

Recurring issues in the Court of Appeal[^]

Overview

- 1 Appeals from the District Court or summons seeking prerogative relief relating to decisions from the District Court constitute approximately 34 per cent of the business of the Court of Appeal. This is slightly less than the Common Law and Equity Divisions of Supreme Court, which combined account for around 48 per cent of the Court's business. In 2013, the Court of Appeal disposed of 161 cases that proceeded from the District Court. A number of these cases were discontinued (13), settled (25) or were otherwise disposed of than by judgment (5). Thirteen cases in 2013 came by way of a s 69 summons. Of the remaining cases that proceeded by way of appeal, 46 required leave to appeal. The Court of Appeal heard 26 of those applications concurrently.
- 2 The issues raised by the grounds of appeal/ relief were various and raised questions in administrative law, contracts/ insurance, costs, the duty to give reasons, equity, evidence, issue estoppel, local government, procedure, real property, workers compensation and many issues in the area of tort. Please see the appendix to this paper, which organises the cases according to the issues that they raise.
- 3 Faced with two large volumes of folders containing New South Wales Court of Appeal judgments handed down in 2013 on cases arising from the District Court, I have decided to narrow the scope of this presentation and focus on the particular issues which have been repeatedly raised in the case law and those issues that I predict will be of significance in the future. From my review of the judgments, I have identified the following issues of particular importance:

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- (1) Duty to give reasons;
- (2) Offers of compromise;
- (3) Contract: post-contractual conduct;
- (4) Evidence; and
- (5) Procedure: service by electronic means.

Duty to give reasons

4 In 2013, 10 decisions of the District Court were impugned for a failure to give adequate reasons.¹ The circumstances in which the inadequacy was said to arise varied and included the failure to give adequate reasons for the determination of liability, for the assessment of contributory negligence and for the bases upon which damages were awarded. The appellant succeeded on this ground in six of the 10 appeals and in a further case, the Court was split 2-1 as to whether or not the ground was made out.

5 As explained in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [56], the Court is:

“... conscious of not picking over an ex tempore judgment and, too, of giving due allowance for the pressures under which judges of the District Court are placed by the volume of cases coming before them.”

¹ See *Keith v Gal* [2013] NSWCA 339; *Scott v Williamson*; *Picken v Williamson* [2013] NSWCA 124; *Sexton v Horner* [2013] NSWCA 414; *Watson v Meyer* [2013] NSWCA 243; *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38; *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56; *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33; *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46; *Pannozzo v Fowler* [2013] NSWCA 269; *Commonwealth Financial Planning Ltd v Couper* [2013] NSWCA 444

- 6 Nonetheless, the duty to give reasons is a necessary incident of the judicial process (*Public Service Board of New South Wales v Osmand* [1986] HCA 7; 159 CLR 656 at 667 and the failure to exercise this duty promotes “a sense of grievance” and denies “both the fact and the appearance of justice having been done” and works a miscarriage of justice: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728. The function of an appellate court is not to set the standards for the optimal level of detail to be contained in reasons; it is, as was explained in *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [48], “to determine whether the reasons provided have reached a minimum acceptable level to constitute a proper exercise of judicial power”.
- 7 The nature of the obligation imposed on judges is articulated in a number of decisions of the Court: see *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [56] ff; *Keith v Gal* [2013] NSWCA 339 at [109] ff; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430. In summary, the fundamental principles governing the giving of reasons are:
- (1) The extent and content of reasons will depend upon the particular case under consideration and the matters in issue: *Pollard* at [58]; *Mifsud* at 728. For example, different considerations apply when the right of appeal is given only in respect of a question of law: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 443.
 - (2) Although this means that there is “no mechanical formula” for the content of reasons, there are three fundamental elements: a judge should refer to relevant evidence; set out any material findings of fact and any conclusions or ultimate findings of fact reached; and provide reasons for making the relevant findings of fact (and conclusions) and reasons in applying the law to the facts found: *Beale* at 443-444 per Meagher JA.

