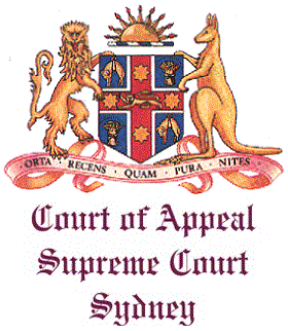

Decisions of interest

1 April 2019 – 26 April 2019

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. **Environment and Planning: Ministerial consent to concept development applications; judicial review**

   Local Democracy Matters Incorporated v Infrastructure NSW **[2019] NSWCA 65**

   Decision date: 12 April 2019

   Leeming JA, Sackville AJA, Emmett AJA

   On December 6 2018, the Minister for Planning granted consent to a concept development application submitted by Infrastructure NSW. Consent was granted for a concept proposal to redevelop Sydney Football Stadium at Moore Park, and for stage 1 works comprising: demolition of the existing Stadium to ground level; removal of 26 trees; and use of the existing Moore Park Carpark as the demolition compound.

   Local Democracy Matters ('LDM') brought proceedings in the Land and Environment Court under the *Environmental Planning and Assessment Act 1979* (NSW), seeking a declaration that the Minister's determination to grant consent was invalid and of no effect. LDM challenged the determination on three grounds. First, LDM asserted that the concept development application was only publicly exhibited for 28 days, but cl 83 of the Environmental Planning and Assessment Regulation 2000 (NSW) required a minimum exhibition period of 30 days. Second, LDM submitted that the Minister had failed to form the opinion regarding design excellence required by cl 6.21(3) of the Sydney Local Environmental Plan 2012 and had failed to have regard to the mandatory design considerations specified in cl 6.21(4) of the Plan. Third, LDM submitted that the Minister failed to comply with the requirements of cl 7 of the State Environmental Planning Policy No 55 – Remediation of Land, which prohibits a consent authority consenting to the carrying out of any development on contaminated land unless satisfied of certain matters.

   The primary judge dismissed LDM's summons, rejecting all three grounds. LDM appealed to the Court of Appeal, putting essentially the same three arguments. The appeal was heard on an expedited basis. At the conclusion of the hearing, the Court made orders, dismissing the appeal. The reasons were published subsequently.

   Held:

   - On the first ground, the Court held that the minimum exhibition period was 28 days; clause 83 of the EPA Regulation was of no effect following the repeal of s 89F of the *EPA Act:* [55], [62].
   - On the second ground, the Court held that LDM failed to discharge the onus of establishing that the Minister did not form the requisite opinion as to the design excellence of the concept proposal: [73], [86].
   - On the third ground, the Court held that LDM failed to establish that the Minister did not comply with the requirements of cl 7 of the Policy: [110].

2. Trade and commerce: misleading and deceptive conduct

Midland Metals Overseas PTE Limited v Australian Cablemakers Association Limited **[2019] NSWCA 78**

Decision date: 17 April 2019

Gleeson JA, Payne JA, Sackville AJA

Midland Metals Overseas PTE Limited ('Midland'), a Singapore-based manufacturer of electrical cables, sued the Australian Cablemakers Association Limited ('the Association'), alleging that the Association had engaged in conduct that was misleading or deceptive in contravention of s 18 of the Australian Consumer Law. That section relevantly provides that 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

The conduct complained of was as follows. The Association, an industry representative association for electrical cable manufacturers, sent letters to the relevant Ministers in all State and Territories who were responsible for electrical safety. Those letters stated that a cable manufactured by Midland had failed a series of tests and was unsafe.

The initial proceedings were heard by a judge of the Equity Division of the Supreme Court of New South Wales. Midland failed in those proceedings, the primary judge holding that the Association's conduct was not misleading or deceptive, and nor was it likely to deceive. The primary judge reached this conclusion on the basis that no Minister who received the Association's letter would take action on the contents of the letter without first seeking expert advice to verify the claims made in it.

Midland appealed, urging various grounds. The key challenge was to the primary judge's finding that the conduct complained of would not have misled or deceived the Ministers, or had a tendency to do so. By notice of contention, the Association sought to uphold the primary judge's decision on the basis that the relevant conduct was not 'in trade or commerce'.

Held:

- Appeal dismissed: [1], [82], [83].
- The primary judge made no error concerning the effects of the letters; viewed prospectively, the contents of the letters were likely to do no more than induce a Minister to believe that an industry body had made claims that may or may not be accurate, and which should be investigated. The letters would not have misled or deceived the Ministers: [47].
- It was not strictly necessary to decide the question raised by the notice of contention. But in obiter, on these specific facts, the Court expressed the view that Midland had not demonstrated that the impugned conduct was 'in trade or commerce': [6]; [72]-[73]; [83].

