NCAT
NSW Civil & Administrative Tribunal
legal bulletin

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The NCAT Legal Bulletin provides a summary of relevant and interesting case law of significance to the work of the NSW Civil and Administrative Tribunal.

In February 2015, NCAT launched its new look website with streamlined navigation and reorganised content, providing users with improved access and online service. Regular users are advised to update bookmarks for webpages and online services to ensure access to our services. Learn more about the recent website changes or complete the NCAT Website Feedback.

A uniform set of summons forms have been developed for use across all NCAT Divisions replacing the multiple divisional-specific summons forms inherited from the former tribunals. The new PDF-fillable forms are available to download from the NCAT website.

On 3 March 2015, the Hon Justice Robertson Wright, President of the Civil and Administrative Tribunal, gave a presentation about NCAT at the College of Law Litigation Breakfast Series. The President's presentation is available to read on the NCAT website.

High Court of Australia

Henderson v Queensland [2014] HCA 52

16 December 2014 – French CJ, Kiefel, Bell, Gageler and Keane JJ

Summary: On appeal from a decision of the Queensland Court of Appeal. The primary question was whether certain property could be excluded from forfeiture under the *Criminal Proceeds Confiscation Act 2002* (Q). The appellant was required to show that, on the balance of probabilities, the property in question (jewellery of his father that his great grandfather allegedly acquired from Russian royalty) was not the proceeds of illegal activity.

In dismissing the appeal the majority reiterated a number of propositions concerning **evidence and inferences** of which it is useful to be reminded, namely:

- the fact that a witness is disbelieved does not prove the opposite of that which is asserted – [2014] HCA 52 at [28];
- in some circumstances, an inference may be drawn from the fact that a witness told a false story that the truth would harm the witness's interests - [2014] HCA 52 at [28].

In this context it is also useful to remember that there is a difference between the mere rejection of a person's account of events and a finding that a person has lied. A lie is a deliberate untruth – *Edwards v The Queen* (1993) 178 CLR 193 at 208. Thus, to be satisfied

that a witness has lied it is usually necessary to be satisfied to the requisite standard not only that the witness's evidence was untrue but also that the witness gave that evidence knowing it to be untrue.

Gageler J (in dissent) also collected useful statements on the civil standard of proof at [87] to [91] including the principles that:

- all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted - [2014] HCA 52 at [91] and thus evidence given by a person with impaired memory must be assessed against that background – *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [36]; and
- members of our society do not ordinarily engage in fraudulent and criminal conduct and hence a finding that, on the balance of probabilities, a party has been guilty of such conduct should not be lightly made - [2014] HCA 52 at [91].

Link: Read the decision on the AustLII website.

Cassegrain v Gerard Cassegrain & Co Pty Ltd [2015] HCA 2

2 February 2015 – French CJ, Hayne, Bell, Gageler and Keane JJ

Summary: On appeal from a decision of the NSW Court of Appeal, the High Court held, by a 4-1 majority (Keane J dissenting), that fraud on the part of one joint tenant does not affect the indefeasibility of title granted by registration under the Torrens system of the other, innocent, joint tenant. In part the case turned on whether the fraudulent joint tenant was the agent of the other joint tenant because the fraudulent joint tenant had carried out tasks that were to the advantage of the other joint tenant.

French CJ, Hayne, Bell and Gageler JJ, in their joint judgment at [32] to [42], and Keane J at [102], rejected the Court of Appeal's finding that the fraudulent joint tenant was the agent of the other tenant. The High Court emphasised that **agency is determined by considering the "scope of authority and whether the agent's knowledge of the fraud is to be imputed to the principal"** – *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2 at [40]. As a consequence, it was held at [41] that:

> [41] … Concluding that Claude [the fraudulent joint tenant] had taken the steps necessary to procure registration of the transfer from the company to Felicity [the other joint tenant] and him as joint tenants showed no more than that Claude had performed tasks that were of advantage to Felicity. It was neither alleged nor found that Claude had acted as Felicity's agent in any other way, whether by negotiating the transaction with GC&Co or by representing that the price for the land could be met by debiting the loan account. So far as the evidence and argument went, Felicity was no more than the passive recipient of an interest in land which her husband had agreed to buy, but which he wanted (with her acquiescence) put into their joint names. [footnotes notes not included]

Link: Read the decision on the AustLII website.

