Court of Appeal
Supreme Court
Sydney

Decisions of Interest

18 July 2020 – 31 July 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

Negligence: dangerous recreational activity, obvious risk

***Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152**

Decision date: 23 July 2020

Basten JA, Leeming JA, Payne JA, McCallum JA, Simpson AJA

Hari Singh was a professional jockey. In August 2012 he was seriously injured when his horse fell during a race meeting at the Tamworth Racecourse. The fall was caused by Glenn Lynch riding his horse so as to push the horse alongside him into the path of Mr Singh's horse. Mr Singh sued Mr Lynch in negligence. Judgment was given for Mr Lynch as the judge found that Mr Singh's injury was the result of the materialisation of an obvious risk which occurred in the course of a dangerous recreational activity, protecting Mr Lynch from liability under s 5L of the *Civil Liability Act 2002* (NSW). Mr Singh brought an appeal, arguing that dangerous riding in breach of the rules of racing did not constitute an "obvious risk" and his involvement in the race as a professional jockey did not constitute participation in a "dangerous recreational activity". He challenged *Goode v Angland* (2017) 96 NSWLR 503; [2017] NSWCA 311 which held that participants in professional sport fell within the scope of "dangerous recreational activity" for the purposes of s 5L.

Held: dismissing the appeal: [79] (McCallum JA and Simpson AJA dissenting).

- The language, the structure of the statute and the legislative history do not provide any basis for excluding professionals involved in a sporting activity from the exemption from liability provided by s 5L: [29]. *Goode v Angland* was correct in its construction of s 5K and s 5L: [43], [132]; and horseracing is a sport within s 5K and therefore a recreational activity: [192].

- There is no reason for fine distinctions differentiating species of unsafe riding to play a role in the characterisation of risk: [66], [136]. The availability of the s 5L defence turned on whether the risk of a fall as a result of another jockey's careless riding, constituted by deliberately making contact with another horse, and contrary to the rules of racing, was the materialisation of an obvious risk: [139]. The risk of being injured falling from a horse in a race was objectively plainly obvious: [151].

- Mr Lynch's riding was contrary to the Rules of Racing and was particularly unsafe: [156]. The primary judge should have found a breach of the duty to have regard to the safety of fellow riders constituting recklessness or gross negligence: [77], [156]. However, s 5L provided an exemption from liability and therefore a finding of a breach would not have altered the outcome: [78]. Per McCallum JA and Simpson AJA dissenting: Mr Lynch's riding was deliberate, persistent and aggressive: [225]-[226]. Mr Lynch failed to establish the s 5L defence and judgment should have been given for Mr Singh: [229], [237].

Contract: dispute resolution clause

Lepcanfin Pty Ltd v Lepfin Pty Ltd **[2020] NSWCA 155**

Decision date: 23 July 2020

Bell P, Payne JA, McCallum JA

In August 2014, Lepcanfin Pty Ltd and Lepfin Pty Ltd and related companies entered into a Development Deed relating to a land development project. Under the Deed, Lepcon Pty Ltd was to advance to Lepfin an interest-free loan of $3.9 million. The Deed also made provision for various parties to it to enter into guarantees in a proforma which was a schedule to the Deed, execution of which was a pre-condition to the Deed coming into effect. Lepcon only paid $1.1 million under the Deed and Lepcanfin claimed that it was entitled to the "Facilitation Fee Top-Up" of the amount of the shortfall. A dispute emerged as to whether, by agreeing to waive the existing defaults under an amendment deed, Lepcanfin had also waived its entitlement to receive the Top-Up.