- (3) The judge must “*enter into’ the issues canvassed and explain why one [party’s] case is preferred over another*”: *Jones v Bradley* [2003] NSWCA 81 at [129]. The manner in which this obligation must be performed was explained by Ipp JA in *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187; 66 NSWLR 186 at [28]:

“It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: ‘I believe Mr X but not Mr Y and judgment follows accordingly’. That is not the way in which our legal system operates.”

- 8 In *Keith v Gal* [2013] NSWCA 339 the appellant had brought a claim relating to a motor vehicle accident. Judgment was delivered nearly 18 months after the hearing, with the District Court allowing only part of the plaintiff’s claim, because the trial judge found that the injury had completely resolved. The plaintiff appealed and argued that the findings of the trial judge necessarily involved a rejection of the evidence of the appellant and his lay witnesses but submitted that the reasoning process was not disclosed. The appellant also argued that the trial judge also failed to provide reasons why the opinion of certain doctors had been preferred over others and although there was some evaluation of parts of the evidence, there was no systematic evaluation or conclusions about the overall reliability of the reports or of the opinions expressed in them.
- 9 In considering the trial judge’s reasons, the Court of Appeal observed that the approach to the statement of reasons was “*almost formulaic*” and that the trial judge had failed in any meaningful way to deal with the unchallenged expert evidence: see at [125]-[131]. The trial judges’ approach was to make a finding that she was “*not satisfied*” of a particular

matter concerning the appellant's alleged disability. The primary judge would state her ultimate finding by stating "*for my reasons above and following, I find that ...*". Her Honour would support these findings by paragraphs which appear to be reasons and cite at the end of each paragraph extensive passages of transcript, various exhibits and the parties' submissions below. The Court of Appeal, at [135], observed that:

"The parties are left with the task of having to turn to each of the cited references to the transcript, the exhibits or the parties' submissions to attempt to glean the implicit basis for her Honour's findings. In many instances however, the cited references do not directly support the finding, and the exhibit references are to medical opinions which are competing. No reasons are given for accepting one body of medical evidence over the other."

Offers of compromise

- 10 2013 was an important year for offers of compromise with the Court of Appeal's five judge bench decision in *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188 and the amendment of the Uniform Civil Procedure Rules 2005 (UCPR), r 20.26 and Pt 42 which affect all offers of compromise made after 7 June 2013. The decision in *Whitney* clarified two issues. First, at [24], the Court held that the phrase "*exclusive of costs*" in r 20.26(2) "*suggests that what is intended is that a compliant offer will not deal with costs at all*". The reason for this "*is that the cost consequences are dealt with in the relevant subrules of r 42*" and that an offer of compromise that provides for the payment of costs "*removes that residual discretion*": see at [25]. Secondly, the Court held that the evidence of an offeror's intention for a non-compliant rules offer to take effect as a *Calderbank* offer is not confined to the terms of the offer: cf *Old v McInnes and Hodgkinson* per Giles JA and Meagher JA at [106]. Bathurst CJ in *Whitney* explained that an offer of compromise may take effect as a *Calderbank* offer if the terms of the offer, the correspondence, or surrounding circumstances indicate that the offeree's non-acceptance

will be relied on to obtain a more favourable costs outcome: see at [42]-[44]; see also at [60] per Barrett JA.

