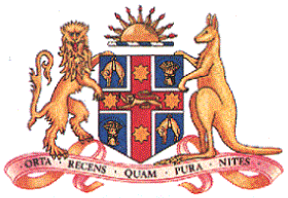

Court of Appeal
Supreme Court
Sydney

Decisions of interest

10 June 2019 – 21 June 2019

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate 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. Contract: deeds; waiver; privity; equitable set-off; impeachment

Wollongong Coal Ltd v Gujarat NRE India Pty Ltd **[2019] NSWCA 135**

Decision date: 11 June 2019

Bathurst CJ, Leeming JA, McCallum JA

Wollongong Coal Ltd ('WLC') and Gujarat NRE India Pty Ltd ('GNI') were both part of the Gujarat Group. In March 2013, WLC entered into an agreement with UIL (Singapore) Pte Ltd ('UIL'), under which UIL paid WLC $20 million for the supply of coal. GNI acted as WLC's guarantor, offering its 150 million fully paid ordinary shares in WLC as security. WLC failed to deliver any coal to UIL. In July 2013, GNI, WLC, UIL, and another company entered into an 'Override Deed', which set up a repayment schedule of $20 million plus interest. WLC failed to make the scheduled payments. UIL subsequently took the shares GNI had offered as security and sold them. In 2014, GNI brought proceedings in the Supreme Court against WLC claiming, inter alia, a right of indemnity as guarantor after being called on to meet WLC's obligations. The primary judge found in favour of GNI, and rejected WLC's defence of equitable set-off. WLC appealed. On appeal, there were two preliminary issues, and two main issues. The preliminary issues and the first main issue all concerned cl 5.3 of the Override Deed. It provided that: '[GNI] irrevocably waives and must not exercise any right of indemnity or subrogation which it otherwise might be entitled to claim and enforce against or in respect of [WLC].' The preliminary issues concerned two contentions made by WLC: first, that cl 5.3 was 'clear and unambiguous' such that it was not necessary to look to the broader context of the deed to construe it; second, that "privity" means that any party is entitled to enforce any provision of an *inter partes* deed. The first main issue concerned the correct construction of cl 5.3, with GNI arguing that the waiver was only for the benefit of UIL and could not be enforced by WLC. The second main issue concerned WLC's equitable set-off defence: WLC had a judgment debt against another company in the Gujarat Group; it contended that there was sufficient connection between that debt and GNI's claim that it would be unconscionable for GNI to rely on one claim without taking into account the other.

Held:

- Appeal allowed in part: [1], [121], [122].
- Both of WLC's preliminary contentions were dismissed. The "privity" point was misconceived: whether a party can enforce a particular provision is a question of construction: [2], [12]-[13], [50]-[51], [61], [69]-[70].
- Correctly construed, cl 5.3 means that GNI immediately and irrevocably waived rights that existed when the deed was executed, and promised not to exercise specified rights in the future. WLC could therefore rely on cl 5.3: [99]-[100].
- The primary judge's decision on set-off – that the requirement of impeachment was not established – was upheld: [14], [119].

2. **Judicial review: planning law; heritage listing**

Stamford Property Services Pty Ltd v Mulpha Australia Ltd **[2019] NSWCA 141**

Decision date: 19 June 2019

Leeming JA, McCallum JA, Emmett AJA

Section 57(1)(e) of the *Heritage Act 1977* (NSW) provides that:

> When an interim heritage order or listing on the State Heritage Register applies to a place, building, work, relic, moveable object, precinct, or land, a person must not do any of the following things except in pursuance of an approval granted by the approval body under Subdivision 1 of Division 3: … (e) carry out any development in relation to the land on which the building, work or relic is situated, the land that comprises the place, or land within the precinct, …

