Supreme Court of New South Wales

MONDAY 29 APRIL 2024

SoNSW v RANDALL 2023/271325 (Curtis ADCJ – 21/6/23)
SoNSW v DICKENS 2023/271345 (Curtis ADCJ – 21/6/23)
SoNSW v JENSEN 2023/271359 (Curtis ADCJ – 21/6/23)
TORTS (other) – the respondents were arrested on several sexual offences in company of others and were remanded in custody – the respondents stood trial and were acquitted - the senior detective constable on the matter committed wrongful conduct during the investigation and was in breach of his duty under s 15A of the *Director of Public Prosecutions Act 1986* (NSW) – the primary judge held that the senior detective constable had charged Randall without reasonable and probable cause and that his conduct was so egregious that the prosecution was malicious – the primary judge further found that the appellant was liable for misfeasance in public office – the primary judge held that Randall was falsely imprisoned during the investigation process and he was awarded $730,000 in damages – Dickens and Jensen were each awarded $30,000 - whether the primary judge erred in making findings as to the credibility of witnesses – whether the primary judge erred in making findings that the appellant was liable for malicious prosecution – whether the primary judge erred in making findings as to misfeasance in public office.
Randall v State of NSW; Dickens v State of NSW; Jensen v State of NSW (*Decision not available on Caselaw)*

SHUN SHENG v JUAN LEI 2023/339742 (Parker J – 29/9/23)
PARTNERSHIPS AND JOINT VENTURES – partnership dispute over a brothel in Guildford – disagreement as to when the partnership was terminated and which party is, or parties are, liable to account – primary judge made orders for an account on the basis that the partnership was terminated on 18 October 2021 and ordered the appointment of a receiver – primary judge deferred consideration of a rent claim and an application to re-open certain claims – leave to appeal sought from the primary judge's interlocutory decision in relation to the date of dissolution of the partnership and regarding a monetary claim and personal guarantee.
Shun Sheng Pty Ltd v Lei [2023] NSWSC 1176

THURSDAY 2 MAY 2024

RAHMAN v RAHMAN 2023/345709 (ex tempore – Williams DCJ – 14/8/23)
ADMIN LAW (judicial review) – a magistrate had dismissed an Apprehended Violence Order, of which the respondent was the subject – the applicant brought an appeal in the District Court against that dismissal – the primary judge dismissed the appeal – whether primary judge fell into jurisdictional error by denying the applicant natural justice – whether the primary judge had erred by failing to take into account material and relevant considerations – whether the primary judge fell into jurisdictional error in failing to give the applicant procedural unfairness – 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 the District Court unavailable

RADOVANOVIC v STEKOVIC 2023/465559 (McGrath J – 29/11/23)
CONTRACTS – the respondents are married, and the appellant is the brother of the second respondent – the respondents sought declarations and orders for specific performance of an alleged settlement agreement with the appellant, regarding a dispute over the distribution of proceeds from the sale of a property in Queanbeyan – the primary judge found that the agreement

alleged by the respondents did exist, as letters sent between the parties dated 2 June 2022 and 3 June 2022 constituted a valid offer and acceptance – whether the primary judge erred in finding that the objective intention of the parties was to be immediately bound by the counteroffer made by the solicitors for the appellant on 2 June 2022 – whether the primary judge erred in failing to find that the purported agreement was incomplete – whether the primary judge erred in finding that the appellant was the person with authority over the Baker Deane & Nutt trust account – whether the primary judge erred in failing to find that entry into a deed of settlement was a term of the agreement – whether the primary judge placed excessive weight on the inclusion of the phrase "without prejudice save as to costs" in communications between the parties.
Stekovic v Radovanovic [2023] NSWSC 1471

FRIDAY 3 MAY 2024

KARZI v TOLL 2023/292793 (Olsson SC DCJ – 22/8/23)
WORKERS COMPENSATION – the appellant is a migrant from Afghanistan who was employed by the respondent and was a member of a union (TWU) – another employee of the respondent made racist and offensive comments to the appellant – the employee was dismissed – TWU staged a protest about the appellant, alleging that he might harm his colleagues – the respondent and TWU entered into negotiations and the appellant was moved into a different department at work – the appellant claimed that the move was dehumanizing – the primary judge accepted that the appellant suffered psychiatric injury – the primary judge found that the respondent did not breach the duty it owed to the appellant – whether the primary judge erred in failing to find that the risk of psychiatric injury was not reasonably foreseeable by the respondent – whether the primary judge erred in findings of breach – whether the primary judge erred in findings of causation – whether the primary judge made evidentiary errors.
Karzi v Toll Pty Ltd (*Decision not available on Caselaw*)

