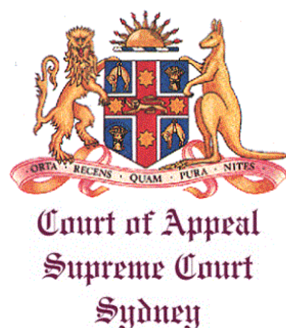

Decisions of Interest

15 August 2020 – 28 August 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

Administrative Law: jurisdiction

***South Eastern Sydney Local Health District v Lazarus* [2020] NSWCA 183**

Decision date: 19 August 2020

Bell P, Macfarlan JA, White JA

In 2010 and 2011, the Independent Commission Against Corruption conducted an investigation into corrupt conduct in two Sydney hospitals. Following completion of that investigation, criminal proceedings in the Local Court were commenced against Ms Sandra Lazarus in 2013. In November 2014 Ms Lazarus was convicted of over 40 offences. In June 2017 Ms Lazarus' conviction appeal was summarily dismissed in view of her failure to appear. In December 2017 Ms Lazarus' severity appeal was determined, reducing her total effective non-parole period.

In March 2020, the South Eastern Sydney and Northern Sydney Local Health Districts filed a Summons seeking judicial review of a District Court decision from December 2019. This was a dismissal of the Health Districts' Notice of Motion which sought directions that a specified sum be paid out of the property of Ms Lazarus to the Health Districts, through and by reason of offences which the Court convicted Ms Lazarus of in December 2017. The primary judge held that the District Court did not have jurisdiction to make the directions sought because, although Ms Lazarus appealed to the District Court and it made certain orders in December 2017, the District Court was not a court that convicted Ms Lazarus, but rather she was convicted of the relevant offences by the Local Court in 2014. The Health Districts brought judicial review proceedings seeking relief.

Held: dismissing the application: [55].

- The District Court did not make any orders which could be taken to have "superseded" the Local Court's orders with respect to conviction. As Ms Lazarus' appeal as to conviction was summarily dismissed by the District Court, the Local Court's orders as to conviction remained on foot. Nothing occurred to alter the fact that it was the Local Court that convicted Ms Lazarus. The language of s 97 of the *Victims Rights and Support Act 2013* (NSW) is clear and intractable: [47].

- Ms Lazarus' severity appeal was allowed and her sentence was varied. While the District Court judge purported to "confirm" the convictions in his orders, why this was necessary was not apparent. The "confirmation" of a conviction is not the same as the making of it. They are two distinct concepts. The identity of the Court which "convicts" a person does not alter: [48]-[50].

- The primary judge was correct in holding that the relevant court that convicted Ms Lazarus of offences in the proceedings was the Local Court, and it was only that Court which could make directions for compensation pursuant to s 97 of the Act. The District Court could not make such directions: [53].

Equity: unconscionable conduct

***Mentink v Olsen* [2020] NSWCA 182**

Decision date: 21 August 2020

Meagher JA, Payne JA, Emmett AJA

A gift in the sum of $2.2 million was made in October 2016 by Mrs Katharine Howard-Olsen to her daughter Ms Karen Mentink (the Gift). Katharine had been suffering from a terminal illness and died in December 2016. Katharine appointed her husband John and Karen as joint executors.

In April 2019, John commenced proceedings against Karen, his step-daughter, in which he claimed judgment against Karen in the Gift Amount. John alleged that Karen obtained the benefit of the Gift by reason of undue influence or unconscionability and was therefore liable to repay the Gift Amount to Katharine's estate. The primary judge found that Karen initiated or contrived her mother's change of mind to her own benefit or took advantage of her mother's vulnerability in unconscionable circumstances and directed the entry of judgment for John, in his capacity as executor of the estate of Katharine, against Karen in the Gift Amount. The primary judge also ordered Karen to pay $369,000 in interest to Katharine's estate and John's costs of the proceedings partially on the indemnity basis. Karen brought an appeal challenging these orders.

