Court of Appeal
Supreme Court
Sydney

Decisions of interest

27 November – 15 December 2017

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. **Negligence: whether horseracing a "recreational activity"**

   ***Goode v Angland* [[2017] NSWCA 311]**

   Decision date: 7 December 2017

   Beazley P, Meagher JA, Leeming JA

   Mr Goode suffered serious injuries in a fall while he was riding as a professional jockey. Mr Goode claimed that his injuries, loss and damage were caused by the negligence of another professional jockey (Mr Angland), who he claimed rode in such a manner as to cause interference with Mr Goode and his horse.

   Mr Angland accepted that the relevant risk was both foreseeable and not insignificant for the purposes of s 5B of the *Civil Liability Act 2002* (NSW) (**CLA**). Therefore, the question to be determined at the trial was whether Mr Goode could establish that Mr Angland rode his horse in an unreasonable manner in all of the circumstances. Harrison J found in the negative, and rejected Mr Goode's claim.

   Harrison J also found that, in any event, s 5L operated to exclude liability on the basis that Mr Goode suffered harm as a result of the materialisation of an obvious risk of a dangerous recreational activity. Section 5K defines "recreational activity" to include any sport, any pursuit or activity engaged in for enjoyment, relaxation or leisure, and any pursuit or activity engaged in at a place where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure. His Honour considered that horseracing was caught by this definition.

   On appeal, Mr Goode submitted that professional horse racing was not a "recreational activity" within the ordinary meaning of that term, and sought to confine s 5L to activities which were of a recreational nature.

   Held:

   - The Court unanimously dismissed the appeal.
   - It was common ground that the risk that a jockey might fall during a race and suffer injury was an obvious risk. Thus, the dispositive issue was whether horseracing was a "recreational activity": [183].
   - The primary judge was correct to conclude that s 5L applied. Horseracing is a sport which engages the first limb of the definition of "recreational activity" in s 5K. The limbs in s 5K are disjunctive. The words "any sport" preclude a distinction between sports engaged in for recreational and professional purposes: [5]; [190]; [210].
   - The Court declined to follow *Dodge v Snell* [2011] TASSC 19, where it was held that professional horseracing was not a "recreational activity", notwithstanding that the Tasmanian statutory definition included "any sport": [205]-[209].

2. Aviation; Bailment; Torts; Worker's Compensation

***South West Helicopters Pty Ltd v Stephenson* [2017] NSWCA 312**

Decision date: 7 December 2017

Basten JA, Leeming JA, Payne JA

In 2006, Parkes Shire Council (**the Council**) engaged South West Helicopters Pty Ltd (**South West**) to provide a helicopter and pilot to conduct a weed survey. The helicopter pilot was an employee of South West but the helicopter was owned by Country Connection Airlines Pty Ltd (**Country Connection**). During the survey, the helicopter struck a power line owned by Essential Energy and crashed, killing the pilot and the Council employees on board (Mr Stephenson and Mr Buerckner).

Mr Stephenson's relatives commenced proceedings against South West and the Council and cross-claimed against Essential Energy. The Council initiated proceedings against South West to recover compensation payments made to its employees' families. South West and Country Connection commenced proceedings against Essential Energy for the loss of the helicopter. Bellew J delivered four judgments. South West and Country Connection, Essential Energy, and the Council appealed.

Held:

South West's liability to the Stephensons':

- Mr Stephenson was a "passenger" on board the helicopter for the purpose of the *Civil Aviation (Carrier's Liability) Act 1967* (NSW). Passengers are persons other than those involved in the flight's operation: [60]; [78]; [263]; [365]. Further, the claims arose in respect of Mr Stephenson's death. Thus, South West had a statutory immunity pursuant to s 35(2) of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), as the Stephensons' claims were brought outside the limitation period.

- If the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) did apply to the Stephensons' claims, South West's liability would be in substitution for any liability under the *Compensation to Relatives Act 1897* (NSW): [83], [260], [365].

South West's liability for worker's compensation payments: The Council could not recover compensation payments made to the family from Southwest. The *Workers Compensation Act 1987* (NSW), s 151Z(1)(d), does not confer a right of indemnity where the employer is a tortfeasor: [170], [261], [371].

