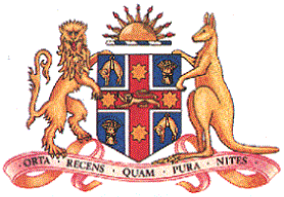

Court of Appeal
Supreme Court
Sydney

Decisions of Interest

6 November 2023 – 12 February 2024

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

Civil Procedure: Permanent Stay of Proceedings

***CM v Trustees of the Roman Catholic Church for the Diocese of Armidale* [2023] NSWCA 313**

Decision date: 15 December 2023

Leeming, Payne JJA and Harrison CJ at CL

On 23 August 2023, Cavanagh J made an order under s 67 of the *Civil Procedure Act* (NSW) permanently staying claims of sexual abuse made by two brothers, CM and EM, . The alleged abuse was committed some 47 years ago by Father David Joseph Perrett, for whose actions the Bishop of Armidale, and thus the Diocese, was vicariously liable. The brothers claimed that Father Perret, then a parish priest in the Diocese of Armidale, sexually abused both CM and EM on separate occasions during a camping trip he organised December 1976.

The primary judge found that, despite the abolition of the limitation period in respect of these causes of action in 2016, there could here be no fair trial. The defendant was unable to obtain instructions from the relevant parties, and therefore could not meaningfully engage on the issue of liability.

The application for a permanent stay was heard, and granted, even though (at the time) the High Court had reserved its judgment in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 (GLJ). That case was the first occasion for the High Court to consider the circumstances in which an organisation (such as the defendant in these proceedings) has been held vicariously liable for sexual abuse by a person under its control, such as a priest.

Held: granting leave to appeal

- GLJ meaningfully changed the principles applicable to the decision to grant a permanent stay of proceedings in this context. The "new world" introduced by s 6A(1) of the *Limitation Act 1969* (NSW), inserted by the *Limitation Amendment (Child Abuse) Act 2016* (NSW), created a new normative structure in which the "burdensome effect" on the defendant, or the probable impoverishment of evidence, occasioned by the effluxion of time is no longer to be regarded as "exceptional" for the purposes of grounding a permanent stay of child sexual abuse proceedings (at least in institutional settings): [74] – [75], [80] – [81], [83] – [86].

Equity: Set-Off

***Mao v Bao* [2023] NSWCA 278**

Decision date: 21 November 2023

Ward ACJ, White and Mitchelmore JJA

On 27 May 2004, Mr Mao purchased a property in Vaucluse for $3.8 million in his own name on trust for the benefit of Mr Bao. $2.275 million was drawn down by Mr Mao under a NAB loan facility to partially meet the purchase price. The majority of the remainder was paid by Mr Bao, through Mr Mao, on a remittance basis. In October 2007 and March 2008, unbeknownst to Mr Bao, the NAB loan facility was increased to $3.44 million, and an additional $1.59 million was drawn down from the facility by Mr Mao for his own personal benefit.

Then, on 11 April 2011, Mr Mao provided a loan of ¥11 million (at 2%) to Mr Bao to be repaid by 1 August 2011. By the end of October 2011, Mr Bao had stopped providing funds to meet the expenses of the Vaucluse property and failed to repay the loan provided by Mr Mao. The mortgage subsequently went into default and NAB sold the Vaucluse property as a mortgagee in possession for $3.26 million, leaving a significant shortfall. No sale proceeds went to Mr Bao.

Mr Mao commenced proceedings seeking repayment of the ¥11 million loan; Mr Bao cross-claimed in respect of the unauthorised drawdowns. Both claims (albeit partially in respect of the cross-claim) succeeded. The primary judge found that the requirements for an equitable set-off were met, and should occur as at the date of the sale of the Vaucluse Property. Judgement was entered in favour of Mr Mao for $57,611.

