Court of Appeal
Supreme Court
Sydney

# Decisions of Interest

12 February 2024 – 23 February 2024

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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# New South Wales Court of Appeal Decisions of Interest

## Equity: Charitable trusts

***Catholic Metropolitan Cemeteries Trust v Attorney General of New South Wales* [2024] NSWCA 30**

**Decision date:** 16 February 2024

Bell CJ, Ward P, Leeming JA

In 1868 and 1889, under the *Necropolis Act 1867*, the Governor set aside land at what is now Rookwood Cemetery for the burial of those of the Roman Catholic denomination (the Catholic burial ground), and vested that land in trustees. In 1901, the *Necropolis Act 1867* was replaced by the *Necropolis Act 1901*, a consolidating statute. All prior proclamations, notifications and appointments were deemed to be made under the consolidating statute.

By a series of legislative amendments, Rookwood Cemetery (including the Catholic burial ground) came to be treated as a "reserve", subject to Crown lands legislation. Then, by the *Crown Lands Act 1989,* the body corporate "Catholic Cemetery Trust, Necropolis" (CCTN) was created, and replaced the then-trustees of the Catholic burial ground. Some 10 years later, the Catholic Cemeteries Board (CCB) was appointed to manage the affairs of CCTN. Then, in 2009, the CCTN was dissolved, and a new "reserve trust", Catholic Metropolitan Cemeteries Trust (CMCT), was appointed trustee of the Catholic burial ground. From 1 July 2018, the *Crown Land Management Act 2016* (NSW) (CLMA) repealed the *Crown Lands Act 1989*.

From 29 February 2024, by virtue of transitional provisions in the CLMA, CMCT was abolished, and CCB became "Crown land manager". CMCT's assets, rights and liabilities were transferred to CCB, and the charitable trust over the Catholic burial ground was abolished. The question arose whether the $160 million in proceeds CMCT had collected from the use of the Catholic burial ground continued to be held on charitable trust, or whether it was held on statutory trust, and so to be administered in accordance with the CLMA.

**The Court declared**:

- The *Necropolis Act 1867* created a charitable trust recognised in equity capable of continuing after the repeal of the statute: [155], [159]-[165], [231].
- The existence of a power to alter or extinguish a trust, created on repeal of the *Necropolis Act 1901* (NSW), is distinct from the exercise of said power. The susceptibility of trust rights and obligations to such a power does not itself extinguish the trust: [224].
- The product of the use of trust property (the $160 million) may be held as property of the trust: [232].
- The CLMA's purpose is to regulate Crown land, not the personalty associated with Crown land. Whilst the CLMA abolished the trust over land, it did not affect the charitable trust over the $160 million: [239]-[242].

## Contracts: Interpretation

***Mie Force Pty Ltd v Allianz Australia Insurance Ltd* [2024] NSWA 23**

**Decision date:** 13 February 2024

Ward P, White and Kirk JJA

Rohrig (NSW) Pty Ltd subcontracted demolition works to Rhino Commercial Stripouts Pty Ltd as part of a project at the General Gordon Hotel, Sydenham. Rhino Stripouts formed part of the "Rhino" group of companies, as did Mie Force, who supplied labour to other companies within the group (including Rhino Stripouts). While employees of Mie Force Pty Ltd were undertaking the works at the Hotel, a fire broke out, damaging the Hotel and neighbouring properties. The Hotel and the neighbouring properties claimed in negligence, with Allianz agreeing to indemnify Rohrig and Rhino Stripouts pursuant to its Construction Risks – General Liability Policy, but not Mie Force.

The primary proceedings turned on the definition of "Named Insured" for the purposes of the Policy's coverage. The primary judge rejected Mie Force's submission that it was a "Named Insured" because it was either an "agent" of Rhino Stripouts or, alternatively, a "subcontractor" as those terms appeared within the definition of "Named Insured" in the Policy.

