Court of Appeal
Supreme Court
Sydney

Decisions of interest

12 February – 23 February 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. **Administrative law: judicial review**

   Boyce v Allianz Australia Insurance Ltd **[2018] NSWCA 22**

   Decision date: 20 February 2018

   Basten JA, Macfarlan JA, Sackville AJA

   Ms Boyce was injured in a motor vehicle accident and the other driver admitted liability. Under the *Motor Accidents Compensation Act 1999* (NSW) s 131, she could only recover damages for non-economic loss if her injuries gave rise to a whole person impairment (**WPI**) greater than 10%. She underwent separate assessments for various injuries. Dr Rochford assessed impairment related to a bladder injury at 10%.

   The other driver's insurer (**Allianz**) was granted a review of Dr Rochford's certificate. The proper officer of the State Insurance Regulatory Authority (**the Authority**) advised Ms Boyce that she should inform them if she objected to the Review Panel (**the Panel**) proceeding without re-examining her. Her solicitor wrote an objection letter to the Authority. However, the Panel was not made aware of the objection, and conducted an assessment without an interview or medical examination. They issued a new certificate which assessed the bladder-related impairment at 2%. This brought Ms Boyce's combined WPI below the 10% statutory threshold. An application for judicial review of the Panel's certificate was dismissed on the basis that there was no reviewable error.

   The issues on appeal were whether the Panel's failure to interview and examine Ms Boyce, or notify her of their intent to proceed without doing so, constituted a constructive failure to exercise jurisdiction, and a breach of procedural fairness.

   Held:

- There had been a constructive failure to exercise jurisdiction. The Panel was required to carry out the whole process of assessment afresh: it was not enough for them to accept Dr Rochford's findings while varying his conclusions. The decision whether to conduct an interview and examination was a material step in the process. The necessity of re-examination was a factual issue for the Panel's determination, however, it could not be properly determined on the false premise that the claimant did not seek such an examination: [49]-[50]; [56]-[58]; [66].

- Ms Boyce was deprived of an opportunity to put her case fully before the Panel because the Tribunal was misled as to her wishes, through no fault of her own. In light of the statutory scheme, the impressions created by an interview and examination may well have been so significant that a reasonable review panel could not have properly denied her the opportunity had it been aware that she sought it. It could not be said that the absence of such opportunities did not deprive her of the possibility of a successful outcome: [94]-[95].

2. Consumer law: unconscionable conduct

***Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15**

Decision date: 14 February 2018

Bathurst CJ, Beazley P, Leeming JA

APS Satellite Pty Ltd (**SkyMesh**) entered into an agreement with Ipstar Australia Pty Ltd (**Ipstar**), a wholesaler of satellite broadband services, for the purchase of bandwidth and proprietary user terminals (**UT**s), which SkyMesh onsold to end users. Installation of a UT was required to connect premises to the satellite. Two defects affected the UTs supplied to SkyMesh between 2009 and 2011, which prevented UTs from connecting to the satellite. Ipstar was aware of these issues from at least 2010. SkyMesh bore the cost of repairing or replacing defective UTs after user complaints, and claimed Ipstar was required to indemnify them against these costs under the *Trade Practices Act 1974* (Cth).

Ipstar reviewed the statutory warranty claims. They made no payments, even in respect of those they considered valid, but purported to reject all claims on the basis that some claims provided insufficient information. At the same time, they began negotiations with SkyMesh for the price of bandwidth for the next 12 months. A final offer was made which increased the price from the previous year by reference to the estimated cost of meeting the claims. SkyMesh accepted the offer but insisted it could not operate at a profit. Ipstar did not make any payment in respect of the claims. The main issue on appeal was whether the primary judge had erred in finding that Ipstar had engaged in unconscionable conduct.

Held:

- The Court dismissed the appeal. The question of whether conduct is unconscionable does not involve an idiosyncratic determination of what is 'fair' and 'just' in a particular case, but involves consideration of all the circumstances to determine whether the conduct falls below acceptable norms, standards, or values as would warrant it unconscionable. It is appropriate to have regard to the terms of the statute, the approach under the unwritten law, and judgments in related areas such as cases involving a lack of good faith: [197]; [269]-[270].

- The conduct in imposing the price rise was unconscionable. Ipstar had imposed a price increase based on an estimated accrued liability while taking steps to avoid payment of that liability, in circumstances where they regarded some of the claims as valid, the reason for the increase was concealed, and SkyMesh was at a commercial disadvantage in dealing with Ipstar due to its business model: [201]; [210]-[217].

- SkyMesh was entitled to claim compensation calculated as the difference between what it had actually paid to Ipstar after the price increase and what it would have paid had the increase not occurred: [225]-[227].

