Court of Appeal
Supreme Court
Sydney

Decisions of Interest

29 February 2020 – 13 March 2020

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

Administrative law: error of law

***Jankovic v Director of Public Prosecutions* [2020] NSWCA 31**

Decision date: 5 March 2020

Macfarlan JA, White JA, Barrett AJA

In 2016 Rodna Jankovic was arrested without a warrant for breaching an Apprehended Domestic Violence Order by sending an SMS message to the relevant protected person. In 2017 Jankovic was convicted in the Local Court of resisting arrest and intimidating a police officer on duty in relation to events that occurred after this arrest. Jankovic appealed by way of rehearing to the District Court, claiming that her arrest was unlawful and therefore her conduct towards police did not occur in the context of execution of duty, but the appeal was dismissed. In 2019 Jankovic's application to the District Court to have the primary judge submit a question of law to the Court of Criminal Appeal (CCA) for determination was dismissed. The relevant question of law was whether the evidence was capable of establishing beyond reasonable doubt that the officer was satisfied that the arrest was reasonably necessary for a purpose under s 99(1)(b) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA).

Jankovic applied to the Court of Appeal for prerogative relief under s 69 of the *Supreme Court Act 1970* (NSW). The issue was whether jurisdictional error was established by the primary judge in finding that the police officer was satisfied that the arrest was reasonably necessary per s 99 of LEPRA and in refusing to submit the question of law to the CCA.

Held:

- Order of the primary judge upholding the convictions was quashed: [96] (White JA dissenting) and the decision on the application to have a question submitted for determination by the CCA was also quashed: [24], [92], [96].
- The evidence did not support the primary judge's finding that the officer was satisfied that the arrest was reasonably necessary in order to stop the further commission of offences: [68]-[69]. This was an error of law which amounted to jurisdictional error: [82] (White JA dissenting).
- Only if, according to an objectively reasonable assessment, continuing freedom presents a significant risk to attainment of any of the law enforcement results will immediate arrest be a proportionate response to that risk and therefore substantially preferable and "reasonably necessary": [61].

Torts: negligence

***Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd* [2020] NSWCA 36**

Decision date: 10 March 2020

Ward CJ in Eq, Leeming JA, Payne JA

In 2012 Mr Paul sustained injuries whilst working as an apprentice butcher at Ashcroft Supa IGA. Mr Paul was employed by Skillset, which had a contract with IGA to place him at IGA to complete his apprenticeship. Mr Paul was under the effective direction and control of IGA. Mr Paul brought proceedings against IGA, alleging that his injuries were caused by the negligence of IGA.

At the time of the accident, IGA held a public liability policy of insurance with Marketform Managing Agency and sought indemnity, cross-claiming against Marketform. Marketform declined indemnity, relying on an exclusion clause in the applicable policy. The primary judge found that the exclusion did not apply and awarded Mr Paul damages of $578,689.11.

On appeal, Marketform challenged the primary judge's construction of the exclusion clause. Marketform also challenged the findings that Mr Paul was guilty of contributory negligence to the extent of 10% and the apportionment of 10% of damages as against Skillset as Mr Paul's employer under s 151Z of the *Workers Compensation Act 1987* (NSW). The damages calculation was challenged by a cross-appeal by Mr Paul.

Held:

- Appeal dismissed, cross-appeal allowed: [96]-[97].
- Mr Paul did not need to be a party to the contract between Skillset and IGA for the exclusion clause to apply: [53]. However, the contract between Skillset and IGA did not fall within the exclusion clause as the conduct was not for "labour only" services, and therefore the primary judge's conclusion was correct: [71]-[73].
- The primary judge did not err in applying s 5R of the *Civil Liability Act 2002* (NSW) when addressing contributory negligence: [79]. Marketform failed to demonstrate that the apportionment of 10% in respect of contributory negligence was "plainly wrong": [84]. No basis was shown to interfere with the finding made by the primary judge that the relevant contribution from Skillset as employer that Mr Paul would have been entitled to under s 151Z of the *Workers Compensation Act* was 10%: [88].
- The damages award was increased to $613,864.24 in accordance with *J Blackwood & Son v Skilled Engineering* [2008] NSWCA 142.

