Court of Appeal
Supreme Court
Sydney

Decisions of Interest

6 June – 19 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

Negligence: defences

Eddy v Goulburn Mulwaree Council **[2022] NSWCA 87**

Decision date: 7 June 2022

Bell CJ, Gleeson and Kirk JJA

The appellant, Mr Eddy, was injured when a temporary ramp on which he was walking slipped from under him. The ramp was placed over repaving work being completed on the footpath outside a Goulburn shopping centre. The respondent, the Goulburn Mulwaree Council ('Council'), was responsible for the footpath. In the weeks prior to the accident the Council had been notified about problems with ramps in the work area twice. Mr Eddy sued the Council for negligence. The Council relied, inter alia, on s 45 of the *Civil Liability Act 2002* (NSW) ('CLA'), which provides road authorities with a defence against civil liability for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm. The primary judge held that s 45 rendered the Council immune from Mr Eddy's claim. Mr Eddy appealed from that decision. He contended that, contrary to the decision of the primary judge, the Council did have "knowledge of the particular risk the materialisation of which resulted in the harm". He submitted that it was sufficient that the Council had actual knowledge that there was a risk that the ramp was not properly secured. Conversely, the Council submitted that because it did not know that the particular ramp that caused Mr Eddy's injury was unsecured, it could not be denied the benefit of the defence.

Held: allowing the appeal with costs and remitting the matter to the District Court for the remainder of the claim to be assessed

- Section 45 creates a somewhat different immunity to the "highway rule" previously incorporated in the common law of Australia: [39]–[42]. The section only applies if and to the extent that there is an omission relating to carrying out road work: [43].
- Section 45 stands in contrast to both the common law and ss 5B and 5C, which direct attention to the kind of injury and kind of chain of events leading to a claimant's injury. Section 45 instead speaks of a *particular* risk. This suggests a focus on the very risk that came home to cause the claimant's injury. It looks backwards, from the perspective of the events that actually occurred to cause the alleged harm when the risk materialised: [48]–[50]. The word "particular" is meant to require greater specificity than arises for other references to risk in the Act (see, eg, ss 5B, 5C, 5F, 5G and 5L): [59]. Factors likely to be important in this regard include the precision of the road authority's actual knowledge of the location and of the nature of the risk to be found there: [83]. It does not, however, require knowledge of every aspect of the precise causal pathway that caused harm: [85].
- The primary judge characterised the particular risk in this case as "the risk of the ramp being susceptible to movement because it was not properly installed or connected". This characterisation was not challenged by either party. So understood, the Council did have actual knowledge of that risk. The risk related to a dangerous feature of the types of ramps being used on the worksite rather than the placement of any particular ramp at any specific time: [89]–[93].

High Risk Offenders: extended supervision orders; Statutory Interpretation

State of New South Wales v Kaiser **[2022] NSWCA 86**

Decision date: 8 June 2022

Bell CJ, Beech-Jones JA and Simpson AJA

In 2007 the respondent, Mr Kaiser, was sentenced to imprisonment for 10 years and 11 months after pleading guilty to manslaughter. In 2016 Mr Kaiser escaped from the correctional centre in which he was being held. While at large, Mr Kaiser committed three further offences for which he was subsequently sentenced. The sentences for two of those offences were specified to commence during the currency of the manslaughter sentence and to extend beyond the expiration of that sentence, ultimately expiring on 9 December 2019. The sentence for the third offence commenced after the expiration of the manslaughter sentence and will expire on 9 December 2022. By amended summons filed on 5 December 2018 the State of New South Wales sought an extended supervision order ('ESO') against Mr Kaiser. Relevantly, s 5B(b) of the *Crimes (High Risk Offenders) Act 2006* (NSW) permits the making of an ESO if the person is a supervised offender within the meaning of s 5I. A person is a 'supervised offender' if, when the application is made, that person is in custody while serving a sentence of imprisonment for, relevantly, a serious offence or for another offence for which the sentence is being served concurrently with or consecutively upon, or partly concurrently with and partly consecutively upon, the sentence for the serious offence. Until 9 December 2019 Mr Kaiser met the definition of 'supervised offender' because manslaughter is a serious offence and the sentences for two of the offences committed while he was at large were being served on a partly concurrent basis. When the application was determined on 8 June 2021, the primary judge held that Mr Kaiser was not a supervised offender at that date but that, assuming the court had the power to make an ESO, the earliest date on which it could commence is 10 December 2022. The State appealed from that decision.

