

**SHORT PARTICULARS OF CASES**  
**APPEALS**

**OCTOBER 2024**

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No.	Name of Matter	Page No
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Wednesday, 9 October 2024 and Thursday, 10 October 2024

- |    |  |          |
|----|--|----------|
| 1. | Pearson v Commonwealth of Australia & Ors;<br>JZQQ v Minister for Immigration, Citizenship and Multicultural<br>Affairs & Anor;<br>Tapiki v Minister for Immigration, Citizenship and Multicultural<br>Affairs | <b>1</b> |
|----|--|----------|

Friday, 11 October 2024

- |    |  |          |
|----|--|----------|
| 2. | Naaman v Jaken Properties Australia Pty Limited<br>ACN 123 423 432 & Ors | <b>6</b> |
|----|--|----------|

Tuesday, 15 October 2024

- |    |   |          |
|----|---|----------|
| 3. | Pafburn Pty Limited (ACN 003 485 505) & Anor v The Owners –<br>Strata Plan No 84674 | <b>8</b> |
|----|---|----------|

Wednesday, 16 October 2024

- |    |                                   |           |
|----|-----------------------------------|-----------|
| 4. | Elisha v Vision Australia Limited | <b>10</b> |
|----|-----------------------------------|-----------|

Thursday, 17 October 2024

- |    |  |           |
|----|--|-----------|
| 5. | Birketu Pty Ltd ACN 003 831 392 & Anor v Atanaskovic & Ors | <b>12</b> |
|----|--|-----------|

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**PEARSON v COMMONWEALTH OF AUSTRALIA & ORS**  
**(S126/2023)**

Date application for a constitutional or other writ filed: 10 October 2023

Date special case referred to Full Court: 7 March 2024

The plaintiff, Ms Katherine Pearson, is a citizen of New Zealand who was granted a temporary visa upon her arrival in Australia in June 2012. In February 2019, she was convicted of offences of supplying prohibited drugs, participation in a criminal group and dealing with the proceeds of crime, for which she was sentenced to an aggregate term of imprisonment of 4 years and 3 months, with a non-parole period of 2 years.

In July 2019, a delegate of the Minister for Home Affairs (“the Minister”) cancelled Ms Pearson’s visa (“the cancellation decision”) under section 501(3A) of the *Migration Act 1958* (Cth) (“the Migration Act”), the delegate not being satisfied that Ms Pearson passed “the character test” under s 501(6)(a), in view of Ms Pearson having a substantial criminal record on account of her having been sentenced to a term of imprisonment for 12 months or more (a basis prescribed in s 501(7)(c)). In June 2020, another delegate of the Minister decided not to revoke the cancellation decision (“the non-revocation decision”), there not being “another reason” (under s 501CA(4)(b)(ii) of the Migration Act) to revoke the cancellation, and on the basis that Ms Pearson did not pass the character test as prescribed in s 501. Ms Pearson then applied to the Administrative Appeals Tribunal (“the AAT”) for a review of the non-revocation decision. In September 2020, the AAT, in an exercise of power conferred by s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“the AAT Act”), affirmed the non-revocation decision (“the AAT decision”).

After an unsuccessful application to the Federal Court for judicial review of the AAT decision and an unsuccessful appeal to the Full Court of the Federal Court, in October 2022 Ms Pearson again applied to the Federal Court, challenging the AAT decision on new grounds. In reasons delivered on 22 December 2022, the Full Court of the Federal Court (Allsop CJ, Rangiah and Sarah C Derrington JJ) unanimously held that an aggregate sentence such as that imposed on Ms Pearson was not “a term of imprisonment for 12 months or more” within the meaning of that prescription in s 501 of the Migration Act. On 24 January 2023, the Full Court quashed both the AAT decision and the cancellation decision, and declared that those decisions and the non-revocation decision were all invalid. This Court subsequently refused an application for special leave to appeal from the decision of the Full Court of the Federal Court.

