NSWCA 254](#)

COSTS – party/party – leave to appeal – where applicants filed submitting appearances – whether applicants responsible for error of consent authority – whether failure by the primary judge to take into account considerations relevant to the costs discretion

[Price v Price \[2020\] NSWCA 312](#)

COSTS – party/party – rule in UCPR r 42.1 that costs prima facie follow the event – orders made by consent without contest or hearing as to the merits – no event for the purposes of UCPR r 42.1 – respondents’ commencement of proceedings precipitous – applicant did not act unreasonably – no order made as to first instance costs

[Shield Limestone Holdings Pty Ltd v LSKF Holdings Pty Ltd \[2020\] NSWCA 59](#)

COSTS — Party/Party — Court’s discretion — primary judge’s assessment of a party’s commercial interests — whether primary judge erred in determining a party achieved a substantial victory

[Silversea Cruises Australia Pty Ltd v Abellanoza \(No 2\) \[2020\] NSWCA 37](#)

COSTS – party/party – general rule that costs follow the event – appeal upheld in part – whether issues severable – partly successful appellant to pay bulk of respondent’s costs

[Wright v Apthorpe \[2020\] NSWCA 300](#)

COSTS — Party/Party — General rule that costs follow the event — Discretion – No presumption or default rule as to the basis of the award of costs

Relevance of history of proceedings

[Wang v State of New South Wales \(No 3\) \[2020\] NSWCA 148](#)

COSTS – notice of motion by State of NSW seeking specified gross sum order – *Civil Procedure Act*, s 98(4) – relevance of history of proceedings and likelihood of incurring further significant costs

Security for costs

[Classic Bet \(NSW\) Pty Ltd & anor v KRM \(Vic\) Pty Ltd & ors; Kay v KRM \(Vic\) Pty Ltd \(No 2\) \[2020\] NSWCA 43](#)

PRACTICE AND PROCEDURE – costs – security for costs – application for security for costs pursuant to s 1335(1) of the Corporations Act 2001 (Cth) – security sought against appellant company – concession that order for security should be made – determination of appropriate quantum of security

[Guan v Lui \[2020\] NSWCA 251](#)

APPEAL – security for costs – UCPR r 51.50 – special circumstances established – appellant has no assets in Australia to enable satisfaction of judgment but is able to request funds as needed from husband in China

[Michael Wilson & Partners, Limited v Emmott \[2020\] NSWCA 245](#)

CIVIL PROCEDURE — Court of Appeal — Application — Dismissal under UCPR r 51.50 — Compliance with security for costs — Variation of security for costs

[Mohareb v Harbour Radio Pty Ltd \[2020\] NSWCA 231](#)

APPLICATION FOR LEAVE TO APPEAL – COSTS — security for costs – Uniform Civil Procedure Rules 2005 (NSW), r 42.21 – inherent jurisdiction of Supreme Court – reluctance to make orders against natural person – delay in making application – applicant bankrupt – evidence of funds transferred to overseas bank account in applicant’s name – applicant evasive and untruthful about transferred funds – applicant’s history of non-payment of court orders – where applicant has a history of failure to comply with costs orders

[Mualim v Dzelme \[2020\] NSWCA 333](#)

APPEALS – security for costs – appellants resident outside Australia – appellants without assets in Australia – merits of appeal balanced – order would not stifle appeal – costs not disproportionate to amount in dispute – relationship of UCPR r 42.21 and r 51.50(1) – effect of r 51.50(3)

Third party costs orders

[KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden \(No 3\) \[2020\] NSWCA 158](#)

COSTS – s 98 Civil Procedure Act – application for orders against third parties – application of principles in Knight v FP Special Assets Ltd and in FPM Constructions v Council of the City of the Blue Mountains – nature of third party interest

COSTS – orders against third parties – whether parents had interest in litigation – whether parents lending funds to son to conduct litigation and desire for son to succeed in that litigation sufficient reason to award third party costs

Timing of payment of costs

[Craig v Johnson \[2020\] NSWCA 278](#)

COSTS – timing of payment of costs – r 42.7 UCPR – unsuccessful attempt by applicants to challenge decision that they abused Court process – costs payable forthwith

Varying cost orders

[Florida Kitchens Pty Ltd v Number One Cutting Service Pty Ltd trading as Number One Marble and Granite \(No 2\) \[2020\] NSWCA 216](#)

COSTS – application to vary costs order – distinct applications for leave to appeal against security for costs and third party costs order – application granted

[Gordon v Lever \(No 4\) \[2020\] NSWCA 280](#)

COSTS – whether costs to be ordered in relation to argument regarding application to vary costs order

[Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd \(No 2\) \[2020\] NSWCA 134](#)

PRACTICE AND PROCEDURE – costs – appeal – variation of costs order – variation by consent – appellant not liable to pay costs of respondents not joined by it

PRACTICE AND PROCEDURE – costs – application to vary costs orders made at trial – orders failed to reflect apportionment of liability – orders not challenged on appeal – no power to vary after appeal determined – slip rule not available

15. Crime

Cruelty to animals

[Will v Brighton \[2020\] NSWCA 355](#)

CRIMINAL LAW – cruelty to animals – offence of serious cruelty to animals – elements of offence - consideration of the element of “intention of inflicting severe pain” in s 530(1) of Crimes Act - statutory defence – whether animal killed was a “pest animal” within the meaning of s 530(2) of the Crimes Act – whether killing of animal was “in the course of or for the purposes of extermination of pest animals”

High risk offenders

[Jones v State of New South Wales \[2020\] NSWCA 202](#)

HIGH RISK OFFENDERS – continuing detention order – unacceptable risk of committing another serious offence – psychological evidence that appellant posed risk to community of further paedophilic sexual offences if not detained – evidence that treatment conducive to rehabilitation not able to be completed in custody – continuing detention order made for one year

[Tannous v State of New South Wales \[2020\] NSWCA 261](#)

WORDS and PHRASES – “unacceptable risk”; “high risk offender”; “high degree of probability” – *Crimes (High Risk Offenders) Act 2006* (NSW)

Intensive correction orders

[Wany v DPP \[2020\] NSWCA 318](#)

SENTENCING — Penalties — Intensive correction orders — where sentencing assessment reports indicated offender was a low risk of reoffending and was suitable for community service — whether community safety is a mandatory element for consideration under s 66(2) *Crimes (Sentencing Procedure) Act* — requirement for court to engage in assessment as to whether an ICO or full-time detention is more likely to address an offender’s risk of reoffending

Supervision orders

[Baldwin v State of New South Wales \[2020\] NSWCA 112](#)

CRIME – extended supervision order – conditions of order – order requiring consent to searches – validity – whether privilege against self-incrimination abrogated – *Crimes (High Risk Offenders) Act 2006* (NSW), s 11

STATUTORY INTERPRETATION – statutory powers – privilege against self-incrimination – abrogation of privilege – conditions imposed under extended supervision order – consent to searches required – clear statement principle – effect of *Crimes (High Risk Offenders) Act*

2006 (NSW), s 11

STATUTORY INTERPRETATION – statutory powers – conditions imposed under extended supervision order – validity – requirement of reasonable belief to initiate search – whether conditions purport to direct or regulate conduct of officers – whether conditions authorised seizure of third party property

[Tannous v State of New South Wales \[2020\] NSWCA 261](#)

CRIME – extended supervision order – validity – unacceptable risk of committing another serious offence – whether unacceptable risk must subsist throughout the duration of the order – *Crimes (High Risk Offenders) Act 2006* (NSW), ss 5B, 10, 11

16. Criminal procedure

Power of District Court judge to submit question of law to Court of Criminal Appeal

[Forrest v Director of Public Prosecutions \(NSW\) \[2020\] NSWCA 162](#)

PRACTICE AND PROCEDURE – criminal – power of District Court to submit question of law to Court of Criminal Appeal – time limit – request to state a case did not allow sufficient time for judge to state a case – effect of timing of application on duty to state a case

Powers of Supreme Court Judge

[Clark v Attorney General of New South Wales \(No 2\) \[2020\] NSWCA 135](#)

CRIME – appeal and review – powers of Supreme Court judge – review of decision to dismiss an application for an inquiry under the *Crimes (Appeal and Review) Act 2001* (NSW), s 79(3) – whether judge who sat on an appeal from the applicant's conviction disqualified from sitting on judicial review proceeding

Whether prosecution initiated without reasonable cause

[Hallaby v Harris \[2020\] NSWCA 12](#)

CRIMINAL PROCEDURE – costs – defendant's costs of unsuccessful prosecution for summary offence – whether magistrate erred in refusing to award costs – honest belief of

prosecutor – whether prosecution initiated without reasonable cause – scope of Criminal Procedure Act 1986, s 214(1)(b), (d)

17. Defamation

Defences

[Bailey v WIN Television NSW Pty Ltd \[2020\] NSWCA 352](#)

DEFAMATION – defences – statutory qualified privilege – reasonableness – relevance of propositions stated in *Morgan v John Fairfax Ltd [No 2]* (1991) 23 NSWLR 374

[Feldman v Nationwide News Pty Ltd \[2020\] NSWCA 260](#)

DEFAMATION – Defamatory matter – Capacity to convey pleaded imputations – whether imputations carried to the ordinary reasonable reader

DEFAMATION – Defences – Fair report – Matter of public interest – Royal Commissions – whether publications were substantially accurate

DEFAMATION – Defences – Justification – Truth

[Feldman v Polaris Media Pty Ltd as Trustee of the Polaris Media Trust t/as The Australian Jewish News \[2020\] NSWCA 56](#)

DEFAMATION — Defences — honest opinion — whether defamatory matter was statement of fact or opinion/comment – where matters of opinion intermingled with statements of fact – whether defamatory matter or defamatory meaning as found focus of inquiry

DEFAMATION — Defences — honest opinion – whether fairness or honesty of comment must be responsive to the defamatory meaning as found or the defamatory matter – whether comment or opinion based on proper material

DEFAMATION — Defences — fair report – whether defamatory matter a fair report where it is a substantially accurate report in fact – where not a substantially accurate report of the meaning conveyed by the report

DEFAMATION — Defences — statutory qualified privilege – whether failure to seek comment from the appellant was not reasonable – where Royal Commission proceedings were a matter of public interest – where evidence of the appellant was ongoing – where appellant contacted through a conduit and published a statement in same publication as appeared the defamatory matter

[KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden \[2020\] NSWCA 28](#)

DEFAMATION – defences – common law qualified privilege – whether privileged occasion correctly identified – relevance of privileged occasion – malice

[Mohareb v Booth \[2020\] NSWCA 49](#)

DEFAMATION – defences – offer to make amends – concerns notice – whether statement of claim a concerns notice – offer to be made within 28 days of receiving concerns notice – no valid offer where made after 28 days – Defamation Act 2005 (NSW), s 14(1)

DEFAMATION – defences – offer to make amends – whether made as soon as reasonably practicable after defendant aware that matter might be defamatory – offer made one year after action commenced – Defamation Act 2005 (NSW), s 18(1)

[Stoltenberg v Bolton; Loder v Bolton \[2020\] NSWCA 45](#)

DEFAMATION – appeals – defences – common law qualified privilege – where posts made on public Facebook page – whether excessive publication – where posts downloaded by people outside Narrabri Shire – whether privileged occasion – whether error in rejecting defence of common law qualified privilege

DEFAMATION – appeals – defences – statutory qualified privilege – Defamation Act 2005 (NSW) s 30 – where finding that publication was unreasonable – whether presumption of honesty – significance of failure to contact plaintiff prior to publication

Imputations

[Bailey v WIN Television NSW Pty Ltd \[2020\] NSWCA 352](#)

DEFAMATION – defamatory matter – where news report on termination of General Manager of Council – where report referred to allegations of bullying and intimidation – whether imputation conveyed that General Manager bullied and intimidated staff

[Feldman v Nationwide News Pty Ltd \[2020\] NSWCA 260](#)

DEFAMATION – Defamatory matter – Capacity to convey pleaded imputations – whether imputations carried to the ordinary reasonable reader

Publication

[Brien v Mrad \[2020\] NSWCA 259](#)

DEFAMATION – defamatory matter – where publication pleaded differs from publication proved – test to be applied – whether language of ‘fatal variance’ helpful

[Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty Ltd v Voller \[2020\] NSWCA 102](#)

DEFAMATION – publication – internet technologies – operators of Facebook pages – whether operators published comments by third parties on news items posted on the pages – whether operators were instrumental in or participated in the publication of defamatory comments made by third parties

MEDIA AND COMMUNICATIONS – broadcasting – operation of Broadcasting Act 1992 (Cth), cl 91 – liability of internet content hosts under state defamation law – issue not raised by parties in answering separate question

Remedies

[Brien v Mrad \[2020\] NSWCA 259](#)

DEFAMATION – remedies – aggravated damages – court not in position to assess aggravated damages – leave refused

[KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden \[2020\] NSWCA 28](#)

DEFAMATION – remedies – damages – whether manifestly excessive

DEFAMATION – remedies – damages – aggravated damages – where conduct not improper, unjustifiable or lacking in bona fides

18. Dispute resolution

Arbitration

[Inghams Enterprises Pty Limited v Hannigan \[2020\] NSWCA 82](#)

ARBITRATION – multi-tiered dispute resolution clause – clause included as a component an arbitration clause for certain types of disputes – proper construction of arbitration clause and its scope – principles applicable to the construction of such clauses

19. Dust diseases

Damages

[Piatti v ACN 000 246 542 Pty Ltd \[2020\] NSWCA 168](#)

DUST DISEASES — Damages — Loss of capacity to provide gratuitous domestic services to a dependant — where level of services needed by dependant increased after the time liability arose — whether damages capped by reference to the level of services being provided at that time — proper construction of s 15B of the Civil Liability Act 2002 (NSW)

DUST DISEASES — Damages — Lost years — where primary judge satisfied that, but for the impact of his mesothelioma, the claimant (now deceased) would have continued to provide gratuitous domestic services to the dependant until the dependant's death — whether damages under s 15B can be awarded for “the lost years”

