Court of Appeal
Supreme Court
Sydney

Decisions of Interest

15 February 2020 – 28 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Appeal Procedure: time for commencing appeal; Judicial Review: relief**

   ***Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14**

   Decision date: 19 February 2020

   Basten JA, Leeming JA, Emmett AJA

   Randren House owns Somerset Park on Yanco Creek in southern NSW and Mr Andrews is the occupier and manager of Somerset Park (the Applicants). The Applicants claimed that Lake Paddock, a dependent ecosystem of Yanco Creek in Somerset Park, was adversely affected by water regulated under a Minister's plan made in 2016 pursuant to the *Water Management Act 2000* (NSW).

   The Applicants brought judicial review proceedings in the Land and Environment Court claiming that the plan was invalid to the extent that it applied to them and their land (in particular Lake Paddock). The Court dismissed the claims and upheld the validity of the Minister's decision to make the plan.

   Orders dismissing the Applicants' claims were made and reasons for judgment were delivered on 15 February 2019. Costs were disputed and resolved on 16 May. A notice of intention to appeal was filed by the Applicants on 11 June 2019 and a notice of appeal was filed on 14 August 2019. The right of appeal to the Court of Appeal is conferred by the *Land and Environment Court Act 1979* (NSW), and governed by the Uniform Civil Procedure Rules. The material date is "the date on which the decision is pronounced or given". The Respondents maintained that an extension of time was required to appeal, and opposed such an extension being granted.

   Held:

   - Orders dismissing all claims were final, and the deferral of the question of costs altered neither the timing nor the character of the order dismissing the proceedings: [54].

   - If the exercise of power by the Minister when making the plan was vitiated, the plan was invalid entirely, not merely in its application to part of the land owned by the Applicants: [36]. While the difficulties concerning relief were a complete answer to the appeal, the remainder of the grounds were addressed, but they generally lacked merit: [48].

   - Leave refused to extend the time within which to appeal and the notice of appeal dismissed as incompetent: [203].

2. **Succession: execution of will**

Rodny v Weisbord **[2020] NSWCA 22**

Decision date: 27 February 2020

Meagher JA, White JA, McCallum JA

In 2016 Laurence Rodny, named as executor, obtained a grant of probate in common form of the will made by his mother, Mrs Rodny, in 1997. Mrs Rodny's daughter, Jeanette, and two of Mrs Rodny's grandchildren sought a declaration under the *Succession Act 2006* (NSW) that a document being a later unexecuted "draft" will constituted her last will. This was a typewritten draft will prepared by a solicitor, Mr Lloyd, in 2008, which was not proved to have been sent to or seen by Mrs Rodny.

The principal differences between the 1997 will and the 2008 document were that the four grandchildren were to receive a home unit property on Balfour Road instead of Laurence, and that the residuary estate was to be shared equally between Laurence and Jeanette rather than going only to Laurence.

The primary judge upheld the claim and Laurence appealed. The main issue on appeal was whether the primary judge erred in finding that, at some point in time, Mrs Rodny intended that the 2008 draft will should without more constitute her last will.

Held:

- Appeal allowed on certain grounds: [65], [95]; orders of the primary judge set aside: [98]; ordered that a grant of probate in solemn form of the will of Mrs Rodny dated 19 December 1997 be made to Laurence: [98].
- The evidence presented did not justify a conclusion that, on the balance of probabilities, Mrs Rodny intended the typewritten draft will without more to operate as her will: [63].
- The challenges to the primary judge's acceptance and rejection of certain evidence relating to whether Mrs Rodny had made statements that she had made a will did not provide a separate basis for allowing the appeal: [66].

3. Building and Construction: breach of contract

Duffy Kennedy Pty Ltd v Galileo Miranda Nominee Pty Ltd **[2020] NSWCA 25**

Decision date: 25 February 2020

White JA, Brereton JA, Barrett AJA

In 2017 Duffy Kennedy (DK) and Galileo Miranda Nominee (Galileo) entered into a contract for DK to design and construct two residential buildings for Galileo. An amount of $293,984.42 plus GST was payable by Galileo to DK on 19 March 2019. Galileo initiated an electronic payment of the amount due on 22 March 2019, which was not deposited into DK's account until 25 March 2019. This did not include interest claimed by DK in the sum of $177.20.