Stamford Property Services Pty Ltd ('Stamford') owned a parcel of land in Sydney. A building listed on the State Heritage Register, the 'Old Health Department Building', stood on part of that land. Another modern building also stood on the land. The two buildings were adjacent and internally connected. Stamford applied for a development consent to demolish the modern building and in its place, build a much larger tower. Under the proposal, the Old Health Department Building would remain. Mulpha Australia Ltd ('Mulpha') owned land adjacent to Stamford's land. Mulpha objected to the development application, including on the basis of its 'unacceptable heritage impacts'. The Heritage Council – the 'approval body' for the purposes of s 57(1)(e) in this case – generally approved that part of the application which concerned the Old Health Department Building, but only provided comments as to the rest, taking the view that the prohibition on development in s 57(1)(e) only applied insofar as development was proposed on the part of the lot where the heritage listed building stood, not the lot as a whole. Mulpha commenced proceedings in the LEC, contending that the Heritage Council had misapprehended s 57(1)(e), and that that section required the Council to either generally approve or indicate refusal of the balance of the application. The primary judge found that the Heritage Council had misapprehended its role, preferring a construction of s 57(1)(e) on which the prohibition in that section only applied to a development which had a 'relevant nexus' with the listed building. Accordingly, he issued orders prohibiting the Central Sydney Planning Committee from determining the application until the Heritage Council made a lawful decision, and requiring the Council to make such a decision. Stamford appealed as of right. On appeal, the key issue concerned the construction of s 57(1)(e). Stamford supported the Heritage Council's construction. Mulpha's primary argument was that the prohibition in s 57(1)(e) applied to all of the development proposed on the lot, because there was a listed building on that lot. In the alternative, Mulpha supported the primary judge's construction.

Held:

- Appeal allowed with costs (McCallum JA dissenting): [96], [97], [159].
- Leeming JA and Emmett AJA held that the construction adopted by the Heritage Council and Stamford was the correct approach to s 57(1)(e): [94], [159].
- McCallum JA agreed that the primary judge had erred, but would have preferred Mulpha's construction of the provision: [100], [122].

3. **Succession: family provision orders**

Strang v Steiner **[2019] NSWCA 143**

Decision date: 19 June 2019

Macfarlan JA, White JA, McCallum JA

On 12 October 2011, Ms Steiner died, leaving an estate valued at over $13 million. She left her estate to her children, John, Lesley, and Robyn. John and Robyn filed summonses in the Equity Division of the Supreme Court, seeking orders under s 59 of the *Succession Act 2006* (NSW) for provision out of the estate for their maintenance, education, and advancement in life in addition to the testamentary gifts left to them. By cross-claim in John's proceedings, the executors sought to recover $881,000 from John that the deceased had lent him under a loan agreement. The agreement had stated that the loan could be repaid by offsetting its amount against John's entitlement as a residuary beneficiary of the estate; there was, however, no residuary estate. The primary judge ordered additional provision for both John and Robyn. By supplementary judgment, he held that the burden of the additional provision to John should be borne first by the legacies payable to John's family, and secondly, if necessary, by the various specific gifts made to Lesley and her family. The primary judge held that the burden of additional provision to Robyn should be borne first by the legacies in favour of her family, and second, if necessary, by the various specific gifts made to Lesley and her family. The executors appealed from the orders for additional provisions, arguing that the primary judge paid insufficient attention to the deceased's testamentary intentions and that the additional provisions were manifestly excessive. By cross-appeal, Robyn's children (bar one) and grandchildren sought variation of the orders, arguing that Lesley's family should bear the burden of the additional provision in favour of Robyn. There were therefore three issues on appeal. First, whether the primary judge erred in his exercise of discretion in relation to Robyn, and if so, whether the amount of additional provision made in her favour should be reduced. Second, whether the same was true in John's case. And third, whether the primary judge erred in exercising his discretion as to who should bear the burden of the additional provision in favour of Robyn.

Held:

- Appeal allowed in part, cross-appeal allowed.
- White JA and McCallum JA found no reason to interfere with the primary judge's assessment of the additional provision made in Robyn's favour. Macfarlan JA would have reduced it: [88]-[90], [146]-[153], [191].
- All three judges held that the additional provision made in John's favour should be reduced. Macfarlan JA and McCallum JA held that it should be reduced by $700,000; White JA would have reduced it by $200,000: [102], [180], [192].
- All three judges held that Lesley's family members should primarily bear the burden of the additional provision made in Robyn's favour: [112]-[113], [181], [193].

