Court of Appeal
Supreme Court
Sydney

Decisions of interest

26 June 2017 – 7 July 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. **Trade and commerce: misleading and deceptive conduct; causation**

***Reavill Farm Pty Ltd v Burrell Solicitors Pty Ltd* [2017] NSWCA 156**

Decision date: 28 June 2017

Bathurst CJ, Leeming JA and Emmett AJA

The appellants retained Burrell Solicitors in relation to proceedings in the Land and Environment Court concerning the expansion of a quarry. Those proceedings were unsuccessful but the appellants obtained approval through another mechanism. The costs of litigation amounted to around $1.5 million. In the present proceedings, the primary judge found that Burrell Solicitors had induced the appellants into retaining the solicitors by providing unreasonable costs estimates for the litigation, in breach of duty and involving misleading and deceptive conduct within the meaning of the *Trade Practices Act 1974* and the *Australian Consumer Law*.

The issue on appeal was whether the appellants were liable to pay the costs of the legal services as assessed. This raised a question:

- in relation to the misleading and deceptive conduct, whether the impugned conduct caused the appellants to suffer loss or damage;
- in relation to the cost assessments, whether the seriousness of the impugned conduct warranted a greater discount of the costs to be paid by the appellants.

Held:

- The appellants failed to prove what would have been reasonable cost estimates at the relevant time, against which damages could be assessed. The appellants also failed to prove at what point they would have ended the litigation or taken steps to reduce costs, rather, the evidence suggested that they would have continued with the litigation even if they had been given reasonable, updated costs estimates. Accordingly, the appellants were unable to establish the amount of loss or damage they suffered as a consequence of the impugned conduct: [159]-[177].
- The Costs Review Panel did not apply a wrong principle or misapprehend the facts, and so the discretion to award a five per cent discount on the costs was not wrongfully exercised as explained in *House v The King*: [281].

High Court Cases considered:

House v The King (1936) 55 CLR 499; [1936] HCA 40

Murphy v Overton Investments Pty Ltd (2004) 216 CLR 388; [2004] HCA 3

2. **Estoppel: proprietary estoppel**

Priestley v Priestley **[2017] NSWCA 155**

Decision date: 27 June 2017

McColl JA, Macfarlan JA and Emmett AJA

The appellant, Mr Duncan Priestley, claimed to be entitled to a property which was owned by his late father, Mr Gordon Priestley. The respondent, Ms Beverley Priestley, was Duncan's mother and executrix of Gordon's will. By an earlier will, Gordon had left the property to Duncan. Duncan had incurred expenses for Gordon and worked on the property for no reward. Unknown to Duncan, Gordon changed his will, leaving the whole of his estate to Beverley.

Duncan contended that he was beneficially entitled to the property. This raised a question:

- whether there was a contract between Duncan and Gordon to the effect that Gordon would leave the property to Duncan in his will; and
- whether Gordon was estopped from departing from that representation.

Held:

- The evidence did not disclose that there was a concluded bargain between Duncan and Gordon: [3]-[6], [103]-[122].
- Duncan had relied solely on Gordon's promise that he would leave everything to him, and Gordon knew this. In these circumstances, it was unconscionable for Gordon to depart from that representation and he was estopped from doing so: [16], [124]-[125], [159].
- Duncan was not required to show that he would have acted differently if he had known that Gordon had changed his will. It was enough that Duncan's conduct was so influenced by Gordon's promise that it was unconscionable for Gordon to then retain the property: [136]-[138].
- The relief need not reflect the minimum necessary to remove the detriment. Duncan had made life changing decisions with irreversible consequences which were beyond the measure of money, and it was not unjust to make good the belief on which Duncan had relied for many years: [164]-[167].

High Court Cases considered:

Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10

Sidhu v Van Dyke (2014) 251 CLR 505; [2014] HCA 19

New South Wales Court of Appeal cases considered:

Ashton v Pratt (2015) 88 NSWLR 281; [2015] NSWCA 12

Other Australian intermediate appellate decisions of interest

3. **Contract: enforceability of restraint of trade**

Crowe Horwath (Aust) Pty Ltd v Loone **[2017] VSCA 181**

Decision date: 7 July 2017

Ashley, Priest and Beach JJA

Mr Loone's employment contract contained a restraint of trade clause. The primary judge held that the employment contract was terminated by Mr Loone accepting his employer's repudiatory conduct in respect of the employment contract. Accordingly, the primary judge held that Crowe could not rely on the restraint of trade. The repudiatory conduct involved changes to Mr Loone's employment duties, and non-payment of bonuses to Mr Loone.

The issue on appeal was whether Crowe was entitled to enforce the restraint clause. This raised a question whether an employer can enforce a restraint clause where the employment was terminated by the employee accepting the employer's repudiation of the employment contract.

