Court of Appeal
Supreme Court
Sydney

Decisions of Interest

22 March 2022 – 11 April 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

Legal Practitioners: statutory cap on costs

***Todorovska v Brydens Lawyers Pty Ltd* [2022] NSWCA 47**

Decision date: 30 March 2022

Basten, Leeming and White JJA

In 2015, the respondent acted for the applicant, Ms Todorovska, in a personal injury matter on the basis of a conditional costs agreement. Ms Todorovska was awarded $100,000 in damages, with parties to pay their own costs. The respondent claimed $67,963.08 for costs and disbursements. Pursuant to s 338 of the *Legal Profession Act 2004* (NSW) ('Act'), if the amount recovered for personal injury damages did not exceed $100,000, the maximum legal costs recoverable was the greater of 20% of the amount recovered or $10,000 ('statutory cap'). Pursuant to s 339 of the Act and cl 116 of the Legal Profession Regulation 2005 (NSW) ('Regulation'), solicitors and clients were permitted to exclude the statutory cap by entering into a costs agreement, relevantly subject to the precondition that appropriate disclosures were made about the statutory cap which would otherwise apply and how costs would be calculated under the costs agreement. In the case of conditional costs agreements, being those which were "conditional on the successful outcome of the matter", the agreement was also required to specify the circumstances that constituted a "successful outcome" and contain a statement informing the client of their right to seek independent legal advice: ss 322 and 323 of the Act. After the parties' initial consultation, Ms Todorovska was sent a number of documents totalling 70 pages which included, inter alia, a covering letter and proposed costs and conditional costs agreements that purportedly included statements sufficient to discharge the respondent's duty to make the required disclosures. The primary judge found that the respondent had satisfied the disclosure requirements and that the statutory cap had thus been excluded by the conditional costs agreement. On appeal, Ms Todorovska contended that the disclosures were ineffective to exclude the statutory cap.

Held: granting leave to appeal and allowing the appeal

- A material consideration in determining whether an effective disclosure was made was the sizeable bundle of documents provided to the applicant: [18]. The covering letter stated that "a standard cost agreement … will apply in the event that you do not execute and return the conditional costs agreement". This did not identify the difference between the proposed costs and conditional costs agreements, nor explain that the effect of both was to remove the statutory cap: [31]. The proposed agreements did not make this information sufficiently clear either: [32]–[39], [42]–[59]. Furthermore, while a clear statement as to the need for independent legal advice may have mitigated the effects of the complicated and confusing material provided to the applicant, there was no evidence that the applicant had been advised of this in terms which might have allowed her to comprehend its significance: [19], [41].
- Compliance with cl 116(3) of the Regulation would alert the client to the existence of the statutory cap, which she or he could read if so minded, and bring home to the client that by entering into "this" costs agreement she or he would lose the benefit of the statutory protection: [16], [56]. The Regulation has a distinct protective purpose, which must be given full effect: [62].

Unincorporated Associations; Political Parties

Camenzuli v Morrison **[2022] NSWCA 51**

Decision date: 5 April 2022

Basten, Leeming and Payne JJA

The plaintiff, Mr Camenzuli, is a member of the State Council and State Executive of the NSW Division of the Liberal Party of Australia. He sought to impugn the validity of a resolution passed by a committee of the Federal Executive to endorse three incumbent Liberal members of Parliament as Liberal candidates to recontest their seats in the upcoming federal election. Mr Camenzuli submitted that cl 12.3(a) of the Federal Constitution, which permitted the Federal Executive to "take over the management of" a relevant State Division where a specified ground for intervention existed, did not authorise the impugned resolution because it (1) did not encompass "control" of the Division, (2) did not involve the pre-selection of candidates for election otherwise than in the manner provided for in the Divisional Constitution, and (3) was subject to cl 12.3(b), which denied the Federal Executive the power to "amend" the Divisional Constitution. The defendants submitted that the matter was non-justiciable, as the dispute related to the internal rules of an unincorporated association.

