Court of Appeal
Supreme Court
Sydney

Decisions of interest

30 October 2017 – 10 November 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. **Professions and trades: suspension of medical practitioner; stay of suspension decision**

   Medical Council of NSW v Lee **[2017] NSWCA 282**

   Decision date: 6 November 2017

   Beazley P, Basten JA, Sackville AJA

   Dr Lee was a specialist radiologist. In February 2017, the NSW Police provided the Council with a court attendance notice which detailed nine criminal charges against Dr Lee relating an alleged contravention of an apprehended violence order, stalking and intimidation, and using a carriage service to menace, harass or offend. On 20 March 2017, the Council suspended Dr Lee's registration as a medical practitioner.

   Dr Lee appealed to the Civil and Administrative Tribunal (**the Tribunal**) against the suspension pursuant to s 159(1) of the *Health Practitioner Regulation National Law* (NSW) (**National Law**). On the same day, Dr Lee applied to the Tribunal for a stay of the suspension pending the outcome of the appeal. The Tribunal granted a stay pursuant to s 43(3) of the *Civil and Administrative Tribunal Act 2013* (NSW), which allows the Tribunal to "make such orders … staying or otherwise affecting the operation of the decision to which a pending general application or appeal relates".

   On appeal, the issue was whether the Tribunal had power to grant the stay pursuant to s 43(3).

   Held:

   - The Court allowed the appeal and set aside the stay decision.
   - Section 43(3) of the NCAT Act is not a source of power for the Tribunal to stay a suspension decision. The National Law was intended to deal exhaustively with the circumstances in which a decision by the Council to suspend a medical practitioner can be stayed, terminated or waived: [96].
   - Further, the Tribunal was not empowered by s 161B of the National Law to stay the suspension decision. Section 161B provides that an appeal under Div 6 does not operate to stay the effect of a decision being appealed against "unless the Tribunal otherwise orders". When considered in context and with reference to the legislative history of the section, s 161B also does not provide a source of power to the Tribunal to stay the effect of a suspension decision: [100]-[101].
   - The only power to terminate a suspension lies with the Council, which has ample powers to terminate a suspension when the circumstances require.

2. **Equity: trusts; tracing**

King v Adams & Ors **[2017] NSWCA 277**

Decision date: 6 November 2017

Gleeson JA, White JA, Emmett AJA

In March 2016, Mr Adams started a lottery syndicate with 12 members (**the syndicate of 12**), including Mr King. Each member paid Mr Adams $50 at requested intervals. He purchased $186 worth of tickets for 5 May Powerball, which returned $13.65.

Mr Adams also arranged a second syndicate to purchase more tickets in the 5 May Powerball. Mr Adams contacted 12 people, including nine of the members in the syndicate of 12, who each contributed $50. On 4 May, Mr Adams purchased $592 worth of tickets. The winning ticket won a lottery prize of $40,445,165.25. Mr Adams deposed that he kept the cash received from the different syndicates separately.

The primary judge held that Mr Adams had collected $600 from the members of the second syndicate, which he used to purchase the tickets that included the winning ticket. Accordingly, Mr King was not a member of the winning syndicate and was not entitled to a share of the winnings.

On appeal, counsel for Mr King argued that Mr Adams had only collected $450 at the time the tickets were purchased for the second syndicate. Accordingly, Mr Adams' objective intention was to buy the additional tickets for the syndicate of 12 (because he bought $600 worth of tickets and was dealing in lots of $50). Alternatively, counsel submitted that because Mr Adams had not collected $600 from members of the second syndicate by the morning of 4 May 2016, he must have used money held for the syndicate of 12 to buy tickets for the second syndicate.

Held:

- The court unanimously dismissed the appeal.
- There is no sufficient reason to reject the primary judge's acceptance of Mr Adams as a witness of credit. There is also no sufficient reason to reject the primary judge's conclusion that Mr Adams had collected $600 from the members of the second syndicate prior to purchasing the tickets, which was used to purchase the tickets that included the winning ticket: [47]; [51]; [54].
- Even if Mr Adams had only collected $450 prior to purchasing the tickets, it does not follow that it should be inferred that Mr Adams intended to buy the tickets for the syndicate of 12. It must be inferred that he was buying tickets for a syndicate that included at least two individuals who were not members of the syndicate of 12, but had paid their money: [52].
- As such, it was unnecessary to consider whether Mr King, as a member of the syndicate of 12, had a beneficial interest in the $40 million: [53].