- 11 The amendments to the provisions for offers of compromise under the UCPR are significant. There has been no judicial Supreme Court or Court of Appeal determination as to the proper construction and application of the new rules. That is not surprising given the usual time lag between the commencement of proceedings and the final outcome.
- 12 Under the changes, a number of rules are fundamentally different. First, the prohibition in r 20.26(2) that the offer be “*exclusive of costs*” has been replaced with the stipulation in r 20.26(2)(c) that the offer “*must not include an amount for costs and must not be expressed to be inclusive of costs*”: r 20.26(2)(c).
- 13 Rule 20.26(2)(c) is complemented by r 20.26(3), which not only identifies an exception to r 20.26(2)(c), but explains what types of offers would be rule compliant. Thus, it is no longer the case that a valid offer of compromise under the UCPR must make no reference to costs. The effect of the amended rules is that an offer cannot: (i) include a sum for costs (subject to subrule (3)); and (ii) cannot be expressed to be inclusive of costs. Furthermore, unlike the old regime, an offer of compromise may include reference to the cost consequences of accepting the offer if it falls within the terms of subrule (3); that is, the offer may propose:
 - judgment in favour of the defendant with no order as to costs;
 - judgment in favour of the defendant and that the defendant will pay a specified sum in respect of the plaintiff’s costs;
 - the offeror will pay the offeree’s costs as agreed or assessed; or
 - the costs as agreed or assessed on the ordinary basis or on the indemnity basis will be met out of a specified estate, notional estate or fund.

- 14 Part 42 Div 3 has also been amended. Of particular note is the amendment to Rule 42.13A. Previously r 42.13A stated in non-exhaustive terms that where an offer of compromise was accepted by a plaintiff, costs were payable up until the date of the offer **unless** the court ordered otherwise. Rule 42.13A now applies only to offers that make no provision for costs in respect to the claim (see r 42.13A(1)(b)) and stipulates that where the offer proposes judgment in favour of one party, that party is “*entitled*” to their costs on an ordinary basis up to the time the offer was made. There is no power under r 42.13A for the Court to order otherwise.
- 15 The question that arises is what is the status of an offer under the new rules like that made in *Whitney* in which the offeror makes an offer to settle the claim with the offeror’s costs to be paid by the offeree as agreed or assessed. Such an offer does not offend the prohibition in r 20.26(2)(c) as it is not inclusive of costs and does not include an amount of costs nor does it fall within the types of offers for which r 20.26(3) provides. This raises the question whether UCPR, r 20.26(3) delimits the types of offers that may be made under the rules? Or is the rule simply permissive of the offers that **may** be made?
- 16 Principles of statutory construction inform us that the process of interpretation commences with the construction of the ordinary and grammatical meaning of the words in question, having regard to their context and legislative purpose: *Rail Corporation New South Wales v Brown* [2012] NSWCA 296; 82 NSWLR 318 at [39] per Bathurst CJ; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; 248 CLR 378 at [23] ff per French CJ and Hayne J.
- 17 The rules are not accompanied by any explanatory note as is the case with legislation so that there is no explanation as to what was intended by the rules. Some of the language used in the rules would indicate that such an

offer is permissible. First, UCPR, r 20.26(2)(ii) provides that the offer is to set out the proposed **orders** that are sought. Secondly, r 20.26(3) uses the language of permission and not of requirement. It does not say “*may only*” or “*must*”. Thirdly, r 42.13A deals with offers that are silent as to costs; there being no provision in r 20.26(3) for the making of such an offer.

- 18 Consideration then needs to be given to the interrelationship between r 20.26 and Pt 42, Div 3. As already indicated, the amendments to Pt 42, Div 3 and in particular the amendments to r 42.13A mean that there would be no inconsistency between an offer purportedly made under r 20.26 that deals with the costs consequences of accepting the offer and Pt 42 because r 42.13A is not applicable to such an offer. Furthermore, there could not be inconsistency between such an offer and UCPR, r 42.13A because there is no residual costs discretion in the new r 42.13A. This, as explained in *Dean v Stockland* and *Whitney*, was the rationale for holding that offers that referred to the cost consequences of accepting the offer were non-rule compliant. Examining the amendments to Pt 42, Div 3 it could be argued that a *Whitney* type offer is a r 20.26 offer and thus attracts the operation of Pt 42, Div 3 only to the extent that the offer is not accepted. If the offer is accepted, the offer would take effect according to its terms. If the offer is not accepted, the cost consequences are provided for by rr 42.15, 42.15A and 42.16 and once an offer is not accepted, the terms of the offer for costs is not relevant.

