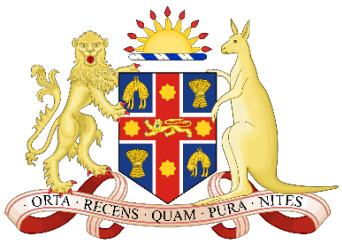

Decisions of Interest

7 March 2025 – 28 March 2025

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

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New South Wales Court of Appeal Decisions of Interest

Torts and civil procedure: malicious prosecution, delay in giving reasons

Rock v Henderson; Rock v Henderson (No 2) **[2025] NSWCA 47**

Decision date: 28 March 2025

Kirk, Adamson, Ball JJA

This appeal involved two sets of related proceedings. The first arose from the acrimonious breakdown of the marriage between Mr Darren Rock and Ms Kim Henderson. The second concerned a claim for battery brought against Ms Henderson by Ms Evelyn Rock, Mr Rock and Ms Henderson's daughter. Two issues dealt with on appeal are particularly worth noting here. They were: (1) whether any consequences followed from the fact that the primary judge did not give reasons for her decision until three months and four days after delivering judgment; and (2) whether the tort of malicious prosecution was available in respect of the procuring of an apprehended domestic violence order. Relevantly, in late September 2018, a provisional ADVO was granted for the benefit of Ms Henderson against Mr Rock. Mr Rock consented to an interim ADVO on a no admission basis. In June 2019, the Local Court dismissed the application for a final ADVO. In July 2019, Mr Rock and his two children returned home from a holiday to find Ms Henderson there, and according to him, tampering with the fuse box. In August 2020, Mr Rock commenced proceedings in the District Court seeking damages against Ms Henderson for malicious prosecution arising out of the application for a final ADVO and for the trespass that occurred on 16 July 2019. Both Mr Rock and Ms Rock pressed the delay issue on appeal.

The Court held, allowing Mr Rock's appeal in part, granting leave to appeal to Ms Rock in part but dismissing the appeal and otherwise refusing leave to appeal:

- Whilst there may have once been a common law duty of a court in civil cases to deliver reasons at or immediately after the time it pronounced judgment, that duty has been substantially modified in civil cases in the Supreme Court, District Court and Local Court. Generally, a court should not make final orders without giving reasons. However, if it is necessary to postpone giving reasons, they should be given as soon as reasonably practicable after judgment is delivered. Whether a court has failed to comply with that obligation will depend on all relevant circumstances, including the nature of the issue to be decided, the length of the delay, and the reasons for any delay. No remedy was appropriate here: [36]-[65].
- Proceedings for an ADVO (or an apprehended violence order for that matter) under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are not criminal proceedings. The tort of malicious prosecution can apply to limited established categories of civil proceedings. Extension of the tort to encompass AVO proceedings would inevitably spawn satellite litigation. The potential for such litigation would tend substantially to undermine the objects and efficacy of the Act. Extending the tort to AVO proceedings was therefore not justified: [66]-[166].

Tort: false imprisonment, power to arrest without a warrant

***Emde v State of New South Wales* [2025] NSWCA 41**

Decision date: 20 March 2025

Gleeson, Kirk, McHugh JJA

The appellant consented without admissions to a final apprehended domestic violence order made in the Local Court on 14 April 2022. The protected person under the ADVO was the appellant's adult daughter who worked at the Woolworths store at Richmond Market Place. Relevantly, Order 8 of the ADVO prohibited the appellant from going into "any place" where his daughter worked or into "any place listed here: Woolworths Richmond, Richmond Market Place, Paget Street and Lennox Street, Richmond, NSW 2753". Police determined that the appellant entered Richmond Market Place, but not the Woolworths store, on two occasions after the ADVO was made. The appellant was arrested on suspicion of two offences of breaching the ADVO. He pleaded guilty to the offences. The appellant later commenced proceedings against the State of New South Wales in the District Court for damages arising out of the circumstances of his arrest. An issue was whether the appellant's arrest was authorised by s 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW). The primary judge found that the ADVO was ambiguous, but that the officer's suspicion that the appellant had committed an offence was held on reasonable grounds for the purposes of s 99(1)(a). The judge further found that the officer's s 99(1)(b) state of satisfaction that the appellant's arrest was reasonably necessary was not manifestly unreasonable, arbitrary, capricious, irrational or not bona fide, even though the officer did not consider any alternative to arrest.

