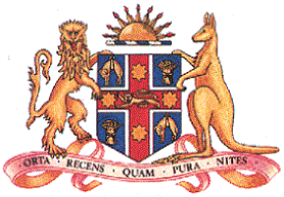

Court of Appeal
Supreme Court
Sydney

Decisions of Interest

26 September 2020 – 9 October 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

Constitutional Law: statutory interpretation

DRJ v Commissioner of Victims Rights (No 2) **[2020] NSWCA 242**

Decision date: 2 October 2020

Bell P, Meagher JA, Leeming JA

Five women of Yazidi ethnicity claimed that in 2014 they were subjected to a series of acts of violence in Syria and northern Iraq at the hands of an Australian man. The man lived in NSW until 2013. None of the plaintiffs has ever been to Australia. In 2018 the plaintiffs' solicitor applied on their behalf for recognition payments and counselling under the *Victims Rights and Support Act 2013* (NSW) (the Act). The application was dismissed, on the basis that none of the acts of violence occurred in NSW. Applications for internal review by a delegate of the Commissioner were dismissed.

The plaintiffs applied for administrative review by the NSW Civil and Administrative Tribunal (NCAT) which was dismissed. Part of the reasoning was that the acts of violence must have occurred in NSW in order for the Act to apply. Additionally it was held that other elements of eligibility under the statutory scheme, including the offence and the injury or death, must have occurred in NSW, and the offence had to be one which was contrary to the law of NSW (a federal offence would not suffice). The plaintiffs filed a summons alleging error on the face of the record of NCAT's decision.

Held: dismissing the summons: [185]

- Where no express provision has been made connecting the statute to NSW, the task is to identify the central focus or central conception of the legislation, and require that to bear a connection with NSW. This is a matter of construction, based on subject matter and scope, with a regard to internal indications and to avoiding improbable and absurd outcomes. It will be relevant to have regard to the purpose of the statute, the likelihood that the statutory purpose will be evaded if made to depend upon something readily altered at the instance of the parties, and the need to avoid an unduly restrictive approach whereby more than one factum is required to bear a connection: [157].

- On its proper construction, the act of violence which is the central concern of the scheme created by the Act must occur in NSW. Even if committed by a NSW resident on holiday overseas, or even if the act of violence amounts to an offence contrary to a NSW law, the victim is not eligible under the scheme. The Commissioner was correct to refuse the applications, and NCAT was correct to dismiss the application for administrative review: [184].

- Observations by Bell P as to the need for clear legislative guidance to be given to the geographical or territorial reach of statutory enactments: [28].

Proceeds of Crime: freezing orders

***Gwe v Commissioner of the Australian Federal Police* [2020] NSWCA 247**

Decision date: 2 October 2020

Bathurst CJ, Bell P, Emmett AJA

Yoo Tak Gwe and his wife Tan Soi Hoang are residents of Indonesia. In 2015 the Commissioner of Police applied for freezing orders in relation to property owned by Mr Gwe and Ms Hoang. This property was suspected to be the proceeds of crime as there had been deposits that disclosed structured payments contrary to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The freezing orders were made. In 2016 Mr Gwe and Ms Hoang applied for orders under the *Proceeds of Crime Act 2002* (Cth) (the Act) that certain property be excluded from the freezing orders. The relevant property was two Westpac bank accounts; three Westpac home loan accounts; and three parcels of real property in Zetland. The basis for the application was that their interest in the property was neither "proceeds" of an offence nor an "instrument of an offence". The application was dismissed. Mr Gwe and Ms Hoang brought an appeal.

Held: granting leave and allowing the appeal: [92].

- For the purposes of s 330(4)(a) of the Act, an assessment of whether property is acquired by a third party in "circumstances that would not arouse a reasonable suspicion that the property was proceeds of an offence", whilst to be made objectively, must be undertaken in light of the *actual knowledge* of the party seeking the order. Thus, if a person with the applicant's knowledge would not have had a reasonable suspicion, then this element will be satisfied: [67].

- The evidence of Ms Hoang that she did not look at and had no knowledge of the fact or detail of multiple individual deposits into the Westpac account was unchallenged and uncontradicted. The evidence could have been challenged and Ms Hoang confronted in cross-examination. A cross-examiner's failure to challenge evidence is a calculated forensic step: [70]-[72]. The primary judge correctly did not reject the consistent evidence Ms Hoang had given: [76].

