Court of Appeal
Supreme Court
Sydney

Decisions of interest

2 July 2018 – 13 July 2018

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

1. **Corporations: winding up, voidable transactions, unfair preferences**

   ***Hosking v Extend N Build Pty Ltd* [2018] NSWCA 149**

   Decision date: 13 July 2018

   Bathurst CJ; Beazley P; Gleeson JA

   Built NSW Pty Ltd entered into a building contract with a subcontractor (**Evolvebuilt**). Evolvebuilt retained secondary sub-contractors to carry out the work. It failed to pay them, and they ceased work on 12 March 2013. That day, Built received a letter from the relevant union (**CFMEU**) requesting that Built make the outstanding payments. Built also received a letter from Evolvebuilt requesting that it make payments "*as discussed*", as per cl 38.2 of the sub-contract. On 14 March, Built sent a letter to the CFMEU outlining an arrangement "*as discussed*" to pay the secondary sub-contractors. Built made initial payments, and after assessing the outstanding amounts, made further payments on 28 March. One of the secondary sub-contractors (**Kennico**) did not receive any such payments, and Evolvebuilt made payments to Kennico of its own accord. Evolvebuilt later went into liquidation. The liquidators commenced proceedings, arguing that the payments made by Evolvebuilt to Kennico and by Built to the other secondary sub-contractors on 28 March were voidable under the *Corporations Act 2001* (Cth) (**the Act**) because they were "*unfair preferences*" under s 588FA(1), entered into at a time when Evolvebuilt was insolvent. The primary judge found that the Kennico payments were unfair preferences but that the Built payments were not. However, he found that Kennico was entitled to rely on the defence in s 588FG(2) on the basis that a reasonable person in their position would not have had an actual fear that Evolvebuilt was insolvent. The issues on appeal were whether the payments made by Built were "*unfair preferences*", and whether Kennico was entitled to rely on the defence.

   Held:

- As s 588FA(1)(a) requires a debtor company and creditor to be "*parties to the transaction*", it was necessary to identify the "*transaction*" and determine whether Evolvebuilt was party to it. In establishing this, it was not helpful to rely upon a "*chain of causation*" connecting the debtor company to the payments: [91]-[94]; [108].

- Evolvebuilt was not relevantly a party. Built was under no contractual obligation to Evolvebuilt to make any payments, and Evolvebuilt was not a party to the arrangement between Built and the CFMEU: [95]-[107]. It was not necessary to consider whether the payments made by Built were received "*from*" Evolvebuilt for the purposes of s 588FA(1)(b), or whether a diminution in the assets of a debtor company was required for a transaction to constitute an "*unfair preference*": [111].

- The statutory defence in s 588FG(2) was not available to Kennico. The payments were made over a period of two months after it had completed its work, and Kennico knew that Evolvebuilt was "*unable to pay everyone*": [120]

2. **Costs: barristers, Chorley exception**

Pentelow v Bell Lawyers Pty Ltd **[2018] NSWCA 150**

Decision date: 13 July 2018

Beazley ACJ; Macfarlan JA; Meagher JA

Ms Pentelow, a barrister, was retained by the respondent to act for their client in proceedings. She brought proceedings in the Local Court and Supreme Court to recover her fees. The Supreme Court made costs orders in her favour in respect of the Local Court and Supreme Court proceedings. Ms Pentelow claimed costs for legal work she had personally undertaken in the Local Court and Supreme Court proceedings. As a general rule, self-represented litigants are not entitled to costs other than disbursements. However, pursuant to the so-called '*Chorley* exception', self-represented solicitors are entitled to professional costs.

The costs claimed by Ms Pentelow were disallowed by a costs assessor and, subsequently, a Review Panel on two bases: first, she was not self-represented as she was represented by solicitors and senior counsel in the Local Court and Supreme Court proceedings; and second, the *Chorley* exception did not apply to barristers. The applicant appealed to the District Court, but was unsuccessful on the same bases. The applicant sought judicial review of the District Court decision. The issues raised by her summons were: (i) whether the *Chorley* exception applied to barristers; (ii) whether the applicant was a self-represented litigant, and (iii) whether the exception applied in circumstances where the applicant had undertaken legal work herself in proceedings where she had also engaged legal representatives.

