Court of Appeal
Supreme Court
Sydney

Decisions of interest

16 July 2018 – 27 July 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. **Contract; restraint of trade; equity: confidential information**

Isaac v Dargan Financial Pty Ltd ATF The Dargan Financial Discretionary Trust (ABN 68 702 047 521) (trading under the name of Home Loan Experts) **[2018] NSWCA 163**

Decision date: 27 July 2018

Bathurst CJ; Beazley P; Gleeson JA

Mr Isaac was engaged by the respondent (**Dargan**) as a sub-originator to submit and manage loan applications to lenders on behalf of clients. The Sub-Origination Agreement was terminated by mutual consent. Mr Isaac commenced work as a loan writer/credit representative for RAMS Financial Group Pty Ltd (**RAMS**), acting as loan writer for nine persons (**the Lost Borrowers**) who had existing loans with Dargan. Dargan brought proceedings alleging that Mr Isaac had breached the confidentiality provisions in the Agreement and an equitable obligation of confidence, by using and retaining a list of Dargan's clients; and had breached the non-interference and non-solicitation restraints in the Agreement, by approaching and accepting approaches from the Lost Borrowers.

Mr Isaac admitted to retaining and using a client list, soliciting Dargan's clients and accepting approaches while employed by RAMS. However, he argued that the list lacked the necessary quality of confidence because the details of certain clients had entered the public domain. He also argued that the restraints were unreasonable and thus unenforceable. The issues on appeal were whether the restraints were unreasonable; whether Mr Isaac had breached the non-interference restraint; and whether the primary judge had erred in granting an injunction permanently restraining his disclosure or use of the client list.

Held:

- The appeal was allowed in part. Whether the conduct of Mr Isaac in relation to the Lost Borrowers interfered with an existing relationship between Dargan and its clients was a question of fact in each case. It was not possible to conclude on the evidence that the non-interference clause had been breached: [91]-[98].

- Dargan had a legitimate commercial interest in protecting customer connections and confidential client information: [122]-[123]. Given this, there was no error in the finding that the non-solicitation restraint was not unreasonable: [132].

- Absent any provision to the contrary, a contractual confidentiality provision will generally be construed as limited only to information that is confidential in character: [137]. The client list entered the public domain when Dargan tendered it in open court without any confidentiality order being sought or made. As such, there was no utility in granting an injunction to permanently restrain the use and disclosure of information that had entered the public domain: [174].

2. **Negligence, contributory negligence; damages: future economic loss**

Avopiling Pty Ltd v Bosevski; Avopiling Pty Ltd v The Workers Compensation Nominal Insurer **[2018] NSWCA 146**

Decision date: 27 July 2018

McColl JA; Payne JA; White JA

Mr Bosevski, a labourer employed by Professional Contracting Pty Ltd (**PCPL**), was injured at a work site operated by Avopiling Pty Ltd. Employees of Avopiling were erecting a mast on a pile driving rig when a cable snapped, causing metal objects to fall and strike Mr Bosevski. He brought proceedings in negligence. Avopiling filed a defence claiming contributory negligence by Mr Bosevski, and alleging that any liability it had ought to be reduced under the *Workers Compensation Act 1987* (NSW) (**the Act**), s 151Z(2), by reason of PCPL's negligence. The Workers Compensation Nominal Insurer (now responsible for PCPL's workers compensation obligations) commenced proceedings against Avopiling seeking indemnity for payments it had made to Mr Bosevski, pursuant to s 151Z(1)(d). Avopiling repeated its defence that any liability ought to be reduced due to PCPL's negligence. The proceedings were heard together. The primary judge found that Avopiling had been negligent. He found that PCPL had not been negligent and Mr Bosevski had not been guilty of contributory negligence. In the indemnity proceedings, the primary judge found in favour of the Workers Compensation Nominal Insurer, and rejected Avopiling's defence. The issues on appeal related to the findings that there had been no negligence by PCPL, or contributory negligence, as well as the award of damages.

