Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 February 2022 – 28 February 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

False Imprisonment; Private International Law: choice of law

Royal Caribbean Cruises Ltd v Rawlings **[2022] NSWCA 4**

Decision date: 4 February 2022

Bell P, Meagher and Leeming JJA

The respondent, Mr Rawlings, travelled on the applicant's Bahamian-flagged cruise ship for a 10-day voyage, departing from Sydney on 10 November 2016 and returning on 20 November. On 15 November, Mr Rawlings was suspected of having sexually assaulted a female passenger, A, while the ship was in international waters. Mr Rawlings was then detained in a guest cabin by the ship's security staff pending investigation of the incident. On the morning of 17 November, the ship's captain received an email from the applicant's onshore Global Security department recommending that Mr Rawlings be released on the condition that he have no contact with A or her family members onboard. After discussing that recommendation with A's family, during which A's mother threatened to throw the respondent overboard should he be released, the Captain decided at midday on 17 November to kept the respondent confined until the ship returned to Sydney. Mr Rawlings brought proceedings in the District Court, claiming damages for wrongful detention and false imprisonment. Hatzistergos DCJ held that the captain was justified in detaining Mr Rawlings until midday on 17 November, but not thereafter. The primary judge awarded damages (including aggravated damages) of $90,000 and ordered costs against the applicant. The applicant sought leave to appeal from the judgment and orders.

Held: granting leave to appeal and allowing the appeal

- Under Australian choice of law rules, the law applicable to a tort committed on a vessel while on the high seas is the law of the state in which the vessel is registered – in this case, the law of the Bahamas: [20]. However, the respondent's claim was pleaded as if the tort had occurred in New South Wales, and accordingly was governed by the law of New South Wales; and the applicant did not plead any defence under or peculiar to the law of the Bahamas: [22].

- The primary judge did not err in accepting as part of the Australian common law the justification defence, as summarised by Slade J in *Hook v Cunard Steamship Co* [1953] 1 WLR 682; [1953] 1 Lloyd's Rep 413, that a ship's master must not only have reasonable cause to believe, but must also in fact believe, that confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board: [24]–[35].

- The primary judge erred in holding that the captain did not subjectively believe, before meeting A and her mother on 17 November, that the respondent's continued detention was necessary beyond that point. That finding was not open on the evidence on which the primary judge relied, and was inconsistent with the evidence of the Captain and the Staff Captain which ought to have been accepted: [80]–[89].

Judicial Review; Racial Discrimination

***Hamzy v Commissioner of Corrective Services NSW* [2022] NSWCA 16**

Decision date: 23 February 2022

Bathurst CJ, Basten and Leeming JJA

The appellant, Mr Hamzy, is serving a term of imprisonment. He is designated as an 'extreme high risk restricted inmate' ('EHRR inmate') under the Crimes (Administration of Sentences) Regulation 2014 (NSW) ('Regulation'). Mr Hamzy instituted proceedings in the Supreme Court challenging conditions imposed upon EHRR inmates which were dismissed by the primary judge. On appeal, the three broad issues were: (1) whether cl 94 of the Regulation, which empowered the Commissioner to refuse to permit visits to an EHRR inmate "on the basis of a criminal record check or for any other reason" applies to visits by lawyers, and if so, whether it was invalid; (2) whether the "drop-in policy", which involves the monitoring of telephone calls made by EHRR inmates, is unlawful in its application to telephone calls between EHRR inmates and their lawyers; and (3) whether cll 101, 116 and 119(6) of the Regulation, which require most communications by EHRR inmates to be in English, were inconsistent with ss 9(1) or 10(1) of the *Racial Discrimination Act 1975* (Cth) ('RDA') and for that reason invalid.

Held: granting leave to appeal, allowing the appeal in respect of issues 1 and 2, and dismissing the appeal in respect of issue 3

- A convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication: [179]. The right of a prisoner to choose his or her own lawyer is of considerable importance, and vulnerable to being abrogated by cl 94 of the Regulation: [198]–[199]. The power to refuse to permit visits from legal practitioners "for any other reason" – which amounts to "for any reason" – cut across the basic right of a person to the legal representative of their choice: [206]–[207], [212]. A regulation which reserved to the Commissioner a broad right to deny EHRR inmates face-to-face access to their legal practitioner was not comprehended by the general words of s 271 of the *Crimes (Administration of Sentences) Act 1999* (NSW), which authorised the making of regulations imposing conditions upon visitors: [233]. However, the power to require a criminal record check was authorised: [238].