Equity: relief against forfeiture; Contracts: doctrine of penalties

***Kay v Playup Australia Pty Ltd* [2020] NSWCA 33**

Decision date: 4 March 2020

Macfarlan JA, Brereton JA, Simpson AJA

In 2018 Ryan Kay agreed to sell his 100% shareholding in Bestbet.com.au Pty Ltd to Playup for $1.6 million, payable as $1 million on exchange and remainder by a Deferred Payment of $600,000 in monthly instalments commencing a month after the Completion Date. Kay gave various warranties and submitted to various restraints under the agreement. Under cl 4.3(b) of the agreement, if any instalment was not paid within seven days of the due date, the warranties and restraints were immediately void ab initio and the total Deferred Payment amount became immediately payable in full.

The parties were obliged to complete the sale on the Completion Date, which was determined to be 22 May 2018. Neither party performed their completion obligations on this date. Kay performed most of his obligations on 7 June 2018. On 8 August 2018 Kay served a creditor's statutory demand for the outstanding balance of the Deferred Payment. On 10 September 2018 Kay commenced winding up proceedings and Playup paid the balance under protest. Playup commenced proceedings for declaratory relief, contending that cl 4.3(b) was void as a penalty, and alternatively that it should be granted relief against forfeiture.

The primary judge held that Playup's obligation to make the Deferred Payment was dependent on Kay fulfilling his obligations, and as the instalment was paid within time, the warranties and restraints were not voided. Once it was determined that cl 4.3(b) was engaged, the significant issues on appeal became the doctrine of penalties and relief against forfeiture.

Held:

- Leave granted, appeal and cross-appeal allowed: [1], [131], [132].
- Clause 4.3(b) was a penalty to the extent that it operated to avoid the restraints and warranties and was of no effect and unenforceable: [99], [127]. The restraints and the warranties were not avoided by cl 4.3(b): [129]. Playup's obligation to pay the Deferred Payment was not suspended: [126].
- The deprivation of accrued contractual rights can amount to a penalty for the purpose of the doctrine of penalties: [93]. A penalty is collateral to the main promise and purpose of the contract and is intended to operate as a deterrent to failure to perform, by creating an additional detriment and benefit in the event of default: [94].
- Relief against forfeiture is confined to proprietary or possessory rights and does not extend to mere contractual rights**:** [128] (Brereton JA, Macfarlan JA and Simpson AJA not expressing an opinion).

Commissions of Inquiry: powers, privileges

***Attorney General for New South Wales v Melco Resorts & Entertainment Limited* [2020] NSWCA 40**

Decision date: 12 March 2020

Bathurst CJ, Bell P, Gleeson JA

In 2019 the Honourable P. A. Bergin SC was appointed by the Independent Liquor and Gaming Authority to preside over an inquiry into a range of matters concerning the Crown Casino and its licensee pursuant to s 143 of the *Casino Control Act 1992* (NSW). The immediate catalyst was a share sale agreement between Melco Resorts & Entertainment (Melco) and CPH Crown Holdings.

An instrument of appointment granted Ms Bergin the powers, authorities, protections and immunities conferred on a Commissioner by Div 1 Pt 2 and Div 2 Pt 2 (with certain exceptions) of the *Royal Commissions Act 1923* (NSW), deliberately picking up the language of s 143A(1)(b) of the *Casino Control Act*. Nine summonses to produce documents were issued to Melco, which asserted a claim of legal professional privilege. The claim was not accepted by the Authority which contended that Melco's privilege was abrogated by a combination of s 143A of the *Casino Control Act* and s 17(1) of the *Royal Commissions Act*.

Melco brought proceedings seeking declaratory relief in January 2020. The primary judge made declarations that s 17(1) of the *Royal Commissions Act* had not come into effect and that Melco's privileges were not abrogated for the purposes of the inquiry. The Attorney General for NSW sought leave to appeal.

Held:

- Falling within Division 2 of Part 2 of the *Royal Commissions Act*, headed "Special Powers", s 17(1) was correctly characterised as conferring a power on a commissioner. It extended the general power to compel the production of documents to include legally privileged documents. It could also be considered as confirming an implicit correlative right or power in a commissioner to exercise compulsory powers unfettered by claims of privilege: [78]-[93].

- In s 143A(1)(b) of the *Casino Control Act*, the legislature has treated s 17(1) of the *Royal Commissions Act* as conferring a power on a commissioner: [87].

