Court of Appeal
Supreme Court
Sydney

Decisions of Interest

29 August 2020 – 11 September 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

Contracts: agency agreement, entitlement to commission

Outerbridge trading as Century 21 Plateau Lifestyle Real Estate v Hall **[2020] NSWCA 205**

Decision date: 3 September 2020

Leeming JA, Emmett AJA, Beech-Jones J

In August 2015 Brian Hall and Marlene Bentino (the Sellers) and Outerbridge, a partnership of estate agents (the Agent), entered into an agency agreement (the Agency Agreement) to sell a property in Byron Bay (the Property). The Agent was to be entitled to a commission of 2.2% of the final sale price where the Agent was "the effective cause of the sale" of the Property under the Agency Agreement.

In December 2017 Julie Weis (the Buyer) contacted the Agent looking for a property. The Agent informed her of the Property and she made an offer of $4.5 million to the Agent to purchase the Property. The offer was accepted by the Sellers but they retracted acceptance a few days later. The Buyer was informed by the Sellers' secretary that the Agent was overseas and there was nothing further that could be done in relation to the Property. The Buyer contacted a second agent, and made an offer of over $5 million for the same Property, which was accepted. The Agent sued the Sellers seeking to recover the commission, contending that the Agent was the, or an, effective cause of the sale of the Property. The primary judge dismissed the claim and the Agent brought an appeal.

Held: dismissing the appeal: [84].

- The actions of more than one agent can answer the description of "effective cause". An assessment of whether the Agent's conduct was the effective cause of the sale required a consideration and evaluation of all circumstances which may have had some causal relationship to the sale: [62]. The transaction was effectively over after the Buyer was rebuffed by the Seller's secretary, and then resuscitated by the second agent: [72].
- There was a miscommunication in the Sellers' expectations, and the second agent resolved it. The Agent could not have done so as he was overseas and effectively uncontactable: [75]. The primary judge erred in failing to give consideration to whether the "task" of negotiating a sale could have been undertaken by the Agent if given the opportunity. The Agent was not capable of rectifying the Buyer's misunderstanding about the Sellers' position: [76]. The second agent did not just continue the negotiation; they resurrected the transaction, restored trust between the parties and bridged a significant price gap: [81].
- The mere introduction of a purchaser that creates their interest is sometimes insufficient to meet the test of effective cause. Ultimately, the issue is not whether the purchaser has been influenced but the extent of the influence on the sale that in fact eventuated including its price: [80].

Equity: equitable interest in property, remedies

***Wallis v Rudek* [2020] NSWCA 207**

Decision date: 7 September 2020

White JA, Emmett AJA, Simpson AJA

In 2008 Yuri and Olga Wallis borrowed approximately $500,000 from ANZ Bank to finance construction on their house in Pennant Hills (the Property). The loan was secured by a mortgage of the Property to ANZ. In 2012 Mr Wallis developed a serious heart condition and was forced to retire. The Wallis' could not afford to meet the mortgage repayments. By 2013, the indebtedness to ANZ amounted to more than $800,000. The Wallis' received a letter from ANZ threatening to take eviction proceedings. In 2013 discussions took place between the Wallis', their daughter Suzanne Rudek and her husband Vass Rudek concerning the transfer of the Property to Mrs Rudek on the basis that she would pay to ANZ the amount secured by the Mortgage.

The Wallis' vacated the upper two storeys of the Property and commenced residing on the ground floor. The Rudeks and their children moved into the upper storeys. Differences developed between them, resulting in Mrs Rudek giving notice to the Wallis' in February 2018 requiring them to vacate the Property. The Wallis' commenced proceedings seeking various declarations relating to the property. In March 2020 the primary judge ordered Mrs Rudek to pay to the Wallis' the sum of $124,287.75 and declared that Mrs Rudek was entitled to vacant possession of the Property. The Wallis' brought an appeal.

Held: dismissing the appeal: [118].

- Based on the evidence, the primary judge was justified in concluding that no arrangement as the Wallis' contended was made: [97]-[101]. His Honour did not err in concluding that there was no promise or representation made by Mrs Rudek that was capable of giving rise to a binding contract or an estoppel as pleaded: [102]. The primary judge did not err in concluding that there was no binding contract and that no express promise or representation was made by Mrs Rudek: [103].

- The only evidence of the value of the Property indicated that its value was $950,000. That was the basis upon which the primary judge determined the appropriate amount of equitable compensation: [104]. The primary judge did not err in assessing equitable compensation: [105].

- A *Calderbank* offer was made on behalf of Mrs Rudek in April 2018, which was rejected by the Wallis': [112]. The primary judge concluded that the Wallis' were not prepared to agree to any settlement that did not give them the right to continue to live at the Property, and therefore they failed on this issue. This demonstrated the unreasonableness of their position and the judge concluded that it was appropriate to make the order that costs be paid to Mrs Rudek on the indemnity basis: [114]. There was no error on the part of the primary judge in the exercise of his discretion as to costs: [117].

