Court of Appeal
Supreme Court
Sydney

Decisions of Interest

11 April 2020 – 24 April 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

Administrative Law: vexatious proceedings

Klewer v Director of Public Prosecutions (NSW) (No 2) **[2020] NSWCA 69**

Decision date: 20 April 2020

Bell P, Basten JA, Simpson AJA

In 2018 Patricia Klewer was convicted of an offence by the Local Court of NSW and a Community Correction Order of 8 months was imposed. Ms Klewer filed a Notice of Appeal from her conviction in the District Court of NSW. The District Court proceedings were dismissed on the sole basis that Ms Klewer was the subject of a vexatious proceedings order made in 2010 and required leave of the Supreme Court to institute any proceedings, which she did not have.

In 2019 Ms Klewer filed a summons seeking leave to institute proceedings in the Court of Appeal and for an extension of time to bring judicial review proceedings relating to her Local Court conviction.

The issues in the proceedings were whether Ms Klewer was required to obtain leave (a) to pursue her appeal against her conviction and sentence to the District Court and (b) to institute proceedings for judicial review in the Court of Appeal.

Held: Setting aside the decision of the District Court and remitting the matter to the District Court for the determination of the appeal: [47].

- Ms Klewer was not required to obtain leave to pursue her appeal against her conviction and sentence in the Local Court by reason of the vexatious proceedings order made against Ms Klewer in 2010: [35]. An appeal to the District Court from a conviction recorded and penalty imposed by the Local Court is appropriately characterised as a "criminal proceeding", for the purposes of s 8(9) of the *Vexatious Proceedings Act 2008* (NSW). This falls within an exception to the restrictions imposed upon vexatious litigants: [25]-[29], [104]-[110].
- The purpose of the *Vexatious Proceedings Act* would not be furthered by requiring a person the subject of a vexatious proceedings order to first have to obtain leave from an authorised court in order to appeal from a conviction or sentence. This would substantially qualify the important right of appeal conferred on a person convicted of a criminal offence: [30].
- By majority, Ms Klewer was required to obtain leave to institute proceedings in the Court of Appeal for judicial review of the District Court's dismissal of her proceedings: [43]. This was because they were not criminal proceedings, even though they sought judicial review of a decision that did have that character: [39] (Basten JA dissenting).

Property: easements; Practice and Procedure

Studholme v Rawson **[2020] NSWCA 76**

Decision date: 24 April 2020

Bell P, Basten JA, Gleeson JA

Elizabeth Studholme owns a home in Middle Cove. On the northern boundary of her property there is a laneway which permits rear access to five properties on the southern side and six properties on the northern side. The original subdivision included the laneway as a right of way six feet in width, burdening the title of the land to the north of the laneway. A survey undertaken noted that the strip of land actually used for access to certain lots was nine feet.

In 2017 Ms Studholme gave notice to the owners of properties along the laneway that she intended to build a fence on the northern boundary which would effectively reduce the laneway to the six feet right of way, and would have prevented most vehicular access along the laneway. Nine of the affected residents sought and obtained an interlocutory injunction and sought the imposition of an easement. Ms Studholme consented to an order imposing an easement extending the right of way by 800mm, providing a right of way just under 2.7m wide. In 2018 the primary judge granted the easement, assessed compensation payable to Ms Studholme and imposed conditions requiring the applicants to undertake certain drainage works on her land.

Ms Studholme brought an appeal, seeking inter alia to set aside the judgment on the basis of bias. Prominent issues on appeal were whether to address the question of bias first, and whether the primary judge was biased.

Held: Allowing the appeal, setting aside the orders and remitting the matter: [199].

- Questions of bias should be addressed first, because the necessary result is a retrial, removing the basis upon which an appellate court could vary orders made below on appeal by way of rehearing if the trial had wholly miscarried: [49].
- The judgment included legal errors and a misunderstanding of the issues, but did not indicate a pre-judgment or partiality that would lead to a finding of bias: [85]-[86]. There was no actual or apprehended bias: [87].
- Observations as to the importance of open justice and the inappropriateness of the primary judge conducting an “informal directions hearing” in chambers without the parties on transcript: [2]-[29], [172]-[175].