Held: allowing the appeal

- Contrary to the respondent's submissions, in circumstances where community safety is the paramount consideration in determining whether or not to make an ESO, there is limited (if any) scope for the application of the principle of legality: [61]–[62].
- For the purpose of identifying the meaning of 'supervised offender', s 5B(b) directs attention to s 5I, in which 'supervised offender' is clearly defined as an offender who, *when the application for the order is made*, is serving a relevant sentence: [68]. The text, context and purpose of ss 5B(b) and 5I(2) do not suggest that the italicised words should not be given effect in considering whether a defendant is a "supervised offender": [69]–[73]. It is not necessary that the subject of the application be serving a sentence for a serious offence at the time the application for an ESO is determined: [69], [77], [99]. Mr Kaiser was a supervised offender as at 8 June 2021.
- Both the State and Mr Kaiser agreed that the primary judge erred in deciding that, if the Court had jurisdiction to make an ESO because Mr Kaiser was a supervised offender, the earliest date on which an ESO could commence was 10 December 2022. As at 8 June 2021, an ESO, if made, would commence on the date it was made because Mr Kaiser was no longer serving a sentence for a serious offence, or for another offence concurrently or consecutively thereupon: [127]–[131].

Family Provision: eligibility; Statutory Interpretation: adoption legislation

***Daley v Donaldson* [2022] NSWCA 96**

Decision date: 17 June 2022

Leeming, White and Mitchelmore JJA

The applicant, Mr Daley, and the respondent, Ms Donaldson, are biological children of the late Mr Richardson. Ms Donaldson was appointed executrix, and was the major beneficiary, under the deceased's will. Mr Daley was estranged from the deceased. From early infancy, Mr Daley resided with his biological mother and her new partner and later husband, Mr Keith Daley, in Queensland. Documents now available to the Court (which were not before the primary judge) established that Mr Daley was adopted by his mother and Mr Keith Daley, with the consent of the deceased, in 1973 pursuant to the *Adoption of Children Act 1964* (Qld). By s 102 of the *Adoption Act 2000* (NSW), that adoption is treated as having the same effect in NSW. Mr Daley applied for a family provision order under s 59 of the *Succession Act 2006* (NSW), contending he was eligible as a child of the deceased. After reaching a compromise of the claim, Ms Donaldson resiled, having come to the view that Mr Daley's adoption rendered him ineligible to be considered a child of the deceased. The primary judge declined to make orders giving effect to the compromise. Mr Daley appealed from that decision.

Held: dismissing the appeal

- First, Mr Daley's submission that s 95(3) qualifies the position under s 95(2)(d), under which an "adopted child ceases to be regarded in law as the child of the birth parents", was misguided. Section 95(3) provides that "an adopted child does not cease to be regarded in law as the child of a birth parent or adoptive parent … if an adoption order is made in relation to a step parent with whom the birth parent or adoptive parent is living". There is nothing to suggest that the disapplication of the general rule in s 95(2)(d) applies to both birth parents, even one who is separate from the adopting parent. The definite article "the" preceding "birth parent or adoptive parent" in s 95(3) refers to the person identified in the condition at the end of the provision, namely, the person with whom the step parent is living. Section 95(3) says nothing about how the law regards the deceased, who did *not* live with the adopting step father: [35]–[45].

- Secondly, Mr Daley did not have, as he contended, a vested or contingent property right to bring a family provision claim against his biological father by virtue of the *Testator's Guardianship of Infants and Family Maintenance Act 1916* (NSW), which was in force at the time of his birth but is now repealed. This is because any such right did not exist prior to the deceased's passing. Until then, Mr Daley had merely an expectation that he may become entitled to apply under statute: [46]–[47].

