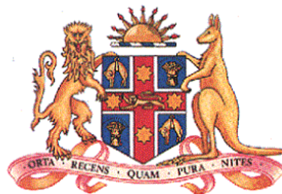

Decisions of interest

11 November 2019 – 6 December 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.

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New South Wales Court of Appeal decisions of interest

1. **Real property: easements; reasonable necessity; conditions**

   ***Gordon v Lever (No 2)* [[2019] NSWCA 275]**

   Decision date: 13 November 2019

   Bell P, Payne JA, Emmett AJA

   The Gordons and the Levers owned neighbouring properties adjacent to the Richmond River. For many years, the Gordons accessed their property through land owned by the Levers, using a bridge that passed over a gully that was wholly on the Levers' property. That bridge was washed away in December 2015. As a result, the only way to access the Gordons' land was by crossing the Richmond River over a ford. At certain times of the year, however, it was either impossible or unsafe to cross at the ford. Additionally, the ford was Crown land, so its use would involve a breach of s 13.3(6) of the *Crown Land Management Act 2016* (NSW).

   In these circumstances, the Gordons applied for an easement over the Levers' land, following the route which had been used, and the use of which had been acquiesced in by the Levers until December 2015. To be of use to the Gordons, such an easement would require constructing a new bridge which would be wholly on the Levers' land, but provide little benefit to them.

   The primary judge granted an easement in the Gordons' favour for a right of carriageway over the Levers' land, but imposed terms which included a limitation on the period during which persons wishing to access the Gordons' land could use the easement to those times when the river at the ford was 300mm or more above the riverbed at that spot.

   The Gordons appealed. The key issues on appeal were: (1) whether the primary judge erred in imposing limitations on the easement in circumstances where the Gordons contended that the easement was "reasonably necessary" (within the meaning of s 88K of the *Conveyancing Act 1919* (NSW)) all, and not only some, of the time; and (2) whether the primary judge erred in imposing restrictions on the terms of the easement which the Gordons contended were not practically or legally workable and/or were uncertain in their practical operation.

   Held:

   - Appeal allowed in part: [102], [103], [106].
   - (1) The primary judge erred in restricting the easement as to time, in circumstances where the easement was "reasonably necessary" at all times and in all circumstances (including the circumstance that use of the ford would involve a trespass to Crown land): [54]-[55], [60], [75].
   - (2) The primary judge erred in imposing restrictions on usage of the easement which were not practically workable in all the circumstances: [60]-[80].

2. **Civil procedure: determination of separate questions**

Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd **[2019] NSWCA 262**

Decision date: 21 November 2019

Bell P, McCallum JA, Simpson AJA

A mortgage lender, Lake Maintenance (NSW) Pty Ltd, brought proceedings in the Supreme Court of New South Wales against a valuer, Todd Hadley Pty Ltd ('Todd Hadley'), claiming damages for professional negligence and statutory breaches in connection with the provision of a valuation for mortgage lending purposes. The valuer sought to have separate questions stated to determine when the lender's causes of action accrued.

The valuer contended that the lender's claims were statute barred. The valuer's contention was that the claims accrued when it became clear that the lender could not recoup the amount advanced under a mortgage from the sale of the mortgaged property, and that the recoverability of the monies advanced from the borrower pursuant to a personal covenant in the mortgage was irrelevant to this question. This contention was said to be supported by dicta of Gaudron J in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413; [1999] HCA 25.

The primary judge dismissed the application for separate questions, but in doing so, wrongly attributed to the lender an estimate that the hearing of the proposed separate questions would take at least two weeks. In fact, the lender had estimated that the hearing would take between one to two days, and the valuer had estimated that the hearing would take half a day.

The valuer sought leave to appeal from the primary judge's dismissal of the application for separate questions, and sought to have the Court of Appeal re-exercise the discretion in relation to that application.

Held:

- A majority of the Court of Appeal (McCallum JA dissenting) granted leave to appeal, allowed the appeal, and ordered that a single separate question be determined: [48], [120].
- The majority granted leave to appeal on the basis that the primary judge's dismissal of the application was vitiated by an error as to a highly material matter – namely, the likely length of the hearing determining separate questions relative to the estimated length of the full trial: [17]-[18], [105].
- McCallum JA considered that the primary judge's factual error was not material in the context of a dispute where the parties had starkly differing views as to the factual scope of the issues to be determined by separate question(s): [95]-[99].
- On the basis of assurances from counsel that the valuer's case on the separate question would be confined in appropriate ways, the majority considered that it was appropriate to order a separate question in circumstances where doing so could result in a significant saving of cost and time: [44]-[46], [117]-[120].

