Court of Appeal
Supreme Court
Sydney

Decisions of interest

12 June 2017 – 23 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. **Building and construction: prevention principle**

***Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151**

Decision date: 23 June 2017

Beazley ACJ, McColl JA, Macfarlan JA

DDI was a subcontractor who completed works 144 days after the date for practical completion. It served a Payment Claim on Probuild, the head contractor, under the *Security of Payment Act*. DDI said that Probuild directed DDI to undertake variations after the date for practical completion. In response, Probuild lodged a Payment Schedule in which it said that DDI's claim should be reduced to nil by reason of a set-off for liquidated damages referable to the delay. The adjudicator rejected Probuild's claim on the basis that Probuild's directions to perform significant additional work were inconsistent with a claim for liquidated damages for time spent performing that work.

The issue on appeal was whether the adjudicator applied the prevention principle and, if so, whether he had denied Probuild procedural fairness because the prevention principle was not in issue in the adjudication.

Held:

- The prevention principle disentitles a party from obtaining damages for non-performance of a contractual obligation if that party was the cause of the other party's non-performance. The principle is grounded in considerations of fairness and reasonableness: [114]-[115].
- The operation of the prevention principle can be modified or excluded by a failure to rely on extension of time provisions: [118].
- Probuild was obliged to exercise the discretionary extension of time power under the subcontract honestly and fairly, either because of the underlying rationale of the prevention principle or because there is an implied duty of good faith in exercising the discretion: [128].
- The application of the prevention principle was squarely in issue before the adjudicator and accordingly Probuild was not denied procedural fairness: [131], [144].

New South Wales Court of Appeal cases considered:

Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211; (2002) 18 BCL 322

2. **Real property: whether caveats lodged without reasonable cause**

New Galaxy Investments Pty Ltd v Thomson & Ors **[2017] NSWCA 153**

Decision date: 23 June 2017

Basten JA, Gleeson JA, Sackville AJA

Vendors of properties in Turramurra entered into six contracts for sale with one of the respondents, Golden Destiny Investments (GDI). The contracts allowed GDI to substitute another purchaser for itself. The intention was to substitute the appellant. After a renegotiation of the contracts, the vendors extended the time for completion in return for part payment by GDI of the purchase price in the amount of $6.49 million. Unknown to the vendors, $6 million of this part payment was paid by the appellant. A dispute arose between GDI and the appellant about the terms on which the appellant would be substituted as purchaser. The appellant lodged caveats over the properties. These caveats precluded the vendors from completing the sales.

The issue on appeal was whether the vendors and GDI were entitled to compensation under s 74P of the *Real Property Act 1900* (NSW) on the basis that the appellant, without reasonable cause, lodged the caveats and refused to remove them when requested to do so. This raised a question whether the appellant had an honest belief on reasonable grounds that it had a caveatable interest in the properties.

Held:

- The $6 million payment was made voluntarily, without the vendor's knowledge or request. It was not made to or on behalf of GDI. In these circumstances, the appellant had not shown that it had an equitable interest in the properties as against the vendors or GDI: [114], [305], [313] (Sackville AJA and Gleeson JA, Basten JA dissenting at [94]-[96]).

- However, the vendors and GDI had failed to establish that the appellant did not believe that it had a caveatable interest in the land at the time it lodged the caveats and therefore that they were lodged without reasonable cause: [97], [121] (Basten and Gleeson JJA, Sackville AJA dissenting at [341]). Accordingly, they were not entitled to compensation under s 74P.

High Court Cases considered:

Hill v Ziymack(1908) 7 CLR 352; [1908] HCA 13

Lumbers v W Cook Builders Pty Ltd (in liq) (2008) 232 CLR 635

Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307; [2014] HCA 15

New South Wales Court of Appeal cases considered:

Mahendran v Chase Enterprises Pty Ltd [2013] NSWCA 280; 17 BPR 32,733

3. **Constitutional law: Chapter III; *Proceeds of Crime Act 2002* (Cth)**

***Commissioner of Australian Federal Police v Elzein* [2017] NSWCA 142**

Decision date: 21 June 2017

Beazley ACJ, Basten and Simpson JJA

The Commissioner of the AFP obtained ex parte orders with respect to the respondents pursuant to the *Proceeds of Crime Act 2002* (Cth). The orders required the respondents to provide sworn statements to the AFP. On the next day, two of the respondents were arrested and charged with a number of customs offences. The respondents sought to have the ex parte orders set aside. By consent, the primary judge referred separate questions for determination by the Court of Appeal.

