Court of Appeal
Supreme Court
Sydney

Decisions of Interest

12 April 2022 – 25 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

Judicial Review: jurisdictional error, procedural fairness

Franklin v Director of Public Prosecutions (NSW) **[2022] NSWCA 58**

Decision date: 12 April 2022

Basten, Macfarlan and Brereton JJA

In 2019 the applicant, Mr Franklin, was convicted of common assault in the Local Court. On appeal to the District Court, he sought leave to tender evidence, including a case note report prepared by a NSW Community Correction officer concerning the incident the subject of the assault charge. The District Court judge ('primary judge') refused leave and dismissed the appeal. Mr Franklin thereafter requested the Judge to state a case to the Court of Criminal Appeal ('CCA') pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW) in relation to ten questions, one of which concerned the admissibility of the report. His Honour refused the application on the basis that the questions were not questions of law. Upon judicial review in this Court, the admissibility of the report was found to be a question of law, and the matter was remitted to the District Court to be decided "according to law". The primary judge considered the Court's reasons but again declined to state a case to the CCA as his Honour considered that the admission of the report would not have affected the outcome of Mr Franklin's conviction appeal. Mr Franklin sought judicial review of this second decision, arguing that the primary judge fell into jurisdictional error on grounds of a reasonable apprehension of bias or by declining to exercise the function of a District Court judge under s 5B.

Held: dismissing the summons for judicial review

- In the first proceedings the primary judge had only determined whether the question regarding the admission of the report was a question of law. His Honour had not determined whether, as a matter of discretion, a case should be stated and whether the admission into evidence of the report would have made any difference to the outcome of the appeal. A fair-minded observer would not have had any reasonable apprehension that the primary judge might have prejudged the relevant issues arising on remitter: [32]. A fair-minded lay observer would similarly not have had any reasonable basis for thinking that, as Mr Franklin asserted, the primary judge refused to state the case "for the purpose of avoiding the Court of Criminal Appeal having the opportunity to determine whether he had erred in law on the principle of admissibility of business records": [33].

- The exercise of the power under s 5B involves the relevant judge exercising a discretion, as reflected by the words "may submit" in s 5B(1): [36]–[40]. The primary judge's observation that the question proposed to be stated to the CCA was unlikely to alter the substantive result was relevant because it focused on whether it would be futile and therefore a waste of judicial resources to state a case: [41]. Even if this were not relevant, such an error is not jurisdictional: [43]–[46]. Brereton JA dissented, finding that a District Court judge has a duty to state a case if the conditions which enliven the power are satisfied – namely that the question was one of law and it arose in the appeal – unless doing so would involve an abuse of process; and that a failure to do so constitutes jurisdictional error: [104], [146]–[148].

Res Judicata

***Fordyce v Leung* [2022] NSWCA 55**

Decision date: 12 April 2022

Basten, White and Beech-Jones JJA

The appellant, Mr Fordyce, and his law firm had earlier acted for Ms Leung, the first respondent, in relation to the administration of an estate. Ms Leung and Rhodium Pty Ltd, the second respondent, successfully brought proceedings against the appellant in 2014 in respect of costs agreements relied upon by Mr Fordyce in acting for Ms Leung in that matter. Costs orders were made in the respondents' favour, and Ms Leung sought costs assessments in respect of those orders. In 2020, a costs assessor completed a preliminary assessment of part of the costs in amounts totalling roughly $280,000. In 2021 Ms Leung filed the certificates in the District Court, at which point they were taken to be a judgment of that court for the amount of unpaid costs. Mr Fordyce filed a notice of motion seeking to have that judgment set aside, which was refused by the primary judge. Mr Fordyce challenged that decision on appeal. One of the issues before the Court was whether the primary judge's order was a final order that gave rise to a *res judicata* that would preclude a judge determining an appeal under ss 384 or 385 of the *Legal Profession Act 2004* (NSW) ('Act') from reaching a different conclusion.

Held: dismissing the appeal

- To determine whether the primary judge's order gave rise to a *res judicata*, it is necessary to identify the power the primary judge was exercising or purportedly exercising. First, it is settled that if on appeal under ss 384 and 385 of the Act the District Court determines that the assessor's (or review panel's) decision should be set aside and a different determination be made, or the decision be remitted, the District Court can set aside a judgment that had been entered pursuant to s 368(5). This power is found in the Uniform Civil Procedure Rules 2005 (NSW) ('UCPR') rr 36.16(2)(a), (3) and (4) or is otherwise necessarily implied from the appeal provisions of the Act to enable the court properly to exercise its jurisdiction by correcting its records. This power could only have been exercised following a successful appeal from the cost assessor's determination: [63]. A second power is found in UCPR r 36.15, which grants a general power to set aside a judgment or order if it is made or entered irregularly, illegally or against good faith: [64].

