Decisions of interest

18 September 2017 – 29 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Contract law: incorporation of guarantee document into loan agreement**

   Singh v De Castro; Dhaliwal v De Castro; Brar v De Castro [2017] NSWCA 241

   Decision date: 22 September 2017

   Macfarlan JA, Gleeson JA, Sackville AJA

   New Ridge Property Group Pty Ltd (**the borrower**) entered a Loan Agreement with Mr and Mrs De Castro (**the lenders**). The lenders agreed to loan $300,000 to the borrower and the borrower agreed to pay interest at 12% per annum.

   The borrower defaulted and the lenders commenced proceedings in the District Court against the borrower and its six directors. The lenders argued that each of the six directors were liable due to a guarantee contained within the Loan Agreement. Default judgment was entered against the borrower (which was deregistered prior to the District Court hearing) and one of the directors (who was an undischarged bankrupt at the time of the District Court hearing). Judgment was entered by the primary judge against the remaining five directors (the appellants).

   On appeal, the principal issues were: (1) whether three of the directors signed the loan agreement in a form that contained the guarantee; and (2) whether two of the appellants signed the Loan Agreement at all.

   Held:

   - The court dismissed the appeal with costs: [120].
   - The three appellants had not made out any basis for setting aside the finding that the loan agreement contained the guarantee. The primary judge's finding was based not only on his Honour's assessment of the credibility of the witnesses, but on the objective circumstances and commercial probabilities: [112].
   - The three appellants' admission that they signed the agreement, the rejection of their evidence that they had signed a different document and the absence of any documentary evidence to support the "negative proposition" cast an onus on them to adduce some cogent evidence to support their case: [119].
   - There was ample evidence before the primary Judge to justify the finding that the remaining two appellants signed the loan agreement: [63]; [82]-[83].

2. **Torts: interaction with Australian Consumer Law; obvious risk**

Lets Go Adventures Pty Ltd v Barrett **[2017] NSWCA 243**

Decision date: 22 September 2017

Basten JA, Gleeson JA and Adamson J

Mr Barrett was a commercial diver who operated a diving shop and school. His company entered an agreement with Lets Go Adventures Pty Ltd (**Lets Go Adventures**) to provide a boat and operate it while Mr Barrett took his clients on boat dives. In 2012, a client (Mr Moore) suffered a head injury. Mr Barrett was required to rapidly ascend when Mr Moore became unwell. Mr Barrett administered oxygen to Mr Moore, but did not access oxygen himself. Mr Barrett later reported that he was suffering from severe decompression illness and sold his diving business.

The trial judge found Lets Go Adventures to be liable under s 60 of the *Australian Consumer Law* (**ACL**) for breach of the statutory guarantee that services be rendered with due care and skill. By finding that Mr Barrett was a "consumer", her Honour based Lets Go Adventures' liability on the ACL rather than in negligence. Thus, the waiver signed by Mr Barrett was rendered inoperative, and ss 5M and 5N of the *Civil Liability Act 2002* (NSW) (**CLA**) did not apply.

On appeal, Lets Go Adventures argued that the trial judge erred in accepting Mr Barrett's three lines of argument.

Held:

- Judgment should be set aside: [153].
- The trial judge's finding that Lets Go Adventures ought to have been aware that Mr Barrett needed oxygen was erroneous. Mr Barrett was an experienced diver running a dive business. To require Lets Go Adventures to countermand Mr Barrett's circumstances would elevate the standard of care required: [105]. The trial judge's findings that Mr Barrett was "coughing and exhausted" and that there was insufficient oxygen were also erroneous. It was common ground that if both the "C" and "D" oxygen cylinders were on board, there was sufficient oxygen. Mr Barrett accepted that the "C" cylinder was on board and failed to prove that the "D" cylinder was not: [108].
- The trial judge's finding that Mr Barrett's shoulder and arm injury was the result of lifting Mr Moore into the boat was erroneous: [134].
- The trial judge found that Lets Go Adventures was aware of Mr Moore's head injury, and was therefore responsible for the consequences of the dive. However, there was no evidence that Lets Go Adventures was aware of the injury. Further, Mr Moore indicated willingness to descend by making a sign to Mr Barrett: [137]; [140].