3. **Evidence: corroborative evidence; unjust enrichment**

***Nagamuthu v Shanmugarajah* [[2019] NSWCA 288]**

Decision date: 28 November 2019

Bell ACJ, Meagher JA, Barrett AJA

Mr Charles Shanmugarajah succeeded in a claim in the District Court for monies had and received. The primary judge held that Mr Nagendran Nagamuthu owed him at least $100,000, and ordered restitution in this amount.

The claim of indebtedness arose from the participation of the parties in a series of "seetus". Seetus are a form of financing arrangement that (it was accepted) are relatively common amongst people of Tamil ethnicity, both in Sri Lanka and Australia. The primary judge described a seetu as involving: '… a group of people meeting and agreeing to pay to pay a fixed amount of money at regular intervals, usually monthly, and at each meeting the participants bid to obtain the funds. There are the same number of bidding rounds as there are members of the seetu. Each member can only have one successful bid, and every member has a successful bid. The successful bidder receives the combined amount of the money paid by all members, less the amount of his or her bid. The amount of the bid is decided equally between the other participants. As a result of the bidding process not every member is guaranteed the same amount.'

Mr Shanmugarajah's participation in the seetus organised by Mr Nagamuthu was not the subject of any formal documentation. The primary judge found corroboration of Mr Shanmugarajah's claim in the form of certain post-it notes that were in the possession of Mr Shanmugarajah on which Mr Nagamuthu had written a series of figures and calculations, and in a translated transcript of two recorded conversations between the parties where they discussed various seetus and the amounts owing to various participants in those seetus (including Mr Shanmugarajah).

Mr Nagamuthu appealed, challenging the primary judge's reliance on the corroborating evidence.

Held:

- Appeal dismissed: [69]-[71].
- The evidence that the primary judge relied upon corroborated Mr Shanmugarajah's account of the circumstances that gave rise to Mr Nagamuthu's indebtedness to him. In the circumstances, there was therefore no error in the primary judge ordering restitution by Mr Nagamuthu of the $100,000 owed to Mr Shanmugarajah: [33], [54], [60].

Other Australian intermediate appellate decisions of interest

4. **Appeals: leave to appeal; refusal of application to order an inquest**

***Davis v Ryan, State Coroner* [[2019] QCA 282]**

Decision date: 3 December 2019

Holmes CJ, Gotterson JA, Flanagan J

Mr Davis' wife died in 2013. The investigating Coroner declined to hold an inquest into her death or into the management of the medical treatment she received prior to her death. Mr Davis then applied to the State Coroner for an order that an inquest be held into her death. The State Coroner declined to order an inquest, considering that the investigating Coroner had made findings into all the necessary matters and that it was not in the public interest to hold an inquest. Mr Davis applied to the District Court for an order that an inquest be held into the death of his wife. In considering whether to exercise a discretion to order that an inquest be held, s 30(8) of the *Coroners Act 2003* (Qld) required that a District Court judge be satisfied that it would be in the public interest to hold an inquest. A judge of the District Court was not satisfied that it would be in the public interest to hold an inquest, and so refused Mr Davis' application. Mr Davis sought an extension of time within which to apply for leave to appeal against the refusal decision. His proposed grounds of appeal fell into three categories, corresponding to categories of error identified in *House v The King* (1936) 55 CLR 499. First, he alleged that the primary judge had taken into account irrelevant considerations by: looking to resourcing matters in deciding whether an inquest should be ordered; considering that applications refused by the State Coroner should not be granted lightly; and by considering that the recommendations arising from an inquest in this case would not be binding and would be unlikely to be supported by the medical profession. Second, Mr Davis contended that, contrary to the *Health Practitioner Regulation National Law (Queensland) 2009* and the *Civil Liability Act 2003* (Qld), the primary judge had wrongly taken into account peer professional opinion in considering whether Mrs Davis' doctors had breached their duty of care owed to her. Third, Mr Davis submitted that the primary judge failed to take into account a relevant consideration – namely, evidence of a widespread practice of dangerous prescribing.

Held:

- Extension of time granted, leave to appeal refused: [41]-[43].
- The extension of time to apply was granted as Mr Davis' delay in seeking leave to appeal was readily explained: [2], [41].
- Leave to appeal was refused because Mr Davis had not shown that there was a reasonable argument that the primary judge's exercise of discretion (in refusing to order an inquest) had been affected by a *House v The King* error. The matters alleged to be irrelevant considerations were all relevant; the provisions said to be binding on the primary judge were not applicable here; and the primary judge did not err in his treatment of what was said to be evidence of dangerous prescribing practices: [27]-[31], [37], [39], [40].