Other Australian intermediate appellate decisions of interest

3. **Occupational regulation: horse racing; method of proof**

Racing Victoria Limited v Kavanagh and O'Brien **[2017] VSCA 334**

Decision date: 17 November 2017

Maxwell P, McLeish JA and Cavanough AJA

In June 2015, Racing Victoria Limited laid 16 charges against Mr O'Brien and 4 charges against Mr Kavanagh for breaches of the *Racing Act 1958* (Vic). The most serious charge in each case was that the trainers had caused cobalt to be administered to horses that they trained for the purpose of affecting the horses' performance. The Racing and Disciplinary (**RAD**) Board found that the most serious of the charges were proven. This decision was set aside by the Victorian Civil and Administrative Tribunal, which found that neither trainer had knowledge of the administration of any prohibited substance to any of their horses.

Rule 78D of the *Australian Racing Rules* provides that the certified findings of two Official Racing laboratories shall be prima facie evidence that a prohibited substance has been detected. However, due to a "substantial departure" from the requirements of Rule 78D when obtaining the certificates, the Tribunal found that RVL could not rely on them as prima facie evidence. The Tribunal also excluded other evidence which established the presence of cobalt. This issue was challenged on appeal.

Held:

- The Court allowed the appeal: [10].
- The Tribunal erred in relation to the mode of proof. Evidentiary provisions of this type have consistently been construed as facilitative, so as not to exclude other methods of proof. It is highly improbable that the drafters intended that procedural non-compliance would render inadmissible other evidence which was capable of proving the presence of the prohibited substance: [9]; [79]; [81].
- Comparable evidentiary provisions under other regulatory regimes are designed to relieve the regulatory authority of having to lead evidence from witnesses. Instead, a procedure is laid out leading to the production of certificates which constitute either prima facie or conclusive evidence: [80].
- Accordingly, the Tribunal erred in excluding the non-certificate evidence which established that cobalt was detected in a sample taken from each of the relevant horses: [88].

New South Wales Court of Appeal cases considered:

Day v Sanders; Day v Harness Racing New South Wales [2015] NSWCA 324

4. **Arbitration: commercial arbitration; prima facie and merits approach**

Hancock Prospecting Pty Ltd v Rinehart **[2017] FCAFC 170**

Decision date: 27 October 2017

Allsop CJ, Beskanko and O'Callaghan JJ

Bianca Rinehart and John Hancock commenced proceedings against 15 respondents, including Gina Rinehart and Hancock Prospecting Pty Ltd (**HPPL**). They alleged that Gina Rinehart controlled The Hancock Group, including the trusts which owned shares in HPPL and the Hancock Family Memorial Foundation (**HFMF**), and that she used her position to transfer HFMF's assets to HPPL.

HPPL sought an order under s 8(1) of the *Commercial Arbitration Act 2012* (WA) (**CA Act**) that the proceedings be stayed and referred to arbitration. It was common ground that to invoke s 8(1), a court must be satisfied that the arbitration would be a "domestic commercial arbitration". The primary judge held that the CA Act applied to the dispute. However, her Honour did not order that the proceedings be stayed, and instead directed that the question of whether the arbitration agreements were "null and void, inoperative or incapable of being performed" be tried. The primary judge held that some of the disputes were the subject of an arbitration agreement, and others (including the enforceability of the Hope Downs Deed) were not.

Important issues on appeal were: whether the arbitration was "commercial" for the purposes of the CA Act; the extent to which the matters in dispute are subject of the arbitration agreement; and whether a party that is not party to an arbitration can be referred to arbitration "through or under" entities who are parties.

Held:

- The court allowed the appeal and ordered that the proceedings be stayed, save for claims made against entities that were not party to the arbitration agreement. The arbitration would be a domestic commercial arbitration. A commercial relationship is not a necessary or separate pre-requisite of commercial arbitration. Further, the choice between a dispute being "commercial" or "family" is not binary. "Commercial" should be given a wide import: [119]; [132]-[135].