Contract

- 19 There were nine contract and insurance cases that were the subject of challenge in 2013. The appeals raised various issues including:

- (1) Whether the respondent’s claims as a result of overcharging had been compromised and released by a Settlement Agreement that

had been previously interpreted by the New South Wales Court Appeal: *Cabport Pty Ltd v Marinchek* [2013] NSWCA 51.

- (2) Whether good consideration was proved for the variation of a contract: *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56.
- (3) Whether post-contractual conduct required the Court to remit an appeal to the District Court for a new trial in circumstances where that conduct was inconsistent with the manner in which the contract was interpreted at first instance: *Cooper v Hobbs* [2013] NSWCA 70.
- (4) Whether the evidence established that a guarantee and indemnity contract in relation to a commercial hire purchase agreement was signed by the appellant: *Crossman v Macquarie Leasing Pty Limited* [2013] NSWCA 155.
- (5) Whether expenses incurred by an insured (to prevent failure of a coffer dam wall) to prevent insured loss, damage or liability where recoverable under the general insuring clause or under an implied term: *Vero Insurance Ltd v Australian Prestressing Services Pty Ltd* [2013] NSWCA 181.
- (6) Whether an 'insolvency event' giving rise to a right to terminate the contract had occurred: *Gray t/as Clarence Valley Plumbing Services v Ware Building Pty Ltd* [2013] NSWCA 271.
- (7) Whether the principles required for an harsh and unconscionable contract under the *Contracts Review Act* 1980 had been made out: *May v Brahmatt* [2013] NSWCA 309.

- (8) Whether policy schedule issued subsequent to acceptance of offer recorded terms of earlier agreement: *Bong McArthur Transport Pty Ltd (In Liq) v Caruana* [2013] NSWCA 101.
- 20 The issue that seems to be an increasingly source of work for the Court of Appeal is the relevance of post-contractual conduct to contractual claims.
- 21 In *Cooper v Hobbs*, the plaintiffs sued the defendant, a mortgage broker, to recover an amount of \$150,000. The plaintiffs' claim was that they had lent the \$150,000 to the defendant to invest in a company. The defendant, to the contrary, asserted that this money was not a loan to him but that the plaintiffs had advanced him the money to invest in the company on their behalf. The plaintiff was successful in the District Court in establishing that the \$150,000 was a loan not an investment.
- 22 The critical issue on the appeal concerned a letter written by the plaintiffs' solicitors after the money had been advanced. That letter contained assertions that the sum had been "*invested in*" and "*advanced to*" the company, and so supported the defendant's contentions. The primary judge gave little weight to that letter. The Court of Appeal (McColl JA with Bergin CJ in Eq agreeing, and Meagher JA in a separate judgment) found that this was in error, and that the fact-finding process had miscarried such as to warrant the remission of the matter to the District Court.
- 23 Relevant for present purposes is the treatment of the Court of Appeal of the letter, which was written after the purported contract had been formed. McColl JA, relying on *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; 53 NSWLR 153 at [25] (Heydon J, Mason P and Ipp AJA agreeing), found that this post-contractual conduct constituted admissions of fact that the money had been invested in the company, and

so was relevant to the question of whether the contract contended for by the respondents was formed.

24 This case highlights that the admissibility and relevance of evidence of post-contractual conduct depends upon how the party adducing the evidence wishes to use it. A distinction must be drawn between:

- (1) The use of post-contractual conduct to construe the terms of a contract, which is inadmissible; and
- (2) The use of post-contractual conduct as informal admissions adverse to a person's interest in the outcome of the proceeding, which is admissible: see *Evidence Act 1995*, Pt 3.4.