Held: dismissing the appeal: [202].

- The primary judge concluded that the circumstances surrounding the making of the Gift militated overwhelmingly in favour of the conclusion that only Karen stood to gain from the Gift. His Honour's conclusions and inferences were based on the objective surrounding circumstances and the rejection of Karen's evidence to the contrary, and were clearly open on the evidence: [186]-[187].
- Katharine's decision to make the bequest remained unexplained other than as the product of confusion or misunderstanding. The making of such a bequest was inconsistent with Katharine's general testamentary intention, to which Karen was privy: [37]. The primary judge did not err in finding that the procuring of the gift by Karen was unconscionable: [43]-[44].
- The requirement to establish that the gift was fair, just and reasonable called for an objective assessment of the impugned transaction from the perspective of both Karen and John: [192]. There was no explanation for the sudden change of mind on Katharine's part other than being confused by her daughter. There was nothing fair, just or reasonable about that sudden change of mind. The primary judge's reasons for reaching that conclusion were clearly explained: [197].
- This was not a case where, for example, Katharine knowingly and intentionally represented to Karen that she was making a gift in reliance upon which Karen expended the money given. John was not seeking to resile from the gift, but rather impugning the making of the gift. The defences of estoppel by convention and change of position were not available: [201].

Dust Diseases: damages

***Piatti v ACN 000 246 542* [[2020] NSWCA 168]**

Decision date: 28 August 2020

Basten JA, McCallum JA, Simpson AJA

Mr Charles Abegglen was exposed to asbestos dust for over 20 years during his employment by the two respondents. Shortly before his death from mesothelioma in April 2018, Mr Abegglen commenced proceedings against the respondents in the Dust Diseases Tribunal. In August 2019 judgment was given for Mr Abegglen (on behalf of his estate, represented by Mr Piatti) in an amount of $1.1 million. An appeal was brought in relation to one component of the damages, being a claim for loss of capacity to provide domestic services Mr Abegglen had been providing to his wife, Ms Piatti, assessed pursuant to s 15B of the *Civil Liability Act 2002* (NSW).

Ms Piatti suffered from dementia. At the time when Mr Abegglen's condition became manifest in mid-2016, he was providing gratuitous domestic services to his wife for 16 hours a day. Since January 2018 Ms Piatti has required 24 hour care and supervision, and will require that for the rest of her life. The judge held that he was not entitled to assess damages by reference to a need which had increased since the time liability arose based on a construction of s 15B adopted in *State of New South Wales v Perez* (2013) 84 NSWLR 570. The question on appeal was whether the judge was correct in adopting this constrained approach.

Held: allowing the appeal: [76].

- The factual circumstances differed from those in *Perez*: [4].
- The time at which the definition of dependants must be met for the purposes of s 15B is at the time the liability in respect of which the claim is made arises: [42]. Damages may be awarded for "any" loss of the claimant's capacity to provide gratuitous domestic services to the claimant's dependants, but only if the court is satisfied of four conditions. There is nothing in the language or structure of the section to suggest that, if the court is satisfied as to those four conditions, there is any upper limit on the damages that may be awarded: [44]. The loss of capacity would be assessed by the court at the time of judgment and would extend to both past and future loss as at that time. There is nothing in the language of the section to suggest that this particular head of damages was intended to be frozen at an earlier point in time: [45].
- In the case of a predictable future need for which services were *not* being provided by the claimant at the date liability arose, no damages will be available for any loss of capacity. Where a dependant had a particular need for services which were provided by the claimant, damages may not be awarded for some further and separate need, not then being serviced by the complainant: [12]-[13].
- Damages for the years following Mr Abegglen's death were recoverable: they were not expressly excluded and s 15B strongly indicates that Parliament did not intend to exclude such damages. The cause of action of a claimant who dies is preserved for the benefit of the claimant's estate: [72]-[75].