Other Australian intermediate appellate decisions of interest

3. **Administrative law: migration; effect of breach of privacy legislation on visa cancellation decision**

***Minister for Home Affairs v Hunt* [2019] FCAFC 58**

Decision date: 11 April 2019

McKerracher J, Perry J, Banks-Smith J

Mr Hunt is a New Zealand national who has lived in Australia since 1993 when he arrived as an 8 year old with his parents. Since that time, he has held a Class TY Special Category (Temporary) visa. In 2003, he was convicted in the District Court of Queensland of two counts of dealing indecently with a child under 12 years. He was 16 years old at the time of the offences, and the term of imprisonment to which he was sentenced was wholly suspended. In February 2017, the Department of Immigration and Border Protection notified Mr Hunt of its intention to cancel his visa on character grounds under s 501(2) of the *Migration Act 1958*. A few months later, the Minister personally decided to cancel Mr Hunt's visa. Mr Hunt was notified of that decision in July 2017, and placed in immigration detention. Mr Hunt sought judicial review of the Minister's decision in the Federal Court. He relied on two grounds that were relevant to the eventual appeal to the Full Court. First, he argued that the Minister's decision was based on evidence of his criminal record that was unlawfully or improperly obtained from Queensland authorities in breach of the *Information Privacy Act 2009* (Qld). Second, he argued that the Minister had failed to take into account the fact that the 2003 sentences had been wholly suspended, and thereby failed to take into account a relevant consideration, leading to a legally unreasonable decision. The primary judge rejected the privacy ground, finding that no officer of the Department acted contrary to the *Privacy Act 1988* (Cth), and that even if the Queensland legislation had been breached, there was no indication that the Commonwealth Parliament intended that such a breach would invalidate a s 501(2) decision. The primary judge found the second ground was made out and quashed the Minister's cancellation. The Minister appealed, arguing that he had not erred in the manner found by the primary judge. By notice of contention, Mr Hunt submitted that the primary judge had erred on the privacy ground.

Held:

- Appeal allowed; notice of contention dismissed. The primary judge's orders were set aside: [76], [92], [93].
- On the privacy ground: Mr Hunt failed to adduce sufficient evidence to establish the jurisdictional error asserted; and even if he had, the primary judge's construction of s 501 was plainly correct: [82], [87]-[90].
- On the second ground: reading the Minister's reasons as a whole, and taking into account all the material before him, the primary judge erred in drawing the inference that the Minister had overlooked the suspension of the sentences: [71], [75]-[76].

4. **Defamation: indemnity costs; offers of settlement**

Stokes v Ragless **[2019] SASCFC 31**

Decision date: 4 April 2019

Blue J, Parker J, Lovell J

Mr Stokes commenced defamation proceedings against Mr Ragless in respect of material that Mr Ragless had published about him on a website, by emails, and on Facebook. Mr Stokes had legal representation in the proceedings; Mr Ragless did not. Mr Stokes, by his representatives, made a number of filed settlement offers to Mr Ragless, all of which he rejected; Mr Ragless also made an offer to Mr Stokes at one point, which was rejected. The primary judge found in favour of Mr Stokes, and ordered Mr Ragless to pay $70,000 in general damages, and $20,000 in aggravated damages. Mr Stokes sought indemnity costs, relying on s 38(2)(a) of the *Defamation Act 2005* (SA). Section 38(1) provides that in assessing costs in defamation, a court may have regard to the way in which the parties conducted their cases, as well as any other relevant factors. Section 38(2) provides:

> Without limiting subsection (1), a court must (unless the interests of justice require otherwise) — (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff…

The primary judge found that it would not be in the interests of justice to award indemnity costs, as the successful legally represented party had not informed the self-represented party of the consequences of rejecting filed settlement offers. Mr Stokes appealed from the decision not to award him indemnity costs on two grounds. First, he submitted that he had been denied procedural fairness, as the primary judge had not provided the parties with an opportunity to contest a fundamental factual matter that was ultimately determined against him, namely, the question of Mr Ragless' state of mind concerning the consequences of accepting or rejecting filed settlement offers. Second, he submitted that the trial judge had erred in finding that a legally represented party has an obligation to inform a self-represented party of the consequences of accepting or rejecting filed settlement offers.

Held:

- Appeal allowed: [1], [2], [49].
- The procedural fairness ground was made out: [15], [20].
- On the second ground, Lovell J held (Blue and Parker J agreeing) that the phrase 'the interests of justice' in s 38(2) should not be read so as to impose the purported obligation on legally represented parties; the availability of indemnity costs under the section is not so conditioned. The knowledge (or lack thereof) of a self-represented party may be relevant to a court's exercise of discretion under s 38, but that will depend on the circumstances of the case: [35], [39].

