Court of Appeal
Supreme Court
Sydney

Decisions of Interest

20 June 2022 – 3 July 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

Testamentary Capacity; Family Provision: meaning of 'dependent'

Chisak v Presot **[2022] NSWCA 100**

Decision date: 21 June 2022

Macfarlan, Gleeson and White JJA

The appellant, Ms Chisak, challenged the validity of a will prepared and signed in 2017 by her late grandmother, Ms Savransky, just over a month after she suffered a stroke. By this will, Ms Chisak was to receive one-fifth of the estate (a property) as a tenant in common with four other beneficiaries. The deceased had earlier prepared a will in 2009, by virtue of which Ms Chisak was to receive the residue of the deceased's estate after small legacies were paid to the deceased's executors and two friends. The 2017 will revoked the 2009 will. Before the primary judge, Ms Chisak sought a grant of probate in solemn form of the 2009 will, alleging that the deceased lacked testamentary capacity at the time of making the 2017 will. In the alternative, she sought a family provision order on the basis that she was eligible under s 57(1)(e) of the *Succession Act 2006* (NSW) as a grandchild of the deceased who was "at any particular time, … partly dependent on the deceased". The primary judge dismissed both claims. Ms Chisak appealed from that decision.

Held: dismissing the appeal

- As a result of the deceased's stroke, she suffered aphasia (a condition arising from damage to the part of the brain responsible for language): [27]. However, while a speech pathologist's report indicated difficulty with language, it did not indicate difficulty with cognition. It did not indicate that the deceased would not have known the effect of making a new will, nor that she would not have appreciated her estate, nor that she would not have been capable of weighing the claims on her testamentary bounty: [35].

- The primary judge erred in finding that Ms Chisak was not 'partly dependent' on the deceased. Ms Chisak stayed with the deceased on three or four occasions between 2000 and 2003 for between three weeks to a month at a time: [42]. During these visits, it can be inferred that the deceased assumed parental responsibility for Ms Chisak, who was then a young girl. It could also be inferred that, for those particular periods of time, she was dependent on the deceased: [55]. Earlier cases decided in the Supreme Court that had held that a grandchild is not dependent on their grandparent in the relevant sense during times they spend on holiday together conflated the issue of dependency with the issue of whether there are factors warranting the making of an application for a family provision order and whether the deceased has an obligation to make provision: [44], [48]-[49]. While, to be eligible under s 57(1)(e), dependency must be more than minimal, dependence for a few weeks or a month or two, on three or four occasions, could not be regarded as minimal: [56]–[57].

- Notwithstanding Ms Chisak's eligibility, the primary judge did not err in concluding that the deceased had made adequate provision for Ms Chisak in the 2017 will: [60].

Contracts: interpretation; Leases: right to withdraw

Centuria Property Funds Ltd v Thorn Australia Pty Ltd **[2022] NSWCA 104**

Decision date: 23 June 2022

Ward P, Gleeson and White JJA

In April 2021, the first and second appellants, Centuria Property Funds Ltd and The Trust Company (Australia) Ltd, entered into Heads of Agreement with the respondent, Thorn Australia Pty Ltd ('Thorn'), for the lease of commercial premises. The Heads of Agreement did not constitute a binding lease and expressly reserved the parties' right to withdraw from negotiations prior to the execution of a formal lease. After negotiating the terms of the proposed lease documents (which comprised a Lease and Incentive Deed), Thorn executed the documents and provided the original executed Lease and an executed Incentive Deed to the appellants' solicitors under cover of a letter which contemplated that there would be a formal exchange of the documents after execution by the appellants. Due to difficulties associated with the pandemic, the appellants did not execute either document at that time. On 5 July 2021, the parties' solicitors met and agreed upon a process through which the deeds were to be executed and the lease registered. From 6 July 2021 the respondent sought, and was sometimes granted, early access to the premises to arrange internet and telecommunications connections. In August 2021 the respondent withdrew from the lease transaction. The appellants then purported to execute the documents and advised the respondent that the lease would be registered. The respondent commenced proceedings seeking a declaration that there was no binding lease or agreement for lease. The primary judge held in the respondent's favour, finding that it had not "delivered" the documents it had provided to the appellants' solicitors and had not evinced an intention immediately to be bound by them. His Honour also held that the right to withdraw in the Heads of Agreement had not been abrogated or abandoned. The appellants appealed from that decision.