The Deed contained a dispute resolution clause providing for expert determination of various types of dispute. Pursuant to that clause, the parties appointed an independent expert, Professor Peden, to make a final and binding decision in relation to the dispute. In April 2018 an expert determination agreement was executed with the dispute being described as concerning Lepcanfin's entitlement to the increase in the Facilitation Fee. In June 2018 Professor Peden provided her expert determination, holding that there was no waiver of the entitlement to the Top-Up, but that the Top-Up was a penalty and therefore unenforceable. In June 2019 Lepcanfin filed a Commercial List Summons seeking a declaration that Professor Peden's determination that the Top-Up was a penalty was beyond her mandate, and sought substantive relief in relation to the guarantees, an issue that had not been the subject of the expert determination process. The primary judge found that Professor Peden's mandate had not been exceeded, and that the disputes fell within the scope of the expert determination clause.

Held: Mandate Issue- granting leave but dismissing the appeal: [114]; Guarantee Issue- refusing leave: [115].

- A party's "entitlement" to rely on a particular contractual provision comprehends whether there is any reason which may preclude that party from asserting or enjoying a contractual benefit otherwise conferred by it. If a clause is properly characterised as a penalty, the party is not entitled to enjoy the benefit: [99].
- Lepcanfin sought to circumvent the Deed by seeking to agitate the Guarantee Issue in proceedings in Court. The claims for relief "arose out of" the Deed and the parties should have been held to their bargain: [112]. The primary judge's discretionary decision on this issue was not shown to be infected with error of principle or involve any injustice: [9].
- A dispute resolution clause should be afforded a broad and liberal construction: [80]-[85].

Public Assembly: appeal from prohibition order

Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) **[2020] NSWCA 160**

Decision date: 28 July 2020

Bathurst CJ, Bell P, Macfarlan JA

An assembly was proposed by Padraic Gibson for 28 July 2020 for about 500 people at Town Hall Square, followed by a public procession through the Sydney CBD ending in a rally outside the State Parliament House. The stated purpose of the proposed assembly was "[t]o protest against Aboriginal deaths in custody and demand justice for David Dungay Jnr". On 26 July 2020 the primary judge acceded to an application by the Commissioner of Police for an order pursuant to s 25(1) of the *Summary Offences Act 1988* (NSW) prohibiting the proposed assembly, and held that there had been no failure to comply with the requirements of s 25(2). The primary judge also dismissed a Cross-Summons brought by Mr Gibson seeking a declaration that the Supreme Court lacked jurisdiction to hear the Commissioner's application for a prohibition order under s 25. Mr Gibson brought an appeal on the question of jurisdiction.

Held: dismissing the appeal: [67].

- The Act establishes a regime for the authorisation or prohibition of public assemblies, recognising the sometimes competing interests of public safety and freedom of speech. The Act endeavours to secure an accommodation of these values through a process of consultation and negotiation, with the Supreme Court established as the ultimate arbiter of any dispute which is not able to be resolved consensually: [7].

- Per s 27(2) of the Act, there is no appeal from a decision on an application under ss 25(1) or 26. However, Mr Gibson's appeal was confined to a question of the Court's jurisdiction to have entertained the Commissioner's application for prohibition. This did not fall within the s 27(2) prohibition. That section does not deal with the situation where it is contended that any preconditions for the bringing of an action under ss 25 or 26 have not been met: [36]-[37].

- There was no discernible legislative intention to condition the existence of the jurisdiction of the Court upon the lawful compliance by the Commissioner with s 25(2): [53]. It would be open to the organiser to draw attention to any failure by the Commissioner properly to confer or to take into account relevant matters, and such failure may influence the exercise of discretion. It would be open to the Court to stay or refuse any application for prohibition until consultation had occurred. Any failure to consult may also sound in an adverse order for costs against the Commissioner: [61]-[62].

- The Court's jurisdiction to make an order prohibiting a proposed assembly pursuant to s 25(1) does not depend upon compliance with s 25(2). Therefore, it was not necessary to consider Mr Gibson's attack on the primary judge's decision that there was no relevant non-compliance by the Commissioner: [66].

