Decisions of interest

4 June 2018 – 15 June 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.

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New South Wales Court of Appeal decisions of interest

1. **Equity: fiduciary duties, knowing assistance, limitation periods**

   ***Lewis Securities Ltd (in liq) v Carter* [2018] NSWCA 118**

   Decision date: 7 June 2018

   Leeming JA; Sackville AJA; Emmett AJA

   The appellants, Lewis Securities Ltd (in liq) (**LSL**) and LSL Holdings Pty Ltd (in liq) (**Holdings**), brought an appeal against orders made in two proceedings relating to transactions instigated by Mr Lewis, a director of LSL and Holdings. The respondents were Ms Carter (Mr Lewis' wife) and Mr Miller, respectively the company secretary and a director of LSL. In the Property Proceedings, the appellants alleged that Ms Carter had used funds given to her by Mr Lewis to purchase a property, which she knew were provided from LSL's bank account in a dishonest and fraudulent breach of Mr Lewis' fiduciary duty. The appeal was concerned only with $250,000 said to be invested in LSL by a Mrs Malone. The appellants also alleged that the respondents had assisted Mr Lewis to conduct a fraudulent and dishonest scheme in breach of his fiduciary duty in order to extinguish a debt owed by Mr Lewis to LSL or Holdings, being loans made to enable Mr Lewis to give the funds to Ms Carter (**the Bass Proceedings**). This was achieved through a series of transactions purporting to invest in preference shares in companies incorporated by Mr Miller (**the Bass Transactions**).

   The proceedings were heard together and the primary judge found in favour of the defendants. The appeal concerned the manner in which the primary judge dealt with (i) Mrs Malone's account and (ii) the Bass Transactions, and (iii) his conclusion that the claims in both of the matters would have been time barred.

   Held:

- The Court allowed the appeal in part: [219]. The $250,000 was a loan from Mrs Malone, not LSL or Holdings. In circumstances where no party pleaded a breach of duty owed from Mr Lewis to Mrs Malone, the appellants could not complain about that finding: [2]-[7], [135]-[136]. The judge had erred in concluding that the Bass Transactions were a sham, and that because LSL did not lose the chose in action, the respondents could be held liable. Notwithstanding that LSL, Bass Holdings and Byrne Investments may have had good causes of action to recover the monies, ownership in those funds ultimately passed to the respondents, and the presentation of cheques to LSL extinguished Mr Lewis's debt: [15]; [176].

- The respondents had knowingly assisted Mr Lewis in relation to the Bass Transactions, and were required to account to the appellants. The claims could not be barred by analogy to the *Corporations Act 2001* (Cth), s 1317K, and the *Limitation Act 1969* (NSW), s 47 did not apply as it had not been pleaded: [72]; [217]. The defences of laches and informed consent were not made out.

2. **Torts: false imprisonment, wrongful arrest; damages**

Lule v State of New South Wales **[2018] NSWCA 125**

Decision date: 15 June 2018

Beazley P; Macfarlan JA; Barrett AJA

In December 2014, Mr Lule was arrested by Senior Constable Thomas of the NSW Police Force, following a break and enter that had occurred nearby. The victim had provided a possible description of the offender to Constable Thomas, and her partner had pointed out a person (in fact Mr Lule) who was seated in the rear of a car driving past the victim's apartment block and said "*that car has driven past several times, that is him in the car*". The car was registered to Mr Lule's uncle, who lived nearby. After going to the uncle's apartment, Constable Thomas saw Mr Lule inside and formed the view that he matched the victim's description. Mr Lule was arrested at 6.25pm in front of a number of witnesses. He was handcuffed, transported in a caged police vehicle to the local police station, strip-searched and confined in a police cell. He was not released until about 8.45pm, and received no explanation or apology for his arrest.