Other Australian intermediate appellate decisions of interest

4. **Administrative law: migration; relevant considerations; unreasonableness**

***Minister for Home Affairs v Ogawa* [2019] FCAFC 98**

Decision date: 19 June 2019

Collier, Reeves, Davies, Rangiah and Steward JJ

Dr Ogawa applied for a partner visa. On 18 October 2017, the Minister for Home Affairs made a decision under s 501(1) of the *Migration Act 1958* (Cth) to refuse to grant Dr Ogawa a visa, not being satisfied that Dr Ogawa passed the character test. She did not pass the character test because of her 'substantial criminal record' (s 501(7)). That record was comprised of offences of using a carriage service to harass and to make threats to kill. The offences concerned calls and emails to various persons at the Federal Court in 2006. Dr Ogawa sought judicial review of the Minister's decision in the Federal Court. The primary judge quashed the decision, finding that the Minister erred in two respects. First, the primary judge held that the Minister did not comply with his statutory obligations in ss 54 and 55 of the *Migration Act* to have regard to all of the information in an application and to have regard to any additional relevant information provided by an applicant. As essential aspect of the Minister's reasons for refusing Dr Ogawa's application was his conclusion that she represented 'an unacceptable risk of harm to the Australian community'. Dr Ogawa had provided a report from a psychiatrist which went to the issue of risk of harm. The primary judge found no reference to that report in the Minister's reasons, and drew the inference that the Minister had failed to have regard to relevant information. Since it went to risk of harm, that information was material, and so failure to have regard to it was a jurisdictional error. Second, the primary judge held that the Minister's decision was unreasonable or plainly unjust because it was premature: Dr Ogawa had lodged a petition with the Governor-General for a pardon or for a reference by the Commonwealth Attorney-General; the primary judge found that that petition was detailed and forensically sophisticated; if Dr Ogawa received a pardon, she may not have a 'substantial criminal record' (by operation of s 501(10)); accordingly, it was premature to refuse her visa application on s 501 grounds. The Minister appealed, contending that the primary judge erred on both these points.

Held:

- By majority, appeal dismissed (Collier and Reeves JJ dissenting): [2], [27], [140].
- On the first issue: the relevant obligation was actually that under s 56 to have regard to information that the Minister has *sought* from an applicant; but whether under ss 54 and 55, or s 56, the primary judge's analysis concerning the psychiatrist's letter was upheld: [121].
- On the second issue: the primary judge erred in holding that the Minister's decision was unreasonable; it could not be said that there was no evident or intelligible justification for the Minister's decision to proceed with determining the visa application while the petition was still on foot: [2], [3], [138]-[139].

Other international decisions of interest

5. Civil procedure: service of process; expiry periods; mistakes

England and Wales Court of Appeal

Woodward & Anor v Phoenix Healthcare Distribution Limited **[2019] EWCA Civ 985**

Decision date: 12 June 2019

Bean LJ, Asplin LJ, Nicola Davies LJ

As assignees of two companies, Sally Woodward and Mark Addison sought to bring proceedings for breach of contract and misrepresentation against Phoenix Healthcare Distribution Limited ('Phoenix'). The claims are alleged to exceed £5 million in value. A claim form (ie, originating process) was issued on 19 June 2017, expiring at midnight 19 October 2017. The cause of action was potentially time-barred from 20 June 2017. By their solicitors, Ms Woodward and Mr Addison purported to serve the claim form and particulars of claim on Phoenix's solicitors, Mills & Reeve LLP ('M&R'). They did so by sending the claim form and associated materials by first class post on 17 October 2017. M&R received them on 18 October 2017. The same materials were sent, and received, by email. Neither Ms Woodward nor Mr Addison (nor their solicitors) checked whether M&R was authorised to accept service, and in fact, M&R was not. A partner of M&R formed the view that the service was ineffective, considered that he was not obliged to inform the claimants, and obtained instructions not to do so. The claim form therefore expired unserved, and the limitation period also expired.

The question in these proceedings was whether the court should exercise its power under Civil Procedures Rules 6.15(1) and (2) to retrospectively validate service, in circumstances where service was defective as a result of the claimants' mistake, and any new claim would be statute-barred.

A Master of the High Court retrospectively validated the defective service, considering that M&R (or Phoenix) was required to warn the claimants and their solicitors that their purported service had been defective, and that failing to do so was 'technical game playing'. On appeal, HHJ Hodge QC (sitting as a Judge of the High Court) reversed the Master's decision, setting aside the claim form and dismissing the action. There was, in his view, no basis for imposing a duty on potential defendants to advise claimants of their mistakes. Ms Woodward and Mr Addison appealed to the Court of Appeal.