Mie Force appealed both findings. Allianz filed a notice of contention, arguing the primary judge erred in failing to find that "agent" bore a strict legal meaning.

**The Court held**, dismissing the appeal:

- As to "agent", White and Kirk JJA found that the term as it appears in the Policy was used in its established sense as a legal term of art, describing persons with authority to create binding legal relations between a principal and third parties: [122], [125]-[126], [135]. In dissent on this point, Ward P instead held "agent" be understood inits ordinary sense as someone who steps into the shoes of another in performing a task. In that sense, the idea of "alter ego" was instructive. Thus, although Rhino Stripouts directed Mie Force's employees, the employees were performing obligations owed to Mie Force, and could not reasonably be considered the "alter ego" for Rhino Stripouts: [59], [67], [81]-[82].
- As to "subcontractor", the Court considered it important to distinguish between "all risks" policies (like that at the centre of *Petrofina* [1984] QB 127, which covered strictly one site), and the Policy in this instance, which covered all insured operations for the whole of the Rohrig Group. The effect of Mie Force's proposed construction, which hinged on *Petrofina*'s holding that a "sub-sub-contractor" is a "subcontractor", would transform into a subcontractor anyone providing services to another party under an arrangement with the other party's contractor. In this case, the agreement between Mie Force and Rhino Stripouts was strictly concerned with the supply of labour: [111]-[116], [122].

## Consumer Law: Misleading or deceptive conduct

***Care A2 Plus Pty Ltd v Pichardo* [2024] NSWCA 35**

**Decision date**: 22 February 2024

Bell CJ, Stern JA, and Basten AJA

Care A2 Plus Pty Ltd and Care A2 Australia Pty Ltd (the appellants) made six payments totalling $2,200,000 to DCA Sydney Enterprises Pty Ltd for the purpose of acquiring streaming rights over the 2021 Rugby League World Cup. DCA claimed this would generate an annual revenue of $15,000,000 or $30,000,000. Both these representations were false. The then-sole director of DCA, Dylan Azzopardi (DA), misappropriated the funds for personal gain.

The primary judge held that DA was liable for misleading and deceptive conduct and deceit, and awarded damages for each of the payments the appellants made to DCA. However, the primary judge held that Karla Pichardo (KP), DCA's CFO, was not liable for misleading or deceptive conduct or deceit. The appellants appealed this finding.

**The Court held**, allowing the appeal in part:

- Direct liability for misleading or deceptive conduct depends on whether the conduct is objectively misleading or deceptive, or likely to be so; a person's knowledge or intention is immaterial to a finding of liability (*Google v ACCC* (2013) CLR 425). An intermediary is more likely to have adopted information for the purposes of misleading or deceptive conduct where the underlying item of information has been altered before being passed on; the intermediary is aware of its falsity; or the matter is a simple one within the intermediary's professional judgement. The intermediary's conduct need not be the "sole" cause of the victim's loss, but must be "non-trivial" and "material". Here, KP engaged in objectively misleading and deceptive conduct in sending false emails to the appellants soliciting four of the payments. In the alternative, KP was accessorily liable for such conduct, as she knew, or was recklessly indifferent to, the essential facts underlying DA's misleading or deceptive conduct: [100], [110]-[113], [150], [171]-[183].
- There are five necessary elements in a tortious deceit claim (*Magill v Magill* (2006) 226 CLR 551). First, the defendant made the false representation. Second, the defendant knew, or was reckless or carless as to, its falsity. Third, the defendant intended the representation to be relied upon. Fourth, the plaintiff acted in reliance on the representation. Fifth, the plaintiff suffered damage in reliance. Liability may arise from both positive and negative conduct. The causation requirement is satisfied where the misrepresentation "contributed", even if only a "minor part", to the plaintiff's conduct which precipitated the loss. In this case, the five elements, together with causation, were clearly established on the facts: [123]-[126], [184]-[186].

