Court of Appeal
Supreme Court
Sydney

Decisions of interest

18 February 2019 – 1 March 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Equity: presumption of resulting trust; meaning of 'immediate and unconditional beneficial interest' in *Muschinski v Dodds***

   ***Jain v Amit Laundry Pty Ltd* [2019] NSWCA 20**

   Decision date: 19 February 2019

   Bathurst CJ, Beazley P, White JA

   Rajil Jain is the sole registered proprietor of a property (the Guildford Property), which was initially acquired in the names of Rajil and his brother, Vinay. Vinay subsequently transferred his registered interest to Rajil. The property was acquired in 1999. The deposit for the property was paid by Amit Laundry Pty Ltd (Amit Laundry), a family business operated by the Jains. A mortgage was taken out in the names of Rajil, Vinay, and their older brother, Amit, in order to pay the balance of the purchase price. The mortgage repayments were made by Amit Laundry. Amit Laundry has occupied the ground floor of the Guildford Property since 1999. A dispute arose in relation to the beneficial ownership of the property when, on 2 November 2016, Rajil entered into a contract with a third party for the sale of the Guildford Property with vacant possession. On 4 November 2016, Rajil served on Amit Laundry a notice of termination and notice to quit the premises. Amit Laundry did not vacate the premises. In January 2017, Amit Laundry commenced proceedings in the Supreme Court, seeking, inter alia, a declaration that Rajil held the title to the Guildford Property for it on resulting trust. Rajil argued that the parties intended that he would hold the entire beneficial interest, or alternatively, if the presumption of resulting trust did arise, that it was rebutted by a presumption of advancement in his favour.

   The primary judge held that a presumption of resulting trust arose in favour of Amit Laundry and Amit from the contributions that Amit Laundry made to the deposit and by Amit as a borrower under the mortgage. Her Honour further held that the mortgage repayments made by Amit Laundry did not count as contributions to the purchase price for the purpose of the presumption. Her Honour rejected Rajil's submissions concerning the actual intention of the parties and the presumption of advancement. The main issue on appeal, brought by Rajil, and cross-appeal, brought by Amit Laundry, was whether the primary judge erred in failing to find that there was a common intention amongst the contributors to the purchase price as to how the beneficial interest in the Guildford Property would be allocated.

   Held:

   - At the time of acquisition, there was no common intention amongst the contributors to the purchase price such as to displace the operation of the presumption of resulting trust: [96], [144], [154].

   Cases considered:

   - *Bloch v Bloch* (1981) 180 CLR 390; *Calverley v Green* (1984) 155 CLR 242; *Dullow v Dullow* (1985) 3 NSWLR 532; *Muschinski v Dodds* (1985) 160 CLR 583.

2. **Contracts: insurance; time at which an insured's cause of action for breach of contract under an indemnity policy of property insurance accrues; *Limitation Act 1969* (NSW) s 14**

***Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27**

Decision date: 26 February 2019

Bathurst CJ, Beazley P, Ward JA, Meagher JA, Leeming JA

Globe Church Incorporated (Globe Church) made claims against its insurers, Allianz Australia Insurance Ltd and Ansvar Insurance Ltd (the defendants) under an insurance policy it had taken out that ran to 31 March 2008. The claims arose out of alleged property damage occurring to a church building and its contents. The damage was alleged to have been caused by rainwater and flooding between 8 June 2007 and 31 March 2008. Globe Church made claims under the policy in 2009. Both defendants denied liability in 2011. Globe Church commenced proceedings in the Supreme Court in 2016, alleging that the defendants' denials of liability (or their failures to indemnify) were in breach of the policy, and that it had suffered loss and damage as a result of those breaches. In the circumstances, the six year limitation period on causes of action founded in contract in s 14 of the *Limitation Act 1969* (NSW) raised a significant threshold question: at what time did Globe Church's cause of action in contract against its insurers accrue to it? If it was at the time when the damage to property was sustained, then its claims in contract under the policy ending in March 2008 would be statute-barred. A judge of the Common Law Division referred the matter to the Court of Appeal for the determination of separate questions. Those questions were:

(a) In respect of any alleged damage to the [Church] Properties that occurred between 8 June 2007 and 31 March 2008, which (if any) of the plaintiff's claims in these proceedings in respect of the 2008 policy accrued at the time of alleged damage, for the purposes of s 14(1) of the *Limitation Act 1969* (NSW)?

(b) In light of the answer to (a), which (if any) of the plaintiff's claims in these proceedings in respect of the 2008 Policy for that damage are maintainable?

Held:

- Bathurst CJ, Beazley P, and Ward JA: A promise to indemnify is a promise to hold a plaintiff harmless against loss; as such, a plaintiff's cause of action for breach of such a promise accrues on the happening of the insured event. The questions should be answered: (a) the claims for Property Damages accrued no later than 31 March 2008; (b) none of the claims in question are maintainable: [122], [127], [210], [215].

