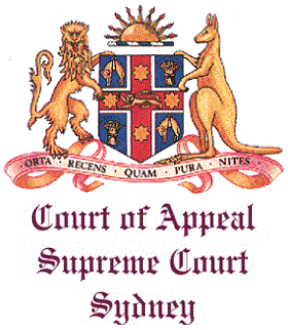

Decisions of interest

13 August 2018 – 24 August 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. **Statutory interpretation: workers' compensation, 'permanent impairment'**

   Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger **[2018] NSWCA 178**

   Decision date: 16 August 2018

   Basten JA; Gleeson JA; Payne JA; Sackville AJA; Simpson AJA

   Ryan Messenger, an employee of the appellant, was killed at work when an excavator he was operating tipped over and crushed the cabin he was in. He suffered a severe high force crush injury and died a few minutes later, during which time he was unconscious. The appellant accepted liability for the payment of death benefits to his estate under the *Workers Compensation Act 1987* (NSW) (**the WC Act**). The respondent then lodged a compensation claim under that Act for the "*permanent impairment*" said to have resulted to Mr Messenger from the crush injury. The dispute was referred for medical assessment under the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) (**the WIM Act**). An initial assessment found permanent impairment of 100 per cent. A "Reconsideration Medical Assessment Certificate" was later issued finding that Mr Ryan had not suffered "*permanent impairment*". On appeal, the Workers Compensation Commission Appeal Panel found it was highly probable that Mr Messenger's injuries would be with him for the rest of his life, assessing his degree of permanent impairment at 100 per cent. The appellant argued that the Panel had misconstrued the meaning of the term "*permanent impairment*" in the WC Act, ss 65 and 66, and the WIM Act, s 322(1). The primary judge upheld the Panel's decision, finding that the term involved an assessment of whether an injury had resulted in "*permanent*", as opposed to "*temporary*" impairment. The issue on appeal was whether the term encompassed impairment so serious that death would inevitably follow within a short time.

   Held:

- The Court allowed the appeal. The term "*permanent impairment*" in ss 65 and 66 of the WC Act involved some diminution in function experienced by a worker which was lasting or enduring. There must be some continued and enduring experience of living. The term did not encompass impairment resulting from an injury so serious that death would inevitably follow within a short time: [63]; [80]; [95].

- Previous authority did not compel a different construction of the term "*permanent impairment*". *Ansett Australia v Dale* [2001] NSWCA 314, which the respondent argued compelled the construction it advanced, could be distinguished on both the statutory language and the facts: [83]-[85]; [89]; [93]-[94].

- It was an error of law for the Appeal Panel to set the "Reconsideration Medical Assessment Certificate" aside, given that Mr Messenger had not suffered "*permanent impairment*" within the meaning of ss 65 and 66 of the WC Act: [98].

2. **Equity: fiduciary duties, conflict of interest and duty; corporations; torts**

Gunasegaram v Blue Visions Management Pty Ltd; Blue Visions Management Pty Ltd v Chidiac **[2018] NSWCA 179**

Decision date: 14 August 2018

Basten JA; Meagher JA; Gleeson JA

A company (**Blue Visions**) was contracted by a Western Australian government department (via the Office of Strategic Projects) to provide programming services for the development of a hospital. Mr Chidiac was responsible for the project's management. Mr Gunasegaram had national responsibility for Blue Visions' project and services area. In March 2014, the men gave notice of their resignations. In response to a question from Mr Hamilton of Strategic Projects, Mr Chidiac indicated he would be "*interested*" to continue providing services after his employment had ended. Mr Gunasegaram advised Mr Parkhouse not to nominate himself as a replacement. Mr Hamilton presented Blue Visions' managing director with three options to deal with Mr Chidiac's resignation: his replacement with someone of equal ability; termination of the contract; or a novation of the strategic programming component of that contract to Mr Chidiac. The third option was taken. On 3 April, Messers Chidiac and Gunasegaram incorporated Aspire, becoming its sole directors and shareholders. Novation to Aspire then took place, before Mr Chidiac's notice period had expired. Blue Visions brought proceedings against the two men, alleging breaches of their fiduciary duties, their employment contracts, and certain *Corporations Act 2001* (Cth) provisions. Aspire was said to be liable as an accessory. Blue Visions also argued that Mr Gunasegaram was liable for misrepresenting his progress on securing work on various other projects. The primary judge dismissed the claim against each man in relation to the novation. He upheld the misrepresentation claim insofar as it related to the Masters hardware store project and awarded damages. Blue Visions appealed against the dismissals and Mr Gunasegaram against liability for misrepresentation and quantum.