Held:

- The Court allowed the summons for judicial review in part. The majority considered that, having regard to the rationale for the *Chorley* exception, namely that solicitors' costs could be assessed and quantified, the *Chorley* exception applied to barristers who were self-represented: [90]-[98]; [115]-[116].

- The question of whether Ms Pentelow was a self-represented litigant was a question of fact, which was not amenable to judicial review: [15]; [82]. Having determined that the *Chorley* exception applied in principle to self-represented barristers, the question of whether it applied in circumstances where she had also engaged legal representatives was one of mixed fact and law. This was amenable to judicial review. However, whether Ms Pentelow was entitled to recover her costs as claimed was a matter for costs assessment: [87]; [90]-[98]; [107]-[115].

- Meagher JA, dissenting, considered that Ms Pentelow had not identified any substantial reason to encroach further upon the plain language of the *Civil Procedure Act 2005* (NSW), s 98, conferring the power to order "*costs*", as defined in s 3. The legislation reflected the general conception of costs as being awarded by way of indemnity for professional legal costs actually incurred in litigation [138]-[142].

Other Australian intermediate appellate decisions of interest

3. **Administrative law: judicial review, jurisdictional error; the legal profession**

Legal Services Commissioner v Nichols **[2018] QCA 158**

Decision date: 6 July 2018

Fraser JA; McMurdo JA; Flanagan J

On the opinion of an investigator, the appellant dismissed a complaint about a solicitor and partner, pursuant to the *Legal Profession Act 2007* (Qld), s 448(1)(a)(i). This provided that the appellant could dismiss a complaint if satisfied there was no reasonable likelihood of a disciplinary body making a finding of unsatisfactory professional conduct or professional misconduct. The complaint concerned the misuse of client trust funds to pay solicitors' fees, where the funds were subject to a *Quistclose* trust in favour of certain creditors. The investigator recommended dismissal on the basis that the likelihood of a finding was contingent on the solicitor's knowledge of the nature of the funds at the time the monies were deposited in the trust account; a determination of the nature of the funds must be made by a court, which had not happened; and the appellant did not have the power to make such a determination. In fact, a Federal Magistrate had found there to be a *Quistclose* trust.

The primary judge made a finding of jurisdictional error. The appellant did not need to make a determination of whether the funds were impressed with a trust, and by misdirecting himself, had erred in the exercise of jurisdiction by misapprehending the nature or limits of his functions or powers. The judge made an order in the nature of *mandamus* under the *Judicial Review Act 1991* (Qld) for the appellant to reconsider the matter according to law. The issues on appeal were whether he had erred in finding that the misdirection involved jurisdictional error; (ii) in making the order when there was no actual or constructive failure to perform the statutory function; and (iii) alternatively in not exercising his discretion to refuse the relief sought.

Held:

- The Court dismissed the appeal. The appellant had not formed the requisite opinion, because he had imposed two impermissible pre-conditions on exercising his power. First, it was not part of his function to consider if he had the power to determine whether the monies were impressed with a trust; nor was it relevant whether a court had done so. Second, the issue of whether the solicitor had used the funds in knowing breach of trust should not have been confined to when the monies were received, as opposed to disbursed. The disbursements were made after the client had provided a chronology identifying the source of the funds: [21]-[27].

- Because the primary judge did not err in finding jurisdictional error, ground two also failed. He had made an express finding that there had been at least a constructive failure by the appellant to perform his statutory function: [30]-[33]. The Court rejected the appellant's submission that relief should not have been granted because the jurisdictional error would not have affected the exercise of the power: [34]-[40].

