Court of Appeal
Supreme Court
Sydney

Decisions of interest

16 October 2017 – 27 October 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Contract law: illegality**

***REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd* [2017] NSWCA 269**

Decision date: 23 October 2017

Beazley P, Macfarlan JA, Gleeson JA

On 13 December 2013, REW08 Projects Pty Ltd (**REW08**) entered into a contract to sell a lot in a subdivision to PNC Lifestyle Investments Pty Ltd (**PNC**). The purchase price was $485,000, with a $250,000 deposit. Special Condition 53 provided that REW08 had a right to rescind the contract and enter into a new contract every 3 months. Special Condition 55 provided for a price reduction of $235,000 to be made at settlement provided that the Purchaser had met all its obligations under the contract. On 17 June 2014, the parties signed two sale contracts in identical terms to the 13 December 2013 contract. The contracts were backdated to 13 March 2014 and 13 June 2014.

Following a disagreement, PNC commenced proceeding seeking specific performance of the 13 June 2014 contract. REW08 filed a defence that the contract was void for illegality because it was entered "for the express purpose of avoiding stamp duty". The primary judge rejected this argument and ordered the contract to be specifically performed. The issue on appeal was whether the primary judge erred in finding the contract was enforceable and ordering specific performance.

Held:

- The Court dismissed the appeal.
- The *Taxation Administration Act 1996* (NSW) imposes a penalty tax where tax is not paid in accordance with the law, and creates various offences relating to provision of false or misleading information. However, the legislature stopped short of providing that an agreement made for the purpose of avoiding stamp duty is unenforceable: [24].
- REW08 did not establish that PNC was conscious that the proposed arrangements knowingly broke the law. Further, delaying the payment of stamp duty was not essential to the parties' bargain. The intent did not go to the "substance of the transaction" so as to "corrupt the contract": [25]; [26].
- In any case, the supposed illegal purpose was not carried into effect. The stamp duties and levies were paid: [27].

High Court cases considered:

Gnych v Polish Club Ltd (2015) 255 CLR 414

Neal v Ayers (1940) 63 CLR 524

2. Workers compensation

Tudor Capital Australia Pty Limited v Christensen **[2017] NSWCA 60**

Decision date: 17 October 2017

McColl JA, Macfarlan JA, Payne JA

Mr Christensen was employed as a Portfolio Manager at Tudor Capital Australia Pty Limited (**Tudor Capital**). He relocated from the London to Sydney office and experienced difficulties due to a slow internet connection speed and time differences between Sydney and the European and US markets. His earnings fell behind his expected results. In September 2008, he developed the flu. Three days later, he died from ventricular fibrillation leading to cardiac arrest.

Mrs Christensen claimed compensation payments pursuant to s 9 of the *Workplace Compensation Act 1987* (NSW) (**WCA**). She argued that stress associated with Mr Christensen's work made him susceptible to a virus, which caused or aggravated the ventricular fibrillation. Tudor Capital argued that Mr Christensen was suffering from hypertrophic cardiomyopathy, which often leads to ventricular fibrillation.

An Arbitrator upheld Mrs Christensen's claim. The Deputy President (**DP**) of the Workers Compensation Commission dismissed Tudor Capital's appeal. Tudor Capital appealed to the Court of Appeal pursuant to s 353(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

Held:

- The Court allowed the appeal and remitted the matter to the Commission.
- The DP erred in finding that the "injury" for the purposes of s 9 of the WCA was Mr Christensen's experience of stress, making him susceptible to contract a virus.
    - The DP's finding of injury differed from the injury the Arbitrator identified (the "entry of the T cell lymphocytes into the myocardium"). This implicitly identified an error of fact, which the DP did not correct: [337], [346].
    - It was incumbent upon the DP to determine whether stress was a psychological injury within the meaning of s 11A(3) of the WCA: [342]-[344].
    - Absent isolation of the relevant "injury", the Arbitrator could not determine whether employment was a substantial contributing factor to the injury. The DP failed to recognise this error of law: [338], [346].
- In examining the medical evidence, the Arbitrator overlooked material facts, including autopsy slides and expert evidence adduced by Tudor Capital. The DP failed to identify this error of law: [384]; [396].
- The majority held that there was no procedural unfairness. Mrs Christensen had an opportunity to respond to the evidence and arguments before the Arbitrator: [302], [304]-[307].