## Workers Compensation: Causation

***Fisher v Nonconformist Pty Ltd* [2024] NSWCA 32**

**Decision date:** 20 February 2024

Meagher JA, Kirk JA and Simpson AJA

The husband and father of the appellants, whilst driving in the course of his normal duties as a courier driver for the respondent, suffered a catastrophic heart attack and died. The appellants each made claims under the *Workers Compensation Act 1987* (NSW) (WC Act), contending that the heart attack was triggered by the deceased's exposure to traffic related air pollution. The respondent denied liability on the basis that the heart attack was not compensable under the WC Act. This denial was upheld by a Member of the Personal Injury Commission, and on appeal by the President of the Commission.

The right to appeal from a decision of the President exists when the party appealing is "aggrieved by a decision… in point of law" under s 353(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). Therefore, before hearing the appeal, the Court had to determine whether it was on a point of law within the meaning of that provision. Beyond this, the appellants advanced three grounds of appeal: (1) the Member and President misdirected themselves as to the proper test for causation within ss 4, 9 and 9A of the WC Act; (2) the Member and President constructively failed to exercise jurisdiction; (3) the Member failed to give reasons, and the President erred in not finding that to be so.

**The Court held**, dismissing the appeals:

- On the threshold s 353(1) issue, a person is "aggrieved" by the President's decision where the grievance raises a point of law; it is the grievance which is *in point of law*. The appeal need not involve a decision made by the President on a point of law, nor be raised below, so long as the appeal grounds are on points of law, such as jurisdictional or other errors, including where those errors in themselves do not necessarily have anything to do with any decision on a point of law, e.g., failure to accord procedural fairness: [33]-[36].
- On the causation issue, in applying the more stringent causation test in s 9A of the WC Act, the Member did not misdirect himself in failing to refer to the statements in *Badawi v Nexon Asia Pacific Pty Ltd* (2009) 75 NSWLR 503 that "substantial contribution" in s 9A connotes "real and of substance". The Member referred to, and applied, the statutory language (the correct focus, as emphasised by the High Court in *Weiss v The Queen* (2005) 224 CLR 300). Similarly, the Member did not err in referring to the principle articulated in *Seltsam Pty Limited v McGuiness* (2000) 49 NSWLR 262 that proof of increased risk is not itself sufficient to establish causation in tort; this Australian position is equally applicable to s 9A and to the common law [72]-[74], [84]-[102].
- As to constructive failure to exercise jurisdiction, it was not sufficient to complain that the Member or President incorrectly addressed an argument, as this may simply be an erroneous error within jurisdiction: [119]-[121].

# Australian Intermediate Appellate Decisions of Interest

## Contracts: Interpretation

***Bagata Pty Ltd & Anor v Sunstorm Pty Ltd*** **[2024] QCA 17**

**Decision date:** 16 February 2024

Morrison JA, Martin SJA and Williams J

Bagata Pty Ltd (appellant) own a property in Murrarrie. In early 2022, the appellants and Sunstorm Pty Ltd (respondent) entered into a lease of that property, to commence on 1 July 2022. Shortly after commencement, a dispute arose over chattels the appellant had left on the property. The respondent wanted them removed, whereas the appellant argued they should remain *in situ*.

The lease required such disputes be referred to expert determination, which was to be conclusive and binding "in the absence of manifest error". Three questions were referred. First, whether vacant possession had been delivered. Second, whether vacant possession was required to be delivered. Third, whether the respondent's proposed use of the property for manufacturing activities was within permitted use. The dispute was determined in the respondent's favour. The appellant commenced proceedings on the basis that the expert made manifest errors in concluding that the respondent was entitled to vacant possession, and that the respondent's activities were within permitted use. The primary judge found in favour of the respondent. The same issues arose on appeal, together with the contention that the primary judge erred in the construction of the term "manifest error".

