Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 November 2021 – 14 December 2021

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

Corporations: directors' statutory and fiduciary duties

Boros v Pages Property Investments Pty Ltd **[2021] NSWCA 288**

Decision date: 25 November 2021

Bell P, Basten and Meagher JJA

Pages Event Hire was run through corporate entities for the benefit of the Pages Family Trust ('PFT'), the trustee of which was Pages Property Investments Pty Ltd ('PPI'). Mr Boros was appointed as a director of Pages Equipment Holdings Pty Ltd ('PEH') and PPI. PPI leased business operations premises to PEH. Mr Boros was removed as director of PPI and alleged to have committed breaches of fiduciary duties and duties under the *Corporations Act 2001* (Cth). The primary judge held that Mr Boros breached his duty under s 180 in failing to ensure that PEH paid all rent payable under the lease and that, acting reasonably, Mr Boros should have understood that the rent payable increased automatically pursuant to an annual rent review clause. The primary judge also found that Mr Boros committed a breach of fiduciary duty in relation to an increased borrowing by PPI under a loan facility, where the funds obtained were used to pay down PEH's debt. Lastly, Mr Boros was found to have contravened s 180 in failing to ensure PPI kept accounts which gave a true and fair view. Mr Boros was ordered to pay compensatory damages, the costs of reconstructing PPI's financial records and 60% of PPI's legal costs.

Held: upholding the appeal

- There were two views reasonably open as to whether the rent review operated automatically. The clause stated that rent would be 'reviewed', suggesting that the landlord would carry out a review and notify the tenant of the outcome: [41]. Additionally, Mr Boros had inherited the practice of paying rent without an annual increase, as the lease was executed prior to his appointment as a director: [43]. PPI also obtained a benefit as a shareholder of PEH, through its failure to insist upon the rent increases, which was relevant to the conclusion reached by a reasonable person acting as a director of PPI: [46]. Lastly, PEH made payments to PPI well in excess of the unpaid rental calculated by the primary judge over the relevant years, which could be taken into account by a director of PPI to not insist on increased rent payments: [47]. Owing to these factors, PPI failed to demonstrate that Mr Boros acted contrary to s 180(1): [49]–[53].

- In considering a breach of fiduciary duty, it was not demonstrated that treating the financial liabilities of the group as a consolidated liability was not commercially realistic: [81]. Furthermore, PPI had benefitted by way of reduced monthly payments to the bank ([81]) and Mr Boros was found not to have disregarded the interests of PPI: [83]. There was no breach of duty: [84].

- A significant amount of the accountant's work reconstructing the records was for other companies and should not have been charged against Mr Boros: [88]–[91].

Judicial Review: jurisdictional error

Quinn v Commonwealth Director of Public Prosecutions **[2021] NSWCA 294**

Decision date: 3 December 2021

Leeming JA, Simpson AJA and Johnson J

Between October 2019 to May 2020, Mr Quinn sent over 10,000 abusive and threatening text messages to his estranged wife. Mr Quinn pleaded guilty to three offences – using a carriage service to menace, harass or cause offence (federal offence) and two domestic violence offences (state offences). He was sentenced to 12 months' imprisonment for the federal offence and 32 months' imprisonment for the state offences. Mr Quinn appealed against his sentence to the District Court, arguing that it should be served by way of intensive correction order ('ICO'). Mr Quinn sought judicial review on two broad bases. Grounds 1–3 sought to establish that the District Court fell into jurisdictional error in deciding against making an ICO by failing to consider community safety as the paramount consideration or by failing to consider whether making an order was more likely to address the risk of reoffending. Grounds 4–5 sought to establish that the sentence was imposed based on the wrong number of text messages sent to the victim, which amounted to jurisdictional error and amounted to procedural unfairness. The agreed statement of facts had recorded that Mr Quinn had sent over 24,000 texts when in fact he had sent only 11,204.

Held: dismissing the application for judicial review

- Ordinarily, a failure to have regard to a matter to which a court is required to pay regard in determining a question within jurisdiction will not amount to jurisdictional error: [9]–[10], [120]. Furthermore, owing to the District Court's significant familiarity with criminal sentencing principles, it may be expected that it will be uncommon for the District Court to misunderstand the limits of its authority to impose a sentence: [20].
- Neither the text, purpose nor context of sections 66(1)–(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) indicate that a failure to consider these provisions will result in jurisdictional error: [127]–[131].
- The District Court did not accord procedural unfairness by deciding the sentencing appeal on the basis of the agreed statement of facts, albeit that this statement contained an error. Procedural unfairness does not necessarily result from a court relying on evidence which is incorrect: [144]–[145]. Furthermore, the number of messages sent was not 'material'; on any view, the applicant engaged in extremely serious offending: [148]–[153]. Equally, there was no jurisdictional error in making a finding of fact which was the subject of the parties' agreement: [162].

