Court of Appeal
Supreme Court
Sydney

Decisions of Interest

24 October 2020 – 6 November 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

Tort: trespass

***Sydney Local Health District v Macquarie International Health Clinic Pty Ltd* [2020] NSWCA 274**

Decision date: 2 November 2020

Bell P, Gleeson, Payne JJA

In 1996, Sydney Local Health District (SLHD) and Macquarie International Health Clinic Pty Ltd (Macquarie) entered into agreements in relation to the development of a private hospital and car park on two lots of land in Camperdown (the Hospital Site and the Car Park Site, respectively). In 2000, SLHD re-entered and took possession of the Sites. In proceedings before the Court of Appeal in 2010, the re-entry was held to constitute a trespass. Stage one of the car park was substantially completed, but no hospital had been built. The Court of Appeal directed a damages inquiry.

In the damages inquiry, Macquarie initially sought compensation by way of damages for loss of commercial opportunity to develop the hospital and loss of profits in respect of the car park, but after 40 days of hearing abandoned that claim and instead sought damages by way of mesne profits as a result of the trespass to the two Sites. By final orders made in 2019, the primary judge awarded Macquarie approximately $55 million by way of mesne profits for the trespass to the Hospital Site, and approximately $30 million in relation to the trespass to the Car Park Site. SLHD brought an appeal. The principal issue on appeal related to the award of mesne profits in relation to the Hospital Site. The Court reduced this award to nil. The Court also reduced the award in relation to the Car Park Site.

Held: allowing the appeal and dismissing the cross-appeal: [548].

- Damages for mesne profits consequent upon a trespass to land are for the defendant's actual use or usage of the plaintiff's real or personal property in its existing state at the time of the commencement of the trespass. The usual measure will be the market rent for the premises or for the hire of the goods in their state during the period of the trespass, having regard to the particular context of the case and characteristics of the property or goods. There may be special circumstances associated with the defendant which warrant a departure from this yardstick: [128]-[137].
- The primary judge's assessment of damages by way of mesne profits in respect of the Hospital Site miscarried, resulting in a massive overcompensation to Macquarie. Damages were awarded in respect of trespass to an unimproved site by reference to a private hospital that never existed and which would not have been built. The primary judge erred in assessing damages in effect for trespass to an asset which had not yet come into existence or for interference with contractual rights: [235]-[238].
- Detailed discussion as to the history of and principles relating to mesne profits.

Legal Profession: complaints, jurisdiction

***Taylor v Council of the Law Society of New South Wales* [2020] NSWCA 273**

Decision date: 3 November 2020

Macfarlan, McCallum JJA, Simpson AJA

Erica Taylor conducted a practice as a sole practitioner under the name "lexicon: legal". In 2015 the Council of the Law Society of NSW appointed a trust account investigator to report on lexicon:legal's affairs which revealed defalcations in the management of its trust account. Ms Taylor disclosed that she had made personal use of funds in the trust account. On 30 June 2015 the Professional Conduct Committee of the Law Society passed certain resolutions that Ms Taylor wilfully breached the *Legal Profession Act 2004* (NSW) (the Act) (now repealed) and misappropriated trust funds. On 18 August 2016 the Council resolved that Ms Taylor was not a fit and proper person to hold a practising certificate.

Section 552 of the Act created a statutory time limit of six months from the date on which the Council decided that there was a reasonable likelihood that the legal practitioner would be found by NCAT to have engaged in unsatisfactory professional conduct or professional misconduct. The Committee made a resolution in these terms on 15 November 2018. Additionally, s 495 of the Act required a complaint about the conduct of a legal practitioner to have been duly made to enliven the NSW Civil and Administrative Tribunal (NCAT)'s jurisdiction to deal with a disciplinary application. Such an application was brought by the Council against Ms Taylor under s 551 of the Act in NCAT on 14 May 2019. Contrary to Ms Taylor's submissions, NCAT held that it had jurisdiction. Ms Taylor brought an appeal against that decision.

