Court of Appeal
Supreme Court
Sydney

Decisions of interest

26 February – 9 March 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. **Negligence: medical practitioners; *Civil Liability Act 2002* (NSW) s 5O**

   ***Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29**

   Decision date: 1 March 2018

   Basten JA, Macfarlan JA, Simpson JA

   Mr Hobson suffered from a genetic disorder which restricted his ability to breathe. Due to his grave prognosis, he was to undertake two surgical procedures, to be performed by Dr Gray, an orthopaedic/spine surgeon, and Dr Sparks, an anaesthesiologist. Midway through the second operation, Dr Sparks requested that it be terminated, as a result of adverse carbon dioxide readings obtained during the course of the operation. However, there had been a severe ischaemic collapse in Mr Hobson's spinal column, resulting in paraplegia.

   Mr Hobson commenced proceedings against the hospital and those involved in the procedure. At trial, judgment was awarded against Dr Gray and Dr Sparks, on the basis that they had failed to terminate the operation early enough as a result of the adverse readings. The doctors appealed, arguing that the harm resulted from the materialisation of an inherent risk under the *Civil Liability Act 2002* (NSW) (**the Act**) s 5I, and that they had acted in accordance with competent professional practice under s 5O of the Act.

   Held:

- The Court unanimously allowed Dr Gray's appeal, and by majority, dismissed Dr Spark's appeal. Dr Gray had not breached his duty, as he was entitled to rely on Dr Sparks to inform him of the readings which would identify concern, and nothing came to his attention during the relevant time that should have directed him towards terminating the surgery: [201].

- Dr Sparks had breached his duty, as he had ignored a serious and imminent danger to Mr Hobson, and allowed the surgery to continue for 30 minutes without consulting Dr Gray: [93]; [183]. In dissent, Simpson JA held that, on the basis of the medical evidence, there had been no breach of duty: [359].

- *Section 5I:* This did not provide a defence to Dr Sparks. The risk which accompanied the surgery was the neurological collapse of the spinal column; this would not have occurred if the operation had been terminated earlier, as it would have had reasonable care and skill been exercised. Accordingly, it could not be said that the risk was an *"inherent risk"*: [49].

- *Section 5O*. This did not provide a defence to Dr Sparks. However, Basten JA and Simpson JA expressed doubts as to Macfarlan JA's interpretation of s 5O in *McKenna v Hunter & New England Local Health District* [2013] NSWCA 476: [40]; [335].

2. **Environment & planning; statutory interpretation**

Council of the City of Ryde v Sally Haddad executor of the estate of the late Dr Jim Haddad **[2018] NSWCA 35**

Decision date: 8 March 2018

McColl JA, Gleeson JA, Sackville AJA

In 2015, Dr Jim Haddad lodged a development application with the Council of the City of Ryde (**the Council**), seeking to use particular premises as business premises. Prior to making the application, he had used the premises for a considerable period as a doctor's surgery. The Council rejected the application on the basis that the use of these premises as business premises was prohibited under the Ryde Local Environmental Plan 2014 (**the LEP**).

Dr Haddad appealed to the Land and Environment Court (**L&E Court**). He relied upon cl 41(1)(e) of the Environmental Planning and Assessment Regulation 2000 (NSW) (**EPA Regulation**), which authorised a change from one *"commercial use"* of the premises to another. He argued that the use of the premises as a doctor's surgery was a *"commercial use"*. Section 107(1) of the EPA Act provided that nothing in that Act or in an environmental planning instrument prevented the continuation of an existing use.

The development was approved and the Council appealed the decision of the Commissioner to the L&E Court. By the time of the hearing, Dr Haddad had died and the claim was maintained by the executrix of his estate. The issue on appeal was whether the primary judge in the L&E Court had erred by upholding the Commissioner's decision that a doctor's surgery constituted a form of *"business premises"* under the *Standard Instrument (Local Environmental Plans) Order 2006* (**Standard Instrument LEP**).

Held:

- The Court upheld the appeal. In order to rely on cl 4(1)(e), Dr Haddad had to establish that the use of the premises as a doctor's surgery was a *"commercial use"*. That required him to show the existing use of the premises, at the date of the application, was as *"business premises"* as that term was defined in the Standard Instrument LEP: [16]; [22].

- On the correct textual construction of the definition provision, the definition of *"business premises"* specifically excluded the use of a premises as a *"medical centre"*, meaning Dr Haddad could not obtain approval to put the premises to a commercial use: [20]; [29]-[30].

