Supreme Court
of New South Wales

WEDNESDAY 5 JUNE 2024

AIR CANADA v EVANS 2023/465441 (Rothman J – 12/12/23)
CONTRACTS – CIVIL PROCEDURE – claim for damages for injuries allegedly suffered from an incident of turbulence experienced on a flight between Vancouver and Sydney – common ground between the parties that Air Canada's International Tariff General Rules (Tariff) formed part of the contract of carriage between the parties – respondents successfully contended at trial that certain provisions of the Tariff operated under Art 25 of the Montreal Convention to displace Art 21(2) (which provides a cap for damages in certain circumstances), such that the applicant was liable on a no-fault basis for an unlimited amount, even if the applicant proved that the damage was not due to its negligence or other wrongful act - appeal brought from the trial Judge's determination on a separate question as to whether the Tariff on its proper construction displaces Art 21(2) of the Montreal Convention.
Evans v AIR CANADA [2023] NSWSC 1535

FRIDAY 7 JUNE 2024

SCKAFF v SCKAFF 2023/459951 (Robb J – 15/12/23)
EQUITY – the property the subject of the dispute (the property) was bought in 1988 under a contract of sale in which the first appellant was the purchaser – the first appellant was also the mortgagor in respect of the debt borrowed to complete the purchase, and became the registered proprietor of the property – since a time shortly after the purchase, the first respondent (the first appellant's brother) and the second respondent (the first respondent's wife) have been permitted to live in the property as their home without payment of any occupation fee – the respondents belief that they were the sole beneficial owners was not disturbed until the first appellant served them an eviction notice in December 2014 – the primary judge held that the appellants held the property on trust for the respondents, and ordered that they transfer the property to the respondents – whether the primary judge erred in reversing the onus of proof regarding the issue of the source of funds for the purchase of the property – whether the primary judge erred in finding that the first appellant did not have the capacity to fund the purchase and repay the mortgage – whether the primary judge erred in finding that the first appellant did not pay the whole of the price of the property – whether the primary judge erred in failing to find that the first appellant was the beneficial owner of the property – whether the primary judge erred in failing to find that the first appellant had informed the first respondent that the property did not belong to the first respondent – whether the primary judge erred in finding that the first appellant had not disabused the first respondent of his belief that the first appellant held the property for the first respondent's benefit – whether the primary judge erred in finding that a proprietary estoppel arose in circumstances where the first appellant had put the first respondent on notice of the first appellant's claim to the property – whether the primary judge erred in finding that the respondent would have rearranged their affairs no later than about 2001 – whether the primary judge erred in exercising his discretion to order a constructive trust over the whole of the property.
Sckaff v Sckaff [2023] NSWSC 1582

FRIDAY 14 JUNE 2024

WHITE ROCK v DULHUNTY 2023/463452 (Robb J – 20/12/23)

CONTRACT – the respondents are the owners of separate adjacent properties in the New England Tablelands (the properties) which they have leased to the appellant for the purpose of the construction and operation of a wind farm pursuant to agreements to lease (the leases) – the properties are adjacent to a trunk high voltage transmission line owned and operated by Electricity Transmission Ministerial Holding Corporation (Transgrid) and the Gwydir Highway – the proposed wind farm would consist of 70 turbines, a substation, and various connections including an access road from the Gwydir Highway to the substation (the access road) – significant disputes arose between the appellant and respondents as to compliance by the appellant with its obligations under the leases – the appellant commenced proceedings, claiming that the respondents were obliged to consent to it entering into a licence deed with Transgrid without insisting upon the appellant or TransGrid accepting an easement over the access road from the respondent, or agreeing to pay additional consideration for either the easement or the grant of approval to the licence deed – the respondents contend that the legal relationship between the parties changed once the appellant allowed options for the grant of access easements to expire, and that it was reasonable for the respondents to require TransGrid accept the grant of an access easement along the access road, and for the appellant to pay an additional consideration for that grant – the primary judge found for the respondents and dismissed the appellant's summons – whether the primary judge erred in failing to find that the respondents were not entitled to refuse consent to the grant by the appellant to Transgrid of a licence to use an access road – whether the primary judge erred in attaching significance to the fact that the appellant had been granted but had not exercised options to secure easements in favour of Transgrid – whether the primary judge erred in holding that it was reasonable for the respondents to decline consent – whether the primary judge erred in failing to find that the respondents are not entitled to prevent or condition ongoing use by Transgrid of the access road.