Held: allowing the appeal: [105].

- A minute of a resolution passed orally at a meeting does not meet the requirement of s 504(2) of the Act that a complaint about an Australian legal practitioner "must be in writing": [2]. The absence of a written complaint would be sufficient to justify setting aside the orders of NCAT: [90].
- The futurity of the language of the 30 June 2015 resolution indicated an intention to make a complaint at a later time. No complaint within the meaning of s 495 was made prior to 1 July 2015. NCAT did not have jurisdiction to deal with the Council's disciplinary application: [67]-[68]. The 30 June 2015 resolution of the Council was no more than a cursory statement of the conclusions that the Council anticipated would be drawn: [87]. It did not sufficiently describe the conduct the subject of the Council's allegations and therefore did not meet the requirements of s 504(3)(c) of the Act: [71].
- The 18 August 2016 resolution was not a decision for the purposes of s 552(6) of the Act, and therefore NCAT was not deprived of jurisdiction by reason of the expiration of the limitation period in s 552(1): [93]-[95]. This decision was reached on 15 November 2018. The proceedings were commenced prior to the expiration of the permitted period: [92].

Land Law: easements

Arcidiacono v The Owners – Strata Plan No 17719; Arcidiacono v The Owners – Strata Plan No 61233 **[2020] NSWCA 269**

Decision date: 28 October 2020

Macfarlan, White, McCallum JJA

John and Anna Arcidiacono purchased two small parcels of land in Sydney's CBD in 2008 which were sold by the Sydney City Council as a result of unpaid rates. The respondents, who were the owners of neighbouring land, brought proceedings claiming that they were entitled to the benefit of easements over the parcels of land. The primary judge found that the respondents were entitled to easements by prescription based on long open use. If the primary judge had not held that the respondents had a present entitlement to those easements, her Honour would have made orders under s 88K of the *Conveyancing Act 1919* (NSW) imposing relevant easements. Her Honour made orders under s 88K imposing easements for the benefit of the adjoining properties over the parcels for overhanging and encroaching structures to remain, and for services and repairs.

Held: granting leave, dismissing the appeal: [78].

- An easement by prescription will arise if the owner of the land alleged to be the servient tenement knows that, over the requisite period, his or her land is being used by another party seemingly as of right, but in fact without authority, yet stands by and does not assert his or her rights, or where the owner does not know of the user but a reasonably diligent owner would have known: [42]-[43].
- Owners of property who are unaware of that ownership may be fixed with knowledge of adverse users of their properties on the basis that a prudent owner would have been aware: [44], [57]. The Arcidiaconos did not discharge their onus of establishing that the owners from time to time were not aware of that user: [57]. The use of the parcels by adjoining residents was open and would have been obvious or apparent to any reasonable observer: [59].
- The primary judge's conclusion that access over a part of one parcel was "substantially preferable" to the construction and use of a fire isolated passage was well supported by the evidence. It was an evaluative conclusion which the Arcidiaconos did not establish was unreasonable or not open: [63]-[65]. Her Honour was entitled to find that imposition of the easements would not be against the public interest: [67]. The Arcidiaconos' challenge to her Honour's assessment of the appropriate compensation that should be paid in the event an easement was imposed failed: [72]. The Arcidiaconos did not establish any error in the primary judge's exercise of her discretion to impose the relevant easements: [74], [77].
- Per White JA: the owners of the parcels did not acquiesce in the use because no one could know whether they owned the parcels: [82]. It is the open and uninterrupted use that gives rise to the easement by prescription: [144]. The notion of constructive knowledge cannot be extended as far as imputing the relevant knowledge to the previous owners: [147]

