Court of Appeal
Supreme Court
Sydney

Decisions of Interest

26 April 2022 – 16 May 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.

Contents

New South Wales Court of Appeal Decisions of Interest

Contract: breach of contract, damages, causation, mitigation

***Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd* [2022] NSWCA 65**

Decision date: 26 April 2022

Macfarlan and Gleeson JJA, Simpson AJA

In 2010, the respondent, Boulos Holdings Pty Ltd ('Boulos'), entered into a contract for the sale of property with the appellant, Edwin Davey Pty Ltd ('Edwin Davey'), for a purchase price of $10.8 million plus GST. In accordance with the contract, the deposit of $2.8 million was paid and released to Boulos by 31 December 2010. On 6 January 2011, the contract was varied to extend the completion date to August 2012. Edwin Davey made an additional prepayment of $1 million of the purchase price on 7 January 2011, which was also released to Boulos. Boulos failed to complete by the fixed date; it had not obtained a discharge of mortgage from Perpetual Nominees Ltd ('Perpetual'), which held security over the property and another property in respect of a $13.2 million loan. The sale completed on 18 September 2012 after Edwin Davey agreed to pay up to $500,000 to Perpetual in the event of a shortfall on the sale of its second security. Boulos commenced proceedings against Edwin Davey in July 2018 claiming approximately $662,000 plus interest under special condition 44 of the contract. Edwin Davey cross-claimed for damages for breach of contract, or alternatively restitution for unjust enrichment, based on the $500,000 it had paid to Perpetual to secure the discharge of the mortgage. The primary judge found only in favour of Boulos and awarded to Boulos damages of approximately $950,000 and costs. Edwin Davey challenged the dismissal of its cross-claim on appeal.

Held: allowing the appeal

- By failing to complete the contract in August 2012, Boulos breached its temporal obligation to complete the contract by the fixed date: [57]. However it was not a continuing breach of that obligation in the sense of "an indefinitely persisting failure and inability to convey clear and unencumbered title" to the property: [59]–[60], [65].
- Critical to the interplay between the issues of causation and mitigation was the fact that the contract completed only after Edwin Davey took action to obtain Perpetual's promise to provide a discharge of its mortgage. If Edwin Davey had not done so, the greater loss that was in prospect was the loss of the property and $3.8 million deposit and prepayment: [79]. The actual circumstances confronting Edwin Davey at the time of its mitigating action in September 2012 meant that there was a causative link, "as a matter of ordinary common sense and experience", between the breach by Boulos and Edwin Davey's actions taken to mitigate its prospective loss by contingently incurring the expenditure required to secure Perpetual's promise: [81]–[86]. Contrary to Boulos' submission, the manner in which Edwin Davey went about mitigating its loss was also reasonable, as assessed by the circumstances at the time of taking those actions: [88]–[98]. Nor was Edwin Davey's loss too remote. It was within Boulos' contemplation that it was "not unlikely" that a failure to obtain a discharge of the Perpetual mortgage and consequential failure to complete would result in Edwin Davey taking action to mitigate its loss: [99]–[107].

Trusts and Trustees: provision of documents to new trustee

Rinehart v Rinehart **[2022] NSWCA 66**

Decision date: 29 April 2022

Gleeson, Leeming and White JJA

In 2011, Ms Bianca Rinehart sued to remove Ms Gina Rinehart as trustee of the Hope Margaret Hancock Trust. In 2015, Gina resigned as trustee before the application to remove her could be determined. The Court made orders appointing Bianca as the new trustee, vesting in her the assets and property of the trust. In 2020, Bianca filed a notice of motion seeking production of two classes of documents in Gina's possession. In opposing production, Gina's primary submissions were that the documents were not trust documents and that Bianca's application was an abuse of process because she sought the documents to assist her case in a pending arbitration. In the alternative, Gina submitted that there should be no production until the conclusion of the arbitration and that there should be a dispensation from the requirement to produce the documents because doing so was likely to involve a breach of her duties as a director of Hope Prospecting Pty Ltd ('HPPL'), shares in which were one of the assets of the trust. The primary judge rejected Gina's primary submissions but accepted her alternative submissions. Her Honour ordered production of the documents but stayed those orders pending the conclusion of the arbitration. On appeal, the principal issues were whether the stay order was valid insofar as it was based on the (1) risk of misuse of the documents and/or (2) risk of breach of duty as a director.

