Court of Appeal
Supreme Court
Sydney

Decisions of Interest

21 November 2020 – 4 December 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.

Contents

New South Wales Court of Appeal Decisions of Interest

Restitution: quantum meruit

***Roude v Helwani* [2020] NSWCA 310**

Decision date: 2 December 2020

White, Brereton, McCallum JJA

Adib Helwani carried out extensive electrical and plumbing work for Ali and Susan Roude who were constructing a house in Greenacre. During the course of the work, the Roudes paid Mr Helwani $37,500. There was no written contract, no quotation, and no defined scope of work. In January 2015 Mr Roude asked Mr Helwani to prepare invoices for the work he had done and he provided the Roudes with tax invoices totalling $123,571.50. The balance outstanding was $86,071.50. Adib Helwani brought a *quantum meruit* claim for reasonable remuneration for the work. A magistrate of the Local Court gave judgment in favour of Adib Helwani for $86,071.50 plus pre-judgment interest in the sum of $26,588.43. The Roudes brought an appeal.

The questions of law raised on appeal were whether there was any evidence of the fair and reasonable cost of performing the work, whether the magistrate failed to give adequate reasons, and whether the magistrate failed to apply the correct standard of proof. The primary judge dismissed the Roudes' appeal. The Roudes brought an appeal challenging this dismissal.

Held: appeal dismissed with costs: [55].

- The onus was on Mr Helwani to establish the reasonableness of his charges. It did not follow that either the primary judge or the magistrate reversed the onus of proof. Mr Helwani had given evidence by affidavit that his charges were reasonable. There was nothing unreasonable about his charges on the face of the invoices and the detailed description of the work done. By reason of his experience in the industry, Mr Helwani was qualified to give an expert opinion as to the reasonableness of the charges: [30]. There was no error of law in the magistrate's finding that the charges were reasonable: [32]. The Roudes failed to dispute the reasonableness of the invoices. Such a failure to respond to a demand for payment may amount to an admission if there are circumstances which render it more reasonably probable that a person who denied liability for the claim would answer the claim than that he or she would not: [33].

- A reference to the calculation of remuneration is to be determined according to what is reasonable, rather than by reference to a market: [41]. Mr Helwani was entitled to an amount that should be found "as a matter of fact to represent a fair and reasonable rate of remuneration, in other words a *quantum meruit*": [43]. Assessment of a fair and reasonable rate of remuneration is a question of fact and reference to a charge "commonly made by others for like services" is a usual measure for assessing that fact where such a standard is available: [44].

- There was evidence of the fair and reasonable market rate for the work performed: [54].

Judicial Review: supervisory jurisdiction

***SafeWork NSW v BOC Limited* [2020] NSWCA 306**

Decision date: 26 November 2020

Basten, Macfarlan, Leeming JJA

In July 2015 BOC Limited incorrectly installed oxygen and nitrous oxide piping to an operating theatre at Bankstown-Lidcombe Hospital. Of the 658 caesarean deliveries undertaken at the hospital before the error was identified, two babies required oxygen and were inadvertently administered nitrous oxide. One survived, with serious brain damage, and the other died.

In August 2018 SafeWork NSW issued a summons directed to BOC alleging a breach of a "health and safety duty" under s 19(2) of the *Work Health and Safety Act 2011* (NSW). This constituted a Category 2 offence which was dealt with summarily. Following the trial, SafeWork NSW was offered an opportunity to request that any question of law arising at or in reference to the proceedings be submitted to the Court of Criminal Appeal for determination, and SafeWork NSW declined to make such a request. In June 2020 the primary judge made orders acquitting BOC. SafeWork NSW filed a summons invoking the supervisory jurisdiction seeking to quash the final orders.

Held: dismissing the summons: [63].

