LOCAL COURT CONFERENCE

CIVIL LAW – AN UPDATE

3 AUGUST 2017

The Honourable Justice Peter Garling RFD

Since the last Local Court Conference, the Common Law Division has decided 36 cases involving appeals in the civil jurisdiction from the Local Court. Of those 36 appeals, 17 have been upheld and 19 have been dismissed.

In the same period, the Court of Appeal has heard three appeals. It has upheld the Local Court's decision in one of those appeals and overturned its decision in two others.

When one pauses and considers how many civil proceedings are finalised each year in the Local Court, this is a remarkably small number of appeals.

I thought it might be helpful for me to group the decisions into topic matters and to comment on those which I think are worthy of drawing to your attention.

Jurisdiction and Power

In *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277, the Court of Appeal dealt with a question of procedure arising from proceedings in the Supreme Court on referral from the Local Court for contempt of that Court.

Although the underlying case was a criminal one, the decision with respect to the procedure involved with the alleged contempt of court arose in the civil jurisdiction of the Court of Appeal and is an important broad issue.

The respondent, Elizabeth Dangerfield, refused to answer questions as a prosecution witness during a criminal prosecution of her brother, Mr Dallas Dangerfield, on a domestic violence-related charge of common assault.

A Magistrate sitting in the Local Court at Lismore formed the view that the conduct "*amounted*" to contempt of the Local Court and referred "*the matter*" to the Supreme Court for determination under s 24(4) of the *Local Court Act* 2007 (NSW).

The Prothonotary commenced proceedings in the Common Law Division against Ms Dangerfield for punishment for contempt. The Prothonotary proceeded in accordance with Pt 55 r 11(3)(c) of the *Supreme Court Rules* 1970 (NSW).

The primary Judge found that the Local Court was required to afford procedural fairness to a person who appears to that Court to be guilty of contempt of court before a valid referral could be made to the Supreme Court under s 24(4) of the *Local Court Act*.

The Court of Appeal regarded the primary question before it as being whether observance of the principles of natural justice was a condition attached to the statutory power under s 24(4) of the *Local Court Act* and governed its exercise, with the consequence that the failure to fulfil that condition means that the exercise of that power is ineffective.

The Court of Appeal found that the answer to that question was in the affirmative, and on the facts of the case, Ms Dangerfield had not been afforded procedural fairness.

The facts should be considered in a little more detail. After a number of occasions in the Local Court where the witness declined to answer questions, and she had been given the opportunity to consult with a duty solicitor, the following exchange between the presiding Magistrate and the witness took place:

> "Q. Do you want to take some time?
>
> A. No.
>
> Q. Cool down a bit?
>
> A. No, just want to get it over and done with. I'm not answering any more questions, sorry.
>
> Q. Alright, you are in contempt of this Court. Did [the solicitor] explain to you what … ?
>
> A. Yes, he explained everything.
>
> Q. And you understand that you may be liable to punishment?
>
> A. Yes, yes, I understand."

Some further questions were put to the witness, and it became apparent that she did not propose to answer any further questions. The following exchange then took place:

"Q. Do you intend to answer any questions?

A. Nah.

Q. You've been warned. I will refer the matter now to the Prothonotary of the Supreme Court."

The presiding Magistrate delivered a short judgment, indicating why he had formed the view that Ms Dangerfield's conduct amounted to a contempt of court.

The Court of Appeal considered whether the provision of s 24(4) of the *Local Court Act*, as a matter of statutory construction, required the Local Court to observe the principles of natural justice. It drew attention to the decision of the High Court of Australia in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 and noted that it was necessary to examine the nature of the power and whether the exercise of that power had the potential to destroy, defeat or prejudice the person's rights or interests was the central question. In those circumstances, the Court of Appeal held that the rules of procedural fairness had not been expressly excluded by the statute. In those circumstances, the Court held that prior to referral, procedural fairness was required to be exercised.

It said at [78]:

> "In a case such as the present, procedural fairness required that the Magistrate inform Ms Dangerfield, as the proposed contemnor, about the two options available to his Honour, either to exercise the summary jurisdiction of the Local Court to deal with the matter of contempt or refer the matter to the Supreme Court, and invite submissions on which of those courses should have been taken. For the opportunity of making submissions to be meaningful in the circumstances of this case, involving an indigenous woman with no legal background, a reasonable and fair procedure would also involve the opportunity to obtain legal advice."

In the circumstances where this had not been done, the Court of Appeal held that the contempt proceedings commenced by the Prothonotary were properly dismissed by the primary Judge in the Supreme Court.

A second matter dealing with the existence of power and jurisdiction was *Roads and Maritime Services v Staniforth* [2017] NSWSC 158.

Ms Staniforth committed a traffic light offence and was issued with a Penalty Notice. After the issue of a Reminder Notice she paid the amount of the penalty recorded on

the Penalty Reminder Notice. In consequence, Roads and Maritime Services ('RMS') notified Ms Staniforth that her driver's licence was to be suspended for a period of three months pursuant to s 36(4) of the *Road Transport Act* 2013 (NSW). That section relates to a person who has previously made an election under s 36 of that Act, and during the 12 month good behaviour bond period incurs two or more demerit points.

Ms Staniforth commenced proceedings pursuant to s 45 of the *Local Court Act* by filing an application notice. The application was purportedly lodged pursuant to s 267 of the *Road Transport Act* and sought orders that the decision of the RMS to suspend her driver's licence ought be varied. Ms Staniforth sought an extension of time to appeal the traffic light offence, and to appeal against the penalty notice.

Before the Local Court, Ms Staniforth's solicitor informed the Court that the matter was an appeal against the traffic light offence, and that he was not asking the Court to deal with the licence suspension. Having heard submissions, the Local Court granted the application, found the traffic light offence proved but dismissed the offence pursuant to s 10(1)(a) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW). The effect of that order was that it lifted the suspension of Ms Staniforth's licence.

The RMS took proceedings in the Supreme Court, contending that the Local Court had no jurisdiction to make any order of the kind which was made because proceedings in respect of the traffic light offence were not before the Court, there having been no Court Attendance Notice filed, nor had the defendant, Ms Staniforth, even been charged.

The Supreme Court found that s 267 of the *Road Transport Act* only provided that a person could appeal to the Local Court against an "*appealable decision*" which, relevantly, was a Notice of Licence Suspension or Cancellation.

The Supreme Court, having commented specifically that the Magistrate hearing the matter received "*very little assistance in the discharge of the hearing of the matter and was in some respects invited to error*", held that the Local Court did not have any jurisdiction to make the orders which it did, and that it was not open to it to deal with the traffic light offence. Further, the Supreme Court held that because there had

been an automatic suspension of Ms Staniforth's licence, the decision by RMS to cancel it was not an appealable decision.

Orders were made pursuant to s 69 of the *Supreme Court Act* quashing the orders in the Local Court.

Practice and Procedure

It is not uncommon for appeals from the Local Court to come before the Supreme Court dealing with matters of practice and procedure. These generally raise questions of procedural fairness, lack of adequate reasons given by the Local Court Magistrate, and occasionally refusal to grant an adjournment.

In *Ferguson v DDEC Detroit Specialist Pty Ltd* [2017] NSWSC 416, Bellew J dealt with the decision made in the Local Court which involved striking out a defence filed by a defendant and entering judgment against him.

The Local Court proceedings involved a claim for the recovery of a sum of a little over $66,000. The proceedings were referred to arbitration. The arbitrator found in favour of the plaintiff.

The defendant made application for a rehearing and consent orders were filed with the Local Court registry which, amongst other things, agreed on the appointment of a single expert to report on the appropriateness of the amounts invoiced by the plaintiff to the defendant and if they were not appropriate, to advise on the appropriate quantum.

No order was made by consent at that time with respect to the costs of the single expert.