- Meagher JA and Leeming JA (dissenting): the language of the insuring clause, the nature of the policy as one insuring against property damage, and the commercial expectations of the parties to such a contract lead to the conclusion that the insurer's promise is to pay a sum of money, calculated in accordance with the policy, within a reasonable time after receiving a claim. The questions should have been answered: (a) None; (b) To the extent this question arises, the answer cannot be determined in the absence of further facts: [236], [284], [285], [287], [302].

Other Australian intermediate appellate decisions of interest

3. **Appeals: competence of appeal; distinction between orders and reasoning**

Director-General, Community Services Directorate v WS **[2019] ACTCA 4**

Decision date: 22 February 2019

Elkiam, Loukas-Karlsson, Rangiah JJ

The Childrens Court of the ACT made a decision concerning the care and protection of a child in August 2016. That decision was appealed to the Supreme Court of the ACT. In May 2018, a judge of the Supreme Court upheld the appeal, set aside the orders made by the Childrens Court, and remitted the matter to the Childrens Court for determination according to law. The Director-General of the Community Services Directorate appealed from that decision to the Australian Capital Territory Court of Appeal, initially seeking to have the orders made in the Supreme Court vacated. At the beginning of the hearing, counsel for the appellant said that the Director-General was no longer seeking to have the Supreme Court's orders vacated, but together with the respondent, wanted the matter to be remitted to the Childrens Court, as ordered by the Supreme Court. But the Director-General still wished to proceed with the appeal in order to challenge the reasoning of the judge below, though not the orders. The Director-General submitted that the judge below's reasons for remitting the matter – based on a particular construction of the *Children and Young Persons Act 2008* (ACT) – were in error, and wished to press that point on appeal. The appellant's approach raised a question for the Court of Appeal as to whether the appeal was competent, given that it did not challenge any order of the court below. This question turned on the construction of s 37E(2)(a) of the *Supreme Court Act 1933* (ACT) which provides that: 'The following matters may be brought before, and heard by, the Court of Appeal: (a) appeals in relation to orders of the court…'. The question of the whether the appeal was competent therefore turned on the construction of the phrase 'orders of the court'.

Held:

- The Court was not satisfied that the Director-General's appeal concerned the 'orders of the court', and therefore dismissed it as incompetent: [7], [16], [20].
- Given that the parties agreed that the matter should be returned to the Childrens Court, even if the Court of Appeal were able to deal with the purported appeal, there was no need for it to do so, so the case was an inappropriate vehicle for full-scale consideration of s 37E(2)(a): [17]-[18].

Cases considered:

- *R v Ireland* (1970) 126 CLR 321; *Driclad Pty Ltd v Commissioner of Taxation* (1968) 121 CLR 45; *Westport Insurance Corporation v Gordian Runoff Limited* 244 CLR 239; *Patsalis v Attorney-General for New South Wales* (2013) 85 NSWLR 463.

4. **Tax: meaning of 'resident or resident of Australia' in s 6 *Income Tax Assessment Act 1936* (Cth)**

***Harding v Commissioner of Taxation* [2019] FCAFC 29**

Decision date: 22 February 2019

Logan, Davies, and Steward JJ

Mr Harding is an Australian citizen who has lived and worked in various places in the Middle East on and off since 1990. These proceedings concerned whether he was a resident of Australia within the meaning of s 6 of the *Income Tax Assessment Act 1936* (Cth) in the financial year ending 30 June 2011. If he was a resident of Australia, then he was liable to pay income tax in respect of the salary he received while working in Saudi Arabia that financial year. In that financial year, the evidence was that he lived in various rented apartments in Bahrain, commuting to Saudi Arabia each day.

Section 6 relevantly provides that 'resident' or 'resident of Australia' means:

> (a) A person, other than a company, who resides in Australia and includes a person:
>
> > (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;

Based on how the parties had conducted the proceedings, the primary judge considered the question for the Court in relation to subpara (i) above to be whether Mr Harding had a permanent place of abode outside Australia. The primary judge construed the phrase 'permanent place of abode' narrowly, finding that because Mr Harding did not have a specific fixed or permanent dwelling in Bahrain (he moved between several apartments), he did not have a permanent place of abode outside Australia, and therefore did not come within the second clause of subpara (i).

Mr Harding appealed to the Full Federal Court, arguing that the primary judge had misconstrued the definition in subpara (i). In the alternative, Mr Harding argued that the primary judge had misapplied the definition in his case, erring in finding that Mr Harding's presence in each of the apartments he inhabited during the relevant period was temporary or transitory, rather than such as to constitute a permanent place of abode outside Australia.

