Decisions of interest

16 September 2019 – 27 September 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. **Statutory interpretation: objects and purposes**

***Cappello v Roads and Maritime Services* [2019] NSWCA 227**

Decision date: 16 September 2019

Payne JA, Brereton JA, Emmett AJA

Rosario and Maria Cappello were the registered proprietors of two adjoining parcels of land at Haberfield. Roads and Maritime Services ('RMS') proposed to acquire their land to construct a tunnel as part of the WestConnex project. A road was to be constructed in the tunnel, and that road would be a tollway.

The proposed acquisition notices stated that the land was to be acquired 'for the purposes of the *Roads Act 1993* in connection with the construction, operation and maintenance of WestConnex M4 – M5 Link tunnels.' Section 177(1) of the *Roads Act 1993* (NSW) relevantly provides that '… RMS … may acquire land for any of the purposes of this Act.'

The Cappellos commenced proceedings in the Supreme Court, challenging the validity of the proposed acquisition notices on the basis that the acquisitions were outside the scope of the purposes of the *Roads Act* and were therefore unauthorised and ultra vires. They sought declarations to that effect and an order that RMS be restrained from compulsorily acquiring the land. The primary judge refused to grant that relief and dismissed the proceedings. On 3 May 2019, RMS became the registered proprietor of the two parcels of land in accordance with s 19 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).

The Cappellos appealed. The core of their argument at first instance and on appeal was that the 'purposes' of the *Roads Act* (within the meaning of s 177) are set out definitively in s 3 ('Objects of the Act') (or at least that the 'purposes' of the *Roads Act* had to be a subset of the 'Objects', or consistent with them). They submitted that the construction of a private road in the form of a tollway was outside the 'Objects' of the *Roads Act*, and that the acquisition of their land for such a purpose was not authorised by s 177.

Held:

- Appeal dismissed: [1], [60], [62].
- The 'purposes' of the *Roads Act* referred to in s 177 are not limited only to the 'Objects' described in s 3. The scope of the expression 'the purposes of this Act' in s 177 is to be determined by reference to the provisions of the Act read as a whole. Those purposes include the exercise and achievement of particular purposes of the Act identified in the powers granted by the Act. The Act grants RMS powers to carry out 'road work', and those powers extend to tollways: [39]-[42], [49]-[52].

2. Administrative law: adequacy of reasons

***New South Wales Land and Housing Corporation v Orr* [[2019] NSWCA 231]**

Decision date: 19 September 2019

Bell P, Ward JA, McCallum JA

The New South Wales Land and Housing Corporation ('the Corporation') and Ms Orr were parties to a social housing tenancy agreement within the meaning of the *Residential Tenancies Act 2010* (NSW). Ms Orr was convicted of an offence of cultivating cannabis plants at the premises which were the subject of the agreement. The Corporation applied to the NSW Civil and Administrative Tribunal to have the tenancy terminated on that basis. The Tribunal found that s 154D(3)(b) of the *Residential Tenancies Act* was engaged as the tenant suffered a disability within the meaning of the section and a termination order would likely result in her suffering undue hardship. The effect of s 154D(3)(b) being engaged was that s 154D(1) – which mandates a termination order – was *not* engaged, and the Tribunal had a discretion whether or not to terminate under s 91. The Tribunal did not terminate the tenancy at that time. Ms Orr was convicted of further offences of the same nature. The Corporation applied again to the Tribunal to have the tenancy terminated. This time, the Tribunal found that s 154D(3)(b) was not engaged, as Ms Orr would not suffer undue hardship if the tenancy was terminated. But if, contrary to the Tribunal's conclusion, s 154D(3)(b) was engaged, the Tribunal determined that the discretion in s 91 should be exercised and the tenancy terminated. Ms Orr appealed to the Tribunal's Appeal Panel. The Panel held that while the Tribunal had erred in its interpretation of 'undue hardship', it had not erred in its exercise of the s 91 discretion. Ms Orr appealed to the Supreme Court. The primary judge held that it was neither apparent from the Tribunal's reasons *that* it took hardship (a mandatory relevant consideration) into account nor *how* it took hardship into account in exercising the s 91 discretion. In particular, the primary judge held that it was questionable whether the Tribunal could have exercised its s 91 discretion unaffected by the error in the meaning it gave to 'undue hardship' for the purposes of s 154D(3)(b). The primary judge therefore allowed the appeal. The Corporation sought leave to appeal to the Court of Appeal. On appeal, the key issues were: (1) whether the Tribunal had failed to consider a mandatory relevant consideration (hardship) such that the exercise of the s 91 discretion miscarried; (2) whether the Tribunal failed to indicate that the process of evaluation for the purposes of s 91 had been properly carried out such that the discretion miscarried; (3) whether the Tribunal's reasons were inadequate for failing to indicate whether the errors in (1) or (2) occurred.

