Decisions of interest

28 January 2019 – 15 February 2019

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

1. **Building and construction: entitlement of company in liquidation to progress payments**

   Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) **[2019] NSWCA 11**

   Decision date: 12 February 2019

   Leeming JA, Payne JA, White JA, Sackville AJA, Emmett AJA

   The proceedings arose out of a claim for progress payments under a building contract between the appellant (Seymour) as contractor and the first respondent (Ostwald) as subcontractor. Following a claim by Ostwald for a progress payment under the *Building and Construction Industry Security of Payment Act 1999* (NSW), and a disagreement between the parties as to the amount of that payment, Ostwald purported to make an adjudication application under s 17(2)(a)(ii) of the Act. An adjudication determined the amount due to Ostwald. Seymour commenced proceedings in the Equity Division, claiming that the adjudication determination was invalid because Ostwald had lodged the application out of time. Ostwald filed a cross-claim, seeking rectification of the building contract to alter the dates on which Seymour was required to make progress payments. Alternatively, Ostwald claimed a sum pursuant to s 16(2)(a)(i) of the Act. The primary judge ordered that the contract be rectified, with the consequence that Ostwald's adjudication application was made in time, and the adjudication determination was valid. Alternatively, even if the application was out of time, Ostwald was entitled to seek recovery of the sum claimed under s 16(2)(a)(i). The primary judge found that the Act continued to apply notwithstanding that Ostwald had begun to be wound up. On appeal, the issues were: (i) whether the primary judge erred in rectifying the contract; (ii) if 'yes' to (i), whether Ostwald was precluded from seeking recovery of the statutory debt under s 16(2)(a)(i), having purported to make an Adjudication Application; and (iii) if the answer to (ii) was 'no', was the Act, rightly construed, inapplicable to a builder or sub-contractor in liquidation in insolvency.

   The Court unanimously held that:

   - (i) The primary judged erred in ordering rectification: [138].
   - (ii) Ostwald was not precluded from seeking to recover the sum under s 16(2)(a)(i): [186].
   - (iii) Rightly construed, the Act is capable of operating for the benefit of a builder or sub-contract which has gone into liquidation in insolvency. On this point, the Court held that *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Ltd* [2016] VSCA 247 was plainly wrong and should not be followed: [256].

2. **Contracts: requirements for effective novation**

Kai Ling (Australia) Pty Ltd v Rosengreen **[2019] NSWCA 3**

Decision date: 5 February 2019

Basten JA; Sackville AJA; Barrett AJA

On 30 April 2015, Mr Rosengreen granted to Saadie Group Pty Ltd ('Saadie Group'), by deed, an option to purchase certain land. On 3 May 2015, Mr Michael Saadie presented to Mr Rosengreen a single sheet of paper in the same form as the execution page of the deed of option, save that the grantee was named Kai Ling (Australia) Pty Ltd ('Kai Ling') instead of Saadie Group. The sheet already bore the signatures of two persons on behalf of Kai Ling. Mr Michael Saadie (who was the father of the sole director of Saadie Group and was not an officer of Kai Ling) asked Mr Rosengreen to sign the sheet, saying that "we may need to change the name of the grantee but it does not change anything". Mr Rosengreen signed as requested and gave the sheet back to Mr Michael Saadie. Kai Ling contended at trial that the events of 3 May 2015 had brought about a novation of the deed of option so that Kai Ling held the option in the place of Saadie Group. The primary judge held that no such novation had taken place, and that Kai Ling accordingly had no interest in Mr Rosengreen's land by virtue of the option granted to Saadie Group. Kai Ling appealed.

On appeal, the key issues concerned whether the primary judge erred: in determining there had been no novation; in determining that Mr Saadie's acts on 3 May 2015 were committed as agent for Saadie Group, not as agent for both Saadie Group and Kai Ling (as Kai Ling contended); and in failing to find that Mr Rosengreen, by his actions on 3 May 2015, agreed to or authorised a change of grantee under the Deed of Option from Saadie Group to Kai Ling.

Held:

- The Court of Appeal (Barrett AJA, Basten JA and Sackville AJA agreeing) dismissed the appeal: [1], [2], [36]. The novation argument failed: Kai Ling had not shown that three relevant parties shared the common intention necessary to effect a novation: [18]-[19], [35].

- Nor did Kai Ling successfully challenge the primary judge's finding that Mr Saadie acted only as agent for Saadie Group in his actions on 3 May 2015. It followed that Kai Ling had not engaged in relevant contractual conduct on that day: [23]-[26].