Courts and Judges: supervisory jurisdiction; Persona Designata

***Huynh v Attorney General* [2021] NSWCA 297**

Decision date: 8 December 2021

Bathurst CJ, Basten, Gleeson, Leeming and Payne JJA

In 2015 the applicant, Mr Huynh, was convicted of a federal offence and sentenced to 12 years' imprisonment. Mr Huynh unsuccessfully appealed against his conviction in 2017. Mr Huynh then applied to the NSW Supreme Court under section 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) ('CAR Act') for an inquiry into his conviction. The application was considered under section 79 and dismissed. Mr Huynh commenced proceedings under section 69 of the *Supreme Court Act 1970* (NSW) seeking an order quashing the decision of the primary judge and a declaration that the primary judge committed an error of jurisdiction and law. The Court made general observations about the structure and operation of Part 7 of the CAR Act (within which sections 78 and 79 sit), having found there was no decision of the primary judge to be quashed or set aside.

Held: dismissing the application for judicial review

- Part 7 of the CAR Act gives statutory effect to two disparate, but related, aspects of executive power: the prerogative of mercy/pardoning power and a power to deal with apparent miscarriages of justice: [17].
- Sections 78 and 79 of the CAR Act do not apply of their own force to convictions for federal offences; there must be federal legislation conferring a power of review on a Supreme Court judge with respect to a federal conviction: [254]. Sections 68 and 79 of the *Judiciary Act 1903* (Cth) do not pick up and apply sections 78 and 79 of the CAR Act in the circumstances of this case as incidental to judicial power. Justice Leeming dissented on this point, finding that the provisions do apply of their own force: [209]–[216].
- The powers conferred by section 79 of the CAR Act are administrative and exercised by a judge acting as a persona designata. The powers reflect those conferred on the Governor and Attorney General under another provision of the CAR Act which, from their context, are intended to be administrative powers: [44]. Section 79(4) expressly states that proceedings under the section 'are not judicial proceedings': [45]. The power is inconsistent with the nature of judicial power because the judge to whom an application is made has no obligation to consider it on the merits: [46]. The jurisdiction of the Court may be exercised by the Chief Justice or a judge 'who is authorised by the Chief Justice to exercise that jurisdiction', which does not indicate language of conferral of judicial power: [53]. The judicial officer is conferred powers, authorities, protections and immunities which indicate they act as a persona designata: [54].
- An exercise of the power under section 79(1)(b) 'to refer the whole case to the Court of Criminal Appeal' may be incidental to the exercise of judicial power in respect of a federal offender: [72], [83], [268]–[269].

Judicial Review: jurisdictional error

McNab v Director of Public Prosecutions (NSW) **[2021] NSWCA 298**

Decision date: 8 December 2021

Bell P, Basten and McCallum JJA

Mr McNab, a medical practitioner, was convicted in the Local Court of committing an aggravated sexual act without the consent of the complainant during a medical examination. The magistrate described the complainant as 'an outstanding witness' in reasons. On appeal to the District Court, the judge noted that he was 'entitled to consider findings of credibility by the magistrate'. Relevantly, the appeal was pursuant to section 18 of the *Crimes (Appeal and Review) Act 2001* (NSW), which provides for an appeal 'by way of rehearing on the basis of evidence given in the original Local Court proceedings'. The judge took into account the magistrate's favourable assessment of the complainant and was satisfied of the applicant's guilt beyond reasonable doubt. The judge consequently dismissed the appeal. The applicant sought judicial review, the principal issues being: whether the judge committed jurisdictional error by having regard to the magistrate's reasons and assessment of the complainant when section 18 alludes only to having regard to the evidence heard in the Local Court; whether an appeal to the District Court under section 18 required the demonstration of error; and whether the onus remained on the Crown to establish on appeal that the appellant was guilty beyond reasonable doubt.

Held: dismissing the application for judicial review

- The reference to the rehearing being 'on the basis of evidence given in the original Local Court proceedings' does not operate so as to preclude reference, where appropriate, to any findings by the magistrate about a witness' performance under cross-examination and their credit. This simply involves recognition of the advantages enjoyed by a judge at first instance and is entirely orthodox: [31]–[39], [74]–[82].
- An appeal under section 18 is not a 'de novo' hearing, in which no error is required to be shown for the appeal to succeed. There is no statutory indication that a section 18 appeal may succeed without error on the part of the court below; this view is supported by earlier authorities: [23]–[24], [83]–[90].
- The fact that an applicant must demonstrate the existence of some error in order to succeed on an appeal does not reverse the onus of proof; the prosecution bears at all material times the onus of establishing guilt beyond reasonable doubt: [26], [91].

