Court of Appeal
Supreme Court
Sydney

Decisions of interest

14 October 2019 – 25 October 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: compulsory acquisition; costs**

***Croghan v Blacktown City Council* [2019] NSWCA 248**

Decision date: 15 October 2019

Meagher JA, McCallum JA, Simpson AJA

Blacktown City Council compulsorily acquired land owned by Mr Croghan. The Valuer-General determined that Mr Croghan was entitled to compensation in the sum of $4.8m. Mr Croghan objected to that valuation, and commenced Class 3 proceedings in the Land and Environment Court challenging it. Mr Croghan initially sought compensation of $11.1m; shortly before the hearing, he reduced his claim to $8.4m. The primary judge awarded Mr Croghan $4.2m in compensation. So far as costs were concerned, the primary judge ordered that the Council pay Mr Croghan's costs in the proceedings on the ordinary basis until 27 September 2017, and with one minor exception, that Mr Croghan pay the Council's costs on an indemnity basis from that date. The primary judge so ordered because the Council had made a formal offer of compromise to Mr Croghan on 27 September 2017. The offer was to resolve the proceedings for $5.2m. Mr Croghan did not accept the offer. The primary judge applied the usual rule applicable in circumstances where an offer of compromise is not accepted and a subsequent judgment is no more favourable to the plaintiff (see UCPR r 42.15). Mr Croghan sought leave to appeal from the costs orders. The key issue on appeal was whether, in determining whether to make orders in accordance with, or departing from, the usual rule in UCPR r 42.15, the primary judge had erred by not considering whether, in all the circumstances, Mr Croghan had acted reasonably in not accepting the offer.

Held:

- Leave to appeal granted; appeal allowed: [46]-[48].
- The primary judge erred in considering the reasonableness of Mr Croghan's conduct in *pursuing* his claim, rather than considering whether it was just and fair that he pay the costs of the proceedings from the date of the offer of compromise on an indemnity basis, taking into account: the nature of the proceedings; the circumstances in which the offer was made and not accepted; and the purposes of the offer of compromise provisions: [20], [35].
- The Court held that Mr Croghan acted reasonably in not accepting the offer of compromise, as at the time that it was made, he could not have made a realistic assessment of the Council's position or the likely outcome of the litigation. This was because at the time of the offer, the parties had not formulated their positions in pleadings and no expert reports had been exchanged: [36]-[37].
- The Court ordered that the Council should pay Mr Croghan's costs both in the LEC and on the appeal. The ordinary rule that costs follow the event does not apply to Class 3 proceedings in recognition of the unique position of a claimant in compulsory acquisition proceedings: [19]-[20], [45]-[46].

2. **Appeals: adequacy of reasons; procedural fairness**

State of New South Wales v Shepherd **[2019] NSWCA 261**

Decision date: 25 October 2019

Bell P, Meagher JA, Simpson AJA

Mr Shepherd commenced civil proceedings in the District Court against the State of New South Wales. The proceedings arose out of an altercation between Mr Shepherd and Constable Marsman, a member of the NSW Police Force. Mr Shepherd suffered injuries as a result of the altercation. The critical issue in the proceedings was how Mr Shepherd sustained those injuries, and whether the State was liable for them.

Mr Shepherd and Constable Marsman gave very different accounts of the nature of the altercation. On Mr Shepherd's account, Constable Marsman threw Mr Shepherd over his leg and kneed him in the groin repeatedly. On Constable Marsman's account, the physical altercation between them only involved a single 'check-drill' – a defensive manoeuvre which involves pushing someone in the chest in order to create distance between an officer and the other person.

The primary judge did not accept either of these accounts. Instead, he made a finding relating to the interaction which was adverse to the State – namely, that Mr Shepherd's injuries were sustained in the course of a second check-drill. That finding did not accord with any evidence, and the primary judge gave no reasons for it. The primary judge awarded Mr Shepherd damages and costs.