MONDAY 6 MAY 2024

MAJUMDAR v DPP 2024/61867 (Kumar DCJ – 11/12/23)
ADMIN LAW (judicial review) – on 15 June 2021, a final Apprehended Violence Order (AVO) was made by Magistrate R Denes in the Local Court restricting the behaviour of the applicant – the AVO was for a period of 2 years – before the expiry of the 2-year period, on 9 February 2023 the applicant applied for the AVO to be revoked – on 15 June 2023, Magistrate C Milanovich (the Magistrate) in the Local Court dismissed the application, stating that the Court did not have jurisdiction to hear the matter as the AVO had expired – the applicant appealed to the District Court – the primary judge dismissed the applicant's appeal against the dismissal of the AVO, citing *Wass v Direction of Public Prosecution (NSW); Wass v Constable Wilcock* [2023] NSWCA 71 (*Wass*), in which the Court of Appeal held that there was no jurisdiction for a Court to revoke an AVO after it had expired – the applicant seeks judicial review of the decision of the primary judge – whether the Magistrate intentionally set the hearing date after the expiry of the AVO – whether the present facts are similar to those in *Wass* – whether the primary judge made a jurisdictional error in relying on irrelevant material and incorrectly interpreting the relevant legislation – whether comparable legislation in other states was properly considered – whether there was a denial of natural justice in not considering the applicant's original application to be in a state of "deemed extension" when it was made 4 months before the expiry of the AVO.
Ex tempore judgment of Kumar DCJ (not available on Caselaw or Austlii).

ENERMECH v ACCIONA 2023/465352 (Stevenson J – 15/12/23)

BUILDING & CONSTRUCTION – the first, second and third respondents (Acciona) comprise an unincorporated joint venture formed to construct the WestConnex M4-M5 Link – Acciona entered into a subcontract (the Contract) with the appellant to perform electrical installation works for an adjustable contract sum of $75.6 million – the appellant was obliged to provide security under the Contract, and procured the issue of a $9.23 million (the Security Amount) undertaking from HSBC (the Security) – in July - September 2022, there was a dispute as to amounts owing under the Contract, ultimately determined by an Adjudicator who found that the appellant was entitled to $5.6 million, which was paid by Acciona – in October - December 2022, there was a further dispute, again determined by the Adjudicator who determined that $9.1 million was payable by Acciona to the appellant, which was paid by Acciona – as the position determined by the Adjudicator now differed from the position as assessed by Acciona's Representative under the Contract, Acciona alleged that EnerMech was obliged to repay $7.2 million under the Contract – on 26 May 2023, Acciona made a demand on HSBC for the Security Amount, which HSBC paid – on 8 June 2023, the appellant served on Acciona a document purporting to be a "payment claim" for the purposes of s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) which included a claim for $9.23 million correlating to Acciona's recourse to the Security (Payment Claim 29) – on 25 July 2023, the Adjudicator made a determination in favour of the appellant for $10.2 million (the Third Determination) – Acciona alleged that the Third Determination was made without jurisdiction – the primary judge held that Payment Claim 29 was not a valid payment claim for the purposes of the Act and quashed the Third Determination – whether the primary judge erred in holding that a payment claim is not a "payment claim" for the purposes of the Act if the claim is not in substance a claim for "construction work" – whether the primary judge erred in holding that Payment Claim 29 was not a claim for "construction work".