Criminal Law: extended supervision order

***Cheema v State of New South Wales* [[2020] NSWCA 190]**

Decision date: 21 August 2020

Bathurst CJ, Leeming JA, White JA

Mr Ahsan Kamal Cheema has a lengthy criminal history involving a range of offences, although no terrorism-related offences. The State applied for an extended supervision order under the *Terrorism (High Risk Offenders) Act 2017* (NSW) in relation to Mr Cheema in May 2020. This related to a single Facebook posting from February 2020 that was publicly viewable, on an account styled "Ahsan Cheema". It was a link to a blog posted by another person in May 2017 relating to Islamic State.

In June 2020 the primary judge made orders that Mr Cheema attend examinations by a psychiatrist and a psychologist for the purpose of furnishing reports to the Supreme Court for the making of an extended supervision order and imposing a 28 day interim supervision order. Mr Cheema brought an appeal challenging these orders, which was heard in August 2020, when the psychological and psychiatric examinations had occurred and reports had been obtained and served. Mr Cheema argued that he was not a "convicted NSW terrorism activity offender" within the meaning of s 10 of the Act, and that s 10 should be read down on the basis of the constitutionally implied freedom of political communication.

Held: dismissing the appeal: [5].

- The proposition that a word or a number can never be an image or a symbol within the meaning of s 10(1A)(a)(ii) cannot be accepted. While it requires the image or symbol to have an association with the person, group, organisation or ideology, there is no reason to require that association to be discernible from the image or symbol in isolation: [36]-[39].

- Section 10(1A)(a)(ii) does not of itself restrict or impose a legal burden on political communication: [71]. There are thousands of eligible offenders in NSW, and only a fraction might realistically fear the prospect of being made a defendant to an application under the Act. The risk of merely being joined as a defendant to such an application is a powerful disincentive, but it was not shown that there was any material inhibition from political communication by reason of that risk. While it is sufficient for the burden to be "slight", it was not shown that *any* communication by anyone is affected by the chilling effect of s 10(1A): [77].

- The class of persons who might fall within the protective purposes of the Act are those who had displayed or used imagery associated with organisations which supported terrorist acts or violent extremism: [81]. To require that an image be reasonably construed as advocating support would not give rise to an effective, clearly articulated test. It is not an obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom: [84]. The provision is adequate in its balance: [86].

Australian Intermediate Appellate Decisions of Interest

Competition: monopoly assets

***Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [[2020] FCAFC 145]**

Decision date: 24 August 2020

Allsop CJ, Beach J, Colvin J

Two applications for review were brought, one by Glencore Coal Assets Australia Pty Ltd and the other by the Australian Competition and Consumer Commission (ACCC). They concerned a decision of the Australian Competition Tribunal, being a re-arbitration under s 44ZP of Part IIIA of the *Competition and Consumer Act 2010* (Cth) of a determination by the ACCC of a disagreement between Glencore and Port of Newcastle Operations over the terms of access to a declared service, being the right to access and use monopoly infrastructure assets at the Port (the Service). Part IIIA enacts a process by which access to a service provided by means of essential infrastructure may be made a declared service. The declared Service related to the use of the shipping channels at the Port. The ACCC had rejected Glencore's submission that the scope of the Service should be broader to include all circumstances where it was exporting coal, including where its customer was the charterer of the vessel that was physically using the shipping channels.

Held: allowing Glencore's application, dismissing the ACCC's application and remitting the matter to the Tribunal for further determination: [10].