On 25 March 2019 DK gave notice to Galileo under s 16(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW), notifying its intention to exercise its right to suspend works as a result of the default in payment. On 28 March 2019 DK served notice of its intention to suspend construction work under s 27 of the Act. On 29 March 2019 DK was served with a 'show cause notice' requiring it to show reasonable cause why Galileo should not exercise a right to take work out of the contractor's hands. On 12 April 2019 DK provided a response to the show cause notice. On 29 April 2019 Galileo gave a 'take out notice' to DK, stating that DK had failed to show reasonable cause and that Galileo took the incomplete work out of the contractor's hands.

Galileo commenced proceedings seeking orders that DK provide certain items required to achieve 'Practical Completion' as required by the contract. The primary judge held that DK's right to suspend works expired three business days after receipt of payment. The major issues on appeal were whether DK was entitled to continue to suspend works until payment of the outstanding interest; and whether the show cause and take out notices were valid.

Held:

- Appeal dismissed: [181].
- The statutory right to suspend works arises where there has been a failure to pay a "scheduled amount", which does not include interest payable on the unpaid amount of a progress payment unless interest is included in a scheduled amount: [63].
- The right to suspend construction work under s 27(2) of the Act exists until three business days after the claimant receives payment for the amount payable: [68]. DK wrongly continued to suspend works after 28 March 2019, being the end of three business days after it received payment: [71], [106].
- The breaches relied upon in the show cause notice were established. Adequate and proper consideration was given to DK's response to the show cause notice before issuing the take out notice. Therefore, the notices were valid: [140], [178].

Other Australian intermediate appellate decisions of interest

4. **Human Rights: discrimination; Judgments: unsafe**

Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) **[2020] FCAFC 13**

Decision date: 20 February 2020

Flick J, Robertson J and Rangiah J

Lilo Hana Von Schoeler (the Appellant) brought proceedings against her former employer, Boral Timber (the First Respondent), and two former colleagues (the Second and Third Respondents). She alleged that, in 2009-10, she had been sexually harassed by the Second Respondent and subsequently victimised and discriminated against by the Third Respondent after making a complaint about the sexual harassment. She alleged that the First Respondent was vicariously liable for the conduct of its employees. The matter was heard in October 2012 and Judge Jarrett delivered judgment in November 2018.

Judge Jarrett in the Federal Circuit Court upheld the Appellant's allegation against the Second Respondent, but dismissed her claims against the First and Third Respondents. The Appellant appealed, alleging that the primary judge erred in holding that the First Respondent was not vicariously liable; that the reasons for judgment were inadequate; and that the judgment was unsafe due to the six year time period between the trial and delivery of final submissions and the judgment.

Held:

- Appeal allowed and matter remitted to the Federal Circuit Court for reconsideration in accordance with law: [115], [117].

- A declaration was made that the First Respondent was vicariously liable for the sexual harassment carried out by the Second Respondent against the Appellant: [117]. The First Respondent failed to prove that it took all reasonable steps to prevent the Second Respondent from engaging in sexual harassment, and was liable for the sexual harassment perpetrated by the Second Respondent: [88].

- Certain allegations were not addressed by the primary judge and specific requirements arising from the primary judge's delay in judgment were not met, such as the need for an explanation as to why the evidence of one witness was preferred over another: [100]. The reasons demonstrated that the primary judge was unable to satisfactorily determine the case six years after hearing the evidence. The judgment was unsafe: [113].

- The delay on the part of the primary judge in delivering his judgment brought the administration of justice into disrepute: [122].

