Court of Appeal
Supreme Court
Sydney

Decisions of interest

10 July 2017 – 21 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. **Evidence: opinion evidence; expert opinion**

***Rolleston v Insurance Australia Ltd* [2017] NSWCA 168**

Decision date: 12 July 2017

Beazley P, Meagher JA and Emmett AJA

The appellant's property was damaged by fire. Insurance Australia Ltd ('IA') refused a claim made under the property's insurance policy for the cost of repairs. Without making repairs, the appellant sold the property for $4,068,000. The primary judge found that IA was liable under the policy. The appellant claimed the difference between the sale price and property's value if it had been repaired. The primary judge declined to admit a valuation report tendered by the appellant, instead ordering IA to pay the cost of repairs. The issue on appeal was the validity of the bases for excluding the report. This raised two questions:

- whether the report satisfied s 79 of the *Evidence Act 1995,* which requires expert opinions to be based wholly or substantially on specialised knowledge; or
- whether the report could be excluded under s 135*,* as it would be unfair for IA to elucidate the expert's reasoning during cross-examination.

Held:

- The primary judge made no error in refusing to admit the valuation report. A precondition of admissibility under s 79 is that expert opinion is wholly or substantially based on specialised knowledge. The author of an expert report should set out their reasoning process and how their field of specialised knowledge applies to the facts: [32]-[35]. Here, the report did not explain:
    - why four properties were considered to be similar, but only three were used to calculate the valuation range: [21]; [24];
    - the impact (if any) of changed market conditions: [24]; and
    - why the property's value without fire damage was any different from the sale price plus the cost of repairs: [37].
- Evidence that does not satisfy the requirements in s 79 might also be inadmissible as irrelevant or under s 135: [33].

New South Wales Court of Appeal cases considered:

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305

2. **Child welfare: working with children check**

***Tilley v Children's Guardian* [2017] NSWCA 174**

Decision date: 19 July 2017

Basten, Meagher and Leeming JJA

The appellant applied to the Children's Guardian for working with children clearance, under s 13 of the *Child Protection (Working with Children) Act 2012* (NSW). The Children's Guardian refused clearance on the basis of two sexual assault charges against the appellant. Proceedings had been discontinued on both occasions. This decision was affirmed by the NSW Civil and Administrative Tribunal and the Supreme Court. The issues on appeal were:

- whether the Court erred in upholding the NCAT's decision that the appellant was subject to an assessment requirement; and
- whether the Court erred in holding that the NCAT applied the correct statutory test to determine whether the appellant posed a safety risk to children.

Held:

- The appellant was subject to an assessment requirement. Upon the appellant being charged and committed to trial, proceedings had commenced against him within the meaning of cl 1(1) in Sch 1. The requirement in cl 1(1)(b) that the offence be "*committed* as an adult" refers to the temporal element (whether the person was a child or an adult at the time of the alleged offence), and not a finding as to guilt: [15]-[18].
- The Tribunal could reasonably have been satisfied that the appellant posed a risk to children. The Court rejected the appellant's submission that if the chance of each allegation being true was less than 50%, the possibility of another event occurring in the future was even more remote. It is not logical to suggest that risk declines with a number of independent though unproven allegations of similar misconduct: [33]; [35].

High Court cases considered:

Commissioner of Taxation v Unit Trend Services Pty Ltd (2013) 250 CLR 523; [2013] HCA 16

Hogan v Australian Crime Commission (2010) 240 CLR 651; [2010] HCA 21

M v M (1988) 166 CLR 69; [1988] HCA 68

Other Australian intermediate appellate decisions of interest

3. **Civil procedure: litigation funding; abuse of process**

Melbourne City Investments Pty Ltd v Myer Holdings Limited **[2017] VSCA 187**

Decision date: 20 July 2017

Osborn, Whelan and Ferguson JJA

Melbourne City Investments Pty Ltd ('MCI') was created as a vehicle to bring class actions against publicly listed companies. It held 400 shares in Myer Holdings Limited. MCI commenced proceedings against Myer for misleading and deceptive conduct and breaching continuous disclosure obligations. MCI intended to apply for ancillary orders under ss 33V and/or 33ZF of the *Supreme Court Act* to compensate its time and effort as lead plaintiff. A judge permanently stayed the proceedings on the basis their predominant purpose was improper.

The issue on appeal was whether it is an abuse of process for a lead plaintiff to commence and maintain a class action for the purpose of generating income in excess of compensation it may be awarded for its alleged loss.

Held:

- The primary judge correctly held that MCI brought proceedings to gain an improper collateral advantage. MCI had no substantial legitimate purpose in the proceeding. For example, it did not seek to: [40]; [48]
    - determine the lead plaintiff's substantive claim or common questions for the benefit of group members: [44]; [46]; or
    - recover damages it has sustained or settle the litigation: [46].
- Rather, MCI's predominant purpose was to obtain compensation via ancillary orders. It is irrelevant that this purpose is not immoral or illegal. The fact that the court may award ancillary orders does not render MCI's purpose proper: [48]; [74].