The matter came back before the Court on the next designated date. On that day the plaintiff was represented by a solicitor and there was no appearance by or on behalf of the defendant. As it turned out, the defendant's mother had been seriously ill around that time, had died and her funeral had taken place the day before. The defendant had been away from his home, did not receive a Notice of Listing and was in fact spending time in Sydney. He also did not receive a Notice of Ceasing to Act filed by his former solicitor.

A letter had been sent by the solicitors for the plaintiff to the defendant, which he also did not receive, advising him that they wanted him to pay 50% of the costs of the expert's report. The solicitors informed the defendant that if they did not receive a response, they would go ahead and provide documents to the expert and produce the letter to the Court "*on the issue of costs*". No suggestion was made that in the absence of a response from the plaintiff, any application would be made to the Court about the costs of the single expert report, let alone one for the entry of monetary judgment against him.

When the matter came before the Court, and in the defendant's absence, the solicitor for the plaintiff noted that the matter was listed for mention and drew the Court's attention to the fact that one half of the expert's fee had not been paid into the solicitor's trust account by the defendant. The solicitor complained that the defendant was "*not doing the right thing*". The solicitor went on to say that in light of the fact that the defendant had not complied with "*the note*", a reference to the request for costs, "*… I'm asking that his defence be struck out and for summary judgment*".

The ensuing discussion between the Bench and the solicitor was unclear as to whether or not a formal court order had previously been made for the payment of half of the costs. It was clear that the Bench thought that such an order had been made. The solicitor did not correct that misapprehension. In fact, no such order had been made.

The Magistrate went on to say that having noted the absence of an appearance and "*there is no compliance with the order for costs*, *the defence is therefore struck out and judgment be entered against the defendant*". An order for costs of the whole proceedings was also made.

The defendant took proceedings to the Supreme Court to set aside those orders. The Supreme Court did so. It did so on the following bases:

a) It was not clear, and entirely unstated, what power the Magistrate was purporting to exercise when he made the orders that he did. The Court held that if he was acting under the power contained in Pt 13 of the Uniform Civil Procedure Rules 2005 ("the UCPR"), there was no evidence which justified the making of those orders. The Court noted that evidence was required to

establish the absence of a bona fide defence. The Court also noted that the contravention of that principle was compounded by the fact that as the proceedings were before the Magistrate for directions or mention only, and there was no foreshadowing of an application of the kind which was made to the Court, the defendant had been denied procedural fairness;

b) It was possible that the Magistrate was purporting to enter default judgment under the power conferred by Pt 16 of the UCPR. The exercise of the power required evidence pursuant to r 16.6, which was not provided; and

c) The third possibility was that the Magistrate was purporting to strike out the defence pursuant to the power conferred by r 12.7 on the basis that the proceedings had not been conducted with due despatch. If that was the basis for the order, the Supreme Court was satisfied that there was no evidence to support the making of such an order.

The Court also noted that there was a fundamental misapprehension by the Court, which was uncorrected by the solicitor for the plaintiff, that there had been an order which required the defendant to meet half the costs of the expert's report.

The Court also drew attention to the provisions of s 58 of the *Civil Procedure Act* 2005 (NSW) and the failure of the Magistrate to consider the factors set out in it.

In *Yarraford Pastoral Co Pty Ltd v Lewington* [2017] NSWSC 316, Davies J dealt with an important question of costs.

The Magistrate had reserved her decision on a money claim, and an off-setting cross-claim. The decision was delivered providing for a verdict for the plaintiff and a verdict on the cross-claim and reasons were published in writing. No order for costs was made.

The Magistrate retired. An appeal to the Supreme Court from the substantive decision was heard and dismissed.

After the Supreme Court appeal was heard and dismissed, the solicitor for the defendant filed a Notice of Motion in the Local Court seeking some minor amendments to the money sums, under the slip rule, and seeking an order that the plaintiff pay the costs of various parts, and ultimately of the whole of the proceedings in the Local Court.

The Motion was transferred by consent to the Local Court at Sydney and was heard by a different Magistrate from the one who had heard the original proceedings and

had retired. Her Honour gave judgment and made orders that the plaintiff was to pay various of the defendant's costs and that each party was to bear their own costs of the cross-claim.

The plaintiff took proceedings to the Supreme Court, asserting that the Magistrate had erred in holding that the Local Court had power under s 98 of the *Civil Procedure Act* to make costs orders in the proceedings. The issue was of some significance since the costs assessed of the original proceedings were in the order of five times more than the verdict sum.

Davies J considered in depth the various decisions dealing with costs in circumstances which were broadly analogous. Ultimately, he held that the finality principle was not offended in the case before him by the making of a costs order, because costs had not been dealt with by the Magistrate hearing the principal proceedings, and also because it was clear from the Magistrate's original judgment that further orders might be needed.

His Honour also held that he was satisfied that s 98(3) of the *Civil Procedure Act* was a specific statutory provision which had the effect of modifying the finality principle.

The effect of his Honour's judgment, and his agreement with the decision of Brereton J in *Moustach Pty Ltd v Eddie Takchi* [2015] NSWSC 2080 at [17], was that the better view of s 98(3) of the *Civil Procedure Act* is that it was intended to empower the Court to make orders, or reconsider orders dealing with costs at any time before the matter was referred for assessment in accordance with the costs assessment procedure. The only limitation on that question was the fact that the costs order could not impugn or alter a final costs order which had already been made.

As well, his Honour added that he was satisfied that as a matter of principle, the slip rule could be invoked to obtain an order for costs where they were not sought at the time the judgment was given.

I considered an appeal in the matter of *Tarabanko v Galachov* [2017] NSWSC 187.

In that case, I was persuaded that a decision of the Magistrate in the Local Court refusing an application to rely on evidence which had not been served involved a

discretionary error of a kind which warranted it being set aside. As well, the judgment which was entered consequent upon that discretionary decision was also set aside.

In determining that there had been an error in the exercise of the Court's discretion, I found that the Magistrate had not considered each of the elements to which s 58 of the *Civil Procedure Act* referred. Whilst I acknowledged that s 56, and the overriding purpose of the application of the *Civil Procedure Act* and the UCPR required the just, quick and cheap disposition of the real issues in the proceedings, I noted that it was not possible for a proper discretionary decision to be made in an area of practice and procedure without the decision maker having regard to the requisite terms of ss 57 and 58. In particular, I noted that in the circumstances of this case, the Magistrate ought to, but did not, have any regard to the degree of injustice that would be suffered by the defendant if the order refusing him permission to rely on late served evidence was made.

I said this at [40] in reference to the requisite principles decided by a number of cases including *Aon Risk Services v Australian National University* (2009) 239 CLR 175; [2009] HCA 27:

> "Those principles require a court considering any interlocutory application, including an application for an amendment of a document or an adjournment of proceedings, to pay careful regard to all relevant matters, including the legislation under which the application is made and by which the Court is bound, any explanation which is proffered by one party or the other for the relevant default or delay, and any prejudice which a party may experience as a consequence of the application being successful."

I went on to say that the Court "*… must undertake an evaluative process whereby it reaches a conclusion which, in all the circumstances, best accords with the interests of justice*".

I noted in the circumstances of the particular case that firstly, the defendant had offered a reasonable explanation for his failure to serve the evidence, secondly that the Magistrate had failed to satisfy herself as to whether the refusal to accept that evidence would produce injustice to any degree at all, including substantive injustice and, finally, that it was of particular importance that the Magistrate had failed to enquire, and the plaintiff in those proceedings had failed to inform her, about the

existence of any prejudice to him in the event that the evidence was admitted and was to be relied upon. In particular, there was no reason to think that the plaintiff in the Local Court could not have adequately dealt with the material which had not been served during the course of his evidence in the proceedings.