Asia Pacific decisions of interest

5. **Customary law: authority to dispose of clan property**

Supreme Court of the Republic of Palau

***Terekieu Clan v Ngirmeriil* [[2019] PWSC 37]**

Decision date: 11 November 2019

Ngiraklsong CJ, Rechucher J, Castro J

The Terekieu Clan owned lands in Koror State, Palau. The lands were leased out to various parties, and the monies received as rent were paid to the Clan. A dispute arose as to the distribution of some of the funds received – and specifically, as to who had authority to distribute the funds. That dispute was between Richard Rihart Rechirei, representing the Clan, on the one hand, and Brenda Berenge Ngirmeriil and Augusta Rengiil on the other. Mr Rechirei held the title of Buik Tucherur, a title which indicated that he was next in line to become the highest male titleholder of the Clan. Ms Ngirmeriil was the female titleholder of the Clan, known as Uodelchad ra Terekieu. Ms Rengiil was her sister. They were both undisputedly ochell members of the Clan – that is, they were senior strong members of the Clan and could trace their line back to the original female member of the Clan. Mr Rechirei, on behalf of the Clan, alleged that Ms Ngirmeriil and Ms Rengiil had disposed of clan property without authority and had improperly used Clan funds for their personal benefit and the benefit of another clan. It was also alleged that Ms Ngirmeriil owed the Clan a fiduciary duty and had breached that duty. Mr Rechirei, submitting that all senior strong members of the Clan should have been involved in disposing of Clan funds, sought a declaration as to who those members were, and sought damages from Ms Ngirmeriil for breach of fiduciary duty and unjust enrichment. Ms Ngirmeriil contended that as Uodelchad, and because she and Ms Rengiil were the strongest members of the clan, they had authority to dispose of Clan funds unilaterally. Ms Ngirmeriil further contended that, as Uodelchad, she was not liable to suit for her use of Clan funds. They also contended that their use of the funds was not contrary to Palaun custom. Relying on expert evidence, the Trial Division held that all Clan funds were, in the circumstances, under the authority of Uodelchad, and that she could spend them as she wished. The Clan appealed, arguing that in so holding, the Trial Division erred as to Palauan customary law and did not take proper account of previous decisions on distribution of clan assets.

Held:

- Appeal allowed: Trial Division's judgment reversed with respect to Palauan customary law; matter remanded for further proceedings according to law: p11.

- The Trial Division erred in the manner alleged: the finding that the female titleholder can dispose of clan property as she wishes was contrary to established custom: p9.

6. **Constitutional law: government employment; powers of review**

Supreme Court of Justice of Papua New Guinea

***Re Jurisdiction of the Public Services Commission* [2019] PGSC 93**

Decision date: 13 November 2019

Salika CJ, Kandakasi DCJ, Kirriwom J, Cannings J, Yagi J

The Public Services Commission ('PSC') is a body established by s 190 of the *Constitution of the Independent State of Papua New Guinea*. Under s 191, its functions include responsibility for 'the review of personnel matters connected with the National Public Service'. Section 194 relevantly defines 'personnel matters' as 'decisions and other service matters concerning an individual whether in relation to his appointment, promotion, demotion, transfer, suspension, disciplining or cessation or termination or employment …' The Public Solicitor dismissed a lawyer who was employed within the Office of Public Solicitor ('OPS'). The employee applied to the PSC for review of the dismissal decision. The PSC conducted a review and, relying on a statutory power, quashed the dismissal decision and directed the Public Solicitor to reinstate the employee and compensate him for lost wages and entitlements. The Public Solicitor disputed that the PSC had jurisdiction to act as it had. Pursuant to a reference under s 19 of the *Constitution*, the Supreme Court was asked to determine whether the PSC has jurisdiction under ss 191 and 194 of the *Constitution* to review any decision of the Public Solicitor or an officer or employee of the OPS. The Public Solicitor argued that the PSC had no such jurisdiction, as the Public Solicitor is not part of the National Public Service, and nor are the employees of the OPS members of the Service. Further, the Public Solicitor argued that the PSC does not have general jurisdiction over public sector personnel matters. The PSC argued that it had jurisdiction to review the Public Solicitor's decisions in personnel matters on the basis that the employment of lawyers and administrative staff employed by the Public Solicitor was governed by the *Public Services (Management) Act 1995*. Further, the PSC argued that personnel decisions taken by the Public Solicitor have a strong connection with the National Public Service and, further still, that the Constitutional Planning Committee intended that the PSC would provide an avenue of review of personnel decisions for all public sector employees, including those employed by other constitutional institutions (like the OPS).

Held:

- The Court held that the PSC does not have jurisdiction to review any decision of the Public Solicitor or an officer or employee of the OPS: [12].

- The Court arrived at that conclusion on the bases that: (i) under relevant statutes, the OPS is not part of the National Public Service; (ii) no relevant statute made employees of the OPS members of the National Public Service; (iii) it is consistent with the constitutional independence of the Public Solicitor that his decisions not be subject to review by the PSC; (iv) the PSC has no general jurisdiction with respect to public sector employees; and (v) recommendations of the Constitutional Planning Committee did not support the PSC's position: [18], [21], [27], [29], [32]-[33].

