Decisions of interest

29 May 2017 – 9 June 2017

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

1. **EQUITY: rectification**

***SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132**

Decision date: 9 June 2017

SAMM Property contracted to purchase land from Shaye Properties. After exchange and prior to completion, a dispute arose as to whether the purchase price was inclusive of GST. Shaye Properties sought rectification of the contract on the basis that the parties' common intention at the time of executing the contract was that the purchase price was exclusive of GST.

The issue on appeal was whether the primary judge was correct to order rectification of the contract. This raised a question:

- whether there was a continuing common intention as to the exclusion of GST from the purchase price; and
- whether SAMM Property was liable to pay interest on the unpaid balance of the purchase price pursuant to cl 41 of the contract.

Held:

- It is the subjective or actual intention of the parties, rather than the objective intention, that is relevant to rectification: [111]-[115].
- The parties' common intention must be proved to a high standard, by clear and convincing proof. Nevertheless, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. The primary judge did not err in so finding: [116]-[119].
- When rectification is granted, the contract is to be read as if it had originally been executed in its rectified form. Here, interest was payable on the purchase price by virtue of the agreement between the parties: [170].

High Court Cases considered:

Simic v New South Wales Land and Housing Corporation [2016] HCA 47; (2016) 91 ALJR 108

New South Wales Court of Appeal cases considered:

Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603; [2007] NSWCA 65

Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603; [2009] NSWCA 407

Newey v Westpac Banking Corporation [2014] NSWCA 319

2. **COSTS: jurisdiction of costs assessor; *Chorley* exception**

***Coshott v Spencer* [2017] NSWCA 118**

Decision date: 31 May 2017

Mr Spencer is a solicitor who provided legal services to Mr Coshott's brother, his brother's wife and a company in respect of proceedings in the Federal Court. Mr Coshott was not a party to the proceedings. The clients and Mr Coshott brought an application for assessment of the costs claimed by Mr Spencer's firm. The costs assessor dismissed Mr Coshott's application on the basis that he was not a "third party payer" within the meaning of the (now repealed) *Legal Profession Act 2004* (NSW).

Mr Coshott unsuccessfully appealed to the District Court. In respect of the costs of the appeal, the costs assessor allowed Mr Spencer professional costs in acting as a legal representative for himself.

The main issues on appeal were:

- whether the costs assessor had jurisdiction to determine whether Mr Coshott was a "third party payer"; and
- whether the "*Chorley* exception" to the rule that a self-represented litigant is not entitled to professional costs applies in New South Wales.

Held:

- A costs assessor undertaking an assessment under the (now repealed) *Legal Profession Act* has jurisdiction to determine whether a party is a "third party payer": [51]-[53].
- The *Chorley* exception continues to apply in New South Wales: [102]-[107].

High Court Cases considered:

Guss v Veenhuizen (No 2) (1976) 136 CLR 47; [1976] HCA 57

New South Wales Court of Appeal cases considered:

Atlas Corporation Pty Ltd v Kalyk [2001] NSWCA 10

Khera v Jones [2006] NSWCA 85

Wang v Farkas (2014) 85 NSWLR 390; [2014] NSWCA 29

Wentworth v Rogers (2006) 66 NSWLR 474; [2006] NSWCA 145

3. **TORTS: negligence; new point raised on appeal; causation**

Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network **[2017] NSWCA 123**

Decision date: 31 May 2017

On 31 October 2008 and 4 November 2008, Mr Smith attempted to commit suicide. He was diagnosed as mentally disordered and detained as an involuntary patient at Liverpool Hospital and then Campbelltown Hospital. On 13 November, Mr Smith was allowed to go on leave until 17 November. On 16 November, he attempted to commit suicide a third time. He is now wheelchair bound and has extensive care needs.

The issue on appeal was whether South Western Sydney Local Health Network had breached its duty of care to Mr Smith by failing to give his parents clear instructions, including in relation to alcohol and other stressors, before allowing Mr Smith to go on leave. This raised a question:

- whether, on appeal, Mr Smith could rely on a reformulated duty of care;
- whether Mr Smith had proved causation; and
- whether the primary judge erred in rejecting the evidence of Mr Smith's mother about what she would have done if she had been properly advised by the respondent.