I pointed out that if it ultimately turned out that the plaintiff could not deal with all of that evidence, then the Magistrate needed to, but did not, consider what adjournment was necessary, what additional costs were occasioned by that adjournment and what other prejudice existed.

A short but important decision is *Seymour v Jaeger* [2017] NSWSC 25. There, Fagan J held that a determination in chambers by a Magistrate pursuant to s 20(6) of the *Service and Execution of Process Act* 1992 (Cth) that the proceedings ought be stayed because the appropriate Court was located in Western Australia, was not the subject of any appeal as of right because it was an interlocutory decision. Fagan J held that the decision under s 20 to stay the proceedings, did not finally determine the rights of the parties in the principal cause pending between them.

An interesting question arose as to whether the Magistrate granting the stay order under s 20 was obliged to deliver extensive reasons. Her Honour had found that the relevant court in Western Australia was the appropriate court. There were no other reasons given.

Fagan J held that, in the circumstances where the factors favouring that decision were reasonably clear from the material before the Magistrate, and that there was no doubt that the Magistrate's Court in Western Australia had the requisite jurisdiction, there was no legal error in the Magistrate's failure to give any reasons other than to stay her finding of the appropriate Court.

I comment that whilst this is an important, but short judgment, caution needs to be exercised about the application of this judgment in all circumstances, particularly in circumstances where there may have been significant debate about matters of fact and matters of principle contained within the application.

In *Metziya Pty Ltd v ICR Engineering Pty Ltd* [2016] NSWSC 1703, the Supreme Court was called upon to consider the adequacy of reasons in an ex tempore

judgment in circumstances where it was said that in light of conflicting evidence, there was insufficient explanation of factual findings and the basis for them.

Schmidt J noted, having regard to the authorities which required the Supreme Court in considering an appeal from an ex tempore judgment, that it would be wrong to examine the "*unedited and unpunctuated report of ex tempore remarks in a busy magistrate's court as if the transcript were a document to be construed strictly*". Her Honour noted that it was the substance of what the Magistrate said and did with which the Supreme Court was concerned: see also *Acuthan v Coates* (1986) 6 NSWLR 472 at 479. Similar comments are regularly referred to in the decisions of the Supreme Court when considering ex tempore decisions of the Local Court. Magistrates should be confident that Judges of the Supreme Court well understand the pressures to which Magistrates are subjected in considering and dealing with civil claims.

By reference to authority, Schmidt J noted that:

> "In giving reasons for a decision, a judge need not 'spell out in minute detail every step in the reasoning process or refer to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings': *Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 at [41]."

Her Honour noted that reasoning on critical points must be exposed and that that may require reference to evidence which is critical to the determination of those issues. In particular, her Honour noted that in case of credit issues, it is necessary to explain why one witness is preferred to another. She said that:

> "Bald findings on credit, where substantial factual issues have to be resolved, may not comply with the duty to give reasons (see *Palmer v Clarke* (1989) 19 NSWLR 158 at 170)."

Her Honour also dealt with an issue of damages in a case where there were obvious difficulties in the plaintiff proving by precise evidence how much work had been performed and what the entirety of its claim was. Her Honour noted, as described by the High Court of Australia in *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; [1991] HCA 54 at [31], that the settled rule is "*that mere difficulty in estimating damages does not relieve a court from the responsibility of estimating*

them as best it can" even though that may sometimes involve guesswork rather than estimation. Such a case is to be distinguished from a case where the plaintiff is not able to adduce evidence that there has in fact been any loss at all.

A further decision of the Supreme Court in the matter of *Salisbury v Local Court of NSW* [2016] NSWSC 1082, is also of relevance. Although a civil proceeding in the Supreme Court, the case arose out of criminal proceedings in the Local Court.

A penalty infringement notice alleging an offence of exceeding the speed limit by greater than 20km an hour was issued to Ms Salisbury. She elected not to pay the amount of the infringement notice and to have the matter dealt with by a court. The matter came before the Local Court in February 2016, at which time Ms Salisbury, as the defendant, entered a plea of not guilty and a hearing date in May 2016 was fixed. Although Pt 2 of Chapter 4 of the *Criminal Procedure Act* 1986 (NSW) prescribes various pre-trial procedures applicable to criminal matters heard before the Local Court, including the obligation on the prosecution to serve a brief of evidence, there was no requirement for the service of a brief of evidence in proceedings for an offence of the kind described.

As well, as Bellew J noted, there is no case management regime pursuant to s 134 and the following provision of the *Criminal Procedure Act* in respect of summary criminal proceedings.

In May 2016, on the day fixed for hearing, the charge against Ms Salisbury came before the Local Court. Counsel for Ms Salisbury informed the Court that it was "*… a speeding matter … it's likely to have a little bit of length to it. We have an expert here, and there's a couple of tricky issues that are raised*". He estimated the likely length of the hearing would be a couple of hours. The Magistrate enquired of the police prosecutor if he was ready to proceed. The prosecutor responded, informing the Court that the relevant police officers were present, but that he had no notice of, or knowledge of, the expert evidence to be adduced by Ms Salisbury. He informed the Court that no report had been served and that he was not in a position to cross-examine any expert without having one of his own. He concluded by informing the Court he was not ready to proceed "*on that basis*". In response, counsel for Ms Salisbury pointed out that he had received the police brief only shortly before the

hearing was due to start and that accordingly, the prosecution had no basis for any complaint.

After further submissions, the Magistrate understandably determined that if there was going to be expert evidence, a report of that evidence would need to be served and the prosecution would have the opportunity to serve a report in reply. That proposition was contested by counsel for Ms Salisbury, submitting that there was no obligation on his client to disclose his case. The Magistrate, upon the basis that the Court was in control of its own proceedings, was entitled to make directions of the control of its proceedings and that it was appropriate to make orders for the service of expert reports. He ordered Ms Salisbury to serve her expert evidence first and then for the prosecution to serve evidence in reply.

Ms Salisbury sought leave to appeal against that order on the basis that the Court had no power to make an order requiring the service of an expert report in criminal proceedings.

In the Supreme Court, counsel instructed by the Crown Solicitor accepted that the Magistrate in the Local Court had no power to make the order which was made. Bellew J concluded that such a concession was correct because the Magistrate did not have power to make an order.

His Honour noted that the Local Court was created by s 7 of the *Local Court Act* and derived its powers from that Act. He noted that whilst it had no inherent power, it does have an implied power "*… to do such things as are necessary for the exercise of the powers otherwise conferred upon it*".

Bellew J went on to draw attention to the fact that the criminal justice system is accusatory in nature,which obliges the Crown to make out a case before any response is forthcoming from the accused. His Honour noted that fundamental to the accusatorial system is the principle that the Crown bears the onus of proving the guilt of an accused.

Bellew J held at [30]:

> "… any such implied power does not extend to the power to make an order, the effect of which is to abrogate fundamental common law principles which

> govern the rights of an accused. The underlying principle of the accusatorial system is that it is for the prosecution to put its case both fully and fairly, before the accused is called upon to announce the course that he or she will follow: *R v Soma* [2003] HCA 13; (2003) 212 CLR 299 at [27] per Gleeson CJ."

His Honour noted that whilst s 28 of the *Local Court Act* gave the Court the power to give directions with respect to any aspect of practice or procedure not provided for, relevantly, by the *Criminal Procedure Act*, that legislation could not be interpreted as abrogating a fundamental common law right unless such an intention to do so was manifested in clear and unambiguous terms.

Finally, I draw attention to a decision on a substantive matter of law which may come before the Local Court from time to time. This was a decision of the Court of Appeal relating to the construction of the *Workers Compensation Act* 1987 (NSW). The case, *State Insurance Regulatory Authority v Abdul-Rahman* [2016] NSWCA 210, involved a question as to whether a sum imposed on an employer under the *Workers Compensation Act* constituted a penalty.