In summary, the questions before the Court were:

- whether ss 180, 39(1) and 319 of the *Proceeds of Crime Act* permit orders to be made against a person who is a defendant in pending criminal proceedings in relation to a related subject matter; and
- whether, if yes, those provisions are invalid to that extent, on the ground that to permit such orders to be made in those circumstances would contravene Ch III of the Constitution?

Held:

- Ss 180, 39(1) and 319 do permit examination orders and orders for the provision of sworn statements to be made. There is a clear intention that s 180 authorises an examination of a person subject to current criminal charges, with respect to matters related to the charges: [54].
- A procedural scheme which substantially interfered with the fairness of a criminal trial would be constitutionally invalid. However, the provisions in question do not fall into that category and so they do not contravene Ch III of the Constitution: [128].

High Court Cases considered:

Condon v Pompano Pty Ltd (2013) 252 CLR 38; [2013] HCA 7

New South Wales Court of Appeal cases considered:

Lazarus v Independent Commission Against Corruption [2017] NSWCA 37

4. **Workers compensation: "in the course of or arising out of employment"**

Tran v Vo **[2017] NSWCA 134**

Decision date: 15 June 2017

Macfarlan, Leeming and Payne JJA

Ms Vo was a casual employee of the appellants. On a day on which she was not rostered to work, Ms Vo came to the shop to meet her friend who was working. The friend asked Ms Vo to assist in cleaning up. In doing so, Ms Vo slipped and sustained serious injuries. Ms Vo received workers compensation payments. She then commenced proceedings for common law damages. At trial, Ms Vo gave an undertaking to repay the workers compensation payments if she was successful in the proceedings for common law damages.

If Ms Vo's injury arose out of or was in the course of her employment, her right to commence proceedings for common law damages against the appellants was restricted by Ch 7, Pt 6 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). Thus, the issue on appeal was whether her injury arose out of or was in the course of her employment. This also raised a question whether, if Ms Vo was successful, the workers compensation payments gave rise to any question of double compensation.

Held:

- The respondent's performance of cleaning at the premises, on a day she was not rostered to work, was not the result of any encouragement or inducement by the appellants: at [88]-[89]. Accordingly, her injury was not suffered "in the course of" her employment: [96].

- The requisite causal connection between the respondent's employment and the injury she suffered was not established. It is not sufficient that "but for" the employment the respondent would not have been at the place of the accident. As such, the respondent's injury was not one "arising out of" her employment: [102]-[105].

- There was no double compensation because, pursuant to her undertaking to the Court, Ms Vo was liable to repay the workers compensation payments: [3]-[4], [126].

High Court Cases considered:

Comcare v PVYW (2013) 250 CLR 246; [2013] HCA 41

Hatzimanolis v ANI Corporation Ltd (1992) 173 CLR 473; [1992] HCA 21

Stewart v Metropolitan Water, Sewerage and Drainage Board (1932) 48 CLR 216; [1932] HCA 45

Other Australian intermediate appellate decisions of interest

5. **Private international law: application for stay under the *Trans-Tasman Proceedings Act 2010* (Cth)**

   ***Australian Gourmet Pastes Pty Ltd v IAG New Zealand Ltd* [2017] VSCA 155**

   Decision date: 23 June 2017

   Tate, Santamaria and Beach JJA

   Australian Gourmet Pastes (AGP) produced and sold garlic paste. AGP contracted with an Australian manufacturer for the supply of caps for its garlic paste jars. The manufacturer supplied faulty caps. AGP sued the manufacturer and its insurer, IAG New Zealand. The contract of insurance contained a condition designating New Zealand as the forum to resolve disputes.

   Under the *Trans-Tasman Proceedings Act 2010* (Cth), an Australian court is bound to stay its proceeding in favour of a New Zealand court where an "exclusive choice of court agreement" designates a New Zealand court to determine the matters in issue. It also confers a discretionary power on an Australian court to grant a stay on the ground that a New Zealand court is the more appropriate forum to determine the matters in issue. The primary judge considered that he was bound, and that discretionary factors favoured a stay.