Statutory Interpretation: jurisdiction

***Secretary, New South Wales Ministry of Health v W* [2020] NSWCA 212**

Decision date: 9 September 2020

Macfarlan JA, Meagher JA, Simpson AJA

In 2018 W was sentenced to a term of imprisonment of 9 months. W had been found to be a "mentally ill person" within the meaning of the *Mental Health Act 2007*. On the expiration of her sentence in May 2019 W ceased to have the status of "correctional patient" and was classified by the Mental Health Review Tribunal as an involuntary patient in the Forensic Hospital.

Health professionals came to a consensus that W would be more appropriately accommodated in a less secure mental health unit as the Forensic Hospital was designed predominantly for correctional or forensic patients. In May 2020 W's legal representatives sought an order from the Tribunal that W be transferred to a facility less restrictive than the Forensic Hospital, and argued that the Tribunal had power to make such an order under s 38(4) of the Act. The Tribunal held that it had an implied power to order the transfer of an involuntary patient from one level of security facility to a lesser level of security facility, the precise facility being a matter for the health professionals treating the involuntary patient and the facility in question. The Secretary of the NSW Ministry of Health sought an order of prohibition against the Tribunal making such orders.

Held: making a declaration that the Tribunal did not have power to order the transfer of an involuntary patient from one mental health facility to another: [74].

- The starting point in questions of statutory construction is the text of the provision. The text is to be considered in its context, including the surrounding provisions: [63].
- Section 38(4) calls for determination of two factual matters. The first is that the patient is a mentally ill person. The second is that no other care of a less restrictive kind, consistent with safe and effective care, is appropriate and reasonably available. "No other care of a less restrictive kind" is plainly intended to mean "no other care of a kind less restrictive than care in a mental health facility". If those two factual matters are found, the Tribunal must make an order that the patient continue to be detained in a mental health facility for further observation or treatment or both: [64].
- The Tribunal's proposed construction is not available on the plain text of s 38(4): [68]. Nothing in s 38(4) expressly or implicitly admits of an order by the Tribunal specifying the nature or status of the mental health facility in which the involuntary patient is to be detained. The proposed construction involved the introduction of words and concepts that was not in the text of the provision: [71].
- Questions as to the location of the detention, the place in which the involuntary patient is to be detained, and the level of security to which the patient is to be subject are administrative decisions to be made by health professionals: [69].

Constitutional Law: judicial power

***Wilson v Chan & Naylor Parramatta Pty Ltd* [2020] NSWCA 213**

Decision date: 8 September 2020

Macfarlan JA, Leeming JA, White JA

In November 2015 Stephen Wilson commenced proceedings in the NSW Civil and Administrative Tribunal (NCAT) against Chan & Naylor Parramatta Pty Ltd. In June 2018 a Senior Member of NCAT dismissed the proceeding for want of jurisdiction. In December 2018 an Appeal Panel of NCAT ordered that the proceedings be transferred to the Local Court. The Appeal Panel of NCAT held that Mr Wilson's claim purportedly sought to invoke federal jurisdiction and NCAT had no authority to decide the claim and ordered Mr Wilson to pay Chan & Naylor's costs of the appeal. In January 2019 the Senior Member ordered that Mr Wilson also pay Chan & Naylor's costs from September 2017.

Mr Wilson sought leave to appeal against or judicial review of both costs orders. That application was dismissed by the primary judge in November 2019. Mr Wilson was granted leave to appeal to the Court of Appeal. The issue was whether a State tribunal whose enabling statute contains a general power to order costs, can order costs against an applicant consequential upon its deciding that it has no authority to decide the claim because it raises a matter within federal jurisdiction, and whether such authority can extend to awarding costs in respect of services extending beyond those provided in challenging the tribunal's authority to decide the matter.

Held: by majority (White JA dissenting in part) dismissing the appeal: [33], [95].

- NCAT is authorised to determine whether claims made to it are within its limited jurisdiction: [13]. In deciding that question, NCAT is not exercising federal judicial power even if it concludes that it lacks jurisdiction because the claim invokes federal jurisdiction: [14]. There is an important distinction between the anterior exercise of authority to determine the limits of NCAT's own authority, and the subsequent adjudication of an application on its merits: [17].

- The implied limitation upon State legislative power does not confine the power to award costs of proceedings which are dismissed or removed for want of jurisdiction to the costs of and incidental to the jurisdictional issue: [4], [20]. Making an order for costs which extends to costs incurred in relation to non-jurisdictional issues, where there has not been a purported exercise of a non-existent jurisdiction, does not contravene the implied limitation: [31].