Representative Proceedings: litigation funding agreements

***Brewster v BMW Australia Ltd* [2020] NSWCA 272**

Decision date: 30 October 2020

Bathurst CJ, Bell P, Payne JA

Multiple sets of representative proceedings were commenced in 2017-18 concerned with allegedly defective motor vehicle airbags manufactured by Takata Corporation. Mr Owen Brewster is the group representative in representative proceedings against BMW Australia. Mr Brewster, and an additional 33 group members, entered into a litigation funding agreement with Regency Funding Pty Ltd. By orders made in September 2020, the following separate question was removed to the Court of Appeal:

> "Does the Court have the power pursuant to s 173 of the *Civil Procedure Act 2005* (NSW) (the Act) to make an order requiring group members in this matter who have not signed a litigation funding agreement with Regency Funding Pty Ltd to pay an amount to that funder out of the proceeds of any settlement by way of return on expenditure, commission or other similar remuneration to the funder?"

In an earlier iteration of these proceedings, *BMW Australia Ltd v Brewster* [2019] HCA 45 (*BMW (HC)*, the High Court, by majority, held that s 183 of the Act did not authorise the making of a "common fund order" at an early stage of proceedings.

Held: declining to answer the separate question: [47].

- The importance of consideration by intermediate appellate courts of "seriously considered dicta" of the High Court does not carry with it an obligation to speculate upon what the High Court might decide in a future case concerned with a different statutory provision: [35].
- The factual context of a settlement being presented to the Court for approval is very different to the situation, at an earlier stage of litigation, where the Court is asked to approve an order nominating a particular percentage or commission which a funder may extract from any ultimate settlement or judgment, when that sum and the attitude of group members towards the settlement are unknown: [38].
- The question as to whether or not it is just that a particular order or proposed order be made, whether it be characterised as "a funding equalisation order" or a "common fund order", is best determined in the context of known facts, both in respect of the precise terms of the proposed order and the facts of the case: [44].
- It was not appropriate to answer the question in an evidentiary vacuum; where there may or may not be a settlement; where the Court did not have before it either the terms of any settlement or order that may be sought if a settlement were reached; where the *ratio decidendi* of *BMW (HC)* was limited to the Court's power under s 183 of the Act to make a common fund order prior *to* any settlement or judgment; and where it was far from obvious that the majority in *BMW (HC)* was addressing any question of power under s 173 of the Act: [28].

Australian Intermediate Appellate Decisions of Interest

Contracts: insurance policy

***Danbol Pty Ltd v Swiss Re International SE* [2020] VSCA 274**

Decision date: 5 November 2020

McLeish, Niall, Sifris JJA

Danbol Pty Ltd held an annual insurance policy with Swiss Re International SE relating to a warehouse in West Footscray which expired on 24 August 2018. That same day, Swiss Re's representative emailed Danbol's insurance broker to advise that Swiss Re had declined to renew the policy because there had been a change of use of the property. Swiss Re's representative offered a 14 day extension of the policy in return for a specified premium of $3,506.06, but would need further information in order to reconsider its decision to decline to renew the annual policy.

Danbol continued to engage with Swiss Re's representative in order to secure an annual policy. On 29 August 2018, Swiss Re's representative offered an annual policy, stating that if that offer was not accepted the extra premium attached to the 14 day extension 'applied' until 7 September 2018. The property burnt down on 30 August 2018, before Danbol could accept the offer of annual cover. Danbol commenced proceedings seeking recovery under the policy. The primary judge dismissed the proceedings, finding that there was no 14 day extension of the policy, and therefore no policy was in place at the time of the fire. Danbol brought an appeal.

Held: granting leave to appeal, dismissing the appeal: [130].

