Decisions of interest

7 May 2018 – 18 May 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. **Civil procedure: whether party could give evidence with face covered**

   Elzahed v State of New South Wales **[2018] NSWCA 103**

   Decision date: 18 May 2018

   Beazley P; Ward JA; Payne JA

   Ms Elzahed (**the appellant**), along with three family members, commenced proceedings in the District Court against the Australian Federal Police and the State of New South Wales (**the respondents**), for damages arising out of the execution of a search warrant at their home in 2014. The claim at trial essentially involved allegations of assault and battery by unspecified police officers.

   During the hearing, the appellant's counsel, apparently without prior notice, told the primary judge that he intended to call her to give evidence with her face (other than her eyes) fully covered by a niqab. Opposing counsel made various suggestions about how the issue could be addressed. The only reference to the appellant being permitted to give evidence from behind a screen, as sometimes occurs in cases with national security implications, fell from a suggestion made by counsel appearing for the Commonwealth. That suggestion was not adopted by the appellant and the judge was not asked to rule on such a proposal. The issue on the appeal was whether the primary judge's discretionary decision to reject the appellant's application to give evidence while wearing a niqab was affected by error of the kind described in *House v The King* (1936) 55 CLR 499.

   Held:

- When a court is invited to make a discretionary decision, to which many factors may be relevant, it is incumbent on the party who contends on appeal that attention was not given to particular matters to demonstrate that the primary judge's attention was drawn to those matters, at least unless they were fundamental and obvious. The alternative approach would permit a party to run one case before the primary judge and a different case on appeal: [2].

- No application was made by the appellant at trial to be permitted to give evidence by some alternative means. It was neither fundamental nor obvious that the appellant was seeking to be permitted to do so. The appellant had not demonstrated that most of the matters of which she complained were drawn to the attention of the primary judge, or fundamental and obvious: [3].

- There was no error in the primary judge's decision to reject the appellant's application. The appellant was a party, not merely a witness. Her evidence was strongly contentious. The resolution of the case would require the primary judge to make findings about whether to accept the appellant's evidence or the conflicting evidence of police officers. Viewing her face while she was giving evidence was capable of affecting the resolution of that conflict: [64].

2. **Insurance: legal liability insurance, 'cap and collar' agreements**

Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance **[2018] NSWCA 100**

Decision date: 16 May 2018

Meagher JA; White JA; Barrett AJA

The appellant (**Weir**) was retained by Phil Gold in connection with the refurbishment of a mill (**SAG Mill**). Some two years after completion of the refurbishment work, a circumferential weld disintegrated, ultimately causing significant damage to the mill. Phil Gold alleged that this resulted from one or both of two factors: inadequacy of welding undertaken during the refurbishment and failure to detect in the course of the refurbishment that pre-existing welding was in need of renewal. It commenced arbitration proceedings against Weir. Before the issue of an award and after the commencement of the arbitration proceedings, Weir and Phil Gold entered into a cap and collar agreement providing that if Phil Gold was awarded damages in the arbitration its recovery would be limited to US$10.725 million (**cap**) and that Weir would pay Phil Gold a fixed amount of US$2 million (**collar**) regardless of the outcome of the arbitration proceedings. The arbitration tribunal later ruled that Weir had no liability in damages to Phil Gold. Weir was left to bear its own substantial costs.

Weir sought indemnification for the collar amount and the costs of defending the arbitration under a broadcover liability policy with AXA. The primary judge dismissed Weir's claims on the basis that: (a) Weir had not established under cl 2.1 that an "*occurrence*" had resulted in property damage; (b) because cl 2.1 did not operate in favour of Weir, legal expenses incurred in the arbitration were not within cl 2.2; (c) the cl 3.4 professional services exclusion defeated any entitlement under cl 2.1 or 2.2 in any event; and (d) the cap and collar agreement was not a settlement agreement on which Weir could rely to establish legal liability. Weir disputed all of these findings.

Held:

- The Court dismissed the appeal. Weir could not rely on the cap and collar agreement to establish Weir's legal liability to pay compensation for damages to Phil Gold. Accordingly, AXA did not breach the insurance contract by declining to indemnify Weir for US$2 million: [76]-[77]. The failure of the circumferential weld did not constitute an "*occurrence*" under cl 2.1; rather, this constituted the damage itself, which should be distinguished from the event causing the damage: [97].

- Subject to any exclusions, AXA was liable under cl 2.2 for the reasonable legal costs incurred in defending the arbitration proceedings: [111]. Cl 3.4 would have defeated any claim for indemnity: [148]. The product defect exception relied upon in the cross-claim would have defeated Weir's claim in respect of costs and expenses only in part: [157].

