Decisions of interest

13 November 2017 – 24 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Torts: false imprisonment; police powers to detain**

***State of NSW v Le* [2017] NSWCA 290**

Decision date: 16 November 2017

Basten JA, Leeming JA, Payne JA

Mr Le was stopped by transport police on 14 January 2016, and was asked to produce his Opal card. He produced a "Senior/Pensioner" card and his concession card. He was then asked to produce photo identification. Mr Le refused to do so, but provided his date of birth. He was detained for a short period while the officers verified his details, and was then told that he was free to go.

The District Court awarded Mr Le $3,201 in damages for false imprisonment. On appeal, the State of NSW submitted that Mr Le's detention was justified by either the Opal Card Terms of Use, or cl 77C of the Passenger Transport Regulation 2007 (NSW) **(the Regulation**), which provides that an authorised officer "may direct a person… who makes a concession ticket available for inspection … to produce to the … authorised officer evidence (for example, the person's pensioner or student concession card) that the person is entitled to the concession ticket."

Held:

- The Court allowed the appeal: [27].
- The purpose of subcl 77C(2) is to allow an officer to verify that the person who has produced a concession ticket is entitled to it. Where the production of the concession card did not allow that link to be made, it was not unreasonable of the officer to seek further evidence: [16]-[17].
- There are no express words authorising an officer to require a person to stop, listen and remain until the inquiry has been completed, as appears in other contexts (for example, *Road Transport Act 2013* (NSW) ss 169A and 175). However, the conferral of a power to request a ticket for inspection implies a power to make the request and, if necessary, stop the person to do so. The same reasoning applies to cl 77C(2). The steps taken by the officer to direct the production of evidence carries an implied power to detain the person whilst those steps are undertaken. Without this implication, officers would be forced to immediately exercise their far more intrusive powers of arrest: [19]; [20].
- It was unnecessary to consider the Opal Card "Terms of Use", as this would introduce additional issues as to whether the deprivation of liberty was consensual or the subject of a contractual obligation: [22].

New South Wales Court of Appeal Cases considered:

State of NSW v Smith [2017] NSWCA 194

2. **Arbitration: interlocutory injunction; whether serious question to be tried**

Kawasaki Heavy Industries, Ltd v Laing O'Rourke Australia Construction Pty Ltd **[2017] NSWCA 291**

Decision date: 17 November 2017

Meagher JA, Payne JA, White JA

JKC Australia was the head contractor of a cryogenic tank project in Darwin. Kawasaki and Laing O'Rourke entered a Subcontract with JKC to joint and severally provide project services to JKC, and to provide performance bonds and advance payment bonds to JKC.

Kawasaki and Laing O'Rourke entered a Consortium Agreement, which outlined the scope of work each party was responsible for under the subcontract. Kawasaki agreed to take responsibility for providing the performance and advance payment bonds to JKC, and Laing O'Rourke agreed to provide surety bonds to Kawasaki. The parties agreed that all disputes would be determined by international arbitration in Singapore, but that interlocutory relief could be sought from a court in a competent jurisdiction. By a third agreement, Laing O'Rourke agreed to perform some of the work allocated to Kawasaki by the consortium agreement.

Following a dispute concerning the project, Ball J granted Laing O'Rourke an ex parte injunction preventing Kawasaki from calling on the surety bonds. Kawasaki informed Laing O'Rourke that it already had made a call on the bonds. Ball J made further ex parte orders requiring Kawasaki to withdraw the call, which it did.

Kawasaki applied to discharge the interlocutory injunction. Stevenson J found that the balance of convenience favoured its continuation on the basis that there was a serious question to be tried. Kawasaki appealed to the Court of Appeal.

Held:

- The Court unanimously dismissed the appeal.
- Stevenson J did not err in finding that there was a serious question to be tried as to whether the parties intended that Kawasaki only be entitled to call the surety bonds in circumstances where JKC had first called on the corresponding Kawasaki Bonds: [86].
- Stevenson J was correct to determine whether there was a serious question to be tried, rather than determining the case "as if" on a final basis. To do so would be inconsistent with the Consortium Agreement, which entrusts an arbitral tribunal with the determination of all disputes: [95]-[96].
- Stevenson J did not err in determining that the balance of convenience favoured the continuation of the injunction. It was not shown that Stevenson J gave insufficient weight to the matters relied upon by Kawasaki: [111]; [115]; [118]; [120]; [123]; [125].