Held: dismissing the proceedings

- *Cameron v Hogan* (1934) 51 CLR 358 remains good authority for the proposition that the internal disputes of unincorporated associations are non-justiciable in the absence of a proprietary interest in property held by the association or to enforce contractual rights (if any) between members: [34], [64]–[69]. Despite the *Commonwealth Electoral Act 1918* (Cth) ('Act') having changed significantly since the case was decided, including by insertion of provisions governing the registration of political parties (Part XI) and the nomination and endorsement of candidates (Part XIV), these do not create justiciable statutory rights or interests based on internal party processes of pre-selection: [23]–[33], [58]–[62]. The reasoning of the Victorian Court of Appeal in *Asmar v Albanese* [2022] VSCA 19 to the contrary is unpersuasive: [46], [51]–[56]. The plaintiff's submission that endorsement by a registered political party gives a candidate a recognised status under the Act which gives rise to a sufficient interest to be enforceable by courts misconstrues the effect of the Act: [57]–[62].

- Though strictly unnecessary to do so, the Court proceeded to construe the Federal Constitution in the interests of finality. It considered that first, other clauses in the Federal Constitution state that "management and control" of the party's affairs "is" vested in the Federal Council. The use of the singular "is" tends to suggest that the phrase engages a single concept which expresses the scope of the power: [72]–[76]. Secondly, it is difficult to infer a limitation on the power of the committee appointed by the Federal Executive to conduct a pre-selection where there are specific powers in the Federal Constitution which expressly engage with the divisional powers and procedures of pre-selection and provide that those powers remain subject to the Federal Constitution: [78]–[81]. Lastly, while the effect of the action was to bypass the selection process provided for in, and vary the effect of, the Divisional Constitution, that involved no amendment of the Divisional Constitution: [81]–[82].

Limitation Periods; Misleading and Deceptive Conduct

CBRE (V) Pty Ltd v City Pacific Ltd (in liq) **[2022] NSWCA 54**

Decision date: 11 April 2022

Bell CJ, Leeming and Brereton JJA

In 2007, City Pacific Ltd ('CP') entered into an option to acquire land on the basis of valuations prepared by Mr Nicodimou, the second appellant, who was employed as a valuer by the first appellant, CBRE (V) Pty Ltd ('CBRE'). CP nominated its wholly owned subsidiary Martha Cove Marina Pty Ltd ('MCM') as the purchaser, and made payments totalling $11.1 million towards the purchase price, but the sale ultimately did not proceed. In 2015, CP and MCM brought proceedings against CBRE and Mr Nicodimou, claiming that the valuations were negligently prepared and misleading and deceptive. The primary judge found in favour of CP and MCM on both issues, but held that MCM's claim was statute-barred as the 6-year limitation period had expired. The primary judge found that CP's claim was not statute-barred and awarded it $6.9 million in damages, on the basis that the transaction gave rise to an implicit loan between CP and MCM, and that CP's cause of action only accrued when repayment by MCM became impossible, which was within the limitation period. On appeal, the Court was invited to consider whether (1) the fact of the relevant valuation being addressed to the vendor, rather than to the purchaser, and the disclaimers it contained, negated the claims of misleading and deceptive conduct; (2) the primary judge erred in finding that CP relied on the valuation or that contravention of the statute caused CP to make the payments; and (3) CP's claim was statute-barred.

Held: allowing the appeal

- The Court held that the appeal ought to be allowed on ground 3. First, MCM was the creature of CP; any transactions between the two entities, whether by way of gift or loan, were of no significance to the net value of CP. Thus, the ordinary commercial considerations accompanying the transfer of funds to another or to discharge the liability of another did not exist: [29]. Secondly, the primary judge was wrong to approach the issue as turning merely on the possibilities of CP having advanced a gift or loan, as equity recognises a third alternative: a resulting trust in favour of a person/entity that contributes to the purchase price of property: [31]. Thirdly, if there was to be an implied loan, there must have been an implicit promise to repay, which was not the case here: [32], [37]. Lastly, no evidence was called to establish any implicit relationship of lender/borrower between CP and MCM: [39]–[60]. Accordingly, there being no loan between it and MCM, CP's cause of action arose at the same time as MCM's and was statute-barred: [61]–[62].

- In respect of the first ground, the question posed by statute is whether there was *conduct* in trade or commerce that contravened the statutory norm: [64]. That the named recipient of the valuation was the vendor and not the purchaser could not immunise the conduct from being misleading or deceptive: [65]. The presence of the disclaimers also did not protect the conduct from being misleading and deceptive; notwithstanding their presence, the conduct conveyed an opinion of value and that the opinion had been obtained by the exercise of due care and skill: [67].