White Rock Wind Farm Pty Ltd v Dulhunty [2023] NSWSC 1464
White Rock Wind Farm Pty Ltd v Dulhunty (No 2) [2023] NSWSC 1631

MONDAY 17 JUNE 2024

ABIGRAIN v RINDFLEISH 2023/462853 (Russell SC DCJ – 6/12/23)

TORTS (negligence) – in January 2016, the respondent suffered serious facial injuries while working on a grain auger at a grain handling facility – the respondent alleged that at the time of the incident he was employed by a wholly owned subsidiary of the appellant – the respondent alleged that the appellant was responsible for the safety of the operations of the facility, and that it breached a duty it owed the respondent, as a result of which he suffered loss and damage – the appellant (among other contentions) argued that the claim should be brought within the workers compensation legislation and that it was time barred – the primary judge entered judgment for the respondent, awarding damages totalling $521,134 – whether the primary judge erred in the findings as to whether the appellant was the employer of the respondent – whether the primary judge erred in failing to find that the respondent's claim failed due to lack of compliance with the procedural provisions of the relevant workers compensation legislation – whether the primary judge erred in failing to find that the proceedings were subject to the workers compensation legislation – whether the primary judge erred in finding that the respondent's cause of action was not time-barred –

whether the primary judge erred in finding that the respondent discharged the onus of proving that the appellant was negligent – whether the primary judge erred in the findings as to contributory negligence – whether the primary judge erred in the assessment of damages.
Rindfleish v Agrigrain Pty Ltd [2023] NSWDC 543

GOLDSPRING v JORDAN 2024/87434 (Henry J – 29/01/24)
CONTEMPT – the parties are six of the seven children of Mr Frederick Goldspring (the deceased) – the appellants sought and were granted probate of the deceased's estate in May 2016 – in September 2020, the respondents filed a notice of motion seeking orders that the appellants be found guilty of and punished for contempt for failing to comply with court orders made in the proceedings – the orders sought related to disputes between the appellants and respondents as to the extent and administration of the estate – the primary judge held that the appellants had committed civil contempt by failing to comply with orders made by Hallen J and ordered compliance with those orders – the primary judge dismissed the majority of the charges – the primary judge ordered that the appellants pay 50% of the respondents' costs on an indemnity basis without indemnification from the estate – whether the primary judge erred in hearing a notice of motion with a defective Statement of Charge – whether the primary judge erred in finding that the appellants had failed to comply with court orders – whether the primary judge erred in holding that the appellants' failure to comply had been proved beyond a reasonable doubt – whether the primary judge erred in making findings not expressed in the Statement of Charge – whether the primary judge erred as to costs.
Jordan v Goldspring (No 2) [2022] NSWSC 780 (Henry J)
Jordan v Goldspring (No 3) [2024] NSWSC 11 (Henry J)

WEDNESDAY 19 JUNE 2024

RIVA v KEY NOMINEES 2024/92895 (Meek J – 7/7/23)
RIVA v KEY NOMINEES 2023/227184 (Meek J – 7/7/23)
COSTS – INTEREST – claim that a costs order for costs incurred over many years included interest, including on orders prior to 25 November 2015 – claimed to be contrary to the express provisions in the legislation which amended s101 of the Civil Procedure Act 2005 (NSW) – consequence that Riva was ordered to pay an extra $84,054.91.
Riva NSW Pty Ltd v Key Nominees Pty Ltd [2023] NSWSC 711