Held: allowing the appeal and dismissing the cross-appeal

- The applicable test for equitable set-off requires that there be such a connection between the respective claims that one impeaches the other, such that it would be unconscionable for one party to enforce its legal right without accepting the other's countervailing right. The interdependence between the two liabilities in this instance was not established. Intuitive unfairness alone is insufficient to ground an equitable set-off: [55] – [59], [184] – [189], [246].

- The *Brickenden* principle has narrow application (if at all) in Australia, and is inapplicable to the question of equitable set-off. Mr Mao could not rely on the counterfactual as to what Mr Bao *would have done* had Mr Mao not failed to account for the unauthorised borrowings: [172], [174], [177], [182].

- In dissent, White JA found that the direct connection between Mao's accrual of a high rate of interest on the loan provided to Mr Bao, and Mr Mao's failure to account for the drawdowns, impeached Mr Mao's entitlement to Mr Mao's continued accrual of interest on the loan, such that equitable set-off was established: [223] – [224].

Limitation of Actions: overpaid rates

***Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2023] NSWCA 275**

Decision date: 21 November 2023

Leeming, Payne and Mitchelmore JJA

Mangoola owns land which had been categorised for rating purposes as farmland. In August 2017, the Council declared that the land was to be categorised as mining land, with effect from 1 July 2016. Mangoola successfully challenged that decision and Mangoola's land was recategorised as farmland with retrospective effect to 1 July 2016. In protest, Mangoola continued to overpay rates between September 2017 until May 2021. Mangoola, relevantly, commenced proceedings in the Land and Environment Court, seeking a refund or a credit pursuant to s 527 of the *Local Government Act 1993* (NSW), which provides that a council must make "an appropriate adjustment of rates paid or payable by a rateable person following a change of category of land". The primary judge held that s 527 of the *Local Government Act* did not entitle Mangoola to either a refund of overpaid rates or a credit against future rates notices. Mangoola appealed on the basis that it had a statutory claim under s 527 of the *Local Government Act*, and that that a statutory claim of that kind was not subject to the limitation period under s 2(1) of the *Recovery of Imposts Act 1963* (NSW).

Held: dismissing the appeal

- A consideration of text, context and purpose makes clear that s 2(1) of the *Recovery of Imposts Act* applies to claims under statute as well as claims at common law. It is difficult to reconcile the width of the Act and its purpose of safeguarding revenue with Mangoola's proposal to construe narrowly the phrase "recoverable on restitutionary grounds" (one of the operative preconditions in s 2(1)): [84]-[88]. While the extrinsic materials showed that a purpose of the various amendments to the *Recovery of Imposts Act* was to safeguard against common law claims, it did not follow that the Act was to be construed as being confined to such claims: [89].

- There are difficulties in reading "recoverable on restitutionary grounds" as involving a distinction between common law and statutory claims. Rather, the words invoke a dichotomy between payments sought to be recovered because they were overpaid, and payments sought to be recovered in order to compensate for loss caused by breach of a contractual, tortious or statutory duty: [80]-[83]. Proceedings seeking a credit were properly characterised as proceedings to recover tax. To read "recover" as requiring a payment of money would lead to improbable consequences, and would frustrate the purposes of the Act: [99]-[101].

- Although it was unnecessary to resolve whether Mangoola enjoyed a right under the *Local Government Act* to a refund or credit of overpaid rates, s 527 considered alone did not confer such a right: [105]-[111].

Equity: proprietary estoppel

***Kramer v Stone* [2023] NSWCA 270**

Decision date: 10 November 2023

Ward P, Leeming and Kirk JJA

The late Dame Kramer owned a property after the death of her husband, Dr Kramer. Under Dame Kramer's will, the property was left to one of the couple's daughters. Mr Stone had farmed the property under an oral share farming agreement since 1975. He claimed he was entitled to the property on the basis of a representation allegedly made to him by Dame Kramer that he would receive the Property on her death, following similar earlier representations allegedly made to him by Dr Kramer. Mr Stone claimed that he relied on the alleged representation to his detriment by undertaking additional tasks on the property and in continuing with the share farming agreement when he could have terminated the agreement and pursued more remunerative work elsewhere. The primary judge found for Mr Stone, on the basis of a proprietary estoppel.