The Court held, (McHugh JA, Gleeson and Kirk JJA agreeing) refusing leave to appeal:

- The appellant's argument that the ambiguity of the ADVO was irrelevant to the s 99(1)(a) test was not supported by the statutory language. It was not necessary for NSW to show that the appellant had actually committed an offence, only that the officer suspected on reasonable grounds that an offence had been committed: [54]-[73].
- The appellant's argument that the arrest was disproportionate because the officer did not consider alternatives to arrest misconstrued the relevant test. The proper question was whether the state of satisfaction was manifestly unreasonable, arbitrary, capricious, irrational, or not bona fide. The appellant did not show a reasonably clear case that it was: [74]-[100] (discussing *Jankovic v Director of Public Prosecutions* [2020] NSWCA 31; *State of New South Wales v Randall* [2017] NSWCA 88; R*eeves v State of New South Wales* [2024] NSWCA 125).
- The State was not entitled to costs in circumstances where no written submissions were filed by either party on the issue of competency, the State's oral submissions on the issue occupied 16 lines of the transcript, and neither the appellant nor the Court was given prior notice of almost the whole argument the State advanced at the hearing, including arguments directed to s 99(1): [105]-[107].

Succession: informal wills

***Kemp v Findlay* [2025] NSWCA 46**

Decision date: 27 March 2025

Ward P, Leeming, Ball JJA

In 2011 Elizabeth Kemp (the appellant), and the late Andrew Findlay (**the deceased**) commenced a de facto relationship. They had three children. In 2015 the deceased executed a will, which left the entirety of his estate to Ms Kemp (the 2015 Will). Their relationship ended in 2019. On 5 June 2019, the deceased sent to his cousin, David Findlay (the respondent), a document, stating that "[t]his is my new will. I am yet to get it signed in front of [my lawyer] but I intend do [sic]". Later, in response to an email from the respondent the deceased said that "[i]f I went under a bus between now and then my wishes would at least be clear". The deceased did not print nor execute this document (the 2019 Document). Under the 2019 Document, the deceased left his estate to his children and changed his executor and testamentary guardian. On 11 June 2019, the deceased had an appointment with a solicitor who recorded that the deceased told him that he had changed his will recently and recalled that the will would leave his assets to his children. In July 2023, the deceased died in a boating accident. Ms Kemp sought a grant of probate of the 2015 Will. Mr Findlay maintained that the deceased had revoked the 2015 Will and sought a grant of probate of the 2019 Document. The primary judge concluded that the deceased intended for the 2019 Document to form his will and admitted it to probate pursuant to s 8 of the *Succession Act 2006* (NSW).

The Court held (Ward P, Leeming and Ball JJA agreeing) dismissing the appeal:

- The primary judge did not err in concluding that the evidence established the deceased's intention that the 2019 Document constituted, without more, the deceased's final will: [188]-[210]. The fact that the execution of the 2015 Will by the deceased was witnessed by two witnesses was a weak basis for inferring that the deceased was aware of the requirement that a will had to be witnessed. The deceased likely thought that the 2019 Document needed to be signed by him in front of his lawyer, but there was no evidence that he received any legal advice on what was necessary to create a valid will: [114]-[129].
- The significance of the time that Ms Kemp was told or learnt about the change to the deceased's will was moot. The evidence supported the conclusion that at least by February 2020 (if not well before), Ms Kemp had been told or been led to believe that the deceased had changed his will and had done so shortly after their separation: [66]-[87].
- While the deceased was the cause of the litigation in the relevant sense (by failing to execute the 2019 Document), to the extent that the conduct of the litigation was unreasonable none of the recognised exceptions to the incidence of costs in probate litigation applied. The primary judge did not err in finding that Ms Kemp had pursued litigation for her personal advantage, given the effect of the position put by Ms Kemp was to disinherit her children: [220]-[231].