25 Each of these questions will be considered in turn, although they are, at points, interrelated.

Post-contractual conduct and construction of a contract

26 The starting point when considering the relevance of conduct occurring subsequent to the point of contracting is that "it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made": see *Administration of Papua and New Guinea v Daera Guba* [1973] HCA 59; 130 CLR 353 at 446 (Gibbs J), approving a statement in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603. This proposition was reaffirmed by Gummow, Hayne and Kiefel JJ in *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; 238 CLR 570 at [35]; see also *Wardle v Agricultural and Rural Finance Pty Ltd* [2012] NSWCA 107 at [358] (Campbell JA).

27 This rule may be seen as a subset of the parol evidence rule, which precludes the use of extrinsic evidence for the construction of a written

contract. In *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337, Mason J (as his Honour then was) approved a statement by Lord Wilberforce in *L Shuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261 that:

“The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or *subsequent to the contract*, any of which to the lay mind might at first sight seem to be proper to receive.”

The High Court strongly affirmed the continuing correctness of *Codelfa Construction* in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 at [4]-[5].

- 28 The exclusion of extrinsic evidence follows from the firm entrenchment in Australian contract law of the “objective theory of contract”, and the irrelevance of subjective intentions to the construction of the contract actually formed. As the plurality reaffirmed in *Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd* [2014] HCA 7, at [35],

“[t]he meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean.”

- 29 The problem with relying on subsequent conduct, as Lord Simon explained in *L Shuler AG v Wickman Machine Tool Sales Ltd* at 269 is that:

“subsequent conduct is equally referable to what the parties meant to say as to the meaning of what they said, and... it is only the latter which is relevant... ‘[If you] tell me what you have done under a deed, I can at best tell you only what you think that deed means’.”

- 30 The weight of existing authority supports the proposition that post-contractual conduct is inadmissible for the construction of the terms of a

contract: see *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; 53 NSWLR 153 at [23].

- 31 Nonetheless, it is worth noting that the position is not entirely settled. In *Royal Botanical Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; 240 CLR 45 at 83, Kirby J commented that it was not the occasion to “*resolve the controversy about the admissibility of post-contractual conduct of the parties.*”
- 32 The cause of this ‘controversy’ is the older High Court authority of *White v Australian and New Zealand Theatres Ltd* [1943] HCA 6; 67 CLR 266. *White* concerned a contract between theatrical artists and a theatre company. The artists had been engaged to provide “*sole professional services*” on certain terms, but the contract did not define what that term meant. Evidence of the parties’ conduct after the contract date was admitted to give meaning to the phrase “*professional services*” in the contract. In particular, Williams J, at 281, had regard to the work that the theatrical artists had carried out after the contract had been entered into, and the way in which the artists were described in advertisements for a show.
- 33 There are two possible views on the relevance of *White*. In *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310, Priestley JA, at 327-328, considered that *White* directly conflicted with the statement quoted above from *Administration of Papua and New Guinea v Daera Guba*. If such a conflict existed, the early willingness of the High Court to consider post-contractual conduct would be superseded by the later High Court authorities discussed above, after the position had become resolved in England: see *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343 at 349-351; *Sportsvision Australia Pty Ltd v Tallglenn Pty Ltd* (1998) 44 NSWLR 103 at 116.

- 34 The better view, however, is that the approach in *White* was “*entirely orthodox*” and reconcilable with more modern authorities: *Sportsvision Australia Pty Ltd v Tallglenn Pty Ltd* (1998) 44 NSWLR 103. Bryson JA considered that Williams J admitted the evidence to determine the subject matter of the contract with reference to the surrounding circumstances, rather than to construe the terms of the contract.