- Allowing an appeal against an acquittal would have created double jeopardy because the accused would have been put on trial for a second time with respect to the one offence where there had been a contested trial, although the position may be different where a charge is dismissed without a trial: [15].
- The rights of appeal available to a prosecutor where a person has been acquitted of an offence are limited to those provided by Part 8 of the *Crimes (Appeal and Review) Act 2001* (NSW). The section applies only to acquittals by the District Court in criminal proceedings for an indictable offence tried by a judge without a jury: [18]. The carefully crafted effect of these statutory rights of appeal casts doubt on the possibility that there is some general right to review verdicts or judgments of acquittal: [23].
- Where the result is to reinstate the conviction at trial, there may be a need to demonstrate that the intermediate appeal was the result of fraud or perjured testimony: [42]. The supervisory jurisdiction of the Court of Appeal does not extend to review an acquittal, following a summary trial by a competent tribunal, absent fraud. Such a possibility runs counter to the general principle of law that a person who is prosecuted for a breach of the law, if acquitted, "is not to be a second time vexed": [43].
- Even errors which might in some circumstances be described as "jurisdictional" will not suffice to allow an appeal from an acquittal of criminal charges: [48].
- Principles stated in relation to administrative decisions do not operate without qualification in relation to criminal trials in a court of record: [51].

Contracts: mistake

***James Adam Pty Ltd v Fobeza Pty Ltd* [2020] NSWCA 311**

Decision date: 3 December 2020

Bell P, Macfarlan, Leeming JJA

James Adam Pty Ltd (the vendor) and Fobeza Pty Ltd (the purchaser) entered into a contract for the sale of land near Cowra. One of the parcels of land to be sold had not come into existence at the date of the contract and was described as "Lot 102 in proposed plan of subdivision". Lot 102 was referred to in clause 39 which annexed a sketch plan and made the contract conditional upon the registration of the plan of subdivision "in accordance with the sketch plan". Lot 102 was based on the size of Lot 101, which was incorrectly stated to be 2001m2 when it was in fact 2205m2. The plan was stated to be preliminary and subject to further survey. The registered plan of subdivision had almost precisely the same dimensions and bearings as the sketch plan.

Clause 41 granted the purchaser a right of rescission "if the area of lot 102 in the plan of subdivision as registered is shown on the plan as being 2,100 sq. m or more." The purchaser purported to rescind pursuant to cl 41. The vendor denied the validity of the notice of rescission, and served a notice to complete. Proceedings were commenced. The purchaser sought a declaration that it had validly rescinded, and sought the return of the deposit. The vendor by cross-summons sought an order for specific performance. The primary judge found that the purchaser was entitled to rescind. The issue on appeal was whether the primary judge erred in dismissing the cross-summons for "rectification".

Held: dismissing the appeal: [74].

- The contract contained an error sufficiently absurd or inconsistent to engage the first limb of the doctrine of rectification by construction. The sketch plan identified two figures, one of which was significantly smaller than the other, and the latter was used to derive the areas in certain clauses of the contract. The obligation to register the plan was "in accordance with the sketch plan", which required very precise dimensions and bearings. If the vendor complied with its obligations to cause to be registered a plan in accordance with every single bearing and dimension identified in the sketch plan, save for the area, then the purchaser had a right to rescind: [44]-[45]. The literal meaning of cl 41 was irrational and absurd. There was no rational basis for imputing to the parties an intention that the purchaser was free to rescind the contract if the vendor complied with the obligation to subdivide in accordance with the very precise dimensions and bearings on the sketch plan: [56].

- Even where it is clear that something has gone awry, construction is to no avail if it is unclear how the absurdity or inconsistency should be resolved: [63]. There were a number of possibilities of construing the relevant clauses, and the correct one could not be ascertained: [66]-[68].

- "Rectification by construction" and "rectification in equity" refer to distinct doctrines at common law and in equity, both of which "correct" a demonstrable mistake in a written instrument: [26] per Leeming JA.

- The use of "rectification" in the context of both the common law and equity is apt to confuse. The *Fitzgerald v Masters* principle of contractual construction did not need to be elevated to the status of a "doctrine": [2] per Bell P.

