Decisions of interest

21 August 2017 – 1 September 2017

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. **Family law and child welfare: paramountcy principle**

Secretary, Department of Family and Community Services v Smith **[2017] NSWCA 206**

Decision date: 23 August 2017

Macfarlan JA, Gleeson JA and Payne JA

The Secretary sought leave to appeal against an order dismissing proceedings brought by the Secretary. The proceedings had sought a permanent injunction restraining Ms Smith and the group "Walking Warriors 4 Missing Children" from publishing information conveying that the child subject of this proceeding was placed in foster care and/or is a ward of the State.

The child is identified by the pseudonym "Julian". Julian disappeared on 12 September 2014. However, coverage of his disappearance has generally (inaccurately) referred to Julian's carers as his parents.

The primary judge found that the Court has power to make the orders sought by the Secretary in the exercise of its protective jurisdiction, but refused to grant the injunction after balancing the child's welfare with the competing rights and interests of others, including the public. The primary judge also found that s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) does not prohibit disclosure of the mere fact that a child is in care without mentioning any relevant care proceedings, non-court proceedings or a report in which the child is mentioned. The Secretary sought leave to appeal.

Held:

- Leave should be refused. The Secretary should not be permitted to raise a new argument on appeal that the child's safety, welfare and wellbeing is paramount. Before the primary judge, the Secretary had conceded that when exercising its "protective" jurisdiction (as opposed to its "custodial" jurisdiction), the interests of the child are not "paramount" and a court should balance the interests of the child and other relevant interests. The Secretary did not point to any exceptional circumstances demonstrating why the new point should be advanced on appeal: [31]; [42].

- The primary judge's construction of s 105 of the *Care and Protection Act* was not arguably wrong. Chapter 6 is directed to protecting the identity of a child or young person who is the subject of or appears in Children's Court Proceedings, non-court proceedings or reports under the Act. s 105 creates a strict liability offence, which strongly supports the view that s 105 was not intended to prevent publication of the name of any child about whom care proceedings had been taken, absent reference to those proceedings: [48]-[49].

2. **Appeals: matters to be proved upon rehearing**

Boyd v Thorn **[2017] NSWCA 210**

Decision date: 23 August 2017

Macfarlan JA, Leeming JA and Emmett AJA

The late Mrs McAuley transferred $260,000 to Mr Boyd. Robb J found that Mr Boyd procured the sum by undue influence and unconscionable conduct. Robb J made two sets of orders:

- On 6 November 2014, that the Estate was entitled to trace the sum of $260,000 into any property in relation to which it had been applied.
- On 13 March 2015, that Mr Boyd held his interest in the family property on constructive trust for the Estate to the value of $200,000; that the Estate's judgment debt constituted an equitable charge on Mr Boyd's interest in that property; and that the Estate could apply for an order under s 66G of the *Conveyancing Act 1919* (NSW). If successful, this would allow trustees to be appointed to sell the Boyd property, with the moneys repaid to the Estate.

Mrs Boyd was not a party to the Robb J proceedings, and applied to set aside the orders made on 13 March 2015. White J granted the application and ordered a new hearing, finding that Mrs Boyd was a necessary party to the proceedings given the involvement of the family property. At the rehearing, Sackar J remade Robb J's orders. On appeal, Mrs Boyd contended that Mr Boyd's conduct (undue influence and unconscionable conduct) needed to be reproved in the rehearing, and that this had not occurred.

Held:

- The Court dismissed the appeal. Leeming JA and Emmett AJA (Macfarlan JA dissenting) found that once the Estate determined to seek proprietary relief against land of which Mrs Boyd was a joint owner, it was *open* to her to seek to challenge the findings of undue influence and unconscionability: [152]; [207].
- However, Mrs Boyd had limited her application to the 13 March orders. In particular, she did not challenge the earlier declaratory and substantive orders, including the finding that Mr Boyd obtained the money by unconscionable conduct. She is therefore unable to contend in the rehearing for findings which would give rise to inconsistent orders: [149]; [203].