Workers' Compensation: compensation

***Gardiner v Laing O'Rourke Australia Construction Pty Ltd* [2020] NSWCA 151**

Decision date: 23 July 2020

Basten JA, Leeming JA, Emmett AJA

From 2011 to 2018 Dr James Gardiner was employed by Laing O'Rourke Australia Construction Pty Ltd. Immediately following the termination of his employment, Dr Gardiner wrote to the President of the Anti-Discrimination Board complaining of victimisation and discrimination on the grounds of disability in the course of his employment with Laing O'Rourke. A settlement of the complaint was agreed upon requiring payment to Dr Gardiner of $29,412 plus legal costs, and a Deed of Release and Confidentiality was duly executed in September 2018.

In March 2018, prior to the settlement, Dr Gardiner lodged a claim for compensation under the *Workers Compensation Act 1987* (NSW) on the basis that he had suffered aggravation, acceleration, exacerbation or deterioration of a psychological condition in the course of his employment. Laing O'Rourke resisted the claim on the basis that Dr Gardiner had received a payment of "damages" awarded "in respect of" the same injury, so that the claim for compensation was precluded by s 151A(1) of the *Compensation Act*. An Arbitrator at the Workers Compensation Commission upheld Laing O'Rourke's contention and dismissed the claim for compensation. Dr Gardiner lodged an appeal, which was dismissed by the President of the Commission.

Held: allowing the appeal, setting aside the order, remitting the proceedings: [71].

- The *Compensation Act* is concerned with "damages" payable in respect of an injury caused by the negligence of the employer, and not amounts recoverable under an extraneous statutory scheme: [36]. The statutory protections provided by the *Anti-Discrimination Act 1977* (NSW) are a discrete and independent statutory scheme: [44]. A purposive construction of the two schemes does not support the proposition that a payment resulting from a complaint of discriminatory conduct, even if the discrimination gave rise to a personal injury, should foreclose any claim for workers' compensation: [51].

- The definition of "damages" in s 149 of the *Compensation Act* accords with the general principle governing the character of payments made pursuant to a settlement: [82]. The question was whether the payment of the sum "as General Damages" can fairly be characterised as Dr Gardiner recovering damages in respect of an injury from Laing O'Rourke as the employer liable to pay compensation under the *Compensation Act*, within the meaning of s 151A: [97].

- The proper construction of the Deed negates any possibility that the payment was intended to settle any claim for workers' compensation: [66]. The parties agreed that the payments were *not* in respect of the injury for which there was a pending claim for workers compensation, which was expressly preserved: [85]. The payment was in consideration of the release of Dr Gardiner's claim under the *Discrimination Act*: [101].

Corporations: public examinations; Class Actions

***ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) v Michael Thomas Walton* [2020] NSWCA 157**

Decision date: 30 July 2020

Bathurst CJ, Bell P, Leeming JA

Arrium was a significant producer of steel and iron ore; its assets included the Southern Iron mining operation; and it was listed on the Australian Stock Exchange. In September 2014 Arrium announced a fully underwritten $754 million capital raising, the proceeds being used to pay down debt. In January 2015 after a decline in the export price of iron ore, Arrium announced that the Southern Iron mining operation would be suspended or closed. In its half yearly reports published in February 2015, it recognised an impairment in the value of its mining operations in an amount of $1,335 million. It was placed into administration in April 2016 and the administrators were appointed liquidators in June 2019.

In April 2018 ASIC authorised the respondents, certain shareholders of Arrium, as eligible applicants for examination orders to determine whether any claims should be brought by way of class action against Arrium, its directors or its auditor. In May 2019 the respondents applied to the Court for orders under s 596A of the *Corporations Act 2001* (Cth) that a summons for examination be issued to a director of Arrium, and that Arrium, its auditor and its advisor produce certain documents. In May 2019 the examination and production orders were made. Arrium sought to have the orders stayed or set aside. The primary judge refused to do so. Arrium brought an appeal.

Held: granting leave and allowing the appeal: [143].

