Court of Appeal
Supreme Court
Sydney

Decisions of Interest

17 May 2022 – 5 June 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

Civil Procedure: permanent stay of proceedings

The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ [2022] NSWCA 78

Decision date: 1 June 2022

Macfarlan, Brereton and Mitchelmore JJA

The respondent, GLJ, commenced proceedings against the applicant, the Trustees of the Roman Catholic Church for the Diocese of Lismore ('Lismore Trust'), in the Supreme Court of NSW claiming the Lismore Trust was negligent in relation to, and/or vicariously liable for, an alleged sexual assault perpetrated by Father Clarence Anderson upon GLJ in 1968. The assault was said to have occurred when Father Anderson was allocated as a support priest to GLJ's family after her father was injured in a motorcycle accident. GLJ was 14 years old at the time of the alleged incident and, on her account, the assault itself was opportunistic, violent, intrusive and traumatic. The Lismore Trust sought a permanent stay of the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW). It claimed that the unavailability of Father Anderson and other members of the clergy who were appointed to perishes in the Diocese, each of whom was deceased, particularly in circumstances where neither Father Anderson nor the Lismore Trust was on notice of the allegation prior to the former's passing, justified a permanent stay. There was, however, extant documentary evidence to suggest that Father Anderson sexually abused young boys while a member of the clergy, and that his superiors in the Diocese were aware of his conduct. Four unsworn statements to this effect were relied on by GLJ. The primary judge declined to stay the proceedings. The Lismore Trust appealed from that decision.

Held: granting leave to appeal and allowing the appeal

- While the primary judge's observation that child sexual abuse occurs overwhelmingly in private places such that "[r]arely can it be expected that eyewitnesses will be available, if ever" may be accepted insofar as it concerns witnesses apart from the complainant and the alleged perpetrator, it is of limited significance where the alleged perpetrator is deceased without knowledge of the allegations. Without any account from Father Anderson or other priests in the parish, the Lismore Trust was at a significant disadvantage on the issue of whether Father Anderson sexually assaulted GLJ, a foundational issue to the causes of action pleaded: [100], [120]. Contrary to the primary judge's assertion that the present case was "not a case where everything depends upon the acceptance of the plaintiff's account in the absence of any available contradictor", everything did in fact depend on the acceptance of GLJ's account: [101]. Furthermore, there was nothing in the primary judge's reasons to indicate that his Honour undertook the task of considering the impact on the fairness of the trial if the Lismore Trust was to be required to meet the evidence contained in the four unsworn statements on which GLJ relied, should they be admitted into evidence: [103].
- The passage of time put this case in an exceptional category of cases in respect of which nothing could be done to relieve against the unfairness which would be experienced by the Lismore Trust if it had to defend the proceedings: [118], [122].

Consumer Law: misleading or deceptive conduct, "in trade or commerce"

***Zong v Wang* [[2022] NSWCA 80]**

Decision date: 1 June 2022

Leeming, White and Brereton JJA

The appellant, Mr Zong, the respondent, Mr Wang, and two other associates established a yacht hire business. The business was incorporated under the name Australian Yacht Club Pty Ltd ('AYC'). AYC purchased a large motor cruiser, "Dreamtime", for $805,000. To fund the purchase, Mr Wang subscribed a total of $315,000 to AYC to acquire a 35% shareholding. Mr Zong acquired a 30% shareholding and another associate acquired the remaining 35% shareholding. The business was unsuccessful and the shareholders fell out. Mr Wang brought proceedings in the District Court against Mr Zong, inter alia, for misleading and deceptive conduct under s 18 of the *Australian Consumer Law* ('ACL'). Mr Wang succeeded on this claim, the making of four representations not being in dispute. Mr Zong appealed from that judgment, claiming, inter alia, that the conduct was not in the course of trade or commerce, that the representations were not relied on by Mr Wang, and that the representations did not cause Mr Wang any loss. In support of the second and third of these contentions, Mr Zong contended that the primary judge impermissibly considered unpleaded conduct in addition to the four undisputed representations.