Held: dismissing the appeal

- In a claim for estoppel by encouragement, the element of actual or constructive knowledge need not be made out, given the act of encouragement in and of itself is sufficient to enliven the representor's conscience (and, separately, constitutes the element of inducement): [287]; [291]. Where the assumption has been brought about by the defendant's positive conduct, there is no reason in principle why some further knowledge on the part of the defendant should be required: [294].

- In relation to estoppel by encouragement, the question of knowledge of detrimental reliance, including, in an appropriate case, constructive knowledge, goes to the question whether it would be unconscionable for the estate of the deceased to be permitted to resile from the representation: [201]. However, knowledge of the acts undertaken in detrimental reliance is not in itself essential in a case of estoppel by encouragement, because the requirement of unconscionable conduct is satisfied by the positive act of encouragement (where there has in fact been reasonable reliance on the representation such that there would be detriment if the representor were permitted to resile from the representation): [200].

- In relation to estoppel by acquiescence, knowledge of the acts in reliance on the representation (or assumed state of affairs) is a necessary element, since it is the knowledge and standing by that engages the conscience of the party sought to be estopped: [199].

Australian Intermediate Appellate Decisions of Interest

Administrative Law: judicial review; error of law

***Armitage v Parole Board Queensland* [2023] QCA 239**

Decision date: 28 November 2023

Mullins P, Flanagan and Boddice JJA

Mr Armitage was resentenced to nine years six months imprisonment for offences of manslaughter and interference with a corpse. 80 to 85% of the deceased's skeletal remains were recovered. Mr Armitage applied to Parole Board Queensland ("the Board") for a parole order. He was eligible for parole on 9 May 2022. The Board made a no cooperation declaration under s 175L of the *Corrective Services Act 2006* (Qld) ("CSA"). Such a declaration may be made in relation to a no body-no parole prisoner as defined by s 175C. The effect of this declaration is that unless the Board decides to "end" it, Mr Armitage is precluded from applying for, and being granted, parole. The Board found that parts of the deceased's remains have not been located because of "the act of dealing with the victim's body and/or the omission to properly bury it and so protect it from the elements and animals".

Held: allowing the appeal

- Considering the legislative scheme as a whole, its purpose, being to recover for the victim's family all if the victim's body/remains, and 14A of the *Acts Interpretation Act 1954* (Qld), s 175C(b) should be construed so as to encourage and elicit cooperation from the prisoner which might assist in the possible locating and recovery of the whole of the victim's body or remains: [28]-[35].
- The "remains" of a person is distinct from and something less than the person's body. In circumstances where not all of the victim's body has been located, but all of their remains have, the provision recognises that the person is not a no body-no parole prisoner because all that is left of the body (that is, all of the "remains") has been "located": [36]-[38].
- The correct interpretation of s 175C(b)(ii) is that when any missing part of the body or remains of a victim no longer exist and the balance has been located, then, on the ordinary meaning of the section, the "remains" have been located. In such circumstances, it cannot be said that the remains "have not been located": [39]-[43]. Therefore, Mr Armitage should not have been declared to be a no-body-no parole prisoner: [43]-[44].

Asia Pacific Decision of Interest

Charities

Better Public Media Trust v Attorney-General **[2023] NZCA 553**

Decision date: 9 November 2023

Court: Court of Appeal of New Zealand

Courtney, Collins and Katz JJ

Better Public Media Trust ("the Trust") applied to be registered as a charity under the *Charities Act 2005* (NZ) ("the Act"). The Trust's purpose is to advance public media. Its application was declined by the Charities Registration Board ("the Board"), and an appeal from the Board's decision was dismissed by the High Court. The Trust appeals against the High Court judgment. The key issue on appeal was whether the Trustee qualified for registration as a charity under the fourth head of charitable purpose set out in s 5(1) of the Act, being that its purposes were "beneficial to the community".