- White JA, dissenting in part: NCAT did not have power to make costs orders that were not consequential on its determination that it lacked authority to determine the claim as this involves the exercise of federal judicial power: [82]. The parties' claims for costs were part of the controversy and part of the matter within federal jurisdiction, and NCAT was purporting to determine the merits of the matter: [85]. The Senior Member's costs order extended beyond the ordering of costs of and incidental to the application to dismiss the proceeding for want of jurisdiction, and to this extent it was beyond power: [90].

Australian Intermediate Appellate Decisions of Interest

Administrative Law: judicial review

***Ko v Hall* [2020] VSCA 224**

Decision date: 4 September 2020

Maxwell P, Beach JA, McLeish JA

In 2017 Lee Mee Ko commenced a proceeding claiming damages for personal injuries against a surgeon, Dr White. Dr White disputed that Ms Ko's physical injury satisfied the threshold level in the *Wrongs Act 1958*, which was necessary to be able to obtain damages for non-economic loss. The medical panel determining the dispute examined Ms Ko and issued a 'Certificate of Determination' in which it answered the question referred to it unfavourably to Ms Ko. The medical panel was required to give its certificate by 7 April 2019, which was extended until 22 April and then 30 May by consent. The second extension was not requested and consented to until after the expiry of the first extension of time.

In 2019 Ms Ko sought judicial review of the medical panel's determination. The sole ground was that the panel committed an error of law on the face of the record, and/or jurisdictional error, when the panel made its determination outside the period specified in the Act. The primary judge ordered that Ms Ko's application for judicial review be reserved for consideration by the Court of Appeal.

Held: dismissing the proceeding: [72].

- The plain words of the provision did not place a limit on when an extension of time could be agreed by the parties. There is no legislative purpose for limiting the parties' ability to do so even after the time has expired: [31]. If time expired and the parties were not empowered to agree to an extension, this would require the parties to commence the process afresh, which negates the suggested legislative intention that the process be undertaken expeditiously: [35]. This intention would have to yield to an intention that the statutory processes be performed with proper care and attention to the resolution of the substantive issue: [36].

- It was improbable, given the nature of the interests at stake and the involvement of independent experts as adjudicators, that Parliament would have intended the panel to forfeit its jurisdiction should it run even slightly over the 30 day limit: [41]. None of the provisions which impose time limits on a panel contains any specification of the consequences of non-compliance: [55]. Loss of jurisdiction is a very grave consequence for non-compliance with a time limit. If this was the legislature's intention, it would have been explicitly indicated: [57].

- It is in the interests of all concerned that, should the making of a determination be for some reason delayed beyond the expiry of the time limit, the panel should be able to complete its work, rather than the parties having to begin the process all over again: [58].

Workers' Compensation: usual place of work

I.C. Formwork Services Pty Limited v Moir (No 2) **[2020] ACTCA 44**

Decision date: 4 September 2020

Mossop J, Loukas-Karlsson J, Collier J

Nigel Moir was an employee of I.C. Formwork Services Pty Limited. Mr Moir alleged that he was injured in May 2015 as a formwork carpenter at a site at Bawley Point in NSW. He commenced proceedings against I.C. Formwork claiming common law damages for negligence. The primary judge was asked to determine whether the substantive law applicable to that claim was that of the ACT per s 182D of the *Workers Compensation Act 1951* (ACT). This section requires that a common law claim against an employer for damages arising out of a work related injury be determined in accordance with the substantive law of the "Territory or State of connection". Section 36B of the Act sets out the employment connection test. The primary judge found that Mr Moir usually worked in one place only, being the ACT, and therefore the relevant substantive law was that of the ACT. I.C. Formwork brought an appeal challenging that decision.

Held: allowing the appeal: [84].

- Section 36B(6) specifically refers to the worker's work history with the employer over the previous 12 months. This compels regard to be had to the 12 month period prior to the date in question and, directly or indirectly, requires that period to be the focus of the enquiry as to where the worker usually works: [49]-[50]. Periods of work in another jurisdiction might be characterised as a "temporary arrangement" if they are below the 6 month cut-off in s 36B(6)(b): [53].

- The primary judge's approach was temporally unconstrained. His Honour framed the question of "usually works" by reference to the whole of Mr Moir's employment with I.C. Formwork. That permitted an outcome which gave no effect to the regular, customary and habitual pattern of work in the 12 month period prior to the accident. That was inconsistent with the statutory framework and involved an error of principle in addressing the issue required to be determined: [54].

- Focussing on the period of 12 months prior to the accident, it was clear that during this period Mr Moir usually worked in NSW. All his work was in NSW, except for a few days at the start of the 12 month period. In those circumstances it was clear that he was regularly working in NSW and that this work was habitual or customary during that period: [60].