Statutory Construction; Human Rights; Constitutional Law

Kassam v Hazzard; Henry v Hazzard **[2021] NSWCA 299**

Decision date: 8 December 2021

Bell P, Meagher and Leeming JJA

The NSW Minister for Health and Medical Research ('Minister') made orders under s 7(2) of the *Public Health Act 2010* (NSW) ('PHA'). These orders required 'authorised workers' from 'areas of concern' ('Order (No 2)') and all 'authorised workers' at aged care facilities and schools to have received at least one dose of an approved COVID-19 vaccine or to have a medical exemption, and to carry evidence of vaccination or exemption when leaving home to engage in employment. The applicants challenged the validity of these orders, asserting that the Minister had acted ultra vires by infringing six rights contrary to the principle of legality. The applicants further argued that the orders were invalid because of improper purpose on the Minister's part, failure to take account of mandatory relevant considerations and legal unreasonableness. The Kassam applicants specifically argued that Order No 2 was unconstitutional, (1) because it enacted a form of 'civil conscription' contrary to s 51(xxiiiA), and (2) because it was inconsistent with federal law. Beech-Jones CJ at CL dismissed both sets of proceedings. The applicants sought leave to appeal. By the time of the hearing, two orders had lapsed and the third was due to lapse in a matter of weeks.

Held: refusing leave to appeal save for those grounds concerning the proper construction of s 7 of the PHA and dismissing the appeal on those grounds

- The requirement of leave to appeal plays an important role in the administration of justice by assisting to control the volume of appellate work requiring the Court's attention. Sufficient doubt to warrant reconsideration; an issue of principle, a question of general public importance, or an injustice which is reasonably clear; and utility are factors affecting the decision to grant leave: [22]–[28]. Of the grounds raised, the proper construction of s 7 of the PHA was of public importance and justified the grant of leave; the other grounds were refused leave owing to lack of utility (given the orders had either lapsed or were about to) and there was no error of principle in the judgment below: [34]–[37].

- The Minister may make orders under s 7 even if the risk to which they are directed has not yet materialised; the powers conferred upon the Minister are broad, although subject to the requirement of reasonableness: [50]–[56], [78].

- The principle of legality is not of universal application and the assistance to be gained from it varies widely: [84]. Three rights raised – the right to earn a living, right to privacy and right not to be discriminated against – are not 'fundamental' and are not engaged by the principle of legality: [111]–[112]. The other three rights raised – the right to bodily integrity, the right to silence and the privilege against self-incrimination – did engage the principle of legality but were not infringed by the PHA orders: [113].

Australian Intermediate Appellate Decision of Interest

Public Interest Privilege; Implied Freedom of Political Communication

F v Crime and Corruption Commission **[2021] QCA 244**

Decision date: 12 November 2021

Morrison and Mullins JJA, Boddice J

F, a journalist, received information from a police officer upon which he instructed another journalist and cameraman to attend a particular address, where they filmed a person being arrested for offences including murder. The Crime and Corruption Commission ('CCC') investigated the disclosures made to F as part of a corruption investigation and required F to attend a closed hearing to give evidence. F refused to answer questions that would identify the source of the disclosures purportedly based on a public interest immunity provision in the *Crime and Corruption Act 2001* (Qld) ('CCA'). F subsequently applied to the Supreme Court for an order that their claim of privilege should be upheld. The primary judge found against F, holding that public interest immunity at common law and in the statute applies where production is sought of a governmental document or communication and the objection is taken by an arm of the executive. F appealed, amongst other grounds contending that a broader public interest immunity privilege could develop in the common law or, in the alternative, that relevant provisions of the CCA operate to compel a journalist to disclose a confidential source in all circumstances and this impermissibly burdens the implied constitutional freedom of political communication.

Held: dismissing the appeal

- Neither the legislation nor accompanying explanatory notes suggested that the reference to public interest immunity was to other than to the immunity recognised at common law: [33]. The Court was being asked to develop the common law in relation to public interest immunity is way that is inconsistent with 'unequivocal' statements by the High Court to the effect that the law does not protect the public interest in the free flow of information to the media to the extent of conferring an immunity on the media from disclosure of its sources: [37]. The Court declined to find that there exists an 'absolute' inviolable public interest immunity (for example, when the executive seeks to object to production of a document) and a more limited, conditional public interest immunity which could be overridden in the face of a greater public interest, which would encapsulate the acts of journalists trying to protect their sources of information: [40]–[41].
- Applying *A v ICAC* (2014) 88 NSWLR 240, a decision of the NSW Court of Appeal, the Court found that while the relevant provisions of the CCA may indirectly burden the implied freedom of political communication, it is reasonably proportionate and adapted to the legitimate purpose of the legislation being to maintain the institutions of representative government by investigating corruption involving public authorities and is therefore constitutionally valid: [62]–[68].