- Finally, even if the parties' compromise was a "considered commercial decision", the Court did not, as a matter of discretion, have to give effect to it: [55]–[60]. It was open to the primary judge to decline to make orders enforcing a compromise which had been entered into on a basis demonstrated to be false: [73].

Australian Intermediate Appellate Decisions of Interest

Interlocutory Proceedings: costs; Evidence: advice to witnesses

State of Victoria v Villan **[2022] VSCA 106**

Decision date: 7 June 2022

Kennedy and Walker JJA

The respondent, Mr Villan, commenced proceedings in tort against the applicant, the State of Victoria, in respect of an alleged sexual assault he suffered at the hands of his school principal ('EFG'). The State denied the allegations concerning EFG's acts. It proposed to call EFG as a witness at trial and he agreed to give evidence. Solicitors for the State recommended to EFG that he obtain legal advice, but EFG did not do so. On the third day of the trial, the jury asked, 'Has there been a criminal charge against EFG?' The jury was told there had not been. However, during the giving of evidence on the same day, Mr Villan expressed his intent to file a police complaint. On the fourth day of the trial, senior counsel for the State informed the Court that, having been told of Mr Villan's evidence, EFG wished to obtain independent legal advice about whether he should give evidence. The trial judge granted an application for the jury to be discharged and the proceedings to be adjourned for this purpose. After receiving legal advice, EFG decided that he was unwilling to give evidence. After considering whether to grant EFG a certificate under s 128 of the *Evidence Act 2008* (Vic), the primary judge held that it was not in the interests of justice that EFG be required to give evidence and stayed the proceedings. The trial judge subsequently ordered that the State pay Mr Villan's costs thrown away by reason of adjournment of the trial. The State appealed against that costs decision, in part contending that it and its solicitors were not at fault in relation to the matters that led to the stay of the proceedings because they were not required to do more than recommend to EFG that he seek legal advice.

Held: granting leave to appeal but dismissing the appeal

- This case raises an importance point of principle warranting a grant of leave to appeal, namely the extent to which a defendant is required to advise or otherwise notify a witness, for whom it does not act, of the implications of giving evidence: [41]–[42].

- The trial judge's remarks, made in an *ex tempore* ruling after a short hearing, could be interpreted in two ways. First, they could be understood as a conclusion that the solicitors for the State ought to have *advised* EFG about the consequences of giving evidence on potential criminal proceedings. Secondly, they could be understood in the much more limited way as being based only on the State's failure to *inform* EFG of the fact that, if he were to give evidence in the civil proceedings, that could have consequences for him if criminal charges were laid in the future. The Court preferred the latter, more limited reading: [59], [61], [67]. The Court considered that when the trial judge used the term 'advised', what his Honour meant was that the solicitors for the State should have 'informed' EFG. That is, the State and its solicitors ought to have given EFG some greater indication of why he needed independent legal advice, without descending into actually providing the legal advice themselves: [61], [65]–[66].

- The State's solicitors did not make any statement to the effect that giving evidence could have consequences for EFG if criminal charges were laid in the future. In the Court's opinion, a statement of that kind would not have involved the provision of legal advice nor have placed the solicitors for the State in a position of conflict: [64].