REIMERS v MEDICAL BOARD OF AUSTRALIA 2024/22850 (Coleman SC ADCJ, M Chu, J Saunders, M Christensen - 22/12/23)
ADMIN LAW (other) – in 2003, NCAT (the Tribunal) found the appellant guilty of professional misconduct and his name was removed from the Register of Medical Practitioners – in 2018, the appellant was deemed a fit and proper person to be granted general registration, subject to 28 conditions – in January 2023, the appellant applied for specialist accreditation in the field of anaesthesia – in August 2023, the respondent refused that application – the appellant appealed the respondent's decision – the Tribunal dismissed the appeal, holding that it was not satisfied that the appellant is a "suitable" or "fit and proper" person to be registered as a specialist in anaesthesia, and in the alternative was satisfied that he is unable to practice the profession competently and safely – whether the Tribunal erred in misconstruing its statutory task or identifying the wrong issues for determination – whether the Tribunal was seriously irrational or legally unreasonable –

whether the Tribunal erred in failing to consider whether the appellant was eligible for registration with conditions imposed.
Reimers v Medical Board of Australia [2023] NSWCATOD 192

THURSDAY 20 JUNE 2024

MICHAEL HILL JEWELLER v GISPAC 2024/75177 (Gleeson J – 31/1/24)
CONTRACT – the respondent is a supplier of packaging material – the appellant is a retailer of jewellery and accessories – the respondent supplied wholesale packaging supplies to the appellant from around 2003 to May 2018, with sales agreements entered into by the parties across the period for different types of bags – the respondent alleged that the appellant was in breach of obligations to purchase certain quantities of goods and to obtain certain goods exclusively from the appellant – the dispute was as to whether the respondent's "Terms and Conditions of Trading" (the Terms) were incorporated into three sales agreements (the Sales Agreements) – the primary judge found that the Terms were incorporated and that the appellant had breached certain of the Terms, and entered judgment for the respondent in the amount of $2.26 million – whether the primary judge erred in finding that the appellant was liable under the Sales Agreements to pay sums under the Terms – whether the primary judge erred in the findings as to the meaning of "QTY" in the Sales Schedule to each of the Sales Agreements – whether the primary judge erred in quantifying the liability of the respondent under cl 17 of the Terms – whether the primary judge erred in finding that the purchase of products from an alternate supplier constituted a breach of cl 17 of the Terms – whether the primary judge erred as to the calculation of the respondent's loss.
Gispac Pty Ltd v Michael Hill Jeweller (Australia) Pty Ltd [2024] NSWSC 18

DAC FINANCE v COX 2024/98286 (Levy SC ADCJ – 16/2/24)
TORTS (negligence) – in July 2018, the respondent was present at premises comprising an aged care facility (the premises) in the course of her employment as an Assistant in Nursing – while travelling in a descending elevator cabin, the power supply was intentionally interrupted as part of testing the functionality of the building's emergency power supply – the respondent alleged she suffered a jolting injury to her lumbar spine – the first appellant is the owner of the premises – the second appellant operates the business of an aged care facility at the premises and is the sole shareholder of the first appellant – the employer of the respondent (DPG Services) is a corporate conduit structure for the payment of wages to persons working at the premises – the respondent brought proceedings against the appellants – the respondents denied liability, and further argued that any award or damages should be reduced due to negligence by DPG Services – the primary judge entered judgment against the appellants jointly and severally in the sum of $925,435.42 – whether the primary judge erred in rejecting the tender of evidence by the appellants – whether the primary judge erred in limiting the use of evidence tendered by the appellants – whether the primary judge erred in failing to find that DPG Services was the responsible party – whether the primary judge erred in finding that the appellants were occupiers of the premises – whether the primary judge erred in the findings as to the scope and content of the duty of care – whether the primary judge erred as to breach – whether the primary judge erred in failing to find that the some liability should be apportioned to DPG Services – whether the primary judge awarded manifestly excessive damages.
Cox v DAC Finance (NSW/QLD) Pty Limited & Anor [2024] NSWDC 22