Held:

- Mr Smith had not demonstrated that it was expedient or in the interests of justice or that there were exceptional circumstances justifying the Court of Appeal entertaining a reformulated duty of care on appeal: [91]-[92].
- It was open to the primary judge to conclude that there was no causal connection between Mr Smith's suicide attempt and his consumption of alcohol or communication with his ex-fiancée: [139], [150].
- The primary judge was best positioned to evaluate the matters which impacted on the weight to be given to Mr Smith's mother's evidence of her hypothetical actions. His Honour was entitled to reject that part of her evidence on the grounds of hindsight bias: [179]-[183].

High Court Cases considered:

Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5

Whisprun Pty Ltd v Dixon (2003) 77 ALJR 1598; [2003] HCA 48

New South Wales Court of Appeal cases considered:

State of New South Wales v Mikhael [2012] NSWCA 338

4. **EQUITY: fraud; whether allegation adequately pleaded; partial rescission**

Nadinic v Drinkwater **[2017] NSWCA 114**

Decision date: 30 May 2017

Ms Drinkwater and Mr Nadinic were the two natural persons involved in the development of land owned by Ms Drinkwater. They fell out, and executed a Deed of Settlement. The developer company and the builder were also parties to the Deed of Settlement.

At trial, the primary judge partially set aside the Mortgage and the Deed of Settlement as it operated between Ms Drinkwater and Mr Nadinic. His Honour found that Mr Nadinic had participated in a dishonest scheme to manipulate the GST system, and had deliberately concealed this scheme from Ms Drinkwater.

The main issues on appeal were:

- whether fraud was adequately pleaded or put to Mr Nadinic; and
- whether the primary judge erred in ordering partial rescission of the Deed.

Held:

- An allegation of fraud (in the strong sense of deliberate falsehood or reckless indifference to the truth) is required to be pleaded specifically and particularised: at [45], [152]-[156]. This was not done in this case.
- Where an allegation of fraud has not been adequately pleaded or put to the party, the court cannot make findings of fraud consistent with, but going beyond, a pleaded case of misleading and deceptive conduct or innocent or negligent misrepresentation: at [105]-[117].
- The aphorism "fraud unravels everything" is not universally true and it is dangerous to apply it literally. The question is whether, by the orders available to a court of equity, "practical justice" can be achieved so as to authorise the rescission of the contract and restore the parties to the position they previously enjoyed: at [37]-[44], [137]-[142].

High Court Cases considered:

Forrest v Australian Securities and Investments Commission (2012) 247 CLR 486; [2012] HCA 39

Banque Commerciale SA en liquidation v Akhil Holdings Ltd (1990) 169 CLR 279

SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189; [2007] HCA 35

Other Australian intermediate appellate decisions of interest

5. DEFAMATION: whether jury finding perverse; *Jameel* principle

***Watney v Kencian & Anor* [2017] QCA 116**

Decision date: 6 June 2017

Mr Watney was a school principal. He sued the respondents for defamation over a letter which was published to the Director-General of the Queensland Department of Education, and republished to the Chairperson of the Non-State Schools Accreditation Board. The jury found that the publication conveyed a number of meanings about Mr Watney, but found that none were defamatory.

The issue on appeal was whether the jury perversely determined that the meanings were not defamatory. This raised a question:

- whether the jury's finding should be overturned; and
- if so, whether the due administration of justice demanded that the court should order that proceeding be stayed rather than order a retrial (applying the principle derived from *Jameel v Dow Jones & Co Inc* [2005] QB 946 as applied in *Bleyer v Google Inc* (2014) 88 NSWLR 670).

Held:

- The jury finding that none of the proven meanings were defamatory was perverse: [36].
- In determining whether an imputation is defamatory, the imputation must be considered in the context of the matter complained of. However, in cases in which imputations are pleaded with appropriate precision, this principle may have limited practical effect: [19]-[25].
- It was inappropriate for the Court to decide whether the *Jameel* principle should be adopted in circumstances where the differences between English, NSW and Queensland law were not the subject of full argument: [61]. Moreover, this was not "one of the rare cases" in which the *Jameel* principle might be applied to permanently stay a proceeding: [66]-[68].