Bias: judicial communications

***Minogue v Falkingham* [2022] VSCA 111**

Decision date: 14 June 2022

Beach, Niall and Emerton JJA

The applicant, Mr Minogue, is currently serving a term of imprisonment. At all relevant times, he had a desktop computer in his cell which did not have the capability of sending and receiving emails. He made a request to the Commissioner of Corrections for Victoria, which was refused, for permission to fund and purchase a laptop. Mr Minogue sought judicial review of that decision and judgment was reserved on 7 May 2020. On 8 May 2020, Mr Minogue made a second request. In mid-August 2020, the Commissioner approved Mr Minogue having access to a Corrections Victoria issued laptop, subject to the desktop computer in his cell being removed. Mr Minogue commenced new proceedings to challenge this decision. Between 10 August 2020 and 18 September 2020, a series of emails were exchanged between the judge's associate and the solicitor for the respondent, Ms Falkingham (Secretary of the Victorian Department of Justice). Mr Minogue was not a party to these emails, and was not immediately provided with copies of that correspondence. On 21 September 2020, the primary judge presided over a mention of the matter. At the outset the primary judge described the various communications, noting his regret that Mr Minogue had only been provided with copies on 18 September 2020. Ultimately, the primary judge dismissed the first proceedings without adjudication and dismissed the second proceedings. On appeal, Mr Minogue submitted that a reasonable apprehension of bias arose due to the private communications between the primary judge's chambers and Ms Falkingham's solicitors.

Held: refusing leave to appeal

- In the circumstances, the parties should have agreed upon a form of communication with the judge's associate or, failing agreement, the matter should have been dealt with in open court: [50]. The difficulty in having a self-represented prisoner receive emails directly heightens the importance of ensuring that no matters of substance are communicated by email without the prior knowledge of the prisoner: [52].

- However, the allegation of bias could not be resolved simply by asking whether the emails should have been sent: [53]. The communications in this case did not give rise to a reasonable apprehension of bias. First, the judge was not a direct party to the communications: [57]. Secondly, the primary judge made full disclosure: [58]. Thirdly, the emails did not contain material that was extraneous or prejudicial in any relevant sense. There was nothing in the emails that could logically cause the judge to decide the legal issues otherwise than on their merits: [59]–[60]. Fourthly, after receiving a copy of the communications, Mr Minogue suggested at first instance that the ex parte communications evidenced bad faith on the part of Ms Falkingham, rather than the primary judge's inability to bring an impartial mind to the matter: [63]. Considering the factors together, the reasonable lay observer would understand that while there may have been a breakdown in proper practice, there was no reason why the judge could not implement corrective measures by full disclosure and by allowing full argument on any issues that had arisen, a course which the judge took: [64].

Asia Pacific Decision of Interest

Judicial Review: exercise of discretion; Ombudsmen

Financial Services Complaints Limited v Chief Ombudsman **[2022] NZCA 248**

Decision date: 15 June 2022

Cooper, Courtney and Goddard JJ

Section 28A of the *Ombudsmen Act 1975* (NZ) prevents persons from using the term 'ombudsman' in connection with any business or the provision of any service without the permission of the Chief Ombudsman. The appellant, Financial Services Complaints Limited ('FSCL'), conducted a dispute resolution scheme approved under the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (NZ) ('FSP Act'). Two similar schemes had obtained permission to use the ombudsman name and FSCL sought to do likewise. The Chief Ombudsman refused permission to FSCL. Following a judicial review challenge, the High Court made a finding of pre-determination against the Chief Ombudsman and directed that a delegate or an ombudsman be appointed temporarily for the purpose of considering FSCL's application. FSCL appealed from that decision. It contended, inter alia, that the primary judge erred in remitting the matter for reconsideration because granting permission was the only lawful decision available and the primary judge should have substituted her decision for that of the Chief Ombudsman.

Held: allowing the appeal

- There is no statutory obligation on the Chief Ombudsman to grant permission under s 28A. It instead involves the exercise of a discretion: [57]. However, save for the concern over whether use of the term 'ombudsman' in industry settings would create confusion about the role of the Parliamentary Ombudsman, the considerations that the legislature must have thought would be relevant in deciding whether permission should be granted (exemplified in the 'Robertson guidelines', drafted by a former Chief Ombudsman) all supported the grant of permission: [58].