Post-contractual conduct as admissions

- 35 This leaves the more complicated question of when post-contractual conduct can be used as informal admissions, which was the question considered in *Cooper v Hobbs*. McColl JA considered, at [54], that post-contractual conduct was admissible on the question of whether the contract for which the respondents contended was formed, and whether a particular person was party to it.
- 36 In respect of evidence said to constitute an admission, regard must be had to the authorities as to the admissibility and probative value of admissions about matters of law, or of mixed fact and law.
- 37 In *Dovuro Pty Ltd v Wilkins* [2003] HCA 51; 215 CLR 317, a question arose as to the admissibility of statements made by a corporation that it had “*failed its duty of care*”. Gummow J (McHugh and Heydon JJ agreeing) expressed the view, at [71], that those statements did not provide a basis upon which to make a finding of negligence. In coming to that conclusion, Gummow J indicated, at [68], that the observations of Mahoney JA in *Jones v Sutherland Shire Council* and *Pitcher v Langford* that admissions could be made of matters of law or mixed fact and law had been stated too widely. Whilst facts may be the subject of an admission, a conclusion which depends upon the application of a legal standard is either not admissible or at the best valueless. See *Grey v Australian Motorists & General Insurance Co Pty Ltd* per Glass JA at 676.

38 In *Dovuro* Gummow J also set out, at [71], the observations of Lockhart and Gummow JJ in *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 68, explaining Glass JA's position in *Grey*:

“[W]hen a standard, measure or capacity is fixed by law, a party cannot be asked to admit a conclusion depending upon the legal standard; however, the witness may be asked to admit facts from which the conclusion of law may be drawn by the court.”

39 These principles were recently considered in *Hopcroft v Edmunds* (2013) 116 SASR 191. There, the appellants sought to rely upon a statement by the respondent, extracted in cross-examination, that he believed a contract had come into existence, as an admission that there was a contract. Kourakis CJ considered that the evidence was inadmissible because it expressed a legal conclusion.

40 White J, with Stanley J agreeing, took a different view. White J agreed that some admissions involving legal conclusions would not be admissible or at best would be “*regarded as valueless.*” However, his Honour considered that the admission made in cross-examination was not based on a legal standard and accordingly its admissibility was not precluded by the statement in *Dovuro*. White J drew a distinction, therefore, between admissions involving legal conclusions, and admissions involving the application of a legal standard.

41 Nonetheless, White J, (at [110]-[111]), dismissed the admissions as irrelevant, because they only evidenced the subjective belief of the respondents, which did not bear upon the objective assessment required of whether the respondents' conduct signalled that the contract had been accepted. The belief as to the subsistence of a contractual relationship was found to be irrelevant (at [112]).

- 42 Given that White J only characterised the respondents' evidence as being of a subjective belief or state of mind, which is a matter of fact rather than of law (see *Edgington v Fitzmaurice* (1885) 29 Ch D 459), it is questionable whether he was required to draw the distinction between admissions involving legal conclusions and admissions involving the application of a legal standard. However, his Honour's distinction was applied by Sackar J in *Lorretta Kistmah Craig v Kia Silverbrook* [2013] NSWSC 1687 at [132], in allowing evidence of a party describing money outstanding as a 'loan' to operate as an admission that she did not have an equitable interest in the profits of an invention.
- 43 Returning to *Cooper v Hobbs*, the admissions of the plaintiffs that they had authorised the appellant to arrange for the funds to be advanced to the company, was a "critical factual contention" (see [56]). Gummow J in *Dovuro* affirmed that "a party may admit the facts from which a conclusion of law may then be drawn"

Evidence

- 44 A number of the cases from the District Court involved evidentiary questions including the admissibility of certain evidence, the weight to be given to evidence and the availability of a *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 inference.
- 45 The Court in *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46 rejected a contention of the appellant that the primary judge failed to recognise that a recorded history contained in an expert's report is not evidence of the fact unless proved by admissible non-hearsay evidence. The appellant relied on *Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642 at 649 and *Dasreef Pty Limited v Hawchar* [2011] HCA 21; (2011) 243 CLR 588 at [80] per Heydon J. The Court of Appeal observed, however, "[t]here was no mention in *Dasreef Pty Limited v*

Hawchar of s 60 Evidence Act 1995. This is understandable because Heydon J was dealing with the decision of the High Court in Ramsay v Watson in 1961.” The Court followed the decision of the Court of Criminal Appeal in *R v Welsh* (1996) 90 A Crim R 364 in which it was held that:

“As a result of s 60, evidence by a doctor of the history given to him or her by the patient and upon which the doctor bases his or her expert opinion is therefore now evidence of the truth of that history ... unless an order is made limited the use which made be made of that evidence pursuant to s 136.”

