Court of Appeal
Supreme Court
Sydney

Decisions of Interest

15 December 2021 – 31 January 2022

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

Summary Disposal of Proceedings; Abuse of Process

CBRE (V) Pty Ltd v Trilogy Funds Management Ltd **[2021] NSWCA 316**

Decision date: 14 December 2021

Bell P, Basten and Macfarlan JJA

Trilogy commenced proceedings ('2021 proceedings') as the trustee and responsible entity of the Pacific First Mortgage Fund ('Fund') against CBRE in relation to an allegedly negligent property valuation by CBRE of a marina, which Trilogy alleged caused loss to the Fund. City Pacific, a previous responsible entity of the Fund, had already brought proceedings ('2015 proceedings') against CBRE in connection with the valuation of the marina by CBRE, regarding loss to it personally. Two weeks after the 2021 proceedings commenced, judgment was handed down in the 2015 proceedings awarding damages to City Pacific. CBRE sought dismissal of the 2021 proceedings on the basis that they constituted an abuse of process, claiming that Trilogy ought to have had its claims heard and determined at the same time as the 2015 proceedings. CBRE argued that the overlap between the issues in the sets of proceedings made the 2021 proceedings oppressive, and contrary to the public interest, if pursued independently. The primary judge rejected CBRE's argument, finding that the claims in the two sets of proceedings were 'properly made by different plaintiffs … in respect of different losses arising from different transactions, incurred at different times'. CBRE sought leave to appeal.

Held: granting leave but dismissing the appeal

- Where a plaintiff (the second plaintiff) commences proceedings against a defendant who had already been sued by a party unrelated to the second plaintiff on legally or factually overlapping claims, in order to constitute an abuse of process the second plaintiff's conduct must be so unreasonable or the continuation of the proceedings would be so unjustifiably oppressive to a party as to bring the administration of justice into disrepute: [31].

- Determining whether the 2021 proceedings were an abuse of process involved a consideration of the reasonableness of Trilogy's conduct in the circumstances proved by the evidence: [94]. As the Fund's responsible entity, Trilogy owed duties under the *Corporations Act 2001* (Cth). In discharging these duties, Trilogy needed to consider whether proof of the Fund's loss might involve it needing to take the serious step of making allegations of dishonesty against CBRE, and the practicality and expense of intervening in existing litigation that was close to a final hearing: [95]–[97]. In light particularly of its duties as a representative of the Fund, it was not unreasonable for Trilogy to act cautiously before commencing proceedings: [99].

Private International Law: service outside jurisdiction; Equity: contribution

Michael Wilson & Partners Ltd v Emmott **[2021] NSWCA 315**

Decision date: 17 December 2021

Leeming and Brereton JJA, Emmett AJA

Mr Emmott was a director and shareholder of Michael Wilson & Partners ('MWP'). The contract provided for Mr Emmott to resign and sell his shares to MWP or its nominee upon termination, and was to be governed by the law of England and Wales with disputes to be submitted to arbitration in London. MWP later engaged Messrs Nicholls and Slater under contracts expressed to be governed by the law of NSW. Messrs Emmott, Nicholls and Slater departed MWP and established the competing 'Temujin' group. MWP commenced proceedings against each of the Temujin group partners. In 2010, arbitration proceedings against Mr Emmott resulted in a substantial award in favour of Mr Emmott although he was held liable for breach of contract and fiduciary duty. In 2012, MWP obtained judgment in NSW against Messrs Nicholls and Slater for substantial sums. Messrs Nicholls and Slater were made bankrupt, and MWP took an assignment of the rights of the trustees in bankruptcy. MWP commenced proceedings in the Supreme Court seeking contribution from Mr Emmott and an account of all benefits received by him as an alleged partner in the Temujin group, and served him *ex juris* in England without leave. Mr Emmott sought to set aside service on the basis that it occurred outside Australia without leave and contrary to the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'). The primary judge refused leave under UCPR r 11.5 and found that service was valid in respect of the contribution claim, but that the case had insufficient prospects of success and thus stayed proceedings under UCPR r 11.6(2)(c). MWP appealed the decision.