- Although the Standard Instrument LEP distinguished between *"medical centre"* and *"health consulting rooms"*, the doctor's surgery on these premises did not satisfy the definition of *"health consulting rooms"* because the surgery was not within the curtilage of a *"dwelling house"* as defined under the instrument: [26].

Other Australian intermediate appellate decisions of interest

3. **Corporations; trusts: insolvency; securities: circulating security interest**

Commonwealth of Australia v Byrnes and Hewitt **[2018] VSCA 41**

Decision date: 28 February 2018

Ferguson, Whelan, Kyrou, McLeish and Dodds-Streeton JJA

Amerind Pty Ltd (**Amerind**) carried out a business solely as the corporate trustee of a trading trust. Amerind had secured facilities with Bendigo and Adelaide Bank (**the bank**). The company went into receivership, with Mr Bynres and Mr Hewitt appointed as administrators (**the receivers**). The company was later wound up and the receivers ultimately held a net surplus of $1.6 million.

The Commonwealth of Australia (**the Commonwealth**) paid entitlements totalling $3.8 million to Amerind's employees under the statutory Fair Entitlements Guarantee Scheme, and sought to be repaid out of the receivership surplus. The *Corporations Act 2001* (Cth) (**the Act**), s 433, provided that a receiver must pay out of the *"property of the company"* in accordance with the priorities under the Act, where that property was subject to a *"circulating security interest"*. Under a 556 of the Act, certain prescribed employee entitlements were to be paid in priority to other creditors. Section 560 gave the Commonwealth the same priority in a winding up as the employees would have had.

The central issue on appeal was whether the insolvent corporate trustee's right of indemnity fell within s 433, such that that priorities regime would apply.

Held:

- The Court analysed High Court decisions on the nature of the trustee's right of indemnity by way of exoneration, to conclude that such a right of indemnity was property of the insolvent trustee company: [271]-[273].
- The priority regime applied with respect to property making up the trust subject to the indemnity right. The Act did not require an inquiry into whether the trustee's right of indemnity was itself a circulating asset, as opposed to the property subject to it: [331]. The time for determining whether property was a circulating asset was when the receiver takes possession, not at the time the security interest was created: [367].
- The Court did not need to decide whether the distribution of funds in such a scenario was confined to "trust creditors", as all of Amerind's creditors were trust creditors. While there was some doubt as to the correct position, until there is contrary appellate authority, Victoria should follow the position that funds are to be distributed to all creditors, as per *Re Enhill* [1983] 1 VR 561: [282]; [286].

4. **Corporations: winding up; constitutional law: conflict of laws**

Longley & Ors v Chief Executive, Department of Environment and Heritage Protection **[2018] QCA 32**

Decision date: 9 March 2018

Gotterson JA, McMurdo JA, Bond J

For some years, Linc Energy Limited (**Linc**) had operated an underground coal gasification project in Queensland under the authority of mineral development and petroleum facility licences, as well as environmental authorities issued under the *Environmental Protection Act 1994* (Qld) (**the Act**). Shortly prior to the appointment of liquidators (**the appellants**), the Chief Executive of the Department of Environment and Heritage Protection directed an environmental protection order (**EPO**) to Linc, pursuant to s 358 of the Act. This required Linc to take certain steps to prevent or minimise the environmental harms resulting from its activities, in satisfaction of its general duty under s 311 of the Act.

The appellants gave notice disclaiming the licences and the environmental authorities which it held for the site, pursuant to the *Corporations Act 2001* (Cth) (**the CA**), s 568. As a consequence, they argued that Linc was relieved from the requirements of the EPO because they were *"liabilities… in respect of the disclaimer property"* under s 568D of the CA. The Chief Executive argued that despite the disclaimer being valid, Linc remained obliged to meet the EPO. The primary judge held that there was a direct inconsistency between the disclaimer provisions of the CA, and the operation of s 311 and 358 of the Act, but that s 5G of the CA rolled back the operation of the CA provisions, such that there was no inconsistency with State law. The liquidators appealed.

Held:

- The Court allowed the appeal. The EPO was expressly issued with respect to the activities of Linc on its site under the mining licence and the (since expired) petroleum license. Once the land and licences had been disclaimed, Linc's authority and capacity to engage in those activities were terminated, as were the liabilities premised on those activities: [11]; [104]-[106]. Because the respondents accepted that the disclaimer was valid, this amounted to acceptance that the liabilities were terminated: [115].