High Court Cases considered:

John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19 (distinguished)

Other Australian intermediate appellate decisions of interest

3. **Negligence: whether expert knowledge is attributable to the reasonable person**

Circular Heads Fencing Pty Ltd v Motor Accidents Insurance Board **[2017] TASFC 6**

Decision date: 30 August 2017

Blow CJ, Brett J and Pearce J

A motorist was injured when cattle escaped from a farming property onto a motorway. The cattle escaped when a gudgeon pin became detached from a gatepost. The Motor Accidents Insurance Board paid compensation to the motorist, and sought reimbursement from the Lesters (who owned the property) and Circular Head Fencing Pty Ltd (**CHF**) (the contractor who built the fence).

The trial judge found that the Lesters and CHF were negligent, and apportioned liability 65:35. Both parties appealed.

Held:

- The Court allowed the appeal. It was accepted that the appellants had a duty of care to road users to exercise reasonable care with respect to the potential escape of cattle: [30].
- In relation to breach, it was open to her Honour to find that the gudgeon pin was not "fit for purpose". However, this did not necessarily lead to a conclusion that by using that pin, the appellants had fallen below the standard expected of a person in their respective positions: [73]. In particular:
    - Expert evidence provided a strong basis for concluding that the gudgeon pin was inadequate to secure the gate against pressure that cattle might foreseeably apply. The appellants would have some familiarity with fences, but not to the level of detailed technical knowledge on which the expert opinions were based: [63]; [65].
    - The fact that there were alternative methods available does not determine what a reasonable person in the position of the appellants should have known or would have done at the time in question: [69].
- It is not necessary for a plaintiff to establish the mechanism of the cause of loss with precision. However, her Honour did not make a finding as to the force which was actually applied to the gate on the night in question (and nor was a finding available on the evidence). In the absence of this finding, it was impossible to determine that the cattle would not have escaped in any event: [84]; [87].

4. **Administrative law: excluding procedural fairness via statutory scheme**

Burragubba v Minister for Natural Resources and Mines **[2017] QCA 179**

Decision date: 22 August 2017

Morrison, Philippides and McMurdo JJA

The Minister granted three mining leases to Adani Mining Pty Ltd (**Adani**) under the *Mineral Resources Act 1989* (Qld) (**MRA**). The land is within the area over which the Wangan and Jagalingou people claim native title. Under the MRA, a person must object to notice of an application before the "last objection day". If a person objects, the matter is referred to the Land Court for hearing. The Minister must then consider the Land Court's recommendation. The facts concern a complicated series of events and legal proceedings:

- The *Native Title Act 1993* (Cth) provides that a grant of a mining lease is a "future act". Before the future act is done, the affected parties must negotiate with a view to reach agreement. Where agreement cannot be reached, a determination may be made by an arbitral body. Here, Adani and the appellants could not agree, and the National Native Title Tribunal found that the lease could be granted. The appellants commenced judicial review proceedings in the Federal Court.

- A third party objected under the MRA, triggering a hearing in the Land Court.

- The Minister granted the leases under the MRA. The appellants commenced judicial review proceedings in the Queensland Supreme Court. They argued that despite the fact that no native title matters were in evidence in the Land Court, the Minister considered material about native title (namely, assuming "native title had been resolved" by the Federal Court) without giving the appellants the opportunity to comment. Bond J rejected the application, finding the MRA reveals an intention to limit the persons to whom natural justice is owed. This appellants appeal that decision.

Held:

- Subject to the terms of the relevant statute, the exercise of administrative power is subject to a requirement to act with natural justice: [53].

- The terms of the MRA affect the *content* of the duty to act with procedural fairness. For example, the Minister is not bound to ask an interested party for a submission which it could have "properly" made under the MRA. However, MRA does not (expressly or by implication) displace the obligation to afford procedural fairness. For example, the Minister should hear from a party on facts and circumstances arising after the submission period: [52]; [54]-[55].

- Here, the appellants were not denied procedural fairness. The Minister made a considered assessment of the prospects of the Federal Court proceedings and decided not to delay his decision until that proceeding was decided: [64].

