Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 August 2020 – 14 August 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: judicial review

Forrest v Director of Public Prosecutions (NSW) **[2020] NSWCA 162**

Decision date: 3 August 2020

Basten JA, Leeming JA, McCallum JA

In 2018 Mark Forrest was convicted in the Local Court of dealing with proceeds of crime relating to $165,000 found in a bag in a vehicle Mr Forrest was driving. He was sentenced to an intensive correction order for a period of 12 months with an obligation to undertake 250 hours of community service. Mr Forrest lodged an appeal in the District Court against the conviction, which was dismissed in August 2019. At 3:49pm on the 28th day after the judgment was handed down, Mr Forrest's solicitor emailed a letter to the judge's associate requesting the judge state a case to the Court of Criminal Appeal pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW). The associate replied the following day advising that the judge had declined to state a case. Mr Forrest filed a summons in the Supreme Court seeking judicial review of the refusal to state a case, which was transferred to the Court of Appeal. Mr Forrest submitted that a judge is obliged to state a case with respect to a question of law unless obviously frivolous or baseless.

Held: refusing the application for judicial review: [69].

- Power is conferred on the District Court to determine all questions of law, such determinations being unreviewable unless the judge has mistaken his or her function, and in doing so has exceeded, or failed to exercise, the jurisdiction of the court. The issue of whether the condition of engagement of the power conferred by s 5B has been satisfied is not a jurisdictional fact to be determined by the reviewing court: [47]-[53].

- Section 5B requires that questions of law are to be submitted to the Court of Criminal Appeal within 28 days of the judgment, or such further time as the Court of Criminal Appeal may allow. There is an implied requirement that any request be made, with a draft stated case and containing the relevant questions, in sufficient time to allow the judge, if so minded, to submit the questions within the prescribed period. The timing of Mr Forrest's request did not comply with that requirement: [57].

- The issues in dispute were entirely factual. It was therefore open to the primary judge to decline to submit the questions to the Court of Criminal Appeal on the basis that they did not identify any error of law arising on the appeal: [61]. No jurisdictional error was made by the District Court judge in refusing to submit a question of law to the Court of Criminal Appeal: [68].

Contracts: construction, breach

***Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2020] NSWCA 161**

Decision date: 3 August 2020

Bathurst CJ, Bell P, McCallum JA

In 1996 a Construction Deed was made between Macquarie International Health Clinic Pty Ltd and Sydney Local Health District's predecessor Central Sydney Area Health Service (SLHD), whereby Macquarie agreed to construct and lease a private hospital and ancillary facilities. The Construction Deed set out various obligations, including: it was an essential term that Macquarie complete the works in accordance with the timetable; providing SLHD with the power to grant an extension of time if there was delay to the works; Macquarie was required to lodge "all necessary applications" to the Council for the carrying out of the works; and an obligation for the parties to act in the utmost good faith.

Various plans for the construction of the hospital were lodged alongside Development Applications and Building Applications which did not correspond with the Construction Deed. SLHD notified Macquarie of an amended timetable, and advised Macquarie of its obligation to obtain a new Construction Certificate. SLHD served Notices of Default and Termination on Macquarie. The primary judge dismissed Macquarie's claim that the termination was invalid, and declared that the Notices of Default and Termination were validly issued. Macquarie brought an appeal challenging the orders.

Held: dismissing the appeal: [338].

- The obligation on Macquarie as an essential term was to lodge a Building Application and obtain building approval sufficient to commence construction: [241]. There was no agreement to a variation of the works such as to permit Macquarie to fulfil its contractual obligations by constructing a hospital of the nature of that set out in the Building Application: [248]. Macquarie did not obtain building approval in accordance with the Construction Deed: [254].

- The power to grant an extension was contained in cl 2.5 of the Construction Deed: [256]. The question of whether cl 2.5 empowered SLHD to grant an extension of a step in the timetable once the step had been completed or needed to be redone because of events outside Macquarie's control involved construing cl 2.5 in the context of the Construction Deed as a whole: [261]. The obligation of the utmost good faith in the exercise of contractual powers under the contract applied to the exercise of the power to set a new timetable: [268].

- The primary judge was correct in her conclusion that the Notice in respect of the leases was sufficiently specific regarding the breach required to be remedied to comply with the requirements of s 129 of the *Conveyancing Act 1919* (NSW): [312]. The Notice was valid and SLHD validly terminated the leases. Therefore the Construction Deed was also validly terminated: [328]-[329].