- Owing to the drop-in policy, calls might be monitored for some period of time and knowledge that the conversation was monitored and any part of it might be heard by an officer was apt to have a chilling effect on what was said: [241]–[242]. It substantially impaired the right to provide confidential, privileged instructions to, and to receive confidential, privileged legal advice from, a legal practitioner: [243]. No legislative provision relied on (ss 232(1) and 235(1)–(2) of the *Crimes (Administration of Sentences) Act 1999* (NSW)) authorised it: [251].

- It may be that the requirement to use English had a discriminatory effect, capable of engaging s 9 of the RDA, but if so that gave rise to questions including that of reasonableness. This issue was not addressed in the primary proceedings and therefore this part of the appeal was dismissed: [274].

Judgments and Orders: review of previous decision of the NSWCA

Johnson v Mackinnon (No 2) **[2022] NSWCA 22**

Decision date: 24 February 2022

Macfarlan and Brereton JJA, Simpson AJA

The Court delivered a judgment on 21 July 2021, in which it dismissed with costs an appeal by the appellant, Ms Johnson, from judgments in the Equity Division of the Supreme Court. The appellant sought to have the 21 July 2021 judgment set aside pursuant to *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR') r 36.16 or the court's inherent jurisdiction, and that the appeal be allowed or reheard by the Court differently constituted.

Held: dismissing the motion with indemnity costs

- UCPR r 36.16 in part provides for the setting aside of a judgment upon a motion filed before it is entered or within 14 days thereafter. However, that does not of itself entitle the applicant to a reconsideration of the judgment. The power to reconsider on such an application is subject to the significant limitation imposed by the public interest in maintaining the finality of litigation, which requires great caution in its exercise, especially where what is sought would have the practical effect of re-opening the proceedings to enable a significant rehearing: [5]. The Court's inherent powers to set aside judgments are subject to at least the same constraints, imposed by the public interest in the finality of litigation, as the statutory power in UCPR r 36.16: [6].
- The appellant's present complaints were ultimately no more than a contention that this Court's considered conclusions were wrong. If those conclusions be wrong, it was not as a result of inadvertence, misapprehension or oversight, but by a deliberate process of reasoning, for which the proper remedy was an appeal. They were not amenable to reconsideration under r 36.16: [18], [51], [59], [61], [67], [68], [70], [75]. A complaint that, from the perspective of the unsuccessful party, a judgment produces an unjust result, is not a reason to reconsider it under UCPR r 36.16, or in the inherent jurisdiction: [91].

Equity: trusts and trustees, breach of fiduciary duty; Indefeasibility

Turner v O'Bryan-Turner **[2022] NSWCA 23**

Decision date: 24 February 2022

Meagher, White and McCallum JJA

The appellant, John Turner, suffers from advanced dementia. He was married to Wendy O'Bryan-Turner, and had two children by his previous marriage and two by his relationship with Wendy (David and Karl). Wendy, purporting to exercise an enduring power of attorney executed by John, signed transfers for no consideration of six farming properties in western New South Wales which John held as sole registered proprietor. Three of the properties were transferred to Wendy and David as tenants in common in equal shares, and three were made to Wendy, David and Karl as joint tenants. Wendy subsequently died, and in the proceedings below John (acting by a tutor) sought to challenge the transfers.

The primary judge found that Wendy executed the transfers in breach of a fiduciary duty owed to John. However, her Honour rejected John's contention that David and Karl were liable under either limb of *Barnes v Addy* (1874) LR 9 CH App 244, holding that they lacked the requisite degree of knowledge to attract liability under either limb, and that there was no 'dishonest and fraudulent design' of Wendy's so as to attract liability under the second limb. In respect of Wendy's breach of fiduciary duty, the primary judge declined to declare that a constructive trust arose in John's favour or order the payment of equitable compensation. The primary judge instead granted relief which would 'make good' John's estate by ensuring that his financial needs were met and that his testamentary intentions (expressed in a 2015 will) were honoured upon his death. John appealed against the findings in respect of the *Barnes v Addy* claims, and otherwise challenged the relief ordered by the primary judge.

Held: allowing the appeal in part

- The appropriate relief would be to declare (not to order) that the property transferred to Wendy and still held by her (ie those in which Wendy's interest was as a tenant in common, and which interest vested in her executor upon the grant of probate) was held on trust by her estate for John's benefit and to order equitable compensation for the value of the balance of the interests in the properties at the time equitable compensation was to be assessed: [69], [73], [87]. As a defaulting fiduciary who herself received a share of the properties, Wendy became bound by a constructive trust arising by operation of law from the time she received title by registration: [70]–[72].