Other Australian intermediate appellate decisions of interest

3. **Competition: cartel arrangements, penalties; statutory interpretation**

***Australian Competition and Consumer Commission v Yazaki Corporation* [2018] FCAFC 73**

Decision date: 16 May 2018

Allsop CJ; Middleton J, Robertson J

In 2012, the Australian Competition and Consumer Commission (**ACCC**) commenced proceedings against Yazaki Corporation (**Yazaki**). This related to a cartel concerning the supply of wire harnesses for motor vehicles between Yazaki and Sumitomo Electric Industries Ltd (**Sumitomo**), and their Australian subsidiaries (**AAPL** and **SEWS-A** respectively). Sumitomo cooperated with the ACCC and much of the evidence was provided by its employees or officers.

The companies had entered into an overarching agreement by which they would coordinate a mutual response to requests for price quotations from vehicle manufacturers, and respect each other's existing market position. This was implemented in Australia on a number of occasions in response to requests for tender from Toyota for the manufacture of Toyota Camry vehicles. The primary judge found each of the cartel arrangements alleged by the ACCC to be made out under the *Competition and Consumer Act 2010* (Cth) (**the Act**), s 45. The primary judge imposed penalties for two courses of conduct, in light of his finding that the maximum penalty was $10 million for each course of conduct. The appeal raised a number of issues relating to statutory construction, the identification of an "*Australian market*", and the appropriate penalties.

Held:

- The primary judge erred in finding that knowledge of the cartel arrangements on the part of the impugned entity was necessary to find that an entity "*[gave] effect to*" the relevant arrangement under s 45(2)(b). On this basis, it was clear that AAPL had given effect to arrangements entered into by Yazaki: [77]-[79].

- It was sufficient that the relevant entities be in competition with each other for there to be an exclusionary provision and contravention of ss 45(2)(a)(i) and (2)(b)(i), without the added requirement that they compete in a market in Australia: [132]-[133]. In any event, the evidence established a market in Australia for the supply of wire harnesses for Toyota Camry vehicles: [168].

- On a proper construction of the Act, s 76(5)(d), the maximum penalty for each contravention was close to $18 million. The calculation of annual turnover informing the statutory maximum included the total revenue of AAPL as a related body corporate to Yazaki, not just the revenue which related to the cartel conduct: [198]; [207]. The Court imposed penalties by reference to five contraventions, amounting to a total of $46 million: [257]-[260].

4. **Evidence: client legal privilege, waiver, *Evidence Act 2008*, ss 122, 131A**

***Viterra Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118**

Decision date: 11 May 2018

Whelan JA; Kyrou JA; McLeish JA

The applicants (**the Viterra parties**) entered into an agreement with Cargill Australia Ltd (**Cargill**) by which Cargill agreed to purchase a malting business from Viterra Malt Pty Ltd. The agreement contained warranties from the Viterra parties as to the accuracy and materiality of the information provided in a memorandum and certain "*data room documentation*" prepared in respect of the proposed transaction. After the sale, Cargill brought proceedings for breach of warranty and misleading and deceptive conduct, alleging that the Viterra parties had failed to disclose certain improper practices during the sale process and due diligence, which substantially underpinned the performance of the business.

The applicants alleged that Cargill had sufficient knowledge or suspicion of the relevant matters so as not to be misled; and that they had relied upon representations by Cargill's executives that the undisclosed matters did not exist and that the warranties were true. They sought inspection of documents over which Cargill had claimed privilege, evidencing Cargill's knowledge of the alleged undisclosed matters. Under the *Evidence Act 2008* (Vic) (**the Act**), s 122(2), otherwise privileged material can be adduced if a party has acted in a way that is inconsistent with objecting to the adducing of the evidence on the basis of privilege. This extends to the production of documents during pre-trial discovery under s 131A. The central issue on appeal was whether the judge below had erred in holding that for waiver of legal professional privilege to be imputed from the pleading of a state of mind, the party must establish that the contents of the documents in question were central to the state of mind pleaded.

Held:

- The Court dismissed the appeal: [83]. The preferable course was not to apply any alternative 'test' from the case law, but look to the language of the statute: [76]. A pleading of reliance, without more, will not usually manifest inconsistency with the maintenance of client legal privilege in communications relevant to that state of mind: [73].

- It is entirely to be expected that a party pleading a misleading and deceptive conduct case arising from a commercial transaction will have received legal advice regarding the transaction before its consummation. Although Cargill's lawyers were integrally involved in the pre-sale process, it could not be inferred that the lawyers had provided advice material to the formation of Cargill's state of mind as to the undisclosed matters over the relevant period. The most that could be said was that some of the confidential communications might be relevant to the issue of what and to which extent Cargill knew about an undisclosed matter: [78]-[82].

