Court of Appeal
Supreme Court
Sydney

Decisions of Interest

14 March 2020 – 27 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.

Contents

New South Wales Court of Appeal decisions of interest 2

Other Australian intermediate appellate decisions of interest 6

Asia Pacific decisions of interest 8

International decision of interest 9

New South Wales Court of Appeal decisions of interest

Defamation: defences

Stoltenberg v Bolton; Loder v Bolton [2020] NSWCA 45

Decision date: 20 March 2020

Macfarlan JA, Gleeson JA, Brereton JA

Stephen Stoltenberg authored and published a series of posts on a public Facebook page styled “Narri Leaks” in 2015. The imputations allegedly conveyed by the posts included allegations of deliberate breaches of the *Local Government Act 1993* (NSW) by Conrad Bolton, the Mayor of Narrabri Shire Council; deliberate corruption by Bolton of the selection process for the Council’s general manager; corrupt, dishonest and intimidating actions of Bolton as Mayor warranting a full ICAC inquiry; and that he had provided the Independent Pricing and Regulatory Tribunal with information he knew to be false. Ann Loder was the author of certain “likes” and comments on the page.

In 2015 Bolton commenced defamation proceedings against Stoltenberg and Loder. The primary judge held that the posts conveyed imputations defamatory of Bolton and rejected Stoltenberg’s defences. The case against Loder was largely rejected but the trial judge found that one of Loder’s “comments” amounted to secondary publication of the posts. Judgment was given against Stoltenberg for damages of $100,000 and interest in the amount of $10,000, plus costs. Judgment was given against Loder for damages of $10,000.

Stoltenberg brought an appeal against the judgment, Loder sought leave to appeal and Bolton sought leave to cross-appeal against the rejection of other parts of his claim against Loder.

Held:

- Appeal dismissed, leave to appeal and leave to cross-appeal refused: [248].
- The notice of appeal contained 25 grounds of appeal totalling 53 issues which was not consistent with the UCPR. The importance of brevity and precision in formulating the grounds of appeal cannot be overstated: [52]. This made the Court’s task more difficult in ascertaining the real issues in dispute: [54].
- The trial judge did not err in rejecting the defence of common law qualified privilege, following from the finding that the Facebook page was downloaded and read by a much wider audience than those residents of the Narrabri Shire Council interested in the finances of the Council: [156].
- The finding of excessive publication was justified by the evidence that the Facebook page was generally accessible on the internet, Stoltenberg took no steps to limit access to the site and the site was accessed by persons other than residents of Narrabri Shire Council: [161].

Disciplinary Proceedings

***Council of the Law Society of New South Wales v Jafari* [[2020] NSWCA 53]**

Decision date: 27 March 2020

Bell P, White JA, Emmett AJA

The Council of the Law Society of NSW brought proceedings against Mehrdad Jafari, a solicitor admitted to practice in 1993. From 1995 to 2009 Jafari was employed as a solicitor by the Australian Government Solicitor. Jafari has not held a Practising Certificate since 20 June 2015.

In 2016 Jafari was charged with an offence under s 131.1(1) of the *Criminal Code Act 1995* (Cth), that he dishonestly appropriated property belonging to the Commonwealth with the intention of permanently depriving the Commonwealth of that property. This related to conduct that occurred in 2008 whereby $220,000 was transferred from an Australian Government Solicitor trust account managed by Jafari by way of a cheque payable to a friend of Jafari's, which was deposited into the friend's account. In 2014 solicitors from the Australian Government Solicitor contacted Jafari in relation to this conduct on two separate occasions and twice Jafari stated that he did not recall this payment and did not recognise his friend's name. In 2015 Jafari declined to participate in an interview with the Australian Federal Police. Jafari later admitted that he owed funds to this friend, as he had gambled away the money she had lent him for investment purposes.

In 2016 Jafari entered a plea of guilty to the charge, and was sentenced in the District Court. After an appeal brought by the Director of Public Prosecutions, Jafari's sentence was increased to a term of imprisonment of three years. In 2017 he disclosed the conviction to the Law Society.

The Council sought a declaration that Jafari was not a fit and proper person to remain on the roll of Australian lawyers, and an order that Jafari be removed from the roll. This relief was not opposed, but the Court was required to be satisfied that it was appropriate to grant the relief sought.

Held:

- The Court was satisfied that the relief sought should be granted: [43]. A declaration was made that Jafari was not a fit and proper person to remain on the roll of Australian lawyers, and ordered that Jafari be removed: [44]-[45].