Held: dismissing the appeal

- It is not necessary, for conduct to be in trade or commerce, that there be an extant commercial operation at the time of the impugned conduct. The conduct must have a commercial character, and the requisite commercial character may attend statements directed to the establishment, financing and operation of a commercial enterprise: [12]. Here, the discussions between the prospective investors were negotiations between potential participants in a commercial venture, as to the terms on which they might participate in that commercial enterprise. Such negotiations were commercial in character, even if they were conducted in a social setting: [13].

- In respect of the second and third contentions, it is important to bear in mind that reliance is not a substitute for the essential question of causation: [21]. The Court did not accept that the primary judge impermissibly referred to conduct other than the four undisputed representations in concluding that Mr Wang relied on them in deciding to invest in AYC. In referring to "the context in which things were said" and the "admitted 'background' statements", his Honour was explaining that the context and the "background" representations supported a finding of reliance on the four representations. Context informs a judgment as to reliance, including because it can show the extent to which a person is dependent on the information conveyed by the representation. The context provided by the "background" representations was relevant to ascertaining, for example, whether the impugned representations were consistent with them, or otherwise likely to engender trust in the representor: [25]–[26]. After reconsidering the evidence given by Mr Wang about the circumstances in which the four undisputed representations were made, the Court found that Mr Wang relied on the representations and suffered consequential loss: [27]–[48].

Judgments and Orders: delivery of reasons, delay; Torts: intentional torts, inferences, contributory negligence

Irlam v Byrnes **[2022] NSWCA 81**

Decision date: 3 June 2022

Simpson AJA, N Adams and Cavanagh JJ

In 2014, the appellant, Mr Irlam, and the respondent, Mr Byrnes, were involved in an altercation. While Mr Irlam was standing adjacent to the open door of the vehicle, Mr Byrnes put the vehicle in reverse and accelerated. Mr Irlam took hold of the door frame and, after about 10 metres, yelled to Mr Byrnes to stop the car. Mr Byrnes laughed and said, "jump fucker". Mr Byrnes then turned the steering wheel sharply and Mr Irlam was thrown from the vehicle and landed on the bank of an adjacent creek, suffering injury as a result. Mr Irlam sought damages based on intentional tort and negligence. After a delay of over two years, the primary judge delivered judgment for Mr Byrnes on 18 December 2020 but did not publish reasons until 24 December 2020. The primary judge held that the respondent was negligent but did not accept that Mr Irlam had established that the respondent intended to hurt him, and assessed contributory negligence at 70%. On appeal, the key issues were (1) the primary judge's failure to give reasons at the time judgment was pronounced; (2) whether the respondent intended to cause injury to the appellant; and (3) whether the partial defence of contributory negligence is available in respect of an intentional tort.

Held: allowing the appeal

- Rule 36.2 of the *Uniform Civil Procedure Rules 2005* (NSW) does not mandate the delivery of reasons simultaneously with the pronouncement of order, but rather contemplates that there may be some break between the two events. What constitutes non-compliance with the rule such as to be fatal to the orders will depend on the circumstances of the case: [2], [118]. In this case, the very short delay, without anything else happening in the matter between the delivery of judgment and the date of publication, did not contravene r 36.2: [117], [119]–[122].

- There was no evidence on which the primary judge could support his inference that, in turning the vehicle, Mr Byrnes did not intend to harm Mr Irlam: [161]–[167]. The approach of the primary judge in focusing on why the respondent caused the vehicle to spin 180 degrees at the precise point ignores the fact that, prior to the vehicle spinning, the appellant had been hanging onto the vehicle whilst the respondent reversed it, during which time the appellant asked him to stop and the respondent told him to jump: [167]–[169]. In the Court's view, the compelling inference was that Mr Byrnes drove the vehicle in such a manner so as to cause injury to Mr Irlam: [173]–[175].

- Having concluded that the primary judge ought to have found that Mr Byrnes intended to cause injury to Mr Irlam, the Court found that contributory negligence should not be available as a defence to the intended consequences of the intentional tort of battery committed by Mr Byrnes. The Court considered that allowing a person who intentionally injures another to escape the consequences of their conduct merely because the injured person might have carelessly contributed seemed counterintuitive: [237]–[238].