Mr Lule brought proceedings against the State claiming damages for, *inter alia*, unlawful arrest and false imprisonment. The primary judge dismissed the claims. The issue on appeal was whether the arrest was lawful under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 99(1). This provides that a police officer may, without a warrant, arrest a person, if (a) they suspect on "*reasonable grounds that the person … has committed an offence*", and (b) they are satisfied that the arrest is "*reasonably necessary …*".

Held:

- The Court allowed the appeal: [106]. The only possible reasonable ground for suspicion was the victim's description. A witness' description of an offender may, without more, be sufficient to constitute reasonable grounds for a suspicion that a person who matches that description is an offender. However, the sufficiency of such a description and whether further enquiries are necessary to form a reasonable suspicion depends on the circumstances. "*[T]he broader and less specific the description*" the less likely it will be that a match with the description on its own constitutes reasonable grounds for an arrest: [84]-[86]; [89].

- The issue of "*reasonable grounds*" is to be "*judged against what was known or reasonably capable of being known at the relevant time*". In light of both the generality and uncertainty of the victim's description of the offender, the police officers should have asked those present at Mr Lule's arrest where he had been at the time the offence was committed: [87]-[94], [109].

- As s 99(1)(a) was not satisfied, it was unnecessary to determine if the arrest had been "*reasonably necessary*": [2]-[5]; [95]-[96]. Mr Lule was awarded $30,000 in compensatory damages for wrongful arrest and false imprisonment: [106].

Other Australian intermediate appellate decisions of interest

3. **Procedure: pleadings, striking out; private international law**

Palmer v Turnbull **[2018] QCA 112**

Decision date: 5 June 2018

Fraser JA; Gotterson JA; Brown J

Mr Palmer sued the respondent, the Honourable Malcolm Turnbull MP, Prime Minister of Australia, for defamation. This arose from words spoken by the respondent at a press conference in Beijing, China, concerning Mr Palmer's management of and role in the collapse of Queensland Nickel. Following receipt of the statement of claim, the respondent's solicitors wrote to Mr Palmer's solicitors asking whether he intended to pursue a claim which was subject to Chinese law and whether he would ask the Court to apply Chinese law. By reply letter, Mr Palmer's solicitors stated that their position was that the law of China would apply, given the location of publication, and that the statement of claim adequately pleaded a cause of action under Chinese law, noting possible applicable provisions. At the hearing, Mr Palmer disavowed any suggestions that he intended to rely upon Chinese law, including what was asserted in the letter.

The respondent successfully applied to have paragraphs 3 and 7(a) of the statement of claim struck out. Para 3 pleaded and set out the remarks of the respondent which were said to be defamatory. This was struck out on the basis that Mr Palmer had failed to plead material facts, namely, the applicable Chinese law and the basis upon which it provided a remedy in the present case. Para 7(a) alleged that one of the defamatory imputations of those remarks was that Mr Palmer had acted fraudulently by taking money from Queensland Nickel. This was struck out on the basis that the imputation lacked precision. The issue on appeal was whether the primary judge had erred in making the strike-out orders.

Held:

- The Court allowed the appeal in part: [43]. Where the foreign law is the *lex causae* by application of Australian choice of law rules, a plaintiff is not required to plead foreign law to establish a cause of action. A party seeking a forensic advantage in the foreign law must specifically plead it in the statement of claim; otherwise it will be presumed that the foreign law is the same as local law: [25].

- Mr Palmer had disavowed the position taken in the letter and any reliance upon a foreign law advantage. In those circumstances, where he relied upon the presumption as to foreign law, he had not failed to plead material facts as to Chinese law and its content. Para 3 should not have been struck out: [29]-[32].

- The primary judge did not err in determining that para 7 was too imprecise and should be struck out. The basis of the fraud which was associated with the taking of the money was not apparent from the pleading: [41]-[42].