Held:

- There is High Court authority, and appellate authority from England and Canada, to support the proposition that a restraint clause is not enforceable against an employee whose employment ends by the employer's wrongful conduct – whether it be wrongful dismissal or the employee's acceptance of the employer's repudiatory conduct. The Court was not aware of any appellate decisions in Australia or England which enforced a restraint clause against a former employee in such circumstances: [193].

- It was not necessary to conclude that this is a "rule of law" to resolve this case; it was enough that all factual circumstances considered to date have produced the same outcome, and the principle of *stare decisis* meant that Crowe's appeal must be rejected. This conclusion does not deny the long-established principle that discharge of a contract by breach does not mean that rights which have been unconditionally acquired are lost: [193], [271].

High Court Cases considered:

Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435

Geraghty v Minter (1979) 142 CLR 177

Kaufman v McGillicuddy (1914) 19 CLR 1

4. **Contract: damages for breach of contract of employment**

Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) **[2017] FCAFC 102**

Decision date: 4 July 2017

Allsop CJ, Rares and McKerracher JJ

Ms Romero brought proceedings against her former employer, Farstad, contending that it had failed to comply with its Workplace Harassment and Discrimination Policy. In an earlier decision, the Full Court held that the Policy was incorporated into Ms Romero's contract of employment, Farstad had not complied with it and therefore breached the contract. The matter was remitted, and the primary judge awarded nominal damages only in favour of Ms Romero.

The issue on appeal was whether Ms Romero was entitled to more than nominal damages for the breach. This raised a question:

- whether the contractual term requiring compliance with the Policy was an essential term, such that any breach justified termination;
- whether Farstad had repudiated the contract or whether Farstad's breach was sufficiently serious to justify termination of the contract; and
- whether Ms Romero's loss of the benefit of her study costs and of a career in the maritime industry were too remote.

Held:

- The test of essentiality is whether it appears that the promisee would not have entered into the contract unless assured of strict or substantial performance of the promise. There was no reason to think that compliance with the Policy was an essential term of Ms Romero's contract: [58]-[68].
- It appeared that Farstad wished to retain Ms Romero's services after the events giving rise to the breach. Moreover, Farstad continued its efforts to attempt to facilitate Ms Romero's active return to work. Accordingly, Ms Romero failed on repudiation and sufficiently serious breach: [76], [83].
- A complete change of career was neither the natural and probable consequence of the breaches of the Policy nor within the reasonable contemplation of the parties as the probable result of the breaches when they entered into the contract. Accordingly, those losses were too remote: [90].

High Court cases considered:

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited [2007] HCA 61; (2007) 233 CLR 115

Hadley v Baxendale (1854) 156 ER 145

Asia Pacific decisions of interest

5. Real property: enforcement and interpretation of covenants

Supreme Court of New Zealand

Lakes International Golf Management Limited and Anor v Hartley Clendon Vincent **[2017] NZSC 99**

Decision date: 29 June 2017

Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ

The appellants owned and managed Lakes Resort, which consisted of a residential development and golf course. Mr Vincent's family trust owned a residential section of the Lakes Resort. A covenant was registered against this section requiring the owner to join, remain a member of, and meet all levies imposed by the "Golf Club". The "Golf Club" was defined as "the golf club to be incorporated as an incorporated society to provide for playing rights on the golf course". In fact, the golf course was not run by an incorporated society, but rather through an unincorporated proprietary club set up and controlled by the appellants.

The issue on appeal was whether the appellants could enforce the covenant against Mr Vincent. This raised a question as to the Court of Appeal's use of extrinsic evidence in the interpretation of the words of the covenant.

Held:

- The extrinsic evidence referred to by the Court of Appeal included evidence that showed that the reference to an incorporated society structure was adopted deliberately and on the basis of legal advice, rather than mistakenly. This material was inadmissible on any approach to the interpretation of the covenant. Accordingly, it was unnecessary to finally decide whether the Court should take a pure interpretative approach, whereby the covenant is construed against a background confined to what subsequent parties could be expected to know or to be able to readily ascertain: [23]-[31].

- The golf course did not exist at the time of the execution of the covenant. Accordingly, the definition of "Golf Course" was not a misdescription of an existing entity, but rather a description of the nature of the entity to be established in the future. The proposed entity was described in terms which did not match the existing golf course, and accordingly the appellants could not enforce the covenant against Mr Vincent: [32]-[33].

- There was no legal basis on which Mr Vincent could be compelled to join the golf club in circumstances where it is not the golf club described in the covenant: [35].

6. Corporations: directors duties

Singapore Court of Appeal

***Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] SGCA 40**

Decision date: 27 June 2017

Chao Hick Tin, Andrew Pang Boon Leong, Judith Prakash JJA

Mr Goh was the director and CEO of the respondents. The respondents brought an action against Mr Goh and two companies which he had set up in the British Virgin Islands, alleging breach of fiduciary duties, diversion of business and wrongful claims for expenses. They also sought to reclaim part of Mr Goh's salary as director.