20. Employment and industrial law

Awards and enterprise agreements

[Industrial Relations Secretary v Fire Brigade Employees' Union of New South Wales \[2020\] NSWCA 46](#)

EMPLOYMENT AND INDUSTRIAL LAW – Awards and enterprise agreements – Interpretation – whether award empowers employer to dismiss firefighters during an intrastate multiday deployment – whether firefighters entitled to overtime payment for entirety of intrastate multiday deployments

Industrial Relations Commission

[Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police \(NSW Police Force\) \[2020\] NSWCA 159](#)

COURTS AND TRIBUNALS – whether Industrial Relations Commission has jurisdiction to review a decision to dismiss a policer officer pursuant to s 72A of the *Police Act 1990* (NSW) – whether matter governed by decision in *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1; [2013] HCA 2

[Commissioner of Police, New South Wales Police Force v Zisopoulos \[2020\] NSWCA 236](#)

INDUSTRIAL RELATIONS – Industrial Relations Commission – whether the removal of an officer from the NSW Police Force was “harsh, unreasonable or unjust” – whether IRC erred in law and failed to exercise jurisdiction whilst undertaking statutory task of review under s

181E of the *Police Act 1990* (NSW) – whether IRC misapplied s 181F(2) concerning onus of proof – legal, tactical and evidential burdens of proof considered

Misconduct and unsatisfactory performance

[Police Association of New South Wales v State of New South Wales \[2020\] NSWCA 3](#)

EMPLOYMENT AND INDUSTRIAL LAW – Public sector – Police – Misconduct and unsatisfactory performance – Powers of Commissioner – Power to order transfer of non-executive police officer to another position in case of “misconduct” – Whether particular transfer a “non-disciplinary transfer” – Meaning of “non-disciplinary transfer”

Work health and safety

[SafeWork NSW v BOC Limited \[2020\] NSWCA 306](#)

CRIME – work health and safety – application for judicial review of verdict of acquittal – risk of death or serious injury to other persons – conduct of employee in the course of his duties – prosecution of employer – employer acquitted due to dishonesty of employee – attempt by prosecutor to review acquittal – *Work Health and Safety Act 2011* (NSW), s 19(2)

21. Environmental and planning law

Coastal Management Act 2016 (NSW)

[Reysson Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 \[2020\] NSWCA 281](#)

ENVIRONMENT AND PLANNING – words and phrases – whether primary judge erred in finding identification of “coastal wetlands and littoral rainforests area” in s 6 of the Coastal Management Act 2016 (NSW) being land identified by State Environmental Planning Policy (Coastal Management) 2018 (NSW) as “being land which displays the hydrological and floristic characteristics of coastal wetlands or littoral rainforests” or adjoining such land not a jurisdictional fact

ENVIRONMENT AND PLANNING – words and phrases – whether the “proximity area” in the Coastal Wetlands and Littoral Rainforests Area Map corresponds in meaning to “adjoining” land in s 6(1) of the Coastal Management Act – whether proximity area or buffer zone is both rational and proportionate as a legislative device to serve the objects of both the Environmental Planning and Assessment Act and the Coastal Management Act

ENVIRONMENT AND PLANNING – words and phrases – Governor’s power is to make an environmental planning instrument – whether Governor must have regard to, approve or do anything at all in relation to making the Coastal Wetlands and Littoral Rainforests Area Map

Development applications

[Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council \[2020\] NSWCA 137](#)

ENVIRONMENT AND PLANNING – development application – power to grant consent – local environmental plan – requirement that proposed development “is compatible” with the “flood hazard” of the land – assessing compatibility at date of determining application – whether future measures to ameliorate flood hazard relevant – future measures not part of application – Wingecarribee Local Environmental Plan 2010 (NSW), cl 7.9(3)(a)

Jurisdiction of Land and Environment Court

[Coffs Harbour City Council v Noubia Pty Ltd \[2020\] NSWCA 142](#)

JURISDICTION – Land and Environment Court – valuation of land – no compulsory acquisition – proceedings transferred from Equity Division – conferral of jurisdiction on transferee court – *Civil Procedure Act 2005* (NSW), s 149B, 149E – Class 4 jurisdiction exercised – *Land and Environment Court Act 1979* (NSW), s 20(1)(cj)

Meaning of “development”

[Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd \[2020\] NSWCA 50](#)

ENVIRONMENT AND PLANNING – statutory interpretation – whether carving into cement render of wall constitutes “development” – Environmental Planning and Assessment Act 1979 (NSW) s 4.2 – whether development consent obtained

State environmental planning policies

[Universal Property Group Pty Ltd v Blacktown City Council \[2020\] NSWCA 106](#)

ENVIRONMENT AND PLANNING – planning schemes and instruments – State Environmental Planning Policies – secondary dwellings – site area and minimum lot size – whether minimum lot size requirement overridden – State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW), cl 22; State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (NSW), cl 4.1AC

Valuation principles under the Land and Environment Court Act 1979 (NSW)

[Coffs Harbour City Council v Noubia Pty Ltd \[2020\] NSWCA 142](#)

ENVIRONMENT AND PLANNING – consent – conditions – construction – transfer of land to Council – public purpose – importation of valuation principles from the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

22. Equity

Ancillary liability

[Pittmore Pty Ltd v Chan; Chan v Tan \[2020\] NSWCA 344](#) .

EQUITY – ancillary liability – liability for procuring or inducing breach of trust or breach of fiduciary duty – whether requirement that third party be “dishonest” – whether separate bases of liability for procuring as opposed to inducing breach – whether director of company acting as such capable of procuring or inducing breach of trust by director’s company

Constructive trusts

[Stephenson v Santos \[2020\] NSWCA 262](#)

CONSTRUCTIVE TRUSTS – house purchased in name of niece – primary judge found aunt and niece agreed that aunt would pay half outgoings in exchange for a one half beneficial interest – primary judge ordered niece to account to aunt for one half of net proceeds of sale, on terms that aunt repay amounts obtained from Centrelink for rental assistance – whether reasons of primary judge inadequate – whether finding as to common intention should be set aside – whether primary judge erred as to effect of illegality – appeal dismissed

Contempt

[Mohareb v Kelso \[2020\] NSWCA 105](#)

CONTEMPT – Criminal contempt – contempt in the face of the court – here appellant was assaulted by first respondent at the appellant’s home far away from the court

Distribution of limited funds in bank accounts

[Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd \(in liq\) & Courtenay House Capital Trading Group Pty Ltd \(in liq\) \(No 2\) \[2020\] NSWCA 117](#)

CORPORATIONS – unregistered managed investment scheme – two companies operating a Ponzi scheme – freezing order on companies’ bank accounts – deposits made to companies’ bank accounts on day of and in days after freezing order by unsuspecting investors – liquidators appointed – Court directions sought as to method of distribution of limited funds in bank accounts – mixed and co-mingled accounts – whether rule in Clayton’s Case, simple pari passu approach or lowest intermediate balance rule to be applied – tracing – role of “hotchpot”.

EQUITY – blended or co-mingled fund in context of a Ponzi scheme – where multiple deposits and withdrawals made from companies’ bank accounts – companies in liquidation – nature of investors’ interests in moneys held in bank account – bank accounts subject to charge or equitable lien – tracing – relationship between tracing and lowest intermediate balance rule

Equitable compensation

[Wallis v Rudek \[2020\] NSWCA 207](#)

EQUITY — Equitable remedies — Equitable compensation — Assessment — Valuation of property for purposes of assessment

EQUITY — Equitable interest in property – Family arrangement — Transferee pays off mortgage on property — Equity in property exceeds amount owing — Transferor permitted to remain in property – licence agreement not signed — Relationship breakdown – Baumgartner v Baumgartner equity — Equitable compensation granted

Equitable interest in property

[Wallis v Rudek \[2020\] NSWCA 207](#)

EQUITY — Equitable interest in property – Family arrangement — Transferee pays off mortgage on property — Equity in property exceeds amount owing — Transferor permitted to remain in property – licence agreement not signed — Relationship breakdown – Baumgartner v Baumgartner equity — Equitable compensation granted

Estoppel by representation

[Kedwell v Deputy Commissioner of Taxation \[2020\] NSWCA 238](#)

ESTOPPEL – estoppel by representation – detrimental reliance – whether ATO officer made representations that the PAYG withholding liabilities had been satisfied – whether Commissioner estopped from asserting that the amount was received and allocated other than in satisfaction of Director Penalty Notice liability

Fiduciary duties

[Pittmore Pty Ltd v Chan; Chan v Tan \[2020\] NSWCA 344](#)

EQUITY – ancillary liability – liability for procuring or inducing breach of trust or breach of fiduciary duty – whether requirement that third party be “dishonest” – whether separate bases of liability for procuring as opposed to inducing breach – whether director of company acting as such capable of procuring or inducing breach of trust by director’s company

[Warner Capital Pty Ltd v Shazbot Pty Ltd \[2020\] NSWCA 121](#)

EQUITY – fiduciary duties – where shareholder transferred share to director’s nominee for nominal consideration upon dissolution of partnership – whether breach of fiduciary duty claim pleaded – whether open for primary judge to find director breached fiduciary duty owed to shareholder

Proprietary estoppel

[Q \(a pseudonym\) v E Co \(a pseudonym\) \[2020\] NSWCA 220](#)

ESTOPPEL – Proprietary estoppel – Encouragement – Where claim of encouragement not based on specific words – Where primary judge emphasised defendant’s knowledge of plaintiffs’ expectation – Whether estoppel as found properly characterised as estoppel by encouragement or acquiescence

ESTOPPEL – Proprietary estoppel – Nature of promise – Where relief encompassed property acquired after encouragement and initial reliance – Where detrimental reliance by plaintiffs continuing – Whether necessary for all property the subject of relief to have been identified and owned by defendant at the time of encouragement and initial reliance

ESTOPPEL – Proprietary estoppel – Detrimental reliance – Where plaintiffs found to have made “life-changing” decisions – Whether error in giving significant weight to plaintiff’s “hypothetical” evidence of counterfactual behaviour in making finding of reliance – Whether “countervailing benefits” received by plaintiffs by reason of reliance relevant to assessment of detriment – Whether plaintiffs would suffer substantial detriment if expectation departed from

ESTOPPEL – Proprietary estoppel – Relief – Where relief involved “acceleration” of the encouraged expectation – Where constructive trust declared by primary judge – Whether to impose conditions on relief – Whether conditions necessary to “do equity” – Whether condition for payment of rent “conceptually inconsistent” with recognition of constructive trust

Quistclose trusts

[Diamond Developments Pty Limited v Puddick \[2020\] NSWCA 32](#)

EQUITY — Trusts and trustees — Resulting trusts — Quistclose trusts — Obligation to return monies when purpose for which trust was set up has failed

Relief against forfeiture

[Kay v Playup Australia Pty Ltd \[2020\] NSWCA 33](#)

EQUITY – Equitable remedies – Relief against forfeiture – Doctrine confined to proprietary or possessory rights as distinct from mere contractual rights

Resulting trusts

[Diamond Developments Pty Limited v Puddick \[2020\] NSWCA 32](#)

EQUITY — Trusts and trustees — Resulting trusts — Quistclose trusts — Obligation to return monies when purpose for which trust was set up has failed

[French v Bremner; Bremner v French \[2020\] NSWCA 339](#)

RESULTING TRUST – presumed resulting trusts – cross-appellant purchased rural lands and placed in joint names of him and first cross-respondent, or in sole name of second cross-respondent – primary judge found presumption of resulting trust rebutted – whether appellable error in so finding – testimonial evidence by cross-respondents – cross-appellant gave no evidence – one cross-respondent not cross-examined on her evidence of beneficial ownership – documents supported rebuttal of presumption – cross-appeal dismissed

[Zhang v Metcalf; Metcalf v Zhang \[2020\] NSWCA 228](#)

EQUITY – trusts and trustees – resulting trusts – purchase money trusts – where de facto partners purchased commercial property as tenants in common in equal shares – whether presumption of resulting trust rebutted – where contemporaneous deed evidencing actual intention of parties to hold property beneficially in equal shares – appropriate division of net sale proceeds of the commercial property

EQUITY – trusts and trustees – resulting trusts – purchase money trusts – where de facto partners purchased residential property as joint tenants – whether presumption of resulting trust rebutted – whether constructive trust arising after purchase of property – significance of conduct of parties after purchase

Specific performance

[Wallis v Rudek \[2020\] NSWCA 207](#)

EQUITY — Equitable remedies — Specific performance — Estoppel — Determination of existence and content of underlying contractual terms.