Commissioner of the Australian Federal Police v Zhao [2015] HCA 5

12 February 2015 – French CJ, Hayne, Bell and Keane JJ

Summary: On appeal from the Victorian Court of Appeal. The unanimous judgment of the Court contains a reminder that the **principle of open justice** is not to be dismissed lightly:

> [44] The Commissioner suggests that protective orders could be made, which might maintain the confidentiality of evidence, and that evidence could be given in closed court. In the latter regard, the open court principle, to which the law adheres…, now finds expression in s 28 of the *Open Courts Act 2013* (Vic). The rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances. Closing the court so that the Commissioner might progress forfeiture proceedings and receive the second respondent's evidence does not qualify as a proper reason for departing from the principle

Link: Read the decision on the AustLII website.

NSW Court of Appeal

Barrak Corporation Pty Ltd v The Kara Group of Companies Pty Ltd [2014] NSWCA 395

19 November 2014 – Barrett JA and Adamson J, Sackville AJA

Summary: On the issue of the **solicitor on record being a witness in the proceedings**, the Court of Appeal noted the change in the Solicitors' Rules during the course of the hearings from rule 19, which read:

> Unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act or continue to act in any case in which it is known or becomes apparent that the practitioner will be required to give evidence material to the determination of the contested issues before the court.

to rule 27.2, which now reads:

> In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

In spite of change in the rule, Adamson J (with whom Barrett JA and Sackville AJA agreed) noted at [48] that there is no "change in the purpose of the provision, which is to protect the administration of justice by circumscribing the circumstances in which a solicitor who is, or may be, required to give evidence in proceedings is permitted to act." As such, in the present

case, the Court decided that a copy of the judgment be forwarded to the Legal Services Commissioner "for consideration of whether a complaint should be made in respect of [the solicitor's] conduct" (at [50]).

Link: Read the decision on the NSW Caselaw website.

DH MB Pty Ltd v Manning Motel Pty Ltd [2014] NSWCA 396

20 November 2014 – Meagher, Barrett and Gleeson JJA

Summary: The Court of Appeal considered the principles which are applicable to the **measure of damages for breach of a covenant to repair in a lease** and concluded that the tenant could recover the reasonable cost of alternative accommodation while the leased premises were unsafe at [31]. Meagher JA (with whom Barrett and Gleeson JJA agreed) held at [25] that:

> The ordinary measure of damages for breach of a covenant to repair is the difference in the value of the premises to the lessee in their present state of repair and what would have been their value to the lessee if the landlord had fulfilled its obligation to repair. That prima facie measure would put the lessee in the position it would have been in had the covenant been performed. The relevant principles are discussed by the English Court of Appeal in *Calabar Properties Ltd v Stitcher* [1984] 1 WLR 287. There, the tenant had to rent alternative accommodation after the premises became uninhabitable because of the landlord's beach of a covenant to repair. In relation to the tenant's counter claim for damages for breach of that covenant, Stephenson LJ observed at 291:
>
> *"It is true that while the defendant was not living in the flat because of the plaintiffs' breach of contract she was not getting anything for the rates etc. which were payable under the lease. But she had not terminated the lease and had to pay outgoings on some property, and I would regard the costs of the property which she rented as alternative accommodation for herself and her husband in the Isle of Man as prima facie the loss suffered by being kept out of her flat for the period of the plaintiffs' continuing breach of covenant, subject to the renting of that alternative accommodation being reasonable."*

Link: Read the decision on the NSW Caselaw website.