- The considerations of fairness upon which the rule in *Browne v Dunn* rests apply: [83]. Ms Hoang could not be criticised for not anticipating a submission based upon a hypothetical example advanced by the primary judge in his judgment, and one which was never put to her by the Commissioner: [85].

- The critical aspect of the primary judge's reasoning on the s 330(4)(a) question was flawed. His Honour engaged in an exercise in speculation based upon an example that obtained no foundation in the facts of the case: [87]. Mr Gwe and Ms Hoang did not have actual knowledge that the property the subject of the freezing orders constituted "proceeds of an offence". As the negative proposition contained in s 330(4)(a) was established, an exclusion order should have been made: [90]-[91].

Contracts: sale of land

Scott v Ennis-Oakes **[2020] NSWCA 239**

Decision date: 1 October 2020

Bathurst CJ, Bell P, Gleeson JA

The Scotts brought a claim against Ms Ennis-Oakes for damages arising out of the termination of a contract for sale by Ms Ennis-Oakes to the Scotts of a lot in a proposed subdivision of Ms Ennis-Oakes' property in Terrigal (the Contract). Additional Condition 37 (AC 37) to the Contract provided that either party may rescind the Contract by notice in writing where either party is "declared bankrupt or enter[s] into any scheme or make[s] any assignment for the benefit of creditors". Completion was to take place within 42 days or 21 days of receipt of notice of the registration of the subdivision plan. The plan of subdivision was not registered within 12 months of the date of the Contract as required. Ms Ennis-Oakes' conveyancer proposed to rescind the Contract. The Scotts did not consent to the proposed rescission. Ms Ennis-Oakes' solicitors did not accept that the Contract was still on foot. The Scotts commenced proceedings seeking specific performance of the Contract. Ms Ennis-Oakes entered into a scheme of arrangement deed with her creditors. Ms Ennis-Oakes' solicitors sent a notice of rescission to the Scotts. The primary judge dismissed the claim and the Scotts brought an appeal.

Held: dismissing the appeal: [60].

- The primary judge was correct in concluding that the Scotts' claim for loss of bargain damages was precluded: [37]. A right to claim loss of bargain damages arises on termination of the contract by the innocent party. On such termination, both parties are absolved from future performance of the contract and the defaulting party comes under a secondary obligation to compensate the innocent party for the loss of the bargain. However, until the contract is terminated by the innocent party, it remains on foot and no right to loss of bargain damages arises: [38].

- The Scotts affirmed the Contract and it was terminated by a supervening event, namely the entry by Ms Ennis-Oakes into a scheme of arrangement with her creditors which gave rise to the right to terminate under AC 37. Thus the Contract came to an end not as a result of termination for breach of a contractual term or repudiation, but rather, as a result of a supervening event which occurred whilst the Contract remained on foot: [42].

- The construction of AC 37 required determination of what a reasonable person in the position of the parties would have taken it to mean. The clause assumed that the Contract was in existence at the time the right to terminate was exercised. AC 37 was designed to protect rights enforceable at the time of termination including preserving rights for damages for breach of contract which had already accrued to either party. Rather than terminating and seeking loss of bargain damages, the Scotts elected to affirm the Contract and seek specific performance. At the time of termination, they had no right to loss of bargain damages and therefore nothing was preserved by AC 37: [53]-[57].

Taxation: multiple liabilities

***Kedwell v Deputy Commissioner of Taxation* [2020] NSWCA 238**

Decision date: 1 October 2020

Bell P, Basten JA, Payne JA

In September 2017, the Deputy Commissioner of Taxation (the Commissioner) issued a Director Penalty Notice (DPN) to Nathan Kedwell in the amount of $384,301. The DPN identified the underlying liability as being PAYG amounts Synergy HR (Aust) Pty Ltd (Synergy) had withheld and not remitted to the Commissioner. Mr Kedwell was at that time the sole director of Synergy. Synergy had a Running Balance Account (RBA) debt of $1,109,811.50 to the Commissioner. Payments were received by the Commissioner from Minerva BPO Pty Ltd (Minerva), of which Mr Kedwell was the sole director, which had bank statement references to Synergy and were applied to Synergy's RBA. The Commissioner issued a statutory demand to Synergy in the amount of $712,728.49.