Held:

- The Court dismissed each appeal. Mr Chidiac did not pursue any particular interest which could give rise to a real or sensible possibility of a conflict. He did not solicit work from, or make any commitment to, Mr Hamilton, and did not cause Aspire to enter into the novation until Blue Visions had agreed to it; [194]-[196]; [201]-[202]. He was also not in breach of s 182(1): [76]-[80]; [228]-[231].

- Whilst it was a breach of fiduciary duty for Mr Gunasegaram to advise Mr Parkhouse against proposing himself as a replacement, there was no evidence it had any effect on the managing director's actions: [245]-[247]. Obtaining advice as to the corporate structure which could be utilised for carrying on a business after expiration of the notice period was not a breach of fiduciary duty: [243].

- Mr Gunasegaram was not denied natural justice; he was on notice in the pleading of the particular allegations of deceit and acts of reliance which he had to meet: [298]. There was no error in the assessment of damages: [316]-[351].

Other Australian intermediate appellate decisions of interest

3. **Industrial law: National Employment Standards, 'casual employee'**

WorkPac Pty Ltd v Skene **[2018] FCAFC 131**

Decision date: 16 August 2018

Tracey J; Bromberg J; Rangiah J

The appellant (**WorkPac**) operated a labour-hire business, employing Mr Skene as a dump-truck operator at a coal mine from July 2010 to April 2012. Mr Skene was a 'fly in, fly out' employee, and worked 12.5 hour shifts on a '7 days on, 7 days off' continuous roster arrangement. Rosters were set at the start of each year. Mr Skene was classified as a 'casual worker' under his contract. He submitted weekly timesheets and was paid at a flat hourly rate. After his employment was terminated, Mr Skene brought proceedings claiming he had been a permanent full-time employee, entitled to annual leave and related entitlements or payment in lieu, pursuant to the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) (**the Act**), ss 86, 87 and 90, and under the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* (**the Agreement**). The primary judge held that he had an entitlement to be paid monies in lieu of untaken leave under the NES, but not under the Agreement. The issues on appeal were whether the judge had erred in failing to find that Mr Skene was a casual employee under the FW Act; in finding that Mr Skene was a causal employee under the Agreement; and in not imposing a pecuniary penalty on WorkPac for its contravention of the NES.

Held:

- The Court dismissed WorkPac's appeal and allowed Mr Skene's appeal. It rejected Workpac's argument that there was a uniformly understood specialised meaning of "*casual employee*" in federal awards and industrial instruments that was picked up in s 86. The expression had a longstanding acquired legal meaning. Determining whether someone was a "*casual employee*" required characterisation of the nature of the employment, as referrable to certain indicia in the case law. Someone in continuous employment was not within the scope of the expression: [159]; [164].

- In relation to "*double dipping*", there was nothing in the Act which required employees who were not casual, and thus entitled to annual leave, to be paid a casual loading. It was not clear Mr Skene was paid casual loading, such that any claim of set-off would have failed. Assuming he had been, this was not a legitimate basis for construing s 86 in the manner contended for by WorkPac: [146]-[147].

- Mr Skene was not a casual employee for the purposes of the Agreement. The primary judge had erred in construing cl 5.5.6 as allowing WorkPac to subjectively determine Mr Skene's employment status: [220]-[221]; [227].

- The primary judge's decision not to impose a pecuniary penalty was vitiated by a material error of fact, namely his finding that WorkPac had taken appropriate advice and closely considered the legal implications of its conduct: [230]-[236].