Day v Harness Racing New South Wales [2014] NSWCA 423

8 December 2014 – McColl, Macfarlan and Leeming JJA

Summary: Leeming JA (with McColl and Macfarlan JJA agreeing) discussed the principles relating to the **duty to accord procedural fairness** at [93] – [94] and [99]. The starting point is the principle in *Kioa v West* (1951) 159 CLR 550 at 584:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of

> administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention

However, Leeming JA noted two "updates" to the principle from *Kioa*. First is that "it is unproductive to consider whether that "common law duty" is to be seen as sourced in common law, or as a matter of "statutory construction" (at [94]), given the intertwined nature of the two sources of law. Second is that references to "legitimate expectations" should be refined in light of recent decisions such as in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, where it was found at [11] that:

> [I]t could now be taken as settled that when a statute confers power to destroy or prejudice a person's rights or interests, principles of natural justice regulate the exercise of that power

Lastly, his Honour reiterates the important principle at [99] that:

> The test for whether there is a duty to accord procedural fairness does not turn on its flexible content or "practical injustice". If a statutory power will prejudice or affect a particular person's right or interests, there is a duty to accord procedural fairness to that person unless it has been excluded by plain words of necessary intendment.

The content of that duty in a particular case turns on questions of practical injustice and the content may vary from case to case.

Link: Read the decision on the NSW Caselaw website.

Nikolaidis v Satouris [2014] NSWCA 448

19 December 2014 – Beazley P, Barrett and Ward JJA

Summary: The NSW Court of Appeal reiterated the principle that an **advocate is immune from civil suit for actions** even in cases of **statutory causes of action** (in the present case, under section 68 of the *Fair Trading Act 1987* (NSW) as it then stood). Barrett JA (with whom Beazley P and Ward JA agreed) held at [39]:

> The power to adjudicate that s 68 of the *Fair Trading Act* gives to a court of competent jurisdiction is a power to adjudicate in exercise of the court's judicial function and in accordance with the principles of just determination that are part and parcel of the operation of the judicial branch of government. Protection of the finality of litigation through recognition and effectuation of the advocate's immunity from suit is part of the operation of the judicial branch of government.

However, this does not involve immunity from disciplinary proceedings:

> [42] The immunity under discussion is immunity from civil suit. It is not immunity from liability as such. That, coupled with the fact that the immunity has its roots in public policy, means that it is not an absolute immunity. *Meadow v General Medical Council*

> [2006] EWCA Civ 1390, [2007] QB 462, a case concerning the allied immunity of witnesses, illustrates the way in which the similar public policy underpinning that immunity may yield to a competing public policy. It was there held that immunity from suit of an expert medical witness in relation to evidence given by him in legal proceedings did not extend to immunity from disciplinary or fitness to practise proceedings. Those proceedings have the purpose of protecting the public by ensuring that persons who are not fit to practise do not do so; and it was regarded as wrong in principle for the court to limit the powers of an inquiry into fitness to practice by extending the immunity from civil suit to such an inquiry.

Link: Read the decision on the NSW Caselaw website.

Mushroom Composters Pty Ltd v IS & DE Robertson Pty Ltd [2015] NSWCA 1

5 February 2015 – Macfarlan and Gleeson JJA, Sackville AJA

Summary: A question of whether there was a binding contract between the supplier of straw (the respondent) and the user, a mushroom composter (the appellant), was on appeal from the Supreme Court of NSW. The Court of Appeal allowed the appeal in part. The judgment of Sackville AJA (Macfarlan and Gleeson JJA agreeing) provides a useful summary of the principles on **formation of contract**:

> [59] First, in Australia the "objective" theory of contract has been accepted… in determining whether a binding contract has been concluded, the law is concerned not with the parties' subjective intentions… what matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe…
>
> [60] Secondly, it is not necessary… to identify a precise offer or acceptance; nor is it necessary to identify a precise time at which an offer or acceptance can be identified…The question to be asked are:
>
> *"in all the circumstances can an agreement be inferred? Has mutual assent been manifested? What would a reasonable person in the position of the [plaintiff] and a reasonable person in the position of the defendant think as to whether there was a concluded bargain?"*
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> *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; 53 NSWLR 153 at [81] (Heydon JA)
>
> [61] Thirdly, an agreement that is incomplete will not give rise to an enforceable contract…
>
> [62] An alleged contract will fail for incompleteness if, even though the parties have used clear language, a term which is regarded as essential as a matter of law has not been agreed…

> [63] If the parties have not agreed on all essential terms, for example because they have left one such term to be settled by future agreement, the contract is incomplete no matter what the parties themselves may think… Moreover, if the parties have not reached consensus on the essential terms of the contract, there will be no binding contract notwithstanding that one of the parties has commenced work referable to the agreement… Depending on the circumstances, non-contractual remedies, for example on restitutionary principles, may be available but the contract itself is incomplete and therefore unenforceable
>
> [64] Fourthly, for an agreement for the supply and sale of goods to constitute an enforceable contract, the parties must agree as to price, although they may leave the price to be determined by a third person or by an agreed mechanism. Thus, if a contract for the supply or sale of goods expressly provides for the price to be agreed between the parties, there is no concluded contract.

