Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 January 2020 – 14 February 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

1. **Employment Law: employee misconduct, involuntary transfers**

   ***Police Association of New South Wales v State of New South Wales* [2020] NSWCA 3**

   Decision date: 10 February 2020

   Macfarlan JA, White JA, Barrett AJA

   Senior Constable Gardner was involuntarily transferred from his position as a surveillance operative within the State Surveillance Branch to a general duties position at Chatswood police station by order of the Commissioner of Police in 2018, following misconduct by Mr Gardner. The order was stated to be non-reviewable action under s 173(2) of the *Police Act 1990*, being a non-disciplinary transfer.

   The Police Association brought proceedings seeking judicial review of the Commissioner's decision to order the transfer of the Officer. The primary judge held that the characterisation of a transfer as "non-disciplinary" or otherwise was "a matter for the evaluative judgment of the Commissioner", and dismissed the proceedings. The Police Association sought leave to appeal.

   The main issue on appeal was whether the transfer was a non-disciplinary transfer.

   Held:

   - Leave to appeal granted unanimously and appeal allowed by majority (White JA dissenting): [125]. A declaration was made that the transfer order was invalid, that it be quashed and the Commissioner be restrained from giving effect to it: [125].

   - The issue of whether a transfer order is a 'non-disciplinary transfer' and therefore a 'non-reviewable action' under s 173 is a question of fact to be determined objectively (per Macfarlan and White JJA): [10], [34]. Absence of any quality of administering discipline is the feature that distinguishes a non-disciplinary transfer from a transfer that is not non-disciplinary: [113] (Barrett AJA).

   - Elements of coercive correction were present in the circumstances, including identifying the transfer as a 'remedial measure' to modify and adjust the officer's behaviour; and included increased supervision, which indicated that the transfer was **not** a non-disciplinary transfer: [13], [121] (per Macfarlan JA and Barrett AJA). The dominant purpose of the order was to correct the officer's behaviour, and was thereby remedial and not disciplinary: [39] (per White JA dissenting).

2. **Mental Health: forensic patients; Statutory Interpretation**

Attorney General of New South Wales v WB **[2020] NSWCA 7**

Decision date: 12 February 2020

Basten JA, Macfarlan JA, Leeming JA

In March 2015 WB (the Respondent) was found unfit to be tried on two counts. Payne DCJ imposed a "limiting term" expiring on 29 November 2019 and referred the Respondent to the Mental Health Review Tribunal to determine his appropriate placement. On 3 September 2019, the Attorney General (the Applicant) filed a summons seeking an extension of the Respondent's status as a forensic patient for a period of three years and an interim extension order for a period of three months. Judgment was delivered on 28 November 2019, one day before the expiration of the limiting term, dismissing the application for an interim extension order. The Applicant sought leave to appeal.

An interim extension order was made by the Court of Appeal for a sufficient period to permit the hearing of an appeal; otherwise it was possible that once the respondent ceased to be a forensic patient, an extension order could not be granted. Notably, an interim extension order cannot have effect for a period of more than three months in total, meaning that the final hearing and determination of the matter would need to occur before 29 February 2020.

Held:

- Leave to appeal granted limited to one ground, being whether the power of the court to grant an extension order operates only with respect to a person who is, at the time the order is made, a forensic patient: [26], [30], [57]. Appeal allowed by majority and the order of the primary judge set aside: [53], [57] (Leeming JA dissenting). Interim extension order made: [57].

- An extension order cannot be made once a person has ceased to be a forensic patient: [52] (Basten JA). The Respondent's construction would result in a situation where a person who has completed a "limiting term" in respect of an offence which they have committed may be subjected at any time in the future to a further constraint on their liberty as a result of the same offence: [59]. The Applicant's construction tightly confines the time period during which an extension of a limiting order can be made, which is the preferred construction: [60] (Macfarlan JA).

- Applying statutory construction principles and considering the provisions as a whole, and considering the practical results of the opposing constructions, the clause confers a discretion as to the making of an extension of a limiting order: [95] (Leeming JA dissenting).