- The primary judge did not determine an appeal from the cost assessor's determination as the only order his Honour made was to refuse Mr Fordyce's application to set aside the judgment. It was correct to treat the application as having been made and determined under UCPR r 36.15. Two consequences flowed from this: (i) the primary judge's order refusing to set aside the judgment was not a final order that gave rise to a *res judicata* that would preclude a judge determining an appeal under ss 384 or 385 of the Act from reaching a different conclusion; and (ii) if an appeal lay, it would have to be determined through the lens of UCPR r 36.15. Whatever objections Mr Fordyce had to the validity of the costs assessor's determination, he pointed to no irregularity, illegality or bad faith in the respondents' filing the certificate as a judgment: [70]–[72].

Administrative Law: suspension of registration of a medical practitioner

Pridgeon v Medical Council of New South Wales **[2022] NSWCA 60**

Decision date: 14 April 2022

Bell CJ, White JA and Harrison J

The applicant, Dr Pridgeon, was a registered medical practitioner. He was charged by the Australian Federal Police and the Queensland Police against the respective criminal codes of those jurisdictions for his role in harbouring and/or supporting a woman and her twin daughters in circumstances where the children had been removed by their mother from the custody of their father, with whom the Family Court of Australia had ordered the children to live. Dr Pridgeon maintained that the mother had informed him that the children's father had sexually abused them, and it was for this reason that he acted as he did. The Medical Council of New South Wales subsequently suspended Dr Pridgeon's registration pursuant to s 150 of the *Health Practitioner Regulation National Law* (NSW) on the ground that he posed a risk to the health and safety of the public. Dr Pridgeon sought a review of that decision under s 150A. The Medical Council affirmed the order for suspension of Dr Pridgeon's registration. On appeal to the NSW Civil and Administrative Tribunal, the Tribunal upheld Dr Pridgeon's suspension on the ground of "public interest" under s 150. Dr Pridgeon sought leave to appeal from that decision.

Held: granting leave to appeal and allowing the appeal

- The context in which s 150 is found indicates that the usual way in which a complaint against a doctor should be dealt with is by the making of a particularised complaint, which the doctor can address at an oral hearing and which, if sufficiently serious to warrant suspension, is to be referred to the Tribunal. The Medical Council's power to suspend a doctor's registration under s 150 should be reserved for urgent cases: [53]–[56], [70].

- The Tribunal's view that the "public interest" protected by s 150 requires that practitioners exhibit traits consistent with the "honourable practice of an honourable profession", which in turn requires members of the medical profession to act within the law at all times, was problematic: [64]. The fact that Dr Pridgeon faced serious criminal charges could not, without more, require the Tribunal to determine the matter in the way it did. The public interest was not obviously served by the suspension of a competent and experienced doctor whose medical skills were not in question and whose services were in demand simply because he had been charged with offences in respect of which he would appear to have a good arguable defence: [66].

- In its context, the term "public interest" is a reference to the public interest in the protection of the public's health and safety. The content to be given to that protection must take its meaning from the conduct of the practice of medicine in respect of which a medical practitioner's registration is granted. The honourable reputation of the medical profession that was said possibly to be affected by the conduct of a medical practitioner in defying a court order is not a concern that relevantly informs the particular public interest in the protection of the public with which s 150 is concerned: [68].

Australian Intermediate Appellate Decisions of Interest

Statutory Interpretation: *Confiscation Act 1997* (Vic)

***Azizi v Director of Public Prosecutions* [2022] VSCA 71**

Decision date: 20 April 2022

Priest, T Forrest and Walker JJA

The applicant, Ms Azizi, and her husband, Mr Osman, purchased a property in 2012 and were registered as joint proprietors. Mr Osman paid the deposit and balance of the purchase price, whereas the applicant did not make any financial contribution. In 2014 Mr Osman was charged with a serious drug offence, and a serious drug offence restraining order was subsequently made over the property under s 18(1) of the *Confiscation Act 1997* (Vic) ('Act'). Ms Azizi was not involved in the commission of the offence. In 2015 Ms Azizi applied under s 20 of the Act to have her interest in the property excluded from the restraining order. The Court is empowered under s 22A of the Act to make an order excluding property from a serious drug offence restraining order if satisfied of various matters including, relevantly, that if the applicant acquired their interest in the property from the accused "directly or indirectly", it must have been acquired for "sufficient consideration" (s 22A(1)(c)). Upon hearing the application, the primary judge found that Ms Azizi acquired her interest in the property from Mr Osman indirectly, and declined to make an order because she did not obtain her interest for "sufficient consideration". The applicant sought leave to appeal from that decision, contending that she had not acquired her interest "from" the accused "indirectly" by his having paid the purchase price to the vendor and registering her name jointly on the title.