Held: dismissing the appeal

- Contrary to the appellants' submission, the process agreed or acquiesced to by the parties' solicitors on 5 July 2021 was not inconsistent with the continued existence of the right to withdraw provided for under the Heads of Agreement. The objective intention of the parties at the time of entering into the Heads of Agreement was that they were not to be bound prior to executing the formal lease documents. It was not necessary for such a statement to have contractual force. The significance of the statement was that it made clear the objective common intention of the parties at that stage as to the time at which they would no longer be free to withdraw: [63]. Consistently with the continuation of the right to withdraw, the 5 July 2021 process can be understood to have provided an authorisation by the respondent for the registration of the documents once duly executed by the appellants: [68].

- Nor were the respondent's requests for early access to the premises unequivocally referable to any obligations under the executed lease documents. They instead appeared to have assumed that access would be provided as contemplated under the Heads of Agreement. The requests for, and taking advantage of, early access did not evince an intention by the respondent immediately to be bound by the lease documents in the absence of execution by the appellants: [99]–[102].

Land Law: Compulsory acquisition; Meaning of 'interest'

Olde English Tiles Australia Pty Ltd v Transport for New South Wales **[2022] NSWCA 108**

Decision date: 28 June 2022

Ward P, Gleeson and Mitchelmore JJA, Basten AJA, Preston CJ of LEC

In 2018, Roads and Maritime Services compulsorily acquired a parcel of land. The two registered owners of the land, Mr Antonio and Mrs Carmel Gaudioso, were also the sole directors and shareholders of the appellant, Olde English Tiles Australia Pty Ltd ("Olde English Tiles"). Olde English Tiles occupied premises on the land under a bare licence. Offers of compensation were made to the registered owners and Olde English Tiles pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("The Act"). However, both challenged the adequacy of the compensation in the Land and Environment Court. The registered owners were awarded compensation by reference to the market value of the land, legal costs and valuation fees. Olde English Tiles claimed compensation for loss attributable to disturbance. The primary judge dismissed its claim on the basis that it did not have a compensable interest because its licence was terminable at will by the registered owners. Olde English Tiles appealed this decision.

Held: dismissing the appeal

- Contrary to the appellant's submission, the reasoning in *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* (2017) 94 NSWLR 554 was upheld. Consequently, possession and use of land by reason of sufferance or interests dependent upon personal relationships, as opposed to contractual rights, are not compensable rights as they are terminable at will: [63]-[64]. The appellant's suggestion that words such as 'privilege' should be given their ordinary English meaning was rejected: [31]-[35].

- An "interest" in land must be a legally enforceable interest of a kind referred to in s 20 of the Act: [43]. This interpretation is consistent with the primary purpose of the statute which is to provide compensation in accordance with the market value of the land: [45]. Furthermore, compensation claimed under other heads of damages in s 55 or s 59 of the Act, including compensation for loss attributable to disturbance, are by way of addition to the compensation for the market value of the land only as opposed to a freestanding right. Consequently, no compensation is available for permissive occupancy terminable at will: [77].

- The Act had been the subject of substantial subsequent amendment, with no variation to the effect of earlier authorities. Subsequent amendments substantially altered the provisions making compensation for disadvantage resulting from relocation. However, none of these changes allowed for a broader set of interests to engage the right to compensation: [73].

