Decisions of interest

10 September 2018 – 21 September 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. **Crime: *Proceeds of Crime Act 2002* (Cth), s 330(4)(a); exclusion orders**

   ***Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199**

   Decision date: 11 September 2018

   Beazley P; McColl JA; Payne JA

   From time to time, the appellants, who were Indonesian citizens and Australian permanent residents, transferred large sums of money from Indonesia to Australia using 'money changers' in Indonesia. The money changers directed the appellants to pay the money to be transferred into nominated Indonesian accounts. A large number of cash deposits under $10,000 were made into the appellants' Australian accounts amounting in total to the sum paid into the Indonesian accounts, as part of a money laundering process called "*cuckoo smurfing*". It was not suggested that the appellants were complicit in any crime. A restraining order was made under the *Proceeds of Crime Act* 2002 (Cth) (**the Act**), s 19, in respect of the funds standing to the credit of five of the appellants' accounts, on the basis that there were reasonable grounds to suspect the funds were the proceeds of an offence. The appellants accepted that the funds were such proceeds. However, they sought an order excluding their interests in the accounts from the restraining order under the Act, s 330(4)(a), asserting that their interests had ceased to be proceeds of an offence because they were acquired by the appellants as third parties for sufficient consideration without the appellants knowing, and in circumstances that would not arouse a reasonable suspicion, that their interests were such proceeds. The primary judge dismissed the application. The issues on appeal were whether the appellants acquired an "*interest*" in "*property*" each time a deposit was made into their accounts within the meaning of the Act; and if so, whether s 330(4)(a) applied.

   Held:

- The Court dismissed the appeal. The appellants had acquired an "*interest*" in "*property*" each time a deposit was made. The "*property*" was a chose in action in respect of each account enforceable against the bank, constituted by the right to demand payment of an amount equivalent to the amount standing to credit. The right to demand payment was an "*interest*" in relation the property: [47]-[82].

- The appellants were not a "*third party*" under s 330(4)(a). A "*third party*" was a person who, at the time of the criminal conduct, is wholly removed from the property constituting the proceeds of an offence. The person must acquire the property after it becomes proceeds: [89]-[117] (contra McColl JA, at [227]). Nor did they acquire their interests in the accounts for sufficient consideration: [133]-[140].

- The conduct identified by the known circumstances would have aroused a reasonable suspicion in the appellants, who were financially sophisticated international investors, that their interests were proceeds of an offence. They need not have known that the conduct constituted an offence: [154]-[163].

2. **Procedure: interaction between Corporations Rules and UCPR; service**

Choy v Tiaro Coal Ltd **[2018] NSWCA 205**

Decision date: 20 September 2018

Gleeson JA; Leeming JA; Payne JA

On 8 May 2017, the respondent filed an originating process in the Supreme Court naming the first to sixth applicants as defendants. The claim attracted the operation of the Supreme Court (Corporations) Rules 1999 (NSW) (**Corporations Rules**). Rule 2.7(1) of the Corporations Rules relevantly provided that "[*a*]*s soon as practicable after filing an originating process and, in any case, at least 5 days before the date fixed for hearing, the plaintiff must serve a copy of the originating process*". Rule 6.2(4) of the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) relevantly provided that an "*originating process is valid for service … for six months after the date on which it is filed.*" The respondent served the applicants in November 2017 – slightly less than six months after the proceedings were commenced. The reason for the delay was that the respondent wished to secure an arrangement with a litigation funder before effecting service. The applicants applied to have the originating process set aside for non-compliance with r 2.7. The primary judge considered the application on the basis, favourably to the applicants, that there had been such non-compliance, but nonetheless dismissed the application on discretionary grounds. The applicants sought leave to appeal.