4. **Defamation: damages, non-economic loss, statutory cap**

Bauer Media Pty Ltd v Wilson (No 2) **[2018] VSCA 154**

Decision date: 14 June 2018

Tate JA; Beach JA; Ashley JA

In May 2015, Bauer Media Pty Ltd (**Bauer**) published an article in the print edition of the Women's Day magazine and a further seven articles on Bauer websites with respect to Ms Rebel Wilson, a well-known Australian actress. The articles were published at a time close to the release of the film Pitch Perfect 2, in which Ms Wilson had a major role, and remained on the websites for around a year. The articles were to the effect that Ms Wilson was a serial liar, who had lied about her real name, age, aspects of her upbringing, and events in her life.

Ms Wilson brought defamation proceedings in the Victorian Supreme Court. A jury found in Ms Wilson's favour and the trial judge subsequently awarded $4,749,920.60 in damages. The award comprised $650,000 in damages for non-economic loss (including aggravated damages), $3,917,472 for economic loss, and interest of $182,448.61. Bauer appealed the award of damages, alleging that the trial judge had erred: (i) in his assessment of damages for non-economic loss, (ii) in construing the statutory cap on damages for non-economic loss under the *Defamation Act 2005* (Vic), s 35, and (iii) in awarding the plaintiff such a significant sum in damages for economic loss.

Held:

- The Court allowed the appeal, substituting an award of $600,000 for non-economic loss, and setting aside the award of damages for economic loss.
- In determining that an award of aggravated damages was warranted, the trial judge erred in making certain findings as to circumstances of aggravation. He was correct in construing s 35 such that where a court is satisfied that an award of aggravated damages is appropriate, the statutory cap on damages for non-economic loss ($389,500) is inapplicable. Given these conclusions, the Court re-assessed the damages for non-economic loss at $600,000: [140]-[142]; [249].
- On review, the evidence did not enable the inference to be drawn, on the balance of probabilities, that Ms Wilson had lost a valuable opportunity to be cast in key roles in the three specified Hollywood films. Nor could the inference be drawn that, had such an opportunity been established, the flow-on effect in the United States from the publication of the relevant articles in Australia was a cause of that lost opportunity. Accordingly, the claim for special damages for economic loss could not be sustained: [545].
- For the same reasons as her claim for special damages should fail, Ms Wilson was not entitled, in the alternative, to *Andrews* damages, being damages awarded for a general decline in Ms Wilson's business: [578].

Asia Pacific decisions of interest

5. **Corporations: statutory demands, set-off**

Manchester Securities Limited v Body Corporate 172108 **[2018] NZCA 190**

Decision date: 13 June 2018

Kós P; Asher J; Gendall J

Body Corporate 172108 (**the respondent**) represented the owners of a 12-story block of units. Whilst the common areas and most of the exterior of the building were owned by the respondent, the level 12 exterior was owned by Manchester Securities Limited (**Manchester**). The level 12 unit had an 'ownership interest' of 11.88% (being the value of the unit relative to the others in the development). Following severe water ingress into the building, the respondent applied for a remediation scheme empowering it to carry out repairs to the whole of the complex under a single building contract.

A scheme was approved whereby Manchester would contribute to the repairs of common property on all levels and its liability would be capped at 11.88% of the total building repair costs. The costs blew out such that the costs of repairing level 12 exceeded the cap. The respondent obtained variation orders removing the cap. Manchester was ordered to make an immediate interim payment equivalent to its minimum net liability for repair costs (**the judgment sum**), to be adjusted on completion of the remediation to level 12. This was unsuccessfully challenged. The respondent served a statutory demand for (i) Body Corporate levies, and (ii) the judgment sum. Manchester applied under the *Companies Act 1993* (NZ), s 290(4)(b) to set it aside, on the basis that they were claiming a set-off which was subject to compulsory arbitration, and that regardless, the existence of a substantial claim of set-off should lead both claims in the statutory demand to be set aside. The primary judge declined the application.

Held:

- The Court dismissed Manchester's appeal: [68]. The claimed set-off should be subject to the usual threshold test of showing that there were "*clear and persuasive grounds*" for a set-off. The debt claimed in the statutory demand was undisputed and not subject to arbitration. The fact that there were other outstanding amounts between the parties that were subject to arbitration should not result in the application of a lower test: [35]-[36].