Other Australian intermediate appellate decisions of interest

3. **Migration law: domestic violence spousal visa**

Perez v Minister for Immigration and Border Protection **[2017] FCAFC 180**

Decision date: 24 November 2017

Besanko, McKerracher and Jagot JJ

To obtain a spousal visa, a person must be the spouse of a person who is a "sponsoring spouse". However, this criterion need not be satisfied if the relationship has ceased and the person suffered family violence committed by the sponsoring spouse.

By cl 1.23 of the *Migration Regulations 1994* (Cth), if the Minister is not satisfied that a person has suffered from family violence, the Minister must seek the opinion of an independent expert. For the independent expert to conclude that the alleged victim suffered relevant family violence, "the violence, or part of the violence … must have occurred while the married relationship or de facto relationship existed".

Ms Perez is a citizen of the Philippines who held a Spouse (Migrant) Subclass 100 visa in Australia. In July 2012, she indicated that the relationship had broken down. Ms Perez claimed that she had suffered four instances of physical violence, threats and verbal abuse. Three of the four instances of abuse occurred during the relationship. However, the fourth incident, as well as the verbal abuse and threats, occurred after it had ceased. The Minister's delegate referred the matter to an independent expert, who gave an opinion that the applicant had not suffered family violence during the requisite period. Accordingly, the delegate refused the visa.

Ms Perez sought to quash the delegate's decision in the Administrative Appeals Tribunal on the basis that the independent expert excluded from her assessment the threats and verbal abuse communicated to Ms Perez after the relationship ceased, and one of the incidents of physical abuse. The AAT affirmed the decision. The Federal Circuit Court also dismissed Ms Perez's application that the Tribunal's decision be quashed.

Held:

- The Court unanimously allowed the appeal and remitted the matter to the AAT.
- The correct question was whether the appellant had suffered family violence the whole or part or of which occurred during the relationship. The independent expert, however, asked only whether the appellant had suffered family violence during the relationship. A misunderstanding of the statutory task of this kind involves jurisdictional error vitiating the decision of the AAT to affirm the decision under review: [9].

4. **Private international law: registration of New Zealand judgment**

***LFDB v SM* [2017] FCAFC 178**

Decision date: 15 November 2017

Besanko, Jagot and Lee JJ

A Registrar of the Federal Court of Australia registered two judgments of the High Court of New Zealand being: (1) orders concerning the division of LFDB and SM's relationship property by Ellis J, and (2) a costs judgment in favour of SM.

A single judge of the Federal Court dismissed an application made by LFDB pursuant to s 72(1) of the *Trans-Tasman Proceedings Act 2010* (Cth) to set aside the registration of both judgments. On appeal, the issue was whether the single judge erred in failing to set aside the registration, on the basis that enforcement would be contrary to public policy in Australia. Specifically, LFDB argued that:

- a judge hearing a substantive application is required to make orders pursuant to the *Property (Relationships) Act 1976* (NZ), which requires "just division" of relationship property. Ellis J had made an order barring LFDB from participating in the property dispute hearing, following a failure to pay adverse costs orders. This order was upheld by the NZ Court of Appeal. LFDB argued that the order rendered it impossible for the Court to fulfil its statutory function so as to allow a just division. Thus, the relevant judgment was "infected" by this flawed process;
- even if it was possible for the Court to fulfil its statutory function notwithstanding the barring order, the Court should have "paid heed to whatever material" to debarred party had previously filed.

Held:

- The Court dismissed the appeal and upheld the registration of the judgment.
- It is not for Australian courts to determine whether an NZ judge can make orders which are consistent with the statutory requirement under the NZ Act. However, it can be noted that the NZ Court of Appeal was plainly cognisant of the order, and considered that any prejudice to LFDB was "self-inflicted": [35].
- It "misses the point" to argue that the Family Court of Australia does not (and would not) make a cognate order in similar circumstances. It is natural, and to be expected, that different jurisdictions (including countries with shared legal heritage) adopt different solutions to the same problems: [37].
- Ellis J's careful and comprehensive reasons plainly demonstrate that, in making final orders, her Honour paid particular heed of material filed by FLDB: [47].