Acciona Infrastructure Projects Australia Pty Ltd v EnerMech Pty Ltd [2023] NSWSC 1565

TUESDAY 7 MAY 2024

A.C.N. 627 087 030 v POCHE 2024/45446 (Gibson DCJ – 13/12/23)

ADMIN LAW (judicial review) – the applicant, a legal firm, represented the respondent in proceedings involving the estate of the respondent's deceased mother – Henry J made orders handed down in June 2020 increasing the amount of provision for the respondent – her Honour awarded capped costs of $125,000 to the respondent, having described the costs accrued by the respondent as "excessive" – in May 2021, a Costs Assessor determined that the applicant should refund to the respondent the sum of $98,541.15 – in March 2022, a Review Panel issued Certificates of Determination upholding that Cost Assessor's assessment – the applicant, by way of summons, sought review of the Review Panel's determination – the primary judge dismissed the summons, upholding the Review Panel's determination – whether the primary judge erred in determining that the Review Panel had properly discharged its statutory function – whether the primary judge erred in determining that the Review Panel's adoption of the determination of costs by the Costs Assessor involved no error when the Costs Assessor's determination was infected by a number of errors – whether the primary judge erred in determining that the Review Panel's determination was without error – whether the primary judge erred in failing to find that the Review Panel denied the applicant procedural fairness.

A.C.N. 627 087 030 Pty Ltd trading as Yates Beaggi Lawyers v Poche [2023] NSWDC 551

Supreme Court
of New South Wales

WEDNESDAY 8 MAY 2024

CURTIS v CURTIS 2023/315725 (Elkaim AJ – 28/9/23)
SUCCESSION – Mr Barry Curtis (the deceased), grandfather of the respondents and brother of the appellant, died on 11 January 2022 – the appellant is executor of the deceased's will (the Will), which makes no provision for the respondents – the sole beneficiary is Mr Rodney Curtis (Rodney), the son of the deceased – the respondents made an application for provision pursuant to s 59 of the *Succession Act 2006* (NSW) (Succession Act) – the primary judge found that the respondents were dependent on the deceased and that there were factors warranting provision for the respondents, and made orders for provision for the respondents in the form of 20% of the proceeds of sale of the deceased's property (the property) – whether the primary judge erred in finding that the respondents were "wholly or partly dependent on the deceased person" – whether the primary judge erred in finding that there were factors warranting provision for the respondents – whether the primary judge erred in the consideration of Rodney's "needs" – whether the primary judge erred in the process of determining "adequate" provision for the respondents.
Curtis v Curtis [2023] NSWSC 1164

THURSDAY 9 MAY 2024

COMMISSIONER OF POLICE v LECC 2024/86203 (*Hon Peter Johnson SC* 28/2/24)
ADMIN LAW (judicial review) – the respondent determined that s 114(3)(d) of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act) obliged the second and third applicants to produce certain documents – the applicants seek interim orders that no person other than a party may inspect the confidential reasons of the respondent – the applicants seek final orders including a declaration that s 114(3)(d) of the LECC Act does not compel the provision to the respondent of access to the documents in question – whether s 114(3)(d) of the LECC Act imposes on the recipient of a notice to provide access to a document a requirement to provide that access even where public interest immunity attaches to those documents, or alternatively where the public interest in not providing the respondent with access to the documents outweighs the public interest in providing the respondent with access to those documents.
Decision of the Hon Peter Johnson SC, Chief Commissioner, Law Enforcement Conduct Commission, dated 28 February 2024 (decision not available)

FRIDAY 10 MAY 2024

PIETY DEVELOPMENTS v CUMBERLAND 2024/14852 (Parker J – 19/12/23)
CONTRACT – the proceedings involve land in Lidcombe owned by the first respondent (the Council) and used as an open-air carpark – in June 2020, the first respondent issued a public invitation to tender for the sale and development of the land – following this process, the Council continued to negotiate with the appellant and another tenderer – the appellant's final offer following negotiation involved payment of $2.25 million and the construction of car parking valued at $9.75 million – at a Council meeting in November 2021, the Council resolved to accept the appellant's offer – the resolution passed narrowly, and certain councillors immediately gave notice of a recission motion – due to the recission motion, no steps were taken to execute documents giving effect to the sale, nor was formal notification of the passage of the motion given to the appellant – as the resolution

was public, the directors of the appellant became aware of its passing – the appellant commenced proceedings seeking specific performance of the alleged contract, submitting that the resolution constituted acceptance of their offer by the Council – the primary judge found that the alleged contract was not legally effective, as the purported acceptance was not validly communicated to the appellant, and further would be unenforceable pursuant to s 54A of the *Conveyancing Act 1919* – whether the primary judge erred in finding that acceptance of the offer by the Council was not sufficiently communicated to the appellant to constitute a binding and enforceable contract – whether the primary judge erred in finding that there was not compliance with s 54A of the *Conveyancing Act 1919* – whether the primary judge erred in finding that the Mayor of the Council was not authorised to sign the relevant document.