On 17 February 2023, the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) (“the Amendment Act”) commenced. Item 4 of Schedule 1 to the Amendment Act provides, *inter alia*, that a thing purportedly done under the Migration Act that would have been invalid only because a sentence taken into account was imposed in respect of two or more offences, is taken to have always been valid, including a thing purportedly done before the commencement of the Amendment Act. Item 2 of Sch 1 defines “do[ing] a thing” to include making a decision, exercising a power, performing a function, and doing anything else.

After being taken into immigration detention, Ms Pearson commenced proceedings in this Court, challenging the validity of the Amendment Act and seeking to prevent the Commonwealth and the Minister from taking any steps based on the cancellation decision. The parties subsequently filed a special case, stating the following questions of law, which Justice Jagot referred for consideration by the Full Court:

1. On their proper construction, do sub-items 4(3), (4), and (5)(b)(i) of Part 2 of Schedule 1 to the Amendment Act, as applied by s 3 of that Act, validate the decision of the AAT to affirm the non-revocation decision?
2. Are sub-items 4(3), (4), and (5)(b)(i) of Part 2 of Schedule 1 to the Amendment Act, as applied by s 3 of that Act, invalid in their operation in respect of the cancellation decision, the non-revocation decision and the AAT's decision, on the ground that they purport to impermissibly usurp or interfere with the exercise of the judicial power of the Commonwealth?
3. What, if any, relief should be granted to the plaintiff?
4. Who should pay the costs of the special case?

Ms Pearson submits that the relevant provisions of the Amendment Act do not apply to the AAT decision, as that decision was made under the AAT Act, rather than under the Migration Act. Even if it can be said that the AAT "did a thing" under the Migration Act by carrying out a review in an exercise of jurisdiction conferred by s 500(1) of the Migration Act, the focus should be on the AAT decision, which was made under s 3 of the AAT Act. Ms Pearson (adopting submissions made by the appellant in the appeal P10/2024) also submits that Parliament cannot via the Amendment Act deem the AAT decision and the cancellation decision always to have been valid. Upon their quashing by the Federal Court, the decisions no longer existed. It was not possible for Parliament to revive them by legislating, in effect, to set aside the Federal Court's orders. This is in view of the separation of powers evinced by Chapter III of the *Constitution*.

The Commonwealth and the Minister submit that the Amendment Act applies to the AAT decision, as the AAT had jurisdiction to conduct a review by virtue of s 500 of the Migration Act (in tandem with the AAT Act) and the AAT therefore was performing a function, or at least was doing something else, under the Migration Act. The Commonwealth and the Minister also submit that item 4 of the Amendment Act did not interfere with the orders made by the Federal Court. Rather, it permissibly altered the law retrospectively so that the legal position was different to that which was declared by the Federal Court. The things done by the AAT and the delegate in the making of their respective decisions were historical facts that were given new legal consequences by the operation of the Amendment Act.

A notice of a constitutional matter has been filed by Ms Pearson. The Attorneys-General of Queensland, Western Australia and the Northern Territory are intervening in the proceeding.

**TAPIKI v MINISTER FOR IMMIGRATION, CITIZENSHIP AND  
MULTICULTURAL AFFAIRS (P10/2024);  
JZQQ v MINISTER FOR IMMIGRATION, CITIZENSHIP AND  
MULTICULTURAL AFFAIRS & ANOR (B15/2024)**

Court appealed from: Full Court of the Federal Court of Australia  
[2023] FCAFC 167 (Tapiki)  
[2023] FCAFC 168 (JZQQ)

Date of judgments: 19 October 2023

Special leave granted: 7 March 2024

Mr Kingston Tapiki is a New Zealand national born in 1993 who has lived in Australia since he was 18 months old. In September 2020, he was convicted of offences of affray and assault, and was given an aggregate sentence of 12 months' imprisonment.

JZQQ was born in Somalia in 1974. After fleeing civil war in that country, he was granted refugee status in New Zealand. In 2011 he moved to Australia. In September 2021, JZQQ was sentenced to an aggregate term of imprisonment for 15 months, for offences of intentionally causing injury and making threats to kill.