- In order to succeed on an application to review the Tribunal's decision, an error of law must be demonstrated. A review concerns whether the legal framework for decision-making was observed and whether the law was properly understood and applied by the Tribunal in making its decision. Matters of fact and contextual economic analysis are for the Tribunal: [5].
- The declaration of a service should not be interpreted as if it was a statutory enactment. It was a purposive instrument which expressed a form of declaration to facilitate the exercise of the statutory right to access services provided by means of facilities, in order to advance the economic objects stated. There should not be a literal or pedantic adherence to the description of a service in an application for the declaration of a service; it is enough that the substance and essential nature of the service is not altered: [93]-[94].
- Access to and use of the shipping channels was not limited to the notion of physical access or use by the control and navigation of the vessel entering and leaving the Port to carry the coal. The broad context of the purpose of the declaration as directed to the relevant dependent market of the production, sale and export of coal made that limitation inappropriate: [158].
- The Tribunal misconstrued the terms of the declared Service and so asked itself the wrong question. It was for the Tribunal, not the Federal Court, to fashion the scope of the terms. The determination was set aside and remitted to the Tribunal to fix the terms of the scope of the determination: [169].

Planning & Environment: permit application

***Cumming v Minister for Planning* [2020] VSCA 208**

Decision date: 20 August 2020

Tate JA, McLeish JA, Osborn JA

WestWind was the proponent of a project to construct and operate a wind farm called the Golden Plains Wind Farm on 16,739 hectares of agricultural land. The project would comprise the largest wind farm in Victoria containing up to 228 turbines. The proposal was fundamentally unacceptable in scale and intensity to the applicants. The first applicant, Mr Cumming, was critically concerned with potential impacts of the wind farm upon Brolga, a native Australian crane. The second applicant, Mr Walton, lived and worked with his wife as farmers on land in close proximity to the project and their concerns included potential noise impacts.

The project required a planning permit for the development of a wind energy facility pursuant to the *Golden Plains Planning Scheme.* In June 2018 the Minister appointed a panel to hold an inquiry into the environmental effects of the project. In June 2018, both the applicants made submissions to the Minister objecting to the project and participated in the public hearings. The panel concluded that the impacts of the project could be managed to an acceptable level and that, given the strong planning policy support for renewable energy proposals, a planning permit should be granted subject to conditions. The Minister issued a conditional planning permit. In November 2018 WestWind sent a letter to the Minister propounding a different set of permit conditions, which was not shown to the applicants.

The applicants brought judicial review proceedings challenging the validity of the Minister's Assessment and the grant of the permit, including the failure of the Minister to disclose the letter to the applicants. The challenges were dismissed and the applicants sought leave to appeal.

Held: granting leave, dismissing the appeal: [233].

- The applicants demonstrated that it is possible that there was some misapplication of an ecological consulting firm's habitat methodology, which was not sufficient to render the decision illogical or irrational. The applicants did not positively demonstrate that the factual decision of the Minister was perverse: [91]-[92]. A defect in the assessment would not necessarily infect the decision to grant a permit and automatically justify the conclusion that the grant of the planning permit must be quashed: [105].

- The receipt of the letter appears to have had no effect upon the Minister's decision, and in particular, the terms of the conditions imposed by him. It is difficult to conclude that the Minister failed to advise the applicants of the letter in circumstances where he intended to take account of some new matter not appearing in the Panel Report: [127]-[128]. The applicants did not demonstrate that the Minister's actions resulted in any practical injustice: [163].

- A failure to include a condition prescribed by a planning scheme within a permit does not render the permit wholly invalid, rather it remains potentially capable of rectification: [196].

Asia Pacific Decision of Interest

Taxation: charities

***Family First New Zealand v Attorney-General* [2020] NZCA 366**

Decision date: 27 August 2020

Clifford J, Stevens J, Gilbert J

To qualify for registration as a charity in New Zealand, an organisation must be established and maintained exclusively for charitable purposes. A trust, society or institution with charitable purposes, but which also has non-charitable purposes and hence is not exclusively charitable, may not be registered.

Family First New Zealand was incorporated under the *Charitable Trusts Act 1957* in 2006 under the name Family First Lobby. In 2013 Family First was deregistered as a charity by the Charities Registration Board. Family First brought proceedings challenging this decision, which was dismissed by the High Court. The High Court confirmed the Board's determination that Family First did not qualify for registration. Its reasons included that Family First's core purpose was said to be to promote its conception of the "traditional family" and that purpose could not be shown to be in the public benefit in the charitable sense under the *Charities Act 2005* (the Act). Further, Family First was found to have other non-charitable advocacy purposes which would disqualify it from registration. Family First brought an appeal.