- In respect of the second ground, the primary judge erred in finding that CP suffered loss or damage "by" the contravention of statute: [72]–[91].

Australian Intermediate Appellate Decisions of Interest

Statutory Interpretation: *Criminal Procedure Act 2009* (Vic)

***Fox v Director of Public Prosecutions* [2022] VSCA 38**

Decision date: 29 March 2022

Kennedy, Walker and Whelan JJA

In determining three matters before the Court, the Court was required to construe provisions in the *Criminal Procedure Act 2009* (Vic) ('CPA') relating to the validity of charges for summary offences and the charge-sheets containing those charges, particularly in circumstances where the limitation period for amending the charge-sheet has elapsed. Clause 1(b) of sch 1 of the CPA requires that a charge contain the particulars "that are necessary to give reasonable information as to the nature of the charge". Pursuant to s 6(1)(a), proceedings are commenced in the Magistrates' Court by filing a charge-sheet. Section 8(1) permits the Magistrates' Court to amend a charge-sheet at any time and in any manner that it thinks necessary. However, after the expiry of the limitation period, s 8(3) forbids the making of an amendment that has the effect of charging a new offence, and ss 8(4)(a)–(c) permit the making of an amendment if the charge-sheet prior to the amendment sufficiently disclosed the nature of the offence, the amendment does not amount to the commencement of proceedings for a new offence, and the amendment will not cause injustice to the accused. While s 6(3)(c) of the CPA requires a charge-sheet to comply with sch 1, s 9(1) provides that "a charge-sheet is not invalid by reason only of a failure to comply with Schedule 1".

Held: granting leave to appeal but dismissing the appeal

- Charge-sheets and charges are different concepts: [6]. Because it is the filing of a charge-sheet that vests the Magistrates' Court with jurisdiction to hear the proceedings, if a charge-sheet were invalid, a possible consequence would be that the Magistrates' Court would lack jurisdiction to determine the matter. In contrast, if a charge were invalid, it would not follow that the Court would lack jurisdiction: [7].

- Where a charge fails to comply with cl 1(b) of sch 1, that, in and of itself, will not render the *charge-sheet* invalid: [13]–[15]. Additionally, s 8(1) confers a broad power of amendment, not requiring there to be a defect or error in order to enliven the power as its predecessor statute required: [20], [23]. However, where the limitation period has expired, the power is constrained; only if the conditions in ss 8(3) and 8(4) are met may a charge-sheet be amended to cure a defect in a charge, even where the defect was such as to cause the charge to be invalid at common law: [24], [29].

- A separate and distinct question arises as to whether a *charge* that fails to comply with cl 1(b) of sch 1 of the CPA is invalid, as s 9(1) has not abrogated the common law in relation to the validity of a charge: [46]–[47]. However, because a charge that would be invalid at common law is capable of amendment under s 8, such a charge is not 'invalid' but rather 'ineffective' in the sense that it is insufficient to found a conviction unless amended. The statutory scheme manifests an intention that a charge that contains a defect is not a nullity: [52], [54], [63].

Industrial Law

***Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2022] FCAFC 50**

Decision date: 1 April 2022

Besanko, Bromberg and Wheelahan JJ

At or about the time of the commencement of the COVID-19 pandemic, Qantas employed approximately 1,100, and Jetstar employed approximately 175, Aircraft Engineers. Owing to the disruption caused by the pandemic, Qantas and Jetstar stood down 356 and 113 of those employees respectively. In so doing, Qantas and Jetstar sought to rely on "stand down" clauses in their relevant enterprise agreements. Clause 14.6 of the Qantas Agreement authorised the deduction of pay "for any day an employee cannot be usefully employed because of a strike or stoppage of work through any cause for which Qantas cannot be reasonably be held responsible". Clause 30.5.1 of the Jetstar Agreement authorised the deduction of pay "for any day or part of a day in which [an employee] cannot be usefully employed because of a stoppage of work by any cause, which Jetstar cannot reasonably prevent". The primary judge found in favour of Qantas and Jetstar, holding that the relevant "stoppage of work" was the substantial stoppage of domestic and international passenger flights during the relevant period, the cause of which was not the decisions of Qantas or Jetstar to stand down the Aircraft Engineers. On appeal, the appellant submitted that the cause of the stoppage of work was a decision made by each airline, and that the stand down clauses did not call for further inquiry beyond this immediate cause into whether that decision was a reasonable and rational economic one.