- Although silence cannot generally be equated with assent, acceptance may be inferred from conduct: [75]. In certain cases, the search for both offer and acceptance may be dispensed with where the conduct between the parties yielded sufficient evidence of mutual assent: [77]. In the absence of a clearly identified offer and acceptance, it will be difficult to identify mutual assent to a binding legal relationship and its terms. Without express terms it is harder to attribute a clear meaning to conduct: [82]. The critical inquiry is what would a reasonable person in the position of the offeror make of an alleged acceptance: [83]. There was nothing in Danbol's conduct that manifested with a sufficient degree of certainty that it had accepted Swiss Re's offer of a 14 day extension of cover: [118].
- The judge correctly proceeded on the basis that the purpose of the extension was to allow placement either with Swiss Re or elsewhere: [92]. Swiss Re had yet to calibrate the risks associated with the change of use that they were being asked to insure: [93].
- The offer of an insurer to provide cover in return for the payment of a premium is not a unilateral contract: [101]; and acceptance of the offer would have imposed an enforceable obligation on Danbol to pay the premium: [97].

Asia Pacific Decision of Interest

Consumer: misleading or deceptive conduct

Commerce Commission v Steel & Tube Holdings Limited **[2020] NZCA 549**

Decision date: 9 November 2020

Miller, Brown, Courtney JJ

After an investigation by the New Zealand Commerce Commission, Steel & Tube Holdings Ltd pleaded guilty to 24 charges of misleading conduct and false representations in connection with its seismic grade steel mesh. It represented that the mesh, used to reinforce concrete structures, was 500E grade, meaning that it had been tested independently and complied with the relevant building standard. A former employee of Steel & Tube was responsible for developing its seismic steel products and ensuring they met the standard. Following the Canterbury earthquakes, the standard was amended to require that steel mesh used in concrete slab floors be 500E grade. Steel & Tube's mesh was not tested in the prescribed manner, and therefore could not have been said to comply with the Standard. By representing that it did, and that it had been independently tested, Steel & Tube misled consumers. The company was fined $1,885,000. Both parties appealed to the High Court, where the fines were increased to $2,009,280. Steel & Tube brought an appeal challenging this decision.

Held: allowing the appeal: [155].

- When a company commits an offence, the actions and states of mind required for the offence are those of human actors which the law attributes to the company: [60]. A corporate defendant is liable by reason of its agency relationship with the individual director, employee or agent concerned, so long as that person was acting within the scope of their actual or apparent authority: [65]. The extent of the statutory attribution reflects the purpose of consumer protection. It is not confined to senior management; rather, it extends to the conduct or state of mind of any employee or agent whose conduct on behalf of the defendant firm may mislead consumers: [66].

- It was necessary to establish the company's state of mind for sentencing purposes: [69]-[72]. Carelessness should not be treated as a default state of mind, with inadvertence and knowing breach characterised as mitigating or aggravating facts. The circumstances of the particular case determine whether facts are material and have the effect of aggravating or mitigating the sentence: [78]. It was an error to sentence on the basis that the company did not share the former employee's state of mind but rather was a victim of his conduct: [74].

- The representations were not intended to mislead or deceive. Steel & Tube believed the mesh did comply and that its testing processes met the standard. The company did not mislead for gain, and the gain it actually made could not be estimated. The company responded by withdrawing the mesh from the market as soon as it was put on notice that its testing processes did not comply: [143]. The sentence substituted in the High Court was manifestly excessive: [154].

International Decision of Interest

Land law: restrictive covenants

Alexander Devine Children's Cancer Trust (Respondent) v Housing Solutions Ltd (Appellant) **[2020] UKSC 45**

Decision date: 6 November 2020

Lord Kerr, Lord Lloyd-Jones, Lord Kitchin, Lord Hamblen, Lord Burrows

The Alexander Devine Children's Cancer Trust (the Trust) was entitled to the benefit of a restrictive covenant preventing development of an area of open land. Housing Solutions Ltd was a property company concerned with the provision of affordable housing. Housing Solutions sought the discharge or modification of the restrictive covenant to ensure that 13 units of affordable housing, built in breach of the restrictive covenant, did not go to waste. The Trust sought to maintain the benefit of the restrictive covenant so that terminally ill children in a hospice built on the Trust's land could fully enjoy, in privacy, the use of the grounds. Housing Solutions acquired the land encumbered by the restrictive covenant from a property developer, who made the application seeking the discharge or modification of the restrictive covenant. The application succeeded but was overturned by the Court of Appeal. Housing Solutions brought an appeal.