Other Australian intermediate appellate decisions of interest

3. **Consumer law: unconscionable conduct**

***Kobelt v ASIC* [2018] FCAFC 18**

Decision date: 15 February 2018

Besanko, Gilmour and Wigney JJ

The appellant, Mr Kobelt, conducted a general store at Mintabie, a remote town in the far north of South Australia. The town is located on an opal field which is part of an area excised by lease to the South Australian government from the Anangu Pitjantjatjara Yankunytjatjara Lands (**APY Lands**). Mr Kobelt sold motor vehicles to Aboriginal residents of the APY Lands (**Anangu**), using a book-up system. As a condition of credit, the customer was required to provide Mr Kobelt with a debit card and PIN number, which Mr Kobelt kept until the debt was paid. The appellant would withdraw money shortly after a customer's wages or benefits were paid, part of which would be taken in reduction of the debt for the car, and part of which the customer could gain access to in the form of cash or groceries purchased upon return to the store. Most of the Anangu customers had limited assets, limited net income, and low levels of financial literary.

On application by the Australian Securities and Investments Commission (**ASIC**), the primary judge found that Mr Kobelt had contravened the *National Consumer Credit Protection Act 2009* (Cth) (**the NCCP Act**) by engaging in credit activity without a licence, and had engaged in unconscionable conduct in connection with the supply of financial services, contrary to the *ASIC Act 2001* (Cth) s 12CB(1). Mr Kobelt appealed.

Held:

- The appeal was upheld in part. The primary judge was correct to conclude that Mr Kobelt had contravened the NCCP Act by engaging in the provision of credit. Viewed objectively, the difference between the amount paid in cash and the amount paid under the book-up system where the payment of the debt is deferred is a charge for deferring payment of the debt: [202]; [205].

- The primary judge had erred in concluding that Mr Kobelt had engaged in unconscionable conduct. Mr Kobelt had not engaged in conduct which was 'predatory' or 'exploitative' in the relevant sense towards his customers. Although the Anangu customers were vulnerable in the sense pleaded by ASIC, they understood the book-up arrangements and their ability to withdraw, and voluntarily entered into them without undue influence. The book-up system was not unique or unusual in remote communities, and had benefits to Anangu customers in alleviating certain economic disadvantages: [260]-[269].

4. **Administrative law: *Mutual Recognition Act 1992* (Cth)**

***Andriotis v Victorian Building Authority* [2018] FCAFC 24**

Decision date: 21 February 2018

Flick, Bromberg and Rangiah JJ

Mr Andriotis was issued with a waterproofing licence by NSW Fair Trading. He lodged an application with the Victorian Building Practitioners Board (**the Board**) seeking registration as a waterproofer, pursuant to the *Mutual Recognition Act 1992* (Cth) (**the Act**), by relying on his NSW licence. The Board rejected his application, and Mr Andriotis applied to the Administrative Appeals Tribunal (**AAT**) for a review of the decision. The AAT affirmed the Board's decision on the basis that Mr Andriotis was not of *"good character"* as required for registration under the *Building Act 1993* (Vic) s 170(1)(c) (**the Building Act**).

Section 17 of the Act provided that a person who is registered in one State for an occupation is *"entitled"*, after notifying the local registration board of the second State, to be registered for the equivalent occupation in that State. Per the exception in s 17(2), this did not affect the operation of laws regulating the manner of carrying on an occupation in the second State, provided that they *"appl[ied] equally to all persons"* and were *"not based on… possession of some qualification or experience relating to fitness to carry on the occupation"*. Section 20(2) provided that, inter alia, a local registration authority *"may grant registration"* where notice has been lodged for such a claim.

The key issues before the Court were whether Mr Andriotis was *"entitled"* to registration in Victoria by reason of his comparable NSW licence, or whether the Tribunal was correct in refusing his registration on character grounds; and whether there was any exercise of discretion to refuse registration, and if so, whether such discretion was properly exercised.

Held:

- The Court allowed the appeal. Section 170(1) of the Building Act was a law which dealt with registration, and did not regulate *"the manner of carrying on an occupation"* within the meaning of s 17(2), as presumed by the AAT: [125].

- Even if s 170(1) were concerned with the manner of carrying on an occupation, nothing in the text, context or purpose of the Act indicated that the term *"qualification"* did not apply to character considerations. A restrictive construction did not correspond with the natural and ordinary meaning, nor was it consistent with *"occupation"* in the Act being defined to include a reference to *"character"*: [50]-[51]; [95]. Accordingly, Mr Andriotis had an entitlement to registration.