- The critical question is whether the purpose of the examination is foreign to the purpose for which those powers were conferred. The purpose of the examination power is limited to assisting the liquidator in the winding-up of a corporation or to support the bringing of criminal charges against the former officers: [131]-[132]. An application for the predominant purpose of advancing the cause of the applicant in litigation against third parties and not for the benefit of the corporation, its contributories or its creditors is a use of the provision for a purpose foreign to the power and an abuse of purpose: [137], [140].

- The prospective litigation which the examination was designed to assist would not have brought any commercial benefit to the company: [123]. Persons entitled to participate in the class action were shareholders who purchased shares on or after 19 August 2014, and therefore did not include all contributories of Arrium but could include those who had subsequently sold their shares, not being contributories at the time the company went into administration. These matters highlighted the essentially private nature of the proposed claim. The predominant purpose was to investigate and pursue a potential claim in their capacity as shareholders against the directors, auditors or Arrium: [128]-[129]. Therefore, such an examination was foreign to the purpose for which the examination power was conferred and there was an abuse of process: [141].

Australian Intermediate Appellate Decision of Interest

Human Rights: sex discrimination

Hughes trading as Beesley and Hughes Lawyers v Hill **[2020] FCAFC 126**

Decision date: 24 July 2020

Collier J, Reeves J, Perram J

In May 2015 Catherine Hill was employed by Owen Hughes as a paralegal in a small legal practice near Byron Bay of which Mr Hughes was the principal, with Mr Hughes promising to train Ms Hill as a solicitor from July 2015. Ms Hill had moved to northern NSW so that her children could maintain a relationship with their father who lived in that area. While Ms Hill was working for Mr Hughes, he acted for her in a mediation with her former husband, during which he obtained confidential and personal information about Ms Hill.

Commencing in July 2015 Mr Hughes began to bombard Ms Hill with emails professing his love for her and proposing a romantic relationship. She repeatedly rejected these overtures in clear terms. Ms Hill suffered from an anxiety disorder and in October 2015 Ms Hill sought medical assistance from a psychologist to deal with this stress. In June 2016 Ms Hill resigned. Ms Hill filed a complaint with the Australian Human Rights Commission, in which the judge found that sexual harassment was established and ordered Mr Hughes to pay Ms Hill $170,000 in damages. Mr Hughes brought an appeal.

Held: dismissing the appeal: [65].

- Mr Hughes used confidential information obtained through previously acting for Ms Hill to attack her during the discrimination proceedings, in a gross breach of his professional obligations as a solicitor: [7].
- The objective standard of what constitutes sexual harassment is whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The reasonable person is assumed to have some knowledge of the personal qualities of the person harassed: [25]-[26]. Mr Hughes' argument that his overtures were not sexual in nature did not address this objective question: [31].
- Mr Hughes' sexual harassment of Ms Hill ruined her quality of life. The abuse of the power he held was the cause and not any weakness in her. She was badly wronged by the unlawful actions of her employer: [46].
- Some of the language of the trial judge was strong but this merely reflected the quality of Mr Hughes' own behaviour: [50]. The trial judge was correct to measure in general damages the power differential that lay between Mr Hughes and Ms Hill not only by the fact that he was her employer but by the fact of his status as a solicitor: [51]. Mr Hughes' threat that Ms Hill not make a complaint or sue him and the conduct of his defence justified aggravated damages: [57]-[61].