- Whilst there was only one offence charged, Jafari's initial and grave dishonesty was compounded by his ongoing concealment of his crime and his dishonest responses when ultimately confronted with it: [34].

- Fitness to practise law carries with it the requirement that the person concerned exhibits honesty and integrity. This extends to a solicitor's dealings with money: [36]-[37].

Constitutional Law: diversity jurisdiction; Appeals: leave

***Gaynor v Attorney General of New South Wales* [[2020] NSWCA 48]**

Decision date: 26 March 2020

Bell P, Basten JA, Leeming JA

Bernard Gaynor who resides in Queensland and Garry Burns who resides in NSW have been involved in a series of disputes. Since 2014 Burns has made a large number of complaints to the President of the NSW Anti-Discrimination Board in relation to statements made by Gaynor, 23 of which were referred by the President of the Board to the NSW Civil and Administrative Tribunal pursuant to the *Anti-Discrimination Act 1977* (NSW).

The High Court has held that certain provisions of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) were invalid to the extent that they purported to confer jurisdiction upon NCAT, where the individuals were "residents of different States" within the meaning of s 75(iv) of the Constitution.

In 2018 Burns sought leave pursuant to s 34B of the NCAT Act to bring proceedings in the Local Court relating to some of his complaints referred by the President to NCAT. The Summonses stated that leave to commence was sought "because the Application involved the exercise of the federal diversity jurisdiction and the Tribunal [NCAT] does not have jurisdiction". Gaynor then commenced proceedings in the Supreme Court seeking an order that Burns' proceedings were void and of no effect. The primary judge dismissed Gaynor's challenge. Gaynor challenged that decision.

Held:

- Leave to appeal was required and not granted: [29]-[30], [85], [123], [146]. Gaynor failed to demonstrate that the value of the matters realistically in contest exceeded the statutory threshold: [29]-[30].

- Section 34B(1) of the NCAT Act was not constitutionally invalid. The powers conferred on NCAT by the Discrimination Act may only be exercised within constitutional limits: [54].

- The primary judge did not err in failing to hold that the Local Court proceedings fell beyond its territorial jurisdiction. The evidence did not disclose precisely what Burns' complaints were or in what way those complaints were connected with NSW: [63]-[65].

- Part 3A of the NCAT Act did not subject Gaynor to discrimination and disability, within the meaning of s 117 of the Constitution. The very source of the need to proceed differently in relation to a matter between residents of different states is the Constitution itself: [74]. The relevant comparison is not between the procedures to which Gaynor was subject in NSW with the applicable procedures had a complaint been made against him in Queensland: [76].

Administrative Law: procedural fairness; Planning: development

***Universal 1919 Pty Ltd v 122 Pitt Street Pty Ltd* [2020] NSWCA 50**

Decision date: 27 March 2020

Macfarlan JA, Meagher JA, Gleeson JA

A Development Control Order (the Order) was issued by the Council of the City of Sydney in 2018 to the registered proprietor of heritage listed premises at 122 Pitt Street Sydney. Universal 1919 has possession of the premises under a registered lease. It operates the “1821 Hotel” in the building on the site which has a Greek theme, including an 8m x 5m depiction of the Greek National flag on a ground floor wall. The depiction was created during renovations in 2016 by removing part of the cement render on the wall, leaving parts of the brickwork underneath exposed. The Order required removal of the flag by reinstatement of the cement render on the wall. The Order alleged that the carving of the flag occurred without planning approval, contrary to the *Environmental Planning and Assessment Act 1979* (NSW), and without approval under the *Heritage Act 1977* (NSW).

Universal brought an application for judicial review of the decision to make the Order. The application was dismissed and Universal brought an appeal. Universal contended that it was denied procedural fairness in relation to the making of the Order; the carving of the Greek flag was not a separate item of development that required approval but otherwise was approved as part of the 2016 renovation works approval; and that the Order was void because notice was not given to the principal certifier of the renovation works as required.