Held: by majority allowing the appeal: [182].

- The word "charitable" means charitable in the legal sense, not according to its ordinary meaning. To qualify as a charity under the "other matter beneficial to the community" head requires both public benefit and a charitable object. The public benefit test is that the purposes must be such as to confer a benefit on a section of the public and the class of persons eligible to benefit must constitute a sufficient section of the public: [66]. Parliament intended to leave the question of what qualifies as a charitable purpose to continue to be worked out over time employing the common law method and adapting to changing social needs and circumstances: [67].

- Charitable status does not depend principally on activities: [87]. Whether an organisation is entitled to charitable status will generally depend on an examination of its purposes expressed in its constitutive document. The objects should be construed as a whole in the context of the relevant background: [86].

- The Judge failed to undertake a detailed analysis of the objects of the trust deed or construe their true meaning and gave too much weight to the perceived activities of Family First: [121]. An entity that provides no or limited tangible public benefit and is primarily engaged in cause advocacy may qualify depending on the end sought to be achieved and the means and manner of its promotion: [134]. With reference to its objects and purposes and taking account of the ways in which Family First seeks to advance those objects and purposes, it is advancing a public benefit, and hence is entitled to charitable status: [154].

International Decision of Interest

Competition: restraint of trade

Peninsula Securities Ltd (Respondent) v Dunnes Stores (Bangor) Ltd (Appellant) (Northern Ireland) **[2020] UKSC 36**

Decision date: 19 August 2020

Lord Wilson, Lord Carnwath, Lord Lloyd-Jones, Lady Arden, Lord Kitchin

Mr Shortall bought land zoned for retail use in Londonderry and approached Mr Dunnes of Dunnes Stores as an "anchor tenant". In May 1980 Mr Dunnes and Mr Shortall orally agreed outline terms, including Mr Shortall promising not to cause or permit the establishment on any other part of the site of a unit measuring more than 3,000 square feet for the sale of food or textiles. In November 1980 Mr Shortall and Dunnes signed Heads of Agreement. Mr Shortall assigned his interest in the centre to Peninsula Securities. Peninsula believed that the centre was ailing and the covenant by Mr Shortall was stunting its ability to revive the centre. Peninsula brought proceedings against Dunnes Stores seeking a declaration that the covenant engaged the doctrine against restraint of trade; that it was unreasonable; and that it was therefore unenforceable. The Court of Appeal in Northern Ireland ruled that the covenant engaged the doctrine. Dunnes Stores brought an appeal.

Held: allowing the appeal and dismissing Peninsula's claim: [53].

- *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 established the pre-existing freedom test: [43]. In terms of public policy, which was the foundation of the doctrine, there was no explanation why a restraint should engage the doctrine if the covenantor enjoyed a pre-existing freedom but why an identical restraint should not engage it if he did not do so: [44].

- A sudden change in the law is likely to destabilise it. Negotiations for contractual restraints on the use of land may well have been conducted with the pre-existing freedom test in mind: [49]. However, across the common law world it has long been accepted and normal for the grant of a long lease in part of a shopping centre to include a restrictive covenant on the part of the lessor in relation to the use of other parts of the centre: [51]. *Esso* has been consistently criticised for over 50 years; the reasoning behind it has scarcely been defended; and the common law has been limping between the continuing authority of the test in the UK and its rejection in Australia and in parts of Canada: [50].

- Under the trading society test a covenant which restrains the use of land does not engage the doctrine if it is of a type which has "passed into the accepted and normal currency of commercial or contractual or conveyancing relations" and which may therefore be taken to have "assumed a form which satisfies the test of public policy": [46]. Unlike the pre-existing freedom test, the trading society test is consonant with the doctrine of restraint of trade: [47].