Tracing

[Caron and Seidlitz v Jahani and McLnerney in their capacity as liquidators of Courtenay House Pty Ltd \(in liq\) & Courtenay House Capital Trading Group Pty Ltd \(in liq\) \(No 2\) \[2020\] NSWCA 117](#)

EQUITY – blended or co-mingled fund in context of a Ponzi scheme – where multiple deposits and withdrawals made from companies’ bank accounts – companies in liquidation – nature of investors’ interests in moneys held in bank account – bank accounts subject to charge or equitable lien – tracing – relationship between tracing and lowest intermediate balance rule

Unconscionable conduct

[Magann v The Trustees of the Roman Catholic Church for the Diocese of Parramatta \[2020\] NSWCA 167](#)

EQUITY – unconscionable conduct – special disability or disadvantage – whether primary judge erred in not holding that respondents had taken advantage of a special disadvantage, namely post-traumatic stress disorder

[Pittmore Pty Ltd v Chan; Chan v Tan \[2020\] NSWCA 344](#)

EQUITY – unconscionability – statutory unconscionability – joint venture to develop land for resale – offer made to one party to sell part of joint venture land at profit – offer communicated to other party with invitation to share profit – other party sought to persevere with joint venture – first party purported to terminate and sell land – finding that first party believed entitled to terminate – in fact first party not entitled to terminate – first party’s conduct not unconscionable contrary to s 21 of Australian Consumer Law

23. Evidence

Circumstantial evidence

[Livers v Legal Services Commissioner \[2020\] NSWCA 317](#)

OCCUPATIONS — Legal practitioners — Misconduct and discipline — where solicitor alleged to have deliberately misled statutory authority including by fraudulently altering a document in order to obtain a grant of funding for legal representation of a client — absence of any direct evidence that solicitor altered the document — whether circumstantial evidence capable of supporting allegations

Documentary evidence

[Feldman v Nationwide News Pty Ltd \[2020\] NSWCA 260](#)

EVIDENCE – Documentary evidence – Royal Commissions – Where transcript and video of appellant’s evidence to Royal Commission admitted in aid of a defence to an action for defamation – Whether s 6DD of the *Royal Commissions Act 1902* (Cth) prevents admission of such evidence – Whether s 6DD only precludes admission of evidence given in a Royal Commission in order to establish civil or criminal liability of person who gave such evidence

Expert evidence

[Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre \[2020\] NSWCA 354](#)

PRACTICE AND PROCEDURE – expert evidence – joint report of experts – admission and tender versus weight – Uniform Civil Procedure Rules (NSW), r 31.26(3)

[Menz v Wagga Wagga Show Society Inc \[2020\] NSWCA 65](#)

EVIDENCE - expert evidence - trial judge rejected expert report as beyond witness’ expertise and not disclosing reasoning process - Evidence Act 1995 (NSW), s 79 - no error established

Further evidence on appeal

[Booth v Fourmeninapub Pty Ltd \[2020\] NSWCA 57](#)

APPEAL - further evidence - special grounds - whether further evidence relevant to appeal confined to question of law - whether further evidence not obtainable with reasonable diligence - Supreme Court Act 1970 (NSW), s 75A(8)

[French v Bremner \[2020\] NSWCA 299](#)

PROCEDURE – additional evidence on appeal – fresh and further evidence – requirement that evidence could not have been obtained with reasonable diligence at trial – application in substance refused

[Lianos v Order of AHEPA NSW Inc \(No 3\) \[2020\] NSWCA 340](#)

APPEALS – reopening application by non-party – stay of orders pending determination of reopening application – extension of stay granted by court making orders – admissibility of further evidence

[McEvoy v Wagglens Pty Ltd \[2020\] NSWCA 330](#)

PRACTICE AND PROCEDURE – subpoenas and notices to produce – application to issue for purposes of appeal – need to show arguable case for adducing further evidence on appeal

Inferences

[Spotlight Pty Ltd v Fatseas Investments Pty Ltd \[2020\] NSWCA 132](#)

EVIDENCE – whether primary judge erred in finding that the “only available inference” on the evidence was that the lessee installed grates and gauze in box gutters – where open to Court of Appeal to review evidence and make appropriate finding as to the most probable inference

Privileges

Legal professional privilege

[GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd \[2020\] NSWCA 266](#)

EVIDENCE – legal professional privilege – waiver by conduct – test of inconsistency between conduct and maintenance of privilege

Without prejudice privilege

[Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd \[2020\] NSWCA 25](#)

EVIDENCE — Privileges — Without prejudice privilege – whether information obtained during the course of ‘without prejudice’ meetings can be used for purposes other than settlement – ‘without prejudice’ privilege is not based upon an implied agreement that if the negotiations do not result in an agreement for settlement of the dispute, the parties will make no use of what has been disclosed by the other party in the negotiations

24. Health

Administration of public health system

[Fernandez v State of New South Wales \[2020\] NSWCA 257](#)

HEALTH – Administration of public health system – Legal proceedings by and against authorities – Where directives to health districts provide for procuring of guarantees of liability of Medicare ineligible patients – Whether directives repugnant to other provisions of *Health Services Act 1997* (NSW) as providing for representations inconsistent with their effect – Whether utility in determining separate questions concerning validity of directives

25. Insurance

Exclusion clause

[Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd \[2020\] NSWCA 36](#)

INSURANCE – Exclusion clause – Shopping Malls Combined Liability Policy - exclusion of liability for injury to a person under a contract for the provision of labour only services to the insured - whether injured apprentice worker employed by a third party a person under a contract for the provision of labour only services to the insured

Life and disability insurance

[Onepath Life Ltd v Standley \[2020\] NSWCA 321](#)

INSURANCE – life and disability insurance – where claim for total and permanent disablement – where definition required insured to be totally and permanently disabled after three month absence from “Own Occupation” – whether three month period must commence on date insured left employment – whether insured can satisfy definition due to psychological condition arising after initial three month absence from engaging in occupation

INSURANCE – claims – proof – where claim for total and permanent disablement – whether medical evidence establishes insured unable and unlikely ever again to be able to engage in

“Own Occupation”

Professional indemnity policy

[DIF III – Global Co-Investment Fund L.P v DIF Capital Partners Limited \[2020\] NSWCA 124](#)

INSURANCE – whether professional indemnity policy responded to a claim – whether insured party became aware of any circumstances that could give rise to a third party claim during the policy period

26. Judgments and orders

Application to set aside or vary orders

[Dickson v Commissioner, Australian Federal Police \[2020\] NSWCA 125](#)

JUDGMENTS AND ORDERS – amending, varying and setting aside – fraud, misrepresentation or suppression of material facts – requirements for setting aside judgment on basis of actual fraud

[Foundas v Arambatzis \(No. 2\) \[2020\] NSWCA 51](#)

JUDGMENTS AND ORDERS — application to vary orders – directions given – no issue of principle

[Foundas v Arambatzis \(No. 4\) \[2020\] NSWCA 100](#)

JUDGMENTS AND ORDERS — application to vary or set aside orders – whether orders for the delivery of vacant possession be set aside or varied in light of the COVID-19 pandemic – whether executive or legislative instruments responding to the COVID-19 pandemic suggest that the orders ought to be set aside or varied – where vacant possession ordered as a consequence of an order under s 66G of the Conveyancing Act 1919 (NSW) prior to the COVID-19 pandemic

[James v Australia and New Zealand Banking Group Ltd \[2020\] NSWCA 101](#)

JUDGMENTS AND ORDERS – setting aside – consent judgment – general power to set aside judgment or order – challenge to validity of agreement – whether judgment based on agreement – Uniform Civil Procedure Rules 2005 (NSW), r 36.15(1)

JUDGMENTS AND ORDERS – amending, varying and setting aside – consent judgement –

orders entered – finality of entered orders

[Owlstara v State of New South Wales \(No 2\) \[2020\] NSWCA 335](#)

JUDGMENTS AND ORDERS – amending, varying and setting aside – application under *UCPR*, r 36.16(3) to vary appeal judgment to include pre-judgment interest – where interest not sought prior to application – whether to backdate judgment to date of decision under appeal

[Pham v Gall \[2020\] NSWCA 116](#)

CIVIL PROCEDURE – undefended judgment – setting aside – where applicant did not appear at hearing of proceedings – whether primary judge erred in describing principles for setting aside an undefended judgment under r 36.16(2)(b) of Uniform Civil Procedure Rules – where applicant sought to rely on *Vacuum Oil Pty Co Ltd v Stockdale* – whether *Vacuum Oil* applied to application to set aside undefended judgment under *UCPR* – whether in 1942 principles for setting aside an undefended judgment different at common law and in equity – whether, with introduction of Supreme Court Act in 1972, a single set of rules applied at common law and in equity – no *House v The King* error shown

CIVIL PROCEDURE – undefended judgment – setting aside – whether primary judge mischaracterised the nature and strength of applicant’s proposed defence – no *House v The King* error shown

CIVIL PROCEDURE – undefended judgment – setting aside – whether prejudice caused to the respondent in setting aside orders – whether prejudice can be remedied by costs order – no *House v The King* error shown

CIVIL PROCEDURE – undefended judgment – setting aside – whether adequate explanation offered for applicant’s non-appearance at hearing and delay – no *House v The King* error shown

[Poulos v Commonwealth Bank of Australia Ltd \(No 3\) \[2020\] NSWCA 72](#)

PROCEDURE – judgments and orders – amending, varying and setting aside – where no basis for application – where application restates matters addressed in impugned judgment

[Windsor v Health Care Complaints Commission \(No 2\) \[2020\] NSWCA 164](#)

APPEAL – application to set aside judgment on appeal – complaint that Court did not address affidavits of applicant – where applicants did not appear on hearing of appeal – where applicants sought to challenge intra-curial arrangements of Court of Appeal – application dismissed

[Zepinic v Health Care Complaints Commission \(No 2\) \[2020\] NSWCA 320](#)

JUDGMENTS AND ORDERS – amending, varying and setting aside – motion under UCPR r 36.16 to set aside previous judgment of Court refusing leave to appeal – arguments advanced by applicant plainly groundless and either previously addressed by the Court or not advanced on the previous occasion when the opportunity to do so existed – public interest in the finality of litigation – no change in circumstances or other good reason to permit further leave application to be made

Constitution of Court

[Hosking v Extend N Build Pty Ltd \(No 2\) \[2020\] NSWCA 107](#)

JUDGMENTS AND ORDERS – Court of Appeal – practice and procedure – constitution of court – where parties failed to provide short minutes of order to give effect to appeal judgment – where one member of original Court of Appeal bench no longer a member of the Court – whether appropriate to reconstitute new bench – appropriate form of order in relation to unfair preference – Corporations Act 2001 (Cth), 588FF(1)(a)

Duty to give reasons

[Coffs Harbour City Council v Noubia Pty Ltd \[2020\] NSWCA 142](#)

JUDGMENTS AND ORDERS – reasons – duty to give reasons – failure to give reasons – constructive failure to exercise jurisdiction distinguished

Pre-Judgment Interest

[Erceg v Volonakis \[2020\] NSWCA 253](#)

JUDGMENTS AND ORDERS – interest – pre-judgment interest – rate applicable – whether primary judge erred in finding that the appellant not liable to pay interest on loan at rate of 48% per annum

[Owlstara v State of New South Wales \(No 2\) \[2020\] NSWCA 335](#)

JUDGMENTS AND ORDERS – amending, varying and setting aside – application under UCPR, r 36.16(3) to vary appeal judgment to include pre-judgment interest – where interest not sought prior to application – whether to backdate judgment to date of decision under appeal

[Spotlight Pty Ltd v Fatseas Investments Pty Ltd \[2020\] NSWCA 132](#)

JUDGMENTS AND ORDERS – interest – whether lessor entitled to contractual rate of interest on component of judgment sum referable to unliquidated claim for damages or indemnity for breaches of lease – whether primary judge’s discretion miscarried in choice of date from which prejudgment interest would accrue on the judgment sum – *Civil Procedure Act 2005* (NSW) s 100

Precedent

[Chief Commissioner of State Revenue v Benidorm Pty Ltd \[2020\] NSWCA 285](#)

PRECEDENT – precedential authority of dissenting judgment – precedential authority of statements applicable to earlier legislation – precedential authority of points assumed without argument

27. Legal practitioners

[Carr v Council of the Law Society of New South Wales \[2020\] NSWCA 276](#)

PROFESSIONS AND TRADES — Lawyers — Complaints and discipline — Misappropriation of trust monies — Requirements for dishonesty — Irregular deposits of trust monies into office account — Deposits made without solicitor’s knowledge — Whether overdraft in office account constitutes misappropriation

PROFESSIONS AND TRADES — Lawyers — Complaints and discipline — Attempts to mislead — Requisite element of intention

PROFESSIONS AND TRADES — Lawyers — Complaints and discipline — Unconditional undertakings — Whether undertaking breached where performance would be unlawful

[Council of the Law Society of New South Wales v Jafari \[2020\] NSWCA 53](#)

LEGAL PRACTITIONERS – disciplinary proceedings – practitioner convicted of offence under s 131.1(1) of the Criminal Code Act 1995 (Cth) – whether fit and proper person – appropriateness of making of declarations as to fitness and propriety – order removing name from roll

[Council of the Law Society of New South Wales v Yoon \[2020\] NSWCA 141](#)

OCCUPATIONS — Legal practitioners — Disciplinary proceedings — Removal of practitioner’s name from the roll

[Council of the Law Society of New South Wales v Zhukovska \[2020\] NSWCA 163](#)

APPEALS - appeal from orders imposed by NCAT cancelling solicitor’s practising certificate and preventing issue of a new certificate for 12 months - Law Society appealed seeking

order removing solicitor's name from roll - nature of appeal - whether necessary to show House v The King error

LEGAL PRACTITIONERS - solicitors - appropriate orders following findings by NCAT of professional misconduct and unsatisfactory professional conduct - whether solicitor's name should be removed from the roll - distinction between suspension of practising certificate, cancellation of practising certificate and removal from roll - significance of recommendations as opposed to conditions - whether NCAT failed to specify appropriate conditions to be satisfied before any new practising certificate issued

[Konstantinidis v Council of the Law Society of New South Wales \[2020\] NSWCA 227](#)

PROFESSIONS AND TRADES – legal practitioner – where disciplinary application against practitioner in New South Wales Civil and Administrative Tribunal – where Law Society did not first comply with *Legal Profession Act 2004* (NSW) ss 537(2) and s 540 – whether Tribunal lacked jurisdiction to hear complaints – where no objection to new point being raised on appeal – where parties seek consent orders – whether desirable to make anonymisation order relating to the Tribunal's decisions

[Livers v Legal Services Commissioner \[2020\] NSWCA 317](#)

OCCUPATIONS — Legal practitioners — Misconduct and discipline — where solicitor alleged to have deliberately misled statutory authority including by fraudulently altering a document in order to obtain a grant of funding for legal representation of a client — absence of any direct evidence that solicitor altered the document — whether circumstantial evidence capable of supporting allegations

[Taylor v Council of the Law Society of New South Wales \[2020\] NSWCA 273](#)

PROFESSIONS AND TRADES – lawyers – complaints and discipline – disciplinary application under *Legal Profession Act 2004* (NSW) – proceedings commenced in Civil and Administrative Tribunal of New South Wales – Tribunal's jurisdiction disputed – jurisdiction contingent upon proceedings being commenced in respect of a "complaint" that was "duly made" – Council of the Law Society of New South Wales passed a resolution that a complaint "be made" – whether language of Council's resolution constituted a "complaint" – whether Council's resolution met the s 504 requirements of a "complaint"