46 Bergin CJ in Eq, with whom the other members of the Court agreed, held at [143]:

“The medical reports to which the primary judge made reference were all admitted as evidence without objection. There was no order sought under s 136 of the Evidence Act 1995 limiting the use of the contents of the reports. There may be an argument that the history in Dr Dowla's report was not something upon which he based his opinion. However that is not the case in respect of Dr Abraszko. I would conclude that the reports were admissible and her Honour was entitled to rely upon them without restriction: *Daw v Toyworld (NSW) Pty Ltd* [2001] NSWCA 25; (2001) 21 NSWCCR 389 at 419-420 [70]; *Guthrie v Spence* [2009] NSWCA 369; (2009) 78 NSWLR 225 at 237-238 [75].”

47 In *Sexton v Horner* [2013] NSWCA 414, the plaintiff's counsel had sought production of any statement obtained by the defendant regarding the motor accident in issue. The defendant produced a report by an investigator which had a statement of the defendant attached but claimed privilege over the statement. A hearing was conducted on the voir dire to decide the claim for privilege but counsel for the plaintiff effectively conceded that the claim for privilege was justified by failing to make any submissions on the issue. The primary judge allowed the claim of privilege.

48 On the appeal, the plaintiff contended that the statement was not a 'confidential communication' within the meaning of the *Evidence Act*, s 117 and thus could not attract the privilege. The appellant submitted that the

trial judge, in allowing the claim, failed to consider the issue whether the document was confidential. This submission was rejected because, as the issue had not been raised before his Honour, he did not have to address it: see at [105]. The Court of Appeal held that the statement was a confidential communication, as it was prepared in circumstances where the person who obtained it was under an obligation not to disclose its contents because it was prepared as a consequence of the contractual relationship between the third party insurer and a firm specialising in accident investigation. The Court observed that this was a relationship of principal and agent and that such a contract would carry with its obligations of confidence, particularly as the investigation was carried out to establish the insurer's exposure and the degree of fault of the parties. This was further demonstrated by the use of a covering letter to the report when it was sent to the third party insurer stating that the report was "*strictly privileged and confidential for the use and consideration of legal advisors in connection with anticipated litigation*".

- 49 *MSPR Pty Ltd v Advanced Braking Technology Ltd* [2013] NSWCA 416 involved a challenge to the primary judge drawing a *Jones v Dunkel* inference against the appellant and to the nature of the inference his Honour drew. The Court of Appeal held that the inference was properly drawn because the evidence established that it would have been "*natural*" for the appellant to call the witness as he was effectively in the appellant's "*camp*". The Court, however, accepted the appellant's complaint about one of the primary judge's formulation of the inference, which was in terms that the evidence would have been "*adverse*" to the appellant. This formulation was "*objectionable*", but the Court regarded it as a slip and as not leading to an erroneous application of principle, because the primary judge had correctly addressed the nature of the inference when he observed that it "*would not have assisted*" the appellant.

- 50 *Cooper v Hobbs* [2013] NSWCA 70 also involved a question whether the primary judge erred in failing to make a *Jones v Dunkel* inference by reason of the failure of the respondents to call their solicitor to support their evidence that a critical letter in the proceedings was sent on the solicitor's advice. The Court noted that the rule in *Jones v Dunkel* does not apply where the witness not called is the party's solicitor, at least where the evidence is privileged and the privilege has not been waived. The Court held that by the respondent's assertions about the solicitor's advice as to the drafting of the letter, they waived legal professional privilege in relation to that advice because they acted inconsistently with the maintenance of the confidentiality which attaches to privileged communications. The Court held, at [74], that the primary judge was entitled to draw more confidently "any inference favourable to the [appellant] for which there was ground in the evidence": *Jones v Dunkel* (at 308) per Kitto J.
- 51 *Gray t/as Clarence Valley Plumbing Services v Ware Building Pty Ltd* [2013] NSWCA 271 the Court considered what probative value should be attributed to hearsay evidence that was admitted, without objection, in an ex parte hearing.
- 52 *Crossman v Macquarie Leasing Pty Limited* [2013] NSWCA 155 considered the weight to be attributed to the expert opinion of a handwriting expert. In that case, Basten JA was of the opinion that the evidence should be given little weight because the letter of instruction risked tainting the expert's opinion, the manner in which the expert conducted the assessment and the expert's incorrect identification of a genuine signature as a forgery.