Other Australian intermediate appellate decisions of interest

3. **Constitutional law: inconsistency of Commonwealth and Territory legislation**

Outback Ballooning Pty Ltd v Work Health Authority and Bamber **[2017] NTCA 7**

Decision date: 19 October 2017

Southwood, Blokland and Riley JJ

A woman died while embarking onto a hot air balloon operated by Outback Ballooning Pty Ltd (**Outback Ballooning**), when her scarf became lodged in the fan being used to inflate the balloon. The Northern Territory Work Health Authority (**WHA**) argued that Outback Ballooning failed to comply with the duty imposed on it by s 19(2) of the *Work Health and Safety (National Uniform Legislation) Act* (NT) to, so far as reasonably practicable, ensure the health and safety of passengers.

The Court of Summary Jurisdiction dismissed the complaint. The magistrate ruled that Commonwealth law covered the field of air safety navigation, so that Territory law could not operate. The Supreme Court then quashed this decision.

The issue on appeal to the Court of Appeal was whether Commonwealth law evinced an intention to completely state the law governing pre-flight operations of balloon aircraft. Outback Ballooning argued that the intention of the Commonwealth Parliament to cover the field and the extent of the field was established by the extensive regulatory regime created under the Chicago Convention and *Civil Aviation Act* (Cth).

Held:

- The Court allowed the appeal.
- In *Heli-Aust v Cahill* (2011) 194 FCR 520, the Full Court of the Federal Court held that within its field of operation Commonwealth civil aviation law was intended to be a complete statement of law. However, the Court did not determine the full extent of the field covered by Commonwealth civil aviation law. It remains unnecessary to make a wide declaration about the extent of the field, and an incremental approach should be adopted: [7]; [8]; [53].
- There was an indirect inconsistency between the Commonwealth and Territory law. The Commonwealth law was a complete statement of the law governing the safety of air navigation, including the safety of an aircraft on the ground and the embarkation of passengers. Accordingly, the WHS Act did not operate to impose a duty on the appellant: [99].

4. **Consumer law: misleading and deceptive conduct**

Australian Olympic Committee v Telstra Corporation **[2017] FCAFC 165**

Decision date: 25 October 2017

Greenwood, Nicholas and Burley JJ

Telstra Corporation Limited (**Telstra**) conducted an extensive marketing campaign promoting the availability of live events streamed from the Rio Olympics by Seven Network (Operations) Ltd (**Seven**). The advertising materials included the terms "Olympic" and "Olympic Games". The Australian Olympic Committee (**AOC**) contends that use of these words was contrary to s 36 of the *Olympic Insignia Protection Act 1987* (**OIP Act**), which provides that a person other than the AOC "must not use a protected Olympic expression for commercial purposes".

The primary judge dismissed the application. His Honour concluded that on balance, the advertisements conveyed that Telstra's relationship was with Seven, not with any Olympic body. The AOC appealed to the Full Court.

Held:

- The Court dismissed the appeal.
- Section 30(2) of the OIP Act deems that protected Olympic expressions are used for a commercial purpose if four cumulative criteria are satisfied:
    - 1. A person causes an Olympic expression to be applied to services;
    - 2. The usage is for advertising or promotional purposes;
    - 3. The usage would suggest to a reasonable person that the company sponsors or provides sponsorship-like support to the AOC. This is an objective test. The court must consider the advertisement's audience and context. "Sponsorship-like support" is broader than sponsorship, and does not require direct financial assistance: [97]-[101];
    - 4. The protected Olympic expression is applied in Australia.
- The trial judge's reasoning considered detail of the advertisement's contents, and what they conveyed in a general sense. This did not reflect error: [117].
- Telstra filed a notice of contention arguing that the approvals provided by the IOC to Seven mean that Telstra in fact had some form of consent, approval or endorsement from or on behalf of the Olympic movement. As the appeal was dismissed, the Court did not consider this issue: [80]; [157].