Held: allowing the appeal

- On the first issue, it should not lightly be inferred that Bianca would misuse the documents. Bianca was advised by practitioners "who are more than competent" and it was unreal to think that she would deploy the documents in the arbitration without taking advice: [66]. Secondly, there was no reason to doubt that other parties to the arbitration, including Gina, would do anything other than vigorously defend their entitlement to not be subjected to the misuse of documents or information. The appropriate venue for that to occur was the arbitration, where the arbitrator was fully apprised of the issues: [67]. Thirdly, Gina's submission that she opposed production to prevent "detriment" to the "interests of the trust" could not be accepted. The "interests of the trust" could mean nothing more or less than the interests of the four beneficiaries, none of whom objected to the delivery of trust documents to the new trustee: [68]–[70]. The primary judge erred in concluding that a risk of misuse justified withholding production: [73].

- On the second issue, it is no answer of itself to an obligation by a trustee who chooses to retire to deliver trust documents to her successor to say that doing so may put her in breach of duties that the outgoing trustee owes in a different capacity to other companies. Furthermore, HPPL was a party to this proceeding and made no claim that there is any breach by Gina of a duty owed to it: [79]. Secondly, if there is a breach of duty, it would be the consequence of Gina's decisions (a) to resign from her office of trustee and (b) to fail to maintain a rigorous separation between trust and company documents: [80]. This ground was not made out: [82].

Australian Consumer Law; 'Illegal Contract'

***Li v Liu* [2022] NSWCA 67**

Decision date: 29 April 2022

Meagher, White and Beech-Jones JJA

The first appellant, Ms Li, and her mother, the second appellant, Ms Hong, are citizens of the People's Republic of China. The first respondent, Ms Liu, and the second respondent, Mr Wang, were the director and managing director of T & S Investment Group Pty Ltd ('T & S') respectively. In 2017, the appellants collectively transferred $500,000 to Ms Liu's bank account in exchange for a promise that T & S would employ Ms Li. The overall objective of the parties' arrangement was the grant of visas to the appellants and Mr Li (the father and husband of the first and second appellants respectively), including a visa that would enable Ms Li to work in Australia. Ultimately, Ms Li failed to obtain a visa. The appellants sued the respondents and T & S in the District Court to recover the amounts paid. The parties' arrangement, however, contravened provisions of the *Migration Act 1958* (Cth) which prohibit the offering or receiving of a benefit in exchange for a "sponsorship-related event". The primary judge granted the appellants relief against T & S on a restitutionary basis, but dismissed their claims against the respondents. On appeal the Court considered, inter alia, whether a claim against Mr Wang under ss 18 and 236 of the *Australian Consumer Law* ('ACL') for his alleged knowing involvement in a false and misleading representation that the appellants "would" obtain visas in return for their investment could be made good in light of the illegality of the parties' arrangement. The respondents filed a notice of contention challenging, inter alia, a finding said to have been made by the primary judge that such a representation was made.

Held: dismissing the appeal

- The appellants did not prove that the representation said to constitute misleading or deceptive conduct was in fact made. The statements by Mr Wang relied on by the appellants did not amount to a representation that the appellants and Mr Li "would" obtain visas: [51]–[55].

- While it was strictly unnecessary to do so, the Court considered, broadly, whether the illegality affecting the parties' contract barred them from relying on s 18 of the ACL and whether the representation, if made, was made in the course of trade or commerce. Whether illegality inhibits or precludes recovery under s 18 of the ACL turns upon the form of illegality in question and by considering and, to the extent necessary, reconciling the ACL and the statutory provisions that create the illegality in the same or similar way that occurs with illegal contracts: [61]–[62]. In this case, the making of investments and the obtaining of employment for the purpose of obtaining visas is not rendered illegal *per se* by the *Migration Act*; nor is the making of representations about the prospects of obtaining visas. Instead, the *Migration Act* makes illegal the method by which those things were sought to be done. Consequently, whatever representations were made to the appellants about their prospects of obtaining visas it was certainly made in trade or commerce: [64]. Had a representation which was misleading or deceptive been proved, the Court would have upheld the appellants' challenge on the ACL grounds: [66].

Australian Intermediate Appellate Decisions of Interest

Administrative Law; Statutory Interpretation

Mosaic Brands Ltd v Australian Communications and Media Authority **[2022] FCAFC 79**

Decision date: 13 May 2022

Collier, Abraham and Cheeseman JJ

The respondent, the Australian Communications and Media Authority ('ACMA'), exercises a number of functions and powers to regulate telecommunications. To support the discharge of its duties, s 522 of the *Telecommunications Act 1997* (Cth) authorises the ACMA to require a person, by written notice, to give it any information or produce to it any documents that it has reason to believe are in the person's possession which are relevant to the performance of any of its telecommunications functions or the exercise of any of its telecommunications powers. In 2020, the ACMA issued such a notice to the appellant, Mosaic Brands Ltd ('Mosaic'), in respect of suspected contraventions of the *Spam Act 2003* (Cth). Mosaic challenged the validity of the notice. The primary judge held that s 522(2) contains an implied entitlement disclosure condition, which requires that a notice specify, with reasonable clarity, that the information and/or documents sought relate to the performance or exercise of the ACMA's telecommunications functions or powers. The primary judge held that the notice complied with the implied condition in this case. Mosaic appealed from that decision. The ACMA submitted a notice of contention, submitting that an entitlement disclosure condition is not implied in s 522.

