Court of Appeal
Supreme Court
Sydney

Decisions of Interest

9 May 2020 – 22 May 2020

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

Tax: estimates of liability

***Lee v Deputy Commissioner of Taxation; Silverbrook v Deputy Commissioner of Taxation* [2020] NSWCA 95**

Decision date: 19 May 2020

Payne JA, McCallum JA, Simpson AJA

Ms Lee and Mr Silverbrook were directors of Worldwide Speciality Property Services Pty Ltd. In 2014 the Commissioner of Taxation issued Worldwide with a Notice of Estimate of Liability under the *Taxation Administration Act 1953* (Cth) in respect of Pay As You Go (PAYG) amounts withheld and not paid to the Commissioner for 22 periods. These estimates became due and payable but Worldwide did not pay by the due date nor did it lodge a statutory declaration specifying that a lesser amount was the amount unpaid or that the estimated liability never existed. Director Penalty Notices were issued by the Commissioner to the directors for the amount of the liabilities notified. The amounts the subject of the Notices were not remitted to the Commissioner. Worldwide went into voluntary liquidation.

The primary judge entered judgment against the directors for $13,961,633.90, being the amount of these Notices plus interest. The directors brought an appeal, on the ground that the primary judge erred in not finding that the statutory scheme caused the remission of any penalties, by reason of Worldwide going into liquidation.

Held: dismissing the appeal.

- The Commissioner was not required to prove that an actual liability to pay PAYG amounts the subject of the estimate existed under s 269-30(2) of the Act: [49]. This section was intended to operate irrespective of the existence of any underlying liability in fact: [49], and assumes that the liability exists in the same way the estimate does: [65]. If otherwise, this would be inconsistent with the statutory scheme of estimates: [58].
- The section intends to ensure that directors' obligations in respect of estimates cannot be thwarted by putting a company into liquidation without the directors or the company advising the Commissioner of the true amount of a withholding, or that no withholding occurred: [68].
- Even if the Commissioner was required to establish the existence of the underlying liability, the Commissioner did establish this fact: [48], [73]. The facts averred by the Commissioner were prima facie evidence of the facts alleged and were sufficient evidence of the unpaid withholding amounts and their due dates: [76]-[77].

Contracts: construction, variation, repudiation

***Lawrence v Ciantar* [2020] NSWCA 89**

Decision date: 12 May 2020

Bathurst CJ, Meagher JA, Gleeson JA

Paul Ciantar and Alice Sammut are the registered proprietors of a property in Forestville. In 2013 Warringah Council approved an application to subdivide the property into three lots. In 2014 the proprietors advertised the property for sale, identifying that there was development application approval to subdivide the land whilst retaining the main residence. Wayne Lawrence, a licensed builder, proposed to purchase Lot 3 in consideration of carrying out the works to complete the subdivision. Negotiations resulted in various agreements between the proprietors and Mr Lawrence, culminating in a written agreement in November 2014, whereby Mr Lawrence would carry out certain works. There was a delay in the completion of the subdivision works to be carried out by Mr Lawrence. The proprietors purported to rescind the contract under the *Home Building Act 1989* (NSW).

Mr Lawrence brought proceedings, seeking declarations that he held a one-third interest in the property and an unregistered mortgage or charge over the property; that the agreements had not been validly terminated by the proprietors; and an order for specific performance or damages. Mr Lawrence's claims were dismissed. Mr Lawrence brought an appeal.

Held: dismissing the appeal.

- The agreements did not state whether Mr Lawrence was to undertake or to fund the subdivision: [114]. However, the surrounding circumstances made it clear that the parties intended Mr Lawrence to perform the construction work, and was not acting as a funder: [111].
- Taking into account both its context and purpose, the November Agreement required Mr Lawrence to undertake the subdivision as distinct from funding a third party builder: [102]. Therefore, ss 7D and 10 of the *Home Building Act* had the effect of denying Mr Lawrence any interest in the property and rendering the contract void: [80].
- There is nothing to suggest that the contract was varied by conduct such that Mr Lawrence's obligation to act as funder was replaced by an obligation to act as builder. Mr Lawrence always had the obligation to act as the builder: [122].
- Mr Lawrence's failure to complete the works showed a clear intention not to be bound by the contract or to perform it in a manner substantially inconsistent with his obligations: [138]. The proprietors were entitled to terminate for repudiation and Mr Lawrence was not entitled to an order for specific performance: [139]-[140].