High Court Cases considered:

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640

Asia Pacific decisions of interest

5. **Contracts: voluntary religious associations; repudiation by conduct**

Court of Appeal of New Zealand

Matamu v Si'itia **[2017] NZCA 482**

Decision date: 24 October 2017

Clifford, Simon France and Toogood JJ

The Avondale Union Parish (**the Parish**) was led by two ministers: one who conducted a service in English, and another (Reverend Amosa) who conducted a service in Samoan. The Procedures for Cooperative Ventures, which governed the Presbyterian Church, provided that Ministers could only hold appointments for ten years. Reverend Amosa's appointment would terminate on 31 July 2013.

There was no equivalent requirement in the rules of the Pacific Island Synod. However, the Samoan parish voted against joining the Pacific Island Synod, and Reverend Amosa's appointment was terminated. At an unauthorised church service, a group of parishioners (**the appellants' group**) declared independence and freedom from the Parish and formed a new Pacific Island Church, to be conducted from the same premises.

At an emergency meeting, the Parish Council (**the Council**) passed a resolution not to allow the appellants' group any further use of Parish premises. The High Court held that this exclusion was valid because the appellants' group had repudiated their contract with the Parish prior to the Council passing the resolution. This finding was challenged on appeal.

Held:

- The Court dismissed the appeal.
- The law treats unincorporated religious communities as voluntary associations. It views the constitution of a voluntary religious association as a civil contract which sets out the rights and duties of the members and its governing bodies: [28].
- The appellants' group repudiated their contract with the parish expressly and by conduct. This occurred prior to the emergency meeting of the Council. The group showed "determination" to cut its ties: [35].
- In particular, the appellants' group had: attempted to hold a second vote to join the Pacific Island Synod; conducted an unauthorised church service; declared independence; adopted a new name; taken funding pledges; appointed new representatives; not contributed financially to Parish liabilities; and did not attend regular services: [35]-[40].

6. **Appeals: significant delay; application for extensions of time**

Supreme Court of Fiji

Fiji Industries Ltd v National Union of Factory and Commercial Workers **[2017] FJSC 30**

Decision date: 27 October 2017

Chandra J, Keith J, Calanchini J

Fiji Industries Ltd (**Fiji Industries**) dismissed Mr Vaja from their employment. On 7 May 2007, an arbitration tribunal found that the dismissal was unreasonable and ordered Mr Vaja's reinstatement not later than 14 days after the publication of the award. Fiji Industries commenced an application for judicial review in 2007. Before Jitoko J could deliver judgment in the matter, the Fijian President suspended the operation of the Constitution and removed all Fijian judges from their posts. Jitoko J was never reappointed.

The file was later transferred to Hettiarachchi J. On 7 October 2011, four years after the application was made, Hettiarachchi J held that the tribunal had not erred in law and dismissed the application. The Employment Relationships Tribunal awarded Mr Vaja the equivalent of his salary for the period from when he should have been reinstated (within 14 days of 7 May 2007) to the date he was actually reinstated (13 December 2011). On 1 December 2015, the Employment Relations Court dismissed an appeal against this decision.

Fiji Industries instructed their solicitors to commence an appeal to the Fijian Court of Appeal. The solicitors did not file a notice of appeal within the requisite 28 days. The Court of Appeal refused to extend the time for filing the notice. Fiji Industries now seeks leave to appeal to the Supreme Court from that refusal.

Held:

- The Court granted leave to appeal but dismissed the appeal. The proposed appeal does not have sufficient prospects of success to justify the appeal proceeding after the expiry of the time for filing the notice of appeal: [44].