Link: Read the decision on the NSW Caselaw website.

Aquaqueen International Pty Ltd v Titan National Pty Ltd [2015] NSWCA 9

11 February 2015 – McColl JA

Summary: McColl JA reiterated the principles that apply to **decisions whether to grant a stay pending appeal**:

> [42] First, there is no automatic right to a stay of execution as, prima facie, the judgment appealed from is correct and the court should not deprive a party of the fruits of victory: *Network Ten Pty Ltd v Rowe* [2006] NSWCA 4.
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> [43] Secondly, the court is not constrained by the outcome of an application for a stay at first instance*: Alexander v Cambridge Credit Corporation Limited* (1985) 2 NSWLR 685 (at 692) ("*Alexander*").
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> [44] Thirdly, the overriding principle to apply when determining an application for a stay is to ask what the interests of justice require: *NSW Bar Association v Stevens* [2003] NSWCA 95 (at [83]) per Spigelman CJ.
>
> [45] Fourthly, it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour: *Alexander* (at 694). The onus is upon the applicant to demonstrate a proper basis for a stay that will be fair to all parties: *Alexander* (at 694).
>
> [46] Before a stay of a judgment pending appeal is granted it is necessary for the court to make a preliminary assessment about whether the appellant has an arguable case: *Alexander* (at 695). The applicant must show that there are serious questions for the

> determination of the appellate court: *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* [2002] NSWCA 383

Moreover, the McColl JA remarked at [48] that:

> it is not sufficient to order a stay that otherwise the appeal would be nugatory. The applicant for a stay must first demonstrate "that the appeal raises serious issues for the determination of the appellate court".

Link: Read the decision on the NSW Caselaw website.

NSW Civil and Administrative Tribunal (Appeal Panel)

The following are brief summaries of all of the decisions of the Appeal Panel of the New South Wales Civil and Administrative Tribunal published as at 12 February 2015. They are not intended to be a substitute for the reasons of the Appeal Panel or to be used in any later consideration of the Appeal Panel's reasons.

Balachandren v Wu [2015] NSWCATAP 1

The Appeal Panel dismissed an appeal in a residential tenancy matter regarding termination of tenancy for failure to pay rent. Holding that leave for appeal was required as no error of law arose, the Appeal Panel considered the principles applicable to the granting of such leave and refused to grant leave to appeal. Read the decision on the NSW Caselaw website.

Bourke v Robertson and Caffrey [2015] NSWCATAP 2

In the course of a residential tenancy matter, the Appeal Panel considered the circumstances in which an error of law arises, citing *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. Notwithstanding the fact that no error of law arose, the Appeal Panel extended the appeal to the merits, considering the issues of service of the termination of tenancy notice via email and payment of rent arrears in the intervening period. Read the decision on the NSW Caselaw website.

Wilair Building Supplies v Brereton [2015] NSWCATAP 3

In an appeal from a building dispute where the Tribunal at first instance ordered that compensation be paid for timber floorboards that were not of acceptable quality, the Appeal Panel dismissed the appeal, holding that there were no errors of law and no leave being granted to appeal on other grounds. In doing so, the Appeal Panel examined among other things when a decision would be so unreasonable as to involve an error of law. Read the decision on the NSW Caselaw website.

Stewart v Yarrawarra Aboriginal Corporation [2015] NSWCATAP 4

The Appeal Panel allowed an appeal in a social housing matter concerning the exercise of the Tribunal's discretion. In so doing, the Appeal Panel considered the following issues: failure to give adequate reasons, failure to accord procedural fairness, the application of the rule in *Jones v Dunkel*, misapplication of the *Civil and Administrative Tribunal Act 2013* (NSW) and taking into account irrelevant matters. Read the decision on the NSW Caselaw website.