In May 2014, the WorkCover Authority of NSW, which became the State Insurance Regulatory Authority ('SIRA'), commenced proceedings in the Local Court against Mr Abdul-Rahman, who was an employer seeking payment of a debt pursuant to s 156(1) of the *Workers Compensation Act* for failing to obtain and maintain a required policy of insurance. The non-insured period fell between September 2007 and March 2012. It was a considerable period. The debt which was claimed in the Local Court consisted of an amount double the assessed premium together with a further sum for inspection costs incurred by SIRA.

The Local Court found in favour of SIRA, dismissing the employer's jurisdictional defence that the relevant limitation period had expired before the proceedings were commenced. The Magistrate characterised the debt as a "*penalty*", finding that the relevant limitation period was two years pursuant to s 18(1) of the *Limitation Act* 1969 (NSW). The Magistrate found that the cause of action had accrued on the date on which SIRA had notified the employer of the assessment of the amount due, namely April 2015, as the date on which the Authority issued a certificate specifying the amount due.

An appeal was heard in the Supreme Court, where Hamill J overturned the decision of the Local Court and gave judgment for the employer/defendant. SIRA sought leave to appeal.

The Court of Appeal unanimously held that an enactment permitting recovery of double the premium payable for insurance, pursuant to s 156(1) of the *Workers Compensation Act*, was a penalty for the purposes of the *Limitation Act*, s 18. That finding depended upon the proper construction of the relevant legislation.

The Court regarded the following factors as relevant to its consideration:

a) the amount was not payable to an insurer as the premium on a policy available in a claim for compensation by a worker, but was paid, pursuant to s 156(3) into a fund established by statute, which covered the costs of operating the scheme for workers compensation in NSW;

b) the amount payable was arbitrary, taking into account the time for which the particular premium had been unpaid;

c) the legislation did not indicate that the amount reflected the costs of the scheme of either delay in payment or expenses incurred in recovering the amount of premium;

d) it may be inferred that the amount recoverable was intended to have a deterrent effect on employers against failing to pay premiums under the legislation; and

e) whilst the legislation described the amount as a "*debt due*", that was not determinative.

On the question of when the limitation period commenced to run, the Court of Appeal held that no cause of action arose.

I should also note that there have been a series of other cases brought to the Supreme Court which deal with, broadly speaking, the issue of contract and guarantee. It would not be profitable to discuss each of those cases. The issues which they raise in the Supreme Court involve what are often quite difficult questions, including whether or not an error of law has been made or whether there has been an error of mixed law and fact, or an error of fact alone.

Putting it generally, the Court has held that, providing the Local Court has applied the correct legal principles in determining whether a contract has arisen and whether

a term has or has not been implied into it, whether a contract is found to have existed and if so what the terms of that contract are, is generally to be regarded as a question of fact, and therefore unappealable.

However, often the Court has, out of an abundance of caution heard full argument in case the question may be regarded as a mixed question of fact or law.

In the various contract cases, I am unable to discern any central principle which will assist the Local Court in determinations of cases of that kind.

Summary

From my perspective, this annual review demonstrates a number of matters. If I may be permitted a brief summary, they are these:

- There is a very low rate of appeal, or applications for leave to appeal, against decisions given in the Local Court, particularly having regard to the significant number of civil cases that are heard and disposed of, and the workload of the Local Court;

- It is of great importance for the Local Court when hearing and determining any proceedings, and making any interlocutory order, to attend to whether a power exists to make an order, what the statutory provisions are which need to be addressed and considered before making an order, and ensuring that all relevant features are stated as being taken into account in making the sort of evaluative judgment which is required to be made in many interlocutory decisions;

- Notwithstanding the pressure of work, there remains an obligation to give adequate reasons which engage with the issues argued in the case, the evidence, particularly when it is in conflict, and provide a reasonable explanation for why it is that the particular decision has been made.

I attach a table which details the decisions of the Court of Appeal, and judges of the Common Law Division dealing with proceedings originating in the Local Court.

I also attach an example, from another jurisdiction, of concise oral pleading which I commend to you.

First Return Day in the
Court of Common Pleas of Yoknapatawpah County

County Clerk: What is your **claim**?

Plaintiff: This trailer trash ain't giv' me back that three hundred I loan' him the borry of down in the saloon las' Thanksgivin'.

County Clerk: **Action for money lent**. What is your **defense** (sic)?

Defendant: This varmint did'n' tell ya how I hoed his fifty acre bottom lan' all March and he done promise t'forget his goddam' three hunderd.

County Clerk: **Plea of accord and satisfaction**.

Defendant: Anyways, he promise' he'd pay me two hunderd over an' above, and he ain't done that no ways. He's only here in court to shuffle out. Connivin' rascal.

County Clerk: **Cross action for work and la**bour.

Plaintiff: Surer'n' Hell I ain't goin' pay him nothin'.

County Clerk: **General Issue**. **Pleadings closed**.

Plaintiff: Jes' confidential, is this Judge on the level?

County Clerk: Demand for Jury Trial.

Name	Facts	Consideration	Outcome	Category
Issa v Australian Alliance Insurance Co Ltd (t/as Shannons Insurance) [2017] NSWCA 87 Beazley ACJ, Basten JA	Local Court proceedings against insurer – whether vehicle was damaged in an accident "that occurs without intent" – Magistrate dismissed claim Appeal to Harrison AsJ dismissed appeal under s 39 of the *Local Court Act* 2007 and refused leave to appeal under s 40(1)	No grounds raised question of law Small amount in issue ($27,000), disproportionate costs already expended Magistrate's reasoning "well-structured, clear and coherent" No error established	Leave to appeal refused	
Ferguson v DDEC Detroit Specialists Pty Ltd [2017] NSWSC 416 Bellew J	Appeal of two decisions in Local Court by plaintiff September decision – Magistrate purported to make orders striking out plaintiff's defence, entering judgment against him December decision – orders dismissing NOM filed by plaintiff to set September decision aside	September decision "redolent of error" – not clear what powers were being exercised – matter determined in the absence of evidence[1] – proceedings listed only for mention – plaintiff not aware of proceedings due to death of mother – "gross denial of procedural fairness" – Magistrate believed erroneously that plaintiff in default of an order – failure to consider s 58 *Civil Procedure Act 2005* ('**CPA**'), which is mandatory[2] December decision – made erroneously upon basis that appeal to District Court preferable – not made on the merits	Remit to the Local Court Appeal allowed Order of September and December decisions set aside	Procedural fairness

[1] Contrary to *General Steel Industries Inc. v Commissioner for Railways* (1964) 112 CLR 125.
[2] *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230 at [43]

Dee Why Auto Clinic and Anor. v Roads and Maritime Services [2017] NSWSC 377 Bellew J	Appeal against decision to dismiss appeal brought by plaintiff Grounds: Magistrate failed to comprehend or apply the *Briginshaw* standard;[3] failure to give adequate reasons Defendant administers Authorised Inspection Scheme ('AIS') authorising persons to test and inspect motor vehicles for registration – plaintiff's registration cancelled Issue – whether plaintiff a fit and proper person to continue to be authorised under the AIS	First ground not made out – Magistrate referred to *Briginshaw* test – inferred that he applied it Second ground made out – Magistrate's finding on disputed issues of fact not clear from judgment – basis for rejecting witness evidence not explained – failure to explain how breach of rules lead to a finding that plaintiff was not a fit and proper person Appeal judge left to speculate as to Magistrate's reasons – this indicates failure to give adequate reasons[4] Failure to engage with dispute – failure to engage with counsel's submissions – failure to conduct weighing exercise[5] – "fundamental shortcomings" in reasons	Appeal allowed Magistrate's decision set aside Proceedings remitted to Local Court	Failure to give adequate reasons
Yarraford Pastoral Co Pty Ltd v Lewington [2017] NSWSC 316 Davies J	Judgment given, substantive relief orders made – no costs order made – Notice of Motion filed re costs Appeal against orders – two grounds: error in finding that Local Court had power, under s 98 CPA to make Proceedings Costs Order; error in failing to find that Local Court had neither jurisdiction nor power to make the Order	Magistrate not *functus officio* because costs had not been dealt with; Magistrate anticipated making more orders Approval of *Grace v Grace (No 9)* [2014] NSWSC 1239 at [38] – "order for costs can be made after the conclusion of proceedings so long as it does not impugn or alter a final costs order already made" *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1988) 77 ALR 190: the slip rule can be invoked to obtain an order for costs where they were not sought at the time judgment was given[6]	Leave to appeal granted Appeal dismissed	Costs