Administrative Law: appeal inquiry

***Li v Attorney General for New South Wales* [2020] NSWCA 302**

Decision date: 25 November 2020

Macfarlan, Meagher, McCallum JJA

Patrick Li sought judicial review of the primary judge's decision to dismiss his application under s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) for an inquiry into his sentence for knowingly taking part in the supply of a large commercial quantity of a prohibited drug. He was also sentenced for a related Victorian sentence. Mr Li's complaint was directed to the finding of the sentencing judge that his "role" in the offending was greater than that of his co-offender, Mr Koh. He submitted that a contrary conclusion had been reached by the County Court of Victoria, and that the finding depended on evidence which had not been admitted, or had been the subject of directions, in the Victorian proceedings, and therefore the primary judge erred in adopting the same starting point in sentencing Mr Li and Mr Koh.

Held: dismissing the summons: [60].

- The transcript of the preliminary hearings did not record any general ruling on the admissibility of or any directions about the use of certain evidence as submitted by Mr Li: [43].
- Whether evidence reflected in the agreed facts was inadmissible in the Victorian proceedings did not bear on whether the sentencing judge was entitled to draw inferences from the agreed facts. It was entirely appropriate for the primary judge to take the agreed facts as established and then to ask whether the arguments made by Mr Li raised any doubt as to sentencing judge's conclusions based on those facts: [44].
- A failure expressly to address an argument or to consider some material does not, without more, constitute legal error. But a failure to address a "substantial, clearly articulated argument" may amount to a failure to afford procedural fairness or to a constructive failure to exercise jurisdiction. What is critical is that the argument was "clearly articulated" in the sense that the decision-maker can be said to have been put on notice of the argument, and "substantial" in the sense that it was capable of altering or clearly material to the decision: [48].
- Mr Li made no reference to any evidence relating specifically to the argument in issue on appeal before the Court and the argument was not "substantial" in the requisite sense. In those circumstances any failure to address the argument could not have involved a constructive failure to exercise jurisdiction. The fact that the primary judge's reasons were brief on this issue did not make them inadequate: [49]-[52].

Australian Intermediate Appellate Decisions of Interest

Industrial Law: statutory construction

***Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Qantas Airways Ltd* [2020] FCAFC 205**

Decision date: 27 November 2020

Rares, Bromberg and Colvin JJ

Qantas Airways Limited, faced with the unprecedented consequences of a global pandemic for its business, stood down about 20,000 of its ground based employees without pay in March 2020. An issue arose as to whether, during the stand down, employees could take paid personal/carer's leave or compassionate leave. Section 524(1) of the *Fair Work Act 2009* (Cth) (the Act) provides that employees may be stood down without pay in certain circumstances but does not apply where an enterprise agreement or contract provides for stand down in the same circumstances: s 524(2). Multiple trade unions brought proceedings seeking to resolve this question. The proceedings were dismissed and the unions brought an appeal.

Held: dismissing the appeal: [104].

- The Act sought to achieve a balance between the interests of employers and employees by conferring minimum entitlements upon employees. Many of those entitlements manifest in obligations which circumscribe the payments to be made by employers to employees. The Act relieves employers of the obligations in the specific circumstances set out in the stand down provisions. It is difficult to discern from the legislation as a whole a purpose that would aid in determining a construction issue that requires a conclusion to be reached as to where the balance between the interests of employers and employees has been struck: [33].

- If an employee who is entitled to take leave for reasons of personal illness or carer responsibilities will be paid during a stand down, but a person who is not entitled to such leave will receive no payment, the result would be that the protection against loss of income afforded by the entitlement to leave would actually create an entitlement to income which the employee otherwise did not enjoy during the stand down. It would increase the employee's income at a time when there was not otherwise a right to receive such income: [36].

- The concept of a stand down provision was concerned with employees who, but for the unavailability of work, were ready and willing to work: [55]. It would be inapt to refer to an employer being able to stand down an employee who is already on annual leave or long service leave by reason that the person cannot usefully be employed: [57].

- The stand down operates to mean that an employee is not required to present for work. Such an employee cannot be said to take leave or be absent because the stand down is in operation and there is no obligation to present for work from which leave may be taken or absence may be authorised: [102].