PROFESSIONS AND TRADES – lawyers – complaints and discipline – complaints made prior to commencement of the Uniform Law – transitional application of *Legal Profession Act 2004* (NSW)

28. Limitation of Actions

Knowledge of seriousness that warrants bringing a cause of action

[Best v Rosamond \[2020\] NSWCA 90](#)

LIMITATION OF ACTIONS – discoverability – personal injury – knowledge of seriousness that warrants bringing a cause of action – when plaintiff “ought to know” fact that injury was sufficiently serious to justify the bringing of an action on the cause of action

29. Medical practitioners

[Chatoor v Health Care Complaints Commission of NSW \[2020\] NSWCA 111](#)

HEALTH – medical professionals – disciplinary proceedings – whether the Tribunal failed to apply the statutory test for unsatisfactory professional conduct – Health Practitioner Regulation National Law (NSW) s 139B(1)(a) – whether the Tribunal failed to have proper regard to the expert evidence before it

[Coleman v Health Care Complaints Commission of NSW \[2020\] NSWCA 337](#)

CIVIL PROCEDURE – stay of proceedings – applicant a medical practitioner facing disciplinary proceedings in Tribunal and pending criminal proceedings – both proceedings to deal with the same alleged misconduct – application of *Zhao* (2015) 255 CLR 46 – applicant would suffer prejudice if disciplinary proceedings not stayed until criminal proceedings resolved – applicant’s registration as a medical practitioner suspended – delay in resolving disciplinary proceedings a relevant but not critical factor

[Ghosh v Health Care Complaints Commission \[2020\] NSWCA 353](#)

ADMINISTRATIVE LAW – particular administrative bodies – NSW Civil and Administrative Tribunal – complaint by Health Care Complaints Commission about medical practitioner under Health Practitioner Regulation National Law – power of Tribunal to order that a complaint be heard on the papers – where National Law required notice of time and place of inquiry to be given – where National Law entitled practitioner to attend the inquiry – where National Law applied despite any provision in Civil and Administrative Tribunal Act

ADMINISTRATIVE LAW – particular administrative bodies – NSW Civil and Administrative Tribunal – complaint by Health Care Complaints Commission about medical practitioner under Health Practitioner Regulation National Law – where Tribunal did not afford practitioner procedural fairness – where Tribunal erred in relation to its consideration of certain complaints – where Tribunal failed to give adequate reasons for its conclusions concerning certain complaints

[Windsor v Health Care Complaints Commission \[2020\] NSWCA 110](#)

APPEAL – medical profession – where suspension by Medical Council of New South Wales of registration of medical practitioner – where suspension affirmed on internal review by Medical Council – Health Practitioner Regulation National Law (NSW), s 150, s 150A – where no appeal by medical practitioner to NCAT – Health Practitioner Regulation National Law (NSW), s 159, s 159B – appeal to Court of Appeal challenging suspension by Council – appeal incompetent

MEDICAL PROFESSION – protective proceedings – where complaint against medical practitioner by Health Care Complaints Commission – where doctor refused to undergo psychiatric examination as directed by Medical Council of NSW – Health Practitioner Regulation National Law (NSW), s 149E, s 149F – where NCAT cancelled registration of practitioner – Health Practitioner Regulation National Law (NSW), s 149C – where review of Tribunal’s decision limited to questions of law – whether error of law demonstrated

[Zepinic v Health Care Complaints Commission \[2020\] NSWCA 146](#)

HEALTH – health practitioner – refusal to order reinstatement of applicant as a psychologist – *Health Practitioner Regulation National Law* s 163B – whether NCAT could take into account applicant’s spent convictions – *Criminal Records Act* ss 12, 16(1)

30. Mental Health

Forensic patients

[Attorney General of New South Wales v WB \[2020\] NSWCA 7](#)

MENTAL HEALTH – forensic patients – expiry of limiting term – extension of status as forensic patient – whether extension order can be made with respect to a person who has ceased to be a forensic patient

Jurisdiction of Mental Health Review Tribunal

[Secretary, New South Wales Ministry of Health v W \[2020\] NSWCA 212](#)

STATUTORY INTERPRETATION — jurisdiction – Mental Health Review Tribunal – *Mental Health Act 2007* (NSW), s 38(4) – statutory construction – whether Mental Health Review Tribunal has power to order the transfer of an involuntary patient from one mental health facility to another mental health facility, either generally or so as to effect a transfer from one level of security facility to a lesser level of security facility

31. Partnerships

Dissolution

[Warner Capital Pty Ltd v Shazbot Pty Ltd \[2020\] NSWCA 121](#)

PARTNERSHIPS – dissolution – account of partnership assets and liabilities – valuation of work in progress – where finding that work in progress comprised “collectible” component and so-called “goodwill” component – whether appropriate to have reference to collections actually made in valuation of collectible work in progress

PARTNERSHIPS – dissolution – where no utility in appointing a receiver – form of orders appropriate to give effect to account of partnership assets and liabilities

32. Police

Offences against police in execution of duty

[Jankovic v Director of Public Prosecutions \[2020\] NSWCA 31](#)

CRIME – offences against police in execution of duty – whether police in execution of duty when alleged offences committed – accused arrested without warrant – whether arrest lawful – whether there was evidence on which the court could find, as required by s 99(1)(b) of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), that the arresting officer was “satisfied” that arrest without warrant was “reasonably necessary” for a reason stated in that section – meaning of “reasonably necessary” – need for police officer to engage in a process of comparison and to make an evaluative judgment regarding proportionate response to risk

Misfeasance in public office

[Ea v Diaconu \[2020\] NSWCA 127](#)

TORT – misfeasance in public office – elements – identification of public power or duty – where police officer involved in trial laughed and rolled eyes during applicant’s trial – where applicant alleges her conduct amounted to misfeasance in public office – whether a purported exercise of a public power or duty identified – whether a capacity to act as an incident of a public office an exercise of public power

Officer removed from NSW Police Force

[Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police \(NSW Police Force\) \[2020\] NSWCA 159](#)

POLICE – non-probationary officer “caused to be retired” pursuant to s 72A of the *Police Act 1990* (NSW) – officer seeking review of decision pursuant to s 84(1) of the *Industrial Relations Act 1996* (NSW) – whether Industrial Relations Commission has jurisdiction to hear matter

[Commissioner of Police, New South Wales Police Force v Zisopoulos \[2020\] NSWCA 236](#)

POLICE – officer removed from NSW Police Force pursuant to s 181D(1) of the *Police Act 1990* (NSW) for alleged voluntary consumption of illicit drugs – officer successfully reviewed dismissal pursuant to s 181E of the *Police Act* – whether IRC misapplied s 181F(2) concerning onus of proof – legal, tactical and evidential burdens of proof considered

STATUTORY INTERPRETATION – construction of s 181F(2) of the *Police Act 1990* (NSW) – whether the removal of an officer from the NSW Police Force was “harsh, unreasonable or unjust”

“Reasonably necessary”

[Jankovic v Director of Public Prosecutions \[2020\] NSWCA 31](#)

CRIME – offences against police in execution of duty – whether police in execution of duty when alleged offences committed – accused arrested without warrant – whether arrest lawful – whether there was evidence on which the court could find, as required by s 99(1)(b) of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), that the arresting officer was “satisfied” that arrest without warrant was “reasonably necessary” for a reason stated in that section – meaning of “reasonably necessary” – need for police officer to engage in a process of comparison and to make an evaluative judgment regarding proportionate response to risk

Search warrants

[Doyle v Commissioner of Police \[2020\] NSWCA 11](#)

POLICE – Search warrant – police officers completed terms of draft warrant and particulars relied upon by issuing officer before application was made – issuing officer signed and dated warrant and issued it in terms sought – issuing officer failed to complete certain parts of warrant – one aspect of warrant supported only by unsubstantiated statement of reasonable suspicion by police – whether issuing officer complied with Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) – whether warrant invalid – whether other relief should issue

[Doyle v Commissioner of Police \(No 2\) \[2020\] NSWCA 34](#)

POLICE – search warrant – computer seized by police pursuant to warrant – interlocutory injunctive relief granted preventing police from accessing computer – warrant later held to be invalid – owner sought return of computer and delivery up or destruction of image of its hard drive – whether representatives of police should be permitted to access computer for purpose of adducing evidence going on discretion

[Doyle v Commissioner of Police \(No 4\) \[2020\] NSWCA 290](#)

POLICE – search warrant – police seized computer and made copy of hard drive – search warrant invalid – hard drive contained child abuse material – police wishing to investigate child abuse material but presently subject to interlocutory regime – whether discretionary relief for destruction of computer and copy of hard drive should issue – relief refused to owner – police released from restriction

Use of force

[Owlstara v State of New South Wales \[2020\] NSWCA 217](#)

POLICE – use of force – arrest – driving offences – pointing gun at offender – handcuffing offender – conveying to police station – whether force used reasonably necessary – compliance with *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 230, 231

33. Real Property

Conveyancing

[Scott v Ennis-Oakes \[2020\] NSWCA 239](#)

LAND LAW – Conveyancing – Contract for sale – Rescission – Respondent wished to rescind contract – Appellants did not consent to proposed rescission and maintained contract was “still on foot” – Appellants elected to affirm contract rather than terminating and seeking loss of bargain damages – Appellants sought orders for specific performance – Respondent subsequently entered into a Scheme of Arrangement Deed and sought to rescind the contract on this basis – Appellants sought loss of bargain damages – Whether contract came to an end because of supervening circumstances – Whether appellants entitled to loss of bargain damages at the time when respondent terminated contract on basis of entering into Scheme of Arrangement

[Super Vision Resources Ltd BVI Registered No 1810534 v AC Holdings Co Pty Ltd \[2020\] NSWCA 319](#)

CONVEYANCING – transfers in fraud of creditors – *Conveyancing Act 1919* (NSW), s 37A – where partly encumbered properties transferred at undervalue – whether transferred with intent to defraud creditors – whether appellant a person prejudiced by transfers – whether transferee had notice of intent to defraud – meaning of “notice” in s 37A(3)

Easements

[Arcidiacono v The Owners – Strata Plan No 17719; Arcidiacono v The Owners – Strata Plan No 61233 \[2020\] NSWCA 269](#)

LAND LAW – easements – creation of easements by prescription – servient owners unknown – whether servient owners acquiesced in user – whether acquiescence a necessary element

LAND LAW – easements – creation of easements by order of court – Conveyancing Act 1919 (NSW) s 88K – whether easements reasonably necessary – whether easements not inconsistent with the public interest – evaluative decision in which appellate courts should exercise restraint

[Aussie Skips Recycling Pty Ltd v Strathfield Municipal Council \[2020\] NSWCA 292](#)

LAND LAW – easements – imposition of easement by Court – standard of appellate review – requirement that proposed easement be “reasonably necessary for the effective use or development” of the land – Conveyancing Act 1919 (NSW), s 88K(1)

LAND LAW – easements – validity – characterisation under general law – rights not to confer exclusive use of servient tenement – enclosure of community land for waste transfer and recycling facility – loss of owner’s use of enclosed land and limited use of residue – whether proposed easement capable of being characterised as an easement

LAND LAW – community land – inability of Council to grant easement over community land – whether Court can impose easement where owner cannot grant it – Local Government Act 1933 (NSW), s 46 and Conveyancing Act 1919 (NSW), s 88K

[Studholme v Rawson \[2020\] NSWCA 76](#)

REAL PROPERTY – easements – compensation – assessment of compensation for owner of servient tenement – application of valuation principles in determining compensation payable – need to determine terms and conditions of easement before assessing compensation – Conveyancing Act 1919 (NSW), s 88K(4)

REAL PROPERTY – easements – whether reasonably necessary – terms and conditions of easement – need to determine when deciding whether easement reasonably necessary – drainage works – joint report of expert engineers rejected – need for remittal – Conveyancing Act 1919 (NSW), s 88K(3)

Leases

[MIR Holdings Pty Ltd v Marina Square Retail Pty Ltd \[2020\] NSWCA 286](#)

REAL PROPERTY – landlord and tenant – agreements for lease – breach – *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) – where tenants in arrears before the relevant “prescribed period” – leave to appeal refused in circumstances where all necessary and proper parties not joined in proceedings

Mortgages

[Sayed v National Australia Bank \[2020\] NSWCA 334](#)

MORTGAGES AND SECURITIES – mortgages – duties, rights and remedies of mortgagee – power of sale – challenge to sale process – claim that sale at undervalue – whether advertisements misleading

MORTGAGES AND SECURITIES – mortgages – power of sale – property with development consent – whether purchaser entitled to development plans

Resulting trust

[Foundas v Arambatzis \[2020\] NSWCA 47](#)

LAND LAW — Co-ownership — Resulting trust – whether proceeds from sale of property be distributed in accordance with the legal title – where property held as tenants in common – where unequal contributions by co-owners to acquisition costs– whether arguable that presumption of resulting trust not rebutted

Statutory trust for sale

[Foundas v Arambatzis \[2020\] NSWCA 47](#)

LAND LAW — Co-ownership — Statutory trust for sale – whether share of property held on trust for other co-owner – whether arguable defence to an application under s 66G Conveyancing Act 1919 (NSW) for appointment of trustees for sale

Strata schemes

[Cooper v The Owners – Strata Plan No 58068 \[2020\] NSWCA 250](#)

LAND LAW – strata schemes – by-laws – scope of subject-matter – purposive limits to the power to make by-laws – Strata Schemes Management Act 2015 (NSW), s 136(1)

LAND LAW – strata schemes – by-laws – restrictions on by-laws – requirement that by-law not be harsh, unconscionable or oppressive – whether by-law imposing blanket prohibition on keeping animals contravenes provision – Strata Schemes Management Act 2015 (NSW), s 139(1)