Personal Costs Orders Against Solicitors

Muriniti v Kalil **[2022] NSWCA 109**

Decision date: 29 June 2022

Macfarlan, Leeming and Brereton JJA

In 2019 the respondents, Mr Kalil and Ms Eather, commenced proceedings in the District Court against two defendants, claiming damages for defamation. The appellants, Mr Muriniti and Mr Newell, respectively the principal and an employed solicitor of LC Muriniti and Associates ('Murinitis'), acted for the defendants in these proceedings. During the proceedings, the respondents' solicitor, Goldsmiths, took issue with Murinitis' drafting of its defence and cross-claim and threatened to make an application for a personal costs order. After Murinitis failed to provide amended pleadings by a date specified by Goldsmiths, Goldsmiths made an application for the defendants' pleadings to be struck out. Goldsmiths also made an application under s 99 of the *Civil Procedure Act 2005* (NSW) for a costs order to be made against Mr Muriniti and Mr Newell. By the time those applications were determined, Murinitis had served a fifth draft amended defence in the defamation proceedings, owing to repeated complaints about earlier drafts. The primary judge granted a personal costs order against Murinitis. Murinitis appealed from that decision.

Held: allowing the appeal

- Courts have not infrequently deprecated the threatening or making of applications for personal costs orders during or prior to the final hearing. This is for multiple reasons. First, often it cannot be determined until the conclusion of the trial whether steps taken in the matter were warranted or unreasonable. Secondly, the lawyer's independence may be compromised, and the client's confidence undermined, by an opponent's threats to apply for costs against the lawyer during the proceedings. Thirdly, such a threat or application will often, if not usually, place the lawyer in position of conflict, resulting in the lawyer deciding that they can no longer act, depriving the client of its chosen representation while proceedings are on foot: [46].

- Mere negligence, incompetence or misconduct is insufficient to satisfy the test in s 99; the section is enlivened only by serious negligence, incompetence or misconduct: [82]. This was a relatively small defamation claim in which Murinitis was acting on a 'compassionate' basis. A practitioner acting for a defence in a small defamation claim in the District Court is not to be judged by the standard of an experienced specialist defamation lawyer: [81]. In this case, a conclusion of serious incompetence did not flow from two unsuccessful attempts to obtain leave to amend a pleading, together with two intermediate drafts that were promptly superseded: [82]. From the first draft, the plaintiffs in the defamation proceedings could have been under no serious misapprehension as to the substance of the defence: [83].

- Goldsmiths' application was plainly motivated in substantial part by the fact that personal costs orders had been made against Murinitis in other unrelated cases. However, that fact was quite irrelevant to whether such an order should be sought or made in the current proceedings and was an inappropriate consideration in deciding to make the application: [101].

Australian Intermediate Appellate Decisions of Interest

Fiduciary Duty: breach; Knowing Receipt of Trust Funds

Break Fast Investments Pty Ltd v Rigby Cooke Lawyers (A Firm) (ABN 58 522 536 547) **[2022] VSCA 118**

Decision date: 23 June 2022

Kyrou, McLeish and Walker JJA

In 2010, the Victorian Supreme Court held that Break Fast held the property on trust for four joint venture partners, one of which was Ambridge Investments Pty Ltd. The appellant, Break Fast Investments Pty Ltd, alleged that the respondent, a legal firm named Rigby Cooke Lawyers, breached its fiduciary duty of loyalty and was the knowing recipient of trust funds. Break Fast sought equitable compensation as a result. The quantum Break Fast sought was calculated by reference to the legal fees that it had paid to RC in acting for it and other defendants in long running litigation about a commercial property in East Melbourne, of which Break Fast was the registered proprietor. The trial judge held that RC did not breach its fiduciary duty of loyalty to Break Fast, RC did not have sufficient knowledge of the trust alleged in the Ambridge Proceedings to become liable for knowing receipt of trust funds and Break Fast was not entitled to equitable compensation. Break Fast appealed from that decision.

Held: granting leave to appeal in respect of grounds 1 and 2, and dismissing the appeal

- Break Fast had a real interest in the Ambridge proceedings because there is a material difference between owning property absolutely, with duties to its shareholders only, and holding the property as trustee for the joint venture partnership and owing more onerous duties as trustee to those partners: [72]. The divergence of interests in relation liability as to costs did not give rise to a conflict because: first, the risk of an adverse judicial decision is inherent in all litigation; secondly, the risk that Break Fast would not be able to recover its legal costs was not material at the relevant time; and thirdly, the mere existence of a risk that Break Fast might not be able to recover the legal costs is not sufficient to create a conflict of duty: [78]-[82].