Held: dismissing the appeal and dismissing the notice of contention

- The authorities make it clear that whether an entitlement disclosure condition is implied into a notice provision and, if so, the necessary content of the notice, turns on the particular statutory scheme under consideration. The ACMA correctly submitted that no universal rule applies as to implying a condition into a notice provision: [61]. The primary judge was correct to conclude that such a condition is implied in s 522. Features which combine to warrant disclosure of the ACMA's entitlement to issue a notice include (1) that s 522(1) imposes a limit on the power to issue the notice; (2) that the breadth of the range of functions and powers in relation to which a s 522 notice can be issued is such as to necessitate the identification of the relevant function or power on the face of the notice; and (3) the potential consequences that flow from the failure of the recipient to comply with a notice. Absent such a condition, a recipient of a notice could not properly assess the notice issued to determine whether the ACMA has the power to require the production of the documents or the information sought: [78], [83]–[84].

- Contrary to Mosaic's submission, the condition did not require the notice to identify the matters the subject of complaint and state, in respect of each, the reason(s) that existed for the ACMA to suspect that Mosaic had contravened the *Spam Act*: [87]. A notice is not required to provide a sufficient degree of detail such as to enable the recipient to assess whether, in its view, the relevant function or power ought to be exercised by the ACMA in respect of individual contraventions: [93].

Industrial Law: adverse action; Statutory Interpretation

Qantas Airways Ltd v Transport Workers' Union of Australia **[2022] FCAFC 71**

Decision date: 4 May 2022

Bromberg, Rangiah and Bromwich JJ

In primary proceedings brought by the Transport Workers' Union of Australia ('TWU'), Qantas Airways Ltd ('Qantas') was found to have engaged in adverse action contrary to s 340(1)(b) of the *Fair Work Act 2009* (Cth) by making a decision to outsource ground handling operations work at 10 Australian airports. The primary judge found that Qantas conducted, an in-house bid process, pursuant to a provision in its enterprise agreement which was intended to enable employees to bid competitively to continue to provide the services. However, his Honour found that "there was never a realistic prospect of it being successful" because Qantas already considered the outsourcing proposal to be in its commercial interests and was willing to pursue it if the risks were not too great. Additionally, at the time the outsourcing proposal was being considered, the employees' enterprise agreement was close to expiring, after which the employees could exercise their workplace right to (i) engage in protected industrial action or a protected action ballot for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement, and (ii) participate in enterprise bargaining. The primary judge found that seeking to prevent the employees from exercising their workplace right influenced the making of the outsourcing decision. However, his Honour dismissed the TWU's application to reinstate the affected workers. The proceedings before the Court involved two appeals, two notices of contention and a cross-appeal. Qantas submitted, inter alia, that the primary judge erred in construing the phrase "to prevent the exercise of a workplace right" in s 340(1)(b) as extending to adverse action taken to prevent a workplace right not presently in existence from arising and being exercised in the future.

Held: dismissing the appeals, cross-appeal and notices of contention

- Section 340(1)(b) prohibits conduct which is aspirational; the adverse action contemplated by the provision is action taken with the ambition of preventing the future exercise of a workplace right. The prospective nature of the exercise of the workplace right which is the subject of the provision's protection provides a temporal frame which does not support an implication that the workplace right must necessarily be present and existing at the time the perpetrator embarks upon preventing a possible future exercise of the workplace right: [98]–[100].

- Furthermore, contrary to the submission made by Qantas, there was nothing useful to be drawn in favour of its construction from the fact that 'workplace right' is described in s 341 in the present tense. The applicable temporal frame is provided by s 340: [101]. Accepting this submission would be productive of absurd results: [104]–[105]. It is not an element of the cause of action provided for in s 340(1)(b) that there be actual prevention of the exercise of the workplace right in question: [126]. The provision is directed at an event anticipated to occur in the future and thus necessarily attended with some degree of uncertainty: [130]. If the objective existence of some uncertainty was a disqualifying factor, the provision could be bereft of any operative utility and fail to meet its purpose: [130]–[138].

Asia Pacific Decision of Interest

Constitutional Rights; Vaccination Mandates

***Puliyel v Union of India*, Supreme Court of India, No. 607/2021**

Decision date: 2 May 2022

Rao and Gavai JJ

The petitioner, Mr Puliyel, was formerly a member of the National Technical Advisory Group on Immunization ('NTAGI'), which relevantly provided advice to the Government of India on COVID-19 vaccines. Mr Puliyel filed a writ petition in the public interest seeking relief which would effectively require the first respondent, the Union of India, to release further detailed information about COVID-19 vaccination trials and related issues, and a declaration that vaccine mandates violate citizens' rights and interfere with the principle of informed self-determination which is protected by Article 21 of the Constitution of India. The Union of India submitted, inter alia, that the Court should be slow to impugn executive decisions on judicial review that concern public health and safety, referring in support of this proposition to decisions such as *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320.

Held:

- The Court will not ordinarily interfere with executive decisions concerning policy matters which are made based on expert knowledge as courts are not ordinarily equipped to question the correctness of such a decision: [22]–[23]. However, the Court continues to exercise jurisdiction to determine if the chosen policy measure conforms to standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons: [24]–[25].

- Although the Union of India submitted that vaccination is voluntary, Mr Puliyel contended that restrictions placed by state governments on unvaccinated persons' access to public places and services result in coercive vaccination and limit the right of unvaccinated persons to refuse medical treatment: [27], [41]. The Court had earlier recognised personal autonomy as a critical facet of the right to life and self-determination under Article 21 of the Indian Constitution: [48]. Given the considerable material filed reflecting the near-unanimous views of experts on the benefits of vaccination in reducing the severity of illness, the Court was satisfied that the government's pro-vaccination policy is informed by relevant considerations and is not unreasonable: [56]. Conversely, no material was placed before the Court which was capable of justifying the discriminatory treatment of unvaccinated individuals in public places owing to some states' vaccine mandates. While vaccine mandates may have earlier withstood constitutional scrutiny as there was more evidence to suggest that vaccines assisted in preventing the transmission of COVID-19, presently available data demonstrates that both vaccinated and unvaccinated individuals are susceptible to transmitting COVID-19 and, consequently, vaccine mandates could not presently be considered a proportional measure: [58]. The Court concluded by suggesting that all authorities, including private organisations, review any relevant orders imposing restrictions on unvaccinated individuals' access to public places and services: [89(v)].

International Decision of Interest

Constitutional Rights: freedom of speech; Government Speech

Shurtleff v Boston **596 U.S. (2022)**

Decision date: 2 May 2022

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

On the plaza near the entrance of Boston City Hall stand thee flagpoles. Boston flies the American and Commonwealth of Massachusetts flags on two of those poles. Ordinarily the city's flag is hoisted on the third pole, although Boston has for some years allowed groups to hold ceremonies at the plaza and hoist a flag of their choosing on the third pole. Between 2005 and 2017, Boston approved the raising of about 50 unique flags, some being those of other countries, and others being associated with groups or causes. In 2017. Mr Shurtleff, the director of 'Camp Constitution', asked to hold an event at the plaza to celebrate the civic and social contributions of the Christian community and wished to raise what he described as the 'Christian flag'. The commissioner of Boston's Property Management Department worried that flying a religious flag at City Hall could violate the Establishment Clause of the United States Constitution and, while permitting the event to take place, denied permission to raise the flag during it. Mr Shurtleff and Camp Constitution commenced proceedings, claiming that Boston's refusal to let them raise their flag violated, inter alia, the First Amendment's Free Speech Clause. The District Court held that flying private groups' flags amounted to government speech, so Boston could refuse petitioners' requests without falling afoul of the First Amendment of the United States Constitution. The First Circuit Court affirmed that decision. On appeal to the US Supreme Court, the key issues concerned (1) whether the flags Boston allows others to fly express government speech and (2) whether Boston could, consistent with the Free Speech Clause, deny petitioners' flag-flying requests.

Held: allowing the appeal

- On the issue of whether the flying of private groups' flags amounts to government speech, the most salient factor was the extent to which Boston actively controlled the flag raisings and shaped the messages which the flags conveyed to the broader public. The answer to this question was "not at all". While Boston maintained control over an event's date/time and physical premises, and provided a hand crank so that groups could hoist their chosen flags, it did not control the flags' content and meaning. The city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads to the conclusion that the flag raisings were private, not government, speech.

- When a government does not speak for itself, it may not exclude speech based on religious viewpoint. Doing so constitutes "impermissible viewpoint discrimination" (see *Good News Club v Milford Central School*, 533 U.S. 98, 112 (2001)). As a result, Boston's refusal to let Mr Shurtleff and Camp Constitution fly their flag based on their religious viewpoint violated the Free Speech Clause of the First Amendment.