- There are two approaches to determining whether disputes are the subject of an arbitration agreement. Under the prima facie approach, matters are referred to arbitration if there appears to be a valid arbitration agreement covering the dispute. Under the merits approach, a full merits review hearing is necessary to determine the existence and scope of the agreement. While any rigid taxonomy is unhelpful, broadly speaking aspects of the prima facie approach has much to commend them, and is consistent with the CA Act and Model Law. The Court's role in s 8 is not to act as a court of summary disposal filtering the matters that are suitable for arbitration: [141]-[142]; [145]; [149].

New South Wales Court of Appeal cases considered:

Rinehart v Welker [2012] NSWCA 95

Asia Pacific decisions of interest

5. Constitutional law; migration law

Supreme Court of Papua New Guinea

***Boochani v Independent State of Papau New Guinea* [2017] PGSC 28**

Decision date: 7 November 2017

Injia CJ

In *Namah v Pato* [2016] PGSC 13, the Supreme Court of Papua New Guinea (**PNG**) found that the detention of asylum seekers at the Manus Island Regional Processing Centre (**MRPC**) was unconstitutional, and ordered its closure. On 31 October 2017, the governments of Australia and PNG closed the MRPC.

Mr Boochani is an asylum seeker at the MRPC who has declined to relocate from the MRPC to one of three new transit centres. Mr Boochani sought declaratory and injunctive relief to enforce certain fundamental rights guaranteed under the PNG Constitution (namely, the right not to be subjected to torture, inhuman treatment and punishment; the right to full protection of the law; and the right to be treated with humanity and respect). Mr Boochani submitted that the PNG Government denied access to the basic amenities and necessities of life by cutting off electricity, water and sewerage, and demolishing and cordoning off buildings.

Held:

- The Court denied declaratory relief.
- There is evidence to support Mr Boochani's claims of threats, intimidation and harassment. There is also evidence that living conditions at the MRPC have become unbearable and the health and safety of asylum seekers are at risk: [4].
- Australia's legal responsibility over the welfare of the asylum seekers ended with the closure of MRPC. The PNG Government is now bound to take all necessary steps under its obligations under the *Migration Act 1978* and international law to cater for the future welfare of the asylum seekers: [8].
- The government of PNG has provided alternative accommodation. These services are of good standard: [10].
- Some of Mr Boochani's Constitutional rights may have been breached. "*On the one hand, it is fair to say that the asylum seekers have brought those upon themselves in refusing to vacate the premises … On the other hand, those breaches or imminent breaches have occurred out of the government's heavy handed tactics to pressure and force the asylum seekers out of the closed MRPC*." Mr Boochani's remedy lies in damages: [11].

6. Defamation: survival of claim after death

New Zealand Court of Appeal

Hagaman v Little **[2017] NZCA 447**

Decision date: 2 November 2017

Kós P, Miller and Winkelmann JJ

Mr and Mrs Hagaman owned a large New Zealand hotel chain. In 2014, Mr Hagaman made a large donation to the governing New Zealand National Party. The hotel chain later received government funding to upgrade a hotel. Mr Little, the Leader of the Opposition Labour Party, gave six public statements drawing a connection between these events.

The Hagamans commenced defamation proceedings against Mr Little. Clark J ruled that the six statements were protected by qualified privilege. The jury found that Mrs Hagaman's claims failed, and two of Mr Hagaman's six claims failed. However, the jury could not agree on Mr Hagaman's other four claims.

In April 2017, Mr Hagaman appealed against one of the four disagreed claims. In May 2017, Mr Hagaman died. The issue on appeal was whether the jury answers constitute a special verdict finding that Mr Hagaman was defamed by Mr Little, which is capable of being enforced by the deceased's personal representative.

Held:

- No verdict was given in the second cause of action, and no appeal may now be advanced on it: [19].
- The old common law rule was that personal actions in tort abate upon the plaintiff's death. The rule was abolished in part by s 3 of the *Law Reform Act 1936* (NZ). However, defamation was excluded from the reforming effect of s 3(1), meaning that the old common law rule continues for defamation: [7]-[9];
- Whether a defamation claim abates with death depends on the stage the proceeding has reached. If judgment has been entered in the claim or a jury enters a verdict, the right to enforce the judgment or verdict survives to the personal representative of the deceased: [10].
- A special verdict is one where the jury is asked to respond with answers to a series of questions rather than simply stating whether they find for the plaintiff and in what amount. An incomplete set of answers does not amount to a verdict. A verdict is a conclusive determination of all factual issues within a cause of action, which can then be perfected by entry of judgment. A verdict for the plaintiff must include the jury's award of damages: [15]-[16].