Other international decisions of interest

7. **Employment law: unfair dismissal; reasons given for dismissal**

   Supreme Court of the United Kingdom

   ***Royal Mail Group Ltd v Jhuti* [[2019] UKSC 55]**

   Decision date: 27 November 2019

   Lady Hale, Lord Wilson, Lord Carnwath, Lord Hodge, Lady Arden

   In 2013, Ms Jhuti commenced employment with Royal Mail Group Ltd. A few months into her employment, she became concerned that other people in her team were acting inappropriately in the manner in which they offered 'Tailor-Made Incentives' to customers, possibly in breach of company policy and the regulator's guidance. Ms Jhuti reported her concerns to her line manager. These reports constituted 'protected disclosures' within the meaning of the *Employment Rights Act 1996* (UK) ('the Act'). In response to these disclosures, her line manager pretended, over several months, that Ms Jhuti's performance of her duties was inadequate. Ms Jhuti felt that she was effectively being managed to be removed. Subjected to significant stress at work, her health declined. The company appointed another officer to determine whether Ms Jhuti's employment should be terminated. That officer was supplied with emails between Ms Jhuti and her line manager, but was not supplied with a complete record of their correspondence, nor with a complete record of Ms Jhuti's correspondence with HR. The officer conducting the review invited Ms Jhuti to attend a meeting. Ms Jhuti responded with about 50 emails, strikingly different in tone from her earlier correspondence. On account of her health, Ms Jhuti did not attend any meeting with the reviewing officer. That officer subsequently recommended that the company should dismiss Ms Jhuti, as it appeared from the material before the officer that Ms Jhuti had not met the required standards of performance and was unlikely to do so going forward. After seeking internal review of the decision, Ms Jhuti filed two complaints with the Employment Tribunal. Relevantly, one of them was for unfair dismissal. Section 103A of the Act provides that dismissal will be unfair if 'the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.' The Tribunal dismissed the unfair dismissal claim on the basis that the reason given by the officer for Ms Jhuti's dismissal was inadequate performance – not that she had made protected disclosures. After two further appeals, the matter reached the Supreme Court. The question of general importance there was: 'In a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?'

   Held:

   - The Court answered that question: 'Yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason': [62].

8. **Civil liability: unlawful arrest**

Supreme Court of Canada

***Kosoian v Société de transport de Montréal* 2019 SCC 59**

Decision date: 29 November 2019

Wagner CJ, Abella J, Moldaver J, Karakatsanis J, Gascon J, Côté J, Brown J, Rowe J, Martin J

In May 2009, Ms Kosoian boarded an escalator at a subway station. She did not hold the handrail. A police officer ordered her several times to hold the handrail. Ms Kosoian refused to do so, and refused to identify herself to the officer. The officer and one of his colleagues subsequently took her to a holding room where her hands were handcuffed behind her back. They arrested her and searched her bag without her consent. They then gave her two statements of offence: one for $100 for disobeying a pictogram which indicated that persons taking the escalator should hold the handrail, and one for $320 for hindering the police in their duties. The Municipal Court acquitted Ms Kosoian on both counts. Ms Kosoian commenced civil proceedings against the officer who arrested her and his employer, the city of Laval, as vicariously liable for his conduct. She also sued Société de transport de Montréal ('STM'), the transport authority responsible for training police officers as to the by-laws relevant to serving as transport inspectors. Ms Kosoian alleged that her arrest constituted a civil fault, as it was unlawful and unreasonable. She argued that no relevant by-law (or other instrument) made it legally obligatory to hold the handrail. And she argued that no reasonable police officer would have conducted the arrest and search in the circumstances. She claimed $69,000 in damages. The trial judge dismissed her claim, holding that the officer had not committed any civil fault. Ms Kosoian appealed. By majority, the Quebec Court of Appeal affirmed the trial judge's decision, as the officer's conduct was consistent with that of a reasonable police officer in the same circumstances, taking into account facts known to the officer at the time of the events, including what the officer had been taught by STM regarding the by-laws. The Court of Appeal held that Ms Kosoian had, in fact, been 'the author of her own misfortune'. Ms Kosoian appealed to the Supreme Court of Canada.

Held:

- Appeal allowed with costs: [141].
- In circumstances where there was no relevant offence, the officer committed a civil fault in ordering Ms Kosoian to identify herself, in arresting her, and in searching her bag: [53], [73], [96].
- The city was liable for the officer's conduct as his employer. STM was liable as the body authorising the officer to act as inspector, and directly liable in providing inaccurate training to officers: [105], [115], [118].
- Ms Kosoian was awarded $20,000 in damages. Liability was apportioned 50/50 as between the officer and STM. Ms Kosoian bore no liability for what had happened to her: [128], [131], [141].