Supreme Court
of New South Wales

TUESDAY 30 JULY 2024

PAMPLIN v IRWIN 2024/77227 (Henry J – 9/2/24)
EQUITY – respondent was the de facto spouse of the late Adrian Pamplin, who died in 2013 without a will – respondent was appointed administrator of his estate – the deceased and his brother, Lionel Pamplin (second applicant) were involved in various business endeavours since 1989 and owned shares and property – in May 2002 the deceased and the second applicant transferred legal ownership and control of companies and assets to Marie Pamplin (first applicant) – trial judge made orders declaring that the applicants hold certain shares on trust partly for the estate of which the respondent is administrator, based on a common intention that the transfer was to evade the operation of the Proceeds of Crime Act 2002 (Cth) - applicants contend that the primary judge erred in finding that an estoppel could be made out in terms which would fetter the exercise of the applicants' powers as trustees - respondent's cross-appeal contends that the primary judge erred in failing to declare that certain other property is held on constructive trust.
Irwin v Pamplin & Ors (No 4) [2024] NSWSC 73

WEDNESDAY 31 JULY 2024

PAMPLIN v IRWIN 2024/77227 (Henry J – 9/2/24)
Day 2

THURSDAY 1 AUGUST 2024

RAHMAN v RAHMAN 2024/104774 (Montgomery DCJ – 18/1/24)
ADMIN LAW (judicial review) – the proceedings relate to an Apprehended Violence Order (AVO) for the protection of the first respondent – the primary judge dismissed the applicant's appeal against a final AVO, ordered that the applicant pay the first respondent's costs – the primary judge varied the AVO (continuing until August 2025), setting out conditions restricting the applicant's behaviour towards, contact with, and proximity to the first respondent – whether the primary judge fell into jurisdictional error by denying the applicant natural justice – whether the primary judge erred in failing to take into account material and relevant considerations – whether the primary judge fell into jurisdictional error in failing to give the applicant procedural fairness – whether the primary judge was affected by jurisdictional error by making a decision made in bad faith – whether the primary judge erred in applying the wrong legal test – whether the primary judge erred by taking into account irrelevant considerations.
Decision of Montgomery DCJ dated 18 January 2024 (not available on Caselaw).

THURSDAY 8 AUGUST 2024

191 BELLS v WJ & HL CRITTLE 2024/145822 (Pike J – 22/3/24)
TRADE PRACTICES – in March 2022, the appellant and first respondent executed an option deed (the Option Deed) with respect to land in Meroo Meadow (the Land) – pursuant to the Option Deed, the appellant was granted a call option to purchase the Land, with the option to be exercised by 23 March 2024 – were the call option to expire, the first respondent would have seven days to exercise a put option to require the appellant to purchase the land – the option fee (paid by the appellant)

was $26.4 million – following entry into the Option Deed, the appellant alleged that it became aware of contamination on the Land – the appellant alleged that the conduct of the respondents in failing to disclose the contamination founded claims for misleading or deceptive conduct and fraudulent concealment, and sought that the Option Deed be declared void – the primary judge dismissed the appellant's claim – whether the primary judge erred in finding that the respondents' failure to disclose the existence of contamination on the Land in the context of other disclosures did not constitute misleading and deceptive conduct – whether the primary judge erred in finding that the Exclusivity Agreement did not impose an obligation on the respondents to disclose the existence of contamination on the Land.
191 Bells Pty Ltd v WJ & HL Crittle Pty Ltd [2024] NSWSC 297

THURSDAY 15 AUGUST 2024

JEA HOLDINGS v REGISTRAR GENERAL 2024/140495 (Richmond J – 26/3/24)
REAL PROPERTY – in December 2010, the appellant purchased adjoining parcels of land in Miller, including the land at issue (Lot 4) – the history of transfers and subdivisions involving Lot 4 is complex, and ultimately resulted in the correction of the register in 2015 that saw an easement affecting Lot 4 added – the appellant contends that the failure to record the easement on the title was an omission that has caused a diminution in the value of the land due to the decreased development potential, and caused the appellant to incur costs in legal proceedings relating to the recording of the easement – the appellant brought proceedings against the respondent as nominal defendant seeking compensation out of the Torrens Assurance Fund – the primary judge found that there was no entitlement to compensation for diminution in the value of Lot 4, but that there was entitlement to compensation for legal costs accrued due to the omission of the easement – whether the primary judge erred in the conclusion as to the operation of a 1963 memorandum of transfer (the 1963 Transfer) – whether the primary judge erred in concluding that the 1963 Transfer operated only as a covenant and not an easement – whether the primary judge erred in considering the instrument creating the interest in land rather than considering the interest itself – whether the primary judge erred in the application of cl 1.9A of the *Liverpool Local Environmental Plan* – whether the primary judge erred in failing to have regard to established principles of statutory interpretation – whether the primary judge erred in the calculation of the appellant's loss.
JEA Holdings (Aust) Pty Ltd v Registrar-General of New South Wales [2024] NSWSC 85

