Court of Appeal
Supreme Court
Sydney

Decisions of Interest

7 November 2020 – 20 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

Revenue: stamp duties

***Chief Commissioner of State Revenue v Benidorm Pty Ltd* [2020] NSWCA 285**

Decision date: 13 November 2020

Meagher, Leeming, Payne JJA

In May 2007, John Dawson, a solicitor acting on instruction from John Robinson, caused Benidorm Pty Ltd to be incorporated. Benidorm entered into a contract for the purchase of an apartment in Sydney for $12,050,000. Mr Dawson executed a declaration of trust acknowledging that he held his shares in Benidorm as a mere nominee for Mr Robinson. Benidorm and Mr Robinson entered a Declaration of Trust, whereby Benidorm declared that it would hold the title as trustee for Mr Robinson. The sale of the apartment was completed and *ad valorem* duty of $783,994.00 was paid on the contract. Mr Robinson died. His will appointed Mr Stubbs as his sole executor and beneficiary. A grant of probate was resealed in the Supreme Court of NSW.

In January 2015, Benidorm and Mr Stubbs entered into a "Declaration of Trust by Nominee". A recital recorded that Mr Robinson's beneficial interest under the first trust deed had now become vested in Mr Stubbs as new beneficiary. The Chief Commissioner assessed ad valorem duty upon the second trust deed on the basis that it was a "declaration of trust" dutiable under the *Duties Act 1997* (NSW). Benidorm applied for review of the assessment, and the primary judge ordered that the assessment be revoked. The Chief Commissioner brought an appeal.

Held: dismissing the appeal: [116].

- The second trust deed had no legal effect because it merely duplicated what was reproduced in its recitals and had already been achieved by the death of the previous sole beneficiary and the granting of probate and resealing of his will: [3]. The document did no more than acknowledge what the position was following the grant of probate and the resealing of the will: [45].
- Section 8(3) of the *Duties Act* does not make a document which does not effect a transaction but merely acknowledges the existing position liable to duty: [4]. A "declaration of trust" for the purposes of s 8(1)(b)(ii) is broader than what the law of trusts might regard as a declaration of trust. "Dutiable transaction" in s 8(2) extends to transfers of dutiable property and certain listed transactions in s 8(1)(b) which represent something which alters the legal or equitable rights or obligations concerning property: [82]. The new regime provides for a tax upon transactions, not instruments. It is inconsistent with that radically altered legislative policy for duty to be charged on documents which are mere pieces of paper and do not effect any transaction: [88].

Torts: negligence, defences

Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc **[2020] NSWCA 294**

Decision date: 18 November 2020

Basten, White JJA, Simpson AJA

In April 2016 Michael Dickson was subjected to a spear tackle by Brendan Fletcher during the course of a rugby league match and was seriously injured. Mr Dickson claimed damages for personal injury against Mr Fletcher and the Northern Lakes Rugby League Sport & Recreation Club Inc (the Club). Mr Fletcher conceded that the tackle was an intentional act. The issue was whether Mr Fletcher intended to cause injury, thereby excluding the operation of the *Civil Liability Act 2005* (NSW) (the CLA) by reason of s 3B(1)(a). The primary judge concluded that Mr Dickson had failed to establish that Mr Fletcher intended to cause injury and dismissed the claim. Mr Dickson brought an appeal challenging the dismissal.

Held: dismissing the appeal: [194].

- The ordinary meaning of the expression "with intent to cause injury" in 3B(1)(a) of the CLA is of a specific actual or subjective intention to achieve the consequence of injury: [4]-[9]. It means actual, subjective and formulated intention, to which the defendant has turned his or her mind. It does not include recklessness, imputed or presumed intention: [19], [181]-[186]. "Injury" refers to the injury which has resulted in compensable loss: [10]. It is not possible to read s 3B(1)(a) as engaged where the intent is to cause an injury which is not the subject of the claim: [15].

- Where the harm actually suffered was the natural and probable consequence of the tortious conduct, the harm lies within the presumed intention of the tortfeasor. Different questions arise where the harm actually suffered was not of the same kind as that which the tortfeasor intended: [113]-[114].

- The video recording confirmed that the inevitable result of the tackle was that some injury would be caused to Mr Dickson. It did not follow from the inevitability of injury that Mr Fletcher intended to cause injury. The presumption that a person intends the natural and probable consequences of his or her conduct was inapplicable in the circumstances. The evidence established the foreseeability of injury and recklessness by Mr Fletcher, however neither was sufficient to establish the intent necessary to be proved for the purposes of s 3B(1)(a): [164]-[170].

- The primary judge's finding that Mr Dickson failed to establish an actual, subjective, intent was conclusive, and was not disturbed by the application of the presumption on which Mr Dickson sought to rely nor an independent review of the evidence: [192].