Contracts: construction; Statutory Interpretation

BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd [2022] NSWCA 82

Decision date: 3 June 2022

Ward P, Leeming, White and Brereton JJA, Basten AJA

In 2016 Ventia Australia Pty Ltd ('Ventia') was engaged to provide services for social housing properties. Ventia subcontracted fire protection and maintenance services to BSA Advanced Property Solutions (Fire) Pty Ltd ('BSA'). Clause 2.1(a) of the subcontract required BSA to execute the services in accordance with the agreement, of which Annexure 4 formed part pursuant to cl 2.1(b). Relevantly, cl (b) in Annexure 4 stated that a "separate Agreement will come into existence each time [Ventia] issues a Work Order". In February 2021, BSA served on Ventia a claim for a progress payment pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW). The claim was made with respect to 25 invoices issued in respect of five work orders. Ventia subsequently served a payment schedule which asserted, inter alia, that the payment claim was invalid as it did not comply with the Act, having been made with respect to multiple construction contracts. In March 2021, an adjudicator found that the payment claim was valid, determining that Annexure 4 cl (b) was inconsistent with the contract as a whole, which did not contemplate separate agreements for each work order. The primary judge quashed the adjudicator's determination, finding that each work order constituted a separate agreement and the Act thus precluded service of the payment claim. On appeal, the primary issues were (1) whether the Act required that a payment claim relate to work done under only one construction contract (the 'one contract rule'); (2) if there be a one contract rule, whether that affected the validity of a payment claim; and (3) whether there was one contract between BSA and Ventia.

Held: allowing the appeal

- Three matters made it inherently implausible that there is a strict and precise 'one contract rule'. First, the object of the Act is to ensure that persons carrying out building work obtain regular payments, subject to a final reckoning. The expansive definition of construction contract, including both a contract and some other arrangement, directs attention to the carrying out of the work for reward rather than the legal characteristics of the work arrangement: [36]. Secondly, the stated requirements for a valid payment claim do not include the identification of the source of the obligation to carry out the work or the source of the entitlement to payment: [37]. Thirdly, as a practical matter, the scope of commercial arrangements under which goods and services are supplied for construction work is expansive, making the 'one contract rule' appear more precise than in actuality: [40]. However, if it be necessary that a payment claim relate to one construction contract, the 'one contract rule' is not a precondition to the service of a valid payment claim: [52].

- In the present case, the adjudicator correctly reasoned that cl (b) in Annexure 4 was inconsistent with the contract as a whole. That inconsistency could not be resolved by the parties affixing a label about the nature of the relationship under which construction work was undertaken. Were it otherwise, a contractor could exclude the practical benefit of the Act by including terms to that effect: [80]–[87], [94]–[95].

Australian Intermediate Appellate Decision of Interest

Legal Profession: disciplinary proceedings; Statutory Interpretation

***Young v Legal Profession Complaints Committee* [[2022] WASCA 52]**

Decision date: 24 May 2022

Quinlan CJ, Buss P and Beech JA

The appellant, Ms Young, was the subject of disciplinary proceedings commenced by the respondent, the Legal Profession Complaints Committee ('LPCC'). Before the State Administrative Tribunal ('SAT'), the LPCC sought an order finding that the appellant had engaged in unsatisfactory professional conduct and/or professional misconduct within the meaning of s 438(1) of the *Legal Profession Act 2008* (WA) (the 'Act'), other orders under s 438(2) of the Act and costs. In March 2020, the SAT decided that, in respect of the demonstrated professional misconduct, Ms Young was not to be granted a local practising certificate for a period of 6 months commencing on 7 August 2019. In addition, the appellant was publicly reprimanded for unsatisfactory professional conduct and ordered to pay the LPCC's costs. At the hearing of the appeal, the Court granted Ms Young leave to amend her grounds of appeal by adding Ground 1A. This ground alleged that the SAT erred in finding that it had power, pursuant to s 439(b) of the Act, to make an order that a local practising certificate not be granted before the end of a specified period with retrospective effect, any part of which predated the making of the order. Relevantly, s 438(2)(b) of the Act provides that if the SAT is satisfied that an Australian legal practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may make an order or orders specified in ss 439 and 441. Section 439(b) permits the making of an order that a local practising certificate "not be granted to the practitioner before the end of a specified period".