The respective visas held by JZQQ and Mr Tapiki (together, "the Appellants") were cancelled mandatorily by delegates of the First Respondent ("the Minister") under section 501(3A) of the *Migration Act 1958* (Cth) ("the Migration Act"), each delegate not being satisfied that the visa holder passed "the character test" because the holder had been sentenced to "a term of imprisonment of 12 months or more", as prescribed in s 501(7)(c). The Appellants each subsequently received a decision by a delegate not to revoke their visa cancellation, and the Administrative Appeals Tribunal ("the AAT") later affirmed each non-revocation decision.

The Federal Court dismissed an application by Mr Tapiki for judicial review of the AAT's decision in respect of him. After commencing an appeal, Mr Tapiki also commenced proceedings for judicial review of his visa cancellation decision. Both proceedings, heard together before the Full Court of the Federal Court, succeeded on the ground that the aggregate sentence imposed on Mr Tapiki was not "a term of imprisonment for a term of 12 months or more" within the meaning of s 501(3A) of the Migration Act. This was in view of the recent decision of the Full Court (differently constituted) in *Pearson v Minister for Home Affairs* [2022] FCAFC 203, delivered on 22 December 2022. On 14 February 2023, the Full Court quashed the AAT decision and declared invalid the decision to cancel Mr Tapiki's visa.

JZQQ separately applied, somewhat later than Mr Tapiki, to the Federal Court for judicial review of the AAT decision that affirmed non-revocation in his case, raising the same ground as to aggregate sentence on which Mr Tapiki had succeeded.

On 17 February 2023, the *Migration Amendment (Aggregate Sentences) Act 2023* (Cth) ("the Amendment Act") commenced. Item 4 of Schedule 1 to the Amendment Act purported to validate decisions, functions and other things done under the Migration Act that would have been invalid because a relevant sentence had been imposed for two or more offences.

In March 2023, Mr Tapiki was placed in immigration detention, on the basis that the Amendment Act had the effect of validating the decision to cancel his visa. Mr Tapiki then commenced fresh Federal Court proceedings, challenging the Amendment Act's validity insofar as it applied to him. His application and JZQQ's were heard and determined consecutively.

On 19 October 2023, the Full Court of the Federal Court (Katzmann, Sarah C Derrington and Kennett JJ) unanimously dismissed both applications. Their Honours held that the Amending Act applied to the AAT decision in respect of JZQQ, because although the AAT exercised decision-making power under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), its jurisdiction to conduct the review was conferred by s 500(1) of the Migration Act, and the AAT therefore had done something under the Migration Act. The Full Court held that item 4 of the Amending Act did not interfere with the exercise of Commonwealth judicial power inconsistently with Chapter III of the *Constitution*, even though it altered JZQQ's substantive rights while they were the subject of pending proceedings for judicial review. Their Honours also held that, although item 4 might effectively acquire property by operating to extinguish rights to sue for false imprisonment, it did not infringe s 51(xxxi) of the *Constitution* by doing so other than on just terms. This was because the Amending Act amended the Migration Act and, by the application of s 11B of the *Acts Interpretation Act 1901* (Cth), s 3B of the Migration Act applied. Section 3B provided just terms by requiring the Commonwealth to pay reasonable compensation for any acquisition of property resulting from the Migration Act.

Mr Tapiki's grounds of appeal are:

- The Full Court erred in not finding that items 4(3), 4(4) and 4(5)(b)(i) of Part 2 of Sch 1 to the Amendment Act are, in their application to Mr Tapiki, an invalid usurpation or interference with the judicial power of the Commonwealth by reversing or dissolving the effect of orders made by a Chapter III court.
- The Full Court erred in not finding that item 4 of Part 2 of Sch 1 to the Amendment Act, in its application to Mr Tapiki, effectuated an acquisition of property other than on just terms contrary to s 51(xxxi) of the *Constitution*.

JZQQ's sole ground of appeal is:

- The Full Court erred in failing to find that the AAT erred jurisdictionally in not being satisfied that JZQQ passed the 'character test' for the reasons explained in *Pearson v Minister for Home Affairs* [2022] FCAFC 203, [40]-49], which reasons governed JZQQ's case notwithstanding the Amendment Act because that Act did not apply to JZQQ or was invalid insofar as it purported to apply to JZQQ.