Asia Pacific decisions of interest

5. Costs: protective costs orders

Designing Hong Kong Ltd v The Town Planning Board, Secretary For Justice **[2018] HKCFA 16**

Decision date: 15 May 2018

Ma CJ; Ribeiro PJ; Tang PJ; Bokhary NPJ; Lord Collins of Mapesbury NPJ

Designing Hong Kong Ltd (**DHKL**), a company limited by guarantee, was a non-profit organisation dedicated to Hong Kong's environment. In 2014, the Town Planning Board (**TPB**) decided not to amend a particular planning instrument, such that an area demarcated for a 150 metre waterfront promenade would be rezoned to allow for a military dock to be built. Despite representations from DHKL and others, the TPB refused to reconsider its decision. DHKL sought leave to apply for judicial review of the decision. It made an application for a protective costs order (**PCO**) protecting DHKL from liability to bear TPB's costs.

Leave to apply for judicial review was granted, but after a two day hearing, the primary judge dismissed the application for a PCO, with costs. An appeal was dismissed, although no costs were ordered. The key issue for the Hong Kong Court of Final Appeal concerned the approach to be taken to one aspect of the discretion to make a PCO, being the financial ability or resources of an applicant, when that applicant is a company.

Held:

- The Court unanimously dismissed the appeal, with no order as to costs: [67]. The principles in *R (Corner House Research) v Secretary for State Trade and Industry* [2005] 1 WLR 2600 provided useful guidance as to the factors relevant to exercising the discretion to make a PCO. These included having regard to the financial resources of the applicant, and whether, if the order were not made, the proceedings would be stifled: [15]; [26].

- Whether it is appropriate to look to the financial ability of shareholders, directors, or other supporters of a company will depend on the circumstances of the case. Usually, the court can expect evidence of why persons who would normally be expected to support the company or have done so in the past cannot or no longer wish to do so. In some cases, it will be necessary to provide details of the financial ability and resources of such persons: [36].

- As a matter of fairness and justice, a PCO should not be granted. Financial ability was important, in light of the rationale of PCOs, being to ensure that proceedings of great public importance are not stifled through a lack of means. By reason of their failure to provide financial information, the directors and CEO, all guarantors, could be assumed to have the means to meet costs orders, but were unwilling to do so, despite being the driving force behind the litigation: [48].

6. **Misleading and deceptive conduct; the legal profession**

***McAlister v Lai* [2018] NZCA 141**

Decision date: 7 May 2018

Winkelmann J; Asher J; Gilbert J

Mr Hurst was a client of Mr Lai's law firm. Mr McAlister advanced him $200,000 to enable him to complete a purchase of Orcon Ltd (**Orcon**). This was secured by a convertible note that would give Mr McAlister the option to either seek repayment of the loan or convert the loan into shares in Semple Investments Ltd (**Semple**), a major shareholder in the company that would complete the purchase. Following a meeting between Mr McAlister, Mr Lai, and Mr Hurst, Mr McAlister signed the convertible note and released the funds. The note, prepared by Mr Lai, was calculated by reference to Mr McAlister's contribution to the total equity in the purchase. Mr McAlister later discovered that significantly less equity had been provided than Mr Hurst represented in the meeting, as certain funds had been incorrectly treated as equity.

Mr McAlister brought proceedings against Mr Lai for misleading and deceptive conduct under the *Fair Trading Act 1986* (NZ) (**the Act**), s 9. The conduct was said to arise from Mr Lai's failure to correct Mr Hurst's false representations as to equity in the meeting and preparation of the convertible note based on the false figures. The primary judge found that Mr Lai had engaged in misleading and deceptive conduct by not clarifying Mr Hurst's misrepresentations about his equity in the Orcon purchase. However, he did not order Mr Lai or his firm to pay damages, on the basis that Mr Lai was not "*knowingly concerned*" in the breach for the purposes of such an order under s 43 of the Act.

Held:

- The Court allowed Mr McAlister's appeal and dismissed the cross-appeal. Mr Lai was privy to all aspects of the transaction, and viewing the facts and context objectively, must have known that the represented equity was wrong: [41]. In the context of the transaction as a whole, when Mr Lai did the calculation for the convertible note in Mr McAlister's presence using an equity figure he knew was false, and represented the result to Mr McAlister, he was by his conduct representing the accuracy of the figure. This was misleading: [44]. It would have been different if he was fresh to the transaction and plainly worked off figures given to him by the parties, without knowing if they were correct or incorrect: [45]

- The appropriate order was to require Mr Lai to compensate Mr McAlister for loss suffered due to the breach: [52]. Although Mr McAlister did not obtain independent legal advice as advised, any such advice would not have uncovered the true position regarding the equity, details of which were private to Mr Hurst and his advisors: [55]. Mr Lai's counsel correctly conceded that the primary judge erred in his approach to s 43 in requiring proof of 'knowing concern': [23].