Strata Titles: maintenance of common property

Vickery v The Owners – Strata Plan No 80412 **[2020] NSWCA 284**

Decision date: 11 November 2020

Basten, Leeming, White JJA

Owners corporations are subject to the duties in s 106 of the *Strata Schemes Management Act 2015* (NSW) (the Act) to "properly maintain and keep in a state of good and serviceable repair", and to "renew or replace any fixtures or fittings comprised in" the common property. Breach of that duty entitles an owner to recover damages from the owners corporation which extends to any reasonably foreseeable loss suffered by the owner as a result of the failure to comply with the duty. Section 232 of the Act provides that the NSW Civil and Administrative Tribunal (NCAT) may "make an order to settle a complaint or dispute".

Mr Vickery was the owner of an apartment in a strata scheme, who claimed that the owners corporation breached its obligation under the Act to maintain the common property, resulting in his apartment leaking with water, and claimed damages of $97,000 in lost rent. He commenced proceedings in NCAT and the owners corporation applied for summary dismissal, which was refused. NCAT ordered the owners corporation to pay Mr Vickery the sum of $97,000 plus costs. The owners corporation appealed to the Appeal Panel, which allowed its appeal. Mr Vickery brought an appeal, the sole issue being whether s 232 of the Act permitted the making of an order for payment of damages.

Held: by majority, allowing the appeal: [64].

- Section 106(5) of the Act creates a statutory right of recovery in the circumstances in which it is engaged which does not depend upon the general law: [19], [169]. Per Leeming JA (dissenting): the right to recover damages for breach of statutory duty pursuant to s 106(5) is a right at common law commonly known as the tort of breach of statutory duty: [80].
- Section 232 covers claims and disputes with respect to any of the matters identified in subs (1), which cover the full range of an owners corporation's functions in operating, administering and managing the strata scheme, and exercising or failing to exercise any function under the Act, or the by-laws of the strata scheme: [28]. The legislative history demonstrates that s 232(1) has been understood as sufficiently broad to encompass an order for the payment of damages: [51]. NCAT's authority extends to making an order that the owners corporation pay damages for breach of its statutory duty under s 106: [164]. Per Leeming JA (dissenting): s 232 does not provide NCAT with authority to determine an action for breach of statutory duty sounding in damages. The language of "settle" a "complaint" or "dispute" and the breadth of the power indicated dispute resolution by means other than payment of damages. This construction was also supported by legislative history: [141]-[149].
- The Court noted the desirability of legislative reform in this area: [2], [66], [190].

Contracts: construction

***HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296**

Decision date: 18 November 2020

Bathurst CJ, Bell P, Meagher JA, Hammerschlag, Ball JJ

Wonkana No. 3 Pty Ltd, F A Edwards and C H Edwards conducted the Austin Tourist Park in Tamworth, NSW and Key Holding and Investments Pty Ltd conducted Thrive Health and Nutrition in Maribyrnong, Victoria. HDI Global insured three of the defendants and the Hollard Insurance Company Pty Ltd insured the remaining defendant for business interruption, including for the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the businesses. The policies excluded cover from "diseases declared to be quarantinable diseases under the *Australian Quarantine Act 1908* (Cth) and subsequent amendments". In 2016, the *Quarantine Act 1908* (Cth) was repealed and the *Biosecurity Act 2015* (Cth) came into force. In January 2020, the Director of Human Biosecurity determined COVID-19 to be a listed human disease. The insurers declined indemnity to the defendants and commenced proceedings seeking declarations that COVID-19 was within the exclusions. The proceedings were removed into the Court of Appeal for hearing.

Held: dismissing the summons: [131].

- On their proper construction, the words "and subsequent amendments" did not extend to or include the *Biosecurity Act*, which was a separate Act: [2], [38]-[47], [120]-[122].
- Per Bathurst CJ and Bell P: Orthodox principles of contractual construction are not so flexible as to permit "declared to be a quarantinable disease under the *Quarantine Act*" to be read as "determined to be a listed human disease under the *Biosecurity Act*": [5].
- Per Meagher JA and Ball J: There was no suggestion that the parties knew the *Quarantine Act* had been repealed and replaced by the *Biosecurity Act* at the times the policies were issued, and therefore in construing the policies the Court could not have regard to the fact of the repeal of the *Quarantine Act*. This left no basis for identifying any mistake in the parties' language and this mistake could not be corrected as it did not represent an imperfect expression of the parties' objective intention: [55]. Applying ordinary principles of construction to ascertain the parties' objective intention, the language of the clauses did not reflect any mistake in the expression of that intention: [61]-[67].
- Per Hammerschlag J: In a commercial context, absurdity is more than just lacking in genuine commercial good sense. It entails commercial nonsense, to the point where it is obvious that the parties did not mean what they said and obvious what they meant to say. What the parties did agree was not a clear mistake and, if it was, it did not rise to the level of absurdity. One may suspect that a mistake was made, but this was insufficient. No application was made to seek to rectify the policies: [124]-[128].