Held:

- The appeal was allowed in part. The primary judge's formulation of the risk of harm was not in error. It identified the source and general causal mechanism of the injury: [43]. PCPL had not been negligent. Mr Bosevski and his supervisor were acting in the scope of their duties by being in the vicinity of the rig: [50]-[52]; [59]; [62]; [79]-[81]. It was not shown that PCPL knew, or had any reason to know, of the risk of harm, or that Mr Bosevski or his supervisor could appreciate the risk of harm: [55]-[58].

- Mr Bosevski had not been contributorily negligent. He had a legitimate reason for being in the vicinity of the rig when he was injured. Avopiling did not prove that he knew or ought to have known of the risk of harm: [66]-[69]; [79]-[81].

- Save for certain agreed adjustments, Avopiling had failed to show error in the award of damages for past economic loss, loss of future earning capacity and past gratuitous care: [94]-[95]; [101]-[103]; [111]-[117]; [169]. However, the primary judge did not approach the assessment of damages for future attendant care, lawn mowing, gardening and handyman services, and future medical expenses in the manner required by the *Civil Liability Act 2002* (NSW), s 13: [139]; [141]; [159]; [165]. These heads of damage were relevantly reassessed.

Other Australian intermediate appellate decisions of interest

3. **Corporations: insolvency, unfair preferences, uncommercial transaction**

Hayden Leigh White in his capacity as Joint and Several Liquidator of Port Village Accommodation Pty Ltd (in liq) -v- ACN 153 152 731 Pty Ltd (in liq) **[2018] WASCA 119**

Decision date: 23 July 2018

Murphy JA; Mitchell JA; Allanson J

Port Village Accommodation Pty Ltd (**PVA**) approached Hickory Group (**HG**) to undertake building work. The work was undertaken by a subsidiary (**HWA**). PVA made payments totalling $10,463,116 over the relevant period. All but one occurred after PVA granted a mortgage in HWA's favour. HWA paid corresponding amounts to HG. PVA went into liquidation. The appellants claimed that the payments from PVA to HWA were unfair preferences under the *Corporations Act 2001* (Cth); and the mortgage was an unfair preference or uncommercial transaction. They sought monetary relief in respect of the payments from HWA to HG. The master held that, assuming that the claims were otherwise established, HG had established a defence under s 588FG(2). Under s 588FG(2), a court may not make an order against a person who became party to a transaction in good faith, where, (i) they had no reasonable grounds for suspecting insolvency, and (ii) a reasonable person in their position would have had no grounds for so suspecting. It was accepted on appeal that the master had erred in applying s 588FG(2), not s 588FG(1), as was directed to non-parties. The issues on appeal related to the consequences of that error.

Held:

- The Court allowed the appeal. The master had erred in law in finding that HG had established a defence under s 588FG(2), when it had not relied on that provision: [128]. This was effectively a slip. In the absence of any relevant material difference between ss 588FG(1) and 588FG(2), this would not, on its own, warrant setting aside the judgment: [135]-[136].

- The master had found that Mr Argyrou, the relevant corporate mind of HWA and HG, was a reasonable person with no reasonable grounds to suspect insolvency. He found that s 588FG(2)(b)(ii) was made out because he was effectively "*a reasonable person in that person's circumstances*". This erroneous approach robbed s 588FG(2)(b)(ii) of independent operation: [95]; [138]-[139].

- Whilst the absence of a creditor's suspicion as to insolvency may be relevant to the ultimate question of how a reasonable person would regard the matter, the master's approach to the evidence focused impermissibly on Mr Argyrou's subjective appreciation of matters. The evidence, properly understood, did not make establishment of the defence inevitable: [125]; [143]. The parties were ordered to make further submissions on final orders in light of the reasons.