Asia Pacific decisions of interest

5. Corporations: creditors compromise; classification of creditors

New Zealand Court of Appeal

Trends Publishing International Limited v Advicewise People Limited **[2017] NZCA 365**

Decision date: 24 August 2017

Cooper, Asher and Clifford JJ

Following a severe downturn in its US market, Trends Publishing International Limited (**Trends**) proposed a creditors compromise which would impose a moratorium on creditors' recovery proceedings. The proposal stated that if the compromise was not accepted, Trends was likely to go into liquidation or voluntary administration. 39 of 48 creditors voted in favour of the compromise. Among the 39 were Thecircle.co.nz Ltd (an associated company of Trends, representing 72% of the total value of affected creditors) and two "insider" creditors (Trends' general manager and one of its directors). The compromise bound all affected creditors with notice of the compromise, regardless of whether the creditor voted against the proposal.

Four creditors (**the respondents**) sought to set aside the compromise under s 232(3)(c) of the *Companies Act 1993* (NZ), which allows a court to set aside a creditor compromise if it is unfairly prejudicial to that creditor, or to the class of creditors to which that creditors belongs. Heath J concluded that the insider creditors should have been put into a separate class for the purpose of voting on the compromise. Trends appealed to the Court of Appeal on this issue.

Held:

- It is inconsistent with the broad discretion of the court under s 232(3)(c) to have a rigid rule limiting separate classes only on the basis of different legal rights. Both legal rights and economic interests must be considered to discern whether a separate class is warranted. The Australian strict legal rights approach in *Re Jax Marine Pty Ltd* must be rejected: [46]; [51]; [55].

- The insider creditors should have been placed in a separate class from the true third party creditors. The insider creditors had a different goal in voting for a compromise than the other creditors. Specifically, they sought to avoid liquidation and resulting investigation and action. In contrast, the third party creditors had much to gain from liquidation. Accordingly, the compromise should be set aside at the status quo restored: [63]; [90].

New South Wales Supreme Court cases considered:

Re Jax Marine Pty Ltd [1967] 1 NSWR 145 (SC)

6. Constitutional law: non-intervention principle

Hong Kong Court of Final Appeal

***Yau Wai Ching v Chief Executive of the Hong Kong Special Administrative Region, Secretary for Justice* [2017] HKCFA 54**

Decision date: 1 September 2017

Chief Justice Ma, Mr Justice Ribeiro PJ and Mr Justice Fok PJ

Sixtus Leung Chung Hang (**Leung**) and Yau Wai Ching (**Yau**) were elected as Legislative Councillors in September 2016. When taking their oath, Leung and Yau made a number of alterations, including: using the term "Hong Kong Nation", mispronouncing "China", displaying a banner stating "HONG KONG IS NOT CHINA", and emphasising the words "Hong Kong". The President of the Legislative Council decided they should be given a further opportunity. This decision was challenged by the Chief Executive and Secretary for Justice.

The Court of First Instance found that Leung and Yau were not entitled to retake their oaths. This decision was affirmed on appeal. An issue for the Court of Final Appeal was whether the matters were justiciable due to the principle of non-intervention, whereby courts recognise that the legislature has exclusive authority to manage its internal processes.

Found

- Leave to appeal should be refused. Although the questions touch upon issues of law of general and public importance, there is no reasonably arguable basis for disturbing the judgments under appeal: [3].

- Article 104 of the *Basic Law of the Hong Kong Special Administrative Region* imposes a constitutional duty on members of the Legislative Council to take an oath to swear to uphold the Basic Law, and swear allegiance to the Hong Kong Special Administrative Region. Although the precise terms of the oath are not expressly set out, the oath must be sworn "in accordance with the law". "Law" should be read to include s 21 of the *Oaths and Declarations Ordinance*, which provides that any person who declines to take an oath shall be disqualified from office: [21].

- Because of the constitutional requirement contained in Article 104, the lower courts were duty bound to consider whether Leung and Yau duly took the oath. The principle of non-intervention does not preclude that inquiry, as the courts retain jurisdiction to determine the existence of a power, privilege or immunity of the Legislative Council: [17]; [22]; [24].

