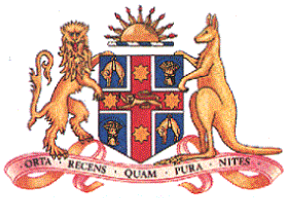

Court of Appeal
Supreme Court
Sydney

Decisions of interest

13 May 2019 – 24 May 2019

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, and 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. Building and construction: adjudication certificates; fraud

YTO Construction Pty Ltd v Innovative Civil Pty Ltd **[2019] NSWCA 110**

Decision date: 15 May 2019

Macfarlan JA, White JA, Emmett AJA

A dispute arose between YTO Construction Pty Ltd ('YTO'), the principal contractor for a development, and a subcontractor working on that development, Innovative Civil Pty Ltd ('Innovative'). Part of the work Innovative contracted to perform was the removal of soil and waste from the building site. Following the dispute, Innovative made a payment claim on YTO under the *Building and Construction Industry Security of Payment Act 1999* (NSW). YTO denied that it was liable to pay anything. Innovative then served an adjudication application with supporting annexures, claiming payment for the removal of 66 loads of General Solid Waste ('GSW') Material, at a rate of $7000 per load. GSW is to be distinguished from Virgin Excavated Natural Material ('VENM'); it was common ground that haulage and disposal of non-VENM GSW commands a higher charge than haulage and disposal of VENM. The adjudicator determined that YTO should make a progress payment to Innovative of approximately $1.5m, and judgment was subsequently entered on the adjudication certificate in the Supreme Court. By summons, YTO commenced proceedings in the Supreme Court, seeking an order that Innovative be restrained from enforcing the judgment. By further amended summons, YTO sought to have the judgment set aside alleging that it had been procured by two forms of fraud. First, YTO alleged that Innovative had claimed it had removed 66 loads of GSW from the site, when it knew that some of those loads were not in fact GSW. Second, YTO alleged that Innovative had represented that $7000 was the cost to it of removing a load of GSW, when Innovative knew that the actual cost was less. The primary judge dismissed YTO's further amended summons, holding that on both points, YTO had departed from its case as pleaded. Further, on the first point, the primary judge held that to prove the falsity of the representation, YTO would have to prove that all 66 loads were not GSW, and YTO had not done so. On the second point, the primary judge was not persuaded that Innovative's representation as to the cost of removing GSW carried the meaning YTO alleged it carried. YTO appealed.

Held:

- Appeal allowed in part. In relation to the first point: the primary judge erred in holding that YTO needed to show that all of the 66 loads claimed as GSW were not in fact GSW; YTO only needed to show was the one or more of the loads in question were not GSW. Accordingly, the proceedings were remitted to the Equity Division for further hearing or redetermination: [1], [53], [93], [108].

- In relation to the second point: YTO did not depart from its pleading in the way that the primary judge found; but it was open to the primary judge to construe the representation as he did, and he did not err in doing so: [70]-[74], [107].

2. **Contracts: sale of land; date of assessment of damages; specific performance**

El Ali v Tritton **[2019] NSWCA 111**

Decision date: 17 May 2019

Macfarlan JA, Leeming JA, Payne JA

Mr El Ali owned vacant land subject to a mortgage. In July 2015, he contracted to sell the land to the Trittons. He refused to complete the sale. The contract was breached in August 2015. In April 2016, the land was sold by the assignee of the mortgagee to a third party.

In October 2015, the Trittons commenced proceedings in the Supreme Court seeking an order for specific performance of the contract. In June 2016, the proceedings were remitted to the District Court. In the Statement of Claim filed there, the Trittons abandoned their claim for specific performance, instead seeking damages for breach of the contract of sale.

The primary judge found in favour of the Trittons, and awarded them damages in the sum of $230,922.34. That sum was comprised of interest, as well as damages in the following categories: 'expectation loss', comprising the difference between the price of the land under the contract and the best evidence of the market value of the land (here, that difference was $60,000); so-called 'reliance costs', in relation to increased building costs that they incurred in building on other land that they purchased following Mr El Ali's breach; 'reliance costs' in relation to rental payments that the Trittons had to make because of Mr El Ali's breach; and 'reliance costs' in relation to interest incurred on a loan facility they had taken out.

Mr El Ali appealed, challenging the primary judge's assessment of damages.

Held:

- Appeal allowed; the primary judge's damage award was set aside; in its place, the Trittons were awarded damages in the sum of $66,934.16 (which included interest): [1], [2], [77].

- As for the damages awarded for 'expectation loss': in circumstances where the Trittons did not accept the repudiation of the contract by Mr El Ali and promptly sought an order for specific performance, damages should be assessed as at the date the remedy of specific performance was no longer available and the contract was lost. The best evidence of the market value of the land at that date was the amount for which the land was sold by the mortgagee's assignee. Accordingly, the challenges to the damages for 'expectation loss' were rejected: [54]-[56].