The State appealed. Mr Shepherd filed a notice of contention seeking to uphold the judgment on an alternative basis, which he submitted was supported by evidence tendered in the proceedings, to which (he contended) the primary judge had given no consideration. The key issues on appeal were: (1) whether the primary judge erred in failing to give proper reasons for his finding on the critical issue and whether there was an absence of evidence to support that finding; (2) whether the primary judge erred in failing to give adequate (or any) reasons for his rejection of the account of the critical issue by witnesses on both sides of the case; and (3) whether the judgment should nonetheless be upheld on the alternative basis contended for.

Held:

- Appeal allowed; retrial ordered: [53].
- (1) The primary judge erred in failing to provide reasons to support his finding on the critical issue; further, there was no basis in the evidence to support his finding of fact on this issue: [28], [31], [33], [39]-[41].
- (2) The primary judge erred in failing to give adequate (or any) reasons for rejecting the accounts of the critical issue presented by the parties: [28]-[30], [38]-[39].
- (3) Upholding the judgment on the alternative basis contended for would have involved a review of all of the evidence and an assessment of the witnesses who gave evidence; there therefore had to be a retrial: [45]-[52].

Other Australian intermediate appellate decisions of interest

3. **Industrial law: adverse action; mental disability; incapacity to work**

Western Union Business Solutions (Australia) Pty Ltd v Robinson **[2019] FCAFC 181**

Decision date: 23 October 2019

Kerr J, O'Callaghan J, Thawley J

Mr Robinson was employed by Western Union Business Solutions (Australia) Pty Ltd ('WU') from February 2013. From September 2016, Mr Robinson was on leave. He provided WU with a series of medical certificates. He also provided a number of Work Cover certificates, certifying that he had 'no current work capacity for any employment'. In January 2017, a representative of WU wrote to Mr Robinson requesting that he attend an independent medical assessment with a doctor chosen by WU. Mr Robinson and the representative exchanged correspondence on this issue, but an appointment was never arranged. On 8 May 2017, the Head of HR at WU at the time, Ms Pickles, wrote to Mr Robinson informing him that his employment had been terminated in view of his 'unreasonable failure to cooperate with [WU's] attempts to obtain up-to-date specialist medical advice' and in view of WU's 'serious concerns about your capacity to return to work'. Mr Robinson commenced proceedings in the Federal Court against WU, claiming (among other things), that WU had breached s 351 of the *Fair Work Act 2009* (Cth). That section relevantly provides that 'An employer must not take adverse action against a person who is an employee … of the employer because of the person's … physical or mental disability…'. The primary judge found that dismissal on the basis of 'concerns about [Mr Robinson's] capacity to return to work' amounted to dismissal on the basis of his mental disability, because there was no relevant distinction between Mr Robinson's capacity to return to work and his mental disability. WU appealed. On appeal, the two key issues were: (1) whether the primary judge erred in finding that there was no relevant distinction between 'capacity to return to work' and 'mental disability'; and (2) whether the primary judge erred in finding that the 'manifestation' of Mr Robinson's disability (inability to work) could not be severed from his alleged disability in circumstances where Ms Pickles did not know whether, as a matter of fact, Mr Robinson had a mental disability. Mr Robinson cross-appealed from the primary judge's assessment of damages.

Held:

- Appeal allowed; cross-appeal dismissed: [103].
- (1) The primary judge erred in the manner alleged: it did not follow from the fact that WU dismissed Mr Robinson on the basis of his lack of capacity to return to work that WU had dismissed him on the basis of mental disability: [48], [59], [64], [154].
- (2) The primary judge erred in the manner alleged: an inability to work may have been a consequence of particular manifestations of Mr Robinson's disability, but it was not itself such a 'manifestation': [48], [80], [138], [142]-[143].

4. **Civil procedure: limitation periods; statutory discretion to extend time**

Singh v Hill & Anor **[2019] QCA 227**

Decision date: 25 October 2019

Sofronoff P, Gotterson JA, Flanagan J

By her litigation guardian, Mr Singh, Ms Kaur sought to bring proceedings claiming damages for personal injury arising out of a motor vehicle accident that occurred in August 2012. Those proceedings were commenced after the statutory limitation period had elapsed, but Ms Kaur sought to invoke the court's power to allow her to bring such proceedings out of time found in s 57 of the *Motor Accident Insurance Act 1994* (Qld) ('*MAIA*').