[Vickery v The Owners – Strata Plan No 80412 \[2020\] NSWCA 284](#)

STRATA TITLES – obligation of owners corporation to maintain common property in good repair – owners corporation breached obligation, causing damage to lot owner – NCAT authorised to make orders to “settle” a complaint or dispute about strata scheme – whether NCAT authorised to award damages to lot owner – consideration of nature of lot owner’s cause of action – consideration of conferral of jurisdiction and power upon NCAT –

consideration of legislative history – consideration of interaction of jurisdiction of courts and NCAT – appeal allowed, NCAT authorised to award damages

TORT – breach of statutory duty – statute authorised lot owner to recover damages for breach of statutory duty – consideration of nature of lot owner’s cause of action

34. Statutory interpretation

Amending legislation

[Bandelle Pty Ltd v Sydney Capitol Hotels Pty Ltd \[2020\] NSWCA 303](#)

STATUTORY CONSTRUCTION – amending legislation – limitation section renumbered and reworded – transitional and savings regulations – regulations deferred commencement and qualified scope of limitation period – effect of repeal of regulation – further regulations including amended regulations preserving repealed sections and qualifying renumbered section – whether effect of legislation and amendment was a period of time during which limitation period did not apply – whether legislation displaced operation of *Interpretation Act 1987* – observations on undesirability of regulations affecting operation of statute

Clear statement rule

[Tannous v State of New South Wales \[2020\] NSWCA 261](#)

STATUTORY INTERPRETATION – clear statement rule – right to liberty – not available to subvert power to make extended supervision order – Crimes (High Risk Offenders) Act 2006 (NSW), s 5B

Defined terms

[Attorney General of New South Wales v WB \[2020\] NSWCA 7](#)

STATUTORY INTERPRETATION – use of defined term – whether used as label – whether context and subject matter show intention that definition not apply – application of Interpretation Act 1987 (NSW), s 6

Departure from literal meaning

[Lawrence v State of New South Wales \[2020\] NSWCA 248](#)

STATUTORY INTERPRETATION – departure from literal meaning - *Terrorism (High Risk Offenders) Act 2017* (NSW) s 39(4) – meaning when read in context – meaning having regard to the purpose of the Act

Expressio unius

[Australian Rail Track Corporation Limited v Dollisson \[2020\] NSWCA 58](#)

STATUTORY INTERPRETATION – whether reference to “compensation” in s 134AB(1) of the Accident Compensation Act 1985 (Vic) is a reference to compensation under that Act or to compensation whether or not awarded under the Act or the Act of some other state or territory – expressio unius reasoning inappropriate where dealing with interpretation of a “patchwork” statute

Implied repeal

[Universal Property Group Pty Ltd v Blacktown City Council \[2020\] NSWCA 106](#)

STATUTORY INTERPRETATION – amendment and repeal – implied repeal – harmonious construction – conflict between State Environmental Planning Policies – whether capable of harmonious construction – requirement for actual contrariety

STATUTORY INTERPRETATION – amendment and repeal – implied repeal – clauses in separate instruments each purporting to control inconsistency by prevailing over the other – effect of each clause

Legislative purpose

[Lawrence v State of New South Wales \[2020\] NSWCA 248](#)

STATUTORY INTERPRETATION – legislative purpose – *Terrorism (High Risk Offenders) Act 2017* (NSW) s 10(1)(c)(ii) – necessary connection between the association or affiliation and the advocacy of terrorist acts or violent extremism

Objects clause

[Tannous v State of New South Wales \[2020\] NSWCA 261](#)

STATUTORY CONSTRUCTION – objects clause – statutory statement of objects as aid to construction

Presumption of territoriality

[DRJ v Commissioner of Victims Rights \(No 2\) \[2020\] NSWCA 242](#)

STATUTORY INTERPRETATION - legal presumptions - presumption of territoriality - *Interpretation Act 1987* (NSW) s 12 - applicants were women of Yazidi ethnicity - plaintiffs claimed they were victims of acts of violence perpetrated upon them in Northern Iraq and Syria by a man who had previously lived in New South Wales - Commissioner and NCAT dismissed application for support because acts of violence did not occur in New South Wales - plaintiffs submitted sufficient connection with New South Wales - nature of territorial nexus of *Victims Rights and Support Act 2013* (NSW) with New South Wales - consideration of history and construction of s 12 *Interpretation Act*, extraterritorial legislative capacity, counterparts and precursors to victims compensation schemes - displacement of legal presumptions - appeal dismissed

Principle of legality

[Attorney General of New South Wales v WB \[2020\] NSWCA 7](#)

STATUTORY INTERPRETATION – principle of legality – fundamental rights and freedoms – intention to confer power to infringe liberty – application to extension orders under the Mental Health (Forensic Provisions) Act 1990

Use of extrinsic materials

[Attorney General for New South Wales v Melco Resorts & Entertainment Limited \[2020\] NSWCA 40](#)

STATUTORY INTERPRETATION – whether s 17(1) of the Royal Commissions Act conferred a power or authority on a commissioner – whether s 143A of the Casino Control Act picked up s 17(1) of the Royal Commissions Act and abrogated legal professional privilege – principle of legality – legislation to be construed in context of case law existing at time of enactment – meaning of “protection” afforded to a witness in s 11(3) of Royal Commissions Act – permissible use of extrinsic materials

[Cooper v The Owners – Strata Plan No 58068 \[2020\] NSWCA 250](#)

STATUTORY INTERPRETATION – use of dictionaries – whether three words comprise a composite statutory criterion

[Michael Brown Planning Strategies Pty Ltd v Wingecarribee Shire Council \[2020\] NSWCA 137](#)

STATUTORY INTERPRETATION – extrinsic materials – dictionaries – usefulness of reliance on dictionaries in statutory interpretation

[Will v Brighton \[2020\] NSWCA 355](#)

STATUTORY INTERPRETATION – where provision in question one of a number of provisions in various statutes concerned with prevention of cruelty to animals – other statutes forming part of the statutory context – consideration of the use of dictionaries in statutory interpretation

35. Succession

Construction of will

[De Lorenzo v De Lorenzo \[2020\] NSWCA 351](#)

SUCCESSION – construction of will – gift of two shares to three children as tenants in common – will stated that if shares not divisible by three, daughter would receive more – whether daughter entitled to both shares under will – consideration of joint ownership of choses in action

Contested probate

[Battenberg v Phillips \[2020\] NSWCA 249](#)

SUCCESSION — Contested probate — Lack of knowledge and approval — Suspicious circumstances — Actual knowledge — Reading will aloud before execution — Sufficiency of evidence

Family provision

[Blendell v Blendell; Blendell v Blendell \[2020\] NSWCA 154](#)

SUCCESSION – Family provision – Appeal against order for provision in favour of two adult children – Where whole of estate left to deceased’s husband – Where failure by one applicant to produce documents relevant to that applicant’s financial circumstances – Where evidence as to value of other applicant’s assets unreliable – Whether failure to comply with notice to produce a basis for rejecting application for provision – Whether Court had sufficient evidence of each applicant’s financial position – Whether primary judge had regard to 50 year marital relationship between deceased and her husband as sole beneficiary, and deceased’s decision to leave all of her estate to him – Appeal dismissed

[Cowap v Cowap \[2020\] NSWCA 19](#)

SUCCESSION – family provision – competing interests of disabled adult son and elderly widow – whether provision ordered in favour of son manifestly excessive – whether “adequate weight” given to widow’s claim to continue to reside in former matrimonial home – appeal dismissed

[Haertsch v Whiteway \[2020\] NSWCA 133](#)

SUCCESSION – Family provision – Notional estate – Where property of the estate distributed – Where primary beneficiary deceased and her estate held by executor – Where notional estate order made by primary judge – Whether estate of deceased beneficiary able to be designated notional estate under Family Provision Act 1982 (NSW), s 24 – Appeal allowed.

SUCCESSION – Family provision – Claim by adult child – Proceedings not commenced within time – Where application made 12 and a half years out of time – Where primary beneficiary of testator now deceased – Where general assurances of a testamentary benefit given to applicant by deceased beneficiary – Whether sufficient cause shown to extend time – Whether primary judge erred in disregarding prejudice to deceased beneficiary and her estate in exercising discretion to extend time – Appeal allowed

[Megerditchian v Khatchadourian \[2020\] NSWCA 229](#)

SUCCESSION – family provision – claim by adult child – judgment in favour of appellant for provision from notional estate – whether adequate provision for the proper maintenance, education or advancement of the appellant

[Robinson v Robinson \[2020\] NSWCA 4](#)

SUCCESSION — Family provision — Appeals — appeal from orders made in chambers approving s 95 Succession Act releases — whether primary judge failed to consider each of the matters listed in s 95(4) Succession Act — appeal dismissed — application for leave to amend grounds of appeal denied — cross-appeal — change of position/ estoppel defence to restitution of moneys paid pursuant to impugned orders

Intention to form a will

[Rodny v Weisbord \[2020\] NSWCA 22](#)

SUCCESSION – probate and administration – informal document – dispensing with requirements for execution of a will pursuant to Succession Act 2006 (NSW), s 8 – intention that document form a will – where no findings as to how intention formed – where primary judge found it more likely that deceased had not seen document propounded as will – where evidence did not permit a finding as to what might have caused deceased to believe she had

executed a will – where evidence did not permit a finding that deceased intended that any particular document would operate as her will

Probate and administration

[Battenberg v Phillips \[2020\] NSWCA 249](#)

SUCCESSION — Contested probate — Lack of knowledge and approval — Suspicious circumstances — Actual knowledge — Reading will aloud before execution — Sufficiency of evidence

[Rodny v Weisbord \[2020\] NSWCA 22](#)

SUCCESSION – probate and administration – informal document – dispensing with requirements for execution of a will pursuant to Succession Act 2006 (NSW), s 8 – intention that document form a will – where no findings as to how intention formed – where primary judge found it more likely that deceased had not seen document propounded as will – where evidence did not permit a finding as to what might have caused deceased to believe she had executed a will – where evidence did not permit a finding that deceased intended that any particular document would operate as her will

36. Summary offences

Statutory limitation of appeals under Summary Offences Act 1988 (NSW)

[Padraic Gibson \(on behalf of the Dungay family\) v Commissioner of Police \(NSW Police Force\) \[2020\] NSWCA 160](#)

APPEAL – whether appeal lies to Supreme Court from order prohibiting proposed public assembly notwithstanding s 27(2) of the *Summary Offences Act 1988* (NSW) – discussion of statutory limitation of appeals under the *Summary Offences Act*

Whether public assembly authorised

[Padraic Gibson \(on behalf of the Dungay family\) v Commissioner of Police \(NSW Police Force\) \[2020\] NSWCA 160](#)

PUBLIC ASSEMBLY – Summary Offences Act 1988 (NSW) – whether Supreme Court had jurisdiction to entertain an application to prohibit a proposed public assembly – whether Supreme Court’s jurisdiction depended on Commissioner first complying with procedure specified in s 25(2) of the Summary Offences Act

[Raul Bassi v Commissioner of Police \(NSW\) \[2020\] NSWCA 109](#)

APPEAL – whether appeal involved a violation of s 27(2) of the Summary Offences Act 1988 (NSW).

PUBLIC ASSEMBLY – Summary Offences Act 1988 (NSW) – whether public assembly was authorised – whether Commissioner of Police had communicated non-opposition to notification of a proposed public assembly within the meaning of s 23(1)(f) of the Summary Offences Act – whether amendment of particulars to timely notification amounted to a new notice of intention

37. Taxation

Federal tax legislation

[Kedwell v Deputy Commissioner of Taxation \[2020\] NSWCA 238](#)

TAXES AND DUTIES – administration of federal tax legislation – collection and recovery of taxes – PAYG tax – where company failed to remit PAYG withholdings to the Commissioner – where Director Penalty Notice issued – where appellant made payments to the Commissioner but failed to advise they were to be applied to the Director Penalty Notice liability – whether primary judge erred in finding that amounts paid did not extinguish Director Penalty Notice liability

[Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation \[2020\] NSWCA 95](#)

TAXES AND DUTIES – administration of federal tax legislation – collection and recovery of taxes – PAYG tax – estimates provisions – where Notice of Estimate issued – where company did not pay the amount of the Notice of Estimate – where Director Penalty Notices issued – where appellants placed company into liquidation – whether Director Penalties were remitted pursuant to s 269-30(1) of Schedule 1 to the Taxation Administration Act 1953 – whether trial judge erred in finding that s 269-30(2) Item 2 of Schedule 1 to the Taxation Administration Act 1953 applied in respect of the Director Penalties

TAXES AND DUTIES – administration of federal tax legislation – collection and recovery of taxes – PAYG tax – averments under s 255-50 of Schedule 1 to the Taxation Administration Act 1953 – where averments made as to unpaid PAYG amounts withheld – whether averments themselves sufficient evidence that the company had withheld PAYG amounts and not paid those amounts to the Commissioner

GST

[Nadinic v Cheryl Drinkwater as trustee for the Cheryl Drinkwater Trust \[2020\] NSWCA 2](#)

TAXES AND DUTIES – GST – input tax credits – entitlement to refunds

PAYG tax

[Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation \[2020\] NSWCA 95](#)

TAXES AND DUTIES – administration of federal tax legislation – collection and recovery of taxes – PAYG tax – estimates provisions – where Notice of Estimate issued – where company did not pay the amount of the Notice of Estimate – where Director Penalty Notices issued – where appellants placed company into liquidation – whether Director Penalties were remitted pursuant to s 269-30(1) of Schedule 1 to the Taxation Administration Act 1953 – whether trial judge erred in finding that s 269-30(2) Item 2 of Schedule 1 to the Taxation Administration Act 1953 applied in respect of the Director Penalties

TAXES AND DUTIES – administration of federal tax legislation – collection and recovery of taxes – PAYG tax – averments under s 255-50 of Schedule 1 to the Taxation Administration Act 1953 – where averments made as to unpaid PAYG amounts withheld – whether averments themselves sufficient evidence that the company had withheld PAYG amounts and not paid those amounts to the Commissioner