4. **Contract: construction and interpretation**

Agtan Pty Ltd v Caltex Australia Petroleum Pty Ltd **[2018] VSCA 169**

Decision date: 10 July 2018

Santamaria JA; McLeish JA; Hargrave JA

On 1 September 1999, the lessor (**Agtan**) entered into a lease with the respondent (**Caltex**) for a 10 year term, with two options to renew, each for a five year term. Caltex conducted a service station from the premises, which contained eight underground steel storage tanks (**the Tank System**). Caltex exercised each option. After it had exercised the first option but before exercising the second, one of the tanks suffered a water leak and was decommissioned. Clause 19.1 of the lease required Caltex to maintain the *"Premises … in good and tenantable repair and good and efficient working order and condition having regard to their condition as at the date of commencement of the Lease*". This was subject to a 'wear and tear' exception. The clause also required Caltex to "*effect repairs to the … Premises … as necessary including the replacement of all worn or defective parts*", subject to a proviso relating to the carrying out of structural works.

A dispute arose as to whether Caltex had an obligation to repair the tank. The primary judge held that cl 19.1 contained a "*single central obligation*" to keep and maintain the premises, of which the obligation to effect repairs was a subset, rather than a freestanding obligation. The repair obligation was therefore subject to the original condition of the premises and to the wear and tear exception. Construing the date of commencement as being the start date of the second option, the primary judge found that Caltex had no obligation to repair the tank, because by this stage it had already been decommissioned. Agtan challenged both of these findings on appeal. Further grounds of appeal contending that Caltex had breached cl 19.1 were premised on the start date being construed as 1 September 1999.

Held:

- The Court dismissed the appeal. The majority considered that, having regard to the text, context and purpose of the lease, cl 19.1 contained two matters designed to clarify the extent of the obligation to "*keep and maintain*", as related to (i) repairs, and (ii) structural works (in the form of the proviso): [91]. If cl 19.1 was interpreted as conferring a separate free-standing repair obligation, the original condition qualification and fair wear exception would be effectively eviscerated: [94].

- "*[D]ate of commencement*" also referred to the start of any lease extension or renewal. A lease obtained by exercising an option to renew was effectively a new leave; it was open for the parties to provide that such a lease was a continuation of the original lease, but they had not done so. The references to 'Lease' throughout the original lease were plainly intended to refer also to any renewal: [125]-[130].

- The effect of these conclusions was that the appeal failed, notwithstanding that members of the court determined some of the other grounds in Agtan's favour: [142]; [168]; [197]; [292].

Asia Pacific decisions of interest

5. **Administrative law: judicial review, unreasonableness; discrimination**

***Director of Immigration v QT* [2018] HKCFA 28**

Decision date: 4 July 2018

Ma CJ, Ribeiro PJ; Tang PJ; Fok PJ; Lord Walker of Gestingthorpe NPJ

QT and her partner SS entered into a same-sex civil partnership in England. SS was then offered employment in Hong Kong. In 2011, SS and QT entered Hong Kong on employment and visitor visas respectively, and lived there thereafter with visa extensions from time to time. Hong Kong had a Policy whereby a person's spouse was eligible to apply for a dependant visa. After making unsuccessful applications for a dependant visa and an employment visa in her own right, on 29 January 2014, QT again applied for a dependant visa. The Director refused her application on the basis that it was "*outside the existing policy",* because spousal admission was based on a monogamous marriage "*consisting of one male and one female*".

QT commenced judicial review proceedings, arguing, *inter alia*, that the decision was unreasonable under public law principles, because it amounted to unjustified discrimination against her on the basis of sexual orientation. The Director contended that the differential treatment was justified because it struck a balance between encouraging persons with skills and talent to come to Hong Kong, and maintaining a system of effective and stringent immigration control. He was entitled to adopt a "*bright-line*" rule on marital status for "*legal certainty and administrative workability*". The Court of Appeal found in QT's favour on the unreasonableness ground and the Director appealed to the Hong Kong Court of Final Appeal.

Held:

- The Court dismissed the appeal. It rejected the Director's argument that there was no discriminatory treatment requiring justification, as same-sex couples who could not attain marital status under Hong Kong law were in a different position to married couples. This was circular reasoning putting forward the challenged differentiating criterion as its own justification. Civil partnerships were not materially distinguishable from marriage; and the argument was contrary to existing authority: [41]-[76].