Construction: claim for progress payment

***TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93**

Decision date: 14 May 2020

Basten JA, Meagher JA, Emmett AJA

TFM Epping Land Pty Ltd and Katoomba Residence Investments Pty Ltd (the principals) engaged Decon Australia Pty Ltd (the builder) to construct a residential development on land in Epping. In 2019 the builder lodged a progress claim seeking $6.4m pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW). The principals did not provide a payment schedule to the builder within 10 business days of the service of the claim as required, and so became liable to pay the claimed amount.

The builder filed a summons and a notice of motion seeking summary judgment for the claimed amount. The principals filed a response challenging the validity of the claim and its service. The primary judge gave judgment for the builder, dismissing each issue raised in the response. The principals sought leave to appeal, contending that the payment claim was invalid and was not validly served.

Held: granting limited leave and dismissing the appeal.

- Where leave is required for an appeal under the Act, the Court should be restrained in granting leave, absent a clear justification, to avoid the inherent additional delay in achieving a resolution of a disputed payment claim: [6].
- The submission that the payment claim was invalid as the amounts claimed for variations were not available pursuant to the contract was rejected: [18]-[19]. The principals could have contended that the amounts claimed for variations did not properly arise under the contract by way of a s 14 payment schedule, indicating the reason for non-payment of any item not accepted: [20], [92]. The trial judge was correct to hold that it was not open to the principals to resist judgment for the full amount of the payment claim on the basis that some elements of the claimed amount were not available under the contract: [23].
- The proposition that a payment claim which includes any amount which accrued after a reference date precludes the claim being made with respect to that date is untenable: [27]. The contract remained on foot and there was an available reference date, and therefore there was an entitlement to make a progress claim for work done up to that date: [32]. The inclusion of interest which accrued after the reference date did not preclude the payment claim from being made with respect to that date and did not invalidate the claim: [37], [94].
- Section 13(7) of the Act provides for a penalty for serving a payment claim without a supporting statement, but does not invalidate such a claim nor does it invalidate the act of service: [47], [74], [88].

Administrative Law: bias, jurisdictional error

***Kirby v Dental Council of NSW* [2020] NSWCA 91**

Decision date: 12 May 2020

Payne JA, Brereton JA, Emmett AJA

In 2015 a complaint was received by the Health Care Complaints Commission that Dr Kirby, a registered dentist practising in NSW, was applying a substance known as "Cansema" to the skin of some of his dental patients as a purported treatment for skin cancer. The Dental Council of NSW by its delegates suspended his registration. In 2016, following a review, the Council lifted Dr Kirby's suspension, and instead imposed conditions on his registration. Dr Kirby brought an appeal in the NSW Civil and Administrative Tribunal, challenging the decisions to suspend his registration and to impose conditions. In 2017 NCAT dismissed the appeal. Dr Kirby brought an appeal in the Supreme Court. In 2018 the Court dismissed his appeal. Dr Kirby sought leave to appeal to the Court of Appeal.

The applicant alleged apprehended bias, as the relevant delegates of the Council had had prior involvement in the investigation of the complaint against Dr Kirby, and failure to exercise jurisdiction under s 159 of the *Health Practitioner Regulation National Law* (NSW). The issue on appeal was whether the primary judge erred in holding that NCAT did not err in law.

Held: granting leave and dismissing the appeal.

- The primary judge correctly applied the *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 test for apprehended bias based on incompatibility of roles arising from prior involvement, by determining whether the "interest" of the delegates of the Council might have led the fair-minded lay observer to entertain a reasonable apprehension that the decision-maker might not have brought an open mind to bear upon the decision: [64], [79].

- Participation in a decision to embark on consideration of whether or not to take action under s 150 of the National Law is not incompatible with participation in a decision to take such action: [91]-[92]. The delegates' prior involvement was not such as to invest them with a relevant "interest" in the outcome: [137].

- The primary judge did not err in holding that NCAT did not constructively fail to exercise its jurisdiction. NCAT was required to, and did, determine whether and what action under s 150 was to be taken, exercising the discretion afresh having regard to the evidence before it and forming its own conclusions as to the risk Dr Kirby's practice posed to the health or safety of his patients: [120]-[123].

- Leave should ordinarily be refused for a case involving a third appeal from an interlocutory order, but the application was fully argued as the interpretation and application of the National Law had not received extensive consideration by the Court, and so leave was granted but the appeal dismissed: [7], [139].