- If it were wrong to hold the respondents to their admission, then s 5G would fall for consideration, as it was not in dispute that the provisions were inconsistent. Section 5G(11) could only operate to displace Queensland law within Queensland itself. The potential remained for inconsistency, because, outside of Queensland, certain insolvency provisions would not be disapplied by s 5G(11). Section 5G(11) could not be used to produce a differential outcome in the application of CA provisions within and outside the state: [82]; [119]-[127]. Section 5G(8) also did not apply because the state law could not be characterised as providing for how a company was to be wound up: [130].

Asia Pacific decisions of interest

5. **Insolvency: winding up on the "just and equitable" ground**

Singapore Court of Appeal

Perennial (Capitol) Pte Ltd v Capitol Investment Holdings Pte Ltd **[2018] SCGA 11**

Decision date: 26 February 2018

Sundaresh Menon CJ; Judith Prakash JA; Steven Chong JA

The appellants, who were two of the three shareholders in the respondent companies, sought to wind up those companies. The third shareholder was Chesham Properties Pte Ltd (**Chesham**). The articles of association of each of the respondent companies provided, in Article 22, a mechanism by which a member ('the vendor') could provide a transfer notice to the company, such that the company would become the vendor's agent for the sale of shares, at the discretion of the directors, to members other than the vendor.

The shareholders intended to undertake a development under a joint venture, and agreed that the management of the retail components of the project would be effected through various management agreements. However, they were unable to agree on terms of certain agreements and the relationship between the parties broke down. The appellants sought to wind up the companies, relying on the *"just and equitable"* ground under the Singapore *Companies Act* s 254(1)(i), and in the alternative, sought orders either for Chesham to buy out their interests, or for them to buy out Chesham's interests in the respondent companies. By this point, the appellants held 50% of the shares in the respondent companies, and Chesham held the remaining 50%.

The winding-up application was rejected by the trial judge. The issue on appeal was whether the appellants were entitled to rely on the just and equitable ground, notwithstanding the existence of Article 22.

Held:

- The jurisdiction of the Court under the *"just and equitable"* ground must be exercised with caution, particularly where the making of a wind-up order would have the effect of releasing the applicant from any obligation to comply with the scheme provided under the memorandum and articles of association: [40]. The presence of a 'buy-out' mechanism in a company's constitution is a vital consideration in determining if it is just and equitable to order a wind-up: [56].

- Here the disaffected shareholders had not only a more moderate course to sell to the other shareholder, but a contractually enforceable guarantee that they would be able to do so at fair value. The mere fact that the shareholders were equal and deadlocked did not engage the just and equitable ground: [76]; [84].

6. **Defamation: damages, scope of re-trial**

***Williams v Craig* [2018] NZCA 31**

Decision date: 5 March 2018

Harrison, Miller and Gilbert JJ

Mr Williams was the founder and executive director of the New Zealand Taxpayers' Union, and a former supporter of the Conservative Party of New Zealand. He claimed that Mr Craig, the founding leader of the Conservative Party, had defamed him in statements made in two publications in 2015. These statements were responses to Mr Williams' published allegation that Mr Craig had sexually harassed his former secretary.

At trial, Mr Craig argued the defences of truth, honest opinion, and qualified privilege. A jury found for Mr Williams and awarded him $1.27 million, the largest defamation award in New Zealand's history. The trial judge set aside the verdict on the basis that the award was excessive. She ordered a new trial on both liability and damages, and declined Mr Craig's application for judgment in his favour. Mr Williams appealed against the order, and Mr Craig cross-appealed.

The issues on appeal were: (i) whether the trial judge erred in setting aside the verdict, (ii) whether the order should have been for a retrial on liability and damages or limited to damages only, (iii) whether the jury was misdirected on the issue of qualified privilege, and (iv) whether the jury's adverse verdict on the defence was supported by the evidence.

Held:

- The jury's award of both compensatory and punitive damages was excessive or wrong and should be set aside. The jury's award reflected its punishment of Mr Craig for his harassment behaviour more than its vindication of Mr Williams' reputation: [54]. Mr Williams' claim was pitched at an *"extravagant level"*, and while the judge's directions on damages were thorough, she should also have directed the jury on the appropriate financial parameters of an award: [56]-[58].

- With respect to the order for a retrial, if the evidence on liability and damages could be considered separately, it would be unjust to order a general retrial when the liability verdict could stand alone. However, if the inquiries could not be separated, they must be determined by one jury. If the award indicated that the jury was biased or mistaken, justice favoured a complete retrial: [63].

- The issues of liability and damages were severable and the trial judge erred in ordering a general retrial. The scope of the retrial should be limited to damages. It would be wrong to allow Mr Craig to re-litigate issues which had been previously exhaustively debated and decisively determined: [76]-[77].

- There was no error in the trial judge's directions or the jury's findings on the defence of qualified privilege: [85]; [109].