- s 21 does not unduly interfere with Leung and Yau's constitutional rights. Leung and Yau manifestly and wilfully omitted to take the oath. It is plainly to be implied that the oath must be taken in an objectively solemn manner: [30]-[31].

Other international decisions of interest

7. Media and communications: competition in telecommunications market

Privy Council

Fair Trading Commission v Digicel Jamaica Limited **[2017] UKPC 28**

Decision date: 24 August 2017

Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge and Lord Carloway

In 2011, two major Jamaican telecommunications companies (Digicel Jamaica Ltd (**Digicel**) and Oceanic Digital Jamaica Ltd (**Claro**)) entered into a merger. A third telecommunications company protested to the Fair Trading Commission of Jamaica (**the Commission**), arguing that the merger substantially lessened competition in the telecommunications market, with the result that prices would rise, consumer choice would be diminished and technological advance would be impeded. The Commission commenced proceedings against Digicel and Claro in the Supreme Court of Jamaica under Part III of the *Fair Competition Act*.

Sinclair-Haynes J found, in answer to a preliminary question, that the Commission had jurisdiction to intervene in the telecommunications market. His Honour concluded that the distinct statutory scheme for the telecommunications market did not implicitly exclude the operation of the Fair Competition Act. The Court of Appeal agreed. Digicel and Claro now appeal to the Privy Council.

Held:

- Part III of the *Fair Competition Act* is in wholly general terms. The Commission is empowered to investigate whether "any enterprise" is engaging in business practices contravening the Act. It would be unusual for a later statute to revoke the powers of an existing statutory body without any express reference to it. But it is in principle possible if it is sufficiently clear that that was the legislature's intention: [12]-[14].

- Where two statutory provisions or schemes are inconsistent, the particular will prevail over the general. However before the particular can be said to displace the general, it is necessary to demonstrate inconsistency between them: [14].

- In this case, the schemes are not inconsistent but complementary. The Office of Utilities Regulation has statutory power to investigate contraventions of the *Telecommunications Act* and commence enforcement proceedings. However, the *Telecommunications Act* does not impose a general duty on firms to refrain from anti-competitive conduct, as is imposed by the general prohibitions of anti-competitive agreements in ss 17-20 of the *Fair Competition Act*: [20].

8. **Human rights: arbitrary deprivation of property**

Constitutional Court of South Africa

Jordaan and Ors v City of Tshwane Metropolitan Municipality and Others **[2017] ZACC 31**

Decision date: 29 August 2017

Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

The City of Tshwane and Ekurhuleni suspended municipal services to the applicants' properties on the basis that the applicants owe the municipalities debts for municipal services rendered to these properties before transfer.

Section 118(3) of the *Local Government: Municipal Systems Act* provides that "an amount due for municipal service fees…is a charge upon the property… and enjoys preference over any mortgage bond registered against the property". The High Court found the section to be constitutionally invalid *to the extent* that it has the effect of transferring municipal debts to new or subsequent owners.

Held:

- s 25 of the Bill of Rights prohibits arbitrary deprivation of property. It was not disputed that the new owner has a property interest that would be affected if the charge were transmissible, and the interests of bond holders who advance loans would be affected: [58].

- s 39(2) of the Constitution requires the Court, when interpreting legislation, to promote the spirit, purport and object of the Bill of Rights. It was therefore necessary for the Court to consider whether the provision in fact means that municipal debts survive the transfer of property: [77].

- The Court concluded that s 118(3) can properly and reasonably be interpreted as meaning that the unregistered charge is only enforceable against the property so long as the original owner holds title. A claim that a specified debt is a "charge" upon immovable property does not make that charge transmissible for successors in title. Public formalisation of the charge is required (eg registration in the Deeds Registry) so as to give formal notice of its creation to the world. The absence of a formalisation requirement in s 118(3) is a telling indication that the charge is defeasible on transfer of ownership: [41]; [78].

- As s 118(3) could be interpreted without constitutional objection, it was not necessary to confirm the High Court's declaration of invalidity. However for clarity, the Court granted the applicants a declaration that the charge does not survive transfer: [78].