Held:

- Appeal dismissed: [53]-[55].
- The claimaints' defective service should not be retrospectively validated. Neither M&R nor Phoenix acted improperly or engaged in technical game playing, and the Master erred in imposing on the potential defendants a duty to warn the claimants of their mistakes: [39]-[40], [50]-[51].

6. Criminal procedure: double jeopardy; federalism; dual-sovereignty doctrine

Supreme Court of the United States

Gamble v United States **587 U.S. ___ (2019)**

Decision date: 17 June 2019

Roberts CJ, Thomas J, Ginsburg J, Breyer J, Alito J, Sotomayor J, Kagan J, Gorsuch J, Kavanaugh J

An Alabama law made it an offence for anyone convicted of 'a crime of violence' to have a firearm in their possession. Crimes of violence included robbery. A federal law made it an offence for someone convicted of 'a crime punishable by imprisonment for a term exceeding one year' to possess a firearm. Terance Gamble had previously been convicted of second-degree robbery. In November 2015, he was pulled over in Mobile, Alabama for a damaged headlight. Smelling marijuana, the police officer who pulled him over searched Mr Gamble's car and found a loaded 9mm handgun. Mr Gamble pleaded guilty to a charge laid under the Alabama statute. He was sentenced to 10 years' imprisonment, with all but one year of that sentence suspended. Federal prosecutors then laid charges under the federal statute. In the District Court, Mr Gamble moved to have these proceedings dismissed on the basis that the federal indictment was for 'the same offence' as his state conviction, in breach (he claimed) of the double jeopardy clause of the Fifth Amendment, which relevantly provides that '…[No person shall] be subject for the same offense to be twice put in jeopardy of life or limb…'. The District Court dismissed his motion, invoking the dual-sovereignty doctrine. That doctrine says that two offences are not the same offence for the purposes of the Fifth Amendment if they are prosecuted by different sovereigns. Mr Gamble then pleaded guilty to the federal charges, and was sentenced to nearly three more years' imprisonment. He appealed on double jeopardy grounds, but the Court of Appeals for the Eleventh Circuit affirmed the trial judge's decision. Mr Gamble appealed to the Supreme Court, inviting it to overturn the dual-sovereignty doctrine.

Held:

- By majority, the decision of the Court of Appeals for the Eleventh Circuit was affirmed and the dual-sovereignty doctrine upheld (Ginsburg J and Gorsuch J dissenting): Opinion of the Court, 2; Thomas J's concurring opinion, 17.

- Reading the word 'offence' in positivist terms, the majority reasoned that an offence is defined by a law, and law is defined by a sovereign; so where there are two sovereigns in a given law area (as in Alabama), there might well be two laws and two offences. Therefore, they reasoned, the dual-sovereignty doctrine follows from the text of the Fifth Amendment: Opinion of the Court, 3-4.

- In dissent, Ginsburg J and Gorsuch J both rejected the dual-sovereignty doctrine on various bases. They both considered that a fundamental problem with the doctrine is that it treats governments as sovereigns, not the people: Ginsburg J at 3; Gorsuch J at 7.