Held:

- As preliminary matter, the parties had conducted the proceedings on the wrong footing: the question in subpara (i) concerns the Commissioner's state of mind, not the objective fact of whether a person's permanent place of abode is outside Australia; but by agreement, the appeal proceeded on that footing: [17], [21]-[22].
- The appeal was allowed on the basis that the first of Mr Harding's arguments succeeded: in this statutory context, 'place of abode' should be understood more broadly to refer to a town or country. On that basis, Mr Harding was not a resident of Australia in the relevant financial year: [26], [40].

Asia Pacific decisions of interest

5. **Constitutional law: powers of parliament to retroactively authorise appropriations; separation of powers**

Supreme Court of Palau

Republic of Palau v Ngarchelong State Government **[2019] PWSC 5**

Decision date: 19 February 2019

Ngiraklsong CJ, Rechucher J, Michelsen J

Browny Salvador, the Governor of the state of Ngarchelong, Palau, was charged by the Office of the Special Prosecutor (OSP) with misconduct in public office and a criminal violation of the code of ethics. Together with the state treasurer, he had authorised an increase in pay to himself, retroactive to the prior year. On the day that he was arraigned on those charges, the Ngarchelong State Assembly passed legislation, retroactively authorising the pay increase. The OSP sought interlocutory relief, naming the State, the Assembly, and the Governor as defendants. The OSP sought a declaration that the law authorising the pay increase was invalid under both the Palau Constitution and the Ngarchelong State Constitution, as well as declarations that the law was an unlawful attempt to interfere with a criminal prosecution and that it contravened a national law prohibiting misappropriation of public funds. The Trial Division temporarily restrained the implementation of the legislation that purported to authorise the pay increase until the criminal proceedings were resolved. Governor Salvador entered a 'Deferred Acceptance of Guilty' plea. Once the constitutional proceedings recommenced, the Trial Division gave summary judgment for the defendants. The OSP appealed from that decision, putting, as grounds of appeal, the same three arguments as at first instance.

Held:

- The Court upheld the Trial Division's decision in all respects: [23].
- The Ngarchelong State Assembly has legislative power to retroactively ratify expenditures or financial obligations that were not authorised when spent if those expenditures were such that they could have been authorised prospectively: [15].
- Because Governor Salvador entered a deferred guilty plea, the question of criminal liability was never in issue. On that basis there was no interference with an ongoing criminal investigation: [16].
- The national law prohibiting misappropriation of public funds applies to persons; it does not apply to legislative acts, so there is no sense in which the authorising legislation can contravene the law prohibiting misappropriation of public funds: [17]-[18].
- On separation of powers grounds, the Assembly should not have been listed as a defendant: [20]-[22].

6. **Administrative law: judicial review; migration; whether failure to exercise merits review rights precludes judicial review under *Immigration Act 2009* (NZ)**

Supreme Court of New Zealand/Te Kōti Mana Nui

H (SC 52/2018) v Refugee and Protection Officer **[2019] NZSC 13**

Decision date: 25 February 2019

Elias CJ, Young, Glazebrook, O'Regan, and France JJ

Mr H was a Pakistani national seeking protection as refugee in New Zealand. He made a claim for protection, and an interview was scheduled with the Refugee Status Branch of New Zealand Immigration (RSB). The day before the interview, he fell ill. He obtained a medical certificate and supplied it, through his lawyer, to RSB on the day his interview was meant to take place. The medical certificate was not in the right file format. Further, though Mr H's lawyer had supplied RSB with additional documents that provided information lacking in the certificate, they did not meet the requirements for cancelling an interview. Consequently, a Refugee and Protection Officer (RPO) declined Mr H's application for recognition as a refugee on the basis that he 'failed' to attend the interview. Mr H applied for judicial review of the RPO's decision, arguing that it was unreasonable and unfair. He also appealed to the Immigration and Protection Tribunal, a body which reviews immigration decisions on their merits. The High Court dismissed the application for review for want of jurisdiction. It reached this conclusion on the basis that s 249 of the *Immigration Act 2009* (NZ) had the effect that the Court only had jurisdiction to hear the proceeding if the appeal had first been determined by the Tribunal. Section 249(1) relevantly provides that: 'No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal.'

The Court of Appeal dismissed an appeal from the High Court. Mr H appealed to the Supreme Court, arguing that s 249(1) was intended to help create a streamlined system of consideration, appeal, and review, but had to be read in the context of that system as a whole, and subject to the recognition of the importance of judicial review in the *New Zealand Bill of Rights Act 1990*. His argument was that the system is intended to provide a first-instance consideration of the merits of a claim by a RPO, followed by a *de novo* appeal in the Tribunal, and the deferral of judicial review that s 249(1) effects is premised on those initial two steps being fulfilled. In the circumstances, his claim had not been considered at first instance, so he argued that judicial review should be available to him regardless of whether he had exhausted appeal rights in the Tribunal.