Held:

- The Court refused leave to appeal: [1]; [2]; [83].
- Where a civil proceeding is commenced under the *Corporations Act 2001* (Cth), the Corporations Rules apply, and the UCPR applies to the full extent that those rules are relevant and not inconsistent with the Corporations Rules: see *Civil Procedure Act 2005* (NSW), ss 3, 11; UCPR, r 1.7, sch 2; Corporations Rules, r 1.3: [20].
- Non-compliance with the requirements as to service in r 2.7 of the Corporations Rules is an irregularity within the meaning of s 63 of the *Civil Procedure Act* entitling the recipient to apply under s 63(3) for orders setting aside service, but does not of itself invalidate the proceedings or the service: [36]-[37].
- Insofar as r 6.2(4) of the UCPR would authorise a plaintiff to delay effecting service, it is inconsistent with r 2.7 of the Corporations Rules, with the latter prevailing to the extent of the inconsistency, and the former applying to the extent that the rules are not inconsistent: [45]-[46].
- In respect of the dispositive reasoning of the primary judge, there was no question of principle or of general importance, and none of the applicants' proposed grounds of appeal warranted a grant of leave to appeal: [65], [70]-[72], [76], [78], [81].

Other Australian intermediate appellate decisions of interest

3. **Property: *Personal Property Securities Act 2009* (Cth), s 62(2)(b)(i); priorities**

***Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* [2018] SASCFC 95**

Decision date: 14 September 2018

Kourakis CJ; Parker J; Doyle J

From at least 2012, Bill's Motorcycles, a motorcycle dealer, was provided with floorplan finance by CDF and held motorcycles financed in this way on bailment for CDF. In 2014, Bill's Motorcycles granted a security interest under the *Personal Property Securities Act 2009* (Cth) (**PPSA**) in all of its present and after-acquired personal property in favour of the appellant (**Samwise**). In 2016, the respondent (**AD**) and Bill's Motorcycles entered into a bailment agreement for AD to provide floorplan finance. On 14 April 2016, AD registered its purchase money security interest (**PMSI**). The next day, it acquired ownership of 40 motorcycles previously owned by CDF and in the possession of Bill's Motorcycles under the floorplan finance granted by CDF. On 18 April 2016, AD issued Bill's Motorcycles with bailed goods notices in respect of each of the 40 motorcycles. In June 2016, administrators were appointed to Bill's Motorcycles. It later went into liquidation. AD instituted proceedings claiming its security interest was entitled to priority over the Samwise interest. The PPSA, s 62(2)(b)(i), provides that a PMSI has priority if it is perfected by registration at the time "*the grantor … obtains possession of the inventory*". The issue was whether this referred to the grantor obtaining possession in their capacity as grantor of the PMSI, or to obtaining possession *simpliciter*. Samwise argued for the latter interpretation, such that Bill's Motorcycles had obtained possession when the motorcycles were bailed to it by CDF, and thus long before AD's interest was registered. The trial judge construed s 62(2)(b)(i) as being directed to possession as grantor. He upheld AD's claim to priority, as AD did not have such possession until it issued the bailed goods notices. Samwise appealed.

Held:

- The Court dismissed the appeal. The text of s 62(2)(b)(i) supported a construction that turned upon possession as grantor rather than possession *simpliciter*. The reference to "*the grantor*" in the section was intended to be a use of the word in its defined sense (s 10), which in terms assumes the existence and attachment of a relevant security interest: [68]-[69]; [75].

- This construction was also consistent with the context and purpose of the section. It was consistent with the rationales for both the conferral of super-priority and the requirement of timely notice. With respect to the latter, it was only at the time of the grant of the PMSI that registration was required to protect subsequent lenders to the grantor. The weight of authority from the United States and Canada also favoured this construction: [76]-[80]; [128]; [134].

4. **Consumer law: unconscionable system of conduct or pattern of behaviour**

***Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155**

Decision date: 19 September 2018

Allsop CJ; Middleton J; Mortimer J

The appellant (**Unique**) was a vocational education and training provider operating in Sydney. Unique offered potential students online courses in respect of which many would be eligible for the Commonwealth 'VET FEE-HELP' financial assistance scheme. It offered incentives for students to enrol in its courses, such as the provision of 'free' laptops and iPads. Unique engaged in recruitment and enrolment practices at a range of locations across New South Wales and other states. The respondent (**ACCC**) alleged that Unique deliberately targeted regional, remote and Indigenous communities and areas with significant populations of people with low socio-economic status. The primary judge found contraventions of the Australian Consumer Law (**ACL**) in relation to misleading and deceptive conduct and unsolicited consumer agreements, with respect to the supply of courses to six named individuals. Those individual case findings were not appealed. The primary judge also found that Unique had engaged in a "*system of conduct or pattern of behaviour*" in the supply of courses, as per the ACL, s 21(4).