- It will be rare for the discretion to be exercised against setting aside a statutory demand where the threshold test has been satisfied: [49]. However, Manchester was effectively attempting to re-litigate matters already decided in the interim payment proceedings: [54]. Moreover, given the unexpected costs and complexity of the dispute, a set-off by Manchester should not provide a basis for withholding the payment of ordinary levies: [65].

6. **Civil procedure: mareva injunctions**

JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd **[2018] SGCA 27**

Decision date: 1 June 2018

Chong JA; Loh J

Between March 2015 and September 2017, JTrust Asia Pte Ltd (**JTrust**), a Singapore company, invested US$210 million in Group Lease Public Company Limited (**GL Thailand**) via three investment agreements. During this period, GL Thailand was chaired by Mr Konoshita. In October 2017, the Securities and Exchange Commission of Thailand published findings that in 2016, GL Singapore, a wholly-owned subsidiary of GL Thailand, had issued US$54 million in loans under Mr Konoshita's direction to four Cyprus companies and a Singapore company (**Cougar**), all companies controlled by Mr Konoshita. The principal was used by the borrower companies to repay the interest on those loans to GL Singapore. This was recorded as income in GL Singapore's books.

After negotiations for a merger between JTrust's and GL Thailand's parent companies broke down, JTrust investigated the claims. The investigations concluded that the relevant loans served no discernible commercial purpose, but constituted a 'round tripping' scheme which artificially inflated GT Thailand's operating results. JTrust brought proceedings against GL Singapore, Mr Konoshita, Cougar, and the Cyprus borrowers, alleging these parties had conspired with GL Thailand to defraud JTrust into investing in GL Thailand. It obtained *ex parte* domestic Mareva injunctions against the first three parties. The respondents obtained an order discharging the injunctions. JTrust appealed.

Held:

- The Court restored the injunctions and gave the GL Singapore and Cougar injunctions worldwide effect. JTrust had established a good arguable case. There was an objective basis to conclude the respondents had conspired to defraud JTrust into investing in GL Thailand by engaging in the round-tripping scheme: [40]. It was immaterial that GL Thailand was not a defendant: the dispute was not over the agreements' validity, but the purpose for which the monies were used. Mr Konoshita, the mastermind, was a defendant: [47]-[50].

- There was a real risk the respondents would dissipate their assets to frustrate the enforcement of an anticipated judgment, as demonstrated by, *inter alia*, Mr Konoshita's history of fraudulent dealings, the ease with which the respondents' assets could be dissipated, and the foreign ownership of the companies: [82].

- JTrust had not come to the court with 'unclean hands': [88]; [91]-[92]. Moreover, whilst the presence of a collateral or ulterior purpose in seeking relief is sufficient to deny a plaintiff who would otherwise be entitled to *Mareva* relief, this was not satisfied here. It could not be said that the predominant purpose of JTrust's application was to bully GL companies into agreeing to a merger: [101]-[108].

Other international decisions of interest

7. **Private international law: jurisdiction; defamation: online**

***Haaretz.com v Goldhar*, 2018 SCC 28**

Decision date: 6 June 2018

Mr Goldhar, a prominent Canadian businessman, owned a popular professional soccer team in Israel. Mr Goldhar maintained a residence in Israel, and travelled there every few months. Haaretz, an Israeli newspaper, published an article about Mr Goldhar concerning his ownership and management of the soccer team. This included allegations that his management model derived from his approach to managing his Canadian business, an approach described in wholly negative terms. The article was not distributed in print form in Canada but was available electronically. It was read by an estimated 200 to 300 people in Canada, including many of Mr Goldhar's employees in Canada.