Australian Intermediate Appellate Decision of Interest

Practice and procedure: recusal, apprehended bias

***ASIC v SunshineLoans Pty Ltd* [2025] FCAFC 32**

Decision date: 24 March 2025

Perram, Bromwich, Colvin JJ

The primary judge conducted a trial in which ASIC sought against the respondent (**Sunshine**) a declaration that it had contravened certain civil penalty provisions of the *National Consumer Credit Protection Act 2009* (Cth) and orders imposing a civil penalty on Sunshine. The judge ordered that there would be two hearings to determine whether a contravention had occurred, and if so, separately the penalty to be imposed. After the first hearing, the judge concluded that a declaration of contravention should be made. Sunshine had called as a witness at the trial, Mr Powe, a director of Sunshine. The judge was not impressed with Mr Powe as a witness, finding that he did not give his evidence in an honest or credible manner and that he had given his evidence "in the manner of someone who had been schooled to advance a particular theory". The preparatory steps for the penalty hearing foreshadowed that Sunshine would prepare a further affidavit of Mr Powe. Sunshine applied to the judge to disqualify himself from the hearing on the basis of an apprehension of bias said to arise from the fact that his Honour had already made adverse credit findings about some of Sunshine's directors, including Mr Powe. The primary judge accepted that submission and disqualified himself from the hearing.

The Court held, (Bromwich J and Colvin J, Perram J dissenting) allowing the appeal:

- The statutory regime under which the contravention and penalty proceedings were brought meant that in determining ASIC's application for a pecuniary penalty, the judge was compelled to consider the findings made at the liability stage of the hearing, at least insofar as they included findings about the nature and extent of the contraventions and the circumstances in which they took place. The same conclusion should apply to other civil penalty proceedings conducted in a similarly bifurcated way. A fair-minded lay observer, properly informed even in general terms of the relationship between the impugned findings in the course of the liability determination, and their role in relation to the determination of the penalty, would not find that the primary judge might not be able to bring an impartial mind to bear at this second stage of the proceeding: [107]-[124] (Bromwich J).
- The primary judge was entitled, during the initial hearing, to form views as to the seriousness of the contravention (knowing that that seriousness would be relevant to the penalty if liability were established). The primary judge erroneously treated the penalty hearing as a separate and distinct hearing to be conducted without any of the views formed during the first hearing being carried forward into the second hearing. This led the primary judge to adopt that same perspective for the independent fair-minded lay observer. The recusal was done in error: [136]-[168] (Colvin J).

Asia Pacific Decision of Interest

Contract: keepwell deeds, granting of loans to maintain solvency

Peking University Founder Group Company Limited v Nuoxi Capital Limited; Hongkong JHC Co Limited; Kunzhi Limited **[2025] HKCFA 6**

Decision date: 19 March 2025

Cheung CJ, Ribeiro, Fok, Lam PJJ and Allsop NPJ

The Peking University Founder Group Company Limited (**PUFG**) was the holding company of a large corporate group which sought to raise funds to undertake a wide range of commercial activities. For this purpose, between 2017 and 2018, two companies in the PUFG group, Nuoxi Capital Limited and Kunzhi Limited (**Issuers**) issued bonds, worth US$1.7 billion, which were guaranteed by two other companies in the group, Founder Information (Hong Kong) Limited and Hongkong JHC Co Limited (**Guarantors**). In support of these bond issuances, PUFG entered into keepwell deeds which required PUFG to maintain at all times a positive consolidated net worth of at least US$1 of the four companies (cl 4.1(i)), and sufficient liquidity to ensure timely payments under the bonds or guarantees as they fell due (cl 4.1(ii)). In early 2020, PUFG's financial position deteriorated and it was ordered into re-organisation. Kunzhi then failed to make an interest payment leading the bond trustee to declare an event of default on 16 April 2020 which triggered cross-defaults over all bonds. The Issuers and Guarantors sued PUFG for damages for breaches of the deeds. At trial and on appeal, PUFG was found to have breached cl 4.1(ii) by not keeping the respondents solvent by way of a gift. In the Court of Final Appeal, PUFG argued that the failure to inject liquidity into the respondents did not cause any loss, as it could not have been expected to perform cl 4.1(ii) by way of gift, and a loan would not have affected the respondents' balance sheets because they would have come under a corresponding obligation to repay the same sum.