FRIDAY 16 AUGUST 2024

TJIONG v CHANG 2024/61464 (Henry J – 9/2/24)
EQUITY – the proceedings concern a trust created in the 1970s by the late Mr Tjiong over a unit in Burwood (the Unit), initially for the benefit of his wife, the late Mrs Tjiong (the Trust) – the Trust provided that their son (George) was to hold the Unit and its subsequent sale proceeds on trust for Mrs Tjiong's benefit during her lifetime, and, thereafter, to be applied for the benefit of members of Mr Tjiong's family – in 1996, the Unit was sold, with the proceeds going into George's name – in 2004, George died, before his mother, who died in 2006 – in 2009, the appellant (George's daughter) was appointed the administrator of George's estate, following the removal of George's brother from that role – the first respondent, Mr and Mrs Tjiong's grandson, sought orders as a beneficiary of the Trust, including the appointment of independent trustees – the first respondent

claimed that George breached his duties as trustee of the Trust; that the appellant ultimately became a bare trustee of the Trust, is subject to certain duties and is liable to account – the appellant claimed that the Trust was determined by distribution in the exercise of George's power of appointment under the Trust, through payments made in 1999 to her brother, Lindsay, and that George did not breach any duties – in the (No 1) judgment, the primary judge held that the Trust was not determined by payments that had been made in 1999 to Lindsay by George and the income and corpus of the Trust had been held by the appellant as bare trustee since 2009, when she was appointed administrator of George's estate – the primary judge ordered the appointment of independent trustees, being the second respondent and third respondent's predecessor (the Trustees), to the Trust – in the (No 2) judgment, the primary judge held that the appellant was entitled to indemnity from the Trust for four of the thirteen claims she brought – the primary judge held that the corpus of the Trust was $691,318.11, and ordered the appellant to pay the Trustees the net corpus (being the corpus minus the indemnity entitlement) – whether the primary judge erred in the making of orders as to the Trustees being appointed as trustees of the Trust – whether the primary judge erred in failing to find that any order for repayment should have been on the basis of a liability to replenish funds depleted by George – whether the primary judge erred in finding that the appellant failed to satisfy the Court of the fact that the 1999 payments made to Lindsay terminated the Trust – whether the primary judge erred in rejecting the appellant's claims to indemnity from the Trust.
Chang v Tjiong [2022] NSWSC 1092 (the (No 1) judgment)
Chang v Tjiong (No 2) [2024] NSWSC 74 (the (No 2) judgment)

WEDNESDAY 21 AUGUST 2024

INNDEAVOR APARTMENT v MAROUN 2023/464055 (Waugh SC DCJ – 6/12/23)
CONTRACT – the litigation before the primary judge involved a claim by the first appellant against the respondents, and cross-claims by the respondents against each appellant – the proceedings related to alleged failures by the respondents to pay rental bond moneys and failures by the appellants to pay rent moneys – in the course of the hearing, it emerged that the only issue for the Court to determine was the question of whether the appellant was successful in its accord and satisfaction defence against the respondents' cross-claim (as this would be determinative of both the claim and the cross-claim) – the parties agreed as to what orders would be appropriate following the determination of that issue – the accord and satisfaction defence arose from a written agreement (the agreement), in respect of which the primary judge found the second respondent was not a party – the primary judge therefore found that the first appellant's claim against the second respondent would fail, and the second respondent's claim against the first appellant would be successful – the first respondent consequently withdrew its cross-claim against the first appellant – whether the primary judge erred in concluding that the second respondent was a party to any residential tenancy agreement or otherwise entitled to rent – whether the primary judge erred in concluding that the second respondent was not a party to the agreement – whether the primary judge erred in concluding that the second respondent was not a person bound by the agreement.
Inndeavor Apartment Wolli Creek Pty Ltd v Maroun Pty Ltd and TQM Design & Construct Pty Ltd
(Decision not published on Caselaw but *ex tempore* reasons available)