Held: dismissing the appeal, setting aside the decision of the Upper Tribunal and remaking the decision by refusing the application: [74].

- The enquiry was narrow, and did not involve asking the wide question of whether in all the circumstances it was contrary to the public interest to maintain the restrictive covenant. The good or bad conduct of Housing Solutions was irrelevant at this jurisdictional stage: [44].
- The approach taken by the Court of Appeal, which regarded the manner of breach as being of importance at the jurisdictional stage under the "contrary to the public interest" ground, was incorrect. These considerations are important to the overall decision, but are relevant at the discretionary stage only and not at the jurisdictional stage: [47]. The Upper Tribunal did not make an error of law by regarding as highly relevant at the jurisdictional stage the fact that, by the time of the application, 13 housing units had been built: [50].
- It would only be appropriate for an appellate court to interfere, at the discretionary stage, with the decision of the specialist tribunal charged by Parliament with exercising discretionary power to decide these matters, if that tribunal has made an error of law. The possibility of reaching a different decision when balancing the considerations taken into account by the Upper Tribunal is not a sufficient reason for the court to intervene with the discretionary decision of the Upper Tribunal: [51].
- The Upper Tribunal made an error of law by failing properly to take account of the property developer's cynical conduct in the exercise of its discretion: [62].

Torts: pure economic loss

***Ontario Inc. v. Maple Leaf Foods Inc.,* 2020 SCC 35**

Decision date: 6 November 2020

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

In 2008, a number of Mr. Sub franchisees were affected by the decision of Maple Leaf Foods Inc. to recall meat products that had been processed in one of its factories in which a listeria outbreak had occurred. Following the recall, the franchisees experienced a shortage of product for six to eight weeks. The relationship between Mr. Sub and Maple Leaf was governed by an exclusive supply agreement. No contractual relationship ever existed between the franchisees and Maple Leaf. A class action against Maple Leaf was brought on behalf of the franchisees with Ontario Inc. as the class representative, claiming to have suffered economic loss and reputational injury due to their association with contaminated meat products and seeking compensation for lost sales, profits, capital value of the franchises and goodwill. Maple Leaf unsuccessfully brought a motion for summary judgment dismissing these claims. The Court of Appeal allowed Maple Leaf's appeal. Ontario Inc. brought an appeal.

Held: by a majority of 5 to 4, dismissing the appeal (Wagner CJ, Karakatsanis, Abella, Kasirer JJ dissenting): [96].

- Pure economic loss is economic loss that is unconnected to a physical or mental injury, or to physical damage. It is distinct from consequential economic loss, which results from damage to the plaintiff's rights. While pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss: [17]-[19]. The current categories of pure economic loss incurred between private parties are: (1) negligent misrepresentation or performance of a service; (2) negligent supply of shoddy goods or structures; and (3) relational economic loss: [21].

- In cases of negligent misrepresentation or performance of a service, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose: [32]. Maple Leaf's undertaking to ensure that Mr. Sub customers who ate meats would not become ill or die as a result of eating the meats was made to consumers, and not to commercial intermediaries such as Mr. Sub's franchisees: [39].

- A duty of care in respect of the negligent supply of shoddy goods or structures is predicated upon a defect posing a real and substantial danger to the plaintiff's rights in person or property. Any danger posed by the supply of meats could be a danger only to the ultimate consumer, not to Mr. Sub franchisees. Any real and substantial danger to consumers evaporated when they were recalled and destroyed: [57]-[58].

- There was no relationship of proximity between Maple Leaf and Mr Sub. franchisees for the purposes of recognising a novel duty of care: [62], [95].

- Karakatsanis (dissenting): it is fair and just to impose a novel duty of care on and to hold Maple Leaf responsible for the franchisees' direct economic consequences of being associated with unsafe Maple Leaf products while they posed a danger to consumer health: [101], [155].