The primary judge dismissed Ms Kaur's application. His Honour recognised that she had complied with the pre-court steps required by the *MAIA* except for attending a compulsory settlement conference and exchanging mandatory final offers. He held, however, that she was not conscientious in pursuing her claim because she failed to respond to requests for instructions from her solicitors as to a detailed schedule of damages. The primary judge also rejected a submission that sought to explain Ms Kaur's delay in bringing proceedings by claiming that she lacked capacity to give instructions at material times. The primary judge also considered prejudice to the defendant insurer to be a relevant consideration in his refusal to extend the time in which Ms Kaur could bring her claim.

By her litigation guardian, Ms Kaur appealed. She submitted that the primary judge's exercise of the s 57 discretion had miscarried, and that those errors were of the kind identified in *House v The King* (1936) 55 CLR 499; [1936] HCA 40. Across seven grounds of appeal, she essentially submitted that the primary judge failed to take into account relevant considerations and took into account irrelevant considerations in exercising the discretion, and further, that he had erred in his treatment of the issue of delay.

Held:

- Appeal allowed; the discretion in s 57 was exercised in Ms Kaur's favour, permitting her to commence proceedings within 60 days of a compulsory conference: [100].
- The primary judge failed to take into account relevant considerations in various ways. Centrally, the primary judge erred in treating conscientious compliance with the pre-court steps required by *MAIA* as a precondition to the exercise of the discretion, and failed to consider all the circumstances that were in fact relevant to the exercise of that discretion: [68], [70]-[71], [80]-[86].
- The primary judge erred in his treatment of delay, apparently failing to consider the responsibility that the defendant insurer bore for some of the delay, and failing to consider that some of the delay was explicable on the basis that Ms Kaur's injuries had not yet stabilised and been assessed: [74], [78]-[79], [90]-[91].

Asia Pacific decisions of interest

5. Parole: extended supervision orders; 24/7 monitoring

Court of Appeal of New Zealand/Te Kōti Pīra O Aotearoa

McGreevy v Chief Executive of the Department of Corrections **[2019] NZCA 495**

Decision date: 16 October 2019

Gilbert J, Venning J, Woolford J

In May 2008, Mr McGreevy was made subject to an Extended Supervision Order ('ESO') under the *Parole Act 2002* (NZ). The Parole Board could impose conditions on a person subject to an ESO for a period of 10 years after their release. Under s 15 of the Act, the Board could impose conditions restricting where a person resided and when they had to be at that location, and could impose conditions requiring participation in an Individual Residential Reintegration Programme ('IRRP'). The Parole Board purported to impose conditions of both of these kinds on Mr McGreevy.

Mr McGreevy commenced proceedings in the High Court challenging the conditions imposed on him. He argued that the terms of the *Parole Act 2002* (NZ) did not authorise the Department of Corrections and CRC Limited ('CRC') – a non-government organisation engaged by the Department to implement reintegration programmes – to monitor him 24/7. He also argued that the IRRP provided to him by the Department and CRC did not comply with relevant provisions of the *Parole Act 2002* (NZ).

The primary judge held: (1) that it was lawful for the Department of Corrections and CRC Limited to monitor Mr McGreevy 24/7 between 26 May 2008 and 22 August 2012; (2) that Mr McGreevy had not established that he was being monitored 24/7 after 22 August 2012; and (3) that the IRRP provided and implemented by the Department and CRC Limited did not breach the requirements of the Act.

Mc McGreevy appealed, challenging each of these conclusions.

