Decisions of interest

7 August 2017 – 18 August 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Contracts: contractual interpretation; meaning of "direct dealings"**

   ***LCM Litigation Fund Pty Ltd v Coope* [2017] NSWCA 200**

   Decision date: 11 August 2017

   Macfarlan and Simpson JJA and Emmett AJA

   LCM Litigation Fund Pty Ltd (**LCM**) is a litigation funding company. Mr Coope was engaged as one of LCM's two joint managing directors from 1997 to 2015. Mr Coope was also managing director of Small Claims Funding Pty Ltd (**SCF**), a smaller litigation funding company. In 2013 Mr Rosenblatt, a solicitor acting for Mr Farnsworth, emailed Mr Coope to inquire whether SCF would be interested in funding a case. In 2014, Mr Coope received and executed a funding agreement with Mr Farnsworth as joint director of LCM.

   Following termination of his employment, LCM gained interlocutory orders restraining Mr Coope from "soliciting, canvassing or approaching…any client of LCM, with whom he had had direct dealings…within the two years prior to the date of termination of his employment". In 2015, Mr Coope emailed Mr Farnsworth to advise that he had joined Vannin Capital.

   LCM commenced contempt proceedings for Mr Coope's alleged breach of the undertaking. The primary judge found no contempt was established, as although the emails constituted soliciting, canvassing or approaching, Mr Coope had "direct dealings" with Mr Farnsworth behalf of SCF, not LCM. An issue on appeal was whether the primary judge erred in construing the words "direct dealing".

   Held:

   - The evidence did not support the challenge to the factual finding of the primary judge that the emails were received by Mr Coope in his capacity as director of SCF, rather than on behalf of LCM: [48].
   - When acting in his capacity as director of LCM, Mr Coope did not have "direct dealings" with Mr Farnsworth:
     - Passive receipt of the funding agreement, being a one-sided communication, cannot constitute a direct dealing. "Direct dealing" connotes some interaction, whether in person, by telephone, in writing, or by email (or, perhaps, others) between the parties: [43].
     - The execution of the funding agreement did not amount to a direct dealing. Mere placement of a signature on a document that records a concluded agreement does not establish the necessary interaction (at least where there is no evidence that the executed document, or a copy of it, was conveyed to the other party): [46].

2. **Negligence: damages for future economic loss; reductions for chance**

South Western Sydney Local Health District v Sorbello **[2017] NSWCA 201**

Decision date: 11 August 2017

Macfarlan, Meagher and Simpson JJA

Ms Sorbello gave birth to a son (Joseph) at Bankstown Hospital. Joseph was born with profound difficulties and will require lifetime care. A claim on behalf of Joseph was settled confidentially. Ms Sorbello claimed damages for mental harm suffered as a result of Bankstown Hospital's negligence. Liability was admitted by the South Western Sydney Local Health District (**SWSLHD**) and damages were awarded for non-economic loss, past economic loss and future economic loss.

SWSLHD appealed against the damages award. The issues on appeal were:

- whether the primary judge erred in assessing the respondent's residual earning capacity by casting an onus on the appellant to establish what employment remained open to Ms Sorbello; and
- whether the primary judge ought to have taken the approach outlined in *Malec v J C Hutton Pty Ltd,* concerning the assessment of the chance that circumstances other than the defendant's negligence would, in any event, have brought about the injury about which the plaintiff complains.

Held:

- The Court affirmed the approach taken by the primary judge in assessing future economic loss. Once a loss of earning capacity has been established by a plaintiff, the onus of demonstrating a failure to exploit any residual earning capacity lies on the defendant: *Mead v Kearney.* This assessment must take into account all of the circumstances that apply to the plaintiff: [74]-[76].
- The process required for the assessment of a chance as set out in *Malec* is entirely irrelevant to the present case. Here, there was no issue that the appellant's negligence was the cause of Ms Sorbello's condition. It was not part of SWSLHD's case that there was a chance that Ms Sorbello would, without SWSLHD's negligence, have suffered the disabling psychiatric illness that disabled her from working: [71].