The Minister has filed a notice of contention in JZQQ's appeal, raising the following ground:

- The Full Court ought to have dismissed ground 5 of JZQQ's application on the basis that:
  1. JZQQ's aggregate sentence of 15 months' imprisonment is a "term of imprisonment of 12 months or more" within the meaning of s 501(7)(c) of the Migration Act; and

2. The AAT therefore did not err jurisdictionally in not being satisfied that JZQQ passed the character test in s 501(6) of the Migration Act.

The Appellants have each filed a notice of a constitutional matter. The Attorneys-General of the Commonwealth, Queensland, Western Australia and the Northern Territory are intervening in both appeals.

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**NAAMAN v JAKEN PROPERTIES AUSTRALIA PTY LIMITED**  
**ACN 123 423 432 & ORS (S26/2024)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCA 214;  
[2023] NSWCA 254

Date of judgment: 8 September 2023;  
26 October 2023

Special leave granted: 8 February 2024;  
9 May 2024

This appeal concerns a claim by a secured creditor of a former trustee seeking to enforce a judgment debt, in circumstances where the trust is unlikely to have sufficient trust assets to satisfy the debt. The first respondent (“Jaken”) is the successor trustee of the Sly Fox Family Trust (“the Trust”) and replaced the former trustee, Jaken Property Group Pty Ltd (“JPG”), now in liquidation and not a party to the proceeding. The second to seventh respondents are persons and companies associated with Jaken. Mr Anthony Naaman is a judgment creditor of JPG in the amount of over \$3.4 million. At all material times, the Trust assets have been subject to mortgages, with the main asset being the O’Malley’s Hotel in Kings Cross and other assets being properties in Granville and Victoria.

On 8 February 2024, Mr Naaman was granted special leave to appeal from the first judgment of the Court of Appeal given on 8 September 2023, which allowed an interlocutory appeal in part from the primary judge. On 9 May 2024, Mr Naaman was granted special leave to appeal from a second judgment of the Court of Appeal given on 26 October 2023 (concerning the making of consequential orders), with the appeal proceeding as a consolidation of both grants of special leave to appeal.

There is protracted history to this dispute. Mr Naaman commenced proceedings against JPG as trustee of the Trust in November 2006, seeking damages of \$2 million. In February 2007, Jaken replaced JPG as trustee by way of a Deed of Appointment and Retirement of Trustee of Discretionary Trust (“the Deed”), and JPG’s legal interest in the Trust assets passed to Jaken as the successor trustee. JPG was promised an indemnity from Jaken as the successor trustee in terms contained in the Deed. JPG was subsequently wound up, resulting in a stay of Mr Naaman’s damages claim against it.

The issue at hand is whether a successor trustee owes a fiduciary obligation to a former trustee in respect of the proprietary interest in the trust assets conferred by the former trustee’s right of exoneration. This question involves the proper characterisation of the relationship between a former and successor trustee, and whether any equitable proprietary interest subsists upon the retirement of a trustee such that a successor trustee holds the property in equity for the former trustee.

Mr Naaman claims that JPG transferred its proprietary interests in circumstances where Jaken was aware of the claims Mr Naaman was making against JPG, and where JPG had a right to be indemnified out of the Trust assets in respect of those claims. Mr Naaman alleges that unknown to himself, JPG or its liquidators,

Jaken was whittling away the Trust assets to non bona fide purchasers in an attempt to strip itself of the assets that might otherwise be available to the judgment debt in favour of Mr Naaman, by way of a creditor's right of subrogation to a former trustee's right of indemnity out of the Trust assets. The respondents contend that Mr Naaman is inviting the superimposition of a fiduciary duty upon a contract, that is one made between the former trustee and a successor trustee of a discretionary trust. Instead, the respondents submit that the relationship between Jaken and JPG is that of an equitable chargor and equitable chargee, and an equitable charge or lien is a security interest, not a trust. There is authority<sup>1</sup> that sets out the available proprietary (as opposed to personal) remedies to JPG, to which Mr Naaman is subrogated.