Legal Practitioners: misconduct

***Council of the Law Society of New South Wales v Zhukovska* [2020] NSWCA 163**

Decision date: 4 August 2020

Macfarlan JA, Leeming JA, McCallum JA

In 2012 Ms Myroslava Zhukovska incorporated a law practice known as McMahon Todd Pty Ltd. In 2013 and 2014 Ms Zhukovska undertook work for an elderly and vulnerable client in relation to her estate. The Law Society of NSW brought disciplinary proceedings against Ms Zhukovska in the NSW Civil and Administrative Tribunal (NCAT) in relation to this client. It was alleged she had charged legal rates for performing non-legal work, established a trust unnecessarily, nominated herself as the successor appointer of the trust and made unsecured loans from the proceeds of sale of the client's home. NCAT found that Ms Zhukovska had engaged in five instances of professional misconduct and five instances of unsatisfactory professional conduct. NCAT ordered that her practising certificate be cancelled, that she be reprimanded, fined and precluded from receiving any new practising certificate for 12 months. The Law Society brought an appeal, arguing that NCAT erred in failing to order that Ms Zhukovska's name be removed from the Supreme Court's roll of practitioners.

Decision: ordering submissions as to the conditions to be imposed upon the practising certificate: [157].

- The distinction between suspension and cancellation is not technical and different principles are applicable: [109]. If a practising certificate is suspended, then it may be renewed, and when the period of suspension comes to an end, the practitioner will be permitted to practise. If a practising certificate is cancelled, the person will need to make an application to the designated local regulatory authority for the grant of a new practising certificate: [70]-[71]. Cancellation of a practising certificate and removal from the roll both place an onus upon the person to reapply and justify why he or she should be permitted to return to practice: [66].

- If NCAT was satisfied that Ms Zhukovska was presently unfit to practise, and was likely to be unfit for the indefinite future, then an order for removal was appropriate: [99]. As NCAT was not satisfied that she was permanently or indefinitely unfit to practise, a cancellation order was appropriate, coupled with an order preventing an application from being made for at least such time during which NCAT considered that she would not be fit to practise: [111].

- There was material error in NCAT's decision, insofar as it made no findings to justify the 12 month period during which Ms Zhukovska could not practise, and there was nothing to justify a reasonable prospect of receiving a practising certificate in 12 months' time: [125], especially as there was nothing to indicate what would change in that 12 month period: [128].

Appeal: deed of settlement

Magann v The Trustees of the Roman Catholic Church for the Diocese of Parramatta **[2020] NSWCA 167**

Decision date: 4 August 2020

Bell P, Macfarlan JA, Payne JA

In 2002 Mr Magann lodged a Statement of Complaint with the Trustees of the Roman Catholic Church for the Diocese of Parramatta, in which he complained of emotional, psychological and sexual assault by two priests between 1981 and 1989. In 2003 Mr Magann filed a Statement of Claim against the Respondents and the two priests seeking damages. Mr Magann sought and was granted an extension of time under the *Limitation Act 1969* (NSW) to bring his claims, which was later reversed.

Mr Magann then pursued a mediation conference with the Respondents to resolve his complaints. Ms Bailey was appointed to assess and report on the complaints, which concluded that on the balance of probabilities there were grounds for finding that Mr Magann's allegations were justified. In 2007 a settlement conference was held, during which the Respondents made an offer of $95,000. Mr Magann took the draft deed to his solicitor, then signed and returned it. The Deed contained an acknowledgment by Mr Magann that upon receipt of the payment, he will have received all payments and benefits he may have been entitled to receive in connection with the Complaint and the Proceedings.

After the *Limitation Act* was amended, Mr Magann commenced fresh proceedings against the Respondents relating to the same complaints. A separate question was ordered as to whether the Deed extinguished the Respondents' liability. The primary judge answered in the affirmative and dismissed the proceedings. Mr Magann brought an appeal.

Held: dismissing the appeal: [74].

- The fact that Mr Magann was suffering from PTSD did not in and of itself mean that the Deed was unjust, otherwise any number of deeds of settlement beneficially entered into by persons suffering from such a disorder would be vulnerable to being set aside: [62]. The primary judge correctly held that there was no substantive or procedural unfairness or unjustness which vitiated the Deed: [68].

- Section 6A was introduced into the *Limitation Act* in 2016 removing any limitation period for child abuse actions. Had such a section existed at the time of Mr Magann's 2003 proceedings, there would have been no relevant limitation period and thus no occasion for Mr Magann to seek an extension of time. His failure to achieve such an extension left him with no relevant legal rights against the Respondents at that time or at the time of entry into the Deed, insofar as the subject matter of those proceedings was concerned: [69]-[70]. The amendments did not address the situation of someone who had entered into a deed of release in relation to what may be described as a claim based on alleged historic child sexual abuse in circumstances where that claim was statute barred: [71].