Auchetti v Kirk [2015] NSWCATAP 6

In the course of an appeal in a dividing fence matter, the Appeal Panel considered the principles applicable to a leave to an application for appeal. It refused to grant leave and dismissed the appeal. Read the decision on the NSW Caselaw website.

Kandemir Investments Pty Ltd v Haefli [2015] NSWCATAP 7

In an application for extension of time to appeal for a motor vehicle matter, the Appeal Panel considered the applicable principles. The Appeal Panel extended time and found that there were errors of law regarding admissibility of evidence and in the calculation of damages in the decision at first instance, but the Panel also drew attention to the applicant's unnecessarily intemperate and colourful language in its application. Read the decision on the NSW Caselaw website.

White v Carlton Tow Bars Pty Ltd [2015] NSWCATAP 8

In the course of an appeal in a motor vehicle matter, the Appeal Panel considered the following issues: circumstances under which the failure to identify a cause of action will not result in an error of law; issues of evidence, including departures from NCAT Procedural Directions and significance for the purposes of granting of leave of credibility evidence; and mistakes of fact that do not lead to errors of law. Read the decision on NSW Caselaw.

Commissioner of Police v Joseph [2015] NSWCATAP 9

In granting an appeal in favour of the Commissioner of Police, who refused to grant a firearms dealer licence, the Appeal Panel considered the following issues: impact on relevance and admissibility of possibility of prejudice to applicant; the public interest discretion test in *Ward v Commissioner of Police, New South Wales Police Service* [2000] NSWADT 28; and errors in the determination of jurisdictional facts leading to errors of law. Leave was also granted to extend the appeal to the merits. Read the decision on NSW Caselaw.

Kimber v Gallop [2015] NSWCATAP 10

In the course of a residential tenancy appeal, the Appeal Panel considered the principles governing the right to quiet enjoyment of premises and investigated the claims for compensation not considered by the Tribunal at first instance. The Appeal Panel gave leave

for an extension of time in which to appeal but dismissed the appeal. Read the decision on NSW Caselaw.

Spuds Surf Chatswood Pty Ltd v PT Ltd (No 4) [2015] NSWCATAP 11

In an appeal on a retail lease matter, the Appeal Panel considered the following issues: the scope of remitted hearing, issue estoppels, remedies for unconscionable conduct and assessment of damages for lost profits under the *Retail Leases Act 1994* (NSW), and granting partial relief from liability for rent. Read the decision on NSW Caselaw.

Raslan v Pan [2015] NSWCATAP 12

The Appeal Panel was dealing with an appeal in a residential tenancy matter. The Appeal Panel considered the following issues: whether the lack of opportunity to cross-examine witnesses led to a denial of procedural fairness; whether the lack of opportunity to read and respond to documentary evidence led to a denial of procedural fairness; and the Tribunal's failure to consider extending time for a late application for orders. The application for leave to appeal and the appeal were both dismissed. Read the decision on NSW Caselaw.

Australian Barter Exchange Pty Ltd v Ma Victoria Cezina trading as Immia Cleaning Services [2015] NSWCATAP 13

In the course of an appeal from the Consumer and Commercial Division, the Appeal Panel considered the principles that apply for an application for extension of time in which to appeal and, having regard especially to the appellant's lack of prospects of success, refused to extend time. Read the decision on NSW Caselaw.

Alta Building and Developments Pty Ltd v McAllery [2015] NSWCATAP 14

In an appeal from a home building dispute, the Appeal Panel considered the implication of a term into the cost plus contract between the parties that the costs incurred by the builder would be reasonable and proper. The Appeal Panel then considered whether, on the facts, the implied term had been breached and allowed the appeal in respect of one breach. Read the decision on NSW Caselaw.

Day v Bari [2015] NSWCATAP 15

In dismissing an appeal in a residential tenancy matter, the Appeal Panel considered the principles relevant to an application for an extension of time. Read the decision on NSW Caselaw.