Held: allowing the appeal in respect of the partnership claim

- Where there has been a fraudulent breach of trust to which all the trustees have been parties, there is no right of contribution between them. This is an application of the more general rule that a person who has been guilty of fraud, illegality, wilful misconduct, or even gross negligence is not entitled to contribution from his or her partners, which in turn, reflects the requirement that to obtain contribution in equity the claimant must have "clean hands": [59]. The liabilities of Messrs Slater and Nicholls were not co-ordinate with the liability to Mr Emmott. Messrs Slater and Nicholls, being liable as knowing assistants in a dishonest breach of trust, would not be entitled to claim contribution, let alone indemnity, from Mr Emmott: [63].

- For the purposes of ascertaining a 'real and substantial connection' to Australia pursuant to UCPR r 11.5(5)(a), it was relevant that MWP submitted without any contest that the Temujin partnership held significant assets through Australian corporations: [94], [98]. Similarly, the presence of partnership property in Australia, and the circumstance that it may be difficult if not impossible to obtain relief in respect of it elsewhere, dictated that Australia is an appropriate forum for the partnership claims, and that in all the circumstances the Court should assume jurisdiction: [108]. Leave pursuant to UCPR r 11.5 was granted: [108], [126].

Judicial Review: Jurisdictional Error; Sentencing

Stanley v Director of Public Prosecutions (NSW) **[2021] NSWCA 337**

Decision date: 21 December 2021

Bell P, Basten, Leeming, McCallum and Beech-Jones JJA

The applicant, Ms Stanley, pleaded guilty to various offences against the *Firearms Act 1996* (NSW) and was sentenced in the Local Court to three years' imprisonment with a non-parole period of two years. The applicant appealed against the sentence to the District Court, submitting that it was appropriate instead to impose an intensive correction order ('ICO'). Pursuant to s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), community safety is the paramount consideration when deciding whether full-time detention or an ICO is more likely to address the risk of reoffending. Judge Williams dismissed the appeal, finding it inappropriate to impose an ICO. The applicant sought judicial review on the ground that the judge had committed jurisdictional error by failing to undertake the process of assessment specified in s 66(2).

Held: dismissing the summons for judicial review

- Earlier authority in which it was held that a failure to consider s 66(2) constitutes jurisdictional error, namely *Wany v Director of Public Prosecutions (NSW)* (2020) 103 NSWLR 630; [2020] NSWCA 318, was decided incorrectly: [21]–[22], [148], [193]. Section 66(2) does not impose a precondition on the exercise of a sentencing judge's discretion to order that a term of imprisonment be served by way of ICO: [138], [157], [193]–[194]. McCallum JA dissented.
- The actual or assumed failure to undertake the assessment process contemplated by s 66(2) did not mean that the judge fundamentally misconceived her function, which was to determine an appeal from a sentence imposed on the applicant pursuant to s 17 of the *Crimes (Appeal and Review) Act 2001* (NSW): [59]–[61], [150]–[155], [195].
- Grounds that may attract appellate intervention in relation to consideration of an ICO will not necessarily be available on an application for judicial review because, in the context of an appeal, non-jurisdictional and jurisdictional errors may be relied upon. Practitioners must not make the mistake of assuming that a ground upon which an offender has succeeded in the Court of Criminal Appeal will necessarily be available in judicial review before the Court of Appeal: [53].

Disciplinary Proceedings against Legal Practitioners

Council of the New South Wales Bar Association v EFA (a pseudonym) **[2021] NSWCA 339**

Decision date: 21 December 2021

Bathurst CJ, Leeming JA and Simpson AJA

EFA was a practising barrister who, at a social function during a conference of barristers' clerks, acted inappropriately towards an assistant clerk, H. H and A were at a table when EFA approached the table and engaged A in a ritualised greeting which, in part, parodied oral sex. The Council alleged that EFA then took hold of the back of H's head, moved her head to and from his crotch area, and said the words 'suck my dick' ('the offensive remark'). H made an almost immediate complaint to W, another clerk. The events were recorded from two different angles on two closed circuit television cameras, neither of which was equipped with audio recording capabilities. The Council filed an application in the NSW Civil and Administrative Tribunal ('NCAT') seeking a finding that EFA was guilty of professional misconduct within the meaning of the *Legal Profession Uniform Law* ('LPUL') s 297 and/or at common law, consequential orders under LPUL s 302 and costs. The NCAT found that EFA had made the offensive remark to H, but had not guided her head towards his crotch. Accordingly, the NCAT held that EFA's conduct amounted to unsatisfactory professional conduct instead of professional misconduct and ordered costs against him, although declined to impose a fine or order that the respondent undertake a course of counselling as the Council had sought. The Council appealed against each decision. EFA filed a Notice of Contention challenging the NCAT's finding that he said the offensive remark.