Negligence: personal injury; Evidence: expert

***Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65**

Decision date: 21 April 2020

Leeming JA, Payne JA, White JA

In 2012 Kerrie Menz was seriously injured when her horse fell while warming up before competition at the Wagga Wagga Show. The horse was startled by a very loud noise made by children playing with a metal sign on a nearby fence in the warm up area. The Show Society accepted that it had the care, control and management of the Show. Ms Menz brought a claim in negligence and pursuant to a statutory guarantee imposed by the Australian Consumer Law. Ms Menz alleged that there was a failure on the part of the Show Society to have supervisors to control the children in and around the warm-up area. Judgment was entered against her.

Ms Menz brought an appeal. Ms Menz accepted that she had been engaged in a "recreational activity", but contended that the risk of harm was not an obvious one. The issues on appeal were whether the primary judge erred in characterising the risk of harm as an obvious risk within the meaning of s 5F of the *Civil Liability Act 2002* (NSW); in finding that Ms Menz was engaged in a dangerous recreational activity within the meaning of s 5L of the *Civil Liability Act*; in finding that the Show Society had not breached its duty of care; and in excluding a large part of the expert report of Ms Smyth.

Held: Appeal dismissed: [129].

- The Court's determination of the obvious risk of harm issue required a correct identification of the risk of harm. While the precise mechanism of Ms Menz's horse being spooked may not have been obvious, the fact that her horse could have been spooked by some stimulus at any time was obvious: [78]. The harm suffered by Ms Menz was appropriately characterised as the materialisation of the obvious risk of her horse being spooked by some stimulus: [79].
- Ms Smyth's evidence was rightly excluded, as her report did not explain how her opinions derived from her specialised knowledge; nor did it provide an explanation of the reasoning process underlying her conclusions that marshals should have been present, children should have been excluded, or prevented from making noise: [105].
- Ms Menz fell far short of establishing prospectively that a reasonable person in the position of the Show Society would have taken the submitted precautions: [114]. The claim in negligence was correctly dismissed: [128].

Civil Proceedings: representative proceedings

Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia; Whisson v Subaru (Aust) Pty Ltd; Kularathne v Honda Australia Pty Ltd; Brewster v BMW Australia Ltd; Bond v Nissan Motor Co (Australia) Pty Ltd; Coates v Mazda Australia Pty Ltd; Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia **[2020] NSWCA 66**

Decision date: 22 April 2020

Bell P, Macfarlan JA, Leeming JA, Payne JA, Emmett AJA

Seven separate representative proceedings concerned with allegedly defective airbags are being case managed together in the Equity Division of the Supreme Court. In February 2020 the primary judge made orders in the proceedings which included order 16, which was self-described as one effecting "class closure". It would only have effect in circumstances where an "in principle" settlement was achieved prior to the commencement of the trial on the common issues. In that event, and subject also to court approval of the settlement, the causes of action held by Group Members who had neither registered to participate in a mediation nor opted out of the group would be extinguished by the order.

Order 16 was challenged on appeal. The appellants submitted that the Court lacked power to make order 16 or, in the alternative, in the exercise of discretion the order should not have been made. The principal issue on appeal was whether order 16 was within the power granted by Part 10 s 183 of the *Civil Procedure Act 2005* (NSW), and if it was, whether the discretion to make order 16 miscarried.

Held: Granting leave to appeal and allowing the appeal: [131].

- The clear purpose and effect of order 16 was to effect a contingent extinguishment of Group Members' rights of action against the respondents: [59].
- Order 16 was beyond the power conferred by s 183 of the *Civil Procedure Act*: [114]. The scheme of Part 10 is inconsistent with an interpretation of s 183 which empowers the Court to make orders for pre-settlement class closure: [119].
- The decision of the Full Court of the Federal Court in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2017) 252 FCR 1; [2017] FCAFC 98 was inconsistent with *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 94 ALJR 51 and was not followed: [99].
- If it was within power to make order 16, the discretion to make the order miscarried: [124], [130]. There was no evidence that a settlement at mediation could "only" be effective if order 16 was made: [128]. Order 16, by contingently extinguishing some Group Members' rights upon a settlement, prioritised the interests of defendants over a section of Group Members: [129].