Held:

- Leave to appeal granted; by majority, appeal allowed (McCallum JA dissenting): [107], [109], [144].
- (1) It was apparent from the Tribunal's reasons that it did take hardship into account: [79]-[93], [109].
- (2) The Tribunal's reasons did disclose to the requisite standard *how* hardship was taken into account: [79], [94]-[98], [109].
- (3) The Tribunal's reasons were not inadequate in the manner alleged: [99], [109].

Other Australian intermediate appellate decisions of interest

3. **Native title: male gender restricted evidence; practice and procedure**

***Ah-Chee v Stuart* [2019] FCAFC 165**

Decision date: 18 September 2019

Reeves J, Griffiths J, Charlesworth J

The Arabana People and the Walka Wani People made separate claims for determination of native title. Those claims overlapped with respect to the Oodnadatta Common, an area in South Australia, and so were heard together. The Walka Wani applicant filed an amended interlocutory application which relevantly sought orders for the taking into account of cultural and customary concerns relating to male gender restricted evidence. The Walka Wani applicant sought an order defining male gender restricted evidence as: 'such information relating to Aboriginal law and custom as may be identified, recorded in written form or given in oral evidence … which … may not be disseminated to: a. women; b. Aboriginal men who have not been initiated into the relevant men's law that is to be the subject of the evidence; c. children.' The effect of the orders sought by the Walka Wani applicant would have been that: only certain people could be present when the male gender restricted evidence was given; only certain people could read the transcripts of that evidence; that evidence could only be disclosed to certain people; and limitations would be placed on the recording and transcription of that evidence. The Arabana applicant and the State of South Australia opposed orders being made in the form sought by the Walka Wani applicant. The Arabana applicant particularly objected to the proposed restriction labelled 'b' above on the basis that it would prevent any member of the Arabana applicant from hearing, or being informed of, the evidence in question. They submitted that such a restriction would inhibit their ability to contest the proceedings. They proposed a variation to the orders sought by the Walka Wani applicant under which two members of the Arabana applicant, after providing undertakings, would hear the male gender restricted evidence for the purpose of giving instructions to the Arabana applicant's male legal representatives. The primary judge considered that the orders sought by the Walka Wani applicant – in their original form – would unduly prejudice the Arabana applicant, as they would lead to a denial of procedural fairness with respect to matters which were apparently central to the disagreement between the two groups. He made orders in a form like that proposed by the Arabana applicant. The Walka Wani applicant sought leave to appeal.

Held:

- Leave to appeal refused: [38].
- Leave was refused on the basis that: (i) none of the proposed grounds of appeal had sufficient prospects to warrant leave being granted; (ii) no arguable appealable error was identified; (iii) the primary judge's decision concerned a matter of practice and procedure, and no issue of general principle was at stake: [14]-[15].