Mr Kedwell had multiple telephone conversations with representatives from the Australian Taxation Office (ATO). They included Mr Kedwell seeking to make a "payment arrangement" in relation to Synergy's debts. No direction was given by Mr Kedwell that any payment made had been or should be allocated in payment of his DPN liability. Mr Kedwell was told that no payment plan had been agreed.

The Commissioner filed a statement of claim against Mr Kedwell in relation to the debt owed. The primary judge gave judgment for the Commissioner in the sum of $332,531.61 owing as a result of the non-payment of the DPN. Mr Kedwell brought an appeal.

Held: dismissing the appeal: [91].

- The sporadic payments by Minerva to Synergy over four months, which were then paid to the Commissioner and allocated to Synergy's RBA, was insufficient to establish a loan agreement between Minerva and Mr Kedwell: [53], [55].
- All of the payments made to the Commissioner were made without Mr Kedwell, Synergy or Minerva giving a direction to the Commissioner that the funds should be applied to Mr Kedwell's DPN liability: [58]. Mr Kedwell caused each of the payments to be made without using the payments reference he was given in the DPN for payment of his DPN liability: [60]. Pursuant to s 8AAZLE of the *Taxation Administration Act 1953* (Cth) the Commissioner was not bound by any instructions given to him by Synergy about how those payments were to be allocated in payment of Synergy's debts: [62].
- There was no express or implied representation that the ATO had allocated the sums received in reduction of the liabilities the subject of Mr Kedwell's DPN: [74]. There was no reliance by Mr Kedwell on the alleged representation: [84]. None of the matters alleged by Mr Kedwell as constituting detriment was established: [86].

Australian Intermediate Appellate Decisions of Interest

Property: adverse possession

***Ben-Pelech v Royle* [2020] WASCA 168**

Decision date: 2 October 2020

Murphy JA, Beech JA, Vaughan JA

The Ben-Pelechs and the Royles are the owners of adjacent lots in City Beach. In 1993-94, the Ben-Pelechs and the Royles replaced the existing fence between their lots, which they knew to be misaligned, with a new fence. The replacement fence ran from the rear adjoining corner of the two lots and continued for approximately two-thirds of the assumed boundary between the lots. The remaining one-third of the boundary between the lots was never fenced. The parties' intention was to build the replacement fence on the true boundary line between their lots. The parties discovered in 2017 that the replacement fence was misaligned by approximately 0.5 m. It was built entirely on the Ben-Pelechs' lot.

The Ben-Pelechs brought proceedings seeking a declaration that the boundary between the lots conformed to the boundary on the certificates of title and orders permitting them to remove the replacement fence and build another fence on the true boundary line. The Royles claimed relief on the ground that they had adverse possession of the area on their side of the replacement fence which was actually part of the Ben-Pelechs' lot. The primary judge rejected the Ben-Pelechs' arguments advanced in response to the claim of adverse possession over the rear area. The Ben-Pelechs brought an appeal.

Held: dismissing the appeal: [86].

- A right of adverse possession arises because, and when, the owner's right to bring an action to eject the party in possession has been barred by the expiry of the applicable limitation period. In order to create rights of adverse possession, the claimant's possession must be 'open, not secret; peaceful, not by force; and adverse, not by consent of the true owner': [53]-[54].
- It is only where the true owner knowingly permits the putative adverse possessor to occupy or exercise rights over land the owner knows to belong to him or her, and not to the possessor, that the owner has consented so as to preclude an action for ejectment by the owner: [59].
- The Ben-Pelechs did not know of the misalignment of the fence and, consequently, did not know that the Royles were in occupation of the disputed area of the lot owned by the Ben-Pelechs. Unknown to the Ben-Pelechs, the Royles were exercising rights of exclusive possession. It cannot be said that they consented to the Royles' possession of the rear area: [60]. The Ben-Pelechs had an action to eject the Royles from the time the Royles began occupying land owned by the Ben-Pelechs after the fence was built, and time began to run against the Ben-Pelechs: [68]. The Ben-Pelech's title was extinguished after the expiry of the 12 year limitation period.

Asia Pacific Decision of Interest

Defamation: republication

***Fourth Estate Holdings (2012) Limited v Joyce* [2020] NZCA 479**

Decision date: 9 October 2020

Miller J, Brown J, Goddard J

In March 2018 an article written by Matthew Hooton was published in the National Business Review (NBR) newspaper, published by Fourth Estate Holdings. The article was highly critical of Steven Joyce, who was at the time a Member of Parliament. Mr Joyce brought proceedings against Mr Hooton and Fourth Estate in relation to two specific passages in the article. Mr Joyce made a claim under the *Defamation Act 1992* for a declaration that the defendants were liable to him in defamation, and for an award of solicitor and client costs. Mr Hooton settled the claim against him, apologised to Mr Joyce and the claim was discontinued. Mr Joyce continued the claim against Fourth Estate and Mr Scott, Fourth Estate's sole director and shareholder, as a defendant, alleging that three tweets published by Mr Scott had the effect of republishing the article.