Held:

- Appeal allowed in part and otherwise dismissed: [79]-[80].
- (1) The Court declared that it had not been lawful for the Department and CRC Limited to monitor Mr McGreevy 24/7 between 26 May 2008 and 22 August 2012; such monitoring was not authorised by the *Parole Act 2002* (NZ) and without such authorisation, was inconsistent with the protections Mr McGreevy enjoyed as a citizen under the *New Zealand Bill of Rights Act 1990* (NZ): [29], [79].
- (2) The primary judge did not err in holding that Mr McGreevy had failed to establish that he was monitored 24/7 after 22 August 2012: [66].
- (3) The primary judge did not err in holding that the IRRP developed for Mr McGreevy complied with the requirements of the Act: [77].

6. **Privacy: inherent powers of courts; non-disclosure**

Court of Appeal of New Zealand/Te Kōti Pīra O Aotearoa

Attorney-General v J **[2019] NZCA 499**

Decision date: 16 October 2019

Williams J, Collins J, Toogood J

The Ministry of Social Development ('MSD') and the Ministry of Education ('MOE') were the effective defendants in 210 historical abuse claims lodged in the High Court. The claimants alleged that they suffered physical or sexual abuse, neglect, or other harm while under the care or supervision of those agencies. The MSD and the MOE wished to pass on information disclosed by the claimants in the proceedings to other parties for purposes unrelated to the Crown's defence of the proceedings – for example, to police, to Oranga Tamariki (New Zealand's Ministry for Children), and to alleged abusers and/or their employers. Certain statutory provisions enabled MSD and the MOE to share some or all of this information. For various reasons, some of the claimants were opposed to the sharing of that information. In August 2017, in the course of the High Court proceedings, counsel for the claimants raised concerns about the fact that certain statements of claim had been passed on to the police. After interim orders were made and further hearings held on this issue, the primary judge made final orders to the effect that: (a) there were to be no searches of the relevant litigation files without leave of the Court; (b) subject to certain exceptions, parties to the proceedings could not provide copies of documents on those files to non-parties without leave of the Court; (c) where non-parties did receive information pursuant to one of the exceptions, they could not disclose that information further without leave of the Court. The Crown appealed against those parts of the orders that operated to prevent disclosure of documents and information. (There was no appeal against the order prohibiting searches of the litigation files without leave.) In broad terms, the Crown's key submissions on appeal were that: (1) the High Court lacked jurisdiction to make the non-disclosure orders; and (2) if the High Court had such jurisdiction, it had been exercised in a manner inconsistent with ss 15-18 of the *Oranga Tamariki Act 1989* (NZ) and with Information Privacy Principle 11(f) (found in the *Privacy Act 1993* (NZ)).

Held:

- Appeal dismissed: [91]
- (1) The High Court's inherent power to control its own processes included the power to make the orders which the Crown challenged: [73].
- (2) The High Court's power to control its own processes in this way had not been ousted by either the *Oranga Tamariki Act* or the *Privacy Act*, and nor was the Court's exercise of that jurisdiction inconsistent with the provisions of those Acts relied on by the Crown. In both cases, the applicable legislation permitted but did not require information sharing between agencies. The orders challenged were an appropriate exercise of the Court's inherent powers, and operated to condition the exercise of statutory permissions: [69], [82], [89].

Other international decisions of interest

7. **Succession: inheritance tax; relationship between UK law and EU law**

Supreme Court of the United Kingdom

Routier and another v Commissioners for Her Majesty's Revenue and Customs **[2019] UKSC 43**