- Section 143A(2) of the *Casino Control Act* had the effect of applying s 17(1) of the *Royal Commissions Act* to witnesses summoned to produce documents by a person who fell within either of the two qualifications in s 143A(1)(b). As Ms Bergin was such a person, Melco was subject to the operation of s 17(1) of the *Royal Commissions Act* and it was not entitled to resist production of documents which it was summoned to produce on the grounds of legal professional privilege: [94] – [102].

- The Court also made observations as to principles of statutory construction, the principle of legality and the use of extrinsic materials: [57]-[58], [88], [103]-[110].

Australian intermediate appellate decisions of interest

Estoppel: promissory; Equity: maxims

***Plath v Plath & Anor* [2020] QCA 43**

Decision date: 13 March 2020

Morrison JA, McMurdo JA and Mullins AJA

In 2009 Ira Plath and his parents executed a contract for the sale by his parents to Ira of a house for $315,000. The contract acknowledged that a deposit of $15,000 had been paid and the balance would be paid in yearly instalments of $30,000 plus interest. Ira also executed a mortgage in favour of his parents to secure this debt.

The parents had intended to transfer this house to Ira for some time as a gift, telling Ira and the solicitor who assisted in the execution of the documents of this intention. Ira had not previously owned a house, and the apparent effect of the documents was that he became entitled to a first home owners' grant, which he successfully applied for with the solicitor's assistance and received in 2009. The house was transferred to Ira and the mortgage was registered, but Ira paid nothing under the contract.

The parents died in 2010 and 2011. Two of Ira's siblings, as the personal representatives of their father's estate, brought proceedings against Ira claiming payment of $300,000 plus interest and recovery of possession of the house. Ira's case was pleaded as a defence of estoppel, in that his parents had said to him that he would not be required to make any payment and he signed the documents in reliance upon that representation.

The primary judge held that the contract and mortgage were enforceable, and delivered judgment for the siblings. Ira brought an appeal, challenging the judge's conclusion that the documents were intended to have effect according to their terms and that there was no basis for an estoppel.

Held:

- Appeal allowed: [70].
- The intention of the parties was not that the contract would be performed and the parents were not minded to insist upon performance unless there was some legal requirement for them to do so: [57]-[58]. It was sufficiently established that Ira's expectation was induced by his parents and that he signed the mortgage in that expectation. Ira's siblings were estopped from enforcing the terms of the contract and the mortgage: [64].
- Ira had not come to the Court with "clean hands", and equitable relief was conditional upon Ira "washing" his hands: [69]. Ira undertook to repay to the State of Queensland the first home owners' grant paid to him with any interest and penalty owed: [70].

Migration: apprehended bias, legal unreasonableness

***FSG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 29**

Decision date: 11 March 2020

Bromberg J, Davies J and O'Bryan J

FSG17 was born in Iraq and is of Faili Kurd ethnicity and Shia Muslim faith. His family were expelled from Iraq on account of their ethnicity and deported to Iran. In Iran registered Iraqi refugees are issued with cards which expire annually and must be renewed. FSG17 claimed that since 2011 the Iranian authorities refused to renew his card and he was stateless.

In 2012 FSG17 arrived on Christmas Island as an irregular maritime arrival. In 2016 he applied for a safe haven enterprise visa. He claimed to fear harm if he returned to Iran because he had formed a relationship with a woman from Iran without her father's permission to marry, resulting in threats from her family towards FSG17; and significant discrimination as a Faili Kurd and that he would not be able to become a citizen, obtain employment or continue his education.

In 2017 a delegate of the Minister refused FSG17's application for a safe haven enterprise visa. The Immigration Assessment Authority affirmed the delegate's decision. The Federal Circuit Court dismissed FSG17's application for judicial review. FSG17 filed an application for judicial review of the Authority's decision, contending that the Authority's decision involved jurisdictional error in receiving and considering highly prejudicial and irrelevant information; and was legally unreasonable by rejecting his claim to be stateless and by making demeanour findings. The prejudicial information was that contained within a Court Attendance Notice relating to an offence FSG17 was charged with which had not been finalised at the time of the Authority's decision. The Federal Court had to determine whether the Federal Circuit Court was correct to find that the decision of the Authority was not affected by jurisdictional error.

Held:

- Appeal allowed on certain grounds, orders of the Federal Circuit Court set aside, the Authority's decision was quashed and the Authority was required to determine the application according to law: [75].