4. **Bankruptcy: proof of debts, contingent liabilities, guarantee agreement**

Darwin Foods Pty Ltd v Gray **[2018] SASCFC 84**

Decision date: 20 August 2018

Kourakis CJ; Blue J; Hinton J

The appellant entered into an agreement with Omnyx Pty Ltd for the supply of goods on credit (**the credit agreement**). The respondent, a director of Omnyx, entered into a guarantee and indemnity agreement with the appellant (**the guarantee agreement**) in which he guaranteed payment for any supplies made by the appellant to Omnyx under the credit agreement that Omnyx did not pay for in accordance with the terms and conditions of that agreement. Between 1 April and 22 May 2012, the appellant supplied Omnyx with goods to the value of $87,293.30. On 28 May, receivers and managers were appointed to Omnyx, and on 14 August 2012, Omnyx ceased trading. The $87,293.30 remained owing. The respondent did not pay in response to a letter of demand, and the appellant instituted proceedings in the Magistrates Court. The respondent argued that he was released from all obligations under the guarantee agreement by virtue of him executing a Personal Insolvency Agreement (**PIA**) on 12 January 2012, pursuant to the *Bankruptcy Act 1966* (Cth) (**the Act**), Pt X. The appellant successfully argued that this only protected the respondent from action taken in relation to provable debts within the meaning of s 82 of the Act, and that the debt incurred by Omnyx between 1 April and 22 May 2012 was not a provable debt. This was overturned by a single judge of the Supreme Court of South Australia. The issue for the Full Court was whether the respondent's liability under the guarantee agreement for any debt incurred by Omnyx after 12 January 2012 under the credit agreement was a provable debt within the meaning of s 82(1).

Held:

- The Court allowed the appeal and restored the orders made by the Magistrate: [1]; [46]; [51]. A debt need not be due and payable at the date of bankruptcy to be provable in the bankruptcy, but there must be an obligation upon which the debt was founded, which was incurred before the date of the bankruptcy. The guarantee agreement was divisible in character. Whilst at the date the PIA was entered into, the respondent was subject to a possible liability under the agreement, no obligation with respect to that liability could be said to exist. It was only upon a supply being made to Omnyx that an obligation giving rise to a contingent liability arose: [104]-[105].

- To construe and apply s 82(1) as not capturing supplies after the date of bankruptcy that were the subject of a continuing divisible guarantee agreement executed prior to bankruptcy was not inconsistent with the Act or the modern law of bankruptcy. It was open to the surety to revoke the guarantee: [107]-[108].

- In light of this analysis, the decision of the NSW Court of Appeal in *Proud v Brims Distributors Pty Ltd* (NSWCA, unreported, 26 November 1996) was plainly wrong and should not be followed: [37]; [103].

Asia Pacific and other international decisions of interest

5. **Tort: abuse of process, malicious prosecution, issue estoppel**

Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301 **[2018] SGCA 50**

Decision date: 17 August 2018

Leong JA; Prakash JA; Kwang JA; Tin SJ; Onn J

There was a protracted dispute between the appellant (**Lee Tat**) and the Grange Heights management corporation (**MCST**) over whether Grange Heights' residents had a right of way over the appellant's land. In 2005, the Singapore Court of Appeal held that there was a right of way. It overruled this decision in 2008, finding that the 2005 decision had proceeded on the erroneous basis that a previous decision had determined whether the right of way, granted for the benefit of a particular lot, extended to an adjoining lot on which Grange Heights was located. Considering the issue afresh, it held that the right had been extinguished at law in 1976 by the amalgamation of the two lots. The Court later considered in *obiter* in an unrelated decision that the 2008 decision had been wrongly decided. Lee Tat sued MCST claiming damages for (a) malicious prosecution, (b) abuse of process, (c) malicious falsehood arising from statements by MCST representatives asserting the right of way and (d) trespass, on the basis that residents had used the land until the 2008 decision was handed down. The High Court dismissed the claims.

Held:

- The Court of Appeal dismissed Lee Tat's appeal. The tort of malicious prosecution should not be extended to civil proceedings generally, given, *inter alia*, key differences between criminal and civil prosecutions; and the uncertainty this would introduce into other areas of law [85]-[103]. Policy reasons against recognition included that it would undermine the principle of finality, encourage satellite litigation, and have a possible chilling effect on regular litigation: [104]-[128]. The tort of abuse of process should not be recognised for similar policy reasons. There were also existing civil remedies to deal with abusive litigation: [150]-[161].

- Neither impugned statement was a malicious falsehood because, even taking Lee Tat's case at its highest and assuming that the statements were false, the statements were not made with malice: [181]-[185].