Mr Joyce's claims against Fourth Estate and Mr Scott succeeded in the High Court. The Judge granted a declaration that Fourth Estate and Mr Scott were each liable to Mr Joyce in defamation. Mr Joyce was awarded solicitor and client costs. Fourth Estate and Mr Scott brought an appeal.

Held: allowing the appeal and setting aside the primary judgment: [86]-[87].

- The primary judge proceeded on the basis that he was able to find that the challenged passages had meanings that were different from the pleaded meanings, provided that the meaning he preferred was less injurious than the meaning pleaded by Mr Joyce: [60]. The Court did not express a view on whether it was open to the primary judge to uphold the claim on the basis of a meaning that differed from the pleaded meaning, provided the difference was not material. It has been recognised that there may be limited circumstances in which it is appropriate for a judge to reformulate the plaintiff's pleaded meanings, while ensuring fairness to the parties and having due regard to the importance of pleadings in defamation cases, but the scope for any reformulation of pleaded meanings must be narrowly confined: [77].

- In determining whether passages complained of are capable of bearing allegedly defamatory meanings, the objective test is what the ordinary reasonable person would understand by them under the circumstances in which the words were published: [69]. The two passages, when read in context, conveyed neither the pleaded meanings nor the meanings adopted by the Judge: [68].

- The tweets would have been understood by a reasonable person in the relevant subset of readers as endorsing the core themes of the article, and not the specific passages complained about and their pleaded meanings: [80].

International Decision of Interest

Arbitration Agreements: applicable law

Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb (Appellant) **[2020] UKSC 38**

Decision date: 9 October 2020

Lord Kerr, Lord Sales, Lord Hamblen, Lord Leggatt, Lord Burrows

Chubb Russia insured the owner of a power plant in Russia against damage from fire. The head-contractor engaged Enka as a sub-contractor for construction work to be carried out at the plant. The subcontract contained a dispute resolution clause that required disputes to be determined through arbitration in London. In May 2014, the head-contractor transferred its rights and obligations under the contract to the owner. In February 2016, the power plant was severely damaged by fire. Chubb Russia paid under its property insurance policy and thereby became subrogated to any rights of the owner to claim compensation from third parties for the damage. In May 2019, Chubb Russia brought a claim against Enka in Russia. In September 2019 Enka brought an arbitration claim in the UK arguing that Chubb Russia was in breach of the arbitration agreement and seeking an anti-suit injunction. The High Court dismissed Enka's claim. The Court of Appeal overturned the decision. Chubb Russia brought an appeal.

Held: by majority, dismissing the appeal (Lords Burrows and Sales dissenting): [186].

- Where an English court has to determine which law governs an arbitration agreement incorporated in a contract, it is the common law rules alone which the court must apply: [28]. A contract is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is most closely connected: [27]. A choice of law for the contract will normally apply to an arbitration clause in the contract: [45]. Where the parties to a contract have not chosen the law applicable to the arbitration agreement, the court must determine, objectively and irrespective of the parties' intention, with which system of law the arbitration agreement has its closest connection: [118]. This is the law of the place chosen as the seat of arbitration and will apply by default: [120].

- A choice of the seat of arbitration cannot by itself be construed as an implied choice of the law applicable to the arbitration agreement: [117]. The Court of Appeal was wrong to hold that there is a "strong presumption" that a choice of seat is an implied choice of the law which is to govern the arbitration agreement: [66].

- The contract contained no choice of the law that is intended to govern the contract or the arbitration agreement within it. The validity and scope of the arbitration agreement was governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause was most closely connected. The Court of Appeal's conclusion that the law applicable to the arbitration agreement was English law was affirmed by the Court: [171].

- Lords Burrows and Sales dissenting: where there is no express proper law clause, there is a presumption that the proper law of the main contract is also the proper law of the arbitration agreement: [257]. The parties impliedly chose Russian law for the main contract which encompassed the arbitration agreement: [228].