Unique's grounds of appeal centred on three issues: (i) that the primary judge had erred in his findings about the system case because there was no evidence led as to Unique's conduct towards the vast majority of its students; (ii) challenges to factual findings that Unique had a strategy of targeting certain groups of people, and (iii) challenges to the characterisation of the provision of laptops and iPads as unconscionable. The ACCC cross-appealed in relation to the scope of the unconscionable system or pattern of behaviour found by the primary judge.

Held:

- The Court allowed the appeal and dismissed the cross-appeal. Whether an entity has engaged in conduct that reveals a "*system*" or "*pattern of behaviour*" is a highly fact-specific inquiry, which relies to a significant extent on the forensic exercise the regulator chooses to undertake to prove that system. The same is true of the characterisation of conduct as unconscionable: [150]-[153].

- Here, where the features of the alleged "*system*" depended on what had happened at various sites, and the attributes of those who enrolled, establishing a system required the regulator to pay greater attention to the need to prove the representativeness of individuals, or have a sufficient sample of individual consumers or expert evidence addressing these matters: [153].

- The Court was satisfied that the evidence was insufficient to prove the system case, both as to the conduct said to constitute the system, and the characterisation of that conduct as unconscionable: [92]; [230]; [254]. The matter was remitted to deal only with the balance of relief for other established contraventions: [93].

5. **Insolvency: set-off; charges; *Personal Property Securities Act 2009* (Cth)**

Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liq) (Receivers and Managers Appointed) **[2018] WASCA 163**

Decision date: 21 September 2018

Murphy JA; Mitchell JA; Allanson J

In 2012, the appellant (**Hamersley**), as principal, engaged the respondent (**Forge**), to carry out works relating to the construction of power stations in Western Australia under various contracts. In 2013, Forge obtained funding from a bank, granting the bank security over its personal property. On 2 July 2013, the bank registered its charge under the *Personal Properties Securities Act 2009* (Cth) (**PPSA**). In 2014, the bank appointed receivers to Forge. Forge later went into liquidation. Disputes arose in relation to claims by Hamersley against Forge, and Forge against Hamersley. Hamersley alleged that its claims were greater in value, and it was entitled to set off its claims against Forge's and prove for the balance in the liquidation. It relied upon contractual rights of deduction, equitable set-off, and/or set-off in insolvency under the *Corporations Act 2001* (Cth), s 553C. Forge contended that, once liquidation supervened, there was no right of set-off other than under s 553C, and s 553C had no application. It argued that mutuality under s 553C was determined by reference to equitable interests, and there was no mutuality because the equitable interest in Forge's claims against Hamersley subsisted in the bank from 2 July 2013, due to the operation of the PPSA. On this basis, Hamersley was obliged to pay the receivers debts and monies owing, effectively for the benefit of the bank, and was left to prove in the liquidation for the whole of its claims, without the benefit of any set-off. The primary judge upheld Forge's contentions in a trial of preliminary issues. Hamersley appealed.

Held:

- The Court granted leave and allowed the appeal: [7]. Having considered the bank's position under the financing documents, in the context of the PPSA, the Court held that, at the commencement of the winding up, Forge's claims under the contracts were, in substance, recoverable for the benefit of Forge rather than for the bank. Thus the dealings between Hamersley and Forge were mutual dealings under s 553C, notwithstanding the bank's security interest: [8]; [131]-[132]; [138].

- Even assuming that s 553C did not apply because there was no mutuality, this would not preclude Hamersley from asserting any available contractual or equitable rights of set-off in recovery proceedings brought for the benefit of the bank as secured party. Section 553C did not operate as a code: [8]; [174]-[177].