Payroll tax

[Chief Commissioner of State Revenue v Downer EDI Engineering Pty Ltd \[2020\] NSWCA 126](#)

STATUTORY INTERPRETATION – *Payroll Tax Act 2007* (NSW) – ss 32(2)(a) and 32(2)(d)(i) – relevant contract – whether payments made under a subcontract were exempt from payroll tax – whether legal title required to pass for there to be a supply of goods – whether payments were made “under” the subcontract – whether installation services were “ancillary” to the supply of goods

Penalty proceedings under Taxation Administration Act 1953 (Cth)

[Chief Commissioner of State Revenue v Downer EDI Engineering Pty Ltd \[2020\] NSWCA 126](#)

STATUTORY INTERPRETATION – *Taxation Administration Act 1996* (NSW) – ss 25 and 33 – whether the power to remit penalty tax and interest is limited

[Snell v Deputy Commissioner of Taxation \[2020\] NSWCA 29](#)

TAXES AND DUTIES – Penalty proceedings under (CTH) Taxation Administration Act 1953 – Obligation to remit amounts withheld from wages and salaries paid to employee – Requirements of director penalty notice – Where amount claimed by Commissioner changed after giving director penalty notice – No requirement to give further notice before commencing recovery proceedings - No requirement to commence proceedings within a reasonable time after expiry of notice

TAXES AND DUTIES – Penalty proceedings under (CTH) Taxation Administration Act 1953 s 269-20 – Defence of justifiable non-participation in management under (CTH) Taxation Administration Act 1953 s 269-35 – What constitutes participation in management for the purposes of the defence – The defence must be established for the entire period from the “due day” until at least the expiry of the director penalty notice

Stamp duty

[Chief Commissioner of State Revenue v Benidorm Pty Ltd \[2020\] NSWCA 285](#)

REVENUE – stamp duties – declaration of trust – whether document styled “Declaration of Trust by Nominee” merely acknowledged position after grant of probate and resealing of grant – dutiable transaction - whether mere acknowledgement a dutiable transaction – significance of *Duties Act 1997* (NSW) being tax on transactions, rather than tax on instruments

38. Torts (negligence)

Apportionment of responsibility

[Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd \[2020\] NSWCA 41](#)

TORTS – negligence – apportionment of responsibility between tortfeasors – both parties occupied parts of building site – liability of head contractor – liability of subcontractor undertaking building work – heavy metal plate covering penetration into underground retention pit removed – replacement with empty pallet – delivery driver injured by fall into pit

[Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd \[2020\] NSWCA 36](#)

TORTS – Negligence – Apportionment of responsibility and damages - apprentice worker employed by a third party – liability of employer for non-delegable duty of care - apportionment pursuant to s 151Z Workers Compensation Act 1987 (NSW)

Breach of duty of care

[Bauer Media Pty Ltd v Khedrlarian \[2020\] NSWCA 288](#)

TORTS — negligence — breach of duty — provision of safe system of work — precautions against workplace injury — adequacy of particularisation of precautions — evidence of whether precautions would obviate risk

[Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre \[2020\] NSWCA 354](#)

TORTS – negligence – breach of duty – shopping centre – defect in perimeter security – gap above roller door – exposed entrance – previous break-in via the gap – awareness by owner of premises, security company, and employer of security guard of defect – no steps taken to rectify defect – Civil Liability Act 2002 (NSW), s 5B

[Carnemolla v Arcadia Funds Management Ltd \[2020\] NSWCA 308](#)

TORTS – negligence – breach of duty – allegation of water on floor – management had system of inspection admitted to be adequate – no breach of duty to take reasonable care – *Civil Liability Act* (NSW) ss 5B, 5C

TORTS – negligence – duty of care – slip and fall at shopping centre – duty of shopping centre manager – no duty to ensure floor surface dry – duty to take reasonable care to maintain dry surface – adequacy of system of inspection

[Coffs Harbour City Council v Polglase \[2020\] NSWCA 265](#)

NEGLIGENCE - public authorities - Council and Trust had care, control and management of jetty - young child fell through gap in jetty's railing and sustained serious injury - history of young children falling through railing to Council's knowledge - whether Council breached duty of care by failing to install additional railings or a mesh infill to prevent such falls - whether risk warning at jetty entrance meant no duty of care was owed - jetty built on Crown land and railing designed and constructed by State - State retained control of jetty for five years prior to handover to Council and Trust some nine years before plaintiff's injury - whether State also liable as joint tortfeasor - whether grandparents walking with young grandson breached a duty of care - consideration of relationship between State, Council and Trust - consideration of significance of ownership, occupation, and care control and management of land for purposes of duty of care and breach

[Liprini v Hale \[2020\] NSWCA 130](#)

NEGLIGENCE – breach of duty – *Civil Liability Act*, s 5B – whether failure of solicitors to commence proceedings for *Family Provision Act* provision against estate prior to mediation constituted breach – whether there was a relevant risk of harm

[Smith v Coles Supermarkets Australia Pty Ltd t/as Coles Distribution Centre; Ready Workforce \(A Division of Chandler Macleod\) Pty Ltd v Coles Supermarkets Australia Pty Ltd; Coles Supermarkets Australia Pty Ltd v Chandler Macleod Group Ltd \[2020\] NSWCA 206](#)

TORTS — Negligence — appellant worker injured whilst working on respondent’s premises — evidence at first instance that risk of injury could have been avoided by provision of a ‘pick stick’ — primary judge found respondent company had discharged duty of care and was not negligent — whether primary judge erred in failing to address case put by the parties — whether primary judge erred in failing to find non-provision of pick stick was negligent — whether respondent company was negligent — whether any contributory negligence

Causation

[Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre \[2020\] NSWCA 354](#)

TORTS – negligence – causation – intruder enters shopping centre via gap – requirement to address gap – *Civil Liability Act 2002 (NSW)*, s 5D

[Gray v Coles Supermarkets Australia Pty Ltd; Coles Supermarkets Australia Pty Ltd v Chandler Macleod Group Ltd \[2020\] NSWCA 209](#)

TORTS — Negligence — Causation — appellant worker injured whilst working on respondent’s premises — where primary judge found respondent was not liable — finding that reasonable precautions postulated in particulars of negligence would not have avoided risk of harm to appellant worker — challenge to findings of fact at first instance — no error established

[Liprini v Hale \[2020\] NSWCA 130](#)

NEGLIGENCE – causation – whether a readily enforceable settlement was reached at mediation – whether there was a realistic chance that the appellant would have recovered the full settlement sum but for the negligence – relevance of actions of a third party

Contributory negligence

[Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre \[2020\] NSWCA 354](#)

TORTS – general principles – contributory negligence – security guard followed steps and was praised by management for conduct in securing premises against axe-wielding intruder which led to psychiatric injury – Civil Liability Act 2002 (NSW), ss 5R, 5S

[Charter Hall Real Estate Management Services \(NSW\) Pty Limited v State of New South Wales \[2020\] NSWCA 26](#)

TORTS — negligence — contributory negligence – whether contributorily negligent in knocking a locking bar when descending a ladder that falls and injures the worker – no contributory negligence as mere accidental inadvertence

[Davies v Whitehaven Coal Mining Limited \[2020\] NSWCA 219](#)

TORTS — General principles — Contributory negligence — where employer relied on fact that appellant had climb to top of machine without incident numerous times prior to injury — where employer alleged that injury would not have occurred if appellant had been exercising sufficient care for his own safety — where appellant gave evidence that he had been firmly gripping the handholds when descending from top of LHD

[Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd \[2020\] NSWCA 41](#)

TORTS – negligence – contributory negligence – injury to driver of truck – delivery of supplies to building site before dawn – driver clearing site of empty pallet – concealed penetration into underground retention pit – Civil Liability Act 2002 (NSW), s 5R

[Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd \[2020\] NSWCA 36](#)

TORTS – Negligence – apprentice worker required to insert sausage mince into a machine and link sausages - failure properly to clean the meat room floor by another employee – apprentice worker slips on a piece of sausage mince - Contributory negligence - failure of the apprentice worker to clean the meat room floor.

Damages

[Lee v Strelricks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan \[2020\] NSWCA 115](#)

TORTS — Damages — Damage to non-income producing chattel — Motor vehicle collision — Damaged vehicle unavailable while undergoing repairs — Damages for inconvenience — Owner's need for replacement vehicle — Rental charges incurred for vehicle of equivalent

value to damaged vehicle — Whether charges recoverable — Whether charges reasonably necessary to meet need

[Liprini v Hale \[2020\] NSWCA 130](#)

NEGLIGENCE – damages – loss of commercial opportunity contract claim – prospects of appellant recovering the full settlement sum

Defences

[Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc \[2020\] NSWCA 294](#)

NEGLIGENCE – defences – *Civil Liability Act 2002* (NSW) – s 5L materialisation of an obvious risk of a dangerous recreational activity – whether intentional act – whether effected with intent cause injury – recreational activity where an intention to cause some degree of injury is likely or common

[Liprini v Hale \[2020\] NSWCA 130](#)

NEGLIGENCE – defence of proportionate liability – *Civil Liability Act*, s 35 – concurrent wrongdoers – whether the loss sued for was a different loss to that caused by the alleged wrongdoer

Duty to warn

[Hungry Jack's Pty Ltd v Fourtounas \[2020\] NSWCA 325](#)

TORTS – duty to warn – immunity from liability if risk “obvious” – whether immunity limited to verbal risk warnings – application of *Civil Liability Act 2002* (NSW), ss 5F, 5H

Economic loss

[Aardwolf Industries LLC v Tayeh \[2020\] NSWCA 301](#)

NEGLIGENCE – duty of care to avoid economic loss – whether vulnerability required – applicants pleaded vulnerability as an essential element of duty – no obligation on primary judge to consider alternatives to that position – no relevant vulnerability due to applicants' ability to protect themselves from consequences of liquidators' actions

Elements of cause of action in negligence

[Owners of Strata Plan No 30791 v Southern Cross Constructions \(ACT\) Pty Ltd \(in liquidation\) \[2020\] NSWCA 199](#)

TORTS — Negligence — Essentials of action for negligence — Whether there was a failure to take reasonable care — Whether any failure caused damage — Assessment of expert evidence

[Singh bhnf Ambu Kanwar v Lynch \[2020\] NSWCA 152](#)

TORTS – negligence – elements of cause of action in negligence – breach of duty – whether riding contrary to the Australian Rules of Racing breached jockey’s duty of care – whether liability defeated by s 5L of the *Civil Liability Act 2002* (NSW)

[Tapp v Australian Bushmen’s Campdraft & Rodeo Association Ltd \[2020\] NSWCA 263](#)

TORTS – negligence – elements of cause of action in negligence – breach of duty – whether failing to halt event breached Rodeo Association’s duty of care – whether liability defeated by s 5L of the *Civil Liability Act 2002* (NSW)

Foreseeability of risk

[Charter Hall Real Estate Management Services \(NSW\) Pty Limited v State of New South Wales \[2020\] NSWCA 26](#)

TORTS — negligence — *Civil Liability Act 2002* – foreseeability of risk – whether occupier had actual knowledge of a risk when risk was earlier reported to person whose employment was taken over by occupier – knowledge of the employee imputed to the occupier

General principles

[Davies v Whitehaven Coal Mining Limited \[2020\] NSWCA 219](#)

NEGLIGENCE — General principles — where appellant injured while climbing down from top of load haul dump machine (“LHD”) — whether employer created an unnecessary risk of injury by modifying LHD prior to the injury — where modification required appellant to climb to top of LHD to refuel where previously refuelling was done from the ground — where no evidence that any form of risk assessment was carried out — where rungs and handholds used for climbing already attached to LHD and considered adequate safeguards by employer

[Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc \[2020\] NSWCA 294](#)

TORTS – general principles – *Civil Liability Act 2002* (NSW) – personal injury – “spear tackle” or “dangerous throw” during a rugby league match – whether “intent to cause injury” – presumption that a wrongdoer intends the natural and probable consequences of his or her conduct.