WEDNESDAY 15 MAY 2024

ARJUNAN v NEIGHBOURHOOD ASSOCIATION 2022/365344
VEXATIOUS – Court to consider of its own motion whether to make orders under the Vexatious Proceedings Act 2008 (NSW) in relation to Arjunan.

THURSDAY 16 MAY 2024

CAO v ISPT PTY LTD 2023/429523 (Nixon J – 1/11/23)
REAL PROPERTY – the respondents are the proprietors of World Square Shopping Centre in the Sydney CBD – in early 2020, the respondents leased two shops to Beijing Roast Duck Sydney Pty Ltd (the tenant) – the lease was executed by each of the appellants as guarantors, and by the second appellant as director of the tenant – the lease was for a term of three years with an option to renew a further three years – when the first lockdown commenced in response to the COVID-19 pandemic on 23 March 2020, the tenant was already significantly in arrears in its payment of rent, having failed to make any payments for January, February or March 2020 – the tenant shut the restaurant on 23 March 2020 and did not re-open – the respondents issued a breach notice to the tenant in May 2021, claiming unpaid rent and other amounts under the lease – on 26 May 2021, the tenant went into liquidation – on 10 June 2021, the respondents issued a termination notice – the respondents brought proceedings claiming from the appellants, pursuant to their guarantee and indemnity, the outstanding arrears of rent and other amounts under the lease – the respondents also claimed the loss of rent, the promotion levy for the balance of the term of the lease, legal costs of enforcement, and certain "make good" costs – the appellants contended that the lease had been frustrated by the *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW) and the subsequent public health orders made under the *Public Health Act 2010* (NSW) (the Lockdown Restrictions) – the primary judge found that the lease had not been frustrated and entered judgment in favour of the respondents in the amount of $4.2 million, finding for the respondents on all points except for their claim for "make good" costs – whether the primary judge erred in finding that the lease was not frustrated by the Lockdown Restrictions – whether the primary judge erred in [failing to] find that compliance with the Public Health Orders would have required a radical transformation in the business operated by the tenant, or would have rendered the tenant's business unviable for the remainder of the lease – whether the primary judge erred in finding that the imposition of the Lockdown Restrictions did not have the result that a condition of the lease was incapable of performance, or that performance of that condition would have contravened the law.
ISPT Pty Ltd and AWPF Management No. 2 Pty Ltd v Cao and Zhao [2023] NSWSC 1115

Supreme Court
of New South Wales

MONDAY 20 MAY 2024

INFINITY v COMMISSIONER OF POLICE 2024/28018 (I R Coleman SC ADCJ of NCAT – 28/6/23)
ADMINISTRATIVE LAW – leave is sought to appeal from the Appeal Panel of NCAT (including I R Coleman SC ADCJ) - during a review of a decision to terminate the appellant's security licence, the Commissioner sought orders restricting disclosure to the appellant of confidential material (including Police reports on the appellant contained in an online database to which only officers with clearance had access) – seeking to protect the confidentiality of Police sources and informants – question of whether the Tribunal failed to accommodate procedural fairness or misconstrued section 64(1)(d) of the **Civil and Administrative Tribunal Act 2013 (NSW)** – issues of principal relating to the Act and questions of public importance.
Infinity Security Group Pty Ltd v Commissioner of Police, NSW Police Force [2023] NSWCATAP 173