- Read in context, the bank's security interest in Forge's claims against Hamersley were subject to the PPSA, s 80(1)(a). In other words, the rights of the bank (as the transferee of an account within the meaning of the PPSA), were subject to the terms of the contracts and any equity, defence, remedy, or claim arising in relation to the contracts, including a defence by way of set-off: [8]; [223]; [232].

Asia Pacific and other international decisions of interest

6. **Corporations: insolvency, insolvent transactions, third party payments**

Robt. Jones Holdings Limited v McCullagh **[2018] NZCA 358**

Decision date: 10 September 2018

Cooper J; Winkelmann J; Williams J

In 2010, the appellant (**RJH**) received a series of payments in discharge of a debt owed to it by Northern Crest Investments Ltd (**Northern Crest**). The payments were made by two other entities (**Columbus** and **MSH No 2**). MSH No 2 was a wholly owned subsidiary of Northern Crest. Columbus' sole director at the time of the payments was closely associated with a Northern Crest director. In 2011, Northern Crest went into liquidation. The liquidators applied under the *Companies Act 1993* (NZ) (**the Act**) to set aside the payments on the basis that they were insolvent transactions entered into by Northern Crest in the relevant period before liquidation commenced, at a time when Northern Crest was unable to pay its due debts. The Columbus payments were said to be a re-direction of licence fees it owed to Northern Crest. The MSH No 2 payments were said to be either licence fees or an inter-group loan. A third party payment will constitute an insolvent transaction for the purposes of the Act, s 292, where (i) it is made at the direction of or with consent of the third party; (ii) in discharge of an obligation the third party owes to the insolvent company, and (iii) the money is not the third party's, but paid from funds belong to the insolvent company or to which that company has rights. The liquidators succeeded at first instance. The main issues on appeal were whether there was insufficient evidence for the primary judge to conclude that the payments were transactions by Northern Crest; and, even if the MSH No 2 payments were Northern Crest transactions, whether the judge was wrong to find these were insolvent transactions, as the payments did not result in a diminution of the net pool of assets available to Northern Crest's creditors in the liquidation.

Held:

- The Court dismissed the appeal. The Court rejected RJH's argument that the liquidators had failed to prove that payments by Columbus were a re-direction of licence fees because the licensing arrangements were a sham, or the accounting records relied upon as proof were unreliable: [73]; [106]. Even if either were true, the inevitable inference would be that the payments were by way of a loan to Northern Crest, still rendering them transactions under s 292: [20]; [108]. There was no error in the finding that the MSH No 2 payments were a loan to Northern Crest, procured to meet Northern Crest's obligations to RJH: [115]-[124].

- Satisfaction of s 292(2)(b) did not require the liquidator to show a diminution in the net pool of assets available to creditors, only that the creditor received a greater payment than it otherwise would have received in the liquidation. Australian authorities did not indicate a contrary approach was warranted: [129]-[145].

7. **Courts: appellate review; customary law; collateral estoppel; damages**

***Klobak v Ueki* [2018] PWSC 17; 2018 Palau 17**

Supreme Court of Palau

Decision date: 19 September 2018

Ngiraklsong CJ; Castro AsJ; Yamase AsJ

The appellants filed a suit to prevent the respondents (appellees in the judgment) from interfering with a funeral for a member of the Uchelkeyukl Clan, whom the appellants' claimed was 'Rechiungel' of the clan. They sought a temporary restraining order preventing the respondents from interfering in the funeral and burial at the Ngerbachesis Bai (meeting house) in Ngermid, compensatory and punitive damages, and declaratory relief. The respondents brought a counter-claim seeking declaratory relief, including a judgment that they were "*strong members*" of the clan, entitled to appoint title bearers, and contended that the deceased was not Rechiungel. Additional intervenors claimed to own the land where the burial took place. The respondents also sued the appellants for trespass. The trial division issued a temporary restraining order preventing the respondents from interfering with the funeral and burial. It determined that the intervenors did not have exclusive authority over the land where the burial took place, and refused to consider the declaratory relief sought, in part "*because of the lack of a live controversy between the parties*". The parties filed cross-appeals, arguing that the trial judge erred in determining that "*clan matters should be decided by the clan and not the court*". The appellants also argued that the trial division erred in not deciding the issue of compensatory or punitive damages, contending that both had been proven.