Other international decisions of interest

7. **Torts: negligent misstatement**

Steel v NRAM Limited (Scotland) **[2018] UKSC 13**

Decision date: 28 February 2018

Lady Hale, Lord Wilson, Lord Reed, Lord Hodge, Lady Black

NRAM Limited (**NRAM**) granted loan facilities to Headway Caledonian Limited (**HCL**) in relation to the purchase of a number of commercial units at a business park, in exchange for which HCL granted NRAM security over those properties. Ms Steel, the appellant, was HCL's solicitor.

Headway sought to sell Unit 1 and requested that NRAM release Unit 1 from its security. NRAM confirmed that it would do so, while making clear that it expected its security to remain in place in relation to Units 2 and 4. On the eve of the settlement, Ms Steel sent an email to NRAM which erroneously represented that the whole loan was being paid off, and attached draft deeds of discharge in relation to the security upon all three units. These were signed and the whole security was discharged. HCL later went into liquidation.

NRAM claimed against Ms Steel on the basis that she owed them a duty of care and they suffered loss on account of her negligent misstatements. The issue on appeal was whether liability could be established in these circumstances.

Held:

- The Court examined the development of the authorities on tortious liability for pure economic loss caused by negligent misstatement. The recent authorities ultimately come back to the touchstone of assumption of responsibility. Although this might require incremental development to fit cases to which it does not readily apply, the concept fits the present case perfectly: [24]-[25].

- The unusual dimension of this case was that the claim was brought by one party to an arm's length transaction against a solicitor acting for the other party. A solicitor owes a duty of care to the party for whom they are acting, but generally not to the opposing side: [25]. A solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said, and unless the solicitor should have reasonably foreseen that they would do so. These general ingredients for liability are particularly apposite because the latter's reliance on the solicitor is presumptively inappropriate: [32].

- The tort was not made out. A commercial lender about to implement an agreement with a borrower referrable to its own security does not act reasonably if it proceeds on no more than a description of its terms put forward by the borrower. Responsibility should not be assumed for a misrepresentation about a fact wholly within the knowledge of the representee: [38].

8. **Administrative law: apparent bias**

Almazeedi v Penner and Ors (Cayman Islands) **[2018] UKPC 3**

Decision date: 26 February 2018

Lord Mance, Lord Wilson, Lord Sumption, Lord Hughes, Lord Lloyd-Jones

Following his retirement from the High Court of England and Wales, Justice Peter Cresswell became an additional judge of the Financial Services Division of the Grand Court of the Cayman Islands. He sat ad hoc from time to time as required. From late 2011, he also became a supplementary judge of the Civil and Commercial Court, Qatar Financial Centre. He was not sworn in until 8 May 2012, and it did not appear that he ever actually sat or received remuneration.

Between November 2011 and September 2014, Cresswell J was the judge assigned to the conduct of a winding-up petition and associated applications concerning the BTU Power Company (**BTU**). The economic interest in BTU comprised preference shareholders who were largely Qatari interests with strong state connections, including a Mr Al-Emadi. The appellant, Mr Almazeedi, was the controlling shareholder of the company which managed BTU, and opposed the winding up. He brought a suit alleging that Cresswell J lacked independence on account of his Qatari judicial position and the Qatari personalities in the case.

The Court of Appeal accepted the challenge, but only from 26 June 2013 onwards, being the date that Mr Al-Emadi became Minister of Finance in Qatar and acquired a direct responsibility for judicial appointments. Mr Almazeedi appealed, arguing that the Court should have found that Cresswell J lacked the requisite independence from the start of his involvement in November 2011.

Held:

- By majority, the Board found that Cresswell J lacked the requisite independence from 25 January 2012: [35]. This was the date on which Cresswell J became aware of various salient aspects of the dispute between the appellant and Qatari entities, including the fact that the dispute was seen by the legal advisor of one of those entities as being with the state of Qatar: [11].

- A fair-minded and informed observer would have seen a real possibility that a judgment of Cresswell J would be influenced, even sub-consciously, by his concurrent appointment to the Qatari court. The observer in this context was a person on the Cayman Islands legal scene, who was taken to be aware of the context, including the Qatari background and personalities involved: [32].

- In dissent, Lord Sumption observed that the case against Cresswell J rested entirely on the notion that he might be influenced, perhaps unconsciously, by the hypothetical possibility of action being taken against him in Qatar as a result of a decision in the Cayman Islands which was contrary to the Qatari government's interests. It was implausible that a fair-minded and informed observer would anticipate a real risk of bias: [43].