Other Australian intermediate appellate decisions of interest

3. **Medical Negligence: duty of care, causation**

Nouri v Australian Capital Territory **[2020] ACTCA 1**

Decision date: 13 February 2020

Murrell CJ, Mossop J and Rangiah J

Saba Nouri was born with severe disabilities. Her parents, Ms Nouri and Mr Shaor (the Appellants), brought a claim in negligence against the ACT (the Respondent) contending that the Canberra Hospital should have provided them with certain information, following the receipt of which the pregnancy of Saba would have been terminated and the extensive costs associated with Saba's upbringing would have been avoided.

The primary judge found that the Respondent breached its duty of care in not disclosing the information about Saba's condition to the Appellants. However, it was held that the Appellants had failed to establish they could or would have secured a termination had there not been a breach of the duty of care, and therefore causation was not established. He gave judgment in favour of the Respondent, but also conducted a contingent assessment of damages which assessed damages in the sum of $1,813,807, which did not include general damages and was awarded until the date Saba reached the age of 18 years.

The Appellants challenged the findings going to liability, contending an earlier date upon which the information should have been given to them than that identified by the primary judge and contending that a termination could have been arranged in the circumstances. The Appellants also challenged the failure to award general damages or economic loss beyond Saba's 18th birthday.

Held:

- Appeal dismissed with costs: [110].
- The medical evidence indicated that the primary judge did not err in determining the date upon which the information should reasonably have been provided to the Appellants: [60]-[61]; nor in his conclusion regarding Ms Nouri's likelihood of obtaining a late stage termination: [103]-[104].
- Awarding general damages to the parents of a disabled child to compensate them for the burden of raising a child with disabilities is inconsistent with High Court authority: [107]. The issue of damages beyond a disabled child's 18th birthday has not been resolved. These issues should be determined in a case in which the conclusions reached will affect the outcome of the case: [108]-[109].

4. **Contracts: confidential information, obligations**

Crown Resorts Limited v Zantran Pty Limited **[2020] FCAFC 1**

Decision date: 22 January 2020

Allsop CJ, White J, Lee J

Zantran (the Respondent) commenced representative proceedings against Crown Resorts (the Applicant) for relief including damages arising from alleged contraventions of the *Corporations Act 2001* and the *Competition and Consumer Act 2010*. Former employees of the Applicant had entered into employment contracts with the Applicant that contained confidentiality provisions.

The Respondent filed an application for interlocutory relief from the enforcement of these confidentiality provisions in aid of the more efficient management of the case, submitting that a failure to make such orders would be inimical to the administration of justice considering the public interest in the just resolution of disputes as quickly, inexpensively and efficiently as possible.

The primary judge made an order that 18 former employees were relieved of any obligations of confidence owed by them to the Applicant for the limited purposes of conferring with the Respondent's legal representatives and providing them with evidence (the Order). The Applicant sought leave to appeal.

The issue on appeal whether the Court had power to order one party to litigation to relieve a third party from obligations of confidence owed to that party.

Held:

- Appeal allowed; Order set aside; interlocutory application dismissed: [155].
- The overarching purpose and case management considerations do not form an adequate foundation for a conclusion that it is against public policy for a party in litigation to seek to enforce a valid contractual confidentiality clause when to do so might impede the conduct of private civil litigation: [60].
- The Order assumed the validity of the obligations of confidence and the power in the court to "relieve" a party from such a valid obligation for the purpose of the more convenient running of litigation. The relevant legal task is forming an evaluative judgment as to whether, having regard to public interest considerations, the obligation actually interferes adversely with the administration of justice *so as to render the obligation void or unenforceable at law*: [135].