4. Succession: wills; power of sale; unconscionability

Linke v Linke **[2019] VSCA 210**

Decision date: 24 September 2019

McLeish JA, Niall JA, Emerton JA

Johannes Linke was a farmer and grazier who died in 1962. He had owned a farm in Western Victoria called Abbey Hills. The farm was the principal asset of his estate. Probate of his will was granted to his wife, Emma, and his brother, Walter. Johannes had five children: Leonard (who died in 1965), Victor, Agnes, Peter, and Graeme. In 1973, Emma and Walter, as executors, transferred Abbey Hills to Victor and his wife, Judith. Victor and Judith paid $100,800 for the farm. Some disagreement arose between the siblings as to the distribution of the estate. In May 2015, a release was executed, under which Victor and Judith paid $50,000 to each of Agnes, Peter, and Graeme, and in return, were released from 'all claims suits actions or demands … in respect of the distribution of the Estate'.

In August 2016, Agnes, Peter, Graeme, and Leonard's son, Andrew, commenced proceedings in the Trial Division of the Supreme Court of Victoria. They sought to establish that Abbey Hills was held on trust for them on the basis of an absence of power to sell the estate assets, or, alternatively, on the basis that the circumstances of the transfer were such that Victor and Judith held the property as a constructive trustees. The primary judge dismissed the proceedings.

The unsuccessful applicants appealed. The issues on appeal were: (1) whether the will contained a power of sale; (2) whether the transfer of Abbey Hills gave rise to a trust on the basis that the asset was transferred below value and without knowledge or consent of the beneficiaries; (3) whether a constructive trust arose on the basis of some unconscionability in the transfers; (4) whether the release was unenforceable on the basis that Victor and Judith did not disclose matters that they were bound to disclose.

Held:

- Leave to appeal refused: [172].
- (1) The will contained a power of sale. Such a power was necessary for the trustees to be able to fulfil obligations under the will: [72]-[73], [88].
- (2) It was not proved that Abbey Hills was knowingly transferred to Victor and Judith below value; to the extent that this submission involved an allegation of fraud, that case needed to be distinctly pleaded and proven – and was not: [136]-[137].
- (3) In circumstances where Victor and Judith had run the farm for many years and had agreed to acquire it, it was not unconscionable for the trustees to sell it to them; nor was any unconscionable conduct proved on the part of Victor with respect to the other beneficiaries: [146]-[148].
- (4) It was not proved that there was any inadequate disclosure or other proper basis on which to consider the release unreasonable or unenforceable: [165], [170]-[171].

Asia Pacific decisions of interest

5. **Succession: customary law; undivided interests**

Supreme Court of Palau

***Rechesengel v Lund* [[2019] PWSC 32]**

Decision date: 18 September 2019

Rechucher J, Foley J, Castro J

In 1975, John Baptist Rechesengel and his sisters, Angelica Rechesengel and Ann Lund, inherited 20,447 square metres of land in Ngetkib, Airai, known as Limbo/Eritem. They were co-owners, each holding a one-third undivided interest in the property. In December 1998, with the authorisation of his sisters, John sold 5,000 square metres of the property to Mark Rudmich. John died unmarried and intestate in April 2014. Following his death, no formal eldecheduch was held (an eldecheduch is a customary meeting of the extended family of a deceased person, where the extended family decides how the deceased's assets should be distributed so far as the deceased's spouse and children are concerned). His daughter, Ibau Tissa Rechesengel, filed a petition in October 2017 to have her father's estate settled. Ms Lund and Mr Rudmich filed objections and claims against the estate. The primary judge held that the deceased had conveyed all of his interest in Limbo/Eritem while he was alive. If there was any remaining interest in the land, the primary judge awarded that interest to Lund and her sister. Ibau Tissa Rechesengel filed a motion to amend or alter the judgment on the basis that the Trial Division had proceeded on the basis of manifest errors of fact and law in finding that the deceased had conveyed all of his interest in the property when he was alive. The Trial Division dismissed the motion to amend or alter, holding that there was no manifest error of law or fact. Ibau appealed from that decision.

Held:

- Appeal allowed on the basis of two manifest errors. The matter was remanded to the Trial Division with instructions to issue orders granting the motion to amend or alter the judgment, and to enter an amended judgment according to law: [29].