Australian Intermediate Appellate Decisions of Interest

Appeal: lawfulness of arrest

***Head v Evans* [2020] ACTCA 26**

Decision date: 22 May 2020

Elkaim J, Crowe AJ and Berman AJ

In 2017 two Australian Federal Police officers, Constable Head and Senior Constable McVicar, stopped a motor vehicle driven by Mr Brewer in which Mr Johnson was a back-seat passenger. Mr Brewer was driving in an area reserved for buses. Following a verbal altercation between the officers and the occupants of the vehicle, the officers pulled Mr Johnson from the vehicle against his will, put him on his stomach on the ground and handcuffed him. A video of the incident was taken by another passenger in the car.

In 2018 the officers were charged with assault occasioning actual bodily harm by joint commission and proceedings were instituted. The prosecution alleged that they acted without lawful justification when they pulled Mr Johnson out of the car. The officers said that Mr Johnson had been "hindering" them during their investigation of the offence of driving in a bus only area and that Mr Johnson resisted arrest. The primary consideration was whether Mr Johnson had been lawfully arrested. The Magistrate found that the officers had not acted lawfully, and therefore absent lawful excuse, assault had occurred. In 2019 the officers brought an appeal to the Supreme Court, which was dismissed. The officers brought an appeal to the Court of Appeal, contending that the Magistrate erred in holding that the arrest was not lawful.

Held: dismissing the appeals and remitting the matter for sentencing.

- The appeal was not from the decision of the Magistrate, which had been heard and disposed of. It was an appeal from the decision of the Supreme Court judge and it was necessary to identify error in that judgment, although the Court recognised that this could have derived from the Magistrate's reasons: [48].
- The Court quoted from the primary judge who stated that the video was "disturbing" and that "the dramatic disproportion between the officers' conduct and the situation with which they were dealing [was] readily apparent from the video": [18]. The Court concluded that the video did not permit any interpretation that the officers acted lawfully, emphasising that arrest is a last resort. The officers "rushed" to arrest Mr Johnson "on the flimsiest basis", essentially because he was "being cheeky": [50].
- Police officers are governed by rules which separate their conduct from the conduct of offenders, which the officers ignored. External circumstances such as the officers being close to the end of a long shift after a busy night, tiredness or frustration are insufficient to relieve police officers of their liability to conviction, but may go to mitigation of their sentences: [52]-[53].

Administrative Law: jurisdictional error; Migration

***DVE18 v Minister for Home Affairs* [2020] FCAFC 83**

Decision date: 14 May 2020

Perram J, Charlesworth J and Stewart J

DVE18 is a citizen of Afghanistan. From 2010, he worked as an interpreter assisting the Australian Defence Force in Afghanistan. He continues to reside in Afghanistan with his wife and his two year old son. In 2013 DVE18 was certified as eligible to apply for a Refugee and Humanitarian visa under a program offering resettlement to locally-engaged Afghan employees and their immediate family members who were considered to be at risk of harm due to their association with Australian Government agencies. DVE18 lodged a valid application for the visa claiming that he and his family, being his parents and siblings, were at risk of being murdered by Jihadists in retributive attacks. At that time DVE18 was a single man with no children. In 2016 DVE18 joined his new wife and son on the visa application as secondary applicants.

The Minister for Home Affairs refused to grant the visa. DVE18 made an application for judicial review, arguing that the Minister had failed to have regard to the risk of harm to his wife and child should the visa application be refused. The primary judge accepted this, but concluded that DVE18 had not advanced a claim about that risk in a way that would give rise to an obligation to consider it, and so dismissed the application. DVE18 brought an appeal from that judgment.

Held: allowing the appeal, setting aside the orders of the primary judge, quashing the Minister's decision and remitting the application to be determined in accordance with law.

- There was no proper basis for the Minister to proceed on the basis that the risk of harm to DVE18's parents and siblings was not also asserted to be a risk to his wife and son following his notification in 2016. It was not open to the Minister to adopt that interpretation or to conclude that the risk of harm had only been 'faintly' raised in the information provided in 2016 and that the claim was not seriously advanced: [50]. This divorced the materials from their essentially human context and the fact that DVE18 had updated his application in 2016 to identify who his family members then were: [46].

- The obligation to afford procedural fairness required the Minister to consider the material provided to him in 2016: [36]. Additionally, the obligation to consider DVE18's claims was a necessary incident of the Minister's task: [37].

- Not every failure to mention a claim advanced on behalf of a visa applicant will amount to jurisdictional error. However, the omission in this case amounted to a failure to determine a question of importance arising on the materials. It cannot be said that the outcome could have been no different had proper consideration been given to the issue. The error was material, and so was properly characterised as jurisdictional: [63].