Asia Pacific decisions of interest

5. Appeals: standard of review; relationship between customary and state law

Supreme Court of Palau

***Rengulbai v Azuma* [2019] PWSC 12**

Decision date: 16 April 2019

Ngiraklsong CJ, Rechucher J, Castro J

Mr Azuma buried the remains of six of his relatives at a site in Melekeok State owned by the Lukes Clan. On the certificate of title, the chief titleholder of the land is listed as *Ruluked*, one of the highest clan titles in the Lukes Clan. The land is held on trust for the Clan.

The plaintiffs sued Mr Azuma for trespass, arguing that he was not authorised to bury his relatives on the land. They argued that he ought to have sought their permission to enter the property. In aid of that argument, they sought declarations that they bear the highest clan titles in the Lukes Clan – *Ruluked* and *Ebil Ruluked* – together with an order for the exhumation of the remains of Mr Azuma's relatives, and a permanent injunction preventing Mr Azuma from entering the site in question.

The Trial Division found in favour of Mr Azuma. It held that Mr Azuma and his relatives are members of the Lukes Clan and that he did not need the plaintiffs' permission to enter the site or to bury his relatives there. The Trial Division declined to determine whether the plaintiffs bore the highest titles in the Lukes Clan (whether they were 'senior strong members'), and declined to open the question of the membership statuses of Mr Azuma and his relatives within the clan.

The plaintiffs appealed. On appeal, they challenged the Trial Division's exercise of discretion in refusing to determine the two points just noted.

Held:

- Appeal dismissed; the Trial Division's judgment was affirmed: [2], [14].
- Both of the arguments put by the appellants concerned the exercise of a discretion by the Trial Division; as such, on appeal, the standard of review is whether the Trial Division abused its discretion: [7], [8], [13].
- The action below was in trespass; the Trial Division's decision on the trespass question was not challenged on appeal. On that basis alone, the Trial Division's decision can be affirmed: [12].
- Even if the two arguments put on appeal needed to be addressed, the Trial Division's exercise of discretion would not be disturbed, as there was no abuse of discretion in declining to determine matters that were unnecessary to dispose of the cause of action in trespass: [13].

6. Equity: constructive trusts; *in personam* exception to indefeasibility of title

Supreme Court of Fiji

***Wati v Kumar & Anor* [2019] FJSC 5**

Decision date: 26 April 2019

Marsoof J, Chandra J, Keith J

The plaintiff, Bhan Wati, sought a declaration that she was the rightful beneficial owner of a plot of land on the island of Taveuni on which she had lived for some years. The first defendant, her brother-in-law, Vijay Kumar, counterclaimed, seeking vacant possession of the plot. Mr Kumar's father owned a large piece of land, of which the plot in question was a part. Ms Wati and her husband, Shiu, lived in a house built on the plot. While he was alive, there was an understanding between the father and his son, Shiu, that Shiu would eventually own the plot on which the house he and Ms Wati lived in stood. They never paid rent, but Shiu paid for the materials for the construction of the house, and it seems, also for an extension. After the father died, Mr Kumar (Shiu's brother) became the registered proprietor of his father's land. In time, Shiu died intestate, but Ms Wati continued living on the plot. After she had lived there for 35 years, in July 2005, Mr Kumar informed Ms Wati that she no longer could. At first instance, in the High Court, Ms Wati's claim against Mr Kumar succeeded, and his counterclaim was dismissed. That decision was reversed by majority in the Court of Appeal; Ms Wati was ordered to vacate the land, but the order was stayed for 30 days. Ms Wati appealed to the Supreme Court. In the Supreme Court, there were two principal issues. First, whether a constructive trust arose in favour of Ms Wati. And second, if a constructive trust did arise, whether any exception to indefeasibility of title applied, such that Mr Kumar's registered title would be burdened by an equitable interest held by Ms Wati.

Held:

- Appeal allowed. The Supreme Court restored the orders of the High Court, and ordered that Mr Kumar pay Ms Wati's costs in both appeals: [1], [2], [47].

- Mr Kumar knew of the common understanding between his father and Shiu. Shiu acted to his detriment in reliance on that understanding, spending money on the house; Ms Wati changed her position in reliance on the understanding, remaining on the plot for decades. Mr Kumar knew of this common understanding, and knew of Shiu and Ms Wati's detrimental reliance on it. In the circumstances, it would be unjust to allow Mr Kumar to deny that Ms Wati has a claim to the plot; a constructive trust arose in her favour: [40]-[43].

- Though no statutory exception to indefeasibility of title applied, in circumstances where Mr Kumar knew of the facts which gave rise to Ms Wati's equitable interest and proceeded to register his title to land anyway, the *in personam* exception to indefeasibility applied: [45]-[46].