- The Policy was not rationally connected to the stated "*talent*" or "*immigration control*" objectives. It was contrary to the aim of encouraging talent to come to Hong Kong by allowing them to bring dependants, since a person with desirable skills could be of any sexual orientation. The Policy was not saved by the "*bright line*" aim. The exclusion of *bona fide* civil partners of sponsors did not promote the legitimate aim of strict immigration control. Purely at a convenience level, QT and SS were just as easily able to produce their civil partnership certificate as a married couple: [90]-[99].

- In the absence of a rational connection, it was not necessary to determine whether the differential treatment was proportionate to achieving the stated aims: [109].

6. **Defamation: absolute privilege, innuendo; malicious falsehood**

Chang Wa Shan v Esther Chan Pui Kwan **[2018] HKCFA 29**

Decision date: 11 July 2018

Ribeiro PJ; Tang PJ, Fok PJ, Stock NPJ, Lord Walker of Gestingthorpe NPJ

The plaintiff brought satellite proceedings against the defendant, arising out of a probate action. In the probate action, Mr Chan claimed that the testator had made a new will, displacing the major beneficiary of her earlier will (**CCFL**). Mr Chan was later convicted of forgery. During cross-examination of Mr Leung, a CCFL witness, Mr Chan's counsel (**Mr Mill**) produced documents evincing a transaction between Mr Leung and CCFL. This was intended to undermine Mr Leung's credibility by showing that he had received a substantial financial benefit from CCFL. The defendant had acted as a "middleman" between the documents' source and Mr Chan's legal team.

Anticipating a question about the source, Mr Mill, through his instructing solicitor (**Mr Midgley**), rang the defendant to inquire about it. She named the plaintiff, which Mr Mill then told the judge in open court. This statement, which was false, was widely reported in the media. The plaintiff brought proceedings for malicious falsehood and slander, alleging that reputational injury would flow from the fact that he had business dealings with Mr Leung, and that people would regard his alleged act (a) as a betrayal, (b) helping Mr Chan pursue an unmeritorious claim, and (c) done with a disreputable mercenary motive. It was not disputed that what was said in open court and the resulting media reports were covered by the defence of absolute privilege. The Hong Kong Court of Final Appeal was required to consider whether this defence extended to the communication between the defendant and Messrs Mill and Midgley. The Court also considered issues relating to the pleading of innuendo meanings and damages.

Held:

- Absolute privilege did not extend to communications between a solicitor or barrister for court proceedings, and a person who may not be a witness or potential witness but provides relevant information for possible use in those proceedings: [96]-[98]; [121]. Tang PJ held that absolute privilege extended to persons taking part in the judicial process where their conduct was "*a step towards and part of the administration of justice*", and that this factual inquiry had been satisfied: [59]; [67].

- As the defendant's words were not defamatory in their natural and ordinary meaning, the plaintiff was required to show that Messrs Mill and Midgley, as the persons to whom the statement was published, had knowledge which would lead them to understand the statement as carrying the pleaded innuendo meanings (see (a)-(c), above). As this was neither properly alleged nor proved, the innuendo meanings were not established, and the slander claim failed: [68]-[69]; [122]-[129].

- The plaintiff's alternative claim for malicious falsehood also failed, as he could not show that the statement in open court and resulting news articles were "*calculated to cause pecuniary damage*", or otherwise prove special damage: [130]-[139].