WORDS AND PHRASES – meaning of “intent to cause injury” – *Civil Liability Act 2002* (NSW), s 3B(1) – actual, subjective, intention

Motor vehicle accidents

[Cameron v Catic \[2020\] NSWCA 218](#)

TORTS – negligence – motor vehicle accident – liability admitted by respondent – primary judge awarded appellant limited damages for out-of-pocket expenses and past care only – whether primary judge erred in rejecting appellant’s evidence – rejection of evidence credit-based and rational – no arguable basis for challenges to primary judgment

[Lee v Strelricks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan \[2020\] NSWCA 115](#)

TORTS — Damages — Damage to non-income producing chattel — Motor vehicle collision — Damaged vehicle unavailable while undergoing repairs — Damages for inconvenience — Owner’s need for replacement vehicle — Rental charges incurred for vehicle of equivalent value to damaged vehicle — Whether charges recoverable — Whether charges reasonably necessary to meet need

[Ryan v Workers Compensation Nominal Insurer \[2020\] NSWCA 38](#)

TORTS – negligence – motor vehicle accidents – recovery proceeding by workers compensation nominal insurer – worker drove into stationary oversize truck while latter stopped at intersection – trailer protruded from right turning lane into worker’s through lane – whether truck driver breached duty by failing to advance into intersection beyond unbroken stop-line – whether truck driver breached duty by failing to activate hazard lights – whether failure to activate hazard lights caused collision – appeal allowed and judgment entered for truck driver

[SW v Khaja \[2020\] NSWCA 128](#)

NEGLIGENCE – motor vehicle accident – passenger falling from moving taxi – central factual contest as to whether she was engaged in joint criminal enterprise of attempted armed robbery of the driver – where appellant conceded that it was open to find she had possession of a knife but denied using it and denied any robbery – whether evidence supports the finding that the appellant did attempt to rob the driver with the knife – prohibition on awarding damages by operation of s 54 of the *Civil Liability Act 2002* (NSW)

Obvious risk

[Charter Hall Real Estate Management Services \(NSW\) Pty Limited v State of New South Wales \[2020\] NSWCA 26](#)

TORTS — negligence — Civil Liability Act 2002 –whether obviousness of the risk ought to have led to conclusion risk was insignificant – risk not obvious – risk not insignificant

[Hungry Jack’s Pty Ltd v Fourtounas \[2020\] NSWCA 325](#)

TORTS – duty to warn – immunity from liability if risk “obvious” – whether immunity limited to verbal risk warnings – application of *Civil Liability Act 2002* (NSW), ss 5F, 5H

[Singh bhnf Ambu Kanwar v Lynch \[2020\] NSWCA 152](#)

TORTS – negligence – *Civil Liability Act 2002* (NSW), ss 5F, 5L – meaning of “obvious risk” – identification of risk – level of generality – principles to be applied

[Tapp v Australian Bushmen’s Campdraft & Rodeo Association Ltd \[2020\] NSWCA 263](#)

TORTS – negligence – Civil Liability Act 2002 (NSW), ss 5F, 5L – meaning of “obvious risk” – identification of risk – level of generality – principles to be applied

WORDS AND PHRASES – “obvious risk” – Civil Liability Act 2002 (NSW), s 5K

Professional negligence

[Todd Hadley Pty Limited v Lake Maintenance \(NSW\) Pty Ltd \(No 2\) \[2020\] NSWCA 81](#)

TORTS – Professional negligence – valuers – duty of care – valuation prepared for mortgage security purposes – where mortgage property sold for significantly less than valuation – accrual of cause of action – whether cause of action against valuer for negligent valuation accrues by no later than sale of mortgaged property or only when it becomes reasonably ascertainable that lender will not be able to recover from mortgagor under personal covenant

Psychiatric injury

[Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre \[2020\] NSWCA 354](#)

TORTS – negligence – damages – psychiatric injury – normal fortitude – whether person of normal fortitude might in the circumstances of the case suffer psychiatric harm – Civil Liability Act 2002 (NSW), s 32

Public authorities

[Coffs Harbour City Council v Polglase \[2020\] NSWCA 265](#)

NEGLIGENCE - public authorities - Council and Trust had care, control and management of jetty - young child fell through gap in jetty's railing and sustained serious injury - history of young children falling through railing to Council's knowledge - whether Council breached duty of care by failing to install additional railings or a mesh infill to prevent such falls - whether risk warning at jetty entrance meant no duty of care was owed - jetty built on Crown land and railing designed and constructed by State - State retained control of jetty for five years prior to handover to Council and Trust some nine years before plaintiff's injury - whether State also liable as joint tortfeasor - whether grandparents walking with young grandson breached a duty of care - consideration of relationship between State, Council and Trust - consideration of significance of ownership, occupation, and care control and management of land for purposes of duty of care and breach

Recreational activity

[Carter v Hastings River Greyhound Racing Club \[2020\] NSWCA 185](#)

TORTS – negligence – general principles – *Civil Liability Act 2002* (NSW) – personal injury – operating a catching pen gate at a greyhound race – whether “recreational activity” – whether par (c) of the definition of “recreational activity” in *Civil Liability Act*, s 5K imposes an “artificial meaning” to the word “recreational” – potential anomalous consequence of literal construction – whether activity dangerous – obvious risk – whether respondent in breach of duty to appellant – whether respondent ought to have taken precautions against risk of harm – causation – contributory negligence

[Menz v Wagga Wagga Show Society Inc \[2020\] NSWCA 65](#)

NEGLIGENCE - personal injury - plaintiff's horse fell while warming up before competing in equestrian events – plaintiff's horse “spooked” by noise made by children near warm-up area - whether plaintiff participating in dangerous recreational activity - whether plaintiff's harm resulted from materialisation of obvious risk - appropriate level of generality or particularity of “obvious risk of harm” and “dangerous recreational activity” - *Civil Liability Act 2002* (NSW), ss 5F, 5K and 5L considered - whether plaintiff had established a reasonable person in defendant's position would have taken precaution of stationing marshals in warm-up area - significance of risk warning signed by plaintiff as a precaution - *Civil Liability Act* s 5B(1)(c) considered - appeal dismissed

[Singh bhnf Ambu Kanwar v Lynch \[2020\] NSWCA 152](#)

TORTS – negligence – *Civil Liability Act 2002* (NSW), ss 5K, 5L – meaning of “recreational activity”, “dangerous recreational activity” – whether professional horse racing a recreational activity

Voluntary assumption of risk

[Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre \[2020\] NSWCA 354](#)

TORTS – negligence – voluntary assumption of risk – security guard suffered psychiatric injury due to the approach of an axe-wielding intruder who approached him and threatened him with death – whether this risk was voluntarily assumed

Workplace injury

[Bauer Media Pty Ltd v Khedrlarian \[2020\] NSWCA 288](#)

TORTS — negligence — breach of duty — provision of safe system of work — precautions against workplace injury — adequacy of particularisation of precautions — evidence of whether precautions would obviate risk

[Hallmark Construction Pty Ltd v Brett Harford; Copeland Building Services Pty Ltd v Hallmark Construction Pty Ltd; Hallmark Construction Pty Ltd v Harford Transport Pty Ltd \[2020\] NSWCA 41](#)

TORTS – general principles – vicarious liability – workplace – liability of builder for negligent acts of supervisor on building site – supervisor employed by independent contractor – supervisor under builder’s control – whether employer of supervisor vicariously liable for negligence of supervisor

39. Torts (other)

Assault and battery

[Owlstara v State of New South Wales \[2020\] NSWCA 217](#)

TORTS – intentional – assault and battery – false imprisonment – justification for arrest – driving offences – need to identify suspect – claim of preventing fabrication of evidence and repetition of offences – compliance with *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 99(3)(b), (e)

Damages for intentional torts

[Owlstara v State of New South Wales \[2020\] NSWCA 217](#)

DAMAGES – assessment – intentional torts – compensatory damages – aggravated damages – psychological injury – causal connection with arrest – vindication of claimant's right to liberty and bodily integrity – *Civil Liability Act 2002* (NSW) not applied

Detinue and conversion

[Saad v Volvo Finance Australia Pty Ltd \[2020\] NSWCA 282](#)

TORTS – detinue and conversion – property comprising four commercial trucks with trailers – claim for possession by financier – operating company in liquidation – vehicles disappeared – vehicles discovered in secluded location – whether defendant had possession, control or dominion of vehicles

False imprisonment

[Owlstara v State of New South Wales \[2020\] NSWCA 217](#)

TORTS – intentional – assault and battery – false imprisonment – justification for arrest – driving offences – need to identify suspect – claim of preventing fabrication of evidence and repetition of offences – compliance with *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 99(3)(b), (e)

Fraudulent conspiracy

[Glover v Kaji Australia Pty Limited \[2020\] NSWCA 222](#)

TORTS – fraudulent conspiracy – appellant alleged multiple parties fraudulently conspired to procure him to obtain a short-term loan he was unable to repay – case entirely circumstantial with no direct evidence – matters relied upon fell well short of proving allegations to the relevant *Briginshaw* standard – findings by primary judge credit-based and not shown to be in error

Historic sexual assault

[Gorman v McKnight \[2020\] NSWCA 20](#)

TORTS – sexual assault – alleged consent – where plaintiffs were minors at the time of alleged consent – whether consent by a minor is a defence to a civil claim for damages for sexual assault

Malicious prosecution

[Young v Royal Society for the Prevention of Cruelty to Animals New South Wales \[2020\] NSWCA 360](#)

TORTS — malicious prosecution — malicious criminal proceedings — elements of tort — application for summary dismissal — whether s 32 dismissal constitutes a termination of proceedings in favour of a plaintiff

Misfeasance in public office

[Ea v Diaconu \[2020\] NSWCA 127](#)

TORT – misfeasance in public office – elements – identification of public power or duty – where police officer involved in trial laughed and rolled eyes during applicant’s trial – where applicant alleges her conduct amounted to misfeasance in public office – whether a purported exercise of a public power or duty identified – whether a capacity to act as an incident of a public office an exercise of public power

Trespass

[Sydney Local Health District v Macquarie International Health Clinic Pty Ltd \[2020\] NSWCA 274](#)

TORT – trespass – trespass on two different sites subject to long term leases – one site comprising an undeveloped block of land on which lessee was to construct and operate a private hospital – one site comprising an established car park – inquiry as to damages – initial claim for damages for loss of opportunity to earn profits from hospital site and car park site – damages for mesne profits – user principle – whether damages by way of mesne profits assessed by reference to actual usage and existing state of premises.

TORT – trespass – period of trespass – manner of assessment – where order for possession made but orders stayed – whether trespass continued – whether trespass continued on refusal by High Court of application for special leave to appeal from Court of Appeal decision – whether stay order terminated on refusal of special leave application

DAMAGES – damages for trespass to land – various measures of damages – damages sought by way of mesne profits – history of mesne profits – mesne profits and the user principle – manner of assessment – assessment by reference to market rental of land trespassed upon – whether damages by way of mesne profits assessed by reference to actual usage and existing state of premises

DAMAGES – taxation – grossing up for taxation of damages for mesne profits – where damages calculated were in effect compensation for a lost commercial opportunity – whether it would have been unjust not to take into account identifiable and quantifiable taxation impacts on damages, in line with fourth principle enunciated in *Daniels v Anderson* (1995) 37 NSWLR 438; (1995) 118 FLR 248

40. Trade practices

Compensation orders

[Jonval Builders Pty Ltd v Commissioner for Fair Trading \[2020\] NSWCA 233](#)

CONSUMER LAW - enforcement and remedies - compensation orders - proceedings brought by Commissioner on behalf of consumers - consumers purchased moveable dwellings and entered into occupation agreements with respondents - appellants represented that terms of agreements preventing permanent residence would not be enforced - permanent residence precluded by development consent - no challenge to findings of misleading or deceptive conduct and unconscionable conduct by corporate appellants - whether primary judge erred in making orders requiring payment of purchase price 85% of cost of improvements plus interest on terms that consumers reconvey title to moveable homes - whether need to quantify loss or damage before power to make orders under s 72 of *Fair Trading Act* or s 237 of *Australian Consumer Law* available - consideration of distinction between such orders and damages - consideration of relationship between such orders and orders for rescission in equity for fraudulent representation - whether primary judge erred in finding unconscionable conduct by director of corporate appellants - appeal dismissed

Misleading or deceptive conduct

[Aardwolf Industries LLC v Tayeh \[2020\] NSWCA 301](#)

CONSUMER LAW – misleading or deceptive conduct – whether reliance on accuracy of recitals to deed – clear inference from evidence that person knew of true position

CONSUMER LAW – misleading or deceptive conduct – whether conduct “in trade or commerce” – court-appointed liquidators performing statutory functions – assignment of property with view to facilitating business interests of purchaser arguably had an essentially trading or commercial character

[James v Australia and New Zealand Banking Group Ltd \[2020\] NSWCA 101](#)

CONTRACTS – grounds for setting aside – misleading or deceptive conduct – non-disclosure of information – relevance of actual or constructive knowledge of silent party as to complainant’s beliefs – relevance of undisclosed beliefs of complainant

[Jonval Builders Pty Ltd v Commissioner for Fair Trading \[2020\] NSWCA 233](#)

CONSUMER LAW - enforcement and remedies - compensation orders - proceedings brought by Commissioner on behalf of consumers - consumers purchased moveable dwellings and entered into occupation agreements with respondents - appellants represented that terms of agreements preventing permanent residence would not be enforced - permanent residence precluded by development consent - no challenge to findings of misleading or deceptive conduct and unconscionable conduct by corporate appellants - whether primary judge erred in making orders requiring payment of purchase price 85% of cost of improvements plus interest on terms that consumers reconvey title to moveable homes - whether need to quantify loss or damage before power to make orders under s 72 of *Fair Trading Act* or s 237 of *Australian Consumer Law* available - consideration of distinction between such orders and damages - consideration of relationship between such orders and orders for rescission in equity for fraudulent representation - whether primary judge erred in finding unconscionable conduct by director of corporate appellants - appeal dismissed

[Nadinic v Cheryl Drinkwater as trustee for the Cheryl Drinkwater Trust \[2020\] NSWCA 2](#)

CONSUMER LAW – misleading or deceptive conduct – where parties engaged in joint venture – where subsequently parties entered deed of settlement to resolve disputes – where one party misunderstood financial position of an entity being acquired under deed – where that party did not make inquiries to verify position – where other party participated in causing the misunderstanding, was aware of it and failed to correct it – whether conduct misleading or deceptive

[Norton Property Group Pty Ltd v Ozzy States Pty Ltd \(in liq\) \[2020\] NSWCA 23](#)

MISLEADING AND DECEPTIVE CONDUCT - agent made demands for commission - whether demands misleading or deceptive contrary to s 18 Australian Consumer Law - whether demands were expressions of opinion of agent's legal entitlement

[Wormald v Maradaca Pty Ltd \[2020\] NSWCA 289](#)

MISLEADING OR DECEPTIVE CONDUCT – Misleading or deceptive conduct – misleading or deceptive conduct by silence - alleged non-disclosure relating to sale of shares in private company – where purchaser was an experienced commercial participant – whether primary judge erred in characterising specific representation as providing an “assurance” to the purchaser of shares in private company – whether primary judge erred in finding that the purchaser had a “reasonable expectation” that certain disclosures would be made – whether any misleading or deceptive conduct was causative of loss or damage – where as a matter

of common sense causation, loss sustained was due to a calculated risk by an experienced commercial participant, and not by any alleged misleading or deceptive conduct

41. Valuation

Compulsory acquisition of land

[Alexandria Landfill Pty Ltd v Transport for NSW \[2020\] NSWCA 165](#)

LAND LAW – compulsory acquisition of land – compensation for disturbance – s 59(f) Land Acquisition (Just Terms Compensation) Act – meaning of “other financial costs” – no actual use of the land by claimant – agency relationship not established