- The first error was that the Trial Division misapprehended the nature of the deceased's interest in Limbo/Eritem and the effect of the various dealings with the land on that interest: as a co-owner with an undivided interest, the deceased's sale to Mr Rudmich had not divested him of his interest; rather, it had just diminished the size of the land in which he and his sisters had one-third interests. At his death, therefore, he still held a one-third interest in the land: [21].

- Second, in circumstances where the Palaun inheritance statute was inapplicable, and where no formal eldecheduch had been held, the customary rule that property should pass to the deceased's children should have been applied: [24], [27].

6. **Private international law: stay of proceedings; forum non conveniens**

Hong Kong Special Administrative Region Court of Appeal

***Bright Shipping Limited v Changhong Group (HK) Limited* [2019] HKCA 1062**

Decision date: 20 September 2019

Kwan VP, Barma JA

The CF Crystal was a cargo vessel owned by Changhong Group (HK) Limited ('Changhong'), a Hong Kong incorporated company. The Sanchi was a tanker owned by Bright Shipping Limited ('Bright'), a company incorporated in Belize. On 6 January 2018, the CF Crystal and the Sanchi collided in the East China Sea, at a place within the PRC's Exclusive Economic Zone ('EEZ'), but outside its territorial waters. The CF Crystal was carrying a load of sorghum at the time; the Sanchi was carrying a load of natural gas condensate. The Sanchi exploded upon collision, and both vessels caught fire. The Sanchi subsequently sunk, and none of her officers or crew survived the accident. The crew of the CF Crystal managed to extinguish the fire on board, and proceeded to Zhousan, PRC. The collision led to various legal proceedings being instituted by different parties. Some of those proceedings were brought in the Shanghai Maritime Court. In January 2018, Changhong applied to establish two limitation funds in Shanghai – one for personal injury and one for damage to property.

Bright brought an *in personam* collision action against Changhong in Hong Kong's Court of First Instance. Changhong applied to have that proceeding stayed on ground of forum non conveniens. The primary judge dismissed that application on the basis that Changhong had not established that (i) Hong Kong was not the natural or appropriate forum and (ii) that there was another forum available which was clearly or distinctly more appropriate than Hong Kong. Changhong appealed. On appeal, the two key issues concerned: (1) the significance, if any, of the fact that the collision occurred in the PRC's EEZ; (2) the significance, if any, of the fact that Changhong had established limitation funds in Shanghai and claims had been made against those funds.

Held:

- Appeal dismissed: [73].
- (1) The primary judge did not err in placing limited weight on the fact that the collision occurred in the PRC's EEZ; in circumstances where the collision occurred in the course of navigation activity – not a matter closely connected with the PRC's rights over the EEZ – the fact that the collision occurred in the EEZ was not dispositive: [24], [29]-[30].
- (2) In considering forum non conveniens issues, the significance that should be given to the fact that a party has set up limitation funds in another jurisdiction depends on the particular circumstances. Here, it was of limited significance, as Changhong could avail of itself of an equitable right to be given credit in the distribution of the Shanghai funds for payments it might make in respect of a claim that could have been brought against the funds but was not: [27], [50]-[51].