The liability of joint wrongdoers: South West and the Council were negligent, but Essential Energy was not. Accordingly, South West was liable for two-thirds of the damages, and the Council for one-third. The Council was entitled to recover from South West two-thirds of the payments of damages made to the family, subject to a statutory cap.

South West's claim for loss of aircraft: South West was entitled (as bailee of a chattel) to recover the value of the helicopter, subject to apportionment of liability: [245]-[246]; [261]; [371].

Other Australian intermediate appellate decisions of interest

3. **Damages: recovery of costs against Attorney General**

Wreck Bay Aboriginal Community Council v Williams (No 2) **[2017] ACTCA 56**

Decision date: 1 December 2017

Murrell CJ, Burns and Mossop JJ

The appellant and respondent in this appeal agreed that as between themselves there should be no order made as to the costs of the appeal. However, the Wreck Bay Aboriginal Community Council (**Wreck Bay**) sought a costs order against the Attorney-General of the Australian Capital Territory, who intervened in the proceedings pursuant to s 27 of the *Court Procedures Act 2004* (ACT).

Section 27(4) provides that if the Attorney-General intervenes in a proceeding under that section, and there are in the opinion of the court or tribunal special reasons for making an order, the court or tribunal may make an order for costs against the Crown to reimburse the parties to the proceeding for costs occasioned by the intervention.

Wreck Bay submitted that the Attorney-General's intervention in this case was "gratuitous", and that the Attorney General's privileged position in relation to costs should not extend to involvement in a matter which strays outside the proper basis for intervention.

Held:

- There are no special reasons that warrant the making of the costs order. Accordingly, the Court made no order as to costs as between the appellant and the Attorney-General: [8].
- Section 27(4) clearly involves a modification of the usual rule in relation to costs. It limits the circumstances in which a costs order may be made against an Attorney-General who intervenes under the section. It requires the court or ACAT to reach the conclusion that there are special reasons for the making of a costs order against an Attorney-General who has intervened under the section: [27].
- The immediate dispute in the proceedings had limited consequences for the ACT. However, there were more general questions relating to the relationship between ACT and Commonwealth laws which arose in the case. While it was not a case which, because of the subject matter, compelled intervention by the Attorney-General, it was a case in which it was reasonable for the Attorney-General to intervene: [8].
- The Attorney-General's intervention did not have the effect of substantially lengthening the hearing. While responding to the Attorney-General's written submissions would have required additional work on the part of Wreck Bay, that process refined the issues in dispute and was of assistance to the Court: [8].

4. **Evidence: legal professional privilege; class action proceedings**

***Perazzoli v BankSA, a division of Westpac Banking Corporation Limited* [2017] FCAFC 204**

Decision date: 8 December 2017

Perram, Foster and Murphy JJ

Mr Perazzoli and two others brought class action proceedings (**the investors**) on behalf of all persons who advanced monies to the private lending business Adelaide Lending Centre. The investors alleged that the business was a Ponzi scheme implemented with the knowing assistance of BankSA, a division of Westpac.

BankSA lodged an interlocutory application seeking summary dismissal or a permanent stay of the class action. It issued subpoenas to GMG Legal Services Pty Ltd (trading as **Griffins**) and LCM Litigation Fund Pty Ltd (**LCM**). Griffins and LCM claimed legal professional privilege over numerous documents. The primary judge refused claims in relation to documents that came into existence before 30 June 2013. Until that date, His Honour considered that litigation was no more than “a vague prospect”.

On appeal, the central question was whether the primary judge erred in concluding that documents created by Griffins in the preparatory stages of the class action (before any of the investors had entered into a formal retainer agreement with the firm or signed a litigation funding agreement), did not attract legal professional privilege.

Held:

- The Court allowed the appeal. The evidence demonstrated that Griffins built a case against BankSA in late 2009 and early 2010. Preparation then slowed as Griffins waited for the results of the liquidators’ investigation, awaited the bankruptcy examinations and endeavoured to finalise litigation funding. However, litigation was still “reasonably in anticipation” during this time: [109]; [126].
- The primary judge gave too much weight to the delay in securing litigation funding and insufficient weight to the fact that investors were paying some of the disbursements incurred in the investigation of the case. The Court noted that:
    - The collapse of an investment scheme involving allegations of fraud and causing multi-million-dollar losses very often leads to litigation. This “might well have” resulted in litigation: [109]; [118]-[119].
    - Large class actions involve significant legal work in the incipient stages and case preparation is often slow. A lawyer’s delay should not mean that clients lose the benefit of the litigation privilege: [126]; [128].
    - Litigation may be reasonably anticipated without nailing down the funding arrangements for the proposed case: [133].
    - Investors would not have paid significant disbursements during the investigation stage unless they were seeking to gather information in aid of prospective litigation: [136]-[137].