High Court cases considered:

Campbells Cash and Carry Pty Limited v Fostif Pty Limited; Australian Liquor Marketers Pty Limited v Berney [2006] HCA 41; (2006) 229 CLR 386

Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509

Dowling v Colonial Mutual Life Assurance Society Limited [1915] HCA 56; (1915) 20 CLR 509

4. **Damages: entitlement to restitution for unjust enrichment**

Beagle v Australian Capital Territory and Southern New South Wales Rugby Union Limited **[2017] ACTCA 29**

Decision date: 21 July 2017

Murrell CJ, Burns and Collier JJ

The respondent is a company which owns a franchise trading as the Brumbies Super Rugby team. The appellant claimed he brokered a sponsorship deal for the Brumbies and was entitled to a commission of 10-35%. No contract was alleged, and compensation was sought on a quantum meruit basis. The primary judge dismissed the claim. On appeal, the appellant challenged the test used by the primary judge to determine if restitution was owed to the appellant.

Held:

- To determine whether there is an obligation to make restitution on a quantum meruit basis, the Court applied the test outlined by the High Court in *Equuscorp.* The primary judge had applied an incorrect test set out by Vickery J of the Victorian Supreme Court in *Vasco.* Despite this, the Court agreed with the primary judge's overall approach judge and dismissed the appeal: [93]-[94].

- The primary judge correctly considered whether the appellant materially contributed to the sponsorship deal. The primary judge did not, as alleged by the appellant, consider whether the appellant was the effective cause of the deal: [106].

High Court cases considered:

Baltic Shipping Company v Dillon (1993) 176 CLR 344

David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353

Equuscorp Pty Ltd v Haxton [2012] HCA 7; 246 CLR 498

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; 230 CLR 89

Lumbers v W Cook Builders Pty Ltd (in liquidation) [2008] HCA 27; 232 CLR 635

Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221

State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq) [1999] HCA 3; 73 ALJR 306

Victorian Supreme Court cases considered:

Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd [2014] VSC 455

Asia Pacific decisions of interest

5. **Land law: customary ownership; whether claim res judicata**

Court of Appeal, Republic of Vanuatu

Family Kalmet v Kalmet **[2017] VUCA 20**

Decision date: 21 July 2017

Lunabek CJ, von Doussa, Young, Fariaki, Aru, Chetwynd and Geoghegan JJ

Three interrelated claims were commenced in the Vanuatuan courts:

- Proceedings to determine whether Family Kalmermer, or Families Kaltaktak and Kalmet held customary ownership over certain land. A Supreme Court holding order prevented any dealing over the land until the claim was resolved.

- Proceedings to determine the validity of a lease granted over this land by Families Kaltaktak and Kalmet to Norris Jack and Hugo Bugger. Family Kalmermer sought cancellation of the lease, pleading that it was procured by mistake and/or fraud. It alleged that Norris Jack held the lease on trust for Family Kalmet, and breached his duty as trustee by forging their signatures to affect the transfer.

- An application by Norris Jack to stay the second proceedings pending the resolution of the first proceedings. Fatiaki J determined that the Court of Appeal had already upheld declarations of customary ownership made by the Eratap Customary Land Tribunal in favour of the Families Kaltaktak and Kalmet. Accordingly, Fatiaki J struck out the second proceedings as res judicata. The issue on appeal was the validity of this determination.

Held:

- The second claim was reinstated. The matter was not res judicata as there had been no final determination on the substantive issues of fraud and mistake. Fatiaki J decided the claim on the basis that Family Kalmermer could no longer sustain a claim to the land as customary owners: [34]; [36]; [40].

- As the Fatiaki J proceedings were not intended to provide a vehicle for resolution of claims of fraud and mistake, the parties' attention was not focused on this issue: [38].

6. Constitutional law: impact of extensive political debate on unconstitutional provision

Hong Kong Court of Final Appeal

Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs **[2017] HKCFA 44**

Decision date: 11 July 2017

Ma CJ, Ribeiro, Tang and Fok PJJ and French NPJ

Article 26 of the *Basic Law* and Article 21 of the *Hong Kong Bill of Rights* create a right to participate in public life "without unreasonable restriction", encompassing a right to stand for election. The appellant challenged the constitutionality of s 39(2A) of the *Legislative Council Ordinance*, which barred a legislator who resigned from the Legislative Council from standing in the by-election within 6 months of resignation.

The issue on appeal was whether the primary judge erred in upholding the constitutionality of s 39(2A) on the basis of the proportionality test. The bench included Former Chief Justice French, who was appointed as a non-permanent judge of the Hong Kong Court of Final Appeal in January 2017.