Held: allowing the appeal

- The natural and ordinary meaning of "public media" in cl 2.4 of the trust deed is directed towards media that is owned by public entities and not commercial organisations. The references in the definition of public media to "non-profit, publicly owned ... non-commercial media" are the antithesis of privately owned commercially driven media organisations. This meaning of "public media" is consistent with the campaigns that preceded the creation of the Trust which focused upon the advancement of publicly owned media platforms: [76].

- The Trust's role in advocating for publicly funded media does not necessarily mean that the Trust lacks a charitable purpose: [82]. Similarly, even if other interests are disadvantaged through the advancement of public media, this consequence should not necessarily preclude an advocacy trust from qualifying under the fourth head of charitable purposes: [83]. As stated in its trust deed and by reference to its activities, the Trust's objectives are to enhance democratic and social values through the advancement of public media. These purposes are capable of being charitable: [84]-[90].

- The Trust does not engage in one sided promotion of personally held views, nor does it disseminate information that only reflects the disseminator's views. Therefore, the means and manner by which the Trust achieves its advocacy purpose suggests that its purposes are capable of being beneficial to the community: [91]-[97].

- The Trust's aims may be likened to charitable purposes of improving the physical environment, promoting racial harmony and social cohesion, promoting democracy and natural justice: [98]-[106].

International Decision of Interest

Extradition

Popoviciu v Curtea De Apel Bucharest (Romania) (Rev 1) **[2023] UKSC 39**

Decision date: 8 November 2023

Court: United Kingdom Supreme Court

Lord Hodge, Lord Lloyd-Jones, Lord Kitchin, Lord Hamblen, Lord Stephens

In 2016, Mr Popoviciu was convicted in the Bucharest Court of Appeal of two offences and was sentenced to seven years' imprisonment. In 2017, a European Arrest Warrant was issued by the Bucharest Court of Appeal seeking the return of Mr Popoviciu to serve his sentence. He was arrested in the UK and in 2019, the Westminster Magistrates' Court ordered his extradition. Mr Popoviciu appealed to the High Court and brought evidence alleging that there was an improper and corrupt relationship between Judge Tudoran who had presided at Mr Popoviciu's criminal trial, and a key prosecution witness. The High Court held that there were substantial grounds for believing there was a real risk that Mr Popoviciu's trial was so flagrantly unfair that his right to liberty art Article 5 of the European Convention on Human Rights ("the Convention") would be violated if he were returned to Romania.

Held: dismissing the appeal

- As the European Arrest Warrant had been withdrawn following the hearing of the appeal, the Supreme Court dismissed the appeal by the Romanian authorities, in accordance with s 43(4) of the *Extradition Act 2003* (UK): [48].
- The High Court applied the wrong standard of proof. Where a requested person alleges that they have been convicted in a trial that was so flagrantly unfair that it deprived them of the essence of their right to a fair trial under art 6, and that accordingly extradition would violate their right to liberty under art 5, they have to prove on the balance of probabilities that the trial was flagrantly unfair, subject to an exception for cases involving evidence obtained by torture: [78].
- When the matter was first before the High Court, the Romanian authorities relied upon evidence stating that even if the undisclosed relationship between Judge Tudoran and the prosecution witness were proven, it would not constitute a reason to review a final decision under Romanian legislation: [30]. This raised the issue of whether there would be an effective remedy for Mr Popoviciu to challenge the lawfulness of his detention in Romania if he were extradited, as required by Article 5(4) of the Convention: [104]-[105]. Each party's expert disagreed about whether there was an effective remedy under Romanian law that would allow Mr Popoviciu to challenge his conviction and the fairness of the criminal proceedings. If the European Arrest Warrant had not been withdrawn, the case would have been remitted to the High Court to decide this issue: [108].