Other international decisions of interest

7. **Private international law: jurisdiction; European Union Directives**

Goldman Sachs International v Novo Banco SA **[2018] UKSC 34**

Decision date: 4 July 2018

Lord Mance; Lord Sumption; Lord Hodge; Lady Black; Lord Lloyd-Jones

The appellants were assignees of the rights of Oak Finance Luxembourg SA (**Oak**). Oak lent a sum to a Portuguese bank (**BES**) under an agreement which was governed by English law and provided for the exclusive jurisdiction of the English courts. BES fell into financial strife. Under European Directive 2014/59/EU, member states were required to confer on designated national authorities certain tools for the reconstruction of failing credit institutions. Pursuant to this Directive, in August 2014, the Central Bank of Portugal incorporated the respondent bank to serve as a 'bridge institution' and purported to transfer certain assets and liabilities of BES to it. In December 2014, the Central Bank determined that the Oak liability had never been transferred, as the transfer fell within a statutory prohibition under Portuguese law. The appellants commenced proceedings in England for sums due under the loan, on the basis that the Oak liability had been transferred to the respondent by the August decision, and the respondent was therefore bound by the jurisdiction clause. The Court of Appeal, relying on Art 3 of the Directive, held that an English court was bound to recognise the effect of the December 2014 decision as a matter of Portuguese law, such that the Oak liability had not been transferred.

Held:

- The Supreme Court dismissed the appeal: [36]. Art 3 was intended to ensure that all assets and liabilities of the institution, regardless of location, be dealt with by a single process in the home member state. It was not consistent with the Article's language or purpose that an administrative act such as the December decision should have legal consequences recognised in the home state but not in other member states. Art 3 also required "*reorganisation measures*" to be "*applied in accordance with the laws, regulations and procedures applicable in the home member state",* and to be *"fully effective in accordance with [that state's] legislation*". It would not make sense for another state's courts to give effect to a "*reorganisation measure*" but not to other provisions of the home state's law affecting its operation: [27].

- The effect of the August decision could not be recognised without regard to the December decision. As it was accepted as a matter of Portuguese law that the December decision was conclusive, unless and until annulled by a Portuguese court, an English court must treat the Oak liability as never having been transferred. The respondent was therefore not party to the jurisdiction clause: [28].

- The Court rejected the appellant's alternative case that, even if the December decision was otherwise entitled to recognition in England, it should be regarded as a provisional decision pending the final decision of a Portuguese court: [30]-[34].

8. **Civil procedure: discovery; privacy: aggregate databases**

***British Colombia v Philip Morris International*, 2018 SCC 36**

Decision date: 13 July 2018

In 2001, the Province of British Colombia sued the respondent and other tobacco manufacturers to recover the cost of health care benefits related to "*disease caused or contributed to by exposure to a tobacco product*" on an aggregate basis. This was pursuant to the *Tobacco Damages and Health Care Costs Recovery Act 2000*, SBC 2000, c 30 (**the Act**). Section 2(5)(b) of the Act provided that where the Province has sued on an aggregate basis, "*the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable*".

The respondent argued that s 2(5)(b) did not bar the compellability of various databases, collected by the Province, which contained coded health care information. The Province intended to use such databases in order to prove causation and damages in the action. The respondent argued that access to those databases was crucial to its defence, and made an order compelling their production. The primary judge and the Court of Appeal of British Colombia found that the databases, once anonymised, fell outside the scope of s 2(5)(b), and were therefore compellable. The Province appealed to the Supreme Court of Canada.

Held:

- The Court allowed the appeal: [37]. Neither the relevance of the databases to the Province's pleadings, nor their anonymisation, insulated them from the text of the section, read in context and in its grammatical and ordinary sense, in harmony with the statute's scheme and object: [4].

- Even in aggregate form, to the extent that the databases contained information drawn from individuals' clinical records, they remained "*health care records and documents of particular insured persons*". Even if the databases were not in their entirety, the courts below failed to consider whether they fell within the second category of "*documents relating to the provision of health care benefits for particular individual insured persons*", such that the full scope of s 2(5)(b)'s protections were not accounted for: [21]-[26].

- The courts below had erred in allowing the relevance of the databases to supplant the meaning and legislative intent behind s 2(5)(b). The section conditioned the compellability of records and documents on their nature, not their relevance: [27].

- The courts had also erred in treating "*particular individual insured persons*" as synonymous with "*identifiable individual insured persons*". Such an interpretation would be inconsistent with the Act's scheme. If it were possible to compel records otherwise caught by s 2(5)(b) simply by anonymising them, no party in an aggregate claim would ever need to resort to applying under ss 2(5)(d)-(e) for the discovery of a statistically meaningful sample of records or documents: [28]-[31].