TUESDAY 21 MAY 2024

NOVELLY v TAMQIA 2023/00312939 (Kunc J – 8/9/23)
PROCEDURE – the appellant leases an apartment (the premises) in Sydney from the first respondent – the second respondent is the controlling mind of the first respondent – an initial dispute between the parties came before Peden J (*Novelly v Tamqia Pty Ltd* [2022] NSWSC 1607) which was in part resolved by undertakings given to the Court by the respondents – several of the undertakings were not completed, including the emptying of a storeroom in the premises – the appellant sought relief against the respondents for contempt of court for alleged breaches of the undertakings – the primary judge was satisfied beyond reasonable doubt that the respondents had committed a civil contempt by failing to comply with the undertakings – the primary judge found that the appellant's contention that the respondents' breaches were contumelious amounted to a contention that the breaches constituted criminal contempts – the primary judge dismissed the allegations of contumelious conduct on the basis that they had not been made out beyond reasonable doubt – the primary judge therefore dismissed the appellant's notice of motion – whether the primary judge erred in finding that the proceedings were proceedings for criminal contempt, rather than civil contempt – whether the primary judge erred in equating each of the statements of charge to an indictment or criminal charge – whether the primary judge erred in finding that the allegations of contumacious conduct had to be proved beyond reasonable doubt.
Novelly v Tamqia Pty Ltd (No 2) [2023] NSWSC 10901

WEDNESDAY 22 MAY 2024

CRACKIN' SNACK v GAMEKEEPING 2023/361841 (Gibb DCJ – 20/10/23)
TRADE PRACTICES – whether the primary judge pre-determined the case – whether the primary judge acted with bias – whether the primary judge erred in their application of relevant principles in determining whether there had been misleading and deceptive conduct – whether the primary

judge erred in determining that the transaction was an asset sale – whether the primary judge erred in failing to find that appellants would not have entered into the transaction but for the misleading conduct – whether the primary judge erred in their construction of the Business Sale Agreement – whether the primary judge erred in not applying the statutory presumption in s 4 of the *Australian Consumer Law* (ACL) – whether the primary judge erred in finding that the respondents took all reasonable steps to facilitate the first appellant receiving all credit card takings – whether the primary judge erred in their application of ss 4 and 18 of the ACL regarding the first appellant's entitlement to takings – whether the primary judge erred in several factual findings, including the finding that completion had occurred – whether the primary judge failed to apply s 22 of the ACL – whether the primary judge erred in their application of s 22 of the ACL – whether the primary judge misapplied the principles of election and affirmation – whether the primary judge erred in determining the loss suffered by the appellants.
Decision of Gibb DCJ (decision not available on Caselaw or Austlii)

FRIDAY 24 MAY 2024

OOH!MEDIA v TRANSPORT 2023/363435 (Moore J – 20/10/23)
LAND & ENVRIONMENT – the appellant held a leasehold interest in land on Qantas Drive in Mascot, on which it owned and operated large advertising billboards – in September 2020, the appellant's leasehold interest was compulsorily acquired by the respondent for the purposes of the *Roads Act 1993* – in February 2021, the Valuer General determined that the compensation to be paid by the respondent was $3.8 million – the appellant commenced proceedings pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act) seeking judicial determination of the correct compensation – having considered the claim, the primary judge determined that the compensation payable was $2.7 million – whether the primary judge denied the appellant procedural fairness in rejecting the profit rent approach to market value compensation – whether the primary judge applied the wrong test in respect of s 56(1)(a) of the Just Terms Act – whether the primary judge erred by not allowing compensation under s 55 of the Just Terms Act – whether the primary judge erred in rejecting the "tax gross up" in the discounted cash flow calculation used to determine compensation – whether the primary judge failed to provide adequate reasons for rejecting the "tax gross up" claim.
oOh!media Fly Pty Limited v Transport for NSW [2023] NSWLEC 26

MONDAY 27 MAY 2024

LANGDON v CARNIVAL 2023/457739 (Harrison AsJ – 20/11/23)
TORTS (negligence) – in November 2017, the appellant was on a cruise with the defendant departing from Brisbane – the appellant alleged that he sustained injury to his cervical spine, left shoulder, and psychological injury due to an incident in which he fell a short distance after a step gave way beneath him while onboard the cruise ship (the incident) – the respondent admitted breach of duty of care, but contested causation, denying that it was liable for the injuries and disabilities the appellant alleged he now experiences – relevantly, in December 2017 there was an incident in which the appellant, while intoxicated, had fallen in a bathroom cubicle with sufficient force to smash the toilet bowl – the primary judge concluded that the respondent's breach of duty did not cause the appellant's injuries – the primary judge also made a provisional assessment of damages – whether the primary judge erred in failing to find that the respondent's breach of duty was a necessary condition in the occurrence of the appellant's physical injuries and

psychological illness – whether the primary judge erred in failing to give any or adequate weight or probative value to witnesses' observations of the appellant before and following the incident – whether the primary judge erred in her provisional assessment of the appellant's damages.
Langdon v Carnival PLC t/as P&O Cruises Australia [2023] NSWSC 1406