Mr Goldhar commenced an action for libel in Ontario, Canada, alleging damage to his reputation. Haaretz sought a stay of proceedings on the basis that the Ontario courts lacked jurisdiction, or in the alternative, that Israel was a clearly more appropriate forum. The primary judge found that Canada had jurisdiction, and refused to decline the exercise of jurisdiction in favour of Israel. The Ontario Court of Appeal dismissed Haaretz's appeal, and Haaretz appealed to the Supreme Court of Canada.

Held:

- A majority allowed the appeal and stayed the action. In determining whether a "*real and substantial connection*" exists for the purpose of establishing jurisdiction *simpliciter*, courts must consider whether the existence of a recognised presumptive connecting factor has been established, and whether this has been rebutted. The *situs* of the tort is an appropriate presumptive factor for Internet defamation cases, being the place in which defamatory statements are read or downloaded by the recipient. This factor was established: [35]-[38].

- The presumptive connection with Canada could not be rebutted. The evidence did not establish that Haaretz could not have reasonably expected to be called to answer a legal proceeding in Ontario. Haaretz knew Goldhar lived and operated his businesses in Ontario, and the allegedly libellous article directly referenced Goldhar's Canadian residency and business practices: [45].

- Israel was a "*clearly more appropriate*" forum. Haaretz would face substantial unfairness and inefficiency if a trial were held in Ontario, which was not outweighed by Goldhar's interest in vindicating his reputation there: [95]-[97]; [101]. A majority considered that Canada should not adopt the place of most substantial harm to reputation test for choice of law in Internet defamation actions instead of the *lex loci delicti*, as is the case in Australia: [91]; [198]-[204].

8. **Procedure: standing; European Convention on Human Rights; abortion**

In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) **[2018] UKSC 27**

Decision date: 7 June 2018

Lady Hale; Lord Mance; Lord Kerr; Lord Wilson; Lord Reed; Lady Black; Lord Lloyd-Jones

In Northern Ireland, abortion is criminalised under the *Offences Against the Person Act 1861* (UK), ss 58 and 59, and the *Criminal Justice Act 1945* (NI), s 25(1). It is not a crime to receive or supply an abortion where it is done in good faith to preserve the life of the mother, or where the continuance of the pregnancy will make the woman a "*physical or mental wreck*", following *R v Bourne* [1939] 1 KB 687. The Northern Ireland Human Rights Commission (**NIHRC**) sought to challenge the compatibility of these laws with the European Convention on Human Rights (**ECHR**), Art 3 (prohibition of torture and inhuman or degrading treatment), Art 8 (right to respect for private and family life), and Art 14 (prohibition of discrimination). This was on the basis that the law prohibited abortion in cases of (a) serious foetal abnormality, (b) rape, and/or (c) incest.

NIHRC sought declarations of incompatibility under the *Human Rights Act 1998* (UK), ss 4 and 6. The proceedings were brought in NIHRC's name, rather than those of particular victims, although examples were relied upon during the proceedings. The primary judge considered that NIHRC had standing to bring proceedings, and that ss 58 and 59 were incompatible with Art 8 insofar as they criminalised abortion in cases of fatal foetal abnormality, and rape and/or incest up to the date when the foetus is capable of being born alive. The Northern Ireland Court of Appeal found that the NIHRC had standing but that there was no incompatibility under any article of the ECHR. The NIHRC appealed.

Held:

- The Court dismissed the appeal. A majority (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) considered that the NIHRC did not have standing to bring the claim, by reference to the *Northern Ireland Act 1998* (UK), which established the NIHRC and elucidated its functions. Accordingly, the Court did not have jurisdiction to make a declaration of incompatibility: [73]; [333]; [365].

- A majority (Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) considered that Northern Ireland's abortion laws were disproportionate and incompatible with Art 8 insofar as they prohibited abortion in cases of (a) fatal (as opposed to serious) foetal abnormality, (b) pregnancy as a result of rape, and (c) pregnancy as a result of incest: [19]; [42]; [326]. Lady Black joined the majority with respect to (a): [371].

- A majority (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) found that Northern Ireland's laws were not incompatible with Art 3: [103]; [354]; [367].