4. **Corporations: prohibition against financial assistance to acquire shares**

Slea Pty Ltd v Connective Services Pty Ltd **[2018] VSCA 180**

Decision date: 27 July 2018

Ferguson CJ; Whelan JA; McLeish JA

Two companies (**the Connective Companies**) were incorporated to carry out a business. The relationship between the stakeholders broke down and various proceedings were brought. At the relevant times, Mr Tsialtas' company (**Slea**) held one third of the shares in the Connective Companies. He entered into an agreement with another company (**Minerva**) for the sale of his shares in Slea. The other shareholders (**Millsave and Mr Haron**) argued that this contravened pre-emptive rights provisions in the Connective Companies' constitutions. The agreement was purportedly terminated. Slea and Minerva entered into another agreement (**the Accommodation Agreement**), which was discovered in a proceeding instituted by another Connective shareholder that ultimately settled.

The Companies brought proceedings alleging that the agreements breached the pre-emptive rights provisions and seeking injunctive relief. Slea and Minerva (**the appellants**) argued that (i) by bringing the proceeding in reliance on the Accommodation Agreement discovered in other proceedings, the Connective Companies had breached their implied undertaking not to use that agreement for any purpose other than in those proceedings, and (ii) by bringing the proceeding they were contravening the implied prohibition in the *Corporations Act 2001* (Cth) (**the Act**), s 260A, on giving financial assistance to acquire their own shares. Almond J found in the appellants' favour on (i) and granted a stay. After the companies obtained relief validating their use of the Agreement, the appellants sought leave to appeal against the s 260A finding.

Held:

- The Court allowed the appeal. One must examine the commercial realities of the impugned conduct to decide if it could be properly characterised as the company giving financial assistance to other shareholders, the frame of reference being the language of ordinary commerce: [79]. If the conduct is open to being characterised as such, a contravention is presumed under s 1324(1B): [75].

- By instituting the proceeding, the Connective Companies had provided financial assistance to Millsave and Mr Haron to acquire the Companies' shares. Slea would not offer its shares in the Companies to those shareholders, absent a court order. The proceeding 'assisted' those shareholders to obtain the option to acquire the shares, and if they accepted, to acquire them. The assistance was financial, as there was a net transfer of value from the company, which was bearing the cost of pursuing the proceedings, to Millsave and Mr Haron: [77].

- There was no warrant for taking potential penal consequences into account in assessing if financial assistance was being provided. Nor did it matter that there was no conduct which could be characterised as a 'transaction': [83]-[84].

Asia Pacific decisions of interest

5. **Corporations: compromises, classification of creditors**

Trends Publishing International Limited v Advicewise People Limited **[2018] NZSC 62**

Decision date: 16 July 2018

Elias CJ; William Young J; Glazebrook J; O'Regan J; Ellen France J

The appellant entered into a compromise with its unsecured creditors, as per the *Companies Act 1993* (NZ) (**the Act**), Part 14. Each creditor was to have the first $1,000 of their debts paid in full, with further funds shared pro rata. Under the Act, creditors representing a majority in number and 75% in value of the debts (**a qualified majority**) can commit all the creditors to a compromise. Where there is more than one class of creditor, there must be a qualified majority within each class. The creditors were classed together. Those representing 75% of the value of the debts of those voting consisted of three 'insider creditors' in favour of the compromise. The proposal was also supported by a number of 'minor creditors', each owed $1,000 or less. The respondents, who opposed the compromise, sought orders under s 232 of the Act. Under s 232, a creditor may seek an order that a compromise does not apply to a particular creditor or class of creditors, on such grounds as unfair prejudice to opposing creditors or material irregularities in obtaining approval of the compromise. The Court of Appeal upheld the decision setting aside the compromise. The issues on appeal concerned the approach taken to classification, and whether the information supplied in support of the proposal was inadequate and constituted a material irregularity.

Held:

- The Court dismissed the appeal. It was inappropriate to class the insider creditors with arm's-length creditors as they were on opposite sides of the underlying bargain. The insider creditors were primarily interested in the company's continuation, rather than getting the best return on their debts: [88].