Asia Pacific decisions of interest

5. Human Rights: forced slavery and labour, human trafficking

ZN v. Secretary for Justice & 3 Others **[2020] HKCFA 53**

Decision date: 10 January 2020

Ma CJ, Ribeiro PJ, Fok PJ, Chan NPJ, McLachlin NPJ

ZN (the Appellant) is a Pakistani national who was brought to Hong Kong to work as a foreign domestic helper between 2007-10. During this period, he was badly mistreated by his employer to an extent that constituted forced or compulsory labour per article 4(3) of the Hong Kong Bill of Rights. The Appellant sought to report this treatment to various Government agencies, but this was poorly received, and he commenced judicial review proceedings against these agencies seeking declaratory relief and damages for breach of the Bill of Rights.

The primary judge held that implicit in the concepts prohibited by the Bill of Rights is a prohibition against trafficking a person for the purposes of slavery, servitude and forced or compulsory labour. The judge granted a declaration that the Appellant was a victim of human trafficking; that the relevant authorities were sufficiently alerted and prompted to take appropriate action; and that the Hong Kong Government failed to fulfil its obligations under the Bill of Rights. The Respondent appealed to the Court of Appeal, which amended the declaration to remove the finding that the Hong Kong Government had breached its positive duties under the Bill of Rights.

The Appellant was granted leave to appeal in the Court of Final Appeal to determine whether and the extent to which the Bill of Rights includes a prohibition against human trafficking; and whether the Bill of Rights imposes a positive duty to maintain a specific offence criminalising the prohibited activities.

Held:

- Appeal dismissed: [124].
- While constitutionally protected human rights should be construed generously, the language of the Bill of Rights did not prohibit human trafficking generally for the purposes of exploitation, servitude, or forced or compulsory labour: [80].
- There is no absolute duty on the Hong Kong Government to maintain an offence specifically criminalising forced or compulsory labour. To comply with its obligations in respect of the Bill of Rights, the Hong Kong Government must take steps to afford practical and effective protection of those rights. On the facts of this case, it was not shown that an offence criminalising forced or compulsory labour was necessary: [122].

6. Native Title; Bill of Rights

***Kamo v Minister of Conservation* [2020] NZCA 1**

Decision date: 29 January 2020

Gilbert J, Williams J and Courtney J

Two Maori tribes, Ngāti Mutunga and Moriori, had competing native title claims over Taia Farm on the east coast of Wharekauri/Rēkohu Island. The land was gazetted as an historic reserve in 2002, and the Department of Conservation's current proposal is to vest the farm in the Hokotehi Moriori Trust which would hold the land on trust on conditions to be defined by the Minister of Conservation. When this proposal was formally notified to the public, Ngāti Mutunga lodged an objection, citing an absence of consultation and consideration with their tribe; and the use of public funds for purchasing this land. The trustees of the Ngāti Mutunga o Wharekauri Iwi Trust (the Appellant) sought declarations that the proposal would undermine Ngāti Mutunga's native title and breach the tribe's rights to property, culture and free movement under the *New Zealand Bill of Rights Act 1990* (Bill of Rights).

The primary judge declined to issue declarations in the terms sought and rejected the Ngāti Mutunga claim, holding that the tribe had failed to establish its native title claim over the land; or that the tribe was entitled to the Bill of Rights protection argued for. The Appellant appealed, also raising Treaty of Waitangi arguments.

Held:

- Appeal dismissed: [39].
- The factual foundation was a matter of deep dispute between the tribes which the Court should not resolve: [15], [25].
- Native title and the tribe's Treaty of Waitangi relationship with the Crown are not property. Therefore, the right to be free from unreasonable seizure of property (s 21) does not apply: [28]-[30]. If the relevant cultural loss claimed was the loss of native title, this claim also does not apply in relation to the right to culture (s 20): [31].
- Ngāti Mutunga did not have freedom of movement prior to the vesting as the land was privately owned; and access for the public will be guaranteed once vested. Therefore, the freedom of movement (s 18) has not been lost: [32].
- Any inconsistency in Ngāti Mutunga's Treaty rights will depend upon the terms and conditions of the vesting, which have not yet been determined, and can only be resolved once the Minister has made her decision: [35], [37].