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FRIDAY 21 JUNE 2024

MICHAEL HILL JEWELLER v GISPAC 2024/75177 (Gleeson J – 31/1/24)

Day 2

MONDAY 24 JUNE 2024

ANDERSON v YONGPAIROJWONG 2023/445224 (Griffiths AJ – 10/11/23)
SUCCESSION – the testatrix was the matriarch of a chain of restaurants in Sydney using the Chat Thai brand – the testatrix was domiciled in NSW but died in Thailand in March 2021 – the dispute concerned two wills, the first made in August 2017 in Sydney (the Australian Will) and the second made in June 2020 (the Thai Will) – the appellant is the daughter of the testatrix – the first respondent is the brother of the testatrix and the executor under both wills, but is not a beneficiary under either will – the second respondent is the son of the testatrix – the Australian Will divided the estate between the appellant and second respondent – the Thai Will also divided the estate between the appellant and second respondent, but significantly more in favour of the second respondent – the appellant brought proceedings seeking an order that letters of administration with the Australian Will be granted to her, alleging that the testatrix did not have testamentary capacity (or the requisite knowledge and approval) in relation to the making of the Thai Will – the appellant also brought a family provision claim, the findings in respect of which are not being challenged – the primary judge was satisfied that the second respondent had discharged the onus of establishing that the testatrix had testamentary capacity when she executed the Thai Will and granted probate of the Thai Will to the first respondent – whether the primary judge erred in considering that the second respondent had discharged his onus of proving that the testatrix had testamentary capacity – whether the primary judge erred in concluding that the expert medical evidence adduced by the appellant was incapable of assisting him in concluding that the testatrix lacked testamentary capacity as at the date of execution of the Thai Will – whether the primary judge erred in holding that the testatrix knew and approved of the contents of the Thai Will – whether the primary judge erred in holding that there were no circumstances indicating that the Thai Will did not have the testatrix's consent – whether the primary judge erred in declining to permit the appellant to serve supplementary evidence.
Anderson v Yongpairojwong [2023] NSWSC 1359

SSABR v AMA 2023/463461 (Rees J – 15/12/23 and 2/2/24)
CONTRACT – in October 2018, the appellants sold two smash repair businesses to the first respondent for $4.8 million plus an "Earn-Out Amount" to be paid in two years' time – before the primary judge, the parties sought declaratory relief in respect of the proper construction and application of the earn-out provisions in the Business Sale Agreement (the contract) – each party contended for an alternate construction regarding the calculation of the Earn-Out Amount – separately, the first respondent sought rectification to bring the contract into line with the parties' common intentions laid out in the Binding Heads of Agreement executed a month prior to the execution of the contract – the appellants also contended that the first respondent had breached the contract and engaged in misleading and deceptive conduct by taking steps to reduce the Earn-Out Amount – the primary judge ordered that the contract be rectified to accord with the Heads of Agreement, as contended for by the respondents – whether the primary judge erred in finding that there was sufficient evidence to establish the first respondent's corporate state of mind – whether

the primary judge erred in her findings as to the Circular Resolution – whether the primary judge erred in not drawing *Jones v Dunkel* inferences regarding the failure to call certain witnesses – whether the primary judge erred in drawing a *Jones v Dunkel* inference against the appellants – whether the primary judge erred in finding that the first respondent had discharged its burden of proof regarding the appellant's actual intentions.
SSABR Pty Ltd v AMA Group Ltd [2023] NSWSC 1551
SSABR Pty Ltd v AMA Group Ltd (No 2) [2024] NSWSC 24