New South Wales Court of Appeal cases considered:

Bouton v Labiche (1994) 33 NSWLR 225

Asia Pacific decisions of interest

5. Class actions: consent to commence representative action

Supreme Court of Papua New Guinea

Todiai v Schnaubelt & Ors **[2017] PGSC 37**

Decision date: 13 November 2017

Injia CJ

The Minister for Forests issued a Forest Clearing Authority to clear certain areas of forest to make way for a large palm oil project. A number of village chiefs and local leaders brought judicial review proceedings in respect of that decision on behalf of local residents and resource owners.

Mr Todiai made an application to dismiss the judicial review proceedings on the basis that the plaintiff's representatives lacked standing in respect of the application. He argued that not every plaintiff had signed a consent authorising the proceedings. As this was a class action, the authority and consent of all plaintiffs was required.

The trial judge rejected this argument and allowed the matter to proceed to trial. Mr Todiai sought leave to appeal against that decision. The issues on appeal were whether the appellants have demonstrated an arguable case that the trial judge was wrong in the exercise of his discretion, and if so, whether there is cause to intervene and disturb the trial.

Held:

- The Court dismissed the appeal.
- An arguable case has been demonstrated that the trial judge's finding to allow the matter to proceed to trial in the absence of a complete consent runs against the decisions in *Phillip Takori v Simon Yagari* (2008) SC905 and *Alex Bernard & ors v Minister for Petroleum & ors* (2016) N6299: [9].
- However, the weight to be attached to this conclusion is reduced significantly by the fact that the majority of the plaintiffs signed the authorisation forms. If a class action contains a mixture of plaintiffs' representatives that have or have not obtained consent, the action may continue in respect of those representatives that have obtained authorisation. Those that have not can be removed or terminated from the proceedings: [9].
- The *National Court Rules* are designed to achieve quick and cheap disposal of cases. It would not be in the interest of justice for the trial proceedings to be interrupted and protracted by appeals from interlocutory decisions, except in clear cases of substantial prejudice. The appellant has fallen short of meeting this standard: [11].

6. **Appeals: strikeout application; adequacy of pleadings**

Court of Appeal of Vanuatu

Ahelmhalahlah v Republic of Vanuatu & Ors **[2017] VUCA 50**

Decision date: 17 November 2017

Von Doussa J; Young J; Saksak J; Fatiaki J; Aru J; Geoghegan J

Mr Waltersai was suspended from office as a Magistrate and later resigned. He commenced a claim arguing that:

- 1. The Chief Magistrate defamed him in a letter that stated "Magistrate Waltersai has been seen harassing some of the college d'Isangel female students".
- 2. The Chief Justice intentionally coerced him to resign.
- 3. The Registrar of the Supreme Court acted beyond statutory jurisdiction by suspending him, amounting to an illegal act.
- 4. The Chief Magistrate, Chief Justice and Registrar owed a duty of care to Mr Waltersai, which they breached.

The respondents applied to strike out the claim on the basis it was confusing, unclear and not brief, contrary to R4.2 of the *Civil Procedure Rules 2002*. The primary judge found that the claim did not comply with R4.2, suggested Mr Waltersai obtain legal advice to amend the claim, and adjourned the application.

Mr Waltersai subsequently filed an amended statement of claim, and a further amended statement of claim. The primary judge struck out the proceedings. His Honour found that no amount of amendment would make the claim any more acceptable or tenable, and that the case was "so fundamentally flawed" that "simply it [could not] succeed".

On appeal, Mr Waltersai argued that each of the causes of action were properly pleaded, and do not require amendment.

Held:

- The Court allowed the appeal and reinstated the claim: [37].
- The primary judge took the wrong approach to the application to strike out. The decision was primarily based on his assessment of the merits of the appellant's case. He did not deal with any particular inadequacy in any particular cause of action as the respondent's application required: [24].
- The primary judge should not proceed as the conference judge as definitive views were expressed by him on the factual merits of the claim. Arrangements should be made for a judge from outside the jurisdiction who is not known to the parties to hear the trial: [38].