Australian Intermediate Appellate Decisions of Interest

Procedure: self-represented litigant

***Flightdeck Geelong Pty Ltd v All Options Pty Ltd* [2020] FCAFC 138**

Decision date: 14 August 2020

Markovic J, Derrington J, Anastassiou J

In 2014 Mr Mathews sought the assistance of a brokerage firm to sell his indoor trampoline business called "Airodrome Trampoline Park", owned by Flightdeck Geelong Pty Ltd, of which he was the sole director. In 2015 the broker provided Mr Nicholls with a business profile which included financial details provided to the broker by Mr Mathews. Mr Nicholls used the information to prepare a financial model adopting the sales and profitability figures disclosed. Mr Mathews made numerous representations about the establishment costs of the business, its past revenue and profit, and its future profitability. Mr Nicholls relied on them to cause All Options Pty Ltd, of which Mr Nicholls was the sole director, to purchase the business. Since that date the business has made significant losses.

Mr Nicholls brought proceedings pleading misleading representations and claimed the difference between the cost of the acquisition of the business and its true value and the trading losses sustained. Mr Mathews sought to represent himself and Flightdeck, requiring leave under the *Federal Court Rules 2011* (Cth). An application was made on the first day of hearing, which was refused. Flightdeck brought an appeal, relevantly alleging that the primary judge erred by denying Mr Mathews procedural fairness as a self-represented litigant.

Held: dismissing the appeal: [162].

- The Court must strike a balance between providing assistance to a litigant-in-person, and ensuring a fair trial for all parties: [53]. The assistance provided to a litigant-in-person must therefore be limited to that which is necessary to diminish the disadvantage which he or she will ordinarily suffer, and the Court should be wary to avoid placing a litigant-in-person in a position of advantage or privilege over a represented opponent: [54].

- The onus may be on the appellant to demonstrate what they would have done, or what evidence they would have led, so as to establish they were in fact denied procedural fairness: [59].

- Mr Mathews had a detailed understanding of the nature of the case he was required to meet. His conduct and representations were central to the question of liability, and the business' financial position, of which he was intimately familiar, was central to the question of the quantum of damage. Necessarily, he ought to have been taken as having a greater knowledge and understanding about the factual aspects of both of those matters than any other person: [64].

- The trial judge had provided him with sufficient instruction about the trial process and with assistance and indulgences where needed so as to ensure the fairness of the proceedings: [112].

Land Acquisition: valuation

Caradi Pty Ltd v Secretary to the Department of Transport **[2020] VSCA 197**

Decision date: 5 August 2020

Tate JA, Emerton JA, Osborn JA

Caradi Pty Ltd owned a large irregular shaped parcel of 15,900 m² adjacent to the West Gate Freeway in South Melbourne. In 2010 the Secretary served a Notice of Temporary Occupation on Caradi and entered into occupation until 2011. Caradi engaged architects to prepare concept drawings and designs for a high-rise residential development on the land. In 2013 the Secretary compulsorily acquired the Land. In 2014 the Secretary made an offer of compensation for the market value of the land in the amount of $16.15 million, based on a valuation made on behalf of the Valuer General of Victoria. Caradi rejected the offer and claimed compensation of $61.5 million. In 2015 the claim was referred to the Supreme Court. Four valuations of the land were carried out, ranging from $24.6 million to $56 million. In 2018 a judge determined the claim and valued the land at $25.6 million. Caradi brought an appeal challenging the primary judge's assessment of the market value of the land.

Held: granting leave and dismissing the appeal: [208].

- The first step in the valuation of land is to ascertain the highest and best use both presently open and potentially open in the foreseeable future. However, there is not always a single, clearly defined highest and best use: [121].
- If it was not open to the judge to accept the expert evidence of the valuers, she was in no position to make a determination of the market value of the land, other than by impermissibly bringing a third set of opinions into the arena. This would have required a retrial, which was considered to be an extraordinary proposition given the experience and expertise of the four valuers concerned, and the efforts that were made over a number of years to carefully assess and refine the assessments of the market value of the land: [113].
- The judge was required to subject the valuations to critical evaluation and to accept the expert evidence of the valuer whose valuation best stood up to that critical scrutiny. It was not her task to piece together a market valuation of her own. The applicant must establish that it was not open to the judge to rely on the valuations. It is not a question of preference, but of whether the judge was *precluded*, as a matter of law, from relying on those valuations. It would have been necessary to demonstrate that the valuations so departed from established valuation principles or were otherwise so flawed as to make their expert opinions worthless: [110]-[111]. The valuations did not violate a fundamental valuation principle relating to the identification of the highest and best use of land, which was identified as high-rise residential with some delay. It was open to the judge to rely on their valuations: [133]-[134].