High Court cases considered:

Ryan v Davies Brothers Ltd (1921) 29 CLR 527

Other international decisions of interest

7. Contract law: specific performance of plea agreement

US Supreme Court

***Kernan v Cuero,* 16–1468**

Decision date: 6 November 2017

The *Antiterrorism and Effective Death Penalty Act 1996* provides that a federal court may grant habeas relief to a prisoner if a decision by a state court is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States".

Mr Cuero pleaded guilty to a criminal charge with a maximum sentence of 14 years and 4 months. A California state trial court subsequently permitted the State to amend the charge. To eliminate prejudice to Mr Cuero, the Court allowed him to withdraw his earlier guilty plea. Cuero then pleaded guilty to the amended charge and was sentenced to a term with a minimum of 25 years.

The Court of Appeals for the Ninth Circuit held that Cuero's guilty plea amounted to an enforceable plea agreement, and that the agreement should be interpreted as a contract under state contract law. Californian contract law would consider the State's motion to amend the complaint as a breach of contract. Accordingly, Mr Cuero was entitled to specific performance, namely, a maximum prison term of 14 years. This decision was appealed to the Supreme Court.

Held:

- The Court allowed the appeal and reversed the judgment of the Ninth Circuit.
- The Ninth Circuit erred when it held that federal law as interpreted by the Supreme Court "clearly" establishes that specific performance is constitutionally required here.
- *Santobello v New York* 404 U.S. 257 (1971) held that a defendant may not be bound to a plea agreement following a prosecutorial breach of an enforceable provision of such an agreement. However, *Santabello* held that the ultimate relief to which the petitioner is entitled must be left to the discretion of the state court, which is in a better position to decide whether the circumstances of the case require that there be specific performance.
- *Mabry v Johnson* 467 U.S. 504 (1984) held that *Santobello* expressly declined to hold that the Constitution compels specific performance of a broken prosecutorial promise as the remedy for such a plea.

8. Competition law: minimum pricing; consistency with EU law

UK Supreme Court

Scotch Whiskey Association v The Lord Advocate **[2017] UKSC 76**

Decision date: 15 November 2017

Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Sumption, Lord Reed, Lord Hodge

The Scottish Parliament passed the *Alcohol (Minimum Pricing) (Scotland) Act 2012* (**the Act**) to address the health and social consequences arising from the consumption of cheap alcohol. The Act requires alcohol retailers to hold a licence and prohibits alcohol being sold at a price below statutorily determined limits. The minimum price is to be set by regulations.

The Scotch Whiskey Association (**SWA**) presented a petition for judicial review challenging the lawfulness of the Act. It submitted that minimum unit pricing is contrary to European law, and so outside the competence of the Scottish Parliament. SWA submitted that the law conflicted with art 34 of the *Treaty on the Functioning of the European Union*, which prohibits quantitative restrictions on imports and all measures with equivalent effect. The Lord Advocate relies on art 36 which provides: "the provisions of articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of … the protection of health and life of humans".

The first instance court was satisfied that the proposed minimum pricing regime was an appropriate means of curbing the hazardous consumption of alcohol. On appeal, the Lord Advocate accepted that minimum pricing would affect the market. The issue was whether the respondents could justify the EU market interference under art 36.

Held:

- The Court dismissed the appeal. The Act does not breach EU law.
- The objective of the law is more refined than might at first sight appear. The aim is not that alcohol be eradicated or that its costs be made prohibitive. The aim is to strike at alcohol misuse and overconsumption manifesting themselves in the health and social problems suffered by those in poverty: [20]-[28].
- SWA's submission that an excise or tax would be less restrictive and equally effective should be rejected. Minimum pricing targets the health hazards of cheap alcohol and the groups most affected. An excise or VAT would unnecessarily affect groups which are not the focus of the legislation: [38]-[45].
- An analysis of the market and competition impact material that is available demonstrates that the impact will be minor. The system will be experimental, but that is a factor catered for by its provisions for review and "sunset" clause, which is a significant factor in favour of upholding the proposed regime: [63].