- And nor did Kai Ling successfully challenge the primary's judge's finding that Mr Rosengreen, by his actions on 3 May 2015, agreed to or authorised a change of grantee concerning the option granted to Saadie Group on 30 April 2015. Rather, the form of the document he signed on 3 May 2015 was consistent with the creation of a new bipartite contract, not a novation: [25]-[26].

Other Australian intermediate appellate decisions of interest

3. **Administrative law: migration, Tribunal relying on information supplied anonymously, legal unreasonableness**

Minister for Immigration and Border Protection v Gill **[2019] FCAFC 9**

Decision date: 5 February 2019

Moshinsky J; Charlesworth J; Lee J

The respondent, Mr Jatinder Singh Gill, applied for a Skilled (Residence) (Class VB) subclass 887 (skilled – Regional) visa under the *Migration Act 1958* (Cth). A condition of the grant of the visa is that the Minister be satisfied that Mr Gill had resided in a specified regional area – in this case, Wodonga, Victoria – for a period of two years preceding the date of application. A delegate of the then Minister for Immigration and Border Protection refused to grant the visa. That decision was affirmed by the Administrative Appeals Tribunal, which was not satisfied that Mr Gill had lived at the Wodonga addresses he claimed in the relevant period. In arriving at that conclusion, the AAT relied on information provided to it (and to the Department of Immigration and Border Protection) by anonymous telephone calls. The gist of that information was that Mr Gill had lived and worked in Melbourne over the relevant period, and had contrived evidence that he had lived in Wodonga. On judicial review, the Federal Circuit Court set aside the Tribunal's decision. The primary judge in the FCC accepted Mr Gill's argument that the Tribunal's reliance on the anonymous information was illogical or otherwise legally unreasonable, and so concluded that the Tribunal's decision was affected by jurisdictional error. On appeal to the Federal Court, the Minister contended that 'the primary judge erred in concluding, in effect, that it was not open to the Tribunal to consider or place any weight on the evidence from the anonymous informant (or informants) in the circumstances of this case'

Held:

- The Full Court of the Federal Court (Moshinsky, Charlesworth, and Lee JJ) allowed the Minister's appeal, holding that the Tribunal's use of the anonymous information was not illogical or otherwise legally unreasonable: [49], [54]
- The Full Court emphasised that the 'use to which anonymous information may be put will depend in all cases on the statutory context and upon the body of information before a decision-maker', and that there is no general rule that reliance on anonymous information is unreasonable: [46]-[47], [53].

4. **Public law: administrative law – meaning of "Commonwealth Record" under *Archives Act 1983* (Cth); constitutional law – relationships between Governor-General and Commonwealth, and Governor-General and Queen**

***Hocking v Director-General of the National Archives of Australia* [2019] FCAFC 12**

Decision date: 8 February 2019

Allsop CJ; Flick J; Robertson J

Professor Jennifer Hocking applied to the National Archives of Australia, seeking access to originals and copies of correspondence between the former Governor-General Sir John Kerr (or his Official Secretary) and the The Queen (by means of Her Private Secretary). Access was refused in May 2016, on the basis that the records sought were not a 'Commonwealth record' within the meaning of s 3(1) of the *Archives Act 1983* (Cth), as they were not 'property of the Commonwealth', and were therefore not subject to the access provisions in Div 3 of Part V of the Act. Professor Hocking applied for judicial review of that decision in the Federal Court, seeking a declaration that the records sought were 'Commonwealth records' within the meaning of the Act. The primary judge did not make the declaration sought, finding that the records in question were not 'the property of the Commonwealth', but were rather the personal property of Sir John Kerr. Professor Hocking appealed to the Full Court of the Federal Court on the ground that the primary judge should have found that the records, or some of them, were the property of the Commonwealth because they were created or received by the Governor-General in performance of his office and concern the government of the Commonwealth.

Held:

- Allsop CJ and Robertson J dismissed the appeal (Flick J dissenting), holding that the correspondence in question is 'private or personal', in the sense that it arose from 'the unique representative character of the relationship between The Monarch and the Governor-General'. The records are 'personal' in the sense that they remain 'the property of the person then holding the office of Governor-General'. As 'personal' records in this sense, they are not 'property of the Commonwealth', and therefore not 'Commonwealth records' within the meaning of the Act: [95]-[99], [102].

- Flick J would have allowed the appeal, holding that the records sought by Professor Hocking are 'Commonwealth records'. His Honour reached that conclusion by reference to the positions occupied by The Queen and the Governor-General, the functions being discharged by the Governor-General, the nature of the correspondence in question and the subject matters it addressed, and the importance of those matters to the constitutional system of government in Australia: [110], [119].