The primary judge (Kunc J) held that the relationship between Jaken and JPG was a fiduciary relationship, and accepted Mr Naaman's submissions that Jaken engaged in a dishonest and fraudulent design in breach of its fiduciary duties owed by Jaken to the former trustee, JPG, to dissipate the Trust assets to put them beyond the reach of JPG. Kunc J found that each of the other respondents knowingly received trust assets or were knowingly involved in Jaken's dishonest and fraudulent design in breach of fiduciary duty, and were liable for equitable compensation (with the question of quantum reserved for further consideration). Jaken appealed to the Court of Appeal who, by a majority decision (Leeming and Kirk JA, Bell CJ dissenting), concluded that Jaken did not owe a fiduciary obligation to JPG. The Court of Appeal granted leave to appeal and allowed the appeal in part, resulting in Mr Naaman's appeal to this Court.

The sole ground of appeal is that:

- The Court of Appeal erred in concluding that Jaken as successor trustee did not owe a fiduciary duty to the former trustee not to deal with trust assets so as to destroy, diminish or jeopardise the former trustee's right of indemnity or exoneration from those assets.

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<sup>1</sup> *Associated Allowes Pty Ltd v CAN 001 452 106 Pty Ltd* (2002) CLR 588; [2000] HCA 25.



**PAFBURN PTY LIMITED (ACN 003 485 505) & ANOR v  
THE OWNERS – STRATA PLAN NO 84674 (S54/2024)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCA 301

Date of judgment: 13 December 2023

Special leave granted: 11 April 2024

The first and second appellants are the builder (“Pafburn”) and developer (“Madarina”), respectively, of a high-rise apartment building comprising 19 units located at 197 Walker Street in North Sydney (“the Building”). The respondent is an owners corporation. The Building is the subject of a residential strata scheme under the *Strata Schemes Management Act 2015* (NSW). The duty of care provided under the *Design and Building Practitioners Act 2020* (NSW) (“the DBPA”) is a duty that now extends to subsequent owners of the land, including an owners corporation where the building is a strata development. This is a case concerning the statutory interpretation of the DBPA alongside the *Civil Liability Act 2002* (NSW) (“the CLA”) in a construction context where there are alleged concurrent wrongdoers.

In 2008, Madarina retained Pafburn to design and construct the Building. A Final Occupation Certificate was issued for the Building in December 2010. Ten years later in December 2020, the owners corporation commenced proceedings against Pafburn, claiming damages for breach of duty of care imposed by section 37 of the DBPA for alleged defective construction work in the common property of the Building. By its defence, Pafburn nominated nine independent contractors as alleged “concurrent wrongdoers” and relied on Part 4 of the CLA which, if applicable, will have the consequence of excluding from the builder’s liability for damages any damage for which a concurrent wrongdoer is responsible, whether joined as a defendant or not. The owners corporation sought to strike out Pafburn’s proportionate liability defence on the basis that Part 4 of the CLA did not apply to the duty owed to it by Pafburn, because the duty was non-delegable. The primary judge (Rees J) found that the proportionate liability defences under Part 4 of the CLA were available to Pafburn and Madarina, and that s 5Q of the CLA did not apply in this situation because a defendant’s duty under s 37 of the DBPA is non-delegable by reason of a statute, rather than by reason of a defendant’s duty falling within any recognised general law category of non-delegable duty.

Section 5Q of the CLA provides that:

*“The extent of liability in tort of a person for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task”.*

Rees J dismissed the owners corporation claim and the owners corporation sought leave to appeal to the Court of Appeal.

The Court of Appeal considered whether: a) the non-delegable duty created by s 37 of the DBPA is a “tort” for the purposes of s 5Q of the CLA; and b) the proportionate liability provisions in Part 4 of the CLA apply. The Court of Appeal found in favour of the owners corporation, granting leave to appeal and allowing the appeal. Pafburn and Madarina now appeal to this Court on the basis that the Court of Appeal erred in their findings that s 5Q applied to the duty created in s 37 of the DBPA; and by concluding that Part 4 of the DBPA excludes by necessary implication Part 4 of the CLA in respect of a claim under Part 4 of the DBPA.