- Equitable causation was not made out. Break Fast was required to establish that if they had received independent legal advice to adopt a passive role in the Ambridge Proceeding, it would have done so: [102]. However, there was significant evidence that neither Voukidis nor Baker automatically followed legal advice: [106].

- The appellant's allegation of knowing receipt of trust funds was not made out. *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 category (iv) was not satisfied as RC did not have the knowledge of circumstances which would indicate to an honest and reasonable person the existence of two facts that were essential for the establishment of liability: [147]. The trial judge was correct in relying upon *Carl Zeiss Stiftung v Herbert Smith & Co [No 2]* [1969] 2 Ch 276 rather than *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd (in liq)* (2008) 252 ALR 4 in the context of a solicitor acting for a defendant to litigation where the issues are whether it held property on trust, provided there is a proper basis for defending the proceedings [148], [152].

Negligence: duty of care; causation

John XXIII College v SMA **[2022] ACTCA 32**

Decision date: 29 June 2022

Murrell CJ, Loukas-Karlsson J and McWilliam AJ

In 2015, a student (SMA) resident at John XXIII College (the College) of the Australian National University (ANU) attended a social event associated with the College that involved the consumption of alcohol and moving between venues. During this event and while intoxicated, SMA was sexually assaulted by another resident while moving between venues. SMA commenced a claim in negligence alleging that the College owed her a duty of care which had been breached by permitting the event to proceed, by directing the students to leave the College, and in the inappropriate management of SMA's complaint. The primary judge found that the College breached its duty of care in accordance with SMA's latter two claims. The College appealed from that decision and SMA cross-appealed on the grounds that the damages awarded were inadequate.

Held: allowing the appeal in part

- The appellant's submission that it was not aware of the event was not accepted. The knowledge of the Head of College was imputed to the College as he was the controlling mind insofar as the Residents were concerned: [47].
- The College's submission that the *Civil Law (Wrongs) Act 2002* (ACT) s 34 should be considered a necessary condition of a central element of SMA's claim, for which SMA bears the burden to discharge was rejected. The College had accepted that it owed SMA a duty of care. Therefore s 34 involved an assessment of whether the risk of psychiatric harm was "a foreseeable risk". Causation was not established as: first, the direction to leave the College was not a necessary condition of the course of event simply brought forward a situation that was to occur even without the direction; second, the primary judge canvassed alternative measures without considering whether they were precautions that a reasonable person in the College's position would have taken in the circumstances and whether the failure to take those precautions was a necessary precondition of the happening of the harm: [84]-[85].
- *Sullivan v Moody* (2001) 207 CLR 562 was distinguished on the basis that the circumstances in question do not involve inconsistent or irreconcilable duties. The College's contractual duty to inquire into and resolve complaints in accordance with the Handbook was consistent with the duty of care to act for the welfare of its residents: [119]-[121].
- The two breaches pleaded, being the direction to leave and the mismanagement of the complaint, are independent of each other, even though the subject matter related to the same earlier conduct. Consequently, SMA's intoxication when the assault occurred did not contribute to the mishandling of her complaint and the resulting harm: [159]-[160].

Asia Pacific Decision of Interest

Charitable Status; Registration as a Charity

***Attorney-General v Family First New Zealand* [2022] NZSC 80**

Decision date: 28 June 2022

Winkelmann CJ, Young, Glazebrook, O'Regan and Williams JJ

Family First New Zealand ('Family First') was established by a trust deed entered into in 2006. It was registered on the Charities Register in 2007. In 2013, the Charities Registration Board resolved to de-register Family First as a charity. The Board considered that Family First no longer qualified for registration as a charitable entity for three reasons: first, its main purpose was political – it sought to advance points of view about family life which had no self-evident public benefit; second, its viewpoint expression was not a charitable purpose for the advancement of religion or education; and third, the Board considered Family First had an independent purpose of procuring governmental action consonant with its own viewpoints. After some litigation, the New Zealand Court of Appeal declared that Family First New Zealand ('Family First') qualified for registration under the *Charities Act 2005* (NZ) and set aside the decision of the Charities Registration Board to remove Family First from the Charities Register. The Attorney-General, in his capacity as Protector of Charities, appealed.