[3] *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34
[4] *Pollard v RRR Corporation* [2009] NSWCA 110 at [56].
[5] *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 388 (Toohey and Gaudron JJ).
[6] *Council of the Shire of Evans & Pioneer Road Services Pty Ltd v Palmer (No 2)* [2005] NSWCA 140 at [25].

*Advanced Concrete Sealing (NSW) Pty Ltd ('**AC**') v Ennis Traffic Safety Solutions Pty Ltd ('**Ennis**')* [2017] NSWSC 228 Harrison AsJ	Ennis sued AC to recover debt – AC cross-claimed saying Ennis supplied AC with defective white paint Issue whether Ennis' paint was defective and/or unfit for purpose AC sought leave to rely on expert report of Mr Brodie – Brodie report served outside timetable provided by consent orders – leave refused Credit finding – AC's lay witnesses – statements contained "identical or substantially the same" passages – infringement of *Browne v Dunn*[7] Evidence of Mr Beard – evidence that paint was defective – no chemical or paint related qualifications – expert evidence given by chemist who tested paint Cross-claim dismissed Appeal by AC – error in excluding Brodie report; error in making general credit finding against AC's witnesses; error in discounting expert's opinion	Leave granted to appeal Brodie report – Magistrate considered *Aon*[8] and *V'Landys*[9] – AC could have applied to amend timetable, vacate hearing date – AC could have sought instructions if it believed refusal of leave prejudiced it – no procedural unfairness – ground one fails Decision to give lay witness's evidence less weight – not an issue of law – critical issue determined with reference to expert, not lay, witness evidence – ground two fails Mr Beard's evidence not "completely discount[ed]" – Magistrate preferred evidence of chemist who was qualified to test paint where Mr Beard was not so qualified – Magistrate entitled to prefer that evidence – ground three fails	Appeal dismissed Magistrate's decision affirmed	Expert evidence Credit findings about witnesses

[7] (1894) 6 R 67.
[8] *Aon Risk Services Australia v Australian National University* (2009) 239 CLR 175; [2009] HCA 27.
[9] *Golden v V'Landys* [2015] NSWSC 1589.

Prestige Auto Traders Australia Pty Ltd v Bonnefin [2017] NSWSC 149 Adams J	Appeal from Magistrate's determination permitting plaintiff to reject second-hand car bought from defendant Main factual dispute about the relevance and significance of various defects Grounds: s 259(3) Australian Consumer Law; misdirection as to definition of "major failure" and/or failure to provide adequate reasons; no evidence to support "major failures"; denial of procedural fairness to allow plaintiff to rely upon statutory limb not pleaded (defect could not be remedied); no evidence that defects could not be remedied	Error in allowing plaintiff to rely on both limbs of s 259(3) ACL – ground rejected – pleadings and correspondence put defendant on notice re grounds of argument – defendant made no relevant submissions – no statutory bar to relying upon both limbs No practical unfairness to defendant – defendant defended this pleading by arguing no defect existed Evidence that defect could not be remedied – resolution of factual dispute – finding in favour of plaintiff supported by evidence – ground not made out Magistrate applied the correct test re "major failure" and re when consumer's knowledge is to be assessed – no error Evidence of "major defect" – factual finding open on the facts	Appeal dismissed	Statutory Construction Evidence to support factual finding
Roads and Maritime Services v Staniforth [2017] NSWSC 158 Walton J	RMS sought orders quashing Local Court orders for want of jurisdiction Staniforth committed traffic light infringement, issued with penalty notice, license suspended – Staniforth appealed against suspension – Staniforth's solicitor informed the Court that it was an appeal against the traffic offence and not license suspension	License suspension under the *Road Transport Act* not an "appealable decision" – suspension automatically arises under circumstances of s 36(4) – limited scope for appeal in s 266(1)(d) *Road Transport Act* Proceedings initiated under the "special jurisdiction" of the Court[10] – s 44 *Local Court Act* expressly removes criminal jurisdiction	Local Court Orders quashed	Jurisdiction-al error Statutory construction

[10] Part 4 *Local Court Act 2007*.

Tarabanko v Galachov [2017] NSWSC 187 Garling J	Appellant sought to rely upon evidence not served upon the respondent at hearing – Magistrate declined to admit evidence	Error in failure to permit evidence to be adduced and in failure to allow further time for service – appellant provided reason for not filing evidence – failure to consider injustice that would be caused to appellant – failure to consider dictates of justice	Appeal allowed Magistrate's decision set aside Matter remitted to Local Court	Procedural fairness
Bartlett v Weatherill [2017] NSWSC 31 Adamson J	Bartlett engaged in misleading or deceptive conduct – challenge to determination of compensation payable – Weatherill cross-appealed Ground 1 cross appeal – error in assessing value of aircraft Ground 2 cross appeal – error in saying that aircraft was more valuable now than it was in 2012 Grounds 1-4 and balance of cross appeal – assessment of damages was in error	Ground 1 cross-appeal – evidence supported magistrate's finding – SC doesn't have jurisdiction to conduct a rehearing of the evidence – no error of law Ground 2 cross-appeal – evidence sufficient to rebut "no evidence" ground Grounds 1-4, cross-appeal – failure to apply *Marks v GIO Australia Holdings Limited*[11] – failure to apply principle that wronged party must establish actual loss before award of damages – erroneous consideration of expected loss, cf. "What is important is what that party could have done, not what it might have hoped for or expected."[12] Value of aircraft exceeded total amount that Weatherill paid for it – no actual loss	Appeal allowed Judgment in Local Court proceedings set aside Judgment ordered in favour of Bartlett Costs remitted to Local Court	Misleading and deceptive conduct Damages

[11] (1998) 196 CLR 494 at [48] – [52].
[12] Ibid.

Seymour v Jaeger [2017] NSWSC 25 Fagan J	Leave to appeal sought from decision ordering permanent stay under s 20 *Service and Execution of Process Act 1992* (Cth) Defendant resided in remote WA – witnesses from WA – contract accepted in WA – would need to engage a second solicitor in Sydney and counsel – Bunbury Magistrate's Court has jurisdiction Matter determined in Chambers (s 20(6) *SEPA*) – stay granted– appropriate Court "Western Australia" Grounds: failure to give reasons; failure to accord the plaintiff a hearing	Whether decision an interlocutory decision – answered in affirmative No legal error arising from failure to give reasons – no appeal lay as of right from the decision – factual considerations were clear, evaluation was "self-evident" – conclusion was open – these factors go against the requirement to give reasons[13]. No appearance of injustice – case has significant connection with WA – significant inconvenience for defendant to litigate in Sydney – not a decision that no reasonable judicial officer could make in the exercise of his/her discretion No substance in the complaint that the plaintiff was not afforded a hearing	Leave to appeal refused	Appeal from interlocutory orders

[13] *Apps v Pilet* (1987) 11 NSWLR 350.