Held:

- The appeal was allowed, and the matter remitted to the High Court for consideration. The construction of privative clauses, like s 249(1), should be approached with caution. In this instance, s 249(1) did not prevent the exercise of the High Court's supervisory jurisdiction to ensure that the system for considering claims established in the legislation was administered according to law: [63], [78], [89].

Other international decisions of interest

7. **Constitutional law: application of Excessive Fines clause of US Constitution to state legislatures**

Supreme Court of the United States

Timbs v Indiana **586 U.S. ___ (2019)**

Decision date: 20 February 2019

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

In criminal proceedings in Indiana, Tyson Timbs pleaded guilty to dealing in a controlled substance and conspiracy to commit theft. At the time of his arrest, police seized his Land Rover SUV. He had bought it for $42,000, using money received from an insurance policy when his father died. The State of Indiana alleged that the SUV had been used to transport heroin, and sought civil forfeiture of the car. At first instance, the trial court noted that the maximum fine for Timbs' drug conviction was $10,000, and denied the State's request for forfeiture. The trial court observed the disparity between the maximum fine and the value of the asset, and concluded that forfeiture of the car would be grossly disproportionate to the gravity of Timbs' offending, and therefore in breach of the Excessive Fines clause of the Eighth Amendment to the US Constitution. The Eight Amendment provides that 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' The Court of Appeals of Indiana upheld that decision. The Indiana Supreme Court reversed it, holding that the Excessive Fines clause only constrains federal action, and does not apply to state governmental action. Timbs appealed to the Supreme Court of the United States.

On appeal, the question was: 'Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause?' The Due Process Clause provides: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

Held:

- The Court unanimously concluded that the prohibition on excessive fines does apply to the States. Seven judges concurred in Ginsburg J's opinion; Gorsuch J and Thomas J each filed concurring opinions.
- The protection against excessive fines was held to be 'fundamental to our scheme of ordered liberty', with 'deep roots in our history and tradition', notably, in Magna Carta and colonial constitutions: 3-7.
- The decision of the Indiana Supreme Court was vacated: 9.

8. **Civil procedure: unnamed defendants; motor vehicle accidents**

United Kingdom Supreme Court

Cameron v Liverpool Victoria Insurance Co Ltd **[2019] UKSC 6**

Decision date: 20 February 2019

Lord Reed, Lord Sumption, Lord Carnwath, Lord Hodge, Lady Black

In May 2013, Ms Bianca Cameron was injured when her car collided with a Nissan Micra. The accident was caused by the negligence of the driver of the Micra. The registration number of the Micra was recorded, but the driver made off without stopping and has not been identified since. The registered keeper of the Micra has been identified, but he refused to identify the driver and has been convicted accordingly. The car was insured under a policy issued by Liverpool Victoria Insurance Co Ltd (LVI) to a Mr Nissar Bahadur – but the company believes him to be a fictitious person. Neither the registered keeper nor the driver on the day of the accident was insured under the policy. The UK's compulsory motor vehicle insurance scheme is set up to provide for victims of 'hit and run' incidents by way of a fund operated by the motor insurance industry. For reasons that are unclear, Ms Cameron did not claim against that fund. Instead, she commenced proceedings in the Liverpool Civil and Family Court. Initially, she sued the registered keeper for damages. The proceedings were amended to seek relief in the form of a declaration that LVI would be liable to meet a judgment against the registered owner. LVI denied liability on the basis that the registered owner could not be liable, as there was no evidence that he was the driver at the time. In response, Ms Cameron applied to amend her claim in order to substitute for the registered owner 'the person unknown' who was driving the Micra. District Judge Wright dismissed the application, and entered summary judgment for the insurer. An appeal to the County Court was dismissed. A further appeal to the Court of Appeal was allowed by majority. The majority held that the Court has a discretion to permit an unnamed defendant to be sued if justice required it. The majority held that justice did require it, in order that Ms Cameron might be compensated by LVI. The majority thought it irrelevant that Ms Cameron could have claimed from the fund noted above. LVI appealed to the Supreme Court.

Held:

- The Court unanimously allowed the appeal, set aside the order of the Court of Appeal, and reinstated the order of District Judge Wright: [31].

- The Court distinguished between two classes of unnamed persons who might be sued: those who are identifiable but whose names are unknown (like squatters in a particular property); and those who cannot be identified (like hit and run drivers). It is a fundamental aspect of natural justice that a person cannot be made subject to the court's jurisdiction without having notice of the proceedings. Where a person is not identifiable, a court cannot have confidence that they will have notice of any proceedings brought against them. It would only be appropriate for such a person to be sued under a pseudonym or description if the circumstances were such that service of process could be effected or justifiably dispensed with: [17], [18], [21], [26].