Asia Pacific Decision of Interest

Electoral Law: minimum voting age; Bill of Rights

Make it 16 Incorporated v Attorney-General **[2021] NZCA 681**

Decision date: 14 December 2021

French, Miller and Courtney JJ

Make it 16 Inc is a lobby group seeking to lower the minimum voting age from 18 years to 16 years. As part of its campaign, Make it 16 issued proceedings in the High Court, seeking a declaration that the provisions of the *Electoral Act 1993* and the *Local Electoral Act 2001* that set the minimum voting age at 18 are inconsistent with the right to freedom from age discrimination guaranteed under section 19 of the *New Zealand Bill of Rights Act 1990* ('Bill of Rights Act'). Section 5 of the Bill of Rights Act permits limits to be placed on the rights and freedoms contained in the Bill only if they 'can be demonstrably justified in a free and democratic society'. The trial judge found against Make it 16, holding that while the provisions did discriminate against 16 and 17 year olds, it was a limitation that was justified in a free and democratic society. Make it 16 appealed the decision.

Held: dismissing the appeal

- The Attorney-General had not established that the limits on the right of 16 and 17 year olds to be free from age discrimination created by the voting age provisions were reasonable limits that could be demonstrably justified in a free and democratic society: [59]. Examination of the justification for limiting these rights was required: [54]. That justification could not be general consistency with the law as the age of responsibility varies greatly under New Zealand law in various contexts, nor did the Attorney-General provide any evidence to suggest that lack of competence or heavy dependence on family preventing the necessary independence of thought required justified the discrimination: [55]–[57]. More was needed for the Attorney-General to discharge the burden of proof established under section 5 of the Bill of Rights Act: [58].

- The Court did not exercise its discretion to issue a declaration of inconsistency between the voting age provisions and the Bill of Rights Act. The Court held that there was no need to go beyond making a finding that on the information before the Court in this instance, the Attorney-General had not discharged the burden of proof. The Court emphasised that the decision rested not on a positive finding that the discrimination could not be demonstrably justified in a free and democratic society, but rather on a failure to attempt to justify the existing age limit: [62].

International Decision of Interest

Constructive Trusts; Proceeds of Crime

Crown Prosecution Service v Aquila Advisory Ltd **[2021] UKSC 49**

Decision date: 3 November 2021

Lloyd-Jones, Sales, Burrows, Stephens and Rose JJSC

Two directors of Vantis Tax Ltd ('VTL') made secret profits of £4.55 million in breach of their fiduciary duties. The secret profits were obtained from the crime of cheating the public revenue by dishonestly facilitating and inducing others to submit false tax relief claims. Aquila Advisory Ltd ('Aquila') acquired the proprietary rights (including choses in action) of VTL and argued that the directors should be treated as having acquired the benefit of the secret profits on behalf of their principal, VTL. Consequently, a constructive trust in favour of Aquila was said to arise. Following the directors' criminal convictions, the Crown Prosecution Service ('CPS') sought confiscation orders under the *Proceeds of Crime Act 2002* ('POCA'). Aquila asserted that it had a proprietary claim in the secret profits and priority over the confiscation orders, which did not give the CPS any proprietary interest in the assets. The trial judge and Court of Appeal found for Aquila. CPS appealed to the Supreme Court. CPS sought to attribute the illegality of the directors' conduct to VTL, arguing that VTL otherwise stood to benefit from the proceeds of crime by obtaining a proprietary interest in the secret profits. Additionally, the CPS submitted that the Court of Appeal's decision was inconsistent with the regime established by POCA and that, even if the directors' unlawful conduct could not be attributed to VTL, the trial judge ought not to have granted Aquila declaratory relief in the proper exercise of their discretion.

Held: dismissing the appeal

- Reasoning analogously to *Bilta (UK) Ltd v Nazir* [2016] AC 1, in which the issue of attributing fraud of an agent to its principal in the context of the company seeking damages or equitable compensation for loss arose, the Court ruled that the principles in *Bilta* prevented the directors' dishonesty from being attributed to the company. The result was that the company did not act illegally and its constructive trust claim was not barred by the defence of illegality: [52]–[61], [71]–[81].
- The overarching principle of POCA is that a confiscation order does not interfere with existing third-party property rights: [33], [83]. While other provisions in POCA could have been used to override the property rights of VTL, the CPS did not avail itself of those remedies and it is not permissible to otherwise alter existing property rights under a constructive trust: [86].
- The trial judge's declaratory relief was not granted improperly: [88].