- Those owed under $1000 should not have been included in the compromise. They were not in any real sense compromising their rights. The $1000 payment also incentivised those who owed small debts to support the compromise; as compared with the opposing creditors, who could expect to recover 11-18% of their debts. A single classification of creditors was inappropriate given the vastly different treatment accorded to their debts. There was unfair prejudice and material irregularity under s 232 sufficient to set aside the compromise: [86]-[88].

- Elias CJ and Ellen France J held that the failure to separate insider and arm's-length creditors, without more, did not amount to material irregularity, referring, *inter alia*, to the approach taken in Australia: [127]; [133]-[134]. However, the compromise was unfairly prejudicial to the opposing creditors, and the information supplied was inadequate, constituting material irregularity: [151].

6. **Torts: negligence, duty of care, economic loss**

NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd **[2018] SCGA 41**

Decision date: 19 July 2018

Menon CJ; Chong JA; Loh J

The appellant (**NTUC**) operated a food outlet (**the Kiosk**) on Premises leased from the Changi Airport Group (**CAG**) in a transit lounge in Terminal 2 of the airport. In 2014, Mr Yap was driving an airtug through the Terminal's underpass baggage handing area, when he failed to keep a proper look out and collided with a pillar supporting the floor of the lounge. This caused damage to the floor, although not directly to the Kiosk. A Closure Order was issued in respect of the affected area of the lounge, which included the Kiosk. NTUC was therefore unable to operate the Kiosk and suffered loss of profits. Some of its equipment was damaged due to dust, rust, and lack of electricity eventuating from the closure. CAG also raised concerns about damage to the waterproofing membrane under the Kiosk's floor and requested that the Kiosk be retrofitted. After the Order was lifted, NTUC rebuilt the Kiosk. It then brought proceedings against Mr Yap to recover economic losses incurred through his negligent operation of the Airtug; and claimed that his employer (**SIAEC**) was vicariously liable. The primary judge found that Mr Yap did not owe a duty of care to NTUC, and thus SIAEC was not liable. Even if a duty had been owed by Mr Yap, his negligence did not cause NTUC to suffer the costs of rebuilding the Kiosk.

Held:

- The Court allowed NTUC's appeal in part. NTUC clearly had a lease of the Premises, but this had no bearing on the outcome. The Premises and Kiosk did not suffer physical damage, nor was there any requirement under the law of negligence in Singapore that a plaintiff own or have possessory title to the property to sue for loss flowing from damage to that property: [34]-[36].

- Under the '*Spandeck* test', a duty of care will arise if it is (a) factually foreseeable that the defendant's negligence might cause the plaintiff to suffer harm; (b) there is sufficient legal proximity between the parties; and (c) policy considerations do not militate against the duty: [38]. A duty was made out on the facts of this case: [79]. However, Mr Yap's negligence did not cause NTUC to sustain the costs associated with rebuilding the Kiosk. There was scant evidence to substantiate CAG's concerns, and rebuilding was not necessary to address them: [81]-[83].

- The Court rejected the respondents' submission that a different test should apply for 'relational economic loss', being loss flowing from damage to the property of a third party. *Spandeck* established a single test for duty of care in negligence, irrespective of the nature of the loss, and whether pure economic loss or relational. There was also no compelling normative justification to transpose the specific factors relied upon in foreign authorities into this test: [59]-[61].

Other international decisions of interest

7. **Torts: negligent misstatement, undisclosed principal**

Banca Nazionale del Lavoro SPA v Playboy Club London Limited **[2018] UKSC 43**

Decision date: 26 July 2018

Lady Hale; Lord Mance; Lord Sumption; Lord Reed; Lord Briggs

Mr Barakat, a Lebanese resident, applied for a cheque cashing facility for up to £800,000 to gamble at the appellant Club. The Club's policy required a bank credit reference for twice the facility amount. The Club's practice was to arrange for an associated company (**Burlington**) to ask the bank for a reference without disclosing the purpose of the inquiry or the fact that the reference was required for another company's benefit. The respondent (**BNL**), confirmed to Burlington in writing that Mr Barakat was trustworthy up to £1.6 million in any one week and that the information was given in strict confidence. The Club granted the facility and later increased it to £1.25 million. Mr Barakat drew cheques on BNL for that total in return for gaming chips. He played at the Club and his net winnings were paid out. He then returned to Lebanon and the cheques were returned unpaid. The Club suffered a net loss of £802,940 and commenced proceedings against BNL. It was common ground that BNL had no reasonable basis for its reference. The issue on appeal was whether BNL owed a duty to the Club.