Held: dismissing the appeal

- Neither the use of "through" in the Qantas Agreement or the use of "by" in the Jetstar Agreement suggests that the causation analysis should be restricted to the immediate or direct cause. In fact, the use of the word "through" in the Qantas Agreement suggests a chain of causation analysis. Secondly, the reference to reasonable responsibility in the case of Qantas, and reasonable preventability in the case of Jetstar, means that the task demanded by the clauses is not only a determination of causation and attribution of responsibility, but also a determination of reasonableness in assessing responsibility or preventability: [50]. It would be inconsistent with the express terms of the stand down provisions to conclude that the causation and responsibility analysis demanded by the clauses concluded with the identification of the immediate or direct cause. To do so would give the provisions an arbitrary operation which ignored the real, substantial or effective cause of the stoppage of work. Furthermore, depending on how the provisions were applied, limiting the inquiry to the immediate or direct cause would fail to give any effect to the notions of reasonable responsibility or reasonable preventability: [51].

- It is incorrect to say that economic considerations can never be relevant to the assessment of reasonable responsibility or reasonable preventability. Stand down provisions cannot be engaged by mere market fluctuations or reductions in profitability, but what Qantas and Jetstar faced here was an almost complete collapse of the international and domestic market for airline services as a result of the COVID-19 pandemic. It was an extreme case: [56].

Asia Pacific Decision of Interest

Constitutional Rights: access to information; Open Justice

Justice Qazi Faez Isa v The President of Pakistan **C.M.A 1243/2021**

Decision date: 4 April 2022

Bandial, Baqar, Malik, Miankhel, SA Shah, SMA Shah, Akhtar, Afridi, Ahmed, Khan JJ

This matter concerned whether the Supreme Court of Pakistan ought to allow public access to judicial proceedings through audio-video streaming in cases involving the exercise of the Court's original jurisdiction under Article 184(3) of the Constitution of Pakistan. The petitioner, Justice Qazi Faez Isa, sought the Court to make provision for the live-streaming of the court proceedings in his case, which involved allegations of misconduct filed against him by the President of Pakistan. The petitioner alleged that the media had launched an "unrelenting false propaganda campaign" against him, and that he, as a Judge of the Supreme Court, was handicapped in his ability to hold a press conference to rebut or respond to the allegations. The petitioner contended that permitting his court proceedings to be livestreamed would correct the public perception and be a testament to accountability and transparency. He placed reliance on Article 19A of the Constitution, which guarantees citizens a right to access information "in all matters of public importance subject to regulation and reasonable restrictions imposed by law". The Court had earlier determined that cases under Article 184(3) are matters of public importance, and ordered that live streaming of court hearings in such cases should be made available to the public. The Court published its reasons for making those orders in this judgment.

Held: granting the petition

- Article 19A of the Constitution confers a justiciable right which comprehends all matters of public importance undertaken by State institutions. The right conferred is subject to, but not dependent for its effectiveness upon, laws that may regulate or reasonably restrict the right: [14]. The expression "matters of public importance" refers to those matters which pertain to and affect the public at large; it includes matters in which the general interest of a whole community, as opposed to the particular interest of individuals, is directly and vitally concerned: [16]. Cases heard by the Court under Article 184(3) are inherently matters of public importance, "public importance" being one of two preconditions to invoking the original jurisdiction of the Court (the other being that the matter involves the enforcement of fundamental rights): [17].

- Article 19A is couched in positive language, which requires affirmative State action to protect and fulfil the right conferred. The State's obligation must be fulfilled by all its organs (the legislature, the executive and the judiciary) within the sphere of their authority and competence as prescribed under the Constitution and law: [21]–[22].

- A large section of the population cannot avail their right to see court proceedings in person due to time, distance and financial constraints: [29]. Virtual access to court proceedings under Article 184(3) would serve the goals of democracy as much as it would make the exercise of judicial power in such cases transparent: [38].