Other international decisions of interest

7. **Contracts: 'no oral modification' clauses; consideration**

Rock Advertising Limited v MWB Business Exchange Centre Limited **[2018] UKSC 24**

Decision date: 16 May 2018

Lady Hale; Lord Wilson; Lord Sumption; Lord Lloyd-Jones; Lord Briggs

The respondent (**Rock Advertising**) entered into a written licence agreement with the appellant (**MWB**) to occupy office premises. Clause 7.6 required that all variations to the licence be made in writing. The respondent fell behind on its rent payments, and proposed a revised schedule of payments by telephone to a representative of MWB, which, on the respondent's case, was orally agreed upon. MWB subsequently locked the respondent out of the premises on account of their failure to pay the arreras and sued to recover the amounts owing. The respondent counter-claimed for damages for wrongful exclusion from premises.

The trial judge found that an oral agreement had been made, supported by valuable consideration, but that the variation was ineffective because it was not recorded in writing. The Court of Appeal overturned the decision, finding that the oral agreement amounted to an agreement to dispense with Clause 7.6, such that MWB was bound by the variation and could not recover. The issues on appeal were (i) whether a "no oral modification" (**NOM**) clause could be legally effective; and (ii) whether an agreement is supported by consideration where its sole effect is to vary a contract to pay money by substituting an obligation to pay less money or the same money later.

Held:

- The Court allowed the appeal. The law of contracts does not normally obstruct the legitimate interests of businesspeople, except for overriding reasons of public policy. Parties may agree to NOM clauses to prevent attempts to undermine written agreements informally; avoid disputes about the terms of purported variations; and better police internal rules restricting the authority to vary: [12]. There is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for variation: [13]-[14].

- The natural inference from the parties' failure to observe the formal requirements of a NOM clause is not that they intended to dispense with it, but that they overlooked it: [15]. Estoppel can act as a safeguard for a party which relies on a variation but finds itself unable to enforce it, but this was not made out here: [16].

- Because Clause 7.6 was effective and the oral variation invalid, it was not necessary to deal with the issue of consideration. However, this area of law is ripe for re-examination in an appropriate case: [17]-[18].

8. **Negligence: duty of care: reasonable foreseeability**

***Rankin (Rankin's Garage & Sales) v JJ*, 2018 SCC 19**

Decision date: 11 May 2018

The respondent (**J**), and his friend (**C**), were both minors. After drinking and smoking marijuana at the house of C's mother, they went into town, and eventually arrived at the premises of the appellant, being a commercial car garage. The garage was located near a main intersection. C found an unlocked car parked behind the garage, with the keys left in the ashtray. C instructed J to get in the car and drove out of the garage, onto the highway. The car crashed and J suffered a catastrophic brain injury.

Through his guardian, J sued the appellant, C, and C's mother for negligence. The primary judge found that all parties had been negligent, and apportioned liability between the parties. The Ontario Court of Appeal upheld the finding that the appellant owed a duty of care to J. The issue for the Supreme Court of Canada was whether such a duty should have been found. Specifically: (i) was the risk of personal injury reasonably foreseeable; (ii) did Rankin have a positive duty to guard against the risk of theft by minors; and (iii) could illegal conduct sever any proximity between the parties or negate a *prima facie* duty of care?

Held:

- The majority allowed the appeal. There is no clear guidance in Canadian law as to whether a business owes a duty of care to someone who is injured following the theft of a vehicle from its premises. The Court proceeded on the principles applicable to determining the existence of a novel duty, the first question being whether there was a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: [18]; [27].

- It was not enough to find that the theft of the vehicle was foreseeable. To establish the duty, there must be some evidence or circumstance to suggest that a person in the appellant's position ought to have reasonably foreseen the unsafe operation of the vehicle. The Courts below relied upon the risk of theft by minors to connect the failure to secure the vehicles with the nature of the harm suffered. Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by minors. Here, there was insufficient evidence to indicate that minors would frequent the premises at night, or be involved in joyriding or theft. There was insufficient evidence for the appellant to establish a *prima facie* duty of care: [46]; [48]-[50]; [55]-[56].

- The mere fact that J was a minor did not impose a positive duty on Rankin, as a commercial garage, to guard against the risk of theft by minors: [57]-[61]. While it was not necessary to consider the effect of illegality, the Court observed, *inter alia*, that it had consistently rejected the notion that illegal conduct by a plaintiff precluded the existence of a duty of care: [62]-[65].