Asia Pacific decisions of interest

5. **Criminal law: appeal, *Computer Crimes Ordinance 1993*, Distributed Denial of Service attack**

Hong Kong Court of Final Appeal

***Hong Kong Special Administrative Region v Chu Tsun Wai* [2019] HKCFA 3**

Decision date: 1 February 2019

Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Cheung PJ, Lord Hoffman NPJ

The appellant, Chu Tsun Wai, took part in a Distributed Denial of Service (DDos) attack on the website of the Shanghai Commercial Bank. The Bank's server received 504,592 requests within the space of an hour; 6,652 of those requests came from the appellant's computer within the space of 16 seconds. In the circumstances, the attack achieved little, as the Bank's server had sufficient surplus bandwidth to prevent the attack from affecting the server's other operations. The appellant was charged with criminal damage contrary to s 60(1) of the *Crimes Ordinance* (Cap 200), which criminalises intentional or reckless conduct which 'destroys or damages any property' without lawful excuse. By virtue of s 59(1A) of the *Computer Crimes Ordinance 1993* (Ordinance No 23 of 1993), the phrase 'damage any property' in s 60(1) includes 'misuse of a computer'. 'Misuse of a computer' is defined in terms that include, '[t]o cause a computer to function other than as it has been established to function by or on behalf of its owner, notwithstanding that the misuse may not impair the operation of the computer or a program held in the computer or the reliability of data held in the computer'. The appellant was convicted. On appeal, the question was whether the appellant had caused the computer 'to function other than as it has been established to function by or on behalf of its owner'. The appellant argued that the computer/server was established to receive and respond to requests; during the attack, it had responded to the appellant's requests (and others) exactly as programmed; the attack therefore caused no the server to act no differently than as it was established to program. The prosecution/respondent argued that the bank had established the server to receive and respond to genuine requests for its services. Requests that were sent only for the purpose of using up bandwidth caused it to function other than as the Bank had established it to function.

Held:

- The Court dismissed the appeal. All of the judges agreed with Lord Hoffman's reasons. Lord Hoffman held that the statute is concerned to protect not the operation of computers per se, but the purposes for which owners set up computers/servers: [13], [15], [18].

6. **Contract: insurance, interpretation, interest on judgment sum**

Dominion Insurance Ltd v Housing Authority **[2019] FJCA 3**

Court of Appeal of Fiji

Decision date: 4 February 2019

S Chandra RJA; A Brito-Mutunayagam JA; Deepthi Amaratunga JA

The appellant, Dominion Insurance, had issued two insurance policies to the respondent on 31 December 2006 and 1 January 2008 respectively. Both policies were renewed annually. A dispute arose between the parties when the appellant advised the respondent that the premiums would increase from 1 August 2012. The respondent did not agree to pay the increased premiums. From February 2013, the respondent made 11 claims under the policies following the death of, or injury to, its members. The claims amounted to a sum of $487,047.48. The appellant declined to honour the claims. At first instance in the High Court, the issues were whether the appellant had a right under the policies to increase premiums mid-year, and whether the appellant had formally terminated the policies. The trial judge held that the appellant had no such right and had not formally terminated the policies, and accordingly ordered that the appellant honour the claim, and pay interest and costs. In the Court of Appeal, the same two issues arose on appeal, and by way of cross-appeal, the respondents submitted that the High Court had erred in the rate of interest it awarded on the judgment sum. The question of whether the appellant had a right to increase premiums mid-year turned on the interpretation of the words 'during the year' in one of the insurance policies. By way of example, one clause of that policy read, '…In the event that the Loss Ratio exceeds 80% during the year, the insurer has the right to increase the premium rates…' The appellant contended that the premium can be increased at any time during the current year of the policy once the Loss Ratio exceeded 80%.

Held:

- Brito-Mutunayagam JA (Chandra RJA and Amaratunga JA agreeing) dismissed the appeal and allowed the cross-appeal: [17], [26].

- On the construction issue, the Court cited Lord Diplock's judgment in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 for the proposition that the meaning of the phrase 'during the year' had to '[yield] to business common sense', and accordingly found that the premiums could only be increased at the end of the year: [12], [13]. On the question of termination, the Court held that none of the appellant's correspondence with the respondent contained an effective termination: [24].

- On the cross-appeal, the Court held that the High Court had applied the wrong statutory test in calculating the interest the respondent was entitled to: [30], [33].