DAVIS v DAVIS 2023/465354 (Elkaim AJ – 15/12/23)
REAL PROPERTY – the respondent is the daughter of the appellant – at the centre of the dispute is a property (the property) – in 2005, the parties entered into a deed transferring the legal ownership of the property from the appellant to the respondent, and purportedly granting the appellant a "life interest" to reside at the property – in June 2019, following a falling out, the respondent's partner (who was staying at the property with the appellant and respondent) obtained an Apprehend Violence Order against the appellant, causing him to move out of the property – in August 2019, the appellant demanded that the respondent leave the property as the appellant had an exclusive right of possession – the respondent remained at the property with her partner and daughter – the respondent sought an order that the appellant transfer his interest in the property to her – the appellant sought declarations that he holds a life interest in the property, or alternatively is entitled to a "personal right of residence" – the primary judge granted the relief sought by the respondent – whether the primary judge erred in the exercise of discretion to adversely adjust the appellant's interest in the property – whether the primary judge took into account irrelevant considerations and failed to take into account relevant considerations – whether the primary judge reached a conclusion that was manifestly unreasonable and unjust – whether the primary judge ought to have dismissed the respondent's application for relief – whether the primary judge erred in dismissing the appellant's cross-claim.
Davis v Davis (No 2) [2023] NSWSC 1563

TUESDAY 25 JUNE 2024

ANDERSON v YONGPAIROJWONG 2023/445224 (Griffiths AJ – 10/11/23)

Day 2

COCA-COLA v POMBINHO 2024/1601 (Rothman J – 12/12/23)
ADMIN LAW (judicial review) – in May 2021, the first respondent brought a claim for permanent impairment arising from compensable injuries that arose during the course of his employment with the appellant – in October 2022, the first respondent was examined by a Medical Assessor, who issued a Certificate – the appellant appealed the Medical Assessor's decision – the Appeal Panel upheld the appeal and revoked the Certificate – the primary judge found that the Appeal Panel had extended its reach in dealing afresh with the Medical Assessment rather than dealing only with the issue raised on appeal by the appellant – the primary judge quashed the decision of the Appeal Panel and remitted the appeal to the second respondent for determination – whether the primary judge erred in concluding that the third respondent had exceeded its jurisdiction by not limiting itself to the grounds of appeal on which the appeal to it had been made.
Pombinho v Coca-Cola Europacific Partners API Pty Ltd [2023] NSWSC 1536

ZHONG v GUAN 2024/15882 (Fagan J – 18/12/23)
CONTRACT – in September 2018, the appellant advanced $1.15 million to Shield Resources (the first defendant below) by way of loan – the appellant alleged that by Deed of Loan (the deed) the respondent charged her property in St Ives (the property) to secure the amount of Shield Resources' debt and interest under the debt – the primary judge entered judgment for the appellant against Shield Resources for the value of the debt plus interest, but dismissed the appellant's claim against the respondent seeking an equitable charge over the property – whether the primary judge erred in construing the deed – whether the primary judge erred in concluding that the deed could not be construed as providing for a charge over the respondent's property as security for repayment of the loan.
Zhong v Shield Resources Pty Ltd [2023] NSWSC 1611