TUESDAY 28 MAY 2024

ODLUM v FRIEND 2022/180452 (Cavanagh J - 12/5/22)
PROFESSIONAL NEGLIGENCE (legal) – the appellant retained the first and second respondent (as solicitor and barrister respectively) to act on her behalf in respect of a property settlement matter against her former partner – the former partner made several written offers to settle the proceedings and the appellant was ultimately required to pay most of the partner's costs – the appellant commenced proceedings against the respondents' advice in respect of and in response of the costs offers, claiming negligence – the primary judge found that the respondents had acted with due care and skill as required by a professional solicitor and barrister in advising the appellant of the risks of not accepting the costs offers prior to the costs hearing – whether the primary judge erred in making factual findings – whether the primary judge was affected by bias – whether the primary judge had fallen into error by failing to consider relevant considerations – whether the primary judge failed to afford the appellant procedural fairness.
Odlum v Friend & Anor [2022] NSWSC 574

KUMAR v PRIMES 2023/465652 (Waugh SC DCJ – 28/11/23)
CORPORATIONS – the respondents brought two claims against the appellant – the first was for outstanding rent, pursuant to a residential tenancy agreement between the respondents and the appellant – the primary judge found that the appellant had occupied the premises for the relevant period, and failed to pay $27,500 in respect of rent – the second claim involved Bad Developments Pty Ltd (in liquidation) (the Company), of which the appellant and first respondent were directors and shareholders – money had been transferred from the Company's bank accounts into bank accounts in the name of the appellant (the transactions) – the liquidator had assigned the company's claims against the appellant in relation to the transactions to the respondents – the primary judge ordered that the appellant pay $654,790 to the respondents in relation to the transactions – the appellant was not legally represented at the hearing and, having had an application to vacate the hearing date refused, did not take part in the hearing before the primary judge – whether the primary judge erred in failing to grant an adjournment to the appellant in circumstances where the appellant had recently lost his legal representation – whether the primary judge lacked the jurisdiction to enter judgment in favour of the respondents, rather than in favour of the Company – whether the primary judge erred in failing to make an order under s 588FF of the *Corporations Act* or a declaration of fiduciary breach before considering the question of the respondents' entitlements to monetary damages – whether the primary judge erred in granting leave to the respondents to file a further amended statement of claim.
Primes v Kumar [2023] NSWDC 576

WEDNESDAY 29 MAY 2024

MATTHEW CARBONE v FOWLER 2023/443714 (Weber SC DCJ – 10/11/23)
GUISEPPE CARBONE v FOWLER 2023/443762 (Weber SC DCJ – 10/11/23)
BUILDING & CONSTRUCTION – the proceedings involved two contracts between the respondent and each of the appellants (Matthew and Giuseppe) to construct two homes at Oran Park (the

contracts) – Matthew is Giuseppe's son – as the building works approached completion, there was a dispute as to the state of accounts on each contract – the appellants alleged that they had overpaid the respondent and sought repayment – the respondent alleged that the appellants had underpaid and refused to grant access to the homes – the appellants commenced proceedings seeking an order for specific performance of the contracts – by a commercial compromise the respondent agreed to finalise the works and give possession to the appellants – the proceedings remained on foot to determine the amounts owing under the contracts – the respondent did not file a cross claim – the appellants each claimed that they were entitled to a credit in the accounting in respect of the sum of $30,000 they had each paid to Camden Council, and to damages on account of foregone rent – Giuseppe alleged that he was entitled to a credit on account of a cash payment of $60,000 he had allegedly made to the respondent – the primary judge made initial orders and published reasons in February 2023, then appointed a Referee in March 2023 to determine the outstanding issues between the parties – the primary judge in final orders made in November 2023 adopted the Report and Addendum Report of the Referee – the primary judge held that the appellants were not entitled to $30,000 credits on account of the payments to Camden Council, or to damages on account of foregone rent – the primary judge ordered that the respondent pay Matthew $22,000 (plus interest), but ordered that Matthew pay the respondent's costs – in respect of Giuseppe, the primary judge entered judgment for the respondent and ordered that Giuseppe pay the respondent's costs, having found that Giuseppe did not make a $60,000 cash payment to the respondent – whether the primary judge erred in the interpretation of the appellants' pleadings, particularly in respect of the claims for damages for breach of contract and unconscionable conduct under the Australian Consumer Law – whether the primary judge erred in failing to address the appellants' claims for damages for misleading and deceptive conduct – whether the primary judge erred in failing to find loss of rent – whether the primary judge erred in the construction of the contract – whether the primary judge erred in adopting the referee's report – whether the primary judge erred in failing to find that the respondent had breached the contract –– whether the primary judge erred in the determination of costs – whether the primary judge erred in failing to disqualify himself for actual bias (in respect of the Matthew proceedings) – whether the primary judge erred in failing to find that the $60,000 payment had occurred (in respect of the Giuseppe proceedings).
Carbone v Fowler Homes Pty Ltd [2023] NSWDC 29 (Weber SC DCJ)