Held: allowing the appeal

- Any decision-maker considering whether to register or de-register a charitable entity must have regard to both the objects in the entity's constitutional document and also its activities and proposed activities: [26].
- Contrary to Family First's submission, it did not qualify as a charity owing to any activities it pursued for 'the advancement of education'. An entity expounding a singular viewpoint traverses the thin line between education and propaganda: [56]–[60]. While not all entities of this kind will fail to have an educational purpose in the relevant sense, the real question is whether its purpose is capable of securing the public benefits said to accrue from education even though it expresses a view on the subject matter: [62]. Family First's objects and activities in promoting its viewpoint on the benefits of 'traditional family and marriage' could not support the proposition that its purpose is educational. Most of the material put forward by Family First suggested that its primary object was to advocate rather than to educate: [69]–[107].
- Family First's alternative argument that it qualified for registration because it had purposes beneficial to the community also failed. An entity claiming charitable status under this head must establish both that there is a public benefit and that the purpose is charitable by analogy with objects already held to be charitable in earlier cases: [126]. An object of promoting the family as foundational to a stable society could be a charitable object, but Family First's advocacy of the role and importance of a particular version of the family and marriage between a man and a woman was not self-evidently beneficial in a charitable sense; it was, indeed, discriminatory: [135], [137]–[139].

International Decision of Interest

Constitutional Rights: abortion; due process

***Dobbs v Jackson Women's Health Organization*, 597 US (2022)**

Decision date: 24 June 2022

Roberts CJ, Alto, Thomas, Gorsuch, Kavanaugh, Barrett, Breyer, Sotomayor and Kagan JJ

Mississippi's *Gestational Age Act* provides that, except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform, or induce, an abortion of a foetus if the probable gestational age of the foetus is greater than 15 weeks. The respondents, the Jackson Women's Health Organization and one of its doctors, alleged that the law violated the Supreme Court's precents establishing a constitutional right to abortion, in particular *Roe v Wade*, 410 US 113 and *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833. The District Court granted summary judgment in favour of the respondents. The Fifth Circuit Court affirmed this decision. Before the Supreme Court, the petitioners defended on the Act on the grounds that *Roe* and *Casey* were wrongly decided.

Held: upholding the appeal

- The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. Until the latter part of the 20th century, such a right was entirely unknown to American law. The abortion right claimed is also critically different from any other right that this Court had held to fall within the Fourteenth Amendment's protection of "liberty" because a right to abortion is not deeply rooted in the Nation's history and traditions. The right to obtain an abortion is not part of a broader entrenched right to autonomy or right to define one's "concept of existence", as suggested in *Casey*, due to the unique effect abortion has on "potential life".

- The doctrine of *stare decisis* will not apply if the decision in question is egregiously wrong; lacks grounding in constitutional text, history or precedent; imposes an unworkable rule; or distorts other unrelated legal doctrines. Therefore, the Court determined that *Roe* be overturned as it was "egregiously wrong" from the start.

- Mississippi's *Gestational Age Act* is supported by the State's interest in "protecting the life of the unborn" and is thereby sustained. The issue of regulating abortion access and rights was returned to state legislatures.

- In dissent, Breyer, Sotomayor, Kagan JJ reaffirmed the need to strike a balance between the State's interest in protecting the "life of the fetus that may become a child", and a woman's interests maintaining autonomy over such a personal and consequential decision. The minority judgement also emphasises that overturning *Roe* casts doubt on precedents also dependent on the right to autonomy, including those related to same-sex marriage and contraception.