Australian Intermediate Appellate Decision of Interest

Industrial Law: enterprise agreement

***Thiess Pty Ltd v Sheehan* [2020] FCAFC 198**

Decision date: 16 November 2020

Flick, Kerr, Snaden JJ

The Wheatstone Project, a large liquefied natural gas processing and storage facility in West Australia, was a site of some 10 square kilometres surrounded by a security fence. Thiess Pty Ltd sub-contracted employees to undertake part of the construction work on a fly-in and fly-out basis. Whilst working at the site Thiess provided its workers with accommodation some distance away from the site and bussed the employees between the accommodation and the security fence. 151 employees brought representative proceedings relating to whether the time for which they were to be paid ended once the employees arrived back at the crib hut located on site, or ended at that point of time when the employees exited the security gate at the perimeter of the site having been picked up by bus at the crib hut. All relevant workers were employed under the *Thiess Pty Ltd Wheatstone Project Agreement 2012.* Clause 16(9) of the Agreement stated:

> "An Employee's Project Working Hours shall start at the Employee's prestart and finish at the inside of the Site Employee access gates".

The primary judge concluded that the employees were entitled to be paid for the period of time in issue. Thiess sought leave to appeal.

Held: granting leave to appeal and dismissing the appeal: [49].

- The Court rejected the submission that unless an employee is actually performing work, they are not entitled to remuneration: [31]-[32].
- The uncertainty that may have been generated by an employee not taking the first available bus after they arrive at the crib hut to exit the site would have denied the certainty needed to schedule the hours when employees were actually undertaking physical work: [31]. The need for such certainty was not explained by Thiess: [33].
- All workers were employed in a very remote part of West Australia and were totally dependent on Thiess to provide transport, not only from their accommodation to the site, but also transport to and from the crib hut to the perimeter gate at the start and end of each day: [34]. With a construction site the size of that in issue, there was nothing surprising in a conclusion that an employee should be paid for the time taken to get to an access gate at the end of the day: [37].
- The clear terms of cl 16(9) characterise that provision as going beyond a mere "scheduling" provision and extending to a provision which fixes when Project Working Hours are to "finish": [45]. No error was shown in the primary judge's determination of the issue: [48].

Asia Pacific Decision of Interest

Criminal Law: rights of defendants

Solicitor-General's Reference (No 1 of 2020) **[2020] NZCA 563**

Decision date: 12 November 2020

Kós P, French, Gilbert JJ

The *Land Transport Act 1998* (NZ) (the Act) requires that certain motorists who have returned a positive breath alcohol test result be given a warning before they elect whether or not to seek a further blood alcohol test. The warning required by s 77 is that, if a blood test is not requested within 10 minutes, either the positive test could of itself be conclusive evidence to lead to conviction for an offence or an infringement offence against the Act. In actuality, the police used the phrase "in a prosecution against you" per "Block J" of a Police Procedure Sheet. A series of decisions in the District Court held that the linguistic divergence was immaterial. In 2020, further decisions held that the breath tests were inadmissible because the police had failed to comply with the warning requirements in s 77. The Solicitor-General referred questions to the Court of Appeal on this issue, including whether the Judges were correct to find there had been non-compliance with s 77 of the Act, by reason of the wording of Block J on the Police Procedure Sheet.

Held: the Judges were not correct to find there had been non-compliance with the *Land Transport Act*: [45].

- Verbatim recitation of the statutory wording was not necessarily required for the law enforcement process itself to remain lawful: [37]. The Block J wording conveyed the sense and effect of the warning required for category 1–3 offending, but not category 4, which results in an infringement offence rather than a conviction: [35]. For categories 1 – 3, the motorist was not misled by the Block J wording into believing that the potential consequence of the situation they find themselves in is something other than a conviction: [41].

- For category 4, the sense and effect of the subsection was not conveyed, because the meaning was different. The defendant would not know what consequence could result from the breath test result being admitted into evidence and whether they were facing an infringement offence or a conviction. Because of the difference between the two types of offending, it was critical that the defendant was properly advised of the consequence of the breath test before electing whether to take the blood test: [33].

- Motorists should be told that the positive result "could of itself be conclusive evidence that the person has committed an infringement offence". The "sense and effect" of s 77 was not conveyed by the wording of Block J in a category 4 case because it did not make clear that the result gave rise only to an infringement offence, with considerably less rigorous consequences for the motorist than if he or she had triggered a criminal offence and conviction, and thus had the capacity to mislead: [40]-[43].