- As for the other categories of damages: for all three categories, the loss and damage claimed was not proved on the evidence and was, in any event, too remote: [62]-[64]; [67]-[69]; [70]-[74].

3. **Motor accidents: delay in bringing claim; 'full and satisfactory explanation'**

Hunter v Roberts **[2019] NSWCA 116**

Decision date: 20 May 2019

Meagher JA, Brereton JA, Simpson AJA

Section 72(1) of the *Motor Accidents Compensation Act 1999* (NSW) relevantly provides that a claim for compensation arising out of a motor accident must be made within 6 months of the date of the accident. Section 73 provides for the circumstance where a claim is made after such time. Section 73(1) provides that a claim can be made after such time if the claimant provides a 'full and satisfactory explanation for the delay in making the claim'. That explanation is to be provided, initially at least, to the insurer.

Ms Hunter was seriously injured in a single vehicle accident on 28 March 2013 (the date of the accident). She gave notice of her motor accident claim to NRMA Insurance ('NRMA') on 10 February 2014, and again on 3 March 2014; such notice should, under the ordinary rule in s 72, have been given by 28 September 2013. In March 2014, the NRMA rejected that late claim, and requested that she provide a full and satisfactory explanation for her delay in bringing a claim. She attempted to do so by various means over a period of years after the NRMA rejected her late claim. Ms Hunter then commenced proceedings in the District Court against Mr Roberts, who she alleges was the driver of the vehicle at the time of the accident. The NRMA, as Mr Roberts' insurer, applied to have those proceedings dismissed on the ground of delay. Section 73(7) provides that on such an application, the court must dismiss the proceedings unless satisfied that the claimant has a full and satisfactory explanation for the delay. The primary judge dismissed the proceedings, and ordered Ms Hunter to pay Mr Roberts' costs. Ms Hunter sought leave to appeal, seeking to raise two grounds: first, that the primary judge had erred in applying the settled principles as to what constitutes a 'full and satisfactory' explanation to the facts; and second, that in determining her explanation was 'satisfactory', the primary judge had made material errors of fact.

Held:

- Leave to appeal was granted and the appeal allowed: [27], [33], [34].
- The first ground was accepted: the relevant test is whether a hypothetical reasonable person in Ms Hunter's position would have experienced the same delay (here, 4 months and 14 days); the test does not require a claimant to establish that all reasonable persons would have experienced the same delay. The primary judge misapplied this test, not considering whether a reasonable person, with the applicant's age and life experience, who did not appreciate the consequences of not formally pursuing a claim, would have taken steps to understand the claims process at the relevant time. Applying that test, the Court of Appeal held that Ms Hunter's explanation was full and satisfactory: [20]; [23]-[25].
- The second ground was conceded by the respondent: [21]-[22].

Other Australian intermediate appellate decisions of interest

4. **Native title: representative bodies; power to delegate statutory functions**

***Northern Land Council v Quall* [2019] FCAFC 77**

Decision date: 20 May 2019

Griffiths J, Mortimer J, White J

The Northern Land Council ('NLC') and the Northern Territory Government agreed upon an Indigenous Land Use Agreement ('the agreement') concerning the Cox Peninsula near Darwin. Application can be made for such agreements to be registered with the Native Title Registrar, pursuant to s 24CG of the *Native Title Act 1993* (Cth). Section 24CG(3) relevantly provides that such an application must be 'certified by all representative Aboriginal/Torres Strait Islander bodies for the area in performing their functions under s 203BE(1)(b) in relation to the area'. Section 203BE(1)(b) provides that the certification functions of a representative body (like the NLC) include certifying applications to register Indigenous Land Use Agreements. Concerning the powers of representative bodies more generally, s 203BK(1) provides that '[a] representative body has power to do all things necessary or convenient to be done for or in connection with the performance of its functions'. On 23 March 2017, the CEO of the NLC signed a certificate for the purposes of an application to register the agreement. The applicants below (respondents in these proceedings) sought judicial review in the Federal Court of the NLC's decision to certify the agreement. They advanced two arguments: first, that the NLC's certification function under s 203BE(1) could not be delegated; or, second, if it could, it had not been validly delegated to the NLC's CEO. The primary judge rejected the first argument, but accepted the second. The NLC appealed, and the respondents cross-appealed. The key issue before the Full Court was that raised by the cross-appeal, namely, whether the certification functions of a representative body under s 203BE(1)(b) can be delegated to the CEO of that body.