- A fair-minded lay observer might reasonably apprehend that the Authority might not bring an impartial mind to its decision by reason of being informed of the relevant prejudicial information: [38]. If the information is sufficiently prejudicial, and the person affected is not informed of the information or given an opportunity to respond, procedural fairness may require the individual decision-maker exposed to the information to recuse him or herself from the matter: [44].

- It was legally unreasonable for the Authority to consider material to determine whether it was possible for a Faili Kurd refugee to become an Iranian citizen without any evidence that FSG17 had Iranian paternal ancestry: [62].

Asia Pacific decision of interest

Equity: property settlement, unconscionable bargain; Trusts

Hurlimann v Noland **[2020] NZCA 42**

Decision date: 9 March 2020

Clifford J, Mallon J and Moore J

In 2012 Ms Noland and Mr Hurlimann separated after 12 years of marriage. In 2015 Ms Noland applied for an order for the dissolution of their marriage. Mr Hurlimann claimed an interest in the family home, which was Ms Noland's home from a previous marriage.

In 2016 Ms Noland paid Mr Hurlimann $305,902 pursuant to their relationship property settlement, representing Mr Hurlimann's entitlement to a one-half share in the home. 11 days later, they met for dinner as Mr Hurlimann sought reconciliation, and during dinner he paid $250,000 back to Ms Noland. Ms Noland later informed Mr Hurlimann that she no longer wished to continue any relationship with him, and Mr Hurlimann asked her to return the $250,000 he had paid her. Ms Noland refused to do so, claiming it was a gift.

Mr Hurlimann brought proceedings against Ms Noland in the New Zealand High Court for the return of the money, claiming it was held on a resulting trust; its payment represented an unconscionable bargain; or it was paid as a result of deceit. The primary judge rejected each claim. Mr Hurlimann appealed to the New Zealand Court of Appeal, arguing that it was unconscionable for Ms Noland to retain the payment.

Held:

- Appeal dismissed: [55].
- The payment was intended as a gift in the context of a loving relationship to clear away bad feelings arising from Mr Hurlimann's claim to the home: [23]. Mr Hurlimann did not condition the gift on reconciliation being achieved, but rather hoped this would occur. Therefore, if the gift was conditional, the condition did not fail: [28].
- The evidence demonstrated that Ms Noland was reluctant to re-engage with Mr Hurlimann, and at most acknowledged that the payment would prepare for possible reconciliation. Her actions did not constitute undue influence or an unconscionable retention of the monies: [48].

International decision of interest

Conflict of Laws: state and federal

***Kansas v Garcia* 589 U.S. ___ (2020)**

Decision date: 3 March 2020

Roberts CJ, Alito J, Thomas J, Gorsuch J, Kavanaugh J, Breyer J, Ginsburg J, Sotomayor J, Kagan J

The *Immigration Reform and Control Act of 1986* makes it unlawful for an employer to hire an alien (a person who is not a citizen or national of the United States) knowing that they are unauthorised to work in the United States. The *Immigration Act* requires employers to comply with a federal employment verification system in verifying that any new employee "is not an unauthorized alien" by examining approved identification documents. All employees must also complete an Employment Eligibility Verification (I-9 form) by their first day of employment to attest that they are authorised to work. It is a federal crime to provide false information or to use fraudulent documents, but it is not a crime to work without authorisation.

Three unauthorised aliens were convicted under Kansas statutes for fraudulently using another person's Social Security numbers on multiple forms, including I-9 forms. The Kansas Supreme Court reversed this decision, holding that the *Immigration Act* prohibits a State from using any information contained within an I-9 form as the basis for a state law identity theft prosecution of an alien.

The issue on appeal was whether the Kansas statutes prohibiting "identity theft" or engaging in fraud to obtain a benefit imposes restrictions or confers rights which conflict with the *Immigration Act*, with the result that "the federal law takes precedence and the state law is preempted" (overridden): p. 9.

Held:

- By majority, the decision of the Kansas Supreme Court was reversed. The Kansas statutes were not expressly or impliedly pre-empted: p. 14, 20.
- An item of information may be "contained in" many different places at any point in time, and a person does not 'use' information contained in a particular source unless that person **makes use** of that source: p. 11. The mere fact that an I–9 contains an item of information, such as a name or address, does not mean that information "contained in" the I–9 is used whenever that name or address is later employed: p. 12.
- The *Immigration Act* does not exclude a State from legislating on the entire 'field of employment verification': p. 17. The federal and state statutes do not conflict as it is possible to comply with both: p. 18.