High Court cases considered:

John Fairfax Publications Pty Ltd v Rivkin [2003] HCA 50; 77 ALJR 1657

New South Wales Court of Appeal cases considered:

Australian Broadcasting Corporation v Reading [2004] NSWCA 411

Bristow v Adams [2012] NSWCA 166

6. **INDUSTRIAL LAW: right of entry; interaction of *Fair Work Act 2009* (Cth) and State OHS legislation**

***Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89**

Decision date: 2 June 2017

Mr Powell was an official of the CFMEU. In 2014, a health and safety representative on a construction project at Ringwood, Victoria, asked Mr Powell to attend the building site. Mr Powell did so without a permit. The appellant Commissioner commenced proceedings against Mr Powell for asserted contravention of s 494(1) of the *Fair Work Act 2009* (Cth). S 494(1) required Mr Powell to hold a permit before he could exercise "State or Territory OHS rights".

The issue on appeal was whether the provisions of the (now repealed) *Occupational Health and Safety Act 2004* (Vic) by which Mr Powell came to be on site conferred on him a "State or Territory OHS right". This raised a question:

- whether an obligation on the part of the employer to provide access conferred on Mr Powell a "right to enter"; and
- whether "right to enter" only referred to rights conferred on Union officials in their capacity as representatives of the Union.

Held:

- The *Fair Work Act 2009* (Cth) and the *OHS Act* (Vic) need to work in a practical way at the work site, and if at all possible not be productive of fine distinctions concerning the characterisation of entry on to a site: [15].
- An "objects" provision within a statute does not control clear statutory language but, rather, is properly to be considered as an aid to construction: [48].
- The relevant provisions of the *OHS Act* (Vic) imposed a statutory obligation on the employer to allow Mr Powell access to the workplace if the representative requested that he attend. The statutory entitlement or authorisation conferred on Mr Powell can be legitimately described as a right to enter and be on the premises: [33]-[36].
- S 494 of the *Fair Work Act 2009* (Cth) is not confined to rights granted to or conferred on officials of organisations by reason of their position. The plain meaning of the section can encompass the right conferred on Mr Powell in this case: [56]-[59]. Accordingly, Mr Powell required a permit.

New South Wales Court of Appeal cases considered:

Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd [1996] NSWSC 348; (1996) 91 LGERA 31

Asia Pacific decisions of interest

7. TAX: meaning of "last payment"

Court of Appeal of New Zealand

Commissioner of Inland Revenue v Fugle **[2017] NZCA 230**

Decision date: 1 June 2017

Bathos Properties Ltd owed the Bank of New Zealand $2,659,442 plus interest. The Bank assigned the debt to Mr Fugle, the sole shareholder in Bathos, for $90,000 in FY2005. Bathos credited the $2,659,442 to Mr Fugle in his shareholder's current account with Bathos, although Bathos did not in fact have $2,659,442.

The Commissioner audited Mr Fugle and assessed his FY2005 income on the basis that, by crediting Mr Fugle's account, Bathos made the "last payment" of a loan. Under the relevant tax legislation, this then required a "base price adjustment" which affected Mr Fugle's assessable income attributable to the loan.

The issue on appeal was whether the "last payment" of the loan occurred at the time the $2,659,442 was credited to Mr Fugle's current account.

Held:

- A crediting of money to a person's bank account or shareholder's current account will constitute payment when that money is placed unreservedly at the disposal of the person: [17].
- In the context of accrual rules, which are concerned with cash flows, a "payment" takes place when the creditor receives cash or its equivalent or credit on which, in the normal course of business or banking practice, he can draw in the form of cash: [23].
- Such a state of affairs did not exist when the debt was credited to Mr Fugle's account since Bathos did not have sufficient funds to cover the full amount. Bathos had impliedly not agreed to pay unless funds were available, or had only agreed to pay subject to the condition precedent of funds being available: [24]-[27].
- The credit to Mr Fugle's shareholder's current account in FY2005 was therefore not the "last payment" and no base price adjustment was triggered: [28].