Other international decisions of interest

7. **Equity: trusts, whether beneficial owner of a building can directly sue a third party debtor of the trust**

Court of Appeal for British Columbia

Price Security Holdings Inc v Klompas & Rothwell **2019 BCCA 36**

Decision date: 31 January 2019

Mr Justice Tysoe; Mr Justice Harris; Madam Justice Griffin

Price Security Holdings Inc was the beneficiary of a trust that owned a commercial building. Klompas & Rothwell, an accounting firm, was a tenant in that building. Klompas & Rothwell had stopped paying rent. Price Security transferred its beneficial interest in the building to a third party. Price Security then brought proceedings against Klompas & Rothwell, seeking judgment for the unpaid rent. Price Security claimed, by notice of motion, that it had made written demands to the third party that purchased its beneficial interest that they cooperate in enforcing Price Security's rights against Klompas & Rothwell, and that the third party had refused to cooperate. Price Security sought an injunction compelling the third party to cooperate with Price Security in seeking all available remedies in respect of the rent owing by Klompas & Rothwell. Price Security named the trustee/landlord as a defendant, but did not seek relief against the trustee. The matter proceeded by summary trial, and orders were made in favour of Price Security. Klompas & Rothwell appealed. The primary issue on appeal was whether Price Security had standing. While the general rule is that a beneficiary of a trust cannot directly sue a third party debtor of the trust, the primary judge found that Price Security had satisfied the three criteria that she located in *Stoney First Nation v Imperial Oil Resources Limited* 2014 ABQB 408 that justify departure from the general rule: (i) the trustee refused the request of the beneficiary to sue; (ii) the trustee was named as a party in the action suing the third party debtor; and (iii) the beneficiary exhausted its remedies against the trustee.

Held:

- The Court of Appeal (Mr Justice Tysoe, Mr Justice Harris and Madam Justice Griffin agreeing) allowed the appeal. The Court held that the primary judge erred by failing to consider an additional requirement that a beneficiary must satisfy if they are to directly sue a third party debtor of the trust – namely, that 'special circumstances' must exist: [70].

8. **Constitutional law: interpretation, appointments to Judicial and Legal Service Commission for Trinidad and Tobago**

Attorney General of Trinidad and Tobago (Respondent) v Maharaj (Appellant) **[2019] UKPC 6**

Judicial Committee of the Privy Council

Decision date: 11 February 2019

Lady Hale; Lord Kerr; Lord Wilson; Lady Black; Lord Lloyd-Jones

The composition of the Judicial and Legal Service Commission for Trinidad and Tobago ('JLSC') is governed by s 110 of the Constitution of Trinidad and Tobago. In addition to the Chief Justice and the Chairman of the Public Service Commission, s 110(2)(c) provides that the JLSC shall be composed of 'such other members (hereinafter called 'the appointed members') as may be appointed in accordance with subsection (3).' Section 110(3)(a) provides that one of the other members will be a judge or retired judge. Section 110(3(b) provides that two of the other members will be 'from among persons with legal qualifications at least one of whom is not in active practice as such…'. The primary question in this case concerned the interpretation of s 110(3)(b), particularly, whether a judge or retired judge could be appointed under s 110(3)(b), such that more than one judge or retired judge sat on the JLSC (in addition to the Chief Justice). The question arose because the Attorney General of Trinidad and Tobago was unsure about whether two retired judges could sit on the JLSC. On 5 June 2017, two retired judges were sitting on the JLSC, and the following day, two new judges were due to be sworn-in pursuant to advice provided to the President by the JLSC. Concerned about the constitutionality of the appointment process, the Attorney-General sought a declaration that the appointment of retired judges to the JLSC is not permitted under s 110(3)(b), and sought an interim injunction preventing the appointment of the new judges until the matter was resolved. After interlocutory orders were made early on 6 June 2017, on the same day, the Court of Appeal heard full argument on the issues. The Court of Appeal concluded unanimously that s 110(3)(b) permitted the appointment of a retired judge, finding that nothing in the words of the section prevented a retired judge from being appointed to the JLSC. That decision was appealed to the Judicial Committee of the Privy Council.

Held:

- The Judicial Committee of the Privy Council (Lady Black writing for the Committee) allowed the appeal. The Committee read s 110(3)(a) alongside s 110(3)(b) and concluded that the two sections are intended to capture exclusive and distinct 'pools' of possible appointees to the JLSC – judges and retired judges on the one hand (s 110(3)(a)), and other legally qualified persons on the other (s 110(3)(b)): [28], [42].