Other Australian intermediate appellate decisions of interest

3. Contracts: damages for depression and anxiety

Archibald v Powlett **[2017] VSCA 259**

Decision date: 21 September 2017

Redlich, Osborn and McLeish JJA

Ms Powlett owned a cottage that she let out as holiday accommodation. Seeking to expand her rental operation, she entered six contracts with Mr Weis for the purchase, transport and restumping of two relocatable houses. Mr Archibald was named as the party responsible for the sale and transport of the houses.

The houses were never delivered, and as a result Ms Powlett sold the cottage and a second property to meet loan repayments. She commenced proceedings against Mr Weis and Mr Archibald in the County Court. The trial judge entered judgment against Mr Weis in respect of the restumping contract, but found that Mr Weis signed the sale and transportation contracts as Mr Archibald's agent.

At a separate trial, a different trial judge found that Mr Achibald was a party to the sale and transportation contracts and awarded damages for breach. On appeal, the central issue was whether the trial judge erred in awarding damages for distress, anxiety and depression in connection with the contract.

Held:

- The award of damages should be set aside: [67].
- Pt VBA of the *Wrongs Act 1958* prevents recovery of damages for anxiety or stress unless there is evidence of a 'significant injury'. As there was no significant injury, Ms Powlett needed to demonstrate that Pt VBA did not apply. A claim for inconvenience may be made without a claim for anxiety or stress, provided the inconvenience is of some significance. Such a claim falls outside Pt VBA because it is not 'in respect of an injury': [56]; [59]-[60].
- Ms Powlett pointed to several cases where damages for anxiety, distress and disappointment were awarded following breach of a building contract. However, all of these cases involved a physical imposition on the plaintiff (such as an offensive odour), which is not alleged in the present case: [63].
- Damages may be awarded for inconvenience following breach of a building contract where the physical inconvenience or mental distress is *directly related* to those inconveniences caused by the breach of contract: *Boncristiano v Lohmann* [1998] 4 VR 82. Ms Powlett's case does not satisfy this test. The inconvenience she faces is time and trouble spent dealing with the breach, not actual disruption or physical imposition: [65]-[66].

4. **Jurisdiction: accrued jurisdiction to hear defamation claim in ACL matter**

Rana v Google Inc **[2017] FCAFC 156**

Decision date: 28 September 2017

Allsop CJ, Besanko and White JJ

Mr Rana alleged that Mr and Ms Gregurev had published defamatory material on websites hosted by Google which appear in Google search results. Mr Rana commenced proceedings in 2012 against Google Inc, Google Australia Pty Ltd and the Gregurevs. The claim against Google Australia was dismissed by Mansfield J, and Mr Rana discontinued the other proceedings.

Mr Rana commenced the present proceedings against Google Inc and the Commonwealth in 2014. The claim against the Commonwealth was resolved by consent. Mr Rana sought leave to commence further proceedings against Google Inc for the publication of the same defamatory matter, as required by s 21 of the *Defamation Act* (SA). Mansfield J refused leave, but granted leave to file a proposed amended originating application and statement of claim.

These amended documents came before Charlesworth J in 2016. Mr Rana claimed against Google in defamation, negligence and contravention of ss 18 and 21 of the *Australian Consumer Law* (**ACL**). Charlesworth J struck out the ACL claims as embarrassing. Her Honour found that due to the inadequacy of the ACL pleas, it was not possible to conclude whether the defamation and ACL claims formed part of the same matter so as to fall within the Federal jurisdiction. Accordingly, her Honour concluded that the Court lacked jurisdiction to hear and determine the defamation claims as there was no core federal matter pleaded. Mr Rana appealed to the Full Court on the question of jurisdiction.

Held:

- The Full Federal Court allowed the appeal. While Charlesworth J was correct to strike out the ACL claims, the Court retained jurisdiction to hear and determine the defamation claim on the basis of accrued jurisdiction from the ACL claim, or alternatively due to the fact the claim was brought against the Commonwealth: [11]; [14]; [39].

- Where federal and non-federal claims comprise the same justiciable controversy, a court exercising federal jurisdiction can resolve the entire matter. Upon the existence of federal jurisdiction, the matter remains within federal jurisdiction regardless of how the federal issue is ultimately resolved. For example, it remains federal if the federal claim is struck out or effectively abandoned: [17]; [20]; [21].