- There is no rule that because the litigant has not been at fault, he can escape the consequences of his lawyers' mistake. Nor is there any rule that because lawyers are expected not to make the sort of mistake which results in a notice of appeal not being filed in time, the litigant can never escape the consequences of such a mistake. It depends on the facts of each case: [20].

- The court is engaged on a balancing exercise, reconciling a number of competing interests: the need to ensure that time limits are observed, the desirability of litigants having their appeals heard, the undesirability of appeals being allowed to proceed with little or no chance of success, and the prospect of successful litigants having to face a challenge to a decision later than they could reasonably have expected: [25].

Other international decisions of interest

7. **Constitutional law: costs in proceedings against the State**

Constitutional Court of South Africa

Harrielall v University of KwaZulu-Natal **[2017] ZACC 38**

Decision date: 31 October 2017

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

In 2015, Ms Harrielall applied for admission to the Bachelor of Medicine/Bachelor of Surgery degree at the University of ZwaZulu-Natal and was unsuccessful. In 2016, she reapplied under the "mature students" policy, and was again unsuccessful.

Ms Harrielall launched a review application in the High Court to set aside the decision not to award her a place. The High Court dismissed the review application with costs. The Supreme Court of Appeal dismissed an appeal against the review application.

Held:

- The Court unanimously dismissed the appeal.
- The University clearly correctly applied its admissions policy. Ms Harrielall was unsuccessful because she was competing against candidates who were more qualified: [9].
- However, the High Court and Supreme Court of Appeal erred in not applying the *Biowatch* principle to the question of costs. The *Biowatch* principle requires that an unsuccessful party in proceedings against the state be spared from paying the state's costs in constitutional matters. This prevents the chilling effect that adverse costs orders might have on litigation concerning constitutional rights: [10]; [14].
- The University is a public institution through which the state discharges its constitutional obligation to make access to further education realisable: [15].
- Further, the proceedings raise two constitutional issues:
    - 1. When the University determined the application for admission, it exercised a public power: [17].
    - 2. Section 29(1)(b) of the Constitution guarantees her access to further education. The fact that the applicant was admitted into another programme does not change the fact that her access to the relevant institution was limited: [19].

8. Shipping and navigation: average

UK Supreme Court

Mitsui & Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG **[2017] UKSC 68**

Decision date: 25 October 2017

Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge

A vessel travelling in the Arabian Sea was boarded by Somalian pirates. After seven weeks of negotiations, the vessel's owners agreed to a $1.85 million ransom. The pirates initially demanded $6 million. However, due to the delay caused by the negotiation, the vessel owners incurred expenses such as crew wages and vessel operating expenses.

The vessel's cargo was carried by Mitsui & Co Ltd (**Mitsui**) under a bill of lading. The bill of lading provided that "General Average… shall be settled in accordance with the York-Antwerp Rules 1974". General Average is a system of maritime law where losses incurred as a result of actions taken to preserve a maritime adventure from peril are rateably shared between all of those whose property is at risk.

An adjudicator found that expenses incurred during the negotiation period were allowable in general average. These expenses were incurred in place of another expense (that is, the $4.15 million saved as a result of the negotiations with the pirates). Mitsui's challenge to this decision was dismissed by the Commercial Court. Mitsui succeeded in the Court of Appeal on the basis that the payment of $41.5 million was merely a "variant" of the same course of action, not an "alternative course of action". The Owners appealed to the Supreme Court.

Held:

- The majority allowed the appeal. The negotiation expenses were an alternative course of action from the payment of $4.15 million. The former involved incurring vessel operating expenses and the latter involved paying a ransom: [22]; [26].

- The alternative course of action need not be shown to have been consciously or intentionally incurred by the Owners. Whether one expense is occurred "in the place of another expense" must be assessed objectively. Here, it is clear that negotiations were needed if the ransom was to be reduced, that such negotiations took time, and that the passage of time resulted in the negotiation period expenses being incurred: [33]-[34].

- An appellate court should be very slow to interfere with the conclusion of the primary judge that the vessel and cargo would have been released promptly if the initial demand was paid: [36].