- Bromberg J, dissenting: an entitlement to take a period of leave is an entitlement to be absent from the performance of the work ordinarily performed by the employee: [121].

Workers' Compensation: psychiatric injury; Torts: negligence

***State of Victoria v Kozarov* [2020] VSCA 301**

Decision date: 24 November 2020

Beach, Kaye JJA and Macaulay AJA

Zagi Kozarov was a solicitor and former employee of the Victorian Office of Public Prosecutions. Between 2009 and 2012, she worked in the Specialist Sexual Offences Unit (SSOU) and suffered chronic post-traumatic stress disorder and a major depressive disorder. Ms Kozarov commenced proceedings against the State of Victoria claiming damages for personal injury. She alleged that her injuries were caused through ongoing, repeated exposure to a high volume of sexual offence cases. The primary judge upheld Ms Kozarov's claim, rejected the State's defence of contributory negligence, and assessed damages in the sum of $435,000. The State sought leave to appeal.

Held: allowing the appeal: [111].

- The duty of care an employer owes an employee in respect of a risk that the employee might suffer psychiatric injury arising from the performance of work is only engaged if injury to the particular employee is reasonably foreseeable: [69].
- When viewed in isolation, each of the matters relied on by the primary judge might not individually constitute relevant notice to the State that Ms Kozarov was at risk of suffering psychiatric injury as a result of the nature of her work. The correct approach, which was taken by the primary judge, was to analyse and consider all of those matters in combination: [76].
- It was reasonably open to the judge to conclude that, by the end of August 2011, the defendant knew, or ought to have known, that Ms Kozarov's mental health was at risk arising from the nature of the work that she was performing in the SSOU. It was open to the judge to consider that, in the context of the events that had preceded it, Ms Kozarov's email to her supervisor outlining the issues she was experiencing constituted a 'sentinel event' which ought to have put her employer on notice that she was suffering genuine emotional distress as a result of the nature and content of her work: [80].
- The judge's conclusion that if her employer had taken appropriate steps, it was probable Ms Kozarov would not have suffered the exacerbation of PTSD, involved a significant degree of hypothesis which is not uncommon where the negligence alleged is negligence by omission, rather than commission: [104].
- The only outcome or response which would have prevented the exacerbation of Ms Kozarov's condition would have been for Ms Kozarov to be rotated out of the SSOU. It was not suggested that her employer could have compelled Ms Kozarov to move to another unit that did not involve work relating to sex offences. It necessarily involved a finding by the judge that Ms Kozarov would have co-operated if her employer had offered to rotate her to a different unit: [106]. Ms Kozarov failed to establish that if her employer had exercised reasonable care by taking the steps specified by the judge from August 2011, including offering for Ms Kozarov to rotate to a different unit, those steps would have avoided or reduced the exacerbation of her PTSD that occurred between August 2011 and February 2012: [110].

Asia Pacific Decision of Interest

Human Rights: sex discrimination

Leung Kwok Hung also known as "Long Hair" v. Commissioner of Correctional Services **[2020] HKCFA 37**

Decision date: 27 November 2020

Ma CJ, Ribeiro, Fok PJJ, Chan, Lord Collins of Mapesbury NPJJ

In March 2012, Leung Kwok Hung, a politician and activist widely known as "Long Hair", was convicted of charges of criminal damage and disorderly behaviour. At Lai Chi Kok Reception Centre, Mr Hung was required to have his hair (then about 80 cm long) cut pursuant to Standing Order 41-05:

> "The hair of all male convicted prisoners will be kept cut sufficiently close, but not close clipped, for the purposes of health and cleanliness… Except as recommended by MO, a female prisoner's hair shall not be cut shorter than the style on admission without her consent."

Mr Hung brought judicial review proceedings claiming that he was discriminated against on account of his sex, claiming that he was treated less favourably than female prisoners. The primary judge made a declaration that direct sex discrimination had occurred which violated article 25 of the Basic Law. The Commissioner of Correctional Services brought an appeal which was allowed. Mr Hung brought an appeal.

Held: allowing the appeal: [57].