Capitol Carpets Pty Ltd v Schwartz Family Co Pty Ltd [2016] NSWSC 1753 McCallum J	Schwartz sued Capitol for negligence and breach of contract in installing carpets – Schwartz provided the carpet – carpets began to ripple Magistrate found Capital liable for 50% of damage – found plaintiff had used carpet in other hotels without problem – carpet should have lasted another 7-8 years – no evidence that the problem lay with the carpet Error: findings unavailable on evidence	Ground 1 – error in admitting Schwartz's expert evidence – alleged failure to comply with Order of the Court not made out – ground rejected Ground 3 – error in finding that carpet could be expected to last another 5-8 years – finding a necessary premise of ultimate decision – expert evidence incapable of supporting that proposition Ground 2 – error in accepting expert evidence that carpet could last another 5-8 years – no proof of facts upon which opinion based – *Makita v Sprowles*[14] – leave to appeal on that ground granted Ground 4 – error in finding that carpet was defective – evidence that carpet was not fit for purpose – evidence overlooked in judgment – ground made out Ground 6 – error in factual determination– not a question of law Ground 7 – error in attributing 50% of damages to Capitol – no basis for Schwartz's pleaded apportionment of damages – ground made out	Judgment in Local Court set aside	Expert evidence Basis for factual findings

[14] (2001) 52 NSWLR 705; [2001] NSWCA 305 at [64] (Heydon JA); *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 (Heydon J); known as "the assumption rule".

KFS Financial Services Pty Ltd v Mostamandi [2016] NSWSC 1797 Wilson J	Construction of contractual agreements – lease and rental agreements where defendant would lease/rent equipment from plaintiff – defendant failed to return lease and rental equipment Issue – moneys were due under contracts Three judgments delivered – factual findings – final accounting of amounts payable – plaintiff to pay defendant's costs Plaintiff appealed	Did the lease agreement entitle the plaintiff to charge the defendants for costs of maintaining the lease equipment as part of the monthly lease instalment? No – no specific term – no evidence that such costs were incurred – reasonable person would not expect lease payments to include a hidden maintenance fee – ground not made out When did the lease agreement expire? Magistrate found that lease expired after 5 year term – no evidentiary grounds for finding – ground upheld Whether oral variation of lease permitting defendant to hold equipment – submission rejected – ground dismissed Lease agreement continued in the absence of formal termination –no notice of termination ever given – agreement continued until proceedings commenced. Rental agreement – Magistrate found termination occurred in an inquiry sheet notice – not enough to constitute formal notice of termination – error since requirement of written notice clear and unambiguous in contract Notification of address where equipment should be sent upon termination – plaintiff provided email where address was given to defendant – Magistrate concluded email was falsified – issue of falsification not put to relevant witness or to plaintiff – procedural unfairness – strong corroborative evidence of email's legitimacy – error.	Appeal upheld in part Defendant ordered to pay claimed amount minus unlawful maintenance payments claimed by plaintiff	Contractual construction Factual basis for findings

Metziya Pty Ltd v ICR Engineering Pty Ltd [2016] NSWSC 1703 Schmidt J	Appeal by ICR against decision awarding Metziya recovery of some alleged outstanding sums under contracts – appeal against costs order	Failure to provide adequate reasons – lack of clarity in transcribed ex tempore judgment – failure to refer to critical evidence – insufficient explanation of factual findings where evidence conflicted – reasoning for resolution of matters in dispute not exposed – ground upheld Failure to determine damages relating to particular claim – Magistrate required to do as best as he could to estimate damages – ground upheld Calculation of moneys owing under contract – mere conclusion provided, no reasons – ground upheld Issue of terms to a contract – basis/reasoning of finding not explained – ground upheld Magistrate's conclusions not the only conclusions available – decision did not do justice to issues before the Court	Matter remitted to the Local Court for a new trial	Leave to appeal Reasons for decision

GLMC Properties 2 Pty Ltd v Hassarati & Co Pty Ltd [2016] NSWSC 1642 Garling J	Claim for damages – trespass to land through drilling anchors under plaintiff's land, crane passing overhead – claim dismissed – plaintiff appealed Drilling consented to by former landowner Extension of time to grant application for leave to appeal granted	Refusal to permit plaintiff to call former landowner as witness– no error of law, conclusion available and rational – effect of decision on plaintiff one aspect of interests of justice, not to outweigh others – factor was not ignored or given undue weight – no *House* error – ground dismissed Refusal to certain evidence to be adduced –evidence not relevant – ground not made out Construction of correspondence – finding of fact supported by evidence – no suggestion of error of law – ground not made out Factual finding – Magistrate's decision open on evidence – no error of law – ground not made out	Appeal dismissed	Overriding purpose Relevance
Najask Pty Ltd v Stow [2016] NSWSC 1511 Wilson J	Plaintiff operated holiday accommodation; defendant a tour operator – defendant refused to pay plaintiff in full for accommodation when it was found to be of unsatisfactory condition Whether implied term for standard of accommodation and services – Magistrate found existence of implied term – found in favour of defendant	No error in Magistrate's conclusion that defendant's expected benefit from the contract would be derived from every part of the consideration No error in application of *Baltic Shipping*[15] No error established	Appeal dismissed	Contractual construction

[15] *Baltic Shipping Co v Dillon* [1992-1993] 176 CLR 344; [1993] HCA 4.

Prothonotary of the Supreme Court of New South Wales v Dangerfield [2016] NSWCA 277 Beazley ACJ, Gleeson JA, Payne JA	Ms Dangerfield charged with contempt of Court – Magistrate referred "the matter" to the SC under s 24(1) *Local Court Act* Primary Judge (Adamson J) – held Court must afford contemnor procedural fairness before exercising power of referral – contemnor must be afforded chance to make submissions – remitted matter to LC Appeal as of right to CA under s 101 *Supreme Court Act* 1970	Whether observance of natural justice attached to exercise of power under s 24(1) – legislation permits two courses of action: (1) contemnor is heard and matter is determined, or (2) matter is referred to SC – two steps required: whether contempt made out, and then whether referral should be made Significant disparity between punishments able to be given by LC and SC on charge of contempt Exercise of power apt to affect interests of contemnor – statutory construction requires implication of procedural fairness[16] – no plain indication in words of statute that natural justice is excluded Affirmation of *Registrar of Court of Appeal v Maniam (No 1)*[17] – importance of two steps: decide whether there has been contempt, then offer contemnor chance to make submissions as to why the referral power should not be exercised No error in finding that LC must afford procedural fairness to contemnors Magistrate assumed that contemnor had been advised as to possibility of referring contempt to SC – denial of reasonable and fair procedure Failure to afford contemnor natural justice not cured by subsequent events – underlying concern of natural justice is to avoid practical injustice[18]	Appeal dismissed	Contempt of Court Statutory construction

[16] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [11]-[12].
[17] (1991) 25 NSWLR 459.
[18] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6.