8. **JUDICIAL REVIEW: failure to appeal decision under review**

Supreme Court of Papua New Guinea

Unas v Rabaul Shipping Ltd **[2017] PGSC 16**

Decision date: 29 May 2017

The respondent owned a ship called the *Calvos Queen*. A survey certificate was necessary to operate the ship in Papua New Guinea. The National Maritime Safety Authority issued a survey certificate in 2012 with passenger number and weight capacity reduced from that specified in the preceding 2008 certificate.

The respondent successfully sought judicial review of the Authority's decision in the National Court, which set aside the certificate and ordered the issue of a new certificate on terms similar to the 2008 certificate. The Authority failed to appeal the decision within the time for lodging an appeal but then sought leave to apply for judicial review of the National Court's decision pursuant to s 155(2)(b) of the Constitution.

The issue before the Supreme Court was whether the Authority's application for leave to review should be granted.

Held:

- In an application for leave to apply for judicial review under s 155(2)(b) of the Constitution, the applicant must *inter alia* provide a satisfactory explanation for the failure in filing an appeal and any delay in bringing the application for leave for review, demonstrate exceptional circumstances showing manifestation of substantial injustice, and demonstrate that it is in the interest of justice that the decision should be reviewed. The final two factors are the most important: [6].

- The National Court's failure to exclude irrelevant or unreliable evidence produced a substantial injustice. The exceptional circumstances and other requirements for a grant of leave were satisfied: [13]–[26].

Other international decisions of interest

9. **TORTS: psychological injury**

Supreme Court of Canada

Saadati v Moorhead **[2017] SCC 28**

Decision date: 2 June 2017

Mr Saadati sued several defendants for injuries arising from a motor vehicle accident. The alleged injuries included psychological injuries consisting of personality change and cognitive difficulties. The plaintiff sought to prove the psychological injuries by way of lay evidence from his family and friends. The defendants argued that the plaintiffs had not demonstrated by expert evidence a medically recognised psychiatric or psychological injury.

The issue on appeal was whether, to have suffered actionable damage, a claimant must adduce expert evidence or other proof of a recognised psychiatric illness.

Held:

- It is not necessary for a claimant to prove a recognised psychiatric injury in order to recover for mental injury: [2], [13]-[37].
- A negligent defendant need only be shown to have foreseen injury, and not "a particular psychiatric illness that comes with its own label": [31].
- Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proved the mental injury on the balance of probabilities: [38].

Australian decisions considered:

Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35

10. CONSTITUTIONAL LAW: fourteenth amendment due process clause

Supreme Court of the United States of America

***BNSF Railway Co v Tyrrell*, 581 US (2017)**

Date of decision: 30 May 2017

A United States federal statute, the *Federal Employers' Liability Act* (FELA), makes railroads liable in damages for injuries suffered by their employees in the course of employment. An employee sued a railroad in a Montana state court alleging that he had developed a fatal cancer from his exposure to carcinogenic chemicals while working for the railroad. The Montana State court had jurisdiction to hear the case under FELA because the railroad did business in Montana. The defendant maintained less than 5% of its workforce and about 6% of its railways in Montana, it is not incorporated or headquartered there, and the plaintiff's injuries did not occur there.

The issue on appeal was whether the Montana State court had jurisdiction to hear the claim brought under FELA. This raised a question:

- whether FELA conferred "personal jurisdiction" on state courts; and
- whether the Montana State court's exercise of personal jurisdiction under Montana State law, which conferred personal jurisdiction on Montana courts over "persons found within … Montana", comported with the United States Constitution's fourteenth amendment's guarantee of due process.

Held:

- FELA, while providing that "an action may be brought in a district court of the United States", does not confer personal jurisdiction on the Montana court.
- The due process clause does not permit a State court to hale an out-of-State corporation before its courts when the corporation is not "at home" in the State and the episode-in-suit occurred elsewhere: *Daimler AG v Bauman*, 571 US (2014).
- Here, the defendant was not incorporated or headquartered in Montana and its activities in Montana were not "so substantial and of such a nature as to render it at home in that State". Moreover, the plaintiff did not allege injury from work in or related to Montana. Accordingly, the due process clause precluded Montana State courts exercising jurisdiction in this case.