5. **Real property: claim for return of public land**

Supreme Court of Palau

***Kerkur Clan v Koror State Public Lands Authority* [2017] PWSC 28**

Decision date: 30 November 2017

Ngiraklsong CJ, Michelsen and Castro JJ

A dispute arose over the ownership of lots of public land in the State of Koror. Two applicants filed claims for the return of the land that was wrongfully taken by the government. Namely:

- Ngeribongel Rechuld claimed that he had cultivated the land before it was taken by the Japanese.
- The Kerkur Clan claimed that their land was taken by the Japanese, who paid only token compensation.

The Land Court found that the land was public (that is, that the land was "under complete control of the government" since the 1950s). The Court further held that no claimant had met their burden to prevail on a claim for return of public lands. The claimants appealed to the Supreme Court.

Held:

- The Supreme Court dismissed the appeal.
- The Supreme Court must review the Land Court's conclusions of law de novo and its findings of fact for clear error. Factual determinations of a lower court should only be set aside if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion: [11].
- To establish a claim for the return of public land, an applicant must establish that: (1) he or she a citizen who filed a timely claim; (2) he or she is either the original owner of the land or one of the original owner's proper heirs; and (3) that the claimed property is public land, which attained that status by a wrongful government taking: [21].
- Ngeribongel Rechuld's appeal does not meet the high burden to show clear error. The claimant did not provide evidence to support the appeal or directly address the Land Court's findings: [14].
- The Kerkur's Clan's appeal also fails. The Court acknowledged that this "should have been an easy with for the clan". However, it failed to do things necessary to achieve that win. In particular, counsel failed to provide a map which accurately placed a certain piece of land, and conducted a "sweeping" claim: [35].

6. Torts: trespass to land; power to exclude from public meetings

Court of Appeal of New Zealand

***Board of Trustees of Nelson College v Fitchett* [2017] NZCA 572**

Decision date: 7 December 2017

Kós P, Harrison and Brown JJ

Mr Fitchett, a member of the public, began attending meetings of the Nelson College Board (**the Board**) in May 2016. The Board is a local authority for the purpose of pt 7 of the *Local Government Official Information and Meetings Act 1987* (**LGOIM Act**). Section 47 provides that every meeting of a local authority shall be open to the public. Section 48 provides a power to exclude the public during confidential discussions. Section 50 provides a power to exclude individual members of the public so as to maintain order at meetings.

The Board resolved to ban audio recordings of meetings by members of the public. At a meeting on 9 March 2017, Mr Fitchett refused to respond the Chairman's question about whether he was recording the meeting. The Chairman stated that the Board now assumed that he was recording it, and expressed the view that Mr Fitchett's behaviour was likely to prejudice the orderly conduct of the meeting. He asked Fitchett to leave. Mr Fitchett was unresponsive but produced a recording device. The Chairman stated that he had the right to have Mr Fitchett removed, but that he would not exercise that right.

On 30 March 2017, the Board served a trespass notice on Mr Fitchett pursuant to s 4 of the *Trespass Act 1980* (**Trespass Act**)*.* The notice directed Mr Fitchett to "stay off the place known as Nelson College buildings". The High Court found that the notice was invalid. While the Trespass Act can be invoked if a person fails to leave a particular meeting, a notice cannot be issued to prohibit attendance at future meetings.

Held:

- The Court dismissed the appeal.

- In the absence of an express or implied licence, a person who enters on the land of another is a trespasser. Section 47 of the LGOIM Act confers a qualified licence to enter land for the purpose of attending meetings of a local authority. That licence is qualified by ss 48 and 50. When a person's entitlement to attend a meeting is revoked under s 50, they are a trespasser if that person refuses or fails to leave within a reasonable time: [22]-[23].