Supreme Court
of New South Wales

FRIDAY 23 AUGUST 2024

SINGH v AKM INVESTMENTS 2024/172176 (Andronos SC DCJ – 12/4/24)
CONTRACT – in November 2017, $190,000 was transferred by the first respondent to the wife of the appellant (the first defendant below) as part of an arrangement between the appellant and the second respondent – the respondents alleged that this sum was advanced as a loan to be repaid by 31 December 2018 – the appellant alleged that the sum was advanced as a capital contribution to a joint venture through which land in South Australia would be developed – the appellant did purchase land in 2017, but the venture failed and the property was sold at a loss – the primary judge found that the sum was advanced pursuant to a loan agreement, and that the appellant was liable to repay the $190,000 to the respondents – whether the primary judge erred in finding that there was a loan agreement on terms materially different than those pleaded – whether the primary judge erred in finding that the advance was an immediately repayable loan – whether the primary judge erred as to the relevance of subsequent communications – whether the primary judge erred in reversing the onus of proof regarding the relevance of certain evidence – whether the primary judge overlooked evidence.
AKM Investments Group Pty Ltd v Grewal [2024] NSWDC 144

VAN MAI v NGUYEN 2024/125397 (Weber SC DCJ – 7/3/24)
TORTS (other) – the primary judge entered judgment for the respondent – whether the primary judge failed to exercise jurisdiction in failing to determine the appellant's assault claim – whether the primary judge erred in substituting their own medical knowledge on matters of causation – whether the primary judge erred in failing to address the respondent's history of violence – whether the primary judge erred in disregarding relevant evidence – whether the primary judge erred in failing to assess the respondent's credit – whether the primary judge misapplied the principles in *Briginshaw* – whether the primary judge failed to give adequate reasons – whether the primary judge erred in failing to make contingent findings on damages.
Decision of Weber SC DCJ dated 7 March 2024 (decision not available on Caselaw or Austlii)

MONDAY 26 AUGUST 2024

THE OWNERS v ELKHOURI 2024/115025 (Elkaim AJ – 28/2/24)
THE OWNERS v PERPETUAL 2024/115038 (Elkaim AJ – 8/4/24)
THE OWNERS v ELKHOURI 2024/164446 (Elkaim AJ – 8/4/24 and 19/4/24)
ELKHOURI v THE OWNERS (TBA)
REAL PROPERTY – the proceedings concern a penthouse apartment (Lot 11) in Point Piper – the registered owner of the apartment died in 2019, and the executors of his estate (his sons) are the first and second respondents in the El Khouri appeal (the Executors) and have assumed the deceased's involvement in the proceedings – the respondent in the Perpetual appeal (Perpetual) is a mortgagee in possession of Lot 11 – the proceedings related to the construction of By-law 30, which granted the owner of Lot 11 exclusive use of the balconies and rooftop, conditional on maintenance and work being carried out by the owner by the "Sunset date" (23 May 2018), at which point the exclusive use rights would dissolve if full compliance had not occurred – the primary judge held that clause 30.3 of By-Law 30 (the dissolution of exclusive rights clause) was unjust, and that certain levies raised by the appellant were unreasonable – the Executors and Perpetual were ordered to pay amounts in respect of work done by the appellant and in special levies – the primary judge made further orders as to costs and interest in the (No 2) judgment – whether the primary

judge erred in holding that By-law 30.3 was unjust – whether the primary judge erred in holding that the obligations of increased payment, maintenance and upkeep under By-law 30 continued upon the cessation of the exclusive use right held by Lot 11 – whether the primary judge erred in failing to make an order that respondents (in each appeal) pay the reasonable expenses incurred in recovering outstanding levies – (in the Executor appeal) whether the primary judge erred in failing to make an order that the Executors pay the costs and expenses incurred within the meaning of By-law 30.
Perpetual Corporate Trust Ltd v Owners Corporation SP6534; El Khouri v Owners Corporation SP6534 [2024] NSWSC 173
Perpetual Corporate Trust Ltd v Owners Corporation SP6534; El Khouri v Owners Corporation SP6534 (No 2) [2024] NSWSC 358

TUESDAY 27 AUGUST 2024

THE OWNERS v ELKHOURI 2024/115025 (Elkaim AJ – 28/2/24)
THE OWNERS v PERPETUAL 2024/115038 (Elkaim AJ – 8/4/24)
THE OWNERS v ELKHOURI 2024/164446 (Elkaim AJ – 8/4/24 and 19/4/24)
ELKHOURI v THE OWNERS (TBA)

Day 2

MOODINI v RAZZIVINA 2024/187586 (Gibson DCJ – 13/9/22 and 7/11/23)
PROCEDURE – on 13 September 2022, the primary judge struck out the applicant's summons – on 7 November 2023, the primary judge entered orders that the applicant pay the costs of the first and second respondents – the applicant seeks that each of those orders be quashed – the applicant seeks that several solicitors be summoned to show cause why they should not be removed from the role and referred to the ODPP for investigation for public justice offences – the applicant seeks that the primary judge be referred to the "Judiciary Commission of NSW" and ICAC – the applicant seeks the matter be remitted for rehearing – whether several jurisdictional errors were made by the primary judge in respect of the 13 September 2022 and 7 November 2023 orders.
Decisions of Gibson DCJ dated 13 September 2022 and 7 November 2023 (not available on Caselaw).