- In *Farah Constructions Pty Ltd v Say-Dee* (2007) 230 CLR 89, the High Court held that a proprietary claim under the first limb of *Barnes v Addy* did not fall within the *in personam* exception to indefeasibility: [109]. In *Farah*, the High Court did not address the same issue with respect to the second limb: [109], [114]–[116]. Accordingly, this Court's decision in *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 remains good authority for the proposition that where Torrens title land has been acquired by an accessory liable under the second limb of *Barnes v Addy*, a proprietary remedy is available under the *in personam* exception to indefeasibility (cf *Sze Tu v Lowe* (2014) 89 NSWLR 317 at [225]). That conclusion has not been disturbed by the High Court. John would be entitled to claim that David and Karl held their interests in the properties on trust for him if they were liable under the second limb of *Barnes v Addy*: [121]. There was, however, no dishonest and fraudulent design on Wendy's part, and so this claim failed at the first hurdle: [122]–[135].

- The High Court's decision in *Farah* does not operate to extinguish a personal claim against a registered proprietor of Torrens title land who is liable under either limb of *Barnes v Addy*: [103], [137].

Australian Intermediate Appellate Decisions of Interest

Leases and Tenancies; Jurisdiction of Civil and Administrative Tribunal

Chief Executive Officer (Housing) v Young **[2022] NTCA 1**

Decision date: 4 February 2022

Grant CJ, Southwood and Barr JJ

Young and Conway were the tenants of separate residential premises. The appellant was the putative landlord within the meaning of the *Residential Tenancies Act 1999* (NT) ('RTA') for both tenancies. In a dispute involving claims by Young and Conway, and cross-claims by the CEO, before the Civil and Administrative Tribunal, the Tribunal relevantly determined that the purported tenancy agreements were void. The Tribunal found that the operative tenancy agreements were in the terms of the model residential tenancy agreement prescribed by reg 10 and sch 2 of the *Residential Tenancies Regulations 2000* (NT). Young and Conway had contended before the Tribunal that this default tenancy agreement should also be declared void, and rent consequentially repaid to them, in the application of the principle from *Commonwealth Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, on the basis that Young and Conway were at a special disadvantage arising from the lack of a common language with the CEO's agent and other matters. In its final reasons, the Tribunal did not address this claim. Young and Conway appealed to the Supreme Court, wherein the Court remitted the *Amadio* issue to the Tribunal for determination. The CEO appealed, arguing that the Supreme Court erred in remitting the claim for unconscionable dealings and repayment of rent as determining that claim in favour of Young and Conway would mean that there was no tenancy agreement in place and would therefore deprive the Tribunal of jurisdiction under the RTA generally, and power to award compensation pursuant to s 122 of the RTA specifically. Relatedly, the CEO contended that the Supreme Court erred in holding that the Tribunal possesses implied or incidental powers under the RTA to order the repayment of rent where it finds that a tenancy agreement is void.

Held: allowing the appeal on these grounds

- As a creature of statute, the Tribunal has no authority to adjudicate a dispute beyond the jurisdiction conferred on it by legislation: [16]–[19]. The Tribunal does not have a general jurisdiction, either express or implied, which would permit it to declare the entirety of a tenancy agreement void on equitable grounds. Nor does it have power to order the payment or restitution or equitable compensation contingent upon such a declaration [20]. Moreover, the jurisdiction is limited to the parties to a valid tenancy agreement. That is the jurisdictional fact which must exist before the Tribunal can exercise its statutory powers, including the power to award compensation under s 122 of the RTA: [21]–[22].
- A finding by the Tribunal that there is no operative 'tenancy agreement' under the RTA has application for the sole purpose of determining if it has jurisdiction. There is no power to declare the tenancy agreement void and order compensation in the nature of restitution or equitable damages: [23], [28].

