Decisions of interest

21 May 2018 – 1 June 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.

Contents

New South Wales Court of Appeal decisions of interest

1. **Equity: remedies, relief against forfeiture**

   Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd **[2018] NSWCA 114**

   Decision date: 28 May 2018

   Bathurst CJ; Beazley P; Payne JA

   The appellant (**Auburn Village**) leased certain premises to the respondent (**Nelmeer**). Auburn Village later exercised an option in the lease to purchase poker machine permits (**PMPs**) attached to the hotel licence for the premises. The parties entered into a sale agreement, to be completed on 20 February 2017. On that day, Auburn Village's solicitors searched the Personal Property Securities Register and identified several security interests which they thought might affect the PMPs. Auburn Village refused to complete the sale until these were removed. Nelmeer issued a notice to complete.

   Auburn Village commenced proceedings, and orders were made by consent restraining Nelmeer from acting on the notice. Nelmeer wrote to Auburn Village to say that the identified security interests had been removed, and made a settlement proposal. Auburn Village refused to complete the sale or settle unless it was paid compensation for the delay in completion. Nelmeer treated this as a repudiation of the agreement and purported to terminate it. The primary judge found that Nelmeer had validly terminated the agreement and declined to grant Auburn Village relief against forfeiture of its interest in the PMPs. The issues on appeal were: (i) whether Auburn Village had an equitable interest in the PMPs distinct from its equitable interest under the agreement which would entitle it to relief against forfeiture, and (