Australian Intermediate Appellate Decisions of Interest

Disciplinary Proceedings: re-admission

Bax v Legal Practitioners Admission Board **[2020] QCA 71**

Decision date: 15 April 2020

Morrison JA, McMurdo JA, Mullins AJA

Craig Bax was a solicitor who, in 1993, fraudulently assisted his client facing bankruptcy, misleading the client's creditors by backdating a mortgage. Mr Bax was found to be dishonest about his explanations for his conduct. Mr Bax was subsequently struck off the roll of solicitors in 1998.

In 2018 Mr Bax sought re-admission as a solicitor and applied to the Legal Practitioners Admission Board for a declaration under s 32(3)(c) of the *Legal Profession Act 2007* (Qld) that the suitability matters relevant to him, specifically his being struck off the roll, would not, without more, adversely affect the Board's assessment of his suitability for admission.

In 2019 the Board informed Mr Bax that it had resolved to refuse to make the declaration. Mr Bax brought an appeal challenging this refusal, arguing that the evidence he provided in support of his application demonstrated that the Board should have been satisfied that the conduct that resulted in his being struck off would no longer, without more, adversely affect the Board's assessment as to whether Mr Bax was a fit and proper person for re-admission. The issue before the Court was whether the Board's refusal to make the declaration was in error.

Held: Appeal dismissed: [53].

- It is not appropriate for an applicant for re-admission to seek to deal with the effect of the misconduct that resulted in the striking off by way of an application under s 32. It would be an exceptional case for the misconduct that resulted in a striking off not to remain relevant on an application for re-admission: [50].
- Mr Bax cannot show that the Board's refusal to make the declaration under s 32(2) was in error. However, that did not preclude Mr Bax from applying for re-admission and making a full and frank disclosure in relation to all matters that may have a bearing on his suitability for re-admission as a legal practitioner: [52].

Native Title: overlapping claims

***Drury on behalf of the Nanda People v State of Western Australia* [2020] FCAFC 69**

Decision date: 21 April 2020

Mortimer J, White J and Colvin J

Two Indigenous groups, the Malgana People and the Nanda People, each claimed that by separate and distinct laws and customs they had a connection to the same land near the town of Shark Bay in Western Australia. In 2019 the Federal Court made, by consent, a determination of native title over two areas, declaring that both the Malgana People and the Nanda People had non-exclusive native title over the Shared Area, representing overlapping native title interests.

Both groups sought orders that their registered native title body corporates held their respective native title rights and interests in separate trusts. The primary judge was concerned that the Court may not have the power to make an order in the terms sought by the parties with respect to the Shared Area, and reserved two questions for consideration by the Full Court.

The questions were: 1) whether, in an instance where the Court has determined that there are overlapping native titles, the Court has power to determine that more than one prescribed body corporate (PBC) is to perform the functions given to PBCs; and 2) if so, whether the Court has a discretion to determine that there should be only one PBC for the area where each group nominates a separate PBC.

Held:

- The court **does** have the power to determine that more than one PBC is to perform their prescribed functions but only where there has been an overall determination of the existence of separate and distinct native titles over the same land (White J dissenting). The Court **does not** have a discretion to determine that there should be only one PBC for the area where each group nominates a separate PBC (White J not expressing an opinion): [7].
- Section 55 of the *Native Title Act 1993* (Cth) refers only to the overall determination that native title exists, not the extent of the native title rights and interests the subject of the further determination: [27]. The identification of particular rights and interests that derive from that native title that may be enjoyed represents a further determination: [49].
- The nature of native title would not be given proper recognition if there could be two PBCs for one native title, as the nature of native title recognises a single body of laws and customs of a society in respect of the whole area of the native title: [75]. Where the Court has found that the native title for the land comprises rights and interests that are possessed under distinct traditional laws and customs that give rise to separate sources of connection to the same land or waters, the common law holders can each nominate a separate PBC: [76].