- The primary judge erred in finding that Mr Moir usually worked only in the ACT and did not also usually work in NSW. His Honour ought to have found that Mr Moir usually worked in both jurisdictions. His Honour therefore erred in making the declaration that he did: [67]-[68].

Asia Pacific Decision of Interest

Consumer: misleading and deceptive conduct

Southern Response Earthquake Services Limited v Dodds **[2020] NZCA 395**

Decision date: 7 September 2020

Miller J, Clifford J, Goddard J

The Dodds' house in Christchurch was damaged beyond economic repair by earthquakes. The Dodds had insured the house on a replacement basis with Southern Response Earthquake Services Ltd. The insurance policy provided that the Dodds could choose to buy another house, and Southern Response would pay the purchase cost, capped at the cost of rebuilding their house on its site. The Dodds were provided with a "Detailed Repair/Rebuild analysis" (DRA) of their home of $895,937. The Dodds entered into a Settlement Agreement with Southern Response on the basis of this DRA. A more extensive DRA had been prepared which provided for $205,000 of additional costs. Southern Response did not disclose this DRA to the Dodds before they entered into the Settlement Agreement.

The Dodds brought proceedings against Southern Response seeking to recover the $205,000 difference between the figures. The Dodds claimed they entered into the Settlement Agreement as a result of misrepresentations and misleading and deceptive conduct by Southern Response. The claim to recover the difference between the two figures was successful in the High Court. The claim for general damages failed. Southern Response brought an appeal.

Held: partly allowing the appeal; otherwise dismissing: [195]-[197].

- A reasonable person in the position of the Dodds would have understood the statements made by Southern Response as conveying a number of representations, including that Southern Response's estimate of the rebuild cost was $895,937, reinforced by other insurance policy documents, and that the DRA given to the Dodds was the only relevant estimate of rebuild costs that Southern Response had received: [115]-[122]. The statements made by Southern Response led them to believe that their rights under the policy were worth a maximum of $895,937: [127]. These representations were false and therefore were misrepresentations: [140].

- If an insurer dealing with consumers makes absolute statements about matters which are open to doubt, in circumstances in which it is reasonable for the insured to rely on the insurer's statements, a subsequent finding that the insurer was wrong may expose the insurer to liability: [147].

- By entering into the Settlement Agreement the Dodds suffered loss: they surrendered rights under the policy that were worth $205,000 more than the sum they were paid. Southern Response's misleading conduct was an effective cause of that loss: [163]-[164]. The Dodds were entitled to recover the difference between the true value of their rights under the policy and the sum they were paid in exchange for a surrender of those rights: [184].

International Decision of Interest

Class Actions: competing applications

Micron Technology Inc. v. Hazan **2020 QCCA 1104**

Decision date: 2 September 2020

Savard CJQ, Hamilton JA, Moore JA

On 30 April 2018 Gay Hazan filed an Application for Authorization to Institute a Class Action in the Quebec Superior Court, advancing claims under the *Competition Act* relating to a price-fixing conspiracy among the Appellants. On 2 May 2018 Chelsea Jensen filed a Statement of Claim in the Federal Court claiming damages for price fixing against the same defendants.

In November 2018, the Appellants filed a Joint Application for a Stay of the Class Action before the Quebec Superior Court, on the basis of *lis pendens* between the two proceedings and a risk of conflicting judgments on the merits of the claims in the two files. The primary judge dismissed the Stay Application, finding that both courts had concurrent jurisdiction in respect of class actions based on breaches of the *Competition Act*. The appellants brought an appeal.

Held: dismissing the appeal: [70].

- There is *lis pendens* between two pending actions when the conditions for res judicata are met: "the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same": [15]. When there is *lis pendens*, the court will proceed with the first action filed and dismiss any subsequent actions. These general rules do not apply neatly to motions for authorisation to institute class actions: [25]-[26].

- The Superior Court has the inherent jurisdiction to suspend the Quebec Proceedings in favour of the Federal Court proceedings notwithstanding the "first to file" rule: [39]. Its purpose was to provide a simple rule, to avoid having an expensive carriage motion between competing law firms, and that the Superior Court would hold the other proceedings in abeyance and retained the capacity to have the subsequently filed case take the place of the first case if circumstances so required. Those considerations did not justify extending the rule to class actions. When the issue is whether the class action should proceed in the Superior Court as opposed to the courts of another province or the Federal Court, other considerations are relevant: [40]-[42].

- The appropriate test for a suspension is whether it is in the interests of the class members and the administration of justice: [50]. The primary judge should have considered the possibility of suspending the Quebec Proceedings under the court's inherent jurisdiction. The "first to file" rule does not apply in that analysis. The matter should be allowed to proceed to authorisation: [70].