- The claims against Google form one controversy, one matter. Despite the defective expression of the ACL pleas, one can discern a common substratum of facts from which all the claims arise: the defamations by the Gregurevs. The claims need not be identical in scope: [25]; [29]; [37].

Asia Pacific decisions of interest

5. Contracts: subject to contract clause

Singapore International Commercial Court

Tozzi Srl v Bumi Armada Offshore Holdings Ltd and Anor **[2017] SGHC(I) 8**

Decision date: 21 September 2017

Chong JA, Berger IJ, Bernard Eder IJ

Bumi Armada Offshore Holdings Limited (**BAOHL**), a wholly-owned subsidiary of Bumi Armada Berhad (**BAB**), invited Tozzi Industries SpA (**Tozzi**) to support their bid on a project to supply services to a gas field.

The parties signed a pre-bid agreement in which Tozzi agreed to work exclusively with Bumi, and Bumi granted Tozzi a right of first refusal. Before the pre-bid agreement was due to expire, the parties agreed at a meeting that the relationship would continue and that Tozzi would retain its first right of refusal. The minutes stated: *"[parties] agree that these minutes… constitutes an understanding of the discussions… and is subject always to successful negotiation and mutual agreement and execution of a formal contract."*

BAOHL was awarded the contract for the project, but awarded the subcontract to another party without extending the right of first refusal to Tozzi. Tozzi commenced proceedings in the Singapore International Commercial Court.

Held:

- A contract was formed at the meeting for Tozzi to be granted a right of first refusal. The right of first refusal is a standalone right, independent of other matters discussed at the meeting requiring further deliberation. The fact that some terms were still open to negotiation does not preclude the independent right of first refusal from having contractual effect: [24]-[26].
- Given the project timeline, it is unrealistic to suggest that the parties envisaged engaging in further negotiation on the right of first refusal when that right was only to be exercisable during the process of awarding the subcontract, which was likely to occur soon. It is also telling that correspondence after 31 July referenced an "agreement": [27]-[28].
- BAOHL breached the agreement by awarding a subcontract to another company, and supplying other modules "in house": [34].
- BAB did not induce its subsidiary BAOHL to breach the agreement. BAB's employees did not hold formal appointments with BAOHL and were known to Tozzi as BAOHL's executives. The Court distinguished the NSW Supreme Court decision *ADC Pty Ltd v White Constructions (Act) Pty Ltd* (unreported, Giles CJ CommD 55041/91): [35]; [41]; [43].

6. **Commercial arbitration: adequacy of reasons in arbitral award**

Court of Appeal of New Zealand

Ngati Hurungaterangi v Ngati Wahiao **[2017] NZCA 429**

Decision date: 26 September 2017

Harrison, Winkelmann and Gilbert JJ

In the late 1800s, the Crown acquired Māori lands near Rotorua. In 2008, a report by the Waitangi Tribunal found that the acquisition was inconsistent with Treaty obligations. The Crown agreed to return the lands to the Ngāti Whakaue iwi (tribe) and Ngāti Wahiao hapu (clan).

Ngāti Whakaue and Ngāti Wahiao were unable to agree on which of them was entitled to the lands, but agreed to establish a joint trust to take title to the lands until determination of their competing claims. The parties executed a trust deed which outlined a four-step process for resolving the question of ownership. The final step was adjudication by a panel of experts. A panel was appointed consisting of a retired Supreme Court judge and two distinguished Māori leaders. It determined that the lands should be apportioned equally between the parties, but left implementation to be agreed between them.

Ngāti Whakaue appealed to the High Court. Moore J dismissed the appeal. The issue for the Court of Appeal was whether Moore J erred in finding the panel discharged its mandate to give reasons.

Held:

- The appeal was allowed. While brevity is often acceptable in an arbitral assessment of evidence and factual findings, the panel was obliged to analyse the evidence and provide reasonable clarity about the core basis of the conclusion. Here, only five paragraphs of the award might be said to provide reasons. These reasons were so inadequate and inconsistent that they fell short of the discharging the panel's mandate: [69]; [74]; [104].

- Instead of identifying the contentious issues which emerged between the parties, the award focused on formalistic issues arising for determination, and provided a lengthy recital of the parties' cases: [80].