Asia Pacific Decision of Interest

Civil Procedure: strike out application

Bumper East Limited, Aspial Investment Limited v. Mayer Corporation Development International Limited **[2020] HKCFA 11**

Decision date: 16 April 2020

Ma CJ, Justice Fok PJ and Justice Cheung PJ

In 2012 Bumper East Ltd and Aspial Investment Ltd commenced an action against Mayer Corporation Development International Ltd (Mayer) claiming to be the owners of 200 million shares in a company called Mayer Holdings. Mayer commenced proceedings against a number of defendants alleging a breach of fiduciary duty in relation to these shares. The key issue for resolution was who was entitled to the shares. There was a dispute as to whether oral agreements had been reached which authorised the sale of the shares, which were then sold to Bumper and Aspial. Mayer argued that no such oral agreements existed and there was no authorisation of the sale, relying upon a signed Agreement, the authenticity of which was disputed. The primary judge held that the oral agreements had been made, rejecting Mayer's arguments, and that the Agreement was "unreliable" and "on the balance of probability, a fake".

In 2013 Mayer brought an appeal to the Hong Kong Court of Appeal which was dismissed. Mayer sought to introduce new evidence in the form of expert reports on handwriting to demonstrate the authenticity of the Agreement, but this was refused as the condition that the evidence could not have been obtained in the court below was not met.

In 2016 Mayer brought proceedings seeking a declaration that the judgment obtained was procured by fraud and an order to set it aside. It was argued that the responding parties knew at all material times that their case was dishonest and that perjured evidence had been called. At first instance, the 2016 proceedings were struck out but this was reversed on appeal. Bumper and Aspial applied for leave to appeal to the Hong Kong Court of Final Appeal.

Held: Refusing leave to appeal: [15].

- The equitable jurisdiction to set aside judgments on the ground of fraud requires cogent evidence of the fraud: [11].
- Only in plain and obvious cases will the Court strike out an action. Where an application to strike out raises important questions of law and principle, it should only be determined where the factual basis for the determination of the questions of law is certain. Where the facts are in dispute or are yet to be determined, this is often a complete bar to a strike out application: [14].

International Decision of Interest

Criminal Procedure: jury voting

***Ramos v. Louisiana* 590 U.S. __ (2020)**

Decision date: 20 April 2020

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

Evangelisto Ramos was tried by a jury in relation to charges of serious crime in Louisiana. Ten jury members found Mr Ramos guilty beyond reasonable doubt, and two voted to acquit Mr Ramos. In all State and Federal courts in the US except Louisiana and Oregon, a unanimous jury verdict is required to convict. However, Louisiana and Oregon allow 10-to-2 verdicts. Therefore Mr Ramos did not receive a mistrial as would have occurred outside of these exceptions, and he was sentenced to life in prison without the possibility of parole. Mr Ramos brought an appeal, where his conviction and sentence were affirmed. Mr Ramos brought an appeal in the US Supreme Court.

The Sixth Amendment to the US Constitution provides for the right to a trial "by an impartial jury". The question before the Supreme Court was whether the Sixth Amendment, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offence. This issue had been addressed by the Supreme Court in *Apodaca* v. *Oregon*[1] and *Johnson* v. *Louisiana*[2] where it was held that unanimity's costs outweigh its benefits, and therefore majority verdicts were constitutional. The Supreme Court in this case had to determine whether to overturn this precedent.

Held: By majority, the affirmation of the conviction and sentence was reversed: p. 26.

- The Sixth Amendment required unanimity: p. 4.
- The Sixth Amendment applies to state and federal criminal trials equally. Incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government: p. 7.
- The *stare decisis* argument did not prevent overturning *Apodaca*: p. 26.
- The Court highlighted the historical reasons behind allowing non-unanimous verdicts in Louisiana, including the desire to undermine African-American participation on juries: p. 2.

[1] 406 U.S. 404.
[2] 406 U.S. 356.