The question before this Court remains whether, and how, a damages claim under Part 4 of the DBPA is an apportionable claim under Part 4 of the CLA. The position taken by Pafburn and Madarina is that Part 4 of the DBPA specifically sought to overturn the effect of the decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, where this Court held that the head builder of strata titled serviced apartments owed a duty of care to the owner and developer, but not to subsequent owners, absent special cases of vulnerability. They submit that the Court of Appeal judgment incorrectly provides for the application of solidary liability rather than proportionate liability (under Part 4 of the DBPA) and in consequence, persons who owe the statutory duty of care under s 37 of the DBPA are required to bring cross-claims against any other concurrent wrongdoers for contribution. The owners corporation submits that the interpretation of the legislation taken by Pafburn and Madarina is incorrect and inconsistent with the purposes of Part 4 of the DBPA, which was law reform enacted to meet the purpose of the decision in *Brookfield*.

The grounds of appeal are:

- The Court of Appeal erred in concluding that s 5Q of the CLA is enlivened by a cause of action brought under Part 4 of the DBPA;
- The Court of Appeal erred in concluding that s 39 of the DBPA excluded, by necessary implication, the application of Part 4 of the CLA to claims under Part 4 of the DBPA;
- The Court of Appeal ought to have held that the cause of action under Part 4 of the DBPA was subject to Part 4 of the CLA;
- Alternatively, if s 5Q of the CLA is enlivened by a cause of action under Part 4 of the DBPA, the Court of Appeal erred in concluding that no apportionment is to occur; and
- The Court of Appeal should have held that apportionment remains available where there exists, amongst the concurrent wrongdoers in respect of a defect, persons to whom the defendant did not delegate or otherwise entrust work or a task.

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## **ELISHA v VISION AUSTRALIA LTD (M22/2024)**

Court appealed from: Supreme Court of Victoria Court of Appeal  
[2023] VSCA 288

Date of judgment: 28 November 2023

Special leave granted: 7 March 2024

The appellant was employed by the respondent in 2006 as an adaptive technology consultant. His work involved setting up software and hardware systems for vision impaired clients, visiting their homes and workplaces throughout Victoria and interstate. His employment contract provided that the employment would be governed by *inter alia* an industrial award, as well as regulatory requirements and certain of the respondent employer's policies and procedures. His employment was terminated in May 2015 by reason of alleged serious misconduct.

The alleged conduct was said to be constituted by the appellant's "aggressive and intimidating" behaviour towards one of the proprietors of a hotel he was staying in during a work trip in March 2015. The alleged conduct was discovered by two other employees of the respondent when they stayed at the same hotel in May 2015 and became apprised of the hotel proprietor's account of her interaction with the appellant in March. The employees reported the hotel proprietor's complaint to their manager, and the matter was escalated to the respondent's human resources team. Following his return to work from leave in May 2015, the appellant was asked to attend a series of meetings relating to the allegation of serious misconduct and to provide a response to the allegation. The appellant vigorously denied the conduct alleged. Following an internal investigation of the allegation the appellant's employment was terminated. An allegation that the appellant had a history of aggression and excuse making which formed part of the reason for his termination was not put to the appellant during the course of the investigation.

The appellant subsequently sued for damages in the Supreme Court of Victoria, claiming that he suffered injury, which included a major depressive disorder, loss, and damage as a result of the respondent's implementation of processes leading to, and resulting in, the termination of his employment. He claimed in contract, alleging that the respondent had breached due process provisions of the organisation's enterprise agreement and disciplinary procedures. In the alternative, the appellant claimed in negligence, asserting that the respondent's duty of care extended to discipline and termination procedures.

The trial judge (O'Meara J) found that the respondent had breached the appellant's contract and was liable to pay damages in the sum of \$1,442,404.50 by reason of that breach. The trial judge rejected the claim based in negligence, finding that the respondent did not owe the extended duty of care to the appellant.

The respondent successfully appealed the decision of the trial judge. The Court of Appeal unanimously held that the trial judge had erred in awarding the damages for breach of contract. The Court affirmed the finding that the employment contract relevantly incorporated certain of the respondent's policies and procedures – including as to due process in disciplinary and termination procedures – and that the respondent breached them. However, the Court held that the damages for psychiatric injury were unavailable for a breach as to the mode of dismissal and because they were too remote. On the question of negligence, the Court upheld

the determination of the trial judge that the respondent did not owe the appellant a duty of care “in respect of the process by which his employment came to be terminated”. This was because the common law did not recognise the duty asserted by the appellant.