**The Court held**, dismissing the appeal with costs:

- The meaning of the term "manifest error" is to be determined in accordance with the usual methods of construing a contract. Unless the drafting points to the contrary, the "error" can be one of fact or law (*Trampoline Enterprises Pty Ltd v Fresh Retailing Pty Ltd* [2019] VSCA 74): [21]. For an error to be "manifest", there is no requirement to categorise it as either "facile" or "complex". The High Court, in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, observed that the error must appear on the face of the award to be "manifest"; its mere existence does not render the error "manifest": [21]-[25].
- The type of the business conducted by the tenant forms the framework for analysing of whether there has been interference with the possession of the tenant (*Byrnes v Jokona Pty Ltd* [2002] FCA 41). The tenant is entitled to the full benefit of the demise for the purposes of conducting said business. The stipulation that a tenant takes real property on an "as is/where is" basis does not imbue the landlord with any right to store the landlord's chattels on the premises after commencement of the lease. Here, the lease was not of the contents of the property, but rather the area of the building defined in the lease: [54]-[59].
- The term "permitted use" must be afforded commercial sense: [61]-[71].

## Evidence: Use of criminal conviction in civil proceeding

***Osborne v Butler* [2024] VSCA 6**

**Decision date:** 15 February 2024

Emerton P, McLeish and Taylor JJA

In 2017, Osborne (the applicant) was found guilty of two counts of sexual assault of a child under 16, who was the respondent in these proceedings. The respondent subsequently commenced proceedings against the applicant, claiming damages for the assault and battery that constituted the offending. One issue was the effect of ss 91 and 92 of the *Evidence Act 2008* (Vic). Section 91 contains a general rule that that evidence of a decision is not admissible to prove the existence of a fact that was in issue in that proceeding. Section 92(2) provides an exception by permitting the admission of evidence that demonstrates a party has been convicted of an offence. The primary judge found that the effect of ss 91 and 92 together was that the applicant had "an evidentiary onus to prove that he was incorrectly convicted", and stated that the conviction could be used as evidence that he was convicted of the assaults on the respondent "subject to that fact being rebutted by him".

The primary judge held that the applicant had not pointed to any evidence to rebut the fact of his conviction, nor any evidence to rebut the factual matters the subject of the conviction. The primary judge, in effect, treated the convictions as matters of established fact, not open to contestation, and found the case was simply about "the assessment of damages following the admission of the fact of your conviction". In seeking leave to appeal, the applicant contended that the primary judge misconstrued and misapplied ss 91 and 92 of the Evidence Act, failed to ensure a fair trial, failed to accord procedural fairness, and conducted the case in a way that gave rise to apprehended bias.

**The Court held**, granting leave and allowing the appeal:

- The purpose of ss 91 and 92 was to alter the common law position in *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35. Section 91 already permits evidence of a conviction where it is to be used as proof of the fact of conviction. Section 92(2) of the Evidence Act has the wider effect of letting in evidence of a prior conviction to prove the existence of a fact that was in issue in the criminal proceeding. A respondent is permitted to challenge these facts: [30]-[31].
- The primary judge erroneously disallowed the applicant from contesting the facts underlying the conviction, and treated the fact of the convictions as foreclosing inquiry into the fact of the sexual assaults. Rather, the applicant was entitled to seek to displace that evidence. This line of inquiry was foreclosed before it could be ascertained whether the applicant had a factual basis for contesting the evidence. In these ways, the primary judge misconstrued s 92(2) of the Evidence Act: [60]-[62].

# Asia Pacific Decision of Interest

## Copyright

***Alalääkkölä v Palmer* [2024] NZCA 24**

**Decision date**: 21 February 2024

Collins, Katz and Mallon JJ

This case concerned the novel issue of the classification of copyright in artistic works created by one spouse during a relationship for the purposes of the *Property (Relations) Act 1976* (PRA).