Other international decisions of interest

7. **Costs: special costs orders; disability insurance contracts**

Court of Appeal for British Columbia

***Tanious v The Empire Life Insurance Company* 2019 BCCA 329**

Decision date: 20 September 2019

Bauman CJ, Dickson J, Hunter J

Noha Tanious was employed by a Canadian company between 2005 and 2012. Shortly before commencing that employment, she was diagnosed with multiple sclerosis ('MS'). Her health subsequently deteriorated. In 2011, she started to use an illicit substance to try to improve her cognition. In January 2012, her employment was terminated. As an employee, Ms Tanious had been covered by a group policy of disability insurance issued by the Empire Life Insurance Company ('Empire'). She applied for long-term disability benefits under that policy. Empire rejected the claim. Ms Tanious commenced proceedings against Empire, claiming that Empire was in breach of the policy in refusing her claim. The primary judge found in Ms Tanious' favour. Ms Tanious sought a special costs order, namely, costs on a solicitor-client basis rather than a party-party basis. Ms Tanious did not allege any bad faith or reprehensible conduct on Empire's part (the recognised bases on which a special order might be made). Rather, she submitted that disability insurance claims involve special circumstances which justify full indemnification of an insured's costs where they have to litigate to enforce the contract. Special costs were necessary, she argued, to fulfil the purpose of disability insurance: the contract was meant to provide subsistence-level disability benefits; having to cover the difference between her actual costs and an award on the ordinary basis would effectively deprive Ms Tanious of such benefits. The primary judge ordered Empire to pay special costs. Empire appealed on costs, arguing that the primary judge erred in law in awarding special costs in the absence of bad faith, reprehensible conduct, or exceptional circumstances. On appeal, Ms Tanious submitted that special costs awards should be made in all successful disability insurance claims, or in the alternative, that the primary judge had not erred in so ordering in her case.

Held:

- Appeal dismissed; special costs of the appeal awarded: [85].
- The primary judge did not err in awarding special costs in the circumstances. A costs order on the ordinary basis would have defeated the purposes of the contract, as covering the difference between such an award and Ms Tanious' actual costs would have deprived her of the benefits the contract was meant to provide: [77]-[81].
- The Court rejected the submission that special costs awards should be made in all successful disability insurance claims; a principled, judicial exercise of the discretion to award special costs cannot be subject to the prescriptive rule Ms Tanious argued for: [75]-[76].

8. **Constitutional law: separation of powers; judicial review of prerogative powers**

Supreme Court of the United Kingdom

R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland **[2019] UKSC 41**

Decision date: 24 September 2019

Lady Hale, Lord Reed, Lord Kerr, Lord Wilson, Lord Carnwath, Lord Hodge, Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Kitchin, Lord Sales

On the 27th or 28th of August, the Prime Minister of the United Kingdom, Boris Johnson, advised Her Majesty the Queen that the Parliament should be prorogued. An Order in Council was accordingly made ordering that 'the Parliament be prorogued on a day no earlier than Monday the 9th day of September and no later than Thursday the 12th day of September 2019 to Monday the 14th day of October 2019'. When the prorogation was announced, Mrs Gina Miller commenced proceedings in the High Court of England and Wales seeking a declaration that the Prime Minister's advice was unlawful. The High Court dismissed those proceedings on the basis that the question was not justiciable, but granted a "leap-frog" certificate allowing an appeal directly to the Supreme Court. Mrs Miller appealed. In Scotland, 75 MPs and members of the House of Lords, together with a QC, launched a petition in the Court of Session, seeking a declaration that prorogation in order to prevent debate in the run-up to the date when Britain was scheduled to leave the European Union was unlawful, and an interdict to prevent Parliament from being prorogued. On 4 September 2019, the Lord Ordinary, Lord Doherty, refused the petition on the ground that the question was not justiciable. An appeal to the Inner House of the Court of Session succeeded. The Inner House held that: the question was justiciable; the advice was given for the improper purpose of preventing Parliament from scrutinising executive action; and the subsequent prorogation was null and void. The Inner House gave permission to appeal to the Supreme Court. The Advocate General for Scotland appealed.

Held:

- Mrs Miller's appeal was allowed; the Advocate General's appeal was dismissed. The Court declared that the advice was unlawful, quashed the Order in Council, and declared that the prorogation of Parliament was unlawful, null and of no effect: [62], [69], [71].

- The Court held that the question of the exercise of the prerogative power to prorogue the Parliament was justiciable. By reference to constitutional principles, the Court formulated a test by which to assess whether the prorogation power had been used unlawfully: a decision to prorogue Parliament (or to advise the monarch to do so) will be unlawful 'if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.' Applying that test, the Court held that, in the circumstances, the prorogation of Parliament was unlawful: [50], [52], [61].