Other international decisions of interest

7. **Evidence: self-represented litigants; Family Law: child support**

Brown v Brown **[2020] BCCA 53**

Decision date: 13 February 2020

Newbury J, Groberman J, Abrioux J

Mr Brown (the Appellant) and Ms Brown (the Respondent) have two children and have established a shared parenting regime in which the children spend equal time with each parent. A consent order made in 2015 included arrangements for child support. In 2018, the Appellant sought to amend the order which would result in him being eligible to claim a tax credit in respect of one child. The Respondent filed an application seeking re-calculation of all previous and future child support obligations. Following recalculation, the primary judge ordered the Appellant to pay $4,851 in arrears to the Respondent in monthly instalments off-setting amounts payable by the Respondent.

The Appellant appealed to the Court of Appeal for British Columbia, claiming multiple errors in the primary judge's calculation of the child support obligations and procedural error in accepting unsworn evidence from Ms Brown. The substantive analysis of the judgment focused upon this procedural issue of whether the primary judge accepted inadmissible evidence or improperly relied upon unsworn statements.

Held:

- Appeal allowed, only to the extent of certain technical variations, and otherwise dismissed: [101]-[102].
- The judge did not grant any indulgences that made the hearing unfair to Mr Brown, nor did she accept inadmissible evidence or improperly rely upon unsworn statements: [39]-[40].
- The fact that a litigant has made allegations in argument cannot, by itself, be taken as showing that the judge has accepted them as evidence: [20].
- Self-represented litigants are particularly likely to arrive in court without having a complete evidentiary foundation for their arguments. The judge may properly ask questions to ensure that they are afforded an opportunity to present their case, which can serve to enhance both access to justice and the efficiency of the process. However, the judge must strive to ensure that the hearing is fair to both parties. The judge may not make determinations in the absence of evidence, or act on allegations that have no evidentiary value: [25]-[26], [30]-[31], [40].

8. Torts: false imprisonment

Jalloh, R (on the application of) (Respondent) v Secretary of State for the Home Department (Appellant) **[2020] UKSC 4**

Decision date: 12 February 2020

Lady Hale JSC, Lord Kerr JSC, Lord Carnwath JSC, Lord Briggs JSC, Lord Sales JSC

A curfew was imposed upon Jalloh (the Respondent) under the *Immigration Act 1971*, following the expiration of his custodial sentence for various offences. The Respondent was required to remain at his home address between 11:00pm and 7:00am every day and to wear an electronic tag to monitor his compliance for over two years. The Respondent broadly complied with the curfew, except for several breaches mostly relating to his familial or religious obligations.

An unrelated Court of Appeal judgment in 2016 held that the Secretary of State was not empowered to impose a curfew by way of restriction under the paragraph of the Act relied upon,[1] being the same power as relied upon in Jalloh's matter. The Respondent brought judicial review proceedings claiming damages for false imprisonment, and the primary judge ordered that the curfew be lifted. The Respondent was later awarded £4,000 damages for false imprisonment. The Court of Appeal dismissed the Secretary's appeal on liability and the Respondent's cross appeal on the measure of damages.

The Secretary appealed. The issues on appeal were whether the Respondent was falsely imprisoned under the common law; and whether the meaning of false imprisonment at common law should be aligned with the concept of deprivation of liberty in the European Convention of Human Rights (ECHR).

Held:

- Appeal dismissed: [35].
- The Respondent was falsely imprisoned under the common law as he was obliged to stay where he was ordered to stay whether he wanted to do so or not, as he could not have been anywhere else during this time: [24]-[26].
- Deprivation of liberty under article 5 of the ECHR is a very different and much more nuanced concept than imprisonment at common law: [33]. Restricting imprisonment at common law to the deprivation of liberty under the ECHR would be a retrograde step: [33]. There could be imprisonment at common law without there being a deprivation of liberty: [34].

[1] *R (Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409; [2016] 4 WLR 93.