Decision date: 16 October 2019

Lady Hale, Lord Reed, Lord Carnwath, Lord Hodge, Lord Lloyd-Jones

Mrs Beryl Coulter died in Jersey on 9 October 2007. She left her residuary estate on trust ('the Coulter Trust') for charitable purposes. Her will specified that the proper law of the trust was the law of Jersey. The executors of Mrs Coulter's will were domiciled in Jersey and were also appointed as the trustees of the Coulter Trust. The estate included assets in the UK valued at £1.7m. In October 2010, the trustees retired (though they remained the executors), and were replaced by a trustee resident in the UK. The will was also amended to make the proper law of the trust that of England and Wales. Section 23 of the *Inheritance Tax Act 1984* (UK) exempted gifts to charities from inheritance tax. In May 2013, Her Majesty's Revenue and Customs ('HMRC') determined that Mrs Coulter's gift of her residuary estate to the Coulter Trust did not come within that exemption. That conclusion was based on a construction of s 23 that limited its application to trusts governed by UK law; because Jersey law was the proper law of the trust at the time of Mrs Coulter's death, and because Jersey was not part of the UK for the purposes of s 23, HMRC concluded that the gift did not enjoy the benefit of the s 23 exemption. The executors of Mrs Coulter's will challenged that determination on the basis that it was incompatible with art 56 of the Treaty Establishing the European Community (now art 63 of the Treaty on the Functioning of the European Union). Broadly, art 56 prohibits all restrictions on the movement of capital and on payments between member states, and between member states and third countries. On appeal to the Supreme Court, the two key issues were: (1) whether Jersey is a part of the UK for the purposes of art 56 or whether Jersey is a 'third country'; (2) if Jersey is not part of the UK for the purposes of art 56, whether HMRC's refusal of relief under s 23 in respect of Mrs Coulter's gift of her residuary estate to the trust could be justified under EU law.

Held:

- Appeal allowed: [56].
- (1) For the purposes of art 56, Jersey is a 'third country', and therefore not part of the UK: [37].
- (2) HMRC's refusal of relief under s 23 was not justifiable under EU law. There was nothing in the text of s 23 that limited the exemption to trusts governed by UK law. Such a limitation was inconsistent with art 56, and should not have been imposed. Accordingly, the gift to the Coulter Trust was exempt from inheritance tax under s 23: [52], [55]-[56].

8. **Employment law: whistle-blower protections; judicial officers**

Supreme Court of the United Kingdom

***Gilham v Ministry of Justice* [2019] UKSC 44**

Decision date: 16 October 2019

Lady Hale, Lord Kerr, Lord Carnwath, Lady Arden, Sir Declan Morgan

A District Judge raised concerns – and ultimately lodged a formal grievance – with local leadership judges and with senior managers in Her Majesty's Courts and Tribunal Service in relation to the consequences of cost-cutting measures in the County Court. The Judge claimed that as a result of raising these concerns, she was subjected to various detriments at work, including: considerable delay in investigating her grievance; being seriously bullied, ignored, or undermined by colleagues (including fellow judges); being informed that her workload and concerns were a 'personal working style choice'; being inadequately supported in returning to work. She further claimed that her health significantly suffered as a result of her raising the concerns, such that she developed a psychiatric injury and a disability. The Judge made a claim in the Employment Tribunal. In part of that claim, she claimed the protection of 'whistle-blowing' provisions in the *Employment Rights Act 1996* (UK). Those provisions protect persons who come within the definitions of 'worker' or 'person in Crown employment' in the Act. The Judge's claim failed in the Employment Tribunal, and after pursuing appeals through the Employment Appeal Tribunal and the Court of Appeal, the issues in the Supreme Court were: (1) was the Judge a 'worker' or 'person in Crown employment' within the meaning of the Act?; (2) if not, was her exclusion from the protection of the whistle-blowing provisions a breach of her rights under art 10 of the ECHR (freedom of expression) or art 14 when read with art 10 (art 14 provides that the enjoyment of Convention rights shall be secured 'without discrimination' on any ground); and (3) if her Convention rights had been breached, what was the appropriate remedy?

Held:

- Appeal allowed; matter remitted to the Employment Tribunal to be dealt with on the basis that the District Judge was entitled to claim the protections of the whistle-blower provisions: [46].

- (1) Applying ordinary statutory interpretation principles, the Judge was neither a 'worker' nor a 'person in Crown employment': [21], [24]-[25].

- (2) Her exclusion from the protection of the whistle-blowing provisions was a breach of her rights under art 14 when read with art 10: [37].

- (3) In light of the interpretive duty in s 3 of the *Human Rights Act 1998* (UK), and applying the broader approach to statutory interpretation that can be employed in order to resolve tensions between domestic legislation and EU law, the appropriate remedy was to interpret the definition of 'worker' so as to include judicial officers: [39]-[45].