Klapsis v Formosa [2016] NSWSC 1371 Harrison AsJ	Mr Klapsis sole director of boat storage company – Mr Formosa stored his boat at company's premises – Klapsis sold Formosa's boat, did not pay Formosa proceeds of sale Whether Klapsis had authority to sell boat – boat consignment form purportedly signed by Formosa – Formosa denied signing form No defence filed by Klapsis – default judgment entered then set aside – Klapsis in default of court timetable multiple times – court order that Klapsis not permitted to rely upon his evidence if not filed in accordance with order – Klapsis filed his affidavit too late – leave to file in court opposed by solicitor for Formosa – Magistrate refused to admit affidavit Whether denial of procedural fairness	Refusal to grant adjournment – previous delay in proceedings – Magistrate advised Klapsis of potential cost consequences – Magistrate took into account ss 56, 57 and 61 of CPA – Transcript indicates Klapsis understood Magistrate's explanation and decided not to apply for an adjournment – no denial of procedural fairness Refusal to permit Klapsis to rely upon particular evidence – no notice given – no denial of procedural fairness Factual issue – Magistrate's conclusion supported by facts – relevant law applied – no error Error in giving any weight to opinion of handwriting expert – Magistrate entitled to make the findings he did – no error	Appeal dismissed	Procedural Fairness Judicial discretion Factual Determination
Wang v Purpose Pty Ltd (t/as Botany View Hotel) [2017] NSWSC 644 McCallum J	Purported appeal to SC from local court – applicant filed incomprehensible summons, had poor command of English Local Court proceedings dismissed under r 13.4 UCPR – appeal against dismissal	Submissions characterised as "collection of obscure references to unidentified statutes and common law decisions, purported quotes and other words attempting to string those pieces of information together" Judgment of local court open and manifestly correct	Appeal dismissed	Frivolous or vexatious proceedings

Jia v GJKR Pty Ltd [2017] NSWSC 629 Beech-Jones J	Jia (lessor) obtained judgment against defendants in LC – appeal by Jia to increase quantum of judgment Retail lease – GJKR (lessee) ceased making payments after April 2012 – September 2012 GJKR recommences payments – lessor seeking recovery of rental moneys not paid GJKR pleaded (1) not a valid lease but a tenancy at will (2) no mediation undertaken in accordance with lease (3) not a lease but a license (4) Jia's conduct was misleading and deceptive (5) oral agreement made where rent reduced	Appeal as to finding by Magistrate – counsel conceded point in submissions – matter sought to be raised on appeal not an issue at first instance – appeal dismissed	Summons dismissed	Appeals
Benn v State of New South Wales [2016] NSWCA 314 Harrison AsJ	Benn sued NSW for trespass to the person – Benn tasered by police under provisions of the *Mental Health Act* 2007 State pleaded use of taser was an exercise of reasonable force to lawfully apprehend Benn and take him to a declared mental health facility (ss 22 and 81 *MHA*) Magistrate found that decision to arrest Benn and take him to a facility was reasonable – held that police not obliged to warn Benn of the reasons for his arrest in order for the arrest to reasonable	New argument sought to be run on appeal No error in law or mixed question of fact and law by magistrate	Appeal dismissed Appeal to NSWCA dismissed appeal	Appeals

Taing v Gartmore Smash Repairs Pty Ltd [2016] NSWSC 1439 Beech-Jones J	"Tortured" lower court proceedings – defendant filed motion to strike out claim – proceedings struck out by Registrar of LC – plaintiff purported to appeal to Magistrate of LC – Magistrate held that he did not have power to hear appeal – plaintiff purported to file appeal to SC of Magistrate's decision	Defendant filed motion to strike out plaintiff's appeal – no reasonable cause of action disclosed in plaintiff's appeal	Proceedings dismissed	Dismissal of proceedings
Tamworth Regional Council v Hanson [2016] NSWSC 1334 Button J	Council appeal against LC decision Council claimed unpaid rates from Mr and Mrs Hanson – Hansons submitted that that a Settlement and Release Deed absolved them from paying rates Settlement deed related to previous litigation – Deed provided that it was a defence to "any proceedings or claims arising out of the facts, matters and circumstances referred to in the Dispute" – "Dispute" defined as "all liabilities etc. … arising out of or in connection with the Project" – "the Project" not defined Magistrate construed "the Project" to mean "the Property" encompassing the land and dwelling – on that construction Deed was a complete defence to Council's claim for unpaid rates Ground of appeal: misconstruction of Deed	Button J found reference to "the Project" was a mistake – held that "the Project" should be construed to refer to "the proceedings" which the Deed settled between the Hansons and the Council Hence rates unpaid by the Hansons not protected by the Deed Error of law established – no leave to appeal required since contractual construction = issue of law Order for indemnity costs in LC reversed Hansons ordered to pay ordinary cost of LC and SC proceedings	Appeal upheld Costs ordered against the Hansons for LC and SC proceedings	Contractual construction

Temperzone Australia Pty Ltd v Amabile [2016] NSWSC 1197 Hall J	Plaintiff lodged claim for moneys payable pursuant to a Guarantee – Defendant denied entering into Guarantee Defendant claimed misleading and deceptive conduct by plaintiff; in the alternative and submitted that Guarantee was unenforceable Magistrate found that defendant signed Guarantee as director of Twin Air but did not intend to, and did not, enter into a contract with the plaintiff Magistrate found misleading/deceptive conduct by plaintiff by not informing Defendant of the implication of his signature or the existence of Guarantee Appeal by plaintiff	Ground: No objective evidence for Magistrate to conclude that the Guarantee was not intended to be a Guarantee Failure by Magistrate to look at all objective circumstances – conclusion that plaintiff had to draw defendant's attention to terms of conditions of Guarantee not supported by legal authority – no duty for the plaintiff to advise defendant of contents of Guarantee. Magistrate erred in finding that the defendant did not intend to enter into a legal contract with the plaintiff: 1 Magistrate failed to apply proper test to determine whether parties intended to enter into a legally binding contract 2 Magistrate failed to identify any objective circumstances relating to the above matter 1 3 No objective evidence that defendant did *not* intend to be legally bound	LC verdict set aside Order for costs in favour of defendant set aside Judgment entered in favour of plaintiff against defendant	
Allcott Hire Pty Ltd v Silk [2016] NSWSC 1135 Rothman J	One Build Pty Ltd sought to hire equipment from Aluminium Scaffolds Pty Ltd – director of One Build (Mr Silk) signed a "guarantee" One Build went into liquidation, made no payments – Aluminium Scaffolds demanded payment from Mr Silk personally Magistrate dismissed proceedings and awarded judgment in favour of One Build by applying *contra proferentem* rule to guarantee clause in credit application Aluminium Scaffolds appealed to SC – whether clause a guarantee	Rothman J found that the parties intended to enter into a legally binding contract, construed the guarantee as "a contract of surety" Whether Mr Silk entered into a guarantee or indemnity – discussion of proper approach to contractual construction at [64] Construction of clause – clause clumsy but capable of meaning – construction as guarantee better reflects intentions of the parties – supported by witness evidence Conclusion: "the clause is sufficiently clear and sufficiently certain to amount to a guarantee of any sum arising as a result of the default by One Build in a hire agreement entered into by it with [the plaintiff], the sum being measured by the amount of damages for such default."	Leave to appeal granted, appeal allowed LC judgment set aside Matter remitted to LC	Construction of contracts

State Insurance Regulatory Authority v Abdul-Rahman [2016] NSWCA 210 Basten JA, Meagher JA and Gleeson JA	WorkCover Authority of NSW commenced proceedings in LC against Abdul-Rahman for failing to obtain and maintain a policy of insurance – amount equal to double the assessed premium together with a further sum for inspection costs – defendant claimed that claim was out of time – LC found relevant limitation period to be two years (s 18(1) *Limitation Act* 1969) accruing on the date the employer was notified of the "penalty" Hamill J overturned the judgment of the LC on appeal and gave judgment for the employer	Construction of *Workers Compensation Act* 1987 – whether amount payable a "penalty" for the purposes of the *Limitation Act* – relevant factors: • Amount was arbitrary; • Amount intended to have a deterrent effect on employers; • Description as "debt due" in the legislation not determinative. Cause of action accrued when Authority had determined the liability of the employer and the amount recoverable	Appeal allowed Remitted to LC	Legislative construction Limitation periods
Salisbury v Local Court (NSW) [2016] NSWSC 1082 Bellew J	Plaintiff issued with penalty infringement notice for speeding – plaintiff elected for matter to go before a court – plea of not guilty – plaintiff signalled intention to call expert witness Magistrate adjourned proceedings – directed defendant to serve brief of evidence and expert report	Grounds of appeal: (1) error in adjourning proceedings; (2) error in requiring plaintiff to serve expert report. Conclusion: Magistrate did not have power to order plaintiff to serve expert report – implied power of LC does not extend to ordering plaintiff to serve report – order traversed principles of criminal law – plaintiff's rights under criminal law not abrogated by empowering statutory provision since clear and unambiguous words to do so were not used (*Bropho*).	Leave to appeal granted Order set aside Matter remitted to LC	Statutory construction Practice and procedure
Lee v Dow [2016] NSWSC 1404 Garling J	Leave to appeal against LC Magistrate's decision dismissing Ms Lee's application to set aside default judgment	Appeal to SC not reasonably arguable – no error in Magistrate's decision that she was not satisfied that there was a reasonably arguable defence Balance of convenience – balance of convenience did not favour Ms Lee	Leave to appeal dismissed	Default judgment