Asia Pacific Decision of Interest

Evidence: admissibility

Commerce Commission v Bunnings Limited **[2020] NZCA 310**

Decision date: 27 July 2020

Kós P, Gilbert J, Courtney J

Bunnings Ltd was charged with misleading advertising in claiming it offered the "lowest prices", pleading not guilty. The Commerce Commission summoned Mr Snowden, the Business Efficiency Manager at Mitre 10, Bunnings' main competitor. It was proposed he give evidence of an automated price comparison survey undertaken by Mitre 10, and he produced a formal statement of evidence. Bunnings opposed the giving of that evidence on the basis that it was not relevant, reliable, lacked probative value, was hearsay, and was otherwise inadmissible. A pre-trial admissibility hearing took place in March 2018 which dismissed the challenge to the admissibility of Mr Snowden's evidence. Bunnings brought an appeal, which was dismissed, but the judge held that the statement would be inadmissible unless supported by evidence from Mitre 10's electronic records. Bunnings and the Commission sought leave to appeal, on the admissibility and relevance of the evidence respectively.

Held: granting leave, allowing one of Bunnings' appeals, dismissing Mitre 10's appeal: [72]-[74].

- Leave was granted as the appeals raised a matter of general or public importance regarding the admissibility of automated electronic price comparison survey evidence: [4].
- Material presented to a court as evidence must have a tendency to prove or disprove a fact in issue. To be evidence the material tendered must prove or disprove hypotheses, about facts the existence of which is uncertain. If it does not, it is mere distraction and has no place being in the courtroom: [29]. It is thus inherent in evidence that it must be relevant, i.e. probative of something material. Then, it must be determined whether the evidence is inadmissible because it belongs to a class of evidence the law excludes. Finally, the weight to be given to evidence that is relevant and admissible is assessed: [32].
- The fact in issue to which Mr Snowden's evidence was directed was the Commission's hypothesis that a substantial proportion of identical products are priced more cheaply at Mitre 10 than at Bunnings: [37]. Mr Snowden was not presented as an expert and was not qualified to verify the accuracy of the price comparison programme: [39].
- In the absence of foundation by observation, the statement was simply conjecture based on an unproved automated process and did not tend to prove the fact in issue. The statement lacked relevance and was hearsay, and therefore was inadmissible: [41]-[42], [54].

International Decision of Interest

Procedure: reasonable cause of action

***Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19**

Decision date: 24 July 2020

Wagner CJ, Abella J, Moldaver J, Karakatsanis J, Côté J, Brown J, Rowe J, Martin J, Kasirer J

Douglas Babstock and Fred Small commenced a class action alleging that the Video Lottery Terminal (VLT) games offered by Atlantic Lottery Corporation (ALC) in Newfoundland and Labrador were deceptive, harmful, and inherently addictive. They brought proceedings on behalf of any natural person resident in Newfoundland and Labrador who paid to play VLTs in that province in the six years preceding the class action. They contended that ALC, as a regulator and a business corporation, deliberately put people at risk of addiction by deceiving the paying public for the sole purpose of making money. They relied upon three causes of action - waiver of tort, breach of contract and unjust enrichment - and sought a gain-based award, quantified by the profit ALC earned by licensing VLTs.

ALC applied to strike out the plaintiffs' claim on the basis that it disclosed no reasonable cause of action, and the plaintiffs applied for certification of their claim as a class action. The trial judge dismissed ALC's application and certified the class action. The Court of Appeal substantially upheld the certification judge's conclusions, and allowed the plaintiffs' claims to proceed to trial. ALC brought an appeal.

Held: allowing the appeal, setting aside the certification order and striking out the plaintiffs' statement of claim in its entirety: [71].

- The test is whether it is plain and obvious, assuming the facts pleaded to be true, that the plaintiffs' claims disclose no reasonable cause of action: [14].
- Before the Court of Appeal's decision in the proceedings, no Canadian authority had recognised waiver of tort as a cause of action: [15]. It is not determinative on a motion to strike out that the law has not yet recognised the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial. However, if a court would not recognise a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck out: [19]. The term waiver of tort is apt to generate confusion and should therefore be abandoned: [30].
- Disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action: [27]. In order to make out a claim for disgorgement, a plaintiff must first establish actionable misconduct: [30]. It is available for breach of contract only where, at a minimum, other remedies are inadequate: [59].