5. **Constitutional Law: state court exercising judicial power**

***Meringnage v Interstate Enterprises Pty Ltd* [2020] VSCA 30**

Decision date: 25 February 2020

Tate JA, Niall JA and Emerton JA

In 2018, Selinda Meringnage applied to the Victorian Civil and Administrative Tribunal (VCAT) for orders under the *Equal Opportunity Act 2010* (Vic), alleging that he had been discriminated against by Interstate Enterprises (First Respondent), a recruitment agency, when applying for a job with RUAG Australia (Second Respondent). He alleged that the Second Respondent and the Department of Defence (Third Respondent) had authorised or assisted this discrimination against him.

Mr Meringnage alleged discrimination on the ground of his race and nationality, as he was informed that his nationality, Sri Lankan, was proscribed under the International Traffic in Arms Regulations, and therefore he could not be considered for the position. The Second Respondent is required to comply with these Regulations as it works with the US Department of State.

The Third Respondent is 'the Commonwealth' for the purpose of s 75(iii) of the Constitution. The Commonwealth objected to the jurisdiction of VCAT on the basis that it is not a 'court of a State' within Ch III of the Constitution and cannot exercise judicial power in a matter in which the Commonwealth is a party. The President of VCAT gave consent to referring questions of law to the Victorian Court of Appeal. The questions were whether VCAT is a 'court of a State' within the meaning of s 77(iii) of the Constitution, and if not, whether the grant of relief would involve the exercise of judicial power by VCAT, and whether VCAT has authority to decide the application against the Commonwealth.

Held:

- VCAT is not a 'court of a State', and is therefore not capable of exercising judicial power in a matter in which the Commonwealth is a party: [149].
- The grant of relief in these proceedings would involve the exercise of judicial power by VCAT: [149]. This is confirmed by the range and character of the orders that VCAT can make and their unilateral enforceability in accordance with ordinary curial processes: [101]-[108].
- VCAT did not have the authority to decide the application against the Commonwealth: [149]. The complaint raised and remedies sought required the exercise of judicial power by VCAT. VCAT lacks this power as it does not meet the requirements of being a 'court of a State': [148].

Asia Pacific decisions of interest

6. Contract: breach, terms; Trusts: breach

Quoine Pte Ltd v B2C2 Ltd **[2020] SGCA(I) 02**

Decision date: 24 February 2020

Menon CJ, Leong JA, Prakash JA, French IJ, Mance IJ

Quoine operated a cryptocurrency exchange platform known as QUOINExchange (the Platform). B2C2 traded on the Platform using algorithmic trading software which was deterministic, always producing the same output given the same input. Trading on the Platform was concluded without any direct human involvement, save that involved in the creation of the algorithmic processes.

In 2017, B2C2 and other users of the Platform traded cryptocurrencies at 250 times the market rate, and the transactions were automatically settled by the Platform. This situation had resulted from Quoine's failure to make necessary changes to operating systems on the Platform. When Quoine became aware of the transactions, it considered the rates to be highly abnormal and unilaterally cancelled the trades. B2C2 commenced proceedings against Quoine for breach of contract and/or trust. The primary judge rejected Quoine's defences, including that the contracts were void or voidable for unilateral mistake, and allowed B2C2's claims for breach of contract and trust.

The issues on appeal to the Singapore International Commercial Court were how the doctrine of unilateral mistake should operate where contracts were entered into pursuant to deterministic algorithmic programs that had acted exactly as they had been programmed to act; and whether cryptocurrency may be regarded as a species of property capable of attracting trust obligations.

Held:

- Appeal dismissed on the breach of contract claim (Mance IJ dissenting); appeal allowed on the breach of trust claim: [150].
- The Trading Contracts were valid and enforceable, and therefore B2C2 was contractually entitled to the proceeds of the transactions from Quoine: [149].
- There were no terms in the contractual documents which allowed Quoine to unilaterally cancel the transactions: [59]-[62]; nor was there an operative mistake by the other users which vitiated the contracts: [126]-[128]. B2C2 was credited with cryptocurrency pursuant to valid contracts, and was therefore not unjustly enriched: [133]-[136].
- No trust arose over the cryptocurrency in B2C2's account, even assuming that cryptocurrency could be the subject of a trust: [145]-[149].