High Court cases considered:

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638

New South Wales Court of Appeal decisions considered:

Mead v Kearney [2012] NSWCA 215

Other Australian intermediate appellate decisions of interest

3. **Judgments and orders: enforcement of foreign judgment; public policy**

***Kok v Resorts World at Sentosa Pte Ltd* [2017] WASCA 150**

Decision date: 14 August 2017

Martin CJ, Murphy and Beech JJA

Resorts World at Sentosa Pte Ltd loaned money to Mr Lim for the purpose of gambling at its casino. Singaporean law permits authorised casino operators to provide credit to non-resident "premium players". Mr Lim lost the money, and judgment in default of appearance was entered against him in the High Court of Singapore.

The judgment was registered in the Supreme Court of Western Australia. Mr Lim applied to set aside registration of the judgment on the basis that enforcement was contrary to public policy in WA. The master found that credit for the purpose of gambling was prohibited in WA by s 63 of the *Gambling and Wagering Commission Act 1987* (WA). However, he refused Mr Lim's application on the basis that providing credit for gambling is not "so inherently evil as to render it contrary to public policy". Mr Lim failed to appeal within the requisite period, and applied to the Court of Appeal for an extension of time.

Held:

- The application of extension of time should be refused because of the lack of merit in the appeal, which should also be dismissed: [4].
- In a federal system, the laws of the particular jurisdiction where enforcement is sought (here, Western Australia) do not have special significance. This is because reference to "public policy" in s 7 of the *Foreign Judgments Act 1991* (Cth) should be construed as a reference to the public policy of the Commonwealth. In any case, it is inconceivable that a principle of "public policy so sacrosanct as to require maintenance at all costs" could be peculiar to a particular state or territory of Australia: [19]-[22].
- Contrary to the master's findings, s 63 does not prohibit provision of credit by gambling operations conducted in casinos. Counsel conceded that all or at least a number of Australian jurisdictions expressly permit the provision of credit by casino operators to premium players, and authorise courts to enforce these debts. This concession was fatal to the appeal. If a foreign judgment was entered in circumstances which would sustain a good cause of action and a judgment enforceable in Australia, it is inconceivable that enforcement of that foreign judgment could be contrary to the public policy of Australia: [23], [25]-[28]; [32].

4. **Administrative law: failure to consider most recent information; procedural fairness**

Forrest & Forrest Pty Ltd v Minister for Mines and Petroleum **[2017] WASCA 153**

Decision date: 17 August 2017

Murphy, Mitchell and Beech JJA

Cauldron Energy Ltd (**Cauldron**) applied for exploration licences over land held by Forrest & Forrest Pty Ltd (**Forrest**) under a pastoral lease. Forrest objected to the application and the warden conducted a hearing. The warden recommended to the Minister that Cauldron's application be refused due to financial incapacity. Despite the warden's recommendation, the Minister decided that there was sufficient reason to allow Cauldron's application to proceed to the next stage (determination processes under the *Mining Act 1978* (WA) and *Native Title Act 1993* (Cth)). In making this decision, the Minister took into account further written submissions from the parties, including an announcement that Cauldron had since received $11 million from Chinese investors. However, a further submission that the Chinese investor had commenced proceedings in the Supreme Court was deemed to be lodged too late for the Minister to consider.

Tottle J dismissed an application for judicial review of the Minister's decision. Cauldron appealed, seeking declaratory relief in relation to an apprehended exercise of the Minister's power to grant an exploration licence in a manner that would be infected by jurisdictional error: [66].

Held:

- The Court dismissed the appeal. The language, construction and purpose of the *Mining Act* combine to lead to a conclusion that the Minister is entitled, but not bound, to make a decision to grant or refuse an exploration having regard only to the warden's report and accompanying material. The valid exercise of Ministerial power to grant an exploration licence is not conditioned upon a requirement to consider the most recent financial information: [112]-[113].

- This is subject to the qualification that where the Minister gives interested parties an opportunity to make further submissions after the warden's report is received, and parties exercise that opportunity, the Minister must consider the material. However, in that event, the Minister is not bound to consider material submitted after a reasonable deadline has passed: [103]; [122].