POLSEN v HARRISON 2023/223536 (Lonergan J – 6/7/23)
PROFESSIONAL NEGLIGENCE (other) – in July 2013, the appellant underwent a surgical procedure performed by the respondent to manage her morbid obesity – the appellant's post-operative course involved many admissions to hospital and further surgical procedures – the appellant alleged that the respondent should not have selected her as an appropriate candidate for the procedure due to her alcohol consumption, or alternatively, that he failed to warn her of the risks and if he had, the appellant would not have gone ahead with the procedure – the appellant also claimed that the respondent had been negligent in both his performance of the initial operation and his subsequent treatment – the appellant alleged that, consequently, she has been unable to work and her enjoyment of life has been diminished – the primary judge dismissed the appellant's claims – whether the primary judge erred in finding that the surgery was indicated – whether the primary judge erred in the application of s 5O of the *Civil Liability Act 2002* (NSW) (CLA) in relation to the recommendation for surgery and the post-operative treatment – whether the primary judge erred

in finding the s 5I of the CLA provided a defence to the case that the surgery was not indicated – whether the primary judge erred in failing to find that either the recommendation to proceed with the surgery or the failure to provide adequate post-operative treatment caused injury, loss and damage.
Polsen v Harrison (No 8) [2023] NSWSC 764

WEDNESDAY 28 AUGUST 2024

KENNEDY v MALHOTRA 2024/184151 (Cavanagh J – 15/5/24)
PROFESSIONAL NEGLIGENCE (medical) – the appellant suffers from cervical cancer and has limited life expectancy – the respondent was the appellant's general practitioner from around 2014 until 2019 – the appellant brought proceedings alleging that the respondent failed to advise or inform her that she should be undertaking preventative screening in the nature of cervical screening tests during that period – the primary judge dismissed the claim, finding that the in respect of most allegations, breach of duty was not demonstrated, and that the established breaches did not cause the damage of which the appellant complained – whether the primary judge erred in failing to find that the respondent's failure to follow up the appellant's cervical screening status amounted to a breach of duty – whether the primary judge erred in finding that the breaches that did occur did not cause the damage complained of – whether the primary judge predicated his conclusion on causation on false and irrelevant premises – whether the primary judge erred in finding that the appellant would not have been screened even if not for the breaches of duty by the respondent.
Kennedy v Malhotra [2024] NSWSC 576

THURSDAY 29 AUGUST 2024

METAL MANUFACTURES v WESTRAC 2024/96419 (Stevenson J – 23/2/24)
CONTRACT – by contract dated 8 July 2022, Verdia Pty Ltd (Verdia) agreed with the respondent to supply and install a "Solar Photovoltaic System" at premises owned by the respondent (the premises) – Verdia entered into a contract with Symmetry Electrical Services Pty Ltd (SES) to perform part of those works – SES entered a contract with the appellant to supply 3,030 solar panels (the Panels) – the terms of that contract included a retention of title clause such that title in the Panels did not pass to SES until payment – SES instructed the appellant to deliver the Panels to the premises and the appellant did so in October 2022 – SES did not pay the invoices issued by the appellant (the last of which was due in February 2024) – in the meantime, Verdia had gone into liquidation in December 2022, and did not make any payments to SES – at that point, the respondent had paid Verdia for the Panels – the appellant sought a declaration that the respondent's interest in the Panels was subject to the appellant's security interest, and orders under the *Personal Property Securities Act 2009* (Cth) (*PPSA*) that the respondent return the Panels to the Appellant – the primary judge held that the appellant could not assert its interest in the Panels against the respondent – whether the primary judge erred in finding that the contract between Verdia and the respondent was a contract for the supply of goods rather than for the supply of services – whether the primary judge erred in finding that there was a sale between SES and Verdia such that Verdia had title of the Panels – whether the primary judge erred in finding that the monies paid from the respondent to Verdia constituted "proceeds" within the meaning of s 32 of the *PPSA* – whether the primary judge erred in holding that the security interest attached to the "proceeds" rather than to the Panels.

Supreme Court
of New South Wales

Metal Manufactures Pty Ltd trading as TLE Electrical v WesTrac Pty Ltd [2024] NSWSC 144