Procedure

- 53 A number of the appeals before the Court concerned questions of procedure. They included judgments on strike out motions, the setting

aside of default judgments, refusal of leave to amend defences and applications for security for costs. One judgment of particular note is *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268, the (in)famous service by *facebook* case. With the growing importance of social media in modern communication (the Supreme Court of NSW now has a *twitter* account), it seems appropriate to consider the judgment and the issue of service by social media more generally.

- 54 The Court of Appeal in that case disposed of the case on the ground that the order for substituted service ought not to have been made in the absence of evidence that the means of substituted service sanctioned by the order were likely to bring service of the statement of claim to the defendant's attention whilst he was in Australia; the defendant was leaving Australia on the day after the order was made or shortly thereafter: see at [37].
- 55 Macfarlan JA, with whom Ward and Gleeson JJA agreed, observed, that the evidence before the primary judge was an insufficient basis for making an order for substituted service through *facebook*. That evidence was by way of an affidavit of the plaintiff's solicitors that she had access to Flo Rida's *facebook* page which had been accessed from a link appearing on the website 'www.officialflo.com' and that she was able to post content on the *facebook* wall and send private messages. The Court of Appeal held that that evidence did not establish, other than by mere assertion, that the *facebook* page was that of Flo Rida and did not prove that a posting on it was likely to come to his attention in a timely fashion: *Chappell v Coyle* (1985) 2 NSWLR 73 at 77. The Court did not, however, rule out the appropriateness of using social media as a method of substituted service.
- 56 Macfarlan JA's concern echoes that of Ryrie J in *Citigroup Pty Ltd v Weerakoon* [2008] QDC 174 who refused an application for substituted service through *facebook* on the basis of:

“... the uncertainty of Facebook pages, the fact that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant.”

57 On the premise that service by posting on *facebook* is an available means of service, the case law indicates that such an order should only be made where the Court can be reasonably satisfied that:

- (1) The social media profile is that of the defendant; and
- (2) The defendant will receive timely notice of the proceedings.

58 Although these requirements were not satisfied in *Flo Rida*, the authorities from other jurisdictions indicate the evidence that would be required to establish each of those factors. In *MKM Capital Pty Ltd v Corbo & Poyser*, for example, an order for substituted service was made on the basis that the plaintiff had been able to cross-reference the dates of birth and the email address associated with the *facebook* accounts with the two defendants' details and because the two *facebook* profiles were friends: see Paul Mallam and Julie Cheeseman, “Are you being served? Social networking sites used to serve court documents” (2009) July *Internet Law Bulletin* 61 at 61. In *Byrne v Howard* [2010] FMCAfam 509; 239 FLR 62 a Federal Magistrate had made an order for substituted service through the defendant's *facebook* page. It was held, at [19]-[22], that the defendant had been properly served in circumstances in which an affidavit was provided to the effect that the defendant was a regular *facebook* user, the photograph on the *facebook* profile was identified as the defendant, there was an electronic receipt of delivery to the defendant's *facebook* and the defendant took down his *facebook* page following the attempted service on him personally.

Conclusion

- 59 This brief overview gives an indication of the extensive civil jurisdiction conferred on the District Court. It makes for a challenging but interesting judicial life.