- Several aspects of the case emphasised the obligation to give reasons:

    - 1. The panel's was obliged to perform its duties in accordance with the trust deed. As the subject matter of the dispute was factual, it could only be determined through reasoned findings on the evidence: [75].

    - 2. The decision to appoint a retired judge reflected an expectation that the panel's reasons would be marked with depth and solemnity: [71].

Other international decisions of interest

7. Civil procedure: crown immunity from rules of discovery

Supreme Court of Canada

***Canada (Attorney General) v Thouin*, 2017 SCC 46**

Decision date: 28 September 2017

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

Mr Thouin is the designated member in a class action instituted by Automobile Protection Association (**APA**) against ten oil companies and retailers. The class action alleged a conspiracy to fix gasoline prices in regions of Quebec. The allegations were investigated by the Competition Bureau of Canada.

The APA sought permission to examine the Chief Investigator of the Competition Bureau, and an order requiring the Attorney General to disclose all intercepted communications and documents in the investigation file.

The Superior Court granted the motion, allowing discovery solely for the purpose of obtaining information about knowledge specific to the territory covered by the class action. The Court of Appeal dismissed an appeal. On appeal to the Supreme Court, the issue was whether the Attorney General could resist disclosure on the basis of crown immunity, as provided in s 27 of the *Crown Liability and Proceedings Act* (**CLP Act**).

Held:

- The Supreme Court allowed the appeal, finding the Court of Appeal erred in its interpretation of the CLP Act: [3].
- There is a presumption that the common law principle of crown immunity remains unchanged absent a clear and unequivocal expression of legislative intent. Over time, Parliament and legislatures have placed limits on the immunity, drawing the Crown's legal position closer to other litigants: [1]; [19].
- Section 17 of the *Interpretation Act* is the starting point in each case where the Crown may have immunity. In short, the section provides that unless the immunity is clearly lifted, the Crown continues to hold it: [20].
- Section 27 of the CLP Act provides that the Crown is subject to the "rules of practice and procedure of the court" (including the rules on discovery) where the Crown is a party to proceedings. However, section 27 does not indicate a clear and unequivocal intention to lift the immunity in proceedings in which it is *not* a party. As neither the Crown nor Chief Investigator is a party in these proceedings, the Chief Investigator may refuse to submit to the examination and discovery: [24]-[26].

8. **Civil procedure: operation of prescription period**

Constitutional Court of South Africa

Mtokonya v Minister of Police **[2017] ZACC 33**

Decision date: 19 September 2017

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

In September 2010, Mr Mtokonya was arrested by members of the South African Police Service. Mr Mtokonya was detained for five days without being taken to court, in contravention of s 38(1)(d) of the Constitution, which requires that this occur within 48 hours.

In September 2013, Mr Mtokonya instituted proceedings against the Minister for Police to recover damages. This occurred more than three years after Mr Mtokonya was released from detention. Mr Mtokonya argued that he did not know the conduct of the police was wrongful until July 2013 when his neighbour (an attorney) told him he had a cause of action.

The High Court found that Mr Mtokonya's claim had prescribed (that is, barred by a limitation defence), as knowledge that a party's action was wrongful was not a requirement for prescription to start running. On appeal, the issue was whether prescription started to run on the date he was unlawfully detained (September 2010) or the date the applicant became aware that he had a cause of action (July 2013).

Held:

- A majority of the Court dismissed the appeal. A claimant need not know that the respondent's conduct is wrongful before prescription starts to run. To require knowledge that the conduct of a debtor is wrongful would render the law of prescription ineffective, as prescription would not run against people with no legal training: [63]; [85].

- Section 12(3) of the *Prescription Act 1969* requires a claimant to have knowledge of the identity of the party and the facts giving rise to the debt before prescription starts running. Knowledge that conduct is wrongful and actionable is a conclusion of law, not fact: [41]; [44]-[45].

- A minority of the Court (Jafta J, Nkabinde ADCJ and Mojapelo AJ) found that Mr Mtokonya's claim had not prescribed. Section 12(3) of the Prescription Act should not be read as authorising prescription to commence running where the claimant has successfully established that he or she was not aware of the existence of the claim for damages. The effect of holding otherwise would be denying the uneducated and poor people in society the protection arising from constitutional rights: [111]-[112]; [125]; [148].