WEDNESDAY 26 JUNE 2024

BOOTH v CERRETO 2024/113506 (Kunc J – 28/02/24)
CONTRACT – the proceedings relate to a failed joint venture to develop land at Ryde – the late Mrs Maria Dominello (now represented by the third appellant) owned two properties in Ryde (the properties) – the first and second appellants are her daughter and son-in-law – in September 2011 the appellants entered into an oral joint venture agreement with the first and second respondents, the purpose of which was to sub-divide and develop the properties to build a number of residences – Mrs Dominello transferred the properties to entities controlled by the first and second respondents in return for the payment out of her mortgages over the properties and a right to receive half the residences – the first and second respondents took very few steps to progress the joint venture, and the appellants terminated the joint venture in February 2016 – following a hearing in Jun 2019, the parties agreed that there should be a judicial sale of the properties after an accounting of their respective contributions to the joint venture – despite this, in the hearing before the primary judge in 2023, the appellants pressed their claim for contractual damages – the primary judge determined that the claim for damages failed, resolved disputes regarding the appointed expert's accounting process, and ordered that the parties prepare orders for judicial sale of the properties – the parties were largely in agreement as to the necessary orders, but a dispute remained as to the accounting process – the primary judge held that the respondents had been entitled to use the property as security to raise money for purposes unrelated to the joint venture and that no adjustment was necessary – whether the primary judge erred in finding that there was no basis to find that the respondents were prohibited from borrowing on the security of the properties for purposes unrelated to the joint venture – whether the primary judge erred in finding that no adjustment was necessary – whether the primary judge erred in overlooking concessions made by the respondents during the trial – whether the primary judge erred in overlooking that both parties contended for final orders that made an adjustment in favour of the appellants – whether the primary judge erred in failing to consider, or in failing to give adequate reasons for not accepting, the submissions made by the appellants.
Booth v Cerreto [2023] NSWSC 1574
Booth v Cerreto (No 2) [2024] NSWSC 207

Supreme Court
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THURSDAY 27 JUNE 2024

CAPITALINK v WITHNALL 2023/445571 (Abadee DCJ – 7/12/23)
CONTRACT – the appellant is a trustee of an investment trust which owns real property in Queensland (the property) – development approval was obtained in 2013 to construct townhouses on the property – in December 2015, a third party (DDC) agreed with the appellant via a purported deed (the agreement) to carry out construction works (the works) – the appellant contended that the respondent was a party to the agreement and guarantor of DDC's obligations – the appellant alleged that DDC did not complete the works, causing the appellant to incur expenditure – DDC went into external administration in March 2017 – the appellant brought proceedings against the respondent to recover damages for the costs incurred in completing the works – the primary judge found that there had been a breach of the agreement, and that under the guarantee the respondent was liable for the losses flowing from that breach – the primary judge found that, as the invoices relied upon to establish loss had been paid by other parties (most by a company with a mortgage over the property), the appellant could not demonstrate that it suffered or would suffer loss as a consequence of DDC's breach – the primary judge ordered a payment of nominal damages against the respondent and ordered the appellant pay the respondent's costs – whether the primary judge erred in failing to find that loss had been suffered by the appellant because the property with an incomplete building situated on it was less valuable than it would be with a completed building – whether the primary judge erred in finding that that the future cost of completing the works was not a measure of loss suffered by the appellant – whether the primary judge erred in excluding amounts paid by other parties in calculating the loss suffered.
Capitalink Pty Ltd v Withnall (No 2) [2023] NSWDC 547

EPA v McMURRAY 2024/99713 (Duggan J – 7/2/24)
ADMIN LAW (judicial review) – in August 2022, the applicant charged the first respondent (the General Manger of the Cootamundra-Gundagai Regional Council (the Council)) with an offence against s 144(1) of the *Protection of the Environment Operations Act 1997* (POEO Act) – the applicant alleged that the first respondent caused the Cootamundra Sewage Treatment Plant to be used for the disposal of liquid waste without lawful authority – in May 2023, a Magistrate in the Local Court ordered a permanent stay of the prosecution, finding that the charge was beyond the ambit of s 169 of the POEO Act as the first respondent was an officer of the Council – the applicant, by summons, appealed the decision to the Land and Environment Court – the primary judge upheld the Magistrate's findings as to s 169 and dismissed the applicant's summons – whether the primary judge erred in determining that s 169(1) of the POEO Act did not apply to the first respondent by operation of s 220(4) of the *Local Government Act 1993*.
Environment Protection Authority v McMurray [2024] NSWLEC 6