Held: granting leave to appeal but dismissing the appeal

- Section 22A is intended to, and does, achieve the consequence that a person charged with, and later convicted of, serious drug offences cannot avoid the operation of the relevant provisions of the Act by using their own funds to purchase property for themselves and another person jointly, where that other person provides no consideration. Considered as a matter of substance, the other person has received the property 'from' the accused as a gift, even though the accused did not previously have an interest in the property that was transferred to the other person: [8]. The use of the term 'indirectly' is sufficiently, and deliberately, broad enough to capture the circumstance where an accused pays for property but ensures that an interest in the property is vested in a third party: [9]. The primary judge was correct to determine that Ms Azizi acquired her interest in the property indirectly from Mr Osman.

- A purpose of the Act, in particular insofar as it applies to serious drug offenders, is to achieve a harsh outcome: the confiscation of *all* property of a person convicted of a serious drug offence, including property received by a third party as a gift from the accused (subject only to a few limited exceptions). The legislature has recognised that this may operate to the prejudice of the dependants of the accused, including their spouse and children, by making separate provision for the dependants of a serious drug offender: [65]–[66].

Patents: artificial intelligence, scope of term "inventor"

Commissioner of Patents v Thaler **[2022] FCAFC 62**

Decision date: 13 April 2022

Allsop CJ, Nicholas, Yates, Moshinsky and Burley JJ

The central question in this appeal concerned whether a device characterised as an artificial intelligence machine could be considered to be an "inventor" within the meaning of the *Patents Act 1990* (Cth) ('Act') and the *Patents Regulations 1991* (Cth) ('Regulations'). The respondent, Dr Thaler, made a patent application and gave as the name of the inventor "DABUS" (an acronym for "device for the autonomous bootstrapping of unified sentience"). Upon processing the application, IP Australia wrote to Dr Thaler's patent attorneys stating that the application did not comply with reg 3.2C of the Regulations because it failed to identify a natural person as the inventor. Dr Thaler submitted that an artificial intelligence could legitimately be named as an inventor. However, the Deputy Commissioner of Patents determined that s 15 of the Act, which conditions to whom a patent may be granted, would not be workable if the inventor were an artificial intelligence machine. Upon judicial review of that determination in the Federal Court, the primary judge concluded that an inventor could be an artificial intelligence system and ordered that the Deputy Commissioner's determination be set aside. The Commissioner of Patents appealed from that decision.

Held: allowing the appeal

- Regulation 3.2C(2)(aa) requires the applicant to "provide the name of the inventor of the invention" which, as the Explanatory Statement makes clear, is for the purpose of ensuring that the entitlement of the applicant to be granted a patent is clear. It is the inventor's invention that warrants the grant of a patent: [74]–[75], [84], [91].

- In various predecessor Acts, the ability to make an application for a patent was predicated upon the existence of an "actual inventor" from whom the entitlement to the patent was derived: [94]–[98]. The current Act was based in large part on the *Patents, Innovation and Competition in Australia* report produced by the Industrial Property Advisory Committee, which contained no recommendations that the role of the inventor, as the person from whom the entitlement to the grant of the patent should be derived, should change. Nor do the second reading speeches or the Explanatory Memoranda suggest that the established law relating to entitlement was intended to be altered: [99].

- "Inventor" has long been held to bear its ordinary English meaning, being the person(s) "who makes or devises the process or product". The inventor for the purposes of s 15(1) is the person who is responsible for the "inventive concept", being a person who has materially contributed to the inventive concept as described in the specification and the subject of the claims: [100]–[101]. Where s 15(1)(a) provides that a patent may only be granted to "a person who is an inventor", the reference to "a person" emphasises, in context, that this is a natural person: [106]. The circumstances in which a person becomes entitled to the grant of a patent also depend on the existence of a natural person who is the inventor from whom that entitlement is derived: [107]–[110]. "DABUS" could not be accepted to be an inventor for the purposes of the Act and Regulations.

Asia Pacific Decision of Interest

Conflict of Laws; Family Law

***Vew v Vev* [2022] SGCA 34**

Decision date: 14 April 2022

Menon CJ, Leong and Prakash JJCA

The appellant and respondent were once married, and upon their divorce their matrimonial assets were divided by a Singaporean court. During this process, a parcel of real property in London was held not to be a matrimonial asset and was not divided between the parties. The appellant brought a claim pursuant to Part III of the *Matrimonial and Family Proceedings Act 1984* (UK) ('MFPA'), the purpose of this Part being to furnish financial relief in situations of need notwithstanding the fact that financial provision may have been provided pursuant to a prior overseas divorce. The respondent sought an anti-suit injunction, inter alia, on the basis that the English proceedings would re-litigate matters already decided by the Singaporean court. The primary judge granted the relief sought on this basis. On appeal, the issue was whether continuing the English proceedings would cause a re-litigation of decided matters, given that the two proceedings had different purposes (the division of matrimonial assets as compared to a claim for financial relief following an overseas divorce).