LAND LAW – compulsory acquisition of land – compensation for special value – s 57 Land Acquisition (Just Terms Compensation) Act – failure to establish relevant use – agency relationship not established

[Apokis v Transport for NSW \[2020\] NSWCA 39](#)

VALUATION – compulsory acquisition of land – assessment of compensation – market value – role of “judicial valuer” – valuation of non-marketable parcel – assessment of value before and after acquisition – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 56(1)

VALUATION – compulsory acquisition of land – assessment of compensation – disturbance – where acquired land included resource – assessment of value where resource only had value because of the carrying out of the public purpose for which the land was acquired – whether claimed disturbance related to “actual use” of acquired land – Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 55(d) and 59(f)

[RD Miller Pty Ltd v Roads and Maritime Services NSW \[2020\] NSWCA 241](#)

APPEAL – interlocutory decisions to strike out pleadings and refuse leave to amend pleadings – application for leave to appeal – claim for compensation for loss of access to controlled access road – statutory construction of Pt 4, Div 5 of *Roads Act 1993* – entitlement to compensation – access restricted or denied as a result of road “becoming” controlled access road – meaning of phrase “as a result of the road becoming” a controlled access road – whether road becomes controlled access road by the event of the Minister’s order declaring road to be a controlled access road or by a “course of conduct” – assessment of compensation – “market value of land” – whether *Pointe Gourde* principle applies in assessment of compensation

Duty of care of valuers

[Todd Hadley Pty Limited v Lake Maintenance \(NSW\) Pty Ltd \(No 2\) \[2020\] NSWCA 81](#)

VALUERS – duty of care – valuation prepared for mortgage security purposes – where mortgage property sold for significantly less than valuation – accrual of cause of action – whether cause of action against valuer for negligent valuation accrues by no later than sale of mortgaged property or only when it becomes reasonably ascertainable that lender will not be able to recover from mortgagor under personal covenant

Methods of valuation

[Coffs Harbour City Council v Noubia Pty Ltd \[2020\] NSWCA 142](#)

VALUATION – methods of valuation – “before and after” method – developed land on alluvial floodplain – whether alternative hypothetical developments the most financially advantageous use of land – proposed alternative development subject to natural features of the land and associated constraints on use – whether alternative development would have received approval

Principles of valuation

[Coffs Harbour City Council v Noubia Pty Ltd \[2020\] NSWCA 142](#)

VALUATION – valuation of land – principles – whether detention and management of upstream water flows by downstream land owner a “public purpose” to be disregarded in a valuation exercise

42. Vexatious proceedings

Application to set aside vexatious proceedings order

[Mohareb v Palmer \[2020\] NSWCA 323](#)

PRACTICE AND PROCEDURE – recusal application – reasonable apprehension of bias – appeal from vexatious proceedings order – presiding judge having sat on prior appeal and leave application characterised as vexatious – reliance on transcript – other member of the earlier court dismissive of applicant’s case

[Quach v New South Wales Civil and Administrative Tribunal \[2020\] NSWCA 295](#)

CIVIL PROCEDURE – parties – vexatious litigants – fourth application to set aside vexatious proceedings order – application dismissed

Consequences of failure to obtain leave

[Kostov v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 94](#)

VEXATIOUS PROCEEDINGS – party subject to earlier vexatious proceedings order commencing judicial review proceedings in Court of Appeal – where leave to bring proceedings had not first been obtained – consequences of failure to obtain leave – proceedings taken to have been dismissed

[Quach v New South Wales Civil and Administrative Tribunal \[2020\] NSWCA 295](#)

CONTEMPT – allegation of contempt of court – whether enforcement of costs order in breach of undertaking given to the Court – no leave sought to bring proceedings – *Vexatious Proceedings Act 2008* (NSW) s 14 – application dismissed

[Zepinic v Chateau Constructions \(Aust\) Ltd \[2020\] NSWCA 291](#)

APPEAL – applicant for leave to appeal subject to vexatious proceedings order – application falling within scope of the order – no leave sought or granted under *Vexatious Proceedings Act 2008* (NSW) to institute application for leave to appeal – application to be dismissed by reason of that fact – application would in any event have been refused

[Zepinic v Malanos \[2020\] NSWCA 293](#)

APPEAL – applicant for leave to appeal subject to vexatious proceedings order – application falling within scope of the order – no leave sought or granted under *Vexatious Proceedings Act 2008* (NSW) to institute application for leave to appeal – application to be dismissed by reason of that fact – application would in any event have been refused

Definition of “frequently instituted or conduct vexatious proceedings”

[Mohareb v Palmer \(No 2\) \[2020\] NSWCA 324](#)

CIVIL PROCEDURE — Parties — Vexatious litigants – *Vexatious Proceedings Act 2008* (NSW) – s 6 – meaning of “vexatious proceedings” – s 8(1) – meaning of “frequently instituted or conducted vexatious proceedings” – assessment of frequency

Definition of “vexatious proceedings”

[Mohareb v Palmer \(No 2\) \[2020\] NSWCA 324](#)

CIVIL PROCEDURE — Parties — Vexatious litigants – *Vexatious Proceedings Act 2008* (NSW) – s 6 – meaning of “vexatious proceedings” – s 8(1) – meaning of “frequently instituted or conducted vexatious proceedings” – assessment of frequency

Requirement for leave in judicial review proceedings

[Klewer v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 69](#)

VEXATIOUS PROCEEDINGS – applicant subject to vexatious proceedings order – whether applicant required leave under the Vexatious Proceedings Act 2008 (NSW) to institute an appeal to the District Court against her convictions and sentences in the Local Court - whether applicant required leave under the Vexatious Proceedings Act to commence judicial review proceedings in the Court of Appeal in circumstances where she did not require leave to commence proceedings in the court whose decision was the subject of the application for judicial review

[Kostov v Director of Public Prosecutions \(NSW\) \(No 2\) \[2020\] NSWCA 94](#)

PROCEDURE – Vexatious Proceedings Act 2008 (NSW) – whether leave required prior to commencement of proceedings for judicial review – consequence of failing to obtain leave

Where proceedings sought to re-agitate issues below

[Batterham v Nauer \[2020\] NSWCA 204](#)

Vexatious Proceedings Act 2008 (NSW), s 8(7) –applicant sought leave to appeal against primary judge’s order prohibiting him from instituting proceedings against respondent – proceedings commenced by companies controlled by applicant – requirements of *Vexatious Proceedings Act* – proceedings raised essentially issues that had been resolved in earlier proceedings – correspondence of applicant established proceedings commenced to harass or annoy or for another wrongful reason

43. Workers compensation

Causal link between employment and harm suffered

[Workers Compensation Nominal Insurer v Hill \[2020\] NSWCA 54](#)

WORKERS COMPENSATION – entitlement to compensation – deceased worker employed to work at home – deceased killed by co-worker and de-facto partner – attack inspired by his paranoid delusions – delusions related to work and personal relationship – whether evidence of causal link between worker’s employment and harm suffered – evidence of substantial contributing factor – whether Deputy President erred in finding as to evidence – Workplace

Injury Management and Workers Compensation Act 1998 (NSW), ss 4 and 9A

Definition of “injury”

[Booth v Fourmeninapub Pty Ltd \[2020\] NSWCA 57](#)

WORKERS COMPENSATION - appeal from Workers Compensation Commission constituted by President - appeal confined to question of law - whether President erred in disregarding evidence of psychiatrist - distinction between identifying meaning of expert report and evaluating evidence - whether predisposition to bipolar disorder itself a disease which could be aggravated, accelerated, exacerbated or deteriorated during employment - definition of injury in (former) s 4(b)(ii) of Workers Compensation Act 1987 (NSW), considered

Discontinuation of payments

[Hochbaum v RSM Building Services Pty Ltd; Whitton v Technical and Further Education Commission t/as TAFE NSW \[2020\] NSWCA 113](#)

WORKERS' COMPENSATION – Assessment and amount of compensation – Discontinuation of payments – Construction of (NSW) Workers Compensation Act 1987, s 39 – Whether appellants were entitled to payments during the period between discontinuation and resumption of payments following assessment by an approved medical specialist

Entitlement to compensation

[Australian Rail Track Corporation Limited v Dollisson \[2020\] NSWCA 58](#)

WORKERS COMPENSATION – whether worker who was injured in Victoria but was not entitled to compensation under Victorian workers compensation legislation was nevertheless required to pass through statutory gateways under Victorian legislation when seeking common law damages – where worker had received compensation under NSW workers compensation scheme – whether reference to “compensation” in s 134AB(1) of Accident Compensation Act 1985 (Vic) is a reference to compensation under that Act or to compensation whether awarded under that Act or the Act of some other state or territory

[Cruceanu v Vix Technology \(Aust\) Ltd \[2020\] NSWCA 203](#)

WORKERS' COMPENSATION – entitlement to compensation – causal relation between accident and injury – delayed complaint of neck pain – neurological condition said to have painless onset – absence of reports of neck pain to treating medical practitioners

WORKERS' COMPENSATION – entitlement to compensation – employment related injury, disability or disease – workplace accident – claim by worker for lump sum compensation for cervical spine disease

[Gardiner v Laing O'Rourke Australia Construction Pty Ltd \[2020\] NSWCA 151](#)

WORKERS' COMPENSATION – entitlement to compensation – exclusions – payment to settle complaint under *Anti-Discrimination Act 1977* (NSW) – whether payment constituted “damages” under *Workers Compensation Act 1987* (NSW), s 149 – operation of *Workers Compensation Act*, s 151A, s 280B

[Workers Compensation Nominal Insurer v Hill \[2020\] NSWCA 54](#)

WORKERS COMPENSATION – entitlement to compensation – deceased worker employed to work at home – deceased killed by co-worker and de-facto partner – attack inspired by his paranoid delusions – delusions related to work and personal relationship – whether evidence of causal link between worker’s employment and harm suffered – evidence of substantial contributing factor – whether Deputy President erred in finding as to evidence – Workplace Injury Management and Workers Compensation Act 1998 (NSW), ss 4 and 9A

Evidence

[Booth v Fourmeninapub Pty Ltd \[2020\] NSWCA 57](#)

WORKERS COMPENSATION - appeal from Workers Compensation Commission constituted by President - appeal confined to question of law - whether President erred in disregarding evidence of psychiatrist - distinction between identifying meaning of expert report and evaluating evidence - whether predisposition to bipolar disorder itself a disease which could be aggravated, accelerated, exacerbated or deteriorated during employment - definition of injury in (former) s 4(b)(ii) of Workers Compensation Act 1987 (NSW), considered

Worker “with highest needs”

[Meat Carter Pty Ltd v Melides \[2020\] NSWCA 307](#)

WORKERS' COMPENSATION – Construction of *Workers Compensation Act 1987* (NSW) s 38A – Whether payment at special rate pursuant to s 38A payable from time of injury or from time the worker satisfies the definition of “worker with highest needs” – consideration of the defined term ‘worker with highest needs’

Workers Compensation Act 1987 s 38A

[Meat Carter Pty Ltd v Melides \[2020\] NSWCA 307](#)

WORKERS' COMPENSATION – Construction of *Workers Compensation Act 1987* (NSW) s 38A – Whether payment at special rate pursuant to s 38A payable from time of injury or from time the worker satisfies the definition of “worker with highest needs” – consideration of the defined term ‘worker with highest needs’

Workers Compensation Act 1987 s 151Z

[Charter Hall Real Estate Management Services \(NSW\) Pty Limited v State of New South Wales \[2020\] NSWCA 26](#)

WORKERS COMPENSATION – s 151Z Workers Compensation Act 1987- recovery action – whether occupier liable to indemnify employer for workers compensation payments as tortfeasor who, if sued by the worker for negligence, would have been liable to pay damages to the worker

Workers Compensation Guidelines

[Ballas v Department of Education \(State of NSW\) \[2020\] NSWCA 86](#)

WORKERS COMPENSATION – Workers Compensation Guidelines – whether Delegate failed to consider that approved medical specialist took into account irrelevant considerations and failed to take into account relevant considerations when assessing whole person impairment – whether or not characterisation of conduct into one of the “scales” under the Guidelines is a matter of discretion

Speeches delivered in 2020

The Honourable Justice T F Bathurst AC, Chief Justice of NSW	<u>Law as a Reflection of the 'Moral Conscience' of Society – Opening of Law Term Dinner</u>	5 February 2020
	<u>Remarks: Opening of Law Term Jewish Service</u>	12 February 2020
	<u>College of Law Judges' Series: Lawyer-Client Privilege</u>	26 February 2020
	<u>Don't Be Court Out: The Basics Of Court Etiquette</u>	28 March 2020
	<u>2020 Admission Ceremony Speech</u>	August 2020
	<u>The History of Defamation Law: Unjumbling a Tangled Web</u>	8 October 2020
	<u>Welcome Address: ACICA and CIArb International Arbitration Conference 2020</u>	12 October 2020
The Honourable Justice A S Bell, President of the Court of Appeal	<u>The Federal and State Courts on Constitutional Law: The 2019 Law Term</u>	21 February 2020
	<u>'The Rise of the Anti-Arbitration Injunction', Third Annual Supreme Court ADR Address</u>	15 October 2020

The Honourable Justice J Basten	<u>The Richard Davies QC Memorial Lecture presented to the Personal Injury Bar Association, United Kingdom on 10 November 2020: “Loss of a Chance”</u>	10 November 2020
The Honourable Justice R B S Macfarlan	<u>Environment and Planning Law Association Conference 2020: Court of Appeal Update</u>	30 October 2020
The Honourable Justice M J Leeming	<u>A History of Australian Tort Law 1901–1945: England 1945: England’s Obedient Servant?</u>	March 2020
	<u>Six differences between trustees and company directors</u>	April 2020
	<u>Foreword to R Catterwell, “A Unified Approach to Contract Interpretation”</u>	August 2020
	<u>Lawyers’ uses of history, from Entick v Carrington to Smethurst v Commissioner of Police</u>	November 2020
	<u>Launch of ‘Lord Devlin’ by Justice John Sackar</u>	December 2020