Asia Pacific Decision of Interest

Family: property division; Taxation: foreign tax

***Webb v Webb* [2020] UKPC 22**

Decision date: 3 August 2020

Lord Wilson, Lord Carnwath, Lady Black, Lord Briggs, Lord Kitchin

Mr Webb and Mrs Webb were married in New Zealand in 2005. In August 2013 Mr and Mrs Webb and their daughter moved from New Zealand to the Cook Islands. Mr and Mrs Webb separated in April 2016 and Mr Webb moved back to New Zealand. Mrs Webb and their daughter continued to live in the Cook Islands.

In 2011 the New Zealand Inland Revenue Department (the IRD) began an investigation into Mr Webb's business affairs. In 2017 the sum of income tax, penalties and interest which remained unpaid was in excess of NZ$26 million. In May 2016 Mrs Webb issued proceedings in the Cook Islands for matrimonial property orders. The primary judge held that Mr Webb's debts to the IRD consisted of personal debts which would have exhausted any matrimonial property. On appeal, the Court held that the debt was not brought into account because it was unlikely to be enforceable in the Cook Islands. Mr Webb brought an appeal.

Held: by majority, dismissing the appeal: [109] (Lord Wilson dissenting).

- It is a long-standing principle of the common law that the courts will not collect taxes of a foreign state for the benefit of the sovereign of that foreign state. The rule applies to direct and indirect enforcement and to a claim or defence raised by a party to vindicate or assert the claims of a foreign state: [32]-[33].
- In 1965 the *Cook Islands Constitution Act 1964* (NZ) came into force and the Cook Islands became self-governing: [50]. The Cook Islands are now a distinct sovereign state with their own parliament and their own government. Mr Webb's New Zealand IRD debt was not enforceable in the Cook Islands: [55].
- The essential relevant aspect of the context is the recognition of the equal contribution of the spouses to the marriage partnership and an appreciation that each spouse is entitled to an equal share of the matrimonial assets available for division once the matrimonial debts have been taken into account: [45].
- Spouses should share the burden of the unsecured debts they have incurred in the context of their relationship, but not the burden of unsecured personal debts unless they exceed the value of that debtor spouse's separate property. For any unsecured debt to be a personal debt for this purpose it must be enforceable or likely to be paid: [41]. Personal debts which are not enforceable against the matrimonial property in one spouse's name and which are unlikely to be paid should not be brought into account. Were it otherwise the matrimonial assets available for division would be reduced or eliminated and yet those debts would never be paid: [47].

International Decision of Interest

Succession

***Vineet Sharma v Rakesh Sharma & Ors* No. 32601/2018, Supreme Court of India**

Decision date: 11 August 2020

Arun Mishra J, A. Abdul Nazeer J, M.R. Shah J

A question concerning the interpretation of s 6 of the *Hindu Succession Act, 1956* as amended by the *Hindu Succession (Amendment) Act, 2005* was referred to a larger Bench of the Supreme Court of India in view of the conflicting verdicts rendered in two Division Bench judgments.

Coparcenary property was what was inherited by a male Hindu from his father, grandfather, or great grandfather. Property inherited from others is held in his or her own right and cannot be treated as forming part of the coparcenary. Partition is the determination of the share in the joint family property of each coparcener. Prior to the amendment, s 6 of the *Hindu Succession Act* provided that if a male coparcener had left behind on death a female relative specified in Class I, such as a daughter, the daughter was entitled to limited share in the coparcenary interest of her father, and not share as a coparcener in her own right.

With effect from the date of enforcement of the *Amendment Act*, daughters became coparceners by birth in their own right, with the same liability in the coparcenary property as if they had been male. However, a question arose as to whether the amendment would only apply to coparceners and daughters who were both alive at the date upon which the amendment came into effect.

Held: The provisions contained in amended s 6 of the *Hindu Succession Act, 1956* confer status of coparcener on a daughter born before or after amendment in the same manner as a son with the same rights and liabilities: [129].

- It is not necessary that there should be a living coparcener as on the date of the amendment to whom the daughter would succeed. The daughter would step into the coparcenary as that of a son by birth before or after the amendment date. As the right is by birth and not by inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not: [63]-[64].
- The right to claim partition is a significant basic feature of the coparcenary, and a coparcener is one who can claim partition. Daughters are now entitled to claim partition of coparcenary from the date of amendment in 2005: [79].
- The intention of amended s 6 was to ensure that daughters are not deprived of their rights of obtaining a share on becoming coparcener and claiming a partition of the coparcenary property by setting up the frivolous defence of oral partition or recorded in the unregistered memorandum of partition: [116].