Ms Alalääkkölä (the appellant) is an artist who created many original artworks during her 20-year marriage to Paul Palmer (the respondent). Many artworks were sold during the relationship; others were retained by the parties and are currently in the possession of the Family Court. This dispute turned on whether the copyrights in the artworks are relationship property or the appellant's property. In the Family Court, Grace J found that they were the appellant's property. On appeal in the High Court, Isaac J found the copyrights were relationship property. Three issues arose on appeal to the Court of Appeal. First, whether the Copyrights are "property" for the purposes of the PRA. Second, if deemed "property", should they be classified as relationship or separate property. Third, if deemed "property" how should they be allocated between the parties.

The Court held:

- In relation to artistic works, the "bundle of rights" that constituted the copyrights includes the exclusive right to copy the work, issue copies of it to the public, and communicate the work to the public. The "bundle of rights" phenomenon is not unique to copyright. None the rights contained within that buddle (considered in isolation) fall outside the definition of property (exclusive of "moral rights", which do not form part of the "bundle of rights"). The copyrights were therefore property for the purposes of the PRA: [20]-[29].
- The fact that the respondent was not (at the time of this appeal) the legal owner of the copyrights does not preclude them from being classified as "relationship property" under s 8(e) of the PRA. As evident from the statutory language, this term encompasses *all property* acquired by *either spouse* during the relationship: [66].
- Where possible, the division of relationship property under the PRA should reflect the unique and personal nature of copyright. It is therefore sound that the appellant, as the author and creative force behind the artworks, be able to continue to control the commercialisation of the copyrights. On that basis, the copyrights remained with the appellant, and compensatory adjustment was made for the respondent: [76]-[78].

# International Decision of Interest

## Contract: Remoteness

***Armstead v Royal & Sun Alliance Insurance Company*** **[2024] UKSC 6**

**Decision date:** 14 February 2024

Lord Briggs, Lord Leggatt, Lord Burrows, Lord Richards, Lady Simler SCJJ

This claim arose from a collision in which a hire car was damaged through the fault of the other driver. The main issue was whether the damages recoverable by the hirer from the other driver (or insurer) included, in addition to the cost of repair, a sum which the hirer agreed to pay the hire company for the company's loss of use of the car while it was unavailable for hire because it was off the road for repairs.

In the abstract, the question was whether, in circumstances where economic loss, comprising a contractual liability to pay a sum of money, has resulted from physical damage to property, is that loss recoverable as "pure economic loss", or is it too remote? Below, it was held that such loss was too remote.

The Court held, allowing the appeal:

- The test for remoteness in the tort of negligence, as laid down in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co, The Wagon Mound* [1961] AC 388, is that loss is too remote to be recoverable as damages if the type of loss suffered was not reasonably foreseeable at the time of the breach of duty. If reasonably foreseeable, the precise manner in which it was incurred need not be reasonably foreseeable (*Hughes v Lord Advocate* [1963] AC 837): [47](i).
- A reasonably foreseeable type of loss flowing from damage to a hire car is financial loss resulting from inability to use the car. Although the loss here suffered by the claimant was a matter of contractual liability, just as the loss of use to the claimant is reasonably foreseeable and not too remote, so is the contractual liability of the claimant to pay damages for loss of use to the hire company: [31]-[36], [47](ii).
- To fall within this reasonably foreseeable type of loss, it is necessary that the loss be a pre-estimate of the hire company's loss of use. There is nothing wrong in principle, in a case where actual loss may be difficult to calculate, in using an amount estimated in advance as the basis of the contractual liability (*Network Rail Infrastructure Ltd v Conarken Group Pty Ltd* [2011] EWCA Civ 644). To serve this purpose, the contractual liability must constitute a reasonable pre-estimate of the company's loss; failing this, it does not fall within the realm of reasonably foreseeability: [36], [47](iii), [52], [65]-[72].
- In these circumstances, the loss suffered on account of the contractual liability was not too remote so as to not be reasonably foreseeably, nor was the loss *not* a reasonable pre-estimate of the hire company's likely loss. On this latter point, specific consideration was limited as the respondent did not plead or adduce any evidence to show otherwise: [74].