7. **Practice and Procedure: claim against the State**

Nikint Investment Ltd v Niganu **[2020] PGSC 6**

Decision date: 21 February 2020

Yagi J, Kariko J and Koeget J

Thomas Niganu was the registered proprietor of certain land in Port Moresby. In 2009, he lodged an application with the Department of Lands & Physical Planning seeking rezoning of vacant State land adjoining his property so that the area of his property could be extended. He claimed that Department employees plagiarised his documents and lodged their own applications for rezoning and sub-division of the same vacant land, which were approved. Two of the new allotments were then sold to third parties. Proceedings were brought against six Department employees; the transferees of the property; the surveyor involved; the current and former Registrar of Titles; the former Minister for Lands & Physical Planning; and the State, on the basis of vicarious liability.

The State sought dismissal of the proceedings for lack of notice under the *Claims Act*. The purpose of this notice is "to protect the State or to put the State on notice that there is a likelihood of a claim being made against it… it allows the State the opportunity to investigate the claim and sort out its merits and so that claims against the State are not delayed and prolonged." The trial judge acknowledged he was obliged to dismiss the proceedings against the State, but not against the other Defendants, including those sued in their public capacity.

The Appellant brought an appeal in the Supreme Court of Papua New Guinea, alleging inter alia that the judge erred in not dismissing the entire proceedings for Niganu's failure to give proper notice; and in separating the State from its employees and functionaries.

Held:

- Appeal upheld, orders quashed and set aside, proceedings dismissed: [31]-[33].
- Once court proceedings are found to be incompetent, all of the claims or causes of action contained in the originating document cannot stand, not simply the claim against the State: [21]. Failure to provide notice under the *Claims Act* renders the proceedings void from the beginning and the entire proceedings were incompetent: [24].
- A suit against the State is normally founded on vicarious liability, and usually includes servants, agents and officials of the State as defendants whose actions are deemed to render the State liable; or the claims arise out of an alleged legal relationship between the defendant and the State, directly or indirectly through the conduct of servants, agents or officials of the State, making the claims "intertwined and not easily severable": [20].

Other international decision of interest

8. US Constitutional Law; Rights of Action

***Hernandez v. Mesa,* 589 US ___ (2020)**

Decision date: 25 February 2020

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

US Border Patrol Agent Jesus Mesa (the Respondent) shot and killed Sergio Adrián Hernández Güereca, a 15-year-old Mexican national, in an incident on the border of Texas and Mexico. Hernández's parents (the Appellants) brought a claim for damages under *Bivens*,[1] alleging that Mesa violated Hernández's Fourth and Fifth US Constitutional Amendment rights.

The Respondent's motion to dismiss was granted by the District Court, and the Court of Appeals for the Fifth Circuit twice affirmed this dismissal. That Court held that Hernández was not entitled to Fourth Amendment protection because he was a Mexican citizen with no 'significant voluntary connection' to the US and was on Mexican soil; and the Respondent was entitled to qualified immunity on the Fifth Amendment claim. The Court also refused to recognise a *Bivens* claim for a cross-border shooting as this would involve extending *Bivens* claims to a "new context" or a "new category of defendants".

On appeal to the US Supreme Court, the Appellants contended that their claims did not involve a new context because *Bivens* involved a claim under the same Constitutional amendments.

Held:

- The judgment of the Court of Appeals for the Fifth Circuit was affirmed (Ginsburg, Breyer, Sotomayor and Kagan JJ dissenting): p. 20.
- It was "glaringly obvious" that the Appellants' claims involved a new context compared to the accepted contexts giving rise to a *Bivens* claim, being unconstitutional arrest and search; sex discrimination; and inadequate medical treatment: p. 8.
- The Court by majority refused to extend *Bivens*, as a cross-border shooting claim has foreign relations and national security implications: pp. 12-14; and Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad: pp. 14-18.

[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) held that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorised such a claim: p. 4.