International Decisions of Interest

Human Rights: right to equality

***Ontario (Attorney General) v. G* 2020 SCC 38**

Decision date: 20 November 2020

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

In 2001, G was charged with sexual assault, but was found "not criminally responsible on account of mental disorder" (NCRMD) and had no criminal record. The Ontario Review Board found that G was not a risk to public safety and G was given an "absolute discharge" in 2003. In Ontario, under *Christopher's Law,* individuals who are discharged at sentencing for sexual crimes do not have to register on the sex offender registry, but those found NCRMD do. Those found guilty of sexual offences may be removed or exempted from the registry or relieved of their reporting obligations, but no one found NCRMD of sexual offences can ever be removed. In 2004 G was placed on Ontario's registry, he was required to report to the police annually and he was subject to random police checks. G brought an application challenging *Christopher's Law,* alleging that this system was discriminatory and beached ss 7 and 15(1) of the *Canadian Charter of Rights and Freedoms.* The trial judge dismissed the application. The Court of Appeal held that G's s 15 rights were unjustifiably breached. It declared *Christopher's Law* to be of no force or effect to the extent it applied to those found NCRMD. The Attorney General of Ontario brought an appeal.

Held: by majority, dismissing the appeal: [184].

- The law imposes a burden on people found NCRMD in a manner that violates the norm of substantive equality in two respects: the law itself invokes prejudicial and stereotypical views about persons with mental illnesses, feeding harmful stigma; and the law puts those found NCRMD in a worse position than those found guilty: [67]. It was not established, on the balance of probabilities, that the infringement of s. 15(1) was justified under s. 1. Any method of exempting and removing those found NCRMD from the registry based on individualised assessment would be less impairing of their s. 15(1) rights: [74]. Therefore the law violated s 15(1) in its application to persons found NCRMD: [76].
- When an immediately effective declaration of invalidity would endanger an interest of such great importance that, on balance, the benefits of delaying the effect of that declaration outweigh the cost of preserving an unconstitutional law, the court may suspend the effect of the declaration: [117]-[118]. Suspensions should be rare, granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect: [83]. Public safety justified a suspension and the declaration was properly suspended: [178]. An individual exemption from the suspension would ensure that G received an effective remedy and was not denied the benefit of his success on the constitutional merits: [182].
- Per Côté and Brown JJ (dissenting in part): consistent with the limited role of the judiciary vis-à-vis the legislature, the court should not have granted G an individual exemption from the suspension: [294].

Constitutional Law: court sitting

Attorney General of the Turks and Caicos Islands (Respondent) v Misick and others (Appellants) **[2020] UKPC 30**

Decision date: 13 November 2020

Lady Black, Lords Lloyd-Jones, Briggs, Hamblen, Stephens

Seven defendants in criminal proceedings in the Supreme Court of the Turks and Caicos Islands (the TCI) brought proceedings challenging the Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020 which provided for remote hearings of proceedings following the declaration made by the World Health Organisation that COVID-19 was a global pandemic. The appellants contended that Regulation 4(6) purported to allow the Supreme Court to sit outside the TCI and was ultra vires and unconstitutional. The appellants also contended that its application to their trial would create an impermissible inequality of arms, contrary to the Constitution, as the prosecution case was conducted with the trial judge physically present in a courtroom in the TCI and thus conducting the defence case remotely would risk placing the appellants at a substantial disadvantage. The appellants' case on the ultra vires issue succeeded. The TCI Court of Appeal allowed the Attorney General's appeal. The appellants brought an appeal in the Privy Council. The criminal trial remained adjourned pending the outcome of the appeal.

Held: dismissing the appeal: [75].

- Sittings of the Supreme Court are required to take place within the Islands. The Constitution drew a clear distinction between the Supreme Court and Court of Appeal as to where each of those courts may sit. Whilst it expressly stated that the Court of Appeal may sit outside the Islands as directed by the President of the Court, no such equivalent provision was made in respect of the Supreme Court. The clear implication was that the Supreme Court may sit only within the territory of the TCI. If Regulation 4(6) enabled the Supreme Court to sit outside the territory of the TCI then to that extent it was unlawful: [37]. The court would not lightly infer that Regulation 4(6) was intended to override or displace basic tenets of the Constitution: [39].
- The Regulations were made as a temporary measure in response to the coronavirus global pandemic after the Governor had proclaimed a state of emergency and in circumstances where all Supreme Court criminal trials had been suspended until further notice. This gave rise to a clear need to devise methods of resuming the administration of justice: [44]. The purpose was not to permit the Supreme Court to sit outside the TCI but rather the administration of justice had come to a halt so that the limited purpose was to use technology to allow the administration of justice to resume: [57].
- The intention was to allow a judge who was not physically in the courtroom in the Islands to be remotely connected to the courtroom so as to take part in the court proceedings in the Islands. This meaning gave effect to the limited purpose of the Regulations: [59]. Regulation 4(6) was not ultra vires: [61].