The grounds of appeal are:

1. The Court of Appeal erred in concluding that the respondent did not owe a duty to take reasonable care to avoid injury to the appellant in its implementation of the processes leading to and resulting in the termination of his employment.
2. The Court of Appeal erred in concluding that damages for psychiatric injury suffered by the appellant were not recoverable for breach of contract.

The respondent has filed a Notice of Contention raising the following grounds:

1. The 2015 Disciplinary Procedure was not a term of the 2006 Contract.
2. If it did exist, the duty of care was not engaged because the risk of recognised psychiatric injury was not foreseeable.
3. If it did exist and was engaged, the duty of care was not breached.

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**BIRKETU PTY LTD ACN 003 831 392 & ANOR v ATANASKOVIC  
& ORS (S52/2024)**

Court appealed from: Court of Appeal of the Supreme Court of  
New South Wales  
[2023] NSWCA 312

Date of judgment: 15 December 2023

Special leave granted: 11 April 2024

Atanaskovic Hartnell is an unincorporated law firm. In August 2019, its six partners obtained a Supreme Court judgment in their favour on a claim against Birketu Pty Ltd (“Birketu”) and WIN Corporation Pty Ltd (together, “the Appellants”). Subsequently, Birketu was ordered to pay the partners’ costs. In the proceedings, the solicitor on the record for the firm’s partners, Mr John Atanaskovic, was himself one of the partners.

In an application for an assessment of their costs, the partners claimed costs for work done by their employed solicitors (although not for work done by any of the partners themselves). The Appellants sought a determination by the costs assessor that the partners were not entitled to recover the costs of work carried out by their employed solicitors. This was on the basis of the principle that lawyers acting for themselves in legal proceedings cannot recover the costs of their own work. After the costs assessor declined to make such a determination, the Appellants commenced proceedings against him, Mr Atanaskovic, and the firm’s only other partner at the time, Mr Lawson Jepps (the latter two together, “the Partners”).

On 26 October 2022, Brereton JA declared that the Partners were not entitled to recover costs for work done by their employed solicitors. His Honour considered that to permit solicitor litigants to recover the costs of work done by their employees would preserve the appearance of solicitors being in a privileged position as self-represented litigants.

An appeal by the Partners was allowed by the Court of Appeal (Kirk JA and Simpson AJA; Ward P dissenting). The majority found that the resolution of the appeal turned on the meaning of “costs” in section 98(1) of the *Civil Procedure Act 2005* (NSW) (“the CPA”) and, crucially, in the definition of “costs” in s 3 of the CPA, such definition providing that the term “... includes fees, disbursements, expenses and remuneration.” Although the Partners were not billed by their employed lawyers, they paid remuneration to those lawyers, and the CPA expressly included remuneration among the costs payable in relation to proceedings. The recovery of costs of work done by employed lawyers was consistent with the indemnity principle and there was no basis for unincorporated law firms to be excluded as a special category.

Ward P, however, considered that the work done by employed solicitors was effectively the work of the law firm constituted by its partners. There was a lack of necessary professional detachment, as the employed solicitors were supervised by partners who had a direct personal interest in the outcome of the litigation and its costs implications.

The grounds of appeal include:

- The Court of Appeal erred in finding that the Partners were able to recover the costs of the employed solicitors of the Partners' unincorporated law firm in proceedings in which they were self-represented solicitor litigants by their unincorporated law firm, contrary to the general rule of law that a self-represented solicitor litigant may not obtain any recompense for the value of his or her time and labour spent in litigation including the costs of employed solicitors.
- The Court of Appeal erred in finding that s 98(1) of the CPA and the definition of costs in s 3(1) of the CPA authorised the recovery of the costs of the employed solicitors of the Partners' unincorporated law firm in proceedings in which they were self-represented solicitor litigants contrary to the general rule that a self-represented solicitor litigant may not obtain any recompense for the value of his or her time and labour spent in litigation including the costs of employed solicitors.