FRIDAY 28 JUNE 2024

MEDICAL COUNCIL v MOONEY 2024/123098 (Hennessy ADCJ, Dr H North, Dr A Eyers, D Telford – 11/3/24)
ADMIN LAW (other) – the respondent has practised as an ear nose and throat surgeon since 1990 – the respondent has been the subject of various complaints and hearings before the appellant and the Tribunal – in April 2022, the respondent's registration was cancelled by the Tribunal and he was prohibited from reapplying for 12 months – at the expiry of that period, the respondent applied to the Tribunal for the reinstatement of his registration – the appellant resisted the application,

submitting that the respondent is not a fit and proper person to practise as a medical practitioner – the Tribunal made a reinstatement order with conditions – whether the Tribunal erred in its consideration of the weight to be given to the evidence of Dr Farago and Dr Ventura – whether the Tribunal erred in reaching its conclusion as to whether to grant a reinstatement order – whether the Tribunal erred in applying the incorrect test and reversing the onus of proof in considering the respondent's misleading conduct in the post-cancellation period – whether the Tribunal erred in failing to take into account relevant considerations – whether the Tribunal's conclusion was legally unreasonable.
Mooney v Medical Council of NSW [2024] NSWCATOD 24

ACCESS TRAINING v JANE 2023/463696 (Nixon J – 20/12/23)
CONTRACT – Access Group Training Pty Ltd (AGT) provided vocational services training from 1997 to 2019 – all shares in AGT were held equally by James Jane, Judith Jane, John Goard and Suellen Goard (the AGT Shareholders) – discussions occurred with Venture Capital Fund Australia (VCFA) regarding the expansion of AGT's operations into China – a plan emerged involving a parent company (which would hold all shares of AGT) which would then be listed on the ASX – for that purpose, a company (Access Training Group (ATG)) was incorporated in October 2015 – the proposal was that VCFA would subscribe for $1.7 million worth of shares in ATG (acquiring a 74% interest in the company), ATG would then use those funds to pay a deposit to the AGT Shareholders for the purchase of their shares in AGT, Mr Jane would be become ATG's managing director and be issued with the remaining 26% of the shares in ATG, and ultimately ATG would be listed on the ASX – in August 2016, VCFA acquired the 74% holding in ATG for the payment of $1.7 million, and ATG immediately paid the sum to the AGT shareholders – at that time, the agreement between ATG and the AGT Shareholders (the Share Sale Agreement) had been negotiated but not executed – the IPO did not proceed, and the AGT Shareholders did not transfer their shares to ATG, but retained the $1.7 million deposit – in 2019, ATG brought proceedings against the AGT Shareholders for the return of the $1.7 million – the AGT Shareholders alleged that they were entitled to set off against the obligation to repay the $1.7 million any amounts payable to AGT by ATG or VCFA – in 2020, AGT brought proceedings against VCFA for repayment of a loan of $1.3 million made by AGT – VCFA disputed that the payments made by AGT to VCFA constituted a loan – the primary judge found that the $1.3 million had been advanced to VCFA as a loan and that no amount was repaid by VCFA – the primary judge found that a Share Sale Agreement was entered into between ATG and the AGT Shareholders, that ATG had not established that there was a total failure of consideration for the $1.7 million, and that therefore ATG's claim for repayment must fail – the primary judge found that, as the sum owing by VCFA to AGT as at July 2019 exceeded the amount of the $1.7 million deposit, the AGT shareholders had fully satisfied their obligations under cl 5.9(d) of the Share Sale Agreement and was not required to repay any moneys to ATG – the effect of the set off was also to reduce the debt due by VCFA to AGT to $134,371 (plus interest from July 2019 when the set off occurred) – whether the primary judge erred in failing to give reasons regarding ATG's alternative claim that it would be unconscionable for the AGT Shareholders to rely on clause 5.9(d)(ii) of the Share Sale Agreement – whether the primary judge erred in failing to find that reliance on clause 5.9(d)(ii) of the Share Sale Agreement was unconscionable due to the positions held by Mr Jane and the lack of notice given to ATG.
Access Training Group Limited v James Michael Jane & Ors; Access Group Training Limited v Venture Capital Fund Australia Limited [2023] NSWSC 1416