Held:

- The Court dismissed the appeal. The defendant's voluntary assumption of responsibility remains the foundation of the law permitting the recovery of pure economic loss for negligent misstatement: [7]. Knowledge of the transaction in respect of which the statement is made is relevant, *inter alia*, to identify a specific person or group to whom the defendant is said to assume responsibility: [10]. BNL had no reason to suppose that Burlington was acting for someone else, and knew nothing of the Club. In those circumstances it was plain that they did not voluntarily assume responsibility to the Club: [16].

- The Court rejected the argument that the relationship between BNL and the Club was "*equivalent to contract*" because the Club was Burlington's undisclosed principal. Whether a relationship is sufficiently proximate to give rise of a duty of care is a question of fact. Conversely, liability of a contracting party to their counterparty's undisclosed principal is a legal, not a factual, construct. While the relationship between contracting party and undisclosed principal may be mutual in a contractual sense, there is no corresponding mutuality in tort: [12]-[15].

- Lord Mance, concurring, considered that claim should not fail for want of communication of the type of purpose for which the reference was needed. The claim failed because the representation was directed simply and solely to Burlington, who alone objectively requested the representation: [20]-[24].

8. **Torts: novel duties; implied term of trust and confidence**

James-Bowen v Commissioner of Police of the Metropolis **[2018] UKSC 40**

Decision date: 25 July 2018

Lady Hale; Lord Mance; Lord Kerr; Lord Wilson; Lord Lloyd-Jones

In 2003, the respondent police officers took part in the arrest of a suspected terrorist, BA. BA alleged that the officers had seriously assaulted him during the arrest. The complaints were investigated. The Independent Police Complaints Commission released the officers' identities publicly, leading to threats of violence against them and their families by BA supporters. In 2007, BA brought civil proceedings alleging that the Commissioner was vicariously liable for the assaults. The officers were not defendants, nor did the Commissioner bring contribution proceedings against them. The Metropolitan Police Directorate of Legal Services (**DLS**) initially entered a defence denying liability.

The officers alleged that the DLS and counsel told the officers that they were also acting for them. An application for the officers to give evidence behind screens was dismissed pre-trial. A settlement officer was rejected. The officers were told that counsel was no longer representing their interests. They declined to give evidence at trial voluntarily without protective measures. The Commissioner settled the claim, admitting liability and apologising to BA for the "*gratuitous violence*" of the officers. The officers were later acquitted of criminal charges. They brought proceedings seeking compensation for reputational, economic, and psychiatric damage. The issue on appeal was whether the Commissioner owed a duty of care to her officers in the conduct of the defence of proceedings against her, to protect them from economic or reputational harm.

Held:

- No such duty was owed. The Commissioner/officer relationship was closely analogous to that of employer/employee. However, deriving the obligation contended for from the mutual implied term of trust and confidence would move far beyond derivative duties established to date: [15]-[17]. The existence of the duty must therefore be found in tort. A proposed novel duty will be tested against legal policy considerations and the coherent development of the law: [23].

- If, pursuant to authority, a Chief Constable does not have a duty to protect the economic and reputational interests of their officers in respect of the conduct of an investigation or disciplinary proceedings, it is difficult to see why a duty should be owed in relation to the conduct of a defence against a third party: [26].

- The interests of an employer sued on a vicarious liability basis differ fundamentally from the interests of impugned employees, such that it would not be fair, just, or reasonable to impose the duty contended for. Moreover, the Commissioner holds a public office, and must be free to act as she sees appropriate in accordance with her public duties. Legal policy and practical considerations also weighed heavily against imposing a duty of care: [32]-[38].