Held:

- Cross-appeal allowed and appeal dismissed: [140], [156].
- Whether a statutory function is delegable is a matter of construction that requires close attention to the nature and character of the function in question: [41]-[42], [60].
- The terms of the Act repeatedly emphasise the important role of bodies like the NLC as *representative* of, and *protective* of, the interests of native title holders. Given that emphasis, and the absence of any express power to delegate, the Court held that the certification function under s 203BE(1) is not delegable: [88], [95]-[97], [100], [131], [135], [154].
- Section 203BK(1) does not confer a power to delegate; 'necessary and convenient' powers are ancillary powers – their scope depends on the substantive powers in the relevant statute: [105], [107], [144].

5. **Guardianship: mental health; habeas corpus; false imprisonment**

The Public Advocate v C, B **[2019] SASCFC 58**

Decision date: 24 May 2019

Kourakis CJ, Kelly J, Hinton J

BC is a 95 year old man who suffers from moderately severe dementia. For the purposes of s 29 of the *Guardianship and Administration Act 1993* (SA), he does not have mental capacity. Pursuant to s 29, in September 2018, the South Australian Civil and Administrative Tribunal appointed the Public Advocate ('PA') as his limited guardian for the purposes of accommodation and lifestyle. The Tribunal appointed BC's wife his limited guardian for the purposes of health care. In October 2018, the PA exercised its powers as guardian and directed that BC reside in a locked ward at a specified aged care facility. BC did not have access to the code or swipe card that would enable him to come and go from that ward.

BC commenced judicial review proceedings in the Supreme Court of South Australia, challenging the decisions of the Tribunal and the PA, and alleging that his detention in the locked ward was not authorised by the terms of the *Guardianship and Administration Act 1993* (SA). The primary judge found that the PA's direction was not authorised by its grant of limited guardianship, and so declared that BC's detention was unlawful and ordered that a writ of *habeas corpus* should issue. The PA appealed. Before the Full Court, the issues were: (1) do the powers in s 32 ('Special powers to place and detain etc protected persons') impliedly abrogate the general law powers of a guardian to detain, and use other force, in matters concerning protected persons?; (2) does the fact that BC enjoyed occasional conditional liberty preclude the conclusion that he was unlawfully detained during periods when he did not have permission to leave the ward?

Held:

- Appeal dismissed: [5], [75]-[77].
- While at general law, a guardian had powers to detain a protected person, a guardian's powers under the Act are 'subject to' the Act (s 31). Section 32 requires that a guardian seek orders from a Tribunal before a restraint can be imposed on the liberty of a protected person. Therefore, to give full effect to the words 'subject to this Act' in s 31, it follows that a guardian's powers at general law to detain (and use other force on) protected persons are impliedly abrogated: [56], [77].
- The fact that BC enjoyed occasional conditional liberty did not preclude the conclusion that he was unlawfully detained at other times: [72].

International decisions of interest

6. Competition law: monopolies; standing; iPhone applications

Apple Inc. v Pepper et al. **587 U.S. ___ (2019)**

Decision date: 13 May 2019

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

The only place where owners of iPhones manufactured by Apple Inc ('Apple') can lawfully buy applications ('apps') is on Apple's App Store. Most apps are made by independent developers. Under contracts with Apple, developers pay a fixed annual membership fee, and in return, can sell their apps through the App Store. Developers set the retail price (though it must end in $0.99), and Apple takes a 30% commission on each sale. In proceedings commenced in the District Court (Northern California), four iPhone owners alleged that Apple has unlawfully monopolized the aftermarket for iPhone apps, and has used its monopoly to charge consumers prices that go beyond what is competitive. Apple sought to have the proceedings dismissed on the basis that the plaintiffs lacked standing: Apple submitted that the plaintiffs were not 'direct purchasers' from Apple, within the meaning of the Court's previous decision in *Illinois Brick Co. v Illinois* 431 U.S. 720 (1977), and therefore lacked standing to bring antitrust proceedings of this kind. The District Court accepted that argument, and dismissed the proceedings. The Court of Appeals for the Ninth Circuit reversed that decision, holding that the plaintiffs are direct purchasers, because they bought apps directly from Apple. Apple appealed to the Supreme Court of the United States.

Held:

- By a 5:4 majority, the decision of the Court of Appeals was affirmed (Roberts CJ, Thomas, Alito, and Gorsuch JJ dissenting): Opinion of the Court, 2.
- The rule in *Illinois Brick* means 'that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers – that is, those who are "the immediate buyers from the alleged antitrust violators" – may sue'. The plaintiff iPhone owners are not consumers at the bottom of a 'vertical distribution chain', seeking to bring proceedings against a manufacturer at the top of the chain; there is no intermediary between Apple and the owners. Accordingly, as purchasers of apps, the plaintiffs are direct purchasers within the meaning of *Illinois Brick*, and have standing to sue Apple for alleged violations of antitrust law: Opinion of the Court, 6-7.
- The dissentients held that if the 30% commission Apple takes is a monopolistic overcharge, it is the developers who are directly injured by that behaviour, not the purchasers of apps from the App Store: Dissent, 5.