- What must be demonstrated by Mr Hung is that on the ground of his sex he was treated less favourably than the Commissioner has treated or would treat a female prisoner in similar circumstances: [13]. It is only when one is comparing like with like that one can then move to the next critical inquiry of asking whether there is less favourable treatment that has been accorded by the discriminator to the complainant: [17]. Less favourable treatment will almost invariably be the focal point in discrimination cases. The mere fact there is a difference in treatment between the complainant and the compared person will not of itself amount to unlawful discrimination; there must be shown less favourable treatment given to the complainant: [18]. While it is crucial to look at the grounds and factual criteria explaining the difference in treatment, it is irrelevant to consider the motive of the discriminator: justification is irrelevant: [20]. The factor of conventional standards when considering the aspect of less favourable treatment may be a relevant consideration: [23].

- Generally, there will be discriminatory conduct if there has been stereotyping: [34]. Where reliance is placed on convention which reflects stereotyping, a question may arise as to the appropriateness of relying on such a convention for the purpose of defeating an argument of less favourable treatment: [36].

- The Commissioner's evidence did not prove or explain why male and female prisoners should be treated differently: [42]. The Commissioner's view, based on SO 41-05, of what hair lengths for men and women ought to be in society amounted to stereotyping: [53]. Less favourable treatment was given to Mr Hung compared with female prisoners. There was discrimination on the basis of sex: [54].

International Decision of Interest

Constitutional Law: religious discrimination

***Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York,* 592 US ___ (2020)**

Decision date: 25 November 2020

Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett JJ

The Governor of New York issued an Executive Order that imposed restrictions on attendance at religious services in areas classified as "red" or "orange" zones in response to the COVID-19 pandemic. In red zones, 10 persons could attend each religious service, and in orange zones, attendance was capped at 25. No capacity restrictions were imposed upon essential businesses. The Roman Catholic Diocese of Brooklyn and Agudath Israel of America brought separate emergency applications seeking relief from the Order. The applications contended that these restrictions violated the Free Exercise Clause of the First Amendment as they treated houses of worship much more harshly than comparable secular facilities. After the applications were filed, the relevant areas were reclassified to yellow zones and were therefore limited to 50% of the buildings' capacities.

Held: by a 5-4 majority, granting the injunction: p. 7.

- The applicants made a strong showing that the challenged restrictions violated "the minimum requirement of neutrality" to religion. The regulations singled out houses of worship for especially harsh treatment. The list of "essential" businesses included many whose services were not limited to those that could have been regarded as essential: pp. 2-3. Stemming the spread of COVID–19 was unquestionably a compelling interest, but they were not "narrowly tailored." They were far more restrictive than any COVID–related regulations that had previously come before the Court, than those adopted by many other jurisdictions hard-hit by the pandemic, and than that required to prevent the spread of the virus at the services: p. 4. The restrictions would have caused irreparable harm as the great majority of those who wished to attend services would have been barred. It was not shown that granting the applications would have harmed the public: p. 5. Roberts CJ, dissenting: It is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic: p. 1. Breyer J, dissenting: The elected branches of government can marshal scientific expertise and craft specific policies in response to changing facts on the ground more quickly than courts: p. 5.
- There was no justification for withholding relief because the circumstances changed since the applications were made. Injunctive relief was still called for because the applicants remained under a constant threat that the area in question would be reclassified. Reclassification would almost certainly have barred individuals in the affected area from attending services before judicial relief could have been obtained: pp. 6-7.
- Gorsuch J: Government is not free to disregard the First Amendment in times of crisis. The kind of discrimination which is forbidden has occurred in these circumstances, where the Governor has judged traditional religious exercises as not essential: pp. 1-2.
- In *South Bay Pentecostal Church* v. *Newsom*, 590 U.S. ___ (2020), the Chief Justice expressed willingness to defer to executive orders in the pandemic's early stages. That rationale has expired. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause: p. 3. Sotomayor J, dissenting: There is no justification for not following *South Bay* and *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. ___ (2020) in failing to issue similar extraordinary relief.