Unincorporated Associations; Political Parties

***Asmar v Albanese* [2022] VSCA 19**

Decision date: 25 February 2022

Forrest and Whelan JJA, Forbes AJA

The Australian Labor Party ('ALP') is an unincorporated association. Its constituent document is called the 'ALP National Constitution' ('National Constitution'). The related Victorian association is called the 'Australian Labor Party, Victorian Branch' and is governed by the 'Australian Labor Party Victorian Branch Rules' ('Branch Rules'). Typically, ALP candidates for federal seats in Victoria are pre-selected in accordance with the Branch Rules, but the candidates for the forthcoming 2022 federal election were instead pre-selected under the National Constitution after the leader of the parliamentary ALP in Victoria, Mr Daniel Andrews, requested 'National Executive oversight' of the Victorian Branch in 2020. The applicants contended that the pre-selections were unauthorised because they were not conducted in accordance with the Branch Rules. The primary judge held that the applicant's claims, bar one, were non-justiciable. The claim which was found to be justiciable, relating to an issue of unlawful interference with the administration of trusts, was dismissed. The applicant sought leave to appeal, the key issues being whether the primary judge was correct in concluding that the Victorian Branch is not a separate, autonomous and self-governing organisation, or a separate political party; that members of state and territory branches are members of the ALP; and that the National Constitution is binding on all sections and members of the party.

Held: granting leave to appeal and dismissing the appeal

- The use of the term 'branch' in 'Australian Labor Party, Victorian Branch' supports a conclusion that the Victorian Branch is part of a larger one, namely the ALP: [157]-[159]. The Branch Rules expressly adopt the origins, objectives and principles of the national body; the Branch Rules require each applicant for membership to pledge to uphold the National Constitution; and the Branch Rules provide that a failure to comply with the National Constitution is a disciplinary offence: [163]. Upon becoming a member of the Victorian Branch, a person ipso facto becomes a member of the ALP. Once that is accepted, the contention that the Branch Rules should not be read together with the National Constitution becomes untenable: [166].

- When the National Constitution is read together with the Branch Rules, it is clear that the National Executive has the power to intervene and take over the conduct of the affairs of state branches and to conduct pre-selections, provided it acts in accordance with the applicable provisions of the National Constitution: [172]. The Victorian Branch is not a separate entity to the ALP: [173].

- Since *Cameron v Hogan* (1934) 51 CLR 358 was handed down, in which disputes relating to the internal disputes of political parties were found generally to be non-justiciable, political parties have gained recognition under the *Commonwealth Electoral Act 1918* (Cth). Pre-selection disputes in relation to federal parliamentary elections would now generally have the necessary direct connection with the Act to render them justiciable: [211]-[213]. Notwithstanding the primary judge's contrary conclusion on justiciability, this difference did not alter the result reached.

International Decision of Interest

Validity of Subordinate Legislation; Citizenship

***R (O (a minor, by her litigation friend AO)) v Secretary of State for the Home Department* [2022] UKSC 3**

Decision date: 2 February 2022

Hodge DPSC, Briggs, Arden, Stephens and Rose JJSC

The claimant, O, was born in the United Kingdom in July 2007 and had never left the UK. She had Nigerian citizenship, but from her tenth birthday she satisfied the requirements to apply for registration as a British citizen under s 1(4) of the *British Nationality Act 1981* (UK). O was one of three children who lived with their mother, a single parent in receipt of state benefits. In June 2015 the local authority began supporting O's family on the basis that they were destitute. An application was made to register O as a British citizen on 15 December 2017. Her mother was unable to raise the full amount of the fee, which was £973 at the time. She was able to raise only £386, which would have covered the administrative cost of processing the application. The Secretary of State refused to process the application at that time. In 2018, the fee was raised to £1012 by a new regulation, the Immigration and Nationality (Fees) Regulations 2018 (UK). O challenged the level of the registration fee, submitting that the right to citizenship was rendered nugatory by the level at which the fees had been set in the Regulations, and those Regulations were accordingly ultra vires. The High Court accepted that the Secretary of State had failed to discharge her statutory duty to have regard to the need to safeguard and promote the welfare of children in the UK when discharging any functions in relation to immigration, asylum or nationality but dismissed the claim of the ultra vires ground. The Court of Appeal upheld that decision. O was granted permission to appeal to the Supreme Court on the ultra vires ground.

Held: dismissing the appeal

- Parliament has empowered the Secretary of State to set the fees for applications to obtain British citizenship at a level in excess of the cost of processing the relevant application. Section 68(9) of the *Immigration Act 2014* (UK) lists factors to which the Secretary of State is allowed to have regard, including the benefits that are likely to accrue from obtaining British citizenship and the costs of exercising other functions in relation to immigration and nationality: [17]. Parliament authorised the subordinate legislation by which the Secretary of State had fixed the impugned fee: [50]. The appropriateness of imposing the fee on children is a question of policy which is for political determination: [51].

- Where, as was the case here, the Court is not dealing with an interference by statute with a common law constitutional right or with a statutory provisions which declares such a fundamental or constitutional right, the normal canons of statutory interpretation apply: [43].