Other international decisions of interest

7. Administrative law: organ of state seeking review of own decision

South Africa Constitutional Court

State Information Technology Agency SOC Limited v Gijma Holdings (Pty) Limited **[2017] ZACC 40**

Decision date: 14 November 2017

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

The State Information Technology Agency (**SITA**) and Gijima Holdings (Pty) Ltd (**Gijima**) entered into an agreement whereby Gijima was to provide IT services to the South African Police Service. SITA terminated the agreement.

Gijima commenced proceedings in the High Court. By settlement agreement, the parties agreed that Gijima would instead render services to the Department of Defence. Gijima raised concerns that this agreement was not compliant with s 217 of the Constitution, which prescribes a procurement process for state organs. SITA reassured Gijima that it was compliant. Gijima performed the services.

Following a dispute about payment, Gijima initiated arbitration. SITA responded by commencing an action in the High Court to set aside the agreement. The Court found that the decision to award and renew the agreement amounted to "administrative action" within the terms of the *Promotion of Justice Act 3 of 2000* (**PAJA**). The Court dismissed the application on the basis it was brought outside the 180-day period within which review of administrative action must be brought.

The Supreme Court of Appeal dismissed an appeal. In the Constitutional Court, SITA argued that the review should be decided in terms of the principle of legality, and not in terms of the PAJA.

Held:

- The Court declared the award of the contract to Gijima to be invalid: [54].
- PAJA does not apply when an organ of state applies for the review of its own decision and that an organ of state seeking to review its own decision must do so under the principle of legality. SITA acted contrary to s 217 of the Constitution. However, SITA's delay of over 22 months before approaching the High Court was inordinate. There was no basis to exercise discretion to overlook the delay: [40]-[41]; [49].
- SITA must not benefit from having given Gijima false assurances. It only raised the question of the invalidity when Gijima commenced arbitration proceedings. Accordingly, the declaration of invalidity must not divest Gijima of rights which, but for the declaration of invalidity, it might have been entitled: [54].

8. **Administrative law: validity of "prescribed fee" in environmental regulations**

Privy Council

Fisherman and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago) **[2017] UKPC 37**

Decision date: 27 November 2017

Lord Mance, Lord Wilson, Lord Carnwath, Lord Hughes, Lord Briggs

The "Polluter Pays Principle" (**PPP**) ensures that the costs of pollution control are borne by the polluter. The National Environmental Policy (**NEP**) of Trinidad and Tobago incorporated the PPP, and provided that charges may be levied by issuing licences or permits entitling the holder to generate specific quantities of pollutants, and that money collected will be used to correct environmental damage.

Section 31 of the *Environmental Management Act 2000* (**the Act**) provides that the Environmental Protection Authority and all other government entities shall conduct operations in accordance with the NEP. The Water Pollution Rules 2001, made by the Minister under the Act, provide that the Environmental Protection Authority may direct a person who releases a water pollutant outside the permissible level to apply for a permit. The Water Pollution (Fees) Regulations, also made under the Act, prescribes the fixed annual permit fee to be TT$10,000.

Fisherman and Friends of the Sea seek judicial review of the Rules and Regulations on the basis that the fixed fee structure breaches the PPP. It submitted this model only recovers the operating costs of the Environmental Protection Authority (not also the correction of environmental damage); and prevents fees being tailored to meet the degree of damage caused by different permit holders. The primary judge found that the prescribed fee was unlawful. The Court of Appeal allowed the appeal and granted leave to appeal to the Privy Council.

Held:

- The Board allowed the appeal. The prescribed fee breaches the NEP and thus s 31 of the Act. It is not sufficient that the polluter will expend its own money complying with the permit conditions. The fees must be used to finance or contribute to correction activities by the Authority itself. This view is supported by the Authority's functions under s 16 of the Act, which are not limited to the oversight of polluting activities by others: [41]-[45]; [54].

- A "prescribed" fee need not be a single, fixed figure. "Prescribed" is flexible enough to include a formula: [44].

- While the regulations (as pertaining to the prescribed fee) are unlawful, quashing them would create great uncertainty and potentially lead to claims for return of the fees paid. The appropriate order is a declaration of unlawfulness and an order of mandamus directed to the Minister to reconsider the proper basis of the fee to be prescribed: [53].