- In the "*highly exceptional and unusual*" facts of this case, Lee Tat was estopped from pursuing its trespass claim. Despite the Court's later *obiter*, the 2008 decision had to be given final effect. The error should not be perpetuated further by imposing liability on MCST for acts done in the period between the 2005 and 2008 decisions. Faced with two contradictory but final decisions of the apex court, the 2005 decision was to be preferred, being the only one upon which the parties could have ordered their affairs in that interim period. Lee Tat could not establish other exceptions to the issue estoppel arising from the 2005 decision: [195]-[209].

6. **Representative actions; securities, misleading and deceptive conduct**

Houghton v Saunders **[2018] NZSC 74**

Decision date: 15 August 2018

Elias CJ; Glazebrook J; O'Regan J; Arnold J; Kós J

Shares in Feltex Carpets Ltd were sold in an initial public offering (**IPO**) pursuant to an offer document (**prospectus**) issued in May 2004. In 2006, Feltex went into liquidation, such that the shares were essentially worthless. Mr Houghton brought a representative action on behalf of those allotted shares in the IPO. He claimed that the respondents were liable for his loss as a result of misleading statements in the prospectus, under the *Securities Act 1978* (NZ), s 56 (since repealed), and the *Fair Trading Act 1986* (NZ), s 9. Under the *Securities Act*, s 55(a), a statement was deemed to be untrue if it was "*misleading in the form and context in which it [was] included*". The respondents were Feltex directors, a promoter of the offer, and the joint lead managers, which the appellant alleged were also promoters. The stage one hearing was to deal with Mr Houghton's claims and resolve issues common to all investors. The primary judge held that Mr Houghton had failed to prove the prospectus contained any materially misleading statements giving rise to liability under the *Securities Act*; and the *Fair Trading Act* claims were excluded because the impugned conduct was regulated by the *Securities Act*. He indicated that he did not accept Mr Houghton's argument that he would be entitled to a full refund on investment if he established that any of the respondents were liable. The primary judge also held that the joint lead managers were not promoters. Although disagreeing with the primary judge's reasoning in some respects, the Court of Appeal ultimately found that the respondents were not liable to investors.

Held:

- The appeal was allowed in part. The FY04 revenue forecast was an untrue statement, and was capable of causing loss to investors. However, none of the other impugned parts of the prospectus constituted untrue statements: [267]-[268]. It was not a requirement under s 55(a) that the statement be misleading in a material respect: [82]-[84]. The term "*[invested] on the faith of*" the prospectus in s 56 engendered an inference that investors acted in reliance on the prospectus; it did not require investors to have seen or read the prospectus: [127]-[129].

- The Court rejected Mr Houghton's 'but for' argument on loss: [114]-[118]. In light of his failure to lead evidence on the actual loss he had suffered, Mr Houghton had failed to prove loss, ending this claim. Whether the FY04 revenue forecast had in fact caused loss for other investors was a matter for the stage 2 hearing: [275].

- The respondents could be liable under the *Fair Trading Act*. There was nothing indicating that provisions enacted to give primacy to the *Securities Act* were to operate retrospectively: [314]-[317]. The inclusion of the untrue statement in the prospectus amounted to misleading and deceptive conduct: [318]. Causation and loss, including for Mr Houghton, was to be resolved at the stage 2 hearing: [325]. The joint lead managers were not promoters, and were not liable: [320]; [367].

7. **Constitutional law; the legal profession, natural justice**

Chief Justice of Trinidad and Tobago v the Law Association of Trinidad and Tobago (Trinidad and Tobago) **[2018] UKPC 23**