- A member of the public may only be excluded from a local authority meeting under the powers conferred in ss 48 and 50. The Trespass Act is a statute of general effect which applies to all trespasses, whereas the LGOIM Act is confined to meetings of local authorities. The interpretation should be preferred whereby the special provision prevails over the general: [26]; [29].

Other international decisions of interest

7. **Constitutional law: constitutional validity**

Constitutional Court of South Africa

***Ramuhovhi and Others v President of the Republic of South Africa and Others* [[2017] ZACC 41]**

Decision date: 30 November 2017

Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Section 7(1) of the *Recognition of Customary Marriages Act 1998* (**the Act**) provides that customary marriages entered into before the commencement of the Act continue to be governed by customary law. A number of children and wives of pre-Act customary marriages sought a declaration that s 7(1) was invalid on the basis that it discriminated against women on the bases of gender and race, ethnic or social origin. The applicants submitted that Venda customary law vests no rights of ownership or control over marital property in wives.

The High Court made a declaration of invalidity. Pursuant to s 172(2) of the Constitution, the Constitutional Court was required to confirm the declaration of invalidity.

Held:

- The Court confirmed that s 7(1) of the Act discriminates against women in pre-Act marriages on the grounds of gender and marital status. The Court did not consider it necessary to express a view on whether s 7(1) also discriminates on the ground of race: [40]; [43].

- The effect of s 7(1) is to perpetuate inequality between husbands and wives. This discrimination was brought to an end by s 6 of the Act, which introduces equality in status between husbands and wives in customary marriages entered into after the commencement of the Act: [35].

- This discrimination limits the right to human dignity and the right not to be discriminated against unfairly. The wives are considered incapable or unfit to hold or manage property, and are excluded from economic activity: [38]; [43].

- The Court considered that Parliament should determine how to regulate pre-Act polygamous customary marriages. Accordingly, it set aside the High Court's declaration of invalidity and granted interim relief that pending the remedying of the legislative defect, husbands and wives in pre-Act polygamous customary marriages must share equally in the right of ownership in family and house property, including the right of management and control: [51].

8. Human rights: operation of limitation period

UK Supreme Court

***O'Connor v Bar Standards Board* [[2017] UKSC 78]()**

Decision date: 6 December 2017

Lady Hale, Lord Kerr, Lord Wilson, Lord Black and Lord Lloyd-Jones

The UK Bar Standards Board (**BSB**) brought 6 disciplinary charges against Ms O'Connor, a practising barrister. On 23 May 2011, the Disciplinary Tribunal found that five of these charges had been established. On 7 August 2012, Ms O'Connor's appeal to the Visitors to Inns of Court was allowed.

On 21 February 2013, Ms O'Connor commenced proceedings against the BSB under s 6(1) of the *Human Rights Act 1998* (**the Act**), which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Ms O'Connor argued that the BSB discriminated against her on racial or ethnic grounds in bringing the disciplinary proceedings.

BSB applied for an order that the statement of case be struck out. Warby J held that Ms O'Connor's claim was sufficiently pleaded, but that it was time barred by s 7(5) of the Act. Section 7(5)(a) provides that proceedings brought under s 6(1) must be brought before the end of one year, beginning with the date on which the act complained of took place. Warby J considered that the one year period started to run on 23 May 2011, when the Disciplinary Tribunal found that the charges against her had been proved.

Ms O'Connor appealed to the UK Supreme Court. The key issue was whether the disciplinary proceedings brought by the BSB against Ms O'Connor were a series of discrete acts or a single continuing act for the purposes of s 6(1)(a).

Held:

- The Court allowed the appeal.
- The alleged infringement of Convention rights arose from a single continuous course of conduct. Although the disciplinary proceedings brought by the BSB necessarily involved a series of steps, the essence of the complaint is the initiation and pursuit of the proceedings to their conclusion: [29].
- Applying the dicta of Lord Hope in *Somerville v Scottish Ministers* [2007] UKHL 44, time runs from the date when the continuing act ceased, not when it began. The continuing act ceased when the Visitors to the Inns of Court allowed the appeal on 17 August 2012: [31]; [39].
- Accordingly, the present proceedings against the BSB were commenced within the necessary one year period: [39].