- Further, Forrest's application proceeds on an erroneous premise. The Minister's decision does not resolve to grant the licence, it merely finds sufficient reason for the applications to progress to the next stage of the process. The Court was not satisfied that the Minister closed his mind to taking account of the further information in the future: [72]-[73]; [76].

Asia Pacific decisions of interest

5. **Judgments and orders: whether absence of financial records sufficient ground to stay execution of judgment**

Singapore International Commercial Court

CPIT Investments Limited v Qilin World Capital Limited **[2017] SGHC(I) 07**

Decision date: 15 August 2017

Vivian Ramsey IJ

The Singapore International Commercial Court issued judgment in favour of CPIT against Qilin for HK$27.5M. Both Qilin and CPIT are British Virgin Islands companies. The judgment sum was due to be released by Qilin 14 days after they received a written demand by CPIT's solicitors. Upon receipt of that demand, Qinlin sought a stay of enforcement pending its appeal. It alleges that CPIT is not in a healthy financial situation, is essentially a shell company, and there is a serious risk that Qilin's appeal will be rendered nugatory.

Held:

- A stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of regaining them if the appeal succeeds: *Lee Sian Hee Pork Trader v Oh Kheng Soon* [1991] 2 SLR(R) 869. Here, affidavit evidence indicated that CPIT had up to $70M assets. Accordingly, this evidentiary threshold was not satisfied: [8]; [16].
- As both companies are registered in the British Virgin Islands, the full financial status of the companies was not evident to the Court. Despite this, it follows that: [17]-[19]
    - Courts should not draw an inference that a company does not have assets due to this absence of information.
    - Qilin cannot make mere assertions, unsupported by evidence, as to the absence of CPIT's assets, and expect CPIT to respond with financial information which is otherwise protected by registration in a foreign jurisdiction.
    - The difficulty of enforcing a judgment against a BVI company (or against assets in Hong Kong) is not a sufficient ground for a stay.

6. **Human rights: electoral rights of prisoners, indirect racial discrimination**

New Zealand Court of Appeal

Ngaronoa v Attorney-General **[2017] NZCA 351**

Decision date: 17 August 2017

Winkelmann, Asher and Brown JJ

In 2010, s 80(1)(d) of the *Electoral Act 1993* was amended to prohibit all prisoners from voting in New Zealand elections. The High Court held that this blanket exclusion was inconsistent with the right to vote protected by s 12(a) of the New Zealand Bill of Rights: *Taylor v AG* [2015] NZHC 215. In this case, three prisoners sought a declaration that the exclusion was also inconsistent with the right to freedom from racial discrimination, due to the overrepresentation of Māori people in prisons. It also alleged that the 2010 amendment was invalid because s 80 is "entrenched" and may only be amended by a super-majority. The High Court rejected both arguments. The appellants appealed.

Held:

- s 80 does not directly or indirectly discriminate on the basis of race:
    - The Court rejected a comparison between Māori and non-Māori prisoners to establish discrimination. As no prisoner has the right to vote following the 2010 amendment, Māori prisoners are not deprived of something other prisoners can enjoy: [138].
    - Instead, the Court accepted a comparison between the Maori and non-Māori voting community. Proportionally, s 80(1)(d) deprives more Māori than non-Māori of the right to vote, which is sufficiently great to accept an indirect difference in treatment. However, as less than 1% of Māori voters are in prison, the impact of the prohibition is so small that there is no material disadvantage: [147]-[149].
- s 268 of the *Electoral Act 1993* entrenches "section 74, and the definition of the term adult in s 3(1), and s 60(f), *so far as those provisions prescribe 18 years as the minimum age* for…electors". The appellants contend that this means s 74 is entrenched in its entirety. Accordingly, they argue that s 80 is entrenched by implication, because it bears on the qualification of electors in s 74. The respondents contend that only the portion of s 74 prescribing the age requirement is entrenched.
- The respondent's interpretation should be accepted as a matter of conventional grammatical construction and plain English meaning. Further, if Parliament intended to entrench all of s 74, it could be expected to have done so more clearly. It is inherently implausible that Parliament would have left such extensive entrenchment to implication: [70], [78]-[79].