Held:

- Appeal dismissed: [34].
- The statutory scheme contained sufficiently “plain words” to exclude any right that Universal might otherwise have had to be afforded procedural fairness in relation to the issue of the Order: [22]. It provided that an enforcement authority has observed the rules of procedural fairness if it complied with certain provisions, including the requirement to give notice of a proposed order to the person to whom the order was to be directed. This specification was exhaustive: [23]. The ‘person to whom the proposed order is directed’ means the person to whom the Order is intended to be addressed, being the Owner, and not to Universal, and therefore notice was only required to be given to the Owner: [24].
- Due to its size and prominence, the subject carving of the Greek flag constituted “the carrying out of a work” requiring development consent: [26]. It was not part of the 2016 renovations to which development consent was given as required by the Assessment Act: [27], nor the Heritage Act: [31]. Therefore the principal certifier in respect of the development approval works was not the principal certifier regarding the carving of the flag: [32].

Australian intermediate appellate decisions of interest

Civil Procedure: Litigation Funding Agreements

***Nom De Plume v Ascot Vale Self Storage [No 2]* [2020] VSCA 70**

Decision date: 27 March 2020

McLeish JA, Niall JA, Hargrave JA

In 2010 receivers and managers were appointed to the Ascot Vale Self Storage Centre. The developer applied to wind up the Centre. In 2013 the liquidator identified claims against a director, Leggo, and Nom De Plume, which Leggo controlled, and commenced proceedings against them.

The liquidator, the Centre, a guarantor and a funder entered into a funding agreement to fund these proceedings. The agreement was approved by an associate judge but then set aside on appeal, holding that the agreement was not in the interests of creditors. A further funding agreement was approved by the creditors and entered into by the liquidator in 2017 without applying for court approval.

Nom de Plume and Leggo sought orders that the Centre provide security for costs. Consent orders were made and the proceeding was stayed pending the provision of security. In 2018 made an application to lift this stay, while Nom de Plume and Leggo sought a permanent stay on the basis that the proceedings were an abuse of process. The associate judge made orders permanently staying the proceeding.

In 2019 the liquidator and the Centre brought an appeal. The appeal was allowed and the stay was lifted. Nom de Plume and Leggo sought leave to appeal to the Court of Appeal so as to reinstate the permanent stay, arguing that the judge erred in finding that it was not an abuse of process for the liquidator to prosecute the proceeding with funding on terms materially similar to those the Court had twice ruled compromised the liquidator's independence without seeking the Court's approval.

Held:

- Leave granted: [92], appeal dismissed: [119].
- It is open to a court to decline approval of a litigation funding agreement on the basis that pursuit of the litigation contemplated by the proposed funding agreement would constitute an abuse of process. It may constitute an abuse of process for the liquidator to proceed with the litigation after receiving permission to do so: [103].
- Nothing in the judge's reasons for rejecting the funding agreement application precluded the liquidator from pursuing the litigation after obtaining approval of the funding agreement from creditors: [105].

Human Rights: racial discrimination

Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba (No 2) **[2020] FCAFC 39**

Decision date: 13 March 2020

McKerracher J, Rangiah J, Charlesworth J

The Barngarla people are the holders of native title in an area of land situated on the Eyre Peninsula in South Australia. In 2017 two sites within the District Council of Kimba were nominated under the *National Radioactive Waste Management Act 2012* (Cth) as possible sites for the construction of a national radioactive waste management facility. The nominated sites neighbour land in respect of which the Barngarla people hold native title rights and interests.

The Management Act imposes limited obligations upon the Minister to afford procedural fairness to persons whose interests may be affected by the selection of a site for the facility. The Barngarla Determination Aboriginal Corporation brought proceedings alleging that the District Council had contravened the *Racial Discrimination Act 1975* (Cth) by passing resolutions for the conduct of a community poll. A person's eligibility to participate depended upon the person being on the local government electoral roll; and the possession of native title rights would not qualify a person to participate in the poll. Among other things, it was alleged that the passage of the resolutions was an act involving a distinction, exclusion, restriction or preference based on race. The proceedings were dismissed.

On appeal, the Court was asked to determine whether the primary judge erred in concluding that the act of the Council did not involve an exclusion (etc) based on race within the meaning of s 9(1) of the Discrimination Act; and in admitting and considering certain evidence in respect of the Council's reasons for adopting the franchise.

Held:

- Appeal dismissed: [64].
- To prove a contravention of s 9(1) of the Discrimination Act it is not necessary to prove the existence of a subjective motivation to (for example) exclude based on race. However, a subjective motivation may point to a conclusion that the relevant act involved an exclusion based on race: [48].
- Membership of the Corporation was not a characteristic that disqualified any person from the franchise. Rather, the possession of native title rights was not included among the various qualifying criteria: [57].
- There may be cases in which an examination of the purported justification for an act reveals that the justification is nonsensical or cannot withstand objective scrutiny. It may be open to infer that the act could not have been done for the asserted reasons and so render it more likely that the act was subjectively based on race: [61].