Held

- The Court upheld the validity of the section. To determine constitutionality, courts must ask whether: (i) the intrusive measure pursues a legitimate aim; (ii) it is rationally connected to advancing that aim; (iii) the measure is no more than necessary for that purpose; and (iv) pursuit of the legitimate aim results in an unacceptably harsh burden on the individual: [22]; [35].

- Elements (i) and (ii) were clearly satisfied by the legislation, which aimed to prevent resignations by members of the Legislative Council to trigger by-elections in which resigning members would stand: [50].

- When determining element (iii), courts should afford the legislature a margin of appreciation. Two main standards have been applied. The stricter asks whether a measure is "no more than necessary". The more lenient asks whether a measure is "manifestly without reasonable foundation". In deciding which test to apply, courts should consider the nature of the right (whether it is a "core value" or a "general policy"). Electoral laws involving political considerations should be accorded a wider margin of appreciation, particularly if there has been active political debate on an issue or piece of legislation: [36]-[38]; [42].

- Element (iv) is also satisfied. The encroachment on the right to stand for election is relatively small. It only applies to by-elections and the bar is solely against the resigning member: [61].

Other international decisions of interest

7. **Employment law: discrimination on the basis of sexual orientation; retrospective operation of legislation**

UK Supreme Court

Walker v Innospec Limited and Ors **[2017] UKSC 47**

Decision date: 12 July 2017

Lady Hale, Lord Kerr, Lord Reed, Lord Carnwath, Lord Hughes

Walker was employed by Innospec Ltd for 23 years, and made regular contributions to Innospec's pension scheme. Walker sought assurance from Innospec that in the event of his death, Innospec would pay the pension to his (same-sex) civil partner.

Innospec refused on the basis that paragraph 18 of Schedule 9 of the *Equality Act 2010* created an exception that allowed an employer to discriminate against an employee in a civil partnership by preventing or restricting access to employment benefits which accrued before 5 December 2005. The appellant's benefits had accrued since 1980. Walker argued that the EU *Framework Directive* (transposed into UK law in 2003) prohibits discrimination in employment on the ground of sexual orientation. He argued that this prevented an employer from denying a same-sex partner of an employee a benefit that would have been provided to a spouse of the opposite sex.

The Employment Tribunal upheld Walker's claim for discrimination. Innospec successfully appealed to the Employment Appeals Tribunal. The Court of Appeal dismissed the Walker's appeal. The issue on appeal to the Supreme Court was whether paragraph 18 was incompatible with the Directive, and if so whether it should be disapplied.

Held:

- The Court accepted that if the Directive applied, paragraph 18 was clearly incompatible. The central question was whether the Directive applied to an employment relationship which commenced before the Directive came into force: [21]; [24].
- The Directive is capable of regulating payments which accrued prior to 2005. Legislation generally applies prospectively. Here, the act of discrimination occurs at the time the pension falls to be paid, not at the time when it was accrued. The Court of Appeal erred in finding that entitlement to a pension is determined at the time it was accrued: [22]; [44]; [56]
- Accordingly, paragraph 18 is incompatible with the *Framework Directive* and Walker's claim succeeded: [72].

8. **Land law: eviction of employees; constitutional protections**

Constitutional Court of South Africa

Isak Baron and Others v Claytile (Pty) Limited and Anor **[2017] ZACC 24**

Decision date: 13 July 2017

Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla and Zondo JJ and Mojapelo and Pretorius AJJ

The applicants were employed by brick manufacturer Claytile. Each was entitled to live on Claytile's farm for the duration of their employment. The applicants continued to reside on the farm after the termination of their employment. The City of Cape Town Municipality indicated it could not provide alternative accommodation and that emergency housing was unavailable.

Claytile commenced eviction proceedings. The Magistrate's Court granted an eviction order on the basis that Claytile complied with the requirements for an eviction order as set out in the *Extension of Security of Tenure Act* (ESTA). On review, the Land Claims Court held the constitutional obligation to ensure access to adequate housing lies with the State, and not on private citizens.

The question on appeal was whether it is just and equitable to evict tenants from private land where there is no alternative accommodation available. During the course of the appeal, the City offered the applicants alternative accommodation. The applicants submitted this was unsuitable.

Held

- The City is obliged to provide suitable alternative accommodation in instances of eviction. This obligation is contained within ESTA, as well as s 26 of the Constitution which prevents persons being evicted from their homes without a court order. The City must take reasonable measures within its available resources to locate the accommodation: [11]; [40]; [46].

- Claytile is not obliged to provide alternative accommodation. A private landowner who wishes to evict an occupier is only obliged to locate alternative suitable accommodation where there has been no breakdown of the employment relationship. Claytile accommodated the applicants for several years after the termination of their employment. Claytile cannot be expected to continue to grant free accommodation where its current employees are disadvantaged: [37]-[38]; [43]; [49].

- The City's alternative accommodation is suitable, and possesses superior roads and plumbing facilities. Claytile cannot be expected to accommodate the applicants indefinitely when alternative accommodation is available. An eviction order was granted: [39]; [43].