- Section 20(2) did not confer an unstructured discretion to refuse to grant registration on any ground or on any ground consistent with the Act. When read in conjunction with s 23 of the Act it was clear that the bases for refusal were intended to be only those specified in the latter section: [108]-[111].

Asia Pacific decisions of interest

5. **Evidence: Giving witness evidence via video link**

Singapore International Commercial Court

Bachmeer Capital Limited v Ong Chih Ching and 7 Ors **[2018] SCHC(I) 01**

Decision date: 13 February 2018

Vivian Ramsey IJ

The parties to the litigation had engaged in a venture to build a ski resort in Singapore. The relationship broke down, and a termination agreement was signed. A central issue was the extent to which the defendants had discussed the possibility of constructing the resort on an alternative site in conjunction with a third party, the Lu Jia Zui Group (**the Group**), prior to termination.

The defendants applied to the Court to for leave to have two witnesses give oral evidence by way of a live video link from Shanghai, China. The first witness, Yang Xiao Ming (**Chairman Yang**), was chairman of the Group at the relevant time. The second witness, Lee Chee Kiat (**Mr Lee**), was to give evidence of significant conversations between the defendants and the Group.

Under the Singapore *Evidence Act* (**the Act**) s 62A, where the witness is outside of Singapore, evidence may be delivered via video link with leave of the Court. In considering an application, the Court is to have regard to such factors as the reasons for the witness being unable to give evidence in person, (b) the technical and administrative arrangements made at the place where evidence is to be given, and (c) unfair prejudice to any party to the proceedings.

Held:

- The Judge allowed Chairman Yang to give evidence via video link, but denied the application of Mr Lee: [5]. While many business meetings and case management conferences now take place via video conference, courts and international tribunals still attach importance to being able to assess the demeanour of the witness as part of the assessment of credibility. Parties are also disadvantaged in carrying out cross-examination via video-link, especially where evidence is of importance to a central issue in the case: [18].

- The only reason given for Mr Lee's inability to attend was inconvenience; a reason undoubtedly shared with all international witnesses. This was insufficient, particularly where his evidence pertained to a central issue in the case: [19].

- Chairman Yang's pre-existing medical condition would not in itself have been sufficient to grant the application without further evidence. However, as Chinese authorities held his passport and had not granted him permission to attend, evidence via video link was preferable to him not giving evidence at all: [24]-[25].

6. **Equity: breach of trust; knowing receipt**

Coumat Limited v Whitford Properties Limited **[2018] NZCA 15**

Decision date: 16 February 2018

Asher, Lang and Ellis JJ

In 2005, a mortgage was registered over a block of land acquired by Whitford Properties Limited (**Whitford**) to secure borrowings by Whitford from ANZ Bank New Zealand (**ANZ**). Whitford had been incorporated by Mr Bruce and Mr Allen, who were shareholders along with Mr Allen's wife. Mr Bruce and Mr Allen guaranteed the mortgage. In 2013, Mr Hayhow lent money to Mr Bruce under a loan agreement, with interest. This was not repaid.

In 2014, Whitford defaulted on the mortgage and ANZ made steps to sell the land. Mr Allen and Mr Hayhow agreed to establish a joint venture to tender for the land. Mr Allen reached an initial tender agreement (**ITA**) with ANZ in his own name and Mr Hayhow provided the funds for a $1.25 million deposit. It became clear that Mr Allen would be unable to provide his share of the funds. Mr Hayhow then agreed to provide the funds for Mr Bruce to exercise his rights as guarantor, and write off Mr Bruce's debt, in exchange for the land being transferred to Coumat, of which he was the sole director and shareholder.

ANZ cancelled the ITA and the deposit was forfeited. The mortgage was transferred to Mr Bruce and the land was purchased by Coumat under the agreed terms (**the Agreement**). The purchase price was treated as comprising the $1.25 million deposit under the ITA, the forgiveness of Mr Bruce's debt ($1.31 million), and the provision of funds enabling redemption as guarantor. No funds were paid to Whitford. The issue on appeal was whether Mr Bruce had committed breach of trust in failing to account for the proceeds of sale.

Held:

- The $1.25 million deposit paid by Mr Allen was contractually forfeit once the ITA failed. It could not be treated as forming part of the consideration provided for the purchase price for the Whitford land under the Agreement, because it was already a credit against the mortgage, to the benefit of Whitford. Coumat therefore received a credit it had not earned or paid for. Moreover, Mr Bruce obtained a personal benefit in having his $1.31 million debt repaid, while effectively depriving Whitford of that amount: [51]-[53]; [57].

- Together, the credit for these amounts reduced the price that should have been paid for the Whitford land. Mr Bruce therefore breached his statutory and equitable duties to account for the surplus proceeds arising from the sale: [58].