The issue on appeal was whether Mr Goh breached his fiduciary duties owed as a director, and whether the respondents were entitled to recover associated losses and Mr Goh's salary.

Held:

- There is an overlap between the no-conflict rule and a director's duty to act in the best interests of the company. Where a director places themselves in a position of conflict of interest, they will not be permitted to assert that their action was *bona fide* or thought to be in the interests of the company. When Mr Goh made his own interest paramount, invariably he was not acting in the best interests of his company: [47]-[48].

- Under the no-profit rule, payments in breach of the rule need not strictly flow to the fiduciary acting in the capacity of a director; profit merely has to be obtained in connection with the fiduciary's position as a director or by reason or in virtue of the fiduciary office: [54].

- Where payments are made to a fiduciary as bribes or secret commissions, it is strictly unnecessary to show a conflict between duty and interest as the fact of the bribe is sufficient: [57].

- The law does not permit profits earned by a subsidiary company to be attributed to a holding company so as to entitle the holding company to sue for loss of such profits. The companies retain their separate legal personhood. The single economic entity concept is not recognised by Singapore law or by the common law generally: [67]-[75].

- Mr Goh had a legal entitlement to a salary pursuant to his contract of employment, and his breaches of fiduciary duties did not take that entitlement away from him. An employer is only entitled to make a deduction from salary in respect of such losses as the employer can prove it has suffered by reason of the breach: [87].

Other international decisions of interest

7. Practice and procedure: interlocutory injunctions

Supreme Court of Canada

Google Inc v Equustek Solutions Inc **[2017] SCC 34**

Decision date: 28 June 2017

McLachlin CJ, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Equustek was a small technology company which brought proceedings against Datalink, which it claimed was infringing its intellectual property. Despite court orders prohibiting the sale of inventory and the use of Equustek's IP, Datalink continue to carry on its business from an unknown location, selling its impugned product on its websites to customers all over the world. Equustek obtained an injunction ordering Datalink to cease operating or carrying on business through any website. Google accordingly de-indexed 345 specific webpages associated with Datalink, but it did not de-index all of Datalink's websites, and it only de-indexed searches conducted on google.ca. This allowed Datalink to circumvent the court orders by moving the objectionable content to new pages within its websites, and did not affect searches conducted outside Canada.

The issue on appeal was whether an interlocutory injunction should be granted, enjoining Google from displaying any part of Datalink's websites on any of its search results worldwide.

Held:

- The test for determining whether the court should exercise its discretion to grant an interlocutory injunction against Google was met in this case: there was a serious issue to be tried; Equustek was suffering irreparable harm as a result of Datalink's ongoing sale of its competing product through the Internet; and the balance of convenience was in favour of granting the order sought: [25]-[26], [43]-[50].

- Injunctive relief can be granted against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. Datalink was unable to carry on its business in a commercially viable way unless its websites were in Google's search results. Accordingly, Google was facilitating Datalink's breach of the orders and was the determinative player in allowing the harm to occur: [28]-[34], [53].

- When a court has in personam jurisdiction, and where it is necessary to ensure the injunction's effectiveness, the court can grant an injunction enjoining that person's conduct anywhere in the world: [38], [41].

8. **Constitutional law: Free Exercise Clause of the First Amendment; disfavoured treatment on the basis of religious status**

Supreme Court of the United States

***Trinity Lutheran Church of Columbia, Inc. v Comer*, 582 (US) 2017**

Date of decision: 26 June 2017

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

The Missouri Department of Natural Resources ran the Scrap Tire Program, through which qualifying non-profit organisations were offered grants for the installation of playground surfaces made from recycled tires. The Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center was a non-profit organisation which operated a preschool and daycare centre under the auspices of the Trinity Lutheran Church and on church property. The Department denied the Center's application for a grant on the basis that it was a church. In its rejection letter, the Department explained that the Missouri Constitution precluded the Department from providing financial assistance directly to a church.

The issue on appeal was whether the Department's policy violated the rights of the Trinity Lutheran Church under the Free Exercise Clause of the First Amendment by denying the church an otherwise available public benefit on account of its religious status.

Held:

- Denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.
- There is a distinction between neutral laws of general applicability, and laws that single out the religious for disfavoured treatment. The policy expressly discriminates against otherwise eligible recipients on the basis of their religious character.
- Laws imposing special disabilities on account of religious status are subject to the most rigorous scrutiny, with only a state interest of the highest order justifying the policy at issue. The Department's policy does not stand up to this scrutiny.
- Justice Sotomayor, joined by Justice Ginsberg, dissented. Her Honour said that this decision involves the separation between church and state, and that the decision of the majority "profoundly changes that relationship".