Asia Pacific Decisions of Interest

Civil Procedure: abuse of process

Faloon v Planning Tribunal at Wellington **[2020] NZCA 170**

Decision date: 19 May 2020

Kós P, Clifford J and Courtney J

Prior to these proceedings, Clarence Faloon had filed a total of 19 proceedings, giving rise to some 60 judgments. Eleven of the prior proceedings directly or indirectly concerned interests in or rights arising from the former ownership of land adjoining the Palmerston North airport by the Faloon family and family companies.

In 2018 the 20th proceeding was struck out by Justice Dobson pursuant to r 5.35B of the High Court Rules 2016. The Judge made a limited restraint order under s 166 of the *Senior Courts Act 2016* restricting Mr Faloon or any agent purporting to act on his behalf from commencing any civil proceeding which related in any way to his adjudication as a bankrupt which occurred in 2016, or to claimed interests in, or rights arising from, former ownership of land adjoining Palmerston North airport by Trade Lines, for a period of five years.

Mr Faloon brought proceedings seeking judicial review of the limited restraint order in 2016 and of issues relating to the land adjoining the Palmerston North airport.

Held: dismissing the application.

- The statement of claim was "prolix in the extreme", running to 42 pages. It "offend[ed] almost every rule of pleading" and "mixe[d] pleading and evidence in a suffocating and confused concoction": [8].
- The proceeding was an abuse of process and the decision to strike it out was correct: [14]. Mr Faloon had already exhausted his appeal rights, and could not bring a further appeal through the "back" entrance of judicial review: [17]. To the extent that any relief sought had not previously been sought, Mr Faloon should have raised those claims in the earlier related proceedings, in accordance with the rule in *Henderson v Henderson*:[1] [19].
- Civil society requires a fair and effective civil justice system to determine disputes. While access to justice is a critical human right, there must be some reasonable limits to recourse to law, otherwise a form of anarchy arises: [1]. Serial efforts to reopen otherwise final judgments may deny justice to parties and other persons entitled to depend upon those judgments, and delay justice to others with proceedings of their own needing attention: [3].

[1] The "rule" in *Henderson v Henderson* (1843) 67 ER 313 (Ch) states that claims cannot be undertaken by instalment: the claimant must bring all their claims on a subject together in the one claim.

International Decision of Interest

International Law: foreign sovereign immunity; Statutory Interpretation

***Opati v. Republic of Sudan* 590 U.S. ___ (2020)**

Decision date: 18 May 2020

Roberts CJ, Thomas J, Ginsburg J, Breyer J, Alito J, Sotomayor J, Kagan J, Gorsuch J

The *Foreign Sovereign Immunities Act* holds foreign states and their instrumentalities immune from the jurisdiction of federal and state courts, though there are some exceptions. The terrorism exception permitted certain plaintiffs to bring suits against countries who have committed or supported specified acts of terrorism and who are designated by the State Department as state sponsors of terror, but still shielded these countries from the possibility of punitive damages. In 2008 the US Congress amended the Act, seeking to create a new cause of action for this purpose and allowing punitive damages to be awarded.

In 1998 al Qaeda operatives simultaneously detonated truck bombs outside the US Embassies in Kenya and Tanzania, causing hundreds of deaths and thousands of injuries. Victims and their families sued the Republic of Sudan, alleging that it had assisted al Qaeda in perpetrating the attacks. They proved Sudan's role and established their entitlement to damages, having amended their complaint to include the new federal cause of action. However, the Court of Appeals refused to award the plaintiffs punitive damages. The plaintiffs brought an appeal challenging this decision, requesting the Supreme Court to determine whether the amendments permitted plaintiffs to seek and win punitive damages for past conduct.

Held: vacating the judgment of the Court of Appeals and remanding the case for further proceedings consistent with the Supreme Court's opinion: p. 12.

- The Court emphasised the importance of the legal principle that legislation usually only applies prospectively: p. 6. However, even with the benefit of the presumption of prospectivity, Congress was clear when it authorised plaintiffs to seek and win punitive damages for past conduct using the new cause of action. The provisions relating to "Prior Actions" and "Related Actions" specifically authorised plaintiffs to make new claims for conduct which occurred prior to the amendment: p. 9.

- The use of the word "may" in the context of "awards may include punitive damages" vests courts with discretion, and does not fail to authorise punitive damages with sufficient clarity: p. 10.

- Sudan's argument that retroactive punitive damages raise special constitutional concerns which require a new rule requiring Congress to provide a "super-clear statement" when it authorises their use was rejected. Sudan did not challenge the constitutionality of the law, but rather was asking the court to "ignore the law's manifest direction": pp. 10-11.