HORNSBY SHIRE COUNCIL v SALMAN 2023/451422 (Abadee DCJ – 29/11/23)
TORTS (negligence) – in March 2022, the respondent fell while walking in a children's playground – the respondent brought proceedings alleging the appellant was negligent in failing to properly maintain the playground – the appellant denied the existence of any duty of care, that any duty had been breached, and any element of causation – the appellant further invoked the defence of obvious risk – the respondent alleged that the fall had occurred due to the height differential between two types of flooring in the playground – the primary judge found that the defence of obvious risk was not made out, and that the appellant owed the respondent a duty of care, and had breached it, causing the respondent's injuries – the primary judge awarded $283,200 in damages, which included a 15% discount for contributory negligence – whether the primary judge erred in identifying the risk of harm – whether the primary judge erred in making factual findings contrary to the respondent's evidence – whether the primary judge erred in failing to find that the risk of harm would have been obvious to a reasonable person in the position of the respondent – whether the primary judge did not give adequate or proper reasons – whether the primary judge's reasons are internally inconsistent – whether the primary judge erred in his findings as to causation – whether the primary judge erred in failing to find that a reasonable person in the position of the appellant would have considered that the risk of harm did not require a response – whether the primary judge erred in finding that the appellant was in breach of the duty of care it owed the

respondent – whether the primary judge erred in reversing the onus of proof by imposing on the appellant the burden of proving the costs of response.
Salman v Hornsby Shire Council (No 2) [2023] NSWDC 527

THURSDAY 30 MAY 2024

DIBB v TRANSPORT FOR NSW 2023/365961 (Pain J – 26/10/23)
LAND & ENVIRONMENT – the appellants sought compensation of $5.5 million plus disturbance for the compulsory acquisition of their property in Korora (the land) by the respondent for the Coffs Harbour Bypass Project – the Court awarded compensation pursuant to the *Land Acquisition (Just Terms Compensation) Act* (Just Terms Act) of $1.33 million plus disturbance – whether the primary judge erred in not rejecting the evidence of each of the respondent's hydrologist and valuer – whether the primary judge erred in failing to determine a risk percentage factor – whether the primary judge erred in rejecting other properties as comparable sales – whether the primary judge erred in their interpretation of the land's zoning – whether the primary judge erred by presenting the appellants with delay and adverse cost consequences if they were to pursue their claim in reliance of the "statutory disregard" provision of s 56(1)(a) of the Just Terms Act – whether the appellants were denied procedural fairness.
Dibb v Transport for NSW [2023] NSWLEC 114