7. **Constitutional law: sovereign immunity from suit; comity among States**

Franchise Tax Board of California v Hyatt **587 U.S. ___ (2019)**

Decision date: 13 May 2019

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

Mr Hyatt had formerly been a long-term resident of California. In the early 1990s, he earned considerable sums from a technology patent. In 1991, he sold his house in California; he then rented an apartment in Nevada, registered to vote there, took out insurance there, got a driver's license there, and opened a bank account there. When he filed his 1991 and 1992 tax returns, he claimed that Nevada was his primary place of residence. Nevada collects no personal income tax. The Franchise Tax Board of California suspected that Mr Hyatt had misrepresented his residency in order to avoid paying income tax in California. In 1993, it launched an audit in order to determine whether he had underpaid Californian income taxes in 1991 and 1992. In conducting the audit, Board employees travelled to Nevada to interview persons who knew Mr Hyatt, and sent more than 100 letters and demands for information to third parties. The audit concluded that Mr Hyatt had not moved to Nevada until April 1992, and owed California more than $10 million. Hyatt commenced proceedings in Nevada, alleging that the Franchise Tax Board of California committed torts in the course of undertaking the audit. The Board applied for summary judgment, on the basis that the State of California was immune from private suit in the courts of Nevada. The trial court refused that application. The Board applied to the Supreme Court of Nevada for a writ of mandamus, ordering dismissal on the same grounds. Between 1998 and 2019, the proceedings bounced between the Nevada courts and the Supreme Court of the United States. In these proceedings, the question squarely raised was: does the Constitution permit a State to be sued by a private party without its consent in the courts of a different State? At issue was the correctness of the Supreme Court's decision in *Nevada v Hall*, 400 U.S. 410 (1979), which held that the Constitution does not prevent private suits being brought against a State in the courts of another State.

Held:

- By majority, the decision of the Nevada Supreme Court was reversed and *Hall* was overruled (Ginsburg, Breyer, Sotomayor, and Kagan JJ dissenting). The Court held that States retain their sovereign immunity from private suits brought in the courts of other States, and this is an aspect of the Constitution's design: Opinion of the Court, 4-5, 13-16.

- The dissentients would have followed *Hall*, holding that the Constitution *permits* a State court to decline to exercise jurisdiction over another State (as an expression of comity), but does not require it. Further, they held that the 'special justification' required to overrule a settled decision of the Court was lacking in this case: Dissent, 1-2, 4, 10.

8. **Administrative law: judicial review; supervisory jurisdiction; privative clauses**

***R (on the application of Privacy International) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22**

Decision date: 15 May 2019

Lady Hale, Lord Reed, Lord Kerr, Lord Wilson, Lord Sumption, Lord Carnwath, Lord Lloyd-Jones

The Regulation of Investigatory Powers Act 2000 ('RIPA') established a specialist tribunal, the Investigatory Powers Tribunal ('IPT'), with jurisdiction to examine the conduct of various intelligence agencies. Section 67(8) of RIPA provides:

> Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.

Section 5(2) of the Intelligence Services Act 1994 empowers the Secretary of State to issue a warrant 'authorising the taking of such action as is specified in the warrant in respect of any property so specified.' In preliminary proceedings in the Tribunal, the claimant (appellant in Supreme Court) raised a preliminary question of law, namely, whether s 5(2) authorised the issue of 'thematic' warrants which would authorise actions with respect to broad *classes* of property. The specific context in which this question arose concerned the possibility that s 5(2) may have been used to authorise 'Computer Network Exploitation' that affected the claimant. The claimant argued that s 5(2) should not be read as authorising 'thematic' warrants. The IPT dismissed the claim, holding that warrants under s 5(2) must be 'as specific as possible in relation to the property to be covered by the warrant'. The claimant sought judicial review. On the threshold question of jurisdiction, the Divisional Court held that s 67(8) ousted judicial review of the IPT's decision. The Court of Appeal dismissed an appeal. The key issue in the UK Supreme Court was whether s 67(8) ousts the supervisory jurisdiction of the High Court to quash a judgment of the IPT for error of law.

Held:

- By majority, appeal allowed (Lord Reed, Lord Wilson, and Lord Sumption dissenting): [145], [168].
- The majority read s 67(8) in light of the decision in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 14 and in light of the common law's presumption against ouster, holding that s 67(8) only operates to oust review of legally valid determinations, awards, or other decisions – that is, ones that are not affected by errors of law: [105], [107], [111]-[112], [147], [167].
- In dissent, Lord Sumption (with Lord Reid agreeing) read s 67(8) as excluding forms of judicial review for errors of law on grounds that would be tantamount to appeal – that is, review on merits: [172], [201]. Lord Wilson considered that, in light of the decision in *Anisminic*, the purpose of including the word 'jurisdiction' in s 67(8) must have been to exclude review of all errors of law: [224].