Asia Pacific decisions of interest

Land: division; Torts: trespass

***Shih Bin-Fang v Mobel* [[2020] PWSC 7]()**

Decision date: 23 March 2020

Rechucher ACJ, Dolin AJ, Maraman AJ

A dispute arose over boundaries and ownership of land located in Ngetkib, Airai State, Palau. Following litigation concerning this land, a settlement agreement was prepared. A survey was completed of the land and a tentative map was created of the boundaries of each lot and Certificates of Title were issued to the owners accordingly. However, one owner's dwelling was not on their land (Maria Tanaka). A second survey was conducted to ensure the dwelling was contained on that owner's lot. This survey was supposed to be conducted with notice to the parties to attend and provide input on the boundaries, but the surveyor did not provide notice and produced a final map from a computer model. The Land Court issued new Certificates of Title to the land owners on the basis of the second survey.

Prior to the issue of the Certificates, Tanaka had signed a contract leasing part of her land to Shih Bin-Fang and API. API started to build a resort on this land. Mobel filed suit alleging that construction was occurring on land allocated to himself, and therefore API and Tanaka were trespassing, seeking damages and injunctive relief.

The primary court held that as the surveyor failed to provide the parties with the right to notice before the survey, the final maps were improperly created and the subsequent Certificates were void. Therefore, the original Certificates were valid and API's structures occupied part of Mobel's land. The court awarded damages to Mobel for trespass, holding Bin-Fang, API and Tanaka jointly and severally liable and ordered the prompt removal of the allegedly trespassing structures. Bin-Fang, API and Tanaka brought an appeal to the Supreme Court of Palau.

Held:

- The Court partly affirmed and partly vacated the proceedings: p. 23.
- The Court held that the second Certificates of Title were void: p. 8. Legal partition of the land was subject to the condition precedent of a proper survey, which would have included the required notice: p. 14. The Court instructed the primary court to ensure that a proper survey would be conducted: p. 22.
- As there was no effective partition, the land remained jointly owned by Tanaka and Mobel (among others) according to Palauan customary law, and no trespass could have taken place: p. 14. Therefore, the grant of an injunction was an abuse of discretion: p. 18, and the award of damages was vacated: p. 15.

International decision of interest

International Law: mutual legal assistance

***Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10**

Decision date: 25 March 2020

Lady Hale, Lord Reed, Lord Kerr, Lord Carnwath, Lord Hodge, Lady Black, Lord Lloyd-Jones

Shafee El Sheikh is the son of Maha Elgizouli. El Sheikh and others were suspected of involvement in heinous offences committed in Syria. Both the UK and the US conducted investigations into these circumstances. Two of the offences for which the US was investigating carried the death penalty. In 2015 the US requested mutual legal assistance from the UK in relation to these circumstances pursuant to a treaty between these countries. The UK Home Secretary requested an assurance that the information would not be used in a prosecution that could lead to the death penalty. The US refused to provide a full death penalty assurance. In 2018 the UK Home Secretary agreed to provide the information without any assurance.

Elgizouli brought a judicial review of the UK Home Secretary's decision to provide mutual legal assistance to the US. The Divisional Court dismissed her claim on the merits, but certified two questions of law of public importance relating to the lawfulness of the provision of evidence to a foreign state that will facilitate the imposition of the death penalty; and the lawfulness of the provision of personal data to law enforcement authorities abroad for use in capital criminal proceedings.

Held:

- Has the common law evolved to recognise a principle prohibiting the provision of mutual legal assistance that will facilitate the death penalty? No: [4] (Lord Kerr dissenting).
  - The death penalty as such has never attracted the attention of the common law: [194].
  - UK legislation provides that in certain circumstances, the Home Secretary is required to seek assurances, but there is no specific prohibition on the exchange of material where no such assurance is ultimately obtained: [195].
- Is it lawful under the *Data Protection Act 2018* to transfer personal data to law enforcement authorities abroad for use in capital criminal proceedings? As the unlawfulness of the particular exercise was determined, it was unnecessary to decide this: [7].
  - The Home Secretary's decision was unlawful under the Act: [6]. The transfer did not meet the statutory requirements: [10], [227].