LAHOUD v WILLOUGHBY CITY COUNCIL 2023/426490 (Moore J – 2/11/23)
LAND & ENVIRONMENT – in June 2021, the Willoughby Local Planning Panel (the Panel), on behalf of the first respondent, considered a development application (DA) made by the second respondent seeking consent for the conversion of an existing building in Northbridge (the site) into shop top housing – the appellant has an interest in land neighbouring the site – the Panel decided it was appropriate to grant development consent subject to conditions – the Council issued a "Notice of Determination of a Development Application" giving effect to the Panel's decision – in October 2021, the appellant commenced judicial review proceedings in the Land and Environment Court, alleging jurisdictional error (on six grounds) in the Panel's decision-making and seeking orders that the development consent be set aside and the development application be refused – the primary judge found that the appellant had made out jurisdictional error on three grounds, but held that it was appropriate to exercise the discretion given by s 9.46(1) of the *Environmental Planning and Assessment Act 1979* not to make any intervention order arising from those grounds – the primary judge therefore dismissed the appellant's summons – whether the primary judge erred in failing to set aside the development consent and order the refusal of the DA, having found that the mandatory gateway tests dispensing with the height standard were not satisfied – whether the primary judge erred in denying the appellant procedural fairness by making findings on issues the appellant had not had the opportunity to make submissions on, as they had not been raised by any party – whether the primary judge erred in respect of the findings on partial consent – whether the primary judge erred in their exercise of discretion to decline relief, having found that there was no rational basis on which the Panel could have been satisfied that the proposed building would have an active street frontage – whether the primary judge erred in failing to find that the DA was not for the permissible use of shop top housing – whether the primary judge erred in not finding that the contamination grounds had been established, having found that the Panel had wrongly understood the application as not including excavation – whether the primary judge erred in making credit findings against the applicant.
Lahoud v Willoughby City Council [2023] NSWLEC 117

Supreme Court
of New South Wales

FRIDAY 31 MAY 2024

DIBB v TRANSPORT FOR NSW 2023/365961 (Pain J – 26/10/23)

Day 2

M & S v AFFORDABLE 2024/17397 (Pain J – 20/10/23)
PROCEDURE – the applicant commenced multiple private prosecutions of the first through fifth respondents (the Defendants) concerning the deposition of asbestos waste on land at Edmonson Park – the Defendants filed notices of motion seeking orders that all remaining charges be dismissed as a nullity, on the basis that the charges that had been brought are alleged breaches of s 144AAA(1) of the *Protection of the Environment Operations Act 1997* committed in 2016, when s 144AAA did not exist until 25 January 2019 – the primary judge granted the Defendants' notices of motion, dismissing the applicants' summonses as they did not disclose offences known to law – whether the primary judge exceeded her jurisdiction – whether the primary judge committed jurisdictional error in denying the applicant procedural fairness – whether the primary judge committed jurisdictional error or otherwise made errors in law in respect of the findings that the absence of an offence provision at the time of the commencement of proceedings gave rise to a nullity.
M & S Investments (NSW) Pty Ltd v Affordable Demolitions and Excavations Pty Ltd (No 2); M & S Investments (NSW) Pty Ltd v Boutros; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Carbone; M & S Investments (NSW) Pty Ltd v Boutros [2023] NSWLEC 111

TOUMA v HIGHFIELDS 2023/465829 (Richmond J – 1/2/24)
CONTRACT – the first respondent commenced proceedings seeking declarations as to the ownership of four luxury motor vehicles (the vehicles) – the first respondent claimed that the vehicles were transferred to it in 2016 under an oral contract entered into with it by the second respondent – the appellant was the general manager of the second respondent at the time of the transactions, and is the sole director of the company which (at the time of the transactions) was the sole shareholder of the second respondent – the second and third respondents (being the first and third defendants below) did not file a defence, and the litigation was contested between the first respondent as plaintiff and the appellant as a defendant – the appellant contended that while a contract was entered into, it included a term that the second respondent would remain the owner of the vehicles – the primary judge found that the first respondent was entitled to a declaration that it was the owner of the vehicles, and to recover damages for breach of contract – whether the primary judge erred in finding that the first respondent is the owner of the vehicles – whether the primary judge failed to give adequate weight to relevant evidence, including admissions made by Mr Balout (a director and shareholder of the first respondent) – whether the primary judge erred in placing undue weight on the evidence tendered by the first respondent – whether the primary judge failed to provide adequate reasons for their consideration of the evidence.
Highfields Australia Pty Ltd v Advanced Motor Dealers Group Pty Ltd (Receiver and Manager Appointed) [2023] NSWSC 1458 (Richmond J)
Highfields Australia Pty Ltd v Advanced Motor Dealers Group Pty Ltd (Receiver and Manager Appointed) (No 2) [2024] NSWSC 35 (Richmond J)