Held: dismissing the appeal and dismissing the Notice of Contention

- The NCAT did not enjoy any significant advantage in seeing and hearing the witnesses as they gave evidence; NCAT relied heavily on the CCTV footage. As such, the Court was in as good a position as the NCAT to determine whether EFA made the offensive remark, and found that he did: [96]–[102].
- The common law of NSW does not recognise a category of professional misconduct that is divorced from the 'fit and proper person' concept: [149]–[151], [156]–[157]. Equally, 'professional misconduct' determined against the 'critical criterion' of a 'fit and proper person' is indistinguishable from that referred to in s 297(1)(b) of the *Legal Profession Uniform Law*: [160].
- Conduct that would justify a finding of unfitness does not necessarily lead to such a finding. Flawed reasoning in this respect does not necessarily mean that the conclusion reached is incorrect; a correct conclusion may be drawn notwithstanding flaws in the reasoning process: [164]. The NCAT did not err in finding that EFA's conduct did not justify a finding of unfitness: [171]–[173].
- EFA was to suffer a very substantial financial penalty by reason of his amended professional indemnity insurance terms, which obviated the need to order a fine be paid: [184], [197].

Australian Intermediate Appellate Decisions of Interest

Migration: visa cancellation

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs **[2022] FCAFC 3**

Decision date: 16 January 2022

Allsop CJ, Besanko and O'Callaghan JJ

Mr Djokovic, currently the world's number one ranked men's tennis player, was issued a visa on 18 November 2021 to compete in the Australian Open. Within hours of his arrival, his visa was purportedly cancelled by a delegate of the Minister for Home Affairs on the ground that he may, or would or might be, a risk to the health, safety or good order of the Australian community ('the risk ground'). The applicant sought orders quashing this decision on the ground that the process adopted by the delegate was legally unreasonable. The Minister for Home Affairs conceded that the process was legally unreasonable by virtue of having denied Mr Djokovic procedural fairness and the purported cancellation decision was quashed. The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('Minister') then cancelled Mr Djokovic's visa pursuant to a personal power of cancellation in *Migration Act 1958* (Cth) s 133C(3), satisfied that the existence of the risk ground made it in the public interest to do so. In the Minister's statement of reasons, it was said that Mr Djokovic's 'well-known' anti-vaccination stance may pose a health risk to the Australian community at a time where COVID-19 infections were rapidly increasing, and may 'foster anti-vaccination sentiment'. Mr Djokovic sought review of this decision on the basis of legal unreasonableness.

Held: dismissing the application for judicial review

- To establish legal unreasonableness, the Court looks to ascertain, through understanding the approach of the decision-maker and characterising the reasoning process, whether the decision (or state of satisfaction) is so lacking a rational or logical foundation that the decision (or relevant state of satisfaction) was one that no rational or logical decision-maker could reach: [34].
- 2014 amendments to the risk ground (which previously read as, ' is, or would be, a risk' and now reads as, 'may, or would or might be, a risk') clearly lowered the requisite level of satisfaction required: [36].
- It was open to the Minister to conclude that Mr Djokovic had a well-known stance on vaccination and that he was opposed to it: [71]. It was also open to infer that it was perceived by the public that Mr Djokovic was not in favour of vaccinations, and it was not fanciful to suggest that an iconic world tennis star may influence people to emulate him: [79]–[82]. The Minister was not required, as a matter of acting reasonably, to consider whether Mr Djokovic's removal would foster anti-vaccination sentiment itself, as Mr Djokovic contended. The statute directed the Minister to consider the risk posed by Mr Djokovic's *presence* in Australia: [92]–[102].