Held: allowing the appeal

- Of the five factors conditioning the grant of anti-suit injunctions (see at [43]), the Court considered the most significant to be whether the foreign proceedings would be vexatious or oppressive to the plaintiff if allowed to continue: [69]. The Court considered that the commencement of Part III proceedings would not always be vexatious and oppressive, as this would render Part III ineffectual and be an affront to comity, ensuring that parties who divorce in Singapore would never be able to pursue Part III proceedings: [72]. Secondly, the Singaporean legislature modelled Chapter 4A of the Women's Charter upon Part III of the MFPA, enacting the legislation for the same reasons: [35]–[36]. Taking the alternative view would sit uncomfortably with this fact, as Chapter 4A could similarly be rendered ineffectual by the grant of an anti-suit injunction by a foreign court: [62], [73]. Thirdly, as parties must be granted leave to bring an application under Part III, this "filter mechanism" presupposes that English courts will be diligent in sifting out unmeritorious applications. English courts are also required to have regard to "all the circumstances of the case" in making orders for relief and ensure that there "is no improper conflict with the foreign jurisdiction". To grant an anti-suit injunction by default would effectively take the position that the MFPA does not sufficiently safeguard against abuses of process: [57]–[59], [74]–[76]. Considering the totality of these factors, Singaporean courts should generally be slow to grant an anti-suit injunction against the commencement of Part III proceedings: [76].

- In the present case, the Part III proceedings could not constitute a re-litigation of the division of the London-based property, as the question of division of the property was never before the Singaporean court, it having found that the property was not a matrimonial asset: [89]–[90]. The anti-suit injunction should not have been granted.

International Decision of Interest

Taxation Law; Social Welfare Benefits

***United States v Vaello Madero* 596 U.S. (2022)**

Decision date: 21 April 2022

Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett JJ

Puerto Rico is one of five external territories of the United States. Article IV, §3, cl 2 of the Constitution of the United States permits Congress to "make all needful Rules and Regulations respecting the Territory". In exercising this power, Congress has not required Puerto Rican residents to pay most federal income, gift, estate and estate taxes that otherwise apply to residents of the mainland United States. Likewise, Congress had not extended certain federal benefits programs to residents of Puerto Rico, such as the Supplemental Security Income ('SSI') program, which provides benefits for those over the age of 65 who cannot financially support themselves, among others. To be eligible for SSI, a person must be a "resident of the United States", which is defined to include residents of the 50 states, the District of Columbia and the Northern Mariana Islands. The respondent, Mr Madero, earlier lived in New York and was in receipt of SSI benefits. He moved to Puerto Rico and continued to receive SSI benefits as the United States government remained unaware of his new residence. Mr Madero was overpaid more than $28,000, which the United States government sought to recoup. Mr Madero argued that Congress's exclusion of Puerto Rican residents from the SSI program violated the equal protection component of the Fifth Amendment's Due Process Clause. The District Court and Court of Appeals found in favour of Mr Madero. The United States appealed from that decision.

Held: allowing the appeal

- The Constitution affords Congress substantial discretion over how to structure federal tax and benefits programs for residents of the external territories. In doing so, Congress has long maintained federal tax and benefits programs for Puerto Rican residents that differ in some respects from the federal tax and benefits programs for residents of the 50 states. The question of whether Congress *must* extend SSI benefits to Puerto Rican residents must be judged by reference to the deferential rational-basis test. In this respect, Puerto Rico's tax status, and in particular the fact that Puerto Rican residents are typically exempt from most federal income, gift, estate and excise taxes, supplies a rational basis for distinguishing that population from residents of the states for the purposes of the SSI program.

- Justice Sotomayor dissented, holding that the equal protection component of the Fifth Amendment's Due Process Clause renders Congress' exclusion of Puerto Rican residents from the SSI program unconstitutional. Her Honour considered that the distinct federal tax-paying status of Puerto Rican residents did not itself create a rational basis for differential treatment because the jurisdiction in which an SSI recipient resides has no bearing on the purposes or requirements of the program and because it would be antithetical to the entire premise of the program to hold that Congress could exclude citizens "who can scarcely afford to pay any taxes at all on the basis that they do not pay enough taxes".