Decision date: 16 August 2018

Lady Hale; Lord Reed; Lord Kerr; Lord Wilson; Lord Sumption

Allegations were made against the Chief Justice of Trinidad and Tobago (**the appellant**) in a series of press reports. The Law Association of Trinidad and Tobago (**LATT**) was set up under the *Legal Profession Act 1986* (**the Act**) to regulate the country's legal profession. It set up a committee to inquire into the allegations and decide whether or not to make a complaint to the Prime Minister. Under the Constitution of Trinidad and Tobago, s 137, the Prime Minister is the only person who can advise the President to initiate a formal inquiry into the conduct of a member of the higher judiciary which might lead to a judge's removal from office. The appellant brought judicial review proceedings claiming that the LATT had no power to conduct the proposed inquiry because the formal procedure under s 137 was the only permissible inquiry into a judge's conduct, and the proposed inquiry was not within the LATT's statutory powers. He also alleged apparent bias, bad faith, and procedural unfairness. He succeeded on the two principal grounds at first instance. The Court of Appeal allowed the LATT's appeal and dismissed his cross-appeal. The appellant appealed to the Privy Council. The issues on appeal were (i) whether s 137 was effective to prevent the LATT from conducting the investigation; (ii) whether such an investigation was within the LATT's powers; and (iii) whether the Board had acted with an appearance of bias, unfairly, or in breach of the rules of natural justice towards the appellant.

Held:

- The Board dismissed the appeal. Nothing in s 137 indicated that it was the only way in which the conduct of a judge lawfully could be investigated. The LATT was in no position to make findings of fact binding upon the appellant or any tribunal which might be established under s 137, and was in the same position as any other body which might wish to inquire into the misconduct allegations: [20]-[24].

- An investigation was not *ultra vires*. The Act empowered the LATT to maintain and support the administration of justice and the rule of law, and to do things incidental to those aims. This included the power to make a formal complaint where justified and to protect the judiciary against unjustified criticism. Where serious misconduct was alleged, an inquiry to establish if there is a case for making a complaint was an obvious way of reconciling these purposes: [31]-[32].

- An investigation by the LATT could not be equated with a judicial or quasi-judicial determination of rights to which conventional rules of natural justice applied. The local courts were also in the best position to consider what the fair-minded and informed observer in Trinidad and Tobago would apprehend. It was unnecessary to consider what the precise minimum standards of fairness were in the circumstances, as on any view those standards were met: [33]-[41].

8. **Equity; damages: estoppel, equitable compensation, non-financial detriment**

Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased) **[2018] SGCA 48**

Decision Date: 15 August 2018

Leong JA; Chong JA

The appellant had lived, since birth, in a Housing Development Board apartment (**the Flat**), owned by the appellant's grandmother and one of his aunts as joint tenants. His aunt and grandmother passed away, leaving his grandmother's estate, which the appellant was not a beneficiary of, as the Flat's sole legal and beneficial owner. The appellant later was evicted by the respondent administrator. He brought a claim in proprietary estoppel, arguing that his grandmother had promised that the Flat was not to be sold on her death and that he would be free to continue living there. In reliance on this, he had taken care of his aunt and grandmother for a number of years, suffering such detriments as paying for household and medical expenses, dealing with a fear of contracting his grandmother's tuberculosis, and sacrificing his social life. In 2016, he obtained judgment in his favour, with damages to be assessed. He claimed equitable compensation for the loss of his life-long licence to live in the Flat. He argued that this was best quantified by reference to the rent he was paying for his post-eviction accommodation, which he totalled at $420,000. The assistant registrar awarded him $84,000. On appeal, the primary judge increased the quantum to $100,000. This was appealed again.

Held:

- The Court allowed the appeal: [62]. The Court would apply an expectation-based approach to assessment, being how the appellant had framed his case: [27]. The Court tentatively observed, in the absence of argument, that the issue of whether a court should apply an expectation or reliance-based approach might represent a false dichotomy. In other words, the principles set out in the authorities related to the legal relationship between the approaches, not the starting-point a court ought to adopt, the latter being a matter of choice for the plaintiff: [28]-[31].

- The Court agreed with the primary judge's methodology: identifying a suitable amount of rent per month, to be multiplied by a suitable amount of time to find an amount which fulfilled appellant's expectation, before considering whether this sum should be reduced to ensure proportionality of the remedy to the detriment suffered. The $1,500 monthly rental figure was appropriate; however, the multiplier should be increased to ten years, being the period from eviction until the appellant first would be eligible to apply for public housing, as was his intention: [35]-[45].

- The provisional sum of $180,000 was reduced to $140,000 to ensure the proportionality of the remedy to the detriment suffered. The detriment suffered was overall more significant than the primary judge had assessed it to be, as some value ought to have been ascribed to the non-financial detriment suffered by the appellant. The detriment also should not have been offset against the rent-free accommodation the appellant had enjoyed at the material time: [60]-[61].