   The issue on appeal was whether the primary judge erred in granting a stay of the Australian proceedings. This raised a question:

   - whether the primary judge erred in considering that he was bound to stay the Australian proceedings under the Act; and
   - if so, whether the grant of the stay involved a miscarriage of discretion.

   Held:

   - The primary judge was wrong to conclude that he was bound to stay the proceeding. There was no exclusive choice of court agreement between AGP and the insurer. AGP was not personally a party to the contract of insurance, and so the condition in that contract which designated a New Zealand court had no application to these proceedings: [3], [67].
   - The primary judge's exercise of his discretion to grant the stay miscarried. The manufacturer was incorporated in Australia and its principal place of business was Australia. Factual issues in dispute would require evidence from Victorian witnesses. The activities the subject of the proceedings occurred in Australia. The factors supporting the refusal of a stay manifestly outweighed any factors in favour of the grant: [3], [69], [74], [88].

6. **Corporations; whether criminal fault elements apply to civil penalty proceedings under ss 1041A and 1041B *Corporations Act 2001* (Cth)**

Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd **[2017] FCAFC 100**

Decision date: 21 June 2017

Allsop CJ, Middleton and Bromwich JJ

ASIC brought proceedings against the respondent for alleged contraventions of ss 1041A and 1041B of the *Corporations Act 2001* (Cth). These provisions pertain to market manipulation. Such contraventions can be the subject of criminal or civil proceedings. In this case, ASIC only pursued civil penalties.

In *Gore v Australian Securities and Investments Commission* [2017] FCAFC 13; 341 ALR 189, the Full Court of the Federal Court held, *obiter*, that Chapter 2 of the *Criminal Code* applied to civil proceedings brought in relation to allegations of being an accessory to contraventions of s 727(1) and (2) of the *Corporations Act*. If correct, this reasoning would require ASIC to prove criminal fault elements on the part of the respondent for each of the proscribed physical elements in ss 1041A and 1041B.

Prior to the trial, a specially constituted Full Court considered the separate question: is Chapter 2 of the *Criminal Code* engaged in proceedings for the imposition of a civil penalty for a contravention of ss 1041A or 1041B?

Held:

- The answer to the separate questions is "no". The *obiter* observations in *Gore* are wrong on this issue: at [7].
- *Gore* proceeded on the erroneous premise that s 727(1) itself created an offence, creating a perceived commonality between the criminal offence provision and the civil penalty provision. The correct position is that ss 1041A and 1041B do not themselves specify civil or criminal consequences for a breach. Rather, criminal offences arising from the prohibited conduct are created by s 1311, and are enforceable through a criminal stream. Similarly for civil offences, which are created by s 1317E: [27]-[37].

High Court cases considered:

North v Marra Developments Limited [1981] HCA 68; (1981) 148 CLR 42

New South Wales Court of Appeal cases considered:

R v JS [2007] NSWCCA 272; 230 FLR 276

Asia Pacific decisions of interest

7. Private international law: jurisdiction; *forum non conveniens*

Hong Kong Court of Final Appeal

***QMY v GSS* [2017] HKCFA 41**

Decision date: 21 June 2017

Ribeiro, Tang, Fok PJJ, Stock and Gleeson NPJJ

G was a nine-year-old child of a mother resident in mainland China and a father resident in Hong Kong. G was born in Hong Kong and is therefore a Hong Kong permanent resident by birth. G's mother sought orders for G's maintenance in the Family Court pursuant to the Guardianship of Minors Ordinance. G's father commenced proceedings against the mother, seeking custody and maintenance for G. The father then applied to strike out the proceedings on the basis that the court had no jurisdiction, or alternatively, to stay the proceedings on the ground of *forum non conveniens*.

The issue on appeal was whether the primary judge erred in dismissing the father's application. This raised a question:

- whether the Family Court has jurisdiction over children that are neither ordinarily resident nor present in Hong Kong; and
- if so, whether the Court has a discretion to decline jurisdiction otherwise than on *forum non conveniens* principles, and the way in which any such discretion should be exercised.

Held:

- The Court may have inherent jurisdiction solely on the basis of the child's status as a Hong Kong permanent resident. It was unnecessary to decide this question because jurisdiction was established as of right when the respondent was duly served and acknowledged service within the jurisdiction, and the court was bound to acknowledge this jurisdiction unless it was persuaded that the proceedings should have been stayed: [1], [21] [44]-[45], [49], [51].
- The Court has no discretion to decline jurisdiction otherwise than on *forum non conveniens* principles: [34].