7. Torts: third party claims; contribution and indemnity

Court of Appeal for Ontario

Hengeveld v The Personal Insurance Company **2019 ONCA 497**

Decision date: 17 June 2019

Hoy ACJO, Lauwers and Zarnett JJA

Ryan Hengeveld was injured in a car accident in January 2014. The car he was driving was insured by The Personal Insurance Company ('PIC'). Mr Hengeveld and his family retained lawyers – the respondents in these proceedings – to act for them in claims for damages arising out of the accident. In January 2016, Mr Hengeveld and his family commenced personal injury proceedings against the parties that they allege caused his injuries. In October 2017, Mr Hengeveld and his family commenced proceedings against PIC. They claim that in 2014, PIC had agreed to hold the damaged car in storage, in anticipation that it would be evidentially significant in the personal injury proceedings. The substance of the claim against PIC is that negligently, and/or in breach of contract, PIC disposed of the car, and this may affect the Hengeveld's ability to obtain a remedy in the personal injury proceedings. PIC defends the proceedings brought by the Hengevelds. PIC's defence includes a claim that the Hengevelds were negligent in failing to make adequate inquiries of PIC to confirm that the car was held in storage, and in failing to retain an expert to inspect the car in a timely manner. PIC then made a third party claim against the Hengevelds' lawyers, claiming contribution and indemnity from them for any liability it might incur as a result of the Hengevelds' claim against it. The substance of the third party claim is that the lawyers' retainer included terms concerning the preservation of evidence; the lawyers' did not make an agreement with PIC regarding the storage and preservation of the car; so, PIC says, the lawyers breached their retainer with the Hengevelds. The lawyers moved to have the third party claim struck out on the basis that it disclosed no reasonable cause of action. The motion judge acceded to that motion. After noting that the lawyers were not involved in the 'initial loss' (the accident), he held that as between PIC and the Hengevelds, the Hengevelds would be responsible for the actions or omissions of their lawyers (as their agents), so the lawyers were not third parties in any relevant sense. PIC appealed to the Ontario Court of Appeal, arguing that the motion judge erred in treating the initial loss as the accident; the relevant loss in the proceedings between the Hengevelds and PIC was the disposal of the car and whatever flowed from that – and the lawyers were involved in that loss.

Held:

- Appeal dismissed: [47].
- The dispositive issue was not what constituted the 'initial loss'; it was whether the negligence that PIC alleged the lawyers had engaged in was attributable to the Hengevelds. In this case it was, because the acts and omissions said to be negligent were committed in the course of the lawyers acting as agents for the Hengevelds. In those circumstances, PIC's third party claim was not maintainable: [37]

8. Constitutional law: Establishment Clause; war memorials

Supreme Court of the United States

American Legion et al v American Humanist Association et al **588 U.S. ___ (2019)**

Decision date: 20 June 2019

Roberts CJ, Thomas J, Ginsburg J, Breyer J, Alito J, Sotomayor J, Kagan J, Gorsuch J, Kavanaugh J

The Bladensburg Peace Cross is a 32 foot tall Latin cross at the centre of a busy intersection in Maryland. It commemorates local residents who served in the armed forces in World War 1. The Cross was conceived of by a committee of local residents in 1918. They could not fund the whole project, so the local post of the American Legion (a veterans' organisation) took over, completing it in 1925. Since 1961, a government agency, the Maryland-National Capital Park and Planning Commission ('the Commission') has owned the land on which the Cross stands and has paid for the maintenance and preservation of the Cross. The American Humanist Association ('AHA') commenced proceedings in the Maryland District Court against the Commission, alleging that the presence of the Cross on public land and the expenditure of public resources on it violated the Establishment Clause of the First Amendment ('Congress shall make no law respecting an establishment of religion, …'). The AHA sought to have the Cross removed or destroyed, or to have the 'arms' of the Cross removed so that the monument would become a non-religious slab or obelisk. The American Legion intervened. The District Court gave summary judgment for the Commission and the American Legion, holding that the Commission had acquired and maintained the Cross for secular purposes – namely, traffic safety and WW1 commemoration – and so there was no constitutional issue. The Court of Appeals for the Fourth Circuit reversed that decision, holding, by majority, that the Commission's ownership and maintenance of the Cross constituted an impermissible government endorsement of Christianity. The Commission and the American Legion appealed to the Supreme Court.

Held:

- By majority, appeal allowed; the decision of the Court of Appeals for the Fourth Circuit was reversed: Opinion of the Court at 2, 31.
- The majority held that the Cross was not unconstitutional, reasoning that in the context of WW1 commemoration, the Cross has taken on secular meanings. Given its history and cultural significance, removal or alteration now would not be a 'neutral' government act and would not further ideals of respect and tolerance embedded in the First Amendment: Opinion of the Court at 28, 31.
- Gorsuch J (Thomas J agreeing) concurred in the orders of the Court, but further considered that AHA's claim should be dismissed for lack of standing: Gorsuch J at 1.
- In dissent, Ginsburg J (Sotomayor J agreeing) considered that the Commission's maintenance of the Cross on a public highway amounted to government endorsement of Christianity over other faiths, and religion over nonreligion: Ginsburg J at 3.