Other international decisions of interest

7. Human rights: standing to commence constitutional challenge

Constitutional Court of South Africa

Limpopo Legal Solutions v Vhembe District Municipality and Others **[2017] ZACC 30**

Decision date: 17 August 2017

Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Limpopo Legal Solutions is a voluntary association whose object is to promote human rights, ensure that state entities and institutions are held accountable for the use of finances, and ensure that state resources are effectively utilised for the benefit of communities. Limpopo brought an application in the High Court for the benefit of the residents of Malamulele, seeking orders:

- that the respondent's failure to take reasonable steps to provide sanitation was unlawful and inconsistent with s 10 of the Constitution, which guarantees a right to inherent dignity; and
- compelling the respondents to take all reasonable steps to provide affected residents with reasonable access to a toilet facility.

Limpopo argued it had standing under s 38(d) of the Constitution, which provides that "anyone acting in the public interest" may approach a court to allege a right in the Bill of Rights has been infringed or threatened. The High Court found that the applicant was not genuinely acting in the public interest. The applicant appealed to the Constitutional Court.

Held:

- The High Court had no basis for concluding that the applicant did not act in the public interest. If one has regard to the applicant's affidavit, there can be no doubt that the applicant had standing: [12]; [15].
- Factors relevant to determining whether a person is genuinely acting in the public interest include considerations such as (applying *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12): (1) whether there is another reasonable and effective manner in which the challenge can be brought; (2) the nature of the relief sought; (3) the range of persons who may be directly or indirectly affected; (4) the degree of vulnerability of the people affected; and (5) the nature of the right said to be infringed and consequences for infringement: [13].

8. **Personal property: resulting trust over shares**

UK Privy Council

***Chen v Ng* [2017] UKPC 27**

Decision date: 17 August 2017

Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge

Mr Ng transferred shares in Peckson Ltd (**Peckson**) to Madam Chen. Both parties executed a document certifying that US$40,000 was paid by Madam Chen to Mr Ng. However, it is common ground that the money never changed hands. Mr Ng commenced proceedings seeking orders that the transfer was void and that Peckson's register be rectified. Mr Ng argued that he transferred the shares on the express understanding Madam Chen would transfer them back in 6 months. This was allegedly arranged so that Mr Ng's reputation would not affect Peckon's proposal to develop a new casino. Madam Chen denied this.

The British Virgin Islands High Court found that Mr Ng had failed to disprove that the documents did not carry into effect a sale and purchase agreement. The Eastern Caribbean Court of Appeal allowed the appeal, finding that as the transfer had been for no consideration the presumption of resulting trust applied in favour of Mr Ng. Madam Chen appealed to the Privy Council.

Held:

- Madam Chen cannot, at this late stage, contend that BVI courts did not have jurisdiction. She not only submitted to the jurisdiction but invoked it by applying to be joined to Peckson in the proceedings: [24], [26].

- Two alternative analyses exist: (1) that the parties' recital that consideration had been paid was inaccurate, and consideration remains payable; or (2) that the parties' real agreement was that no consideration should ever be paid. On this approach, the transfer either gave rise to a resulting trust or was a gift. In light of the fact that the Shares were registered in Madam Chen's name, the onus was on Mr Ng to establish an interest: [36]; [40]; [42].

- The trial judge rejected Mr Ng's evidence on two bases: (1) that it was futile to expect the Beijing authorities to believe that Mr Ng had no involvement in the development; and (2) had Mr Ng's explanation been true, he would have obtained a transfer in blank executed by Madam Chen to ensure the shares were transferred back. These grounds are not inherently objectionable. However, they were not put to Mr Ng in cross-examination. It is not fair to let the rejection of this evidence stand as the grounds were not obscure or difficult, and it is quite possible that Mr Ng would have given believable evidence which weakened those grounds: [48]-[49]; [57]; [60]-[61].

- Accordingly, the matter should be remitted to a full re-hearing to determine whether the transfer gave rise to a resulting trust: [62].