Held:

- The Court allowed the appeal in part. An appeal court will not overturn the discretion exercised by a trial judge not to intervene in a customary matter and issue a declaratory judgment unless the decision was "*arbitrary, capricious, manifestly unreasonable*" or stemmed from an "*improper motive*": [8]. The trial judge was correct not to consider declaratory relief with respect to issues of membership of the Uchelkeyukl Clan, as those matters had been fully litigated and determined by the appellate court in an earlier case: [16]-[17].

- The appellants also sought a declaration that the respondents did not have authority to use or determine the use and control of the Ngerbachesis Bai. The fact that the funeral had already occurred did not eliminate that question. It was inappropriate to impose an "*actual controversy*" limitation on the *Declaratory Judgment Act* and relevant procedural rule on declaratory relief. The parties' claims for declaratory relief on this issue were remitted to the trial division: [18]-[24].

- There was no clear error in the trial division's finding that there was insufficient evidence upon which to award compensatory damages: [8]; [26]. Nor had the trial division erred in its discretion not to award punitive damages: [27].

8. **Copyright: infringement, *Norwich* orders, costs of compliance**

Rogers Communications Inc v Voltage Pictures, LCC, 2018 SCC 38

Decision date: 20 September 2018

The respondent film production companies (collectively, **Voltage**) alleged their copyright had been infringed due to Internet subscribers sharing films via peer-to-peer file sharing networks. Voltage sued one such unknown person. It brought a motion for a *Norwich* order compelling that person's ISP (**Rogers**) to disclose their contact information, and sought that the order be made with "*no fees or disbursements*" payable to Rogers, pursuant to the *Copyright Act*, RSC 1985, c. C-42 (**the Act**), ss 41.25 and 41.26. Under the regime, when a copyright owner gives notice to an ISP claiming a person at a certain IP address has infringed their copyright, the ISP is required under s 41.26 to forward the notice to the relevant subscriber; inform the copyright owner that this has occurred; and "*retain all records that [would] allow the [subscriber's] identity*" to be determined. ISPs were prohibited from charging fees for compliance with their statutory obligations. The regime did not require ISPs to disclose the identity of persons receiving a notice to a copyright owner. An issue arose as to whether, if any of the steps taken by an ISP to comply with a *Norwich* order overlapped with its statutory obligations, the ISP could recover the costs of duplicate steps as part of its reasonable costs of compliance with the *Norwich* order. The motion judge allowed Rogers to recover the costs of all steps it asserted were necessary to comply with the *Norwich* order. The Federal Court of Appeal confined Rogers' recovery to the reasonable costs of the actual act of disclosure; the rest of Rogers' costs said to be unrecoverable as they overlapped with the steps that formed part of its implicit statutory obligations.

Held:

- The Supreme Court of Canada allowed the appeal. On proper construction of s 41.26, an ISP was required to determine, for the purpose of forwarding notice electronically, the person to whom the IP address belonged, and to take whatever steps were necessary to verify that it had done so accurately. It did not require an ISP to determine the name and physical address of that person. Whilst an ISP's records were to be kept in a form that allowed an ISP to identify the name and address of a person subject to a notice, s 41.26 did not require that they be kept in a form or manner which would permit a copyright owner or court to do so: [47]-[49].

- The motion judge erred in failing to interpret the full scope of an ISP's obligations under s 41.26, and then in failing to consider whether any of the eight steps Rogers identified as required to disclose a subscriber's identity overlapped with Rogers' implicit statutory obligations, for which it was not entitled to reimbursement: [56].

- Although the Federal Court of Appeal was correct to set aside the order, it erred in limiting the recoverable costs to those incurred in the act of disclosure. An ISP was entitled to the reasonable costs of steps necessary to discern a person's identity from accurate records retained under s 41.26(1)(b). The matter was remitted to the motion judge to determine the quantum of Rogers' entitlement: [56]-[59].