Other international decisions of interest

7. **Defamation: use of dictionaries in determining meaning; nature of social media as a publication platform**

Supreme Court of the United Kingdom

Stocker v Stocker **[2019] UKSC 17**

Decision date: 3 April 2019

Lord Reed (Deputy President), Lord Kerry, Lady Black, Lord Briggs, Lord Kitchin

On Facebook, Nicola Stocker wrote that her former husband, Ronald Stocker, "tried to strangle me." Mr Stocker commenced defamation proceedings against Mrs Stocker. He claimed that the statement "He tried to strangle me" conveyed the imputation that he had tried to kill her. Mrs Stocker denied that the words bore that meaning. In the context of a relationship characterised by domestic violence, the words would convey to an ordinary reasonable reader the imputation that he had violently gripped her neck, preventing her from breathing, and causing her to fear that she would be killed. She also argued, in the alternative, that the imputation was substantially true. There was police evidence from an incident in 2003 of handprints on Mrs Stocker's neck. The trial judge had recourse to the Oxford English Dictionary's definition of the verb 'strangle'. The OED provided two meanings: '(a) to kill by external compression of the throat; and (b) to constrict the neck or throat painfully.' The trial judge reasoned that the statement complained of could not mean that Mr Stocker *tried* to strangle her in the second sense, because he had clearly succeeded in doing so; as such, it could only mean that he had attempted to kill her. The trial judge rejected Mrs Stocker's justification defence on the basis that though she had proved some justification for her statements, those justifications did not meet the extent of the sting suffered by Mr Stocker. On appeal, the Court of Appeal upheld the trial judge's judgment in favour of Mr Stocker, and held that there was no error in the way that the trial judge had used dictionary definitions to assist in ascertaining the meaning of statements alleged to be defamatory. Mrs Stocker appealed the Supreme Court

Held:

- The appeal was allowed, and subject to further submissions, the respondent was ordered to pay the costs of the appeal and of the hearings below: [63].
- The primary judge made a legal error in relying upon the dictionary definition of 'strangle' as dictating the meaning of the statement in question. A dictionary can be used as a check, but the essential question is what an ordinary reasonable reader, encountering this post on Facebook (a casual, impressionistic, and fleeting medium) would understand it to mean: [37], [43]-[44], [47].
- An ordinary reasonable reader would take the meaning of the statement to be the one that Mrs Stocker had contended for at first instance: [49]-[51].

8. **Contracts: sale of land; fraudulent misrepresentation; latent defects**

Court of Appeal for British Columbia

***Wang v Shao* 2019 BCCA 130**

Decision date: 23 April 2019

Newbury J, Smith J, Willcock J

Ms Wang owned a residence in Shaughnessy, Vancouver. In 2007, she had been living there with her daughter, Ms Yuan, together with Ms Yuan's husband and 10 year old daughter. In November 2007, Ms Yuan's husband was shot outside the property. Upon learning of his death, the private school that Ms Yuan's daughter attended insisted that she leave the school, citing the safety of other students. The child first moved to a local public school, and was then enrolled at a private school in West Vancouver, some distance from Shaughnessy. In June 2008, Ms Yuan and her daughter moved to West Vancouver. By that time, Ms Wang had moved to China. Since the Shaughnessy residence was now uninhabited, Ms Wang decided to sell it. She signed a power of attorney in Ms Yuan's favour, authorising her to conduct the sale. Ms Yuan engaged real estate agents, Ms Lau and Mr Yee. Ms Yuan informed them that her husband had been killed on the path outside the property. A buyer, Ms Shao, inspected the property. She asked why Ms Wang was selling, and was told by Mr Yee that it was so Ms Yuan's daughter could live nearer to her new school in West Vancouver. Ms Shao agreed to purchase the property. She paid a deposit of $300,000. After paying the deposit, she learnt of the death from a friend and through Google searches. She advised, through her agent, that she would not complete the purchase.

Ms Wang commenced proceedings for breach of contract, claiming damages and a declaration that she was entitled to keep the deposit. Ms Shao counterclaimed, submitting that the murder was a latent defect in the property that had not been disclosed or, alternatively, that Ms Wang, through her agents, had fraudulently or negligently misrepresented the state of the property. Ms Shao sought an order for rescission and the return of the deposit, and damages for breach of contract and for fraudulent or negligent misrepresentation. The trial judge rejected Ms Wang's claims and Ms Shao's latent defect argument, but accepted the fraudulent misrepresentation argument, finding that Mr Yee's representation as to why Ms Wang was selling was calculated to conceal the fact that part of the reason for moving was tied up with the murder. Ms Wang appealed, arguing that the trial judge erred in finding that this was a fraudulent misrepresentation.

Held:

- Appeal allowed: [50].
- It was not fraudulent for Ms Wang and her agents to fail to disclose the fact of the murder when that was not a fact that bore upon the objective value or usefulness of the property. The doctrine of *caveat emptor* places the burden on a buyer to ask specific questions concerning their subjective preferences: [46], [47], [49].