- Coumat was liable for knowing receipt, because it received the benefit of the breach of trust in the form of a reduced purchase price for the Whitford land, insofar as it was given a credit on a purchase where the sale price was at market value: [61]. Mr Hayhow had dishonestly assisted the breach of trust: [63].

Other international decisions of interest

7. **Administrative law: citizenship**

The Advocate General for Scotland v Romein (Scotland) **[2018] UKSC 6**

Decision date: 8 February 2018

Lady Hale, Lord Sumption, Lord Reed, Lord Hodge, Lady Black

Ms Romein was born in the United States in 1978. Her father had no personal connection to the United Kingdom (**UK**), and her mother, born in South Africa, was a citizen of the UK by descent because her father had been born in the UK. Under the *British Nationality Act 1948* s 5(1) (**the 1948 Act**), British citizenship was available to a person by descent if their father was a UK citizen at the time of their birth. If the child were not born in British territory, the birth needed to be registered at a British consulate within the year. When Ms Romein's mother was pregnant with her, she made inquiries with a British Consulate about obtaining British citizenship for her unborn child. She was told, correctly, that her child would not be eligible as her only claim by descent was through her mother.

The *British Nationality Act 1981* (**the Act**) removed the registration restriction to descent through the male line for those born from 1983 onwards. In 2013, Ms Romein applied for British citizenship. At that time, Section 4C of the Act required that applications for citizenship be dealt with on the assumption that the law had always provided for citizenship by descent from the mother on the same terms as for descent from the father (**Assumption A**). However, Ms Romein's application was rejected on the basis that she was unable to satisfy the statutory condition of registration within a year. This was because, although the law was now deemed to allow descent through the female line at all material times, British consulate staff, acting entirely properly under the law as it actually was, would have refused to register her birth because she was ineligible.

Held:

- There were three logical solutions to this paradox. The first was that s 4C required one to assume not only that the 1948 Act had always provided for descent by the female line, but also that consular officials in fact acted on that basis, meaning consular officials would have registered Ms Romein. The second was that s 4C did not allow an assumption that historical facts were anything other than they were, meaning that such applications must always fail where citizenship was dependent on the fact of registration: [9].

- The Court adopted the third solution: that effect could not be given to the registration condition in s 5(1) of the 1948 Act at all, because this would nullify the practical effect of making Assumption A. This did not produce discrimination as between applicants descended from the male or female lines, but merely remedied the subsisting consequences of historical discrimination: [9]; [15].

8. Practice and procedure: limitation periods

Privy Council

Julien and others v Evolving Tecknologies and Enterprise Development Company Limited (Trinidad and Tobago) **[2018] UKPC 2**

Decision date: 19 February 2018

Lord Kerr, Lord Reed, Lord Hughes, Lord Lloyd-Jones, Lord Briggs

In June 2005, Evolving Tecknologies (**Eteck**) made a US $5 million investment in Bamboo Networks Limited (**Bamboo**), which was ultimately wholly lost. The investment was made by Eteck's directors (**the appellants**). At the instigation of replacement directors, Eteck brought a suit claiming that the loss was caused by the negligence of the appellants. Throughout, Eteck had a sole shareholder. It was common ground that Eteck had suffered loss immediately upon making the investment, such that the four year limitation period for a torts claim would ordinarily have expired. However, the *Limitation of Certain Actions Act 1997* (**the Act**) s 14 provided that where *"any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant",* the limitation period would not run until the plaintiff had, or could reasonably have, discovered the concealment. Concealment included deliberate commission of a breach of duty in circumstances where it was unlikely to be discovered for some time.

The issue on appeal was whether the breach of duty was known or discoverable to the sole shareholder, and whether that knowledge or discoverability was attributable to Eteck for the purposes of the limitation statute. The appellants relied on the principle that the unanimous decision of all the shareholders in a company shall constitute a decision of the company, if within power.

Held:

- The Court of Appeal had been entitled to find that breach of duty would not have been discoverable for some time, such that the claim was not statute barred. Accordingly, the Board did not need to finally determine the issue of attribution: [62]; [73].

- Allowing attribution would conform to the general policy of the Act. Section 14 would otherwise have no work to do in circumstances where the directors' knowledge of or ability to discover the breach was not attributable because they were wrongdoers and the company was victim. Moreover, shareholders have the power not merely to bring a derivative action, but to procure the company itself to take proceedings to vindicate its rights against the directors: [48]-[50].

- Militating against attribution was the fact that, unlike directors, shareholders do not owe a duty to the company to report relevant knowledge about its affairs. A flexible test enabling attribution to shareholders in certain circumstances would make it hard to resolve a limitation issue without trial, depriving the benefit of the statute to defendants: [54]-[61].