Asia Pacific Decision of Interest

Judicial Code of Conduct

In the Matter of Associate Justice Gregory Dolin **[2021] PWSC 40**

Decision date: 30 December 2021

Ngiraikelau CJ, Maraman and Castro AJJ

Whilst serving as a full-time justice in the Appellate Division of the Supreme Court of Palau, Associate Justice Gregory Dolin submitted an amicus curiae brief on behalf of the "Cato Institute", a US think tank, in the US Supreme Court without notice to the Chief Justice of the Palau Supreme Court. The question before the Court was whether Associate Justice Dolin had violated Canon 4.11 of the Palau Code of Judicial Conduct ('Code of Conduct'), which stated that a 'full-time judge shall not practice law while holding office; provided, however, that a full-time judge may act pro se'. Associate Justice Dolin argued that the disciplinary complaint was deficient for three reasons: (1) under the presumption against extraterritoriality, the Code of Conduct should not be construed to bar the practice of law outside of Palau; (2) even if acting on behalf of the Cato Institute, his work authoring the amicus brief did not constitute the 'practice of law' because he was not admitted to practice before the US Supreme Court; and (3) he was acting on his own behalf in authoring the amicus brief, which was permissible under the Code of Conduct.

Held: finding that Associate Justice Dolan did not violate the Code of Conduct

- Palau courts have not recognised the presumption against extraterritoriality. The Court observed that, even if a presumption against extraterritoriality were recognised, it would not bar the disciplinary complaint because of the focus of the Code of Conduct is not on the place where a judge's conduct occurs, but on how that conduct looks in the eyes of the Palau public: [8]–[12]. The public could have serious concerns about the ability of the judge to carry out judicial responsibilities with integrity, impartiality, independence, and competence [26].

- According to the US Supreme Court Rules, an attorney does not need to be admitted to the US Supreme Court Bar in order to act as counsel, which the Court found to be a phrase synonymous with practising law: [16].

- Despite the above, Associate Justice Dolin did not violate the Code of Conduct because he submitted the amicus brief on his behalf, which is permitted by Canon 4.11: [19]–[24]. However, the Court held serious concerns about his conduct, taking the view that Canon 4.11 is intended to allow judges to represent themselves when they are parties to litigation and their rights or interests are directly at stake, which is very different from submitting an amicus brief: [2]. The Court found that a sitting judge of the Republic of Palau voluntarily injecting themselves into litigation pending in another country does not reflect well on the Palau judiciary ([2]) and that full-time judges in Palau should not submit amicus briefs in other jurisdictions in the future: [25].

International Decision of Interest

Human Rights: Right to Respect for Private Life

R (Elan-Cane) v Secretary of State for the Home Department **[2021] UKSC 56**

Decision date: 15 December 2021

Reed PSC, Lloyd-Jones, Arden, Sales and Rose JJSC

The appellant was born female but, in the process of growing up, began to feel revulsion at having a female body. The appellant underwent a bilateral mastectomy and hysterectomy in order to alleviate those feelings. The appellant now identifies as non-gendered. Her Majesty's Passport Office ('HMPO') deals with the issuing of passports and related matters in the exercise of the Royal Prerogative. Over the course of 1995 to the present day, the appellant inquired to HMPO and its predecessor on 4 occasions about the possibility of being issued a passport without making a declaration of being male or female. HMPO continued to operate a policy that an applicant for a passport must state on the application form whether their gender is male or female. The appellant contended that the policy operated by HMPO contravened rights of individuals who do not identify as male or female under the European Convention on Human Rights ('ECHR'). Both the Administrative Court and Court of Appeal found that, while 'private life' within the meaning of art 8 of the ECHR included an individual's identification as being non-gendered, the government was not under a positive obligation to permit the appellant to be issued a passport indicating that their gender was unspecified. The appellant challenged that finding.

Held: dismissing the appeal

- There is no judgment of the European Court of Human Rights which establishes a positive obligation to recognise a gender category other than male or female, and none which would require the Secretary of State to issue passports without any indication of gender: [30]. Factors against making a finding that a positive obligation exists in this case included: that the need to establish one's identity arises only occasionally and when it does, there is no obligation to use a passport for that purpose ([38]); the public interest in security, in circumstances where a binary gender marker is relevant to this consideration ([46]–[49]); significant costs to be incurred by the government if it were to change the gender marking system ([50]); and the importance of preserving the coherence of administrative and legal practices within the domestic system, in circumstances where other official records retain a binary gender marking system ([51]–[55]). Allowing for a "margin of appreciation" in the Court's interpretation and application of ECHR obligations is particularly important when considering whether to construe the ECHR as requiring a State to assume positive obligations: [55]. In this case, a wide margin of appreciation was justified, and the appellant's case was dismissed: [62].