Café Du Liban Pty Ltd v Bespoke Garage Pty Ltd [2017] NSWSC 779 Beech-Jones J	Plaintiffs (owners of Cafe) appeal against judgment entered against them in LC Contract entered into for defendant (Bentspoke) to supply coffee beans to plaintiffs and for defendant to loan coffee machine and grinder to plaintiffs – probation period discussed but not term of contract Clause 11 of Supply Contract and clause 12 of Loan Contract made plaintiffs liable to pay moneys due and defendant's costs if plaintiffs repudiated contract Contract came to an end – defendants accepted plaintiffs' repudiation – Defendant sought to recover costs under clauses 11 and 12 LC Magistrate that clauses 11 and 12 were not penalties	Whether coffee beans were supplied in accordance with Supply Contract – whether Magistrate erred in making adverse credit finding – no question of law – ground rejected Probation period – failure of magistrate to address plaintiffs' argument on this issue – leave to appeal granted Whether probation period construed as part of contract – parties intended to sign Supply Contract as constituting whole agreement – appeal dismissed Test as to whether a clause is a penalty – no majority judgment in *Paciocco – Dunlop Pneumatic Tires* tests still relevant – no authoritative test as to the circumstances in which a contractual clause will constitute a penalty – two tests[19] Clause 11 of Supply Contract – error in application of law – clause 11 of Supply Contract was a penalty – ground of appeal upheld Clause 12 of Loan Contract – clause not a penalty – ground of appeal dismissed	Appeal partly upheld Parties to file and serve draft forms of order concerning costs of proceedings, costs order re LC decision	Contractual construction Penalties

[19] Whether the impugned clause requires the payment of a sum "out of all proportion" to the protection of the legitimate interests of the non-defaulting party (French CJ and Kiefel J) or whether the totality of the circumstances suggests that the clause's only, or at least predominant purpose, is to punish the defaulting party (Gageler and Keane JJ).

Simone v Kola (No 2) [2017] NSWSC 821 Schmidt J	Plaintiffs sued to recover moneys from the defendant, a lawyer's, trust account – whether defendant permitted to use trust funds to pay plaintiffs' assessed costs and disbursements LC Magistrate found evidence did not establish that plaintiffs gave defendant authority to use trust moneys to set off legal fees – appeal by defendant Defendant produced documents which contained plaintiffs' representation that trust moneys could be used to offset legal fees	*Jones and Dunkel* inference against plaintiffs who did not give evidence – Magistrate erred in failing to take adverse inference into account Magistrate failed to identify purpose for which money was put into trust account – magistrate's conclusion adverse to defendant not open on evidence Magistrate erred in finding that defendant not entitled to use trust funds to pay outstanding assessed legal costs Magistrate made orders not sought by parties and did not provide reasons for orders – magistrate failed to address parties' arguments – error	Appeal upheld Judgment entered in favour of defendant	Trust accounting Judicial reasoning
Aquawest Pty Ltd v Twynham [2017] NSWSC 652 Lonergan J	Plaintiff entered into contract with Chatoyer Holdings Pty Ltd – contract signed by defendant on behalf of Chatoyer Plaintiff sued defendant for outstanding moneys – construction of particular clause of contract	Whether construction of use of forward slash in contract a question of law – held to be a mixed question of law and fact – no leave to appeal sought – ground fails Held that Magistrate's conclusion that clause ambiguous was correct	Appeal dismissed	Contractual construction
Dix Gardner Pty Ltd v The Owners – Strata Plan 82053 [2017] NSWSC 940 Harrison AsJ	Plaintiff successfully claimed damages from defendants arising from defendants' negligence certifying the construction of a strata development (plaintiff was the subsequent purchaser) Appeal by defendants	Finding on liability – failure to give reasons – duty of care – Magistrate's finding open – ground fails Failure to give reasons on issue of proportionality – error of law – ground made out	Appeal upheld To be remitted to Local Court	Judicial reasoning Duty of care

MacPhail v MacPhail [2017] NSWSC 942 Davies J	"Loan" by mother-in-law to daughter-in-law – Magistrate found existence of legal (as opposed to moral) obligation to repay moneys Magistrate found against daughter-in-law and ordered payment to mother-in-law	Reasoning – Magistrate gave reasons, did not fail to refer to evidence – ground fails Application of law – no error demonstrated – ground fails	Appeal dismissed	Judicial reasoning
Radiant Alliance Australia Pty Ltd v Divola [2017] NSWSC 1021 Adamson J	Plaintiff claimed liquidated sum from defendant comprising moneys paid and loan advances – defendant cross-claimed for wages LC entered judgment in favour of the plaintiff in the moneys paid claim and in favour of the defendant's claim – net result judgment in favour of defendant Plaintiff appealed	Plaintiff company wound up – defendant creditor not given notice of meeting of creditors – defendant sought order dismissing appeal Plaintiff ordered to pay defendant's costs – defendant applied for gross sum costs order – gross sum costs order made	Appeal dismissed	Costs Winding up
Commissioner of Police (NSW Police Force) v Howard Silvers & Sons Pty Ltd [2017] NSWSC 981 Wilson J	Items belonging to defendant seized in a search warrant executed by the plaintiff – whether items imitation firearms within the meaning of the *Firearms Act 1996* Magistrate found items were imitation firearms – ordered that items be returned – appeal by plaintiff	Whether Court has jurisdiction to hear appeal by plaintiff – yes: under Pt 5 *Crimes (Appeal and Review Act) 2001* Construction of meaning of "children's toy" – no failure to draw distinction between "toy" and "children's toy" – ground fails Use of packaging of items to support finding that items were children's toys – Magistrate failed to consider separately qualities intrinsic to the items – error of law	Appeal upheld Matter remitted to Local Court	Statutory construction Judicial fact-finding

Lochner v NSW Roads and Maritime Services [2017] NSWSC 974 Wilson J	Plaintiff a holder of a Victorian driver's license – Defendant revoked plaintiff's permission to drive in NSW Matter heard in LC's special jurisdiction – Magistrate dismissed plaintiff's appeal Plaintiff applied for leave to appeal to SC	Jurisdiction to appeal under s 70 *Local Court Act* or ss 52 or 53 *Crimes (Appeal and Review) Act* Grounds of appeal relating to Magistrate's factual findings not made out Plaintiff's impecuniosity – time to file application for leave to appeal extended Appeal without merit – suspension period expired	Leave to appeal refused	Jurisdiction
Van Gorp v Davy [2017] NSWCA 167 McColl JA, White JA	First LC Matter: proceedings settled by consent Second LC Matter: same subject matter as First LC Matter – struck out Applicant sought leave to appeal to SC before Fagan J – applicant did not appear at hearing – leave to appeal refused	Applicant appeals Fagan J's decision Applicant did not establish substantial miscarriage of Fagan J's discretion to refuse leave to appeal	Leave to appeal refused	Procedural fairness