8. **Human rights: right to smoke in ICU of mental health unit**

Supreme Court of New Zealand

B v Waitemata District Health Board **[2017] NZSC 88**

Decision date: 14 June 2017

William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ

The appellant was a patient in an intensive care unit of a mental health unit of the Waitemata District Health Board. The Board prohibits smoking on any of its premises. The appellant challenged the Board's no smoking policy. This raised a question:

- whether s 6 of the New Zealand *Smoke-free Environments Act 1990* (NZ), which relevantly provides that "[a]n employer may permit smoking by patients or residents of a workplace that is, or is part of, a hospital care institution, a residential disability care institution, or a rest home if the smoking takes place only in 1 or more dedicated smoking rooms", obliged the Board to provide dedicated smoking rooms in its mental health units; and
- whether the Board's no smoking policy was inconsistent with the *New Zealand Bill of Rights Act 1990* (NZ).

Held:

- Section 6 of the *Smoke-free Environments Act* is a permissive section that does not oblige the Board to provide a dedicated smoking room: [29]–[52]. In some situations read in context, "may" means "must", but in this case, it has its ordinary permissive meaning: [31]–[32].
- The no smoking policy is not inconsistent with:
    - the appellant's right to be treated with humanity and with respect for dignity, since, *inter alia*, nicotine replacement therapy was provided to the appellant ([54]–[88]);
    - the right not to be subjected to cruel or disproportionately severe treatment, since it falls short of the high standard of disproportionately severe treatment required to make out inconsistency with this right ([89]–[95]);
    - the appellant's right to be free from discrimination on the basis of disability, since the appellant was not treated differently due to his psychiatric illness ([96]–[105]); or
    - a right to a home or private life which encompassed the right to choose whether nor not to smoke whilst confined for short periods in the ICU of a mental health institution, since no such right exists ([106]–[136]).

Other international decisions of interest

9. **Constitutional law: criminal law; open justice**

Supreme Court of the United States of America

***Weaver v Massachusetts,* 582 (US) 2017**

Decision date: 22 June 2017

Roberts CJ, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan and Gorsuch JJ

Mr Weaver was tried for murder in a courtroom that could not accommodate all the potential jurors. For two days, until the jury was selected, a court officer excluded everybody who was not a potential juror from the courtroom. Mr Weaver was convicted. Five years later, he applied for a new trial on the basis that his counsel had provided ineffective assistance by failing to object to the closure of the courtroom.

The question on appeal was whether a defendant must demonstrate prejudice where a violation to the right to a public trial is not raised at trial or on direct review, but only later via a claim of ineffective assistance of counsel.

Held:

- Where the allegation of the accused's right to a public trial is not raised at trial or on direct review, but only later via a claim of ineffective assistance of counsel, the defendant must demonstrate prejudice to secure a new trial. Prejudice can be demonstrated by showing fundamental unfairness or that the error had a reasonable probability of changing the result of the proceeding.

- Mr Weaver did not demonstrate fundamental unfairness and produced no evidence suggesting a reasonable probability of a different outcome but for counsel's failure to object.

- Per Breyer and Kagan JJ, dissenting: It is enough for the defendant to show that there was a "structural error", being an error that affected the framework within which the trial proceeded. The defendant need not demonstrate prejudice in order to secure a new trial.

10. Costs: whether law firm is litigant in person

England and Wales Court of Appeal

Halborg v EMW Law LLP **[2017] EWCA Civ 793**

Date of decision: 13 June 2017

Etherton MR, Beatson and Underhill LJJ

Rule 46.5(6) of the English Civil Procedure Rules limits the quantum of costs recoverable by a successful litigant in person. The question in this appeal was whether a law firm acting on its own behalf was a litigant in person for the purposes of the Rules.

Held:

- At common law, pursuant to the principle in *The London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872, a solicitor who acts for himself as a party to litigation can recover not only his out of pocket expenses but also his profits, but he cannot recover for anything which his acting in person has made unnecessary: [19].
- Rule 46.5(6) applies the *Chorley* principle: [31]–[32].
- Limited liability partnerships and traditional partnerships are not to be treated differently for the purposes of r 46.5(6): [36].
- A law firm, including a limited liability partnership, is therefore not a litigant in person for the purposes of r 46.5(6): [58].