- In respect of the risk of confusion about the role of the Parliamentary Ombudsman, submissions made by the Chief Ombudsman about matters such as the modest amount of misdirected calls and complaints his office was receiving did not justify his decision. Any possible confusion could be quickly dispelled owing to the different functions of industry and Parliamentary ombudsmen: [65]–[74]. Secondly, there was no basis on which to justify the differential treatment of FSCL as compared to the two earlier schemes that were granted permission under s 28A: [75]–[82]. Thirdly, in his consideration of s 14 of the *Bill of Rights Act 1990* (NZ), which protects freedom of expression, the Chief Ombudsman erred in his view that the proposed use of the term 'ombudsman' was "not particularly strong". He failed to recognise that, although FSCL is a commercial entity, it operates a scheme within a statutory framework that exists for the public interest, namely dispute resolution under the FSP Act: [88]–[89]. The refusal of permission unreasonably limited FSCL's s 14 right: [91].

- The Court concluded that there was no objectively reliable basis for the Chief Ombudsman's decision. The only lawful decision available was to grant FSCL the permission it sought: [92], [96]. It substituted the decision accordingly: [107].

International Decision of Interest

Judgments and Orders: principle of finality; Enforcement of Arbitral Awards

Federal Airports Authority of Nigeria v AIC Ltd **[2022] UKSC 16**

Decision date: 15 June 2022

Hodge DPSC, Briggs, Sales, Hamblen and Leggatt JJSC

Following an arbitration conducted in Nigeria, the appellant, the Federal Airports Authority of Nigeria ('FAAN'), was ordered to pay the respondent, AIC Ltd, US$48.13 million dollars. FAAN sought to have that award set aside in Nigeria. Meanwhile, in January 2019, AIC commenced proceedings in England to enforce the award. The primary judge made an order for enforcement. FAAN applied to have it set aside and AIC cross-applied for a condition that any adjournment should be on terms that FAAN provide security. A High Court judge ('the judge') set aside the enforcement order and adjourned the enforcement proceedings pending the outcome of the Nigerian proceedings on the condition that FAAN provide over US$24 million dollars in security. AIC obtained an order that the security be provided by bank guarantee by 29 October 2019, with permission to apply to enforce the award if the guarantee was not forthcoming by then. FAAN obtained an extension until 14 November 2019 but failed to provide the guarantee by that date. On 6 December 2019, the judge made an order permitting AIC to enforce the award. Meanwhile, FAAN had taken belated steps to obtain the guarantee on 2 December 2019, which was made available to it on the afternoon of 6 December 2019. FAAN applied to the judge to re-open her judgment of that afternoon. The judge directed that her order should not be sealed in the meantime. In an *ex tempore* judgment delivered on 13 December 2019, the judge set aside the enforcement order, extended time for the provision of security until 9 December 2019 and adjourned the enforcement proceedings pending the outcome of the Nigerian proceedings. The Court of Appeal reinstated the enforcement order. FAAN appealed from that decision.

Held: allowing the appeal in part

- Finality in litigation is an overriding objective of the *Civil Procedure Rules 1998* (UK): [29]. On receipt of an application to reconsider a final order before it has been sealed, a judge should not commence from a neutral position; they should ask themselves whether the application should be entertained at all: [32]. The weight to be given to the finality principle will vary, depending upon the nature of the order, the type of hearing and the type of proceedings in which it was made. Finality is likely to be most important in relation to orders made at the end of a full trial, but other orders which end the proceedings at first instance will attract the finality principle to almost as great a degree: [35].

- There was no good explanation for FAAN's delay in taking steps to obtain the guarantee: [43]. On even a generous reading of the judge's reasons for the orders of 6 December 2019, the finality principle was not given the central importance which it deserved, all the more so because the enforcement order constituted a final judgment on the claim in favour of AIC, subject only to appeal. The judge failed to appreciate that finality should ordinarily follow from the making of an order, whereupon it becomes enforceable: [45].

- Despite FAAN's delay, the provision of the bank guarantee significantly changed the circumstances: [62]. The Court held that AIC should not retain the right to enforce the arbitral award, pending the outcome of the Nigerian proceedipngs, beyond the significant enforcement which it had already achieved by calling on the bank guarantee: [64].