The Court held, (Allsop NPJ, Cheung CJ, Ribeiro, Fok and Lam PJJ agreeing) unanimously allowing the appeal:

- Clause 4.1(ii) could be performed by way of a loan. While not specifying a form or mechanism for the provision of that liquidity, the deeds clearly contemplated the use of loans to satisfy liquidity shortfalls. It was not the case that the relationship between cll 4.1(i) and 4.1(ii) meant that funds could not be provided by loan unless the net worth of less than US$1 was remedied first: [25]-[32], [84]-[90].
- If, at 16 April 2020, the consolidated net worth of Nuoxi, Kunzhi or HKJHC was greater or less than US$1, that would not have been affected by a loan to comply with clause 4.1(ii). Had a loan been provided by PUFG to the respondents, the pre-existing indebtedness to the bondholders would simply have been replaced by an equal debt to PUFG. Thus, the respondents had suffered no net loss for which substantial damages would be awarded. An award of nominal damages was therefore appropriate: [67], [80]-[118].

International Decision of Interest

Fiduciary duties: breach, "no-profit rule", account of profits

Rukhadze v Recovery Partners GP Ltd **[2025] UKSC 10**

Decision date: 19 March 2025

Lord Reed, Lord Hodge, Lord Briggs, Lord Leggatt, Lord Burrows, Lady Rose, Lord Richards

Arkadi Patarkatsishvili died in 2008, leaving behind various assets in "disorganised and often hidden locations around the world". His family sought to recover them. The first and second appellants held senior positions at Salford Capital Partners Inc. (**SCPI**), which assigned its claim to Recovery Partners GP Ltd, the first respondent and Revoker LLP, the second respondent. The third appellant was a solicitor with connections to Revoker. The appellants each owed fiduciary duties to SCPI/Revoker. SCPI provided ad-hoc asset recovery services to the family without having reached a final agreement with them. In 2011, the appellants began to denigrate SCPI and sought individual contracts with the family to divert the asset recovery business opportunity to themselves. The appellants then resigned from SCPI and Revoker but continued to provide the family with asset recovery services. The trial judge held that the appellants had breached their fiduciary duties and ordered them to account for their profits, leading to a net award of $134 million plus interest. The appellants challenged the orders by seeking to introduce a "but for" requirement into the long-established "profit rule" in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 46. The appeal was dismissed by the Court of Appeal. The appellants then appealed to the Supreme Court.

The Court held (Lord Briggs (Lord Reed, Lord Hodge and Lord Richards agreeing); Lord Leggatt, Lord Burrows and Lady Rose concurring with separate reasons), unanimously dismissing the appeal:

- A "former fiduciary is not allowed to defend the retention of a profit for themselves by saying that they would have made it anyway, even if they had not committed a breach of fiduciary duty": [5].
- The essential purpose of the profit rule is to deter fiduciaries from departing from their obligation of single-minded loyalty to their principle. The obligation to account for profits is an inherent aspect of being a fiduciary. It is not necessarily triggered by another breach, is not a discretionary remedy, and is not comparable to either an award of damages or to equitable compensation: [16]-[24], [47] and [60].
- Introducing a "but for" test would undermine the essence of the duty and water down the disincentive — the inevitability of the obligation to account for profits — to fiduciaries who might otherwise be tempted to be disloyal: [47].
- The discretion to make allowance for fiduciaries' application of work, skill and risk in the taking of the account is sufficient to avoid excessive harshness: [57]-[58] and [75].