Held: granting leave to appeal and allowing the appeal

- The words 'not be granted' in s 439(b) mean, in the context of the regulatory framework as a whole, that the SAT may order in effect that the Board 'must not grant' a local practising certificate to the practitioner before the end of a period specified by the SAT in its order: [199]–[200]. The tense expressed in the words 'not be granted' in s 439(b) indicates that an order of the kind specified in the provision must be prospective in its operation: [201]. This interpretation is consistent with other provisions in the Act which deny the Board the power to retrospectively renew a local practising certificate and the limited scope of a deemed retrospective renewal: [202]. Further, an order that a local practising certificate 'not be granted' to the practitioner would be devoid of any effect or utility if the order was made in respect of a period that had wholly passed. That outcome is not required by the text, context or apparent purpose of the statutory provisions: [203]–[205]. Consequently, the SAT erred in law in finding that it had power, pursuant to s 439(b), to make an order that a local practising certificate not be granted to the appellant before the end of a specified period with retrospective effect, the whole of which period predated the making of the order: [206].

International Decision of Interest

Costs

***Pfizer Inc v Competition and Markets Authority* [2022] UKSC 14**

Decision date: 25 May 2022

Hodge DPSC, Sales, Leggatt, Stephens and Rose JJSC

In December 2016 the Competition and Markets Authority ('CMA') published a decision finding that Pfizer Inc ('Pfizer') and Flynn Pharma Ltd ('Flynn') had abused their dominant position in the supply of an epilepsy drug by charging excessive prices for the drug. The CMA imposed a significant fine on the companies and gave directions requiring them to reduce their prices. Pfizer and Flynn both appealed that decision to the Competition Appeal Tribunal ('CAT'). The CAT held that the CMA was correct to find that the companies held a dominant position in the relevant market but that it made errors in assessing whether the companies had abused that dominant position. The issue of abuse was remitted to the CMA for reconsideration. The CMA appealed to the Court of Appeal against the CAT's decision and there was a cross-appeal by Flynn. Both the appeal and cross-appeal were dismissed in large part. While the appeal from the CAT's decision was pending before the Court of Appeal, the CAT dealt with the issue of the costs of the proceedings before it. The CAT had regard to "the relative successes and failures of the parties" and accepted that the appropriate approach would be to award the CMA its costs of defending Pfizer and Flynn's claims in respect of market definition and dominance and to award Pfizer and Flynn a percentage of their costs in respect of the part of the appeal relating to abuse. The CAT determined that the CMA should pay Pfizer 58% of its costs and Flynn 55% of its costs. The CMA appealed to the Court of Appeal against the CAT's costs ruling and was successful. The Court of Appeal replaced it with no order for the costs of the proceedings before the CAT. Pfizer and Flynn appealed to the Supreme Court.

Held: allowing the appeal

- Even where a statutory power conferred on a court or tribunal to award costs appears to be unfettered, it is appropriate for an appellate court to lay down guidance or even rules which should apply in the absence of special circumstances: [94]. There is, contrary to the finding of the Court of Appeal, no generally applicable principle that all public bodies enjoy a protected status as parties to litigation where they lose a case which they have brought or defended in the exercise of their public functions in the public interest. The principle supported in an earlier line of cases is, rather, that where a public body is unsuccessful in proceedings, an important factor that a court or tribunal exercising an apparently unfettered discretion should take into account is the risk that there will be a 'chilling effect' on the conduct of the public body, if costs orders are routinely made against it in those kinds of proceedings, even where the body has acted reasonably in bringing or defending the application: [97]. Whether there is a real risk of such a chilling effect depends on the facts and circumstances of the public body in question and the nature of the decision which it is defending; it cannot be assumed to exist: [98].