Court of Appeal
Supreme Court
Sydney

Decisions of interest

4 September 2017 – 15 September 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. **Negligence: pure economic loss; duty to future purchasers of property**

   Ku-ring-gai Council v Chan **[2017] NSWCA 226**

   Decision date: 7 September 2017

   McColl JA, Meagher JA, Sackville AJA

   Mr Acres, an owner-builder, appointed Ku-ring-gai Council as the principal certifying authority in accordance with s 109E of the *Environmental Planning and Assessment Act 1979* (NSW). In order to issue an occupation certificate, the Council was required to be satisfied of the matters in s 109E(3). The Council inspected the property but did not identify defects, which included structural issues and non-compliance with approved plans. The Council then issued the certificate, with the effect of authorising the occupation and use of the building.

   Ms Chan and Mr Cox, the subsequent owners of the property, rectified the defects and paid costs of relocation and alternative accommodation whilst those works were conducted. They commenced proceedings against Mr Acres, the Council and an engineer. Mr Acres cross-claimed against the other defendants.

   McDougall J found that the Council owed the purchasers a duty to take care in issuing the occupation certificate, and that if the Council *had* undertaken the inspections in a competent and professional manner, it would have detected non-compliance and required rectification of the defects. An issue on appeal was whether McDougall J erred in finding a duty of care in a novel claim to recover damages for pure economic loss.

   Held:

   - The Court unanimously allowed the appeal. The purchasers' case depended on the presence or absence of features that assist in determining whether a duty should be imposed: [68].

   - Here, there was no reliance or assumption of responsibility that would give rise to a duty owed by the Council to the purchasers. The purchasers' evidence demonstrated no more than a general expectation that the Council had acted properly and reasonably in issuing the certificate. They expressly acknowledged in cl 16 of the contract for purchase of land that the occupation certificate might be wrong, but were nonetheless content to proceed: [92]–[93].

   - In the absence of any such reliance, the purchasers were not vulnerable in the sense that they were exposed to, but not able to protect themselves from, the Council's want of reasonable care in issuing that certificate. They had the benefits of statutory warranties and remained able to protect themselves by negotiating the terms of purchase: [97]-[98].

2. **Child Welfare: application of the *Evidence Act* to child welfare proceedings**

***NU v NSW Secretary of Family and Community Services* [2017] NSWCA 221**

Decision date: 4 September 2017

Beazley P, McColl JA, Schmidt J

NU and KU are the father and mother of K. NU is also the father of J. J made allegations of sexual abuse of J by NU. This gave rise to two proceedings:

- Children's Court proceedings, in which the Children's Court granted a permanent care order in relation to K. Pursuant to this order, K was placed in the care of her maternal grandparents; and
- criminal proceedings, in which NU was acquitted by a jury following a *Prasad* direction by the trial judge (that it was open to it to conclude the evidence was insufficient to justify a conviction without hearing more).

NU and KU appealed in the District Court against the Children's Court care order. Maiden DCJ dismissed the appeal. His Honour was unable to make a finding as to whether sexual abuse of J by NU did occur, but found that abuse was likely to have occurred and that there was an unacceptable risk of harm to K.

NU then commenced an application for judicial review. The central issue was whether the primary judge committed an error of law by making a finding that there was an unacceptable risk to K, without cross-examining NU.

Held

- The Court unanimously dismissed the application.
- Unless the Court orders otherwise, the rules of evidence do not apply in proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW). However, where there is a serious allegation such as sexual abuse, the *Briginshaw* standard should be applied: [50]; [54]
- A Court's inability make a positive finding of abuse does not conclude determination of whether custody should be granted. The fundamental question is whether the child would be exposed to an unacceptable risk of harm if restored to the care of the parent or parents: [55]; [83]
- There is a corollary to the rule in *Browne v Dunn*: if a witness is on notice of the allegation upon which a party intends to rely and is on notice that his or her evidence is contested on that issue, the rule does not mandate that the witness be cross-examined on the matter: [58]
- Here, NU was on notice that J's allegations of sexual abuse over a three year period were an issue pertinent to proceedings. Counsel's failure to cross-examine NU on the particulars of the allegation was not a breach of procedural fairness: [62]; [70]-[74]

Other Australian intermediate appellate decisions of interest

3. **Statutory interpretation: whether cost of rental property claimable as reasonable medical expense**

Motor Accidents Insurance Board v Bricknell **[2017] TASFC 7**

Decision date: 6 September 2017

Blow CJ, Estcourt J, Marshall AJ

Ms Bricknell was seriously injured in a motor vehicle accident. Her doctor recommended that she live in Hobart while receiving treatment. She rented a house in Hobart and claimed the amount of rent from the Motor Accidents Insurance Board as a "medical benefit" pursuant to Sch I of the *Motor Accidents (Liabilities and Compensation) Regulations 2010.*

The Board rejected her claim, which was upheld by the Motor Accidents Compensation Tribunal. On appeal to the Supreme Court, Brett J held that Ms Bricknell was entitled to the rental expenses under Sch 1, Pt 2 of the *Regulations*, which provide that a person may recover "all the expenses … incurred … for the provision of treatment required by him or her".

On appeal to the Full Court, the issue was the effect of cl 1(3), which defines "treatment" to include "(j) travel by taxi for the purposes of obtaining treatment" (for less than 20 kilometres each way) or "(k) travel by any means" by a person who requires "daily care" (for more than 20 kilometres each way), but does not refer to rental expenses.

Held:

- The Court dismissed the appeal. The *Motor Accidents (Liabilities and Compensation) Act 1973* and the regulations are beneficial legislation. Such legislation should interpreted favourably to the class of persons intended to be benefitted – here, persons injured in motor vehicle accidents: [9].

- Subparagraphs (j) and (k) are not deeming provisions that extend the ordinary meaning of the words to concepts they might not otherwise include: [43].

- Rather, subparagraphs (j) and (k) limit the unbridled recovery of travel expenses incurred in the accessing of medical treatment, which would otherwise be prima facie embraced by the words "expenses reasonably and necessarily incurred by the person or on his or her behalf for the *provision of* the treatment". The words were used to carve out some expenses from what would otherwise qualify as reasonable and necessary travel expenses on the basis that it is not unreasonable for some travel expenses to be borne by injured persons: [33].

4. **Costs: lump sum costs order**

Paciocco v Australia and New Zealand Banking Group Limited (No 2) **[2017] FCAFC 146**

Decision date: 15 September 2017

Allsop CP, Besanko J and Middleton J

The Full Court of the Federal made substantive orders in *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50 regarded 'exception fees' charged by ANZ. ANZ now seeks that costs orders made in its favour be awarded on a lump sum basis pursuant to r 40.02(b) of the *Federal Court Rules 2011.*

The Paciocco parties oppose the lump sum cost order. Their "main concern" (at [29]) is that a lump sum determination of costs would deny the Court the ability to closely scrutinise the costs in a way that would ordinarily occur through the process of taxation, especially in relation to expert evidence.

Held

- The costs order should be granted as a lump sum:
    - The Full Court did not convey that no further order for a lump sum award could or should be made in proceedings: [25];
    - The Court is not precluded from adopting appropriate steps and procedures to inquire into costs or a category of costs, such as the costs of preparing expert's evidence: [31]; and
    - The joint determination of the costs will avoid the difficulty and expense of allocating the cost of each item of work between the various interrelated trials and appeals in *Andrews* and *Paciocco*: [35].
- The Court made the following general comments on lump sum orders:
    - The purpose of r 40.02(b) is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation. This is supported by the Federal Court *Costs Practice Note,* which provides that the Court's preference, wherever it is practicable and appropriate to do so, is to make a lump sum costs order so as to finalise costs and avoid potentially expensive and lengthy taxation hearings: [15]; [16].
    - The Court is able to adopt its own procedures in inquiring into costs, and may be flexible in how it conducts that inquiry: [18].
    - Particular circumstances that may make a lump sum order especially appropriate include: large and complex commercial matters; where a taxation would require the parties to consume additional time and incur additional expenditure; and to avoid an ongoing, counter-productive dispute as to costs: [20].

Asia Pacific decisions of interest

5. Torts: trespass to land, joint and several liability

Court of Appeal of Tonga

Nuku v Luani **[2017] TOCA 5**

Decision date: 6 September 2017

Paulsen P, Handley J, Blanchard J

Mr Kava owned land in Tonga. Mr Kava and Lord Nuku agreed that Mr Kava would apply to Cabinet for consent to surrender his land, enlivening an entitlement in Mr Kava's heir to claim the land for himself. Mr Kava's heir would not make such a claim. If no claim had been received after 12 months of advertisement, the land would revert to Lord Luani (the Estate holder, and a member of one of Tonga's 33 royal families). Lord Nuku's son, Mr Valedale, would then apply to Lord Luani for the land.

Cabinet consented to the surrender, but Mr Kava's heir did not apply for the land within 12 months. Accordingly, the land reverted to Lord Luani. Despite this, Mr Kava, Mr Kava's heir and Mr Valedale purported to lease the land to two Chinese companies for 20 years for use as a quarry. In an accompanying letter, Lord Nuku "certified" that the land could legally be used as a quarry. 85,009 cubic yards of rock were removed.

The primary judge found that Lord Nuku and the Chinese companies were liable jointly and severally in trespass and awarded Lord Luani damages to the value of the rock extracted. On appeal, Lord Nuku challenged his liability as a joint and several tortfeasor and the quantum of damages. The bench included the Hon Kenneth Handley, formerly of the NSW Court of Appeal.

Held:

- Although Lord Nuku did not conduct the quarrying himself or employ others for that purpose, the lease agreement and accompanying "certification" letter implicated him in the trespass. The high rent also evidenced a joint enterprise in the use of the land as a quarry, with the proceeds shared between the parties: [20].

- Lord Luani did not have a right to possess the land during the 12-month period after the consent application was submitted. Trespass is essentially an injury to the plaintiff's possession. Nevertheless, Lord Luani is entitled to damages because the quarrying caused a permanent injury to the land, affecting the reversionary interest: [22]-[23].

- Lord Luani is not entitled to the gross value of the rock extracted. Rather, he is entitled to the net value after allowing for the cost of extraction: [24].

6. Statutory interpretation: appeals from associate judges

Court of Appeal of New Zealand

***Sutcliffe v Tarr* [2017] NZCA 360**

Decision date: 11 September 2017

Winkelmann, Brown and Clifford JJ

Associate Judge Christiansen heard applications commenced in the High Court by Mr Tarr against Mr Sutcliffe and the partners of Frost & Sutcliffe Lawyers (**the Firm**). Christiansen AJ declined applications for summary judgment or strike-out of those proceedings. Mr Sutcliffe and the Firm filed a notice of appeal.

This raised a jurisdictional issue: whether the *Senior Courts Act 2016* or the *Judicature Act 1908* applies to an appeal from an Associate Judge. The *Senior Courts Act* came into force on 1 March 2017. The High Court proceedings were commenced prior to 1 March, but the Associate Judge's judgment was delivered and the appeal commenced after 1 March. If the *Senior Courts Act 2016* applied, leave of the High Court would be required to appeal the present case.

Schedule 5 to the *Senior Courts Act* sets out transitional provisions. Clause 10 provides that "all proceedings pending or in progress in a court operating under the relevant Act immediately before the commencement of this clause may be continued, completed and enforced only under the relevant Act…as if that Act had not been repealed by this Act". The Court of Appeal was asked to determine the meaning of this expression.

Held

- Two interpretations are available:
    - a "proceeding" is only completed when all rights of appeal have been exhausted and the judgment enforced (so that a proceeding commenced in the first instance court before 1 March 2017 is to be completed in accordance with the *Judicature Act,* including any rights of appeal); or
    - an appeal is a new "proceeding" (so that any appeal filed after 1 March 2017 would be commenced and concluded in accordance with the *Supreme Court Act*).
- The first interpretation is correct and the proceeding should continue under the *Judicature Act*. Whilst appeals have a different character and filing number from the original proceeding, they are still part of that initial proceeding as the rights and interests at issue are the same: [21]-[22].
- These transitional provisions are consistent with the general principle of statutory interpretation that proceedings should continue to be determined in accordance with the law as it existed when they commenced: [32].

Other international decisions of interest

7. **Human rights: private international law; extradition**

Supreme Court of Canada

***India v Badesha* (2017) SCC 44**

Decision date: 8 September 2017

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

Br Badesha (B) and Ms Sidhu (S) were charged in India with conspiracy to commit murder, in relation to an alleged honour killing. B and S are Canadian citizens residing in Canada. India sought to extradite B and S. The Canadian Minister of Justice ordered their surrender under s 44(1)(a) of the *Extradition Act* after receiving assurances from India regarding their treatment if incarcerated.

The Court of Appeal found the Minister's orders were unreasonable, ordered that the decision be set aside and remitted the matter to the Minister. The Attorney General appealed from that order to the Supreme Court.

Held:

- The appeal should be allowed, and the orders of the Minister restored: [7]. The Minister's surrender orders are subject to review on a standard of reasonableness: [9]. Here, the Minister's decision fell within a range of reasonable outcomes: [62]-[63]
    - there was no substantial risk of torture or mistreatment of B and S that would offend the principles of fundamental justice protected by s 7 of the *Canadian Charter of Rights and Freedoms;* and
    - the surrenders were not otherwise unjust or oppressive.
- In making this decision, the Minister may also take into account to diplomatic assurances regarding the person's treatment. Such assurances need not eliminate any possibility of torture or mistreatment; they must simply form a reasonable basis for the Minister's finding that there is no substantial risk of torture or mistreatment. The reliability of diplomatic assurances depends on the circumstances of the case, including the ease of monitoring the assurances: [46]-[48].
- The Minister may also take into account: the seriousness of the alleged offence; the importance of Canada meeting its international obligations; general evidence of human rights abuses in the receiving state; and the opportunity to undertake consular monitoring: [45]; [53]; [65].

8. **Bankruptcy: prescription of debt; payment on demand**

Constitutional Court of South Africa

***Trinity Asset Management Pty Ltd v Grindstone Investments 132 Pty Ltd* (2017) CCT 248/16**

Decision date: 5 September 2017

Grindstone Investments 132 Pty Ltd (**Grindstone**) borrowed capital from Trinity Asset Management Pty Ltd (**Trinity**), effective 1 September 2007. Clause 2.3 of the Loan Agreement provided that the loan capital was due and repayable to the applicant within 30 days of the date of delivery of Trinity's written demand.

In September 2013, there was an exchange of emails regarding the repayment. On 9 December 2013, Trinity served a letter of demand on Grindstone, claiming payment within 21 days. Grindstone denied the debt.

On 18 July 2014, Trinity launched an application in the High Court to provisionally liquidate Grindstone. Grindstone argued in defence that Trinity's claim against it for repayment of the debt had prescribed in 2011. The High Court dismissed the application, finding that where there is a genuine dispute about a debt, an application for liquidation is inappropriate and should be dismissed. Here, the defence of prescription was valid.

The Supreme Court of Appeal of South Africa dismissed the appeal. On appeal to the Constitutional Court, the parties agreed that the determinative issue was whether the debt had prescribed.

Held

- The majority allowed the appeal, finding that Grindstone raised a valid prescription defence to liquidation.
- On a holistic reading of the loan agreement, the parties did not intend to delay when the debt would become due or when prescription would begin the run. The parties simply meant to allow Grindstone 30 days to repay the debt once Trinity had issued demand, not to postpone the due date of the debt to an indeterminate future date: [104]-[105]; [137].
- The minority held that Trinity's claim had not prescribed. When no due date is specified, the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance. Where there is such a clear intention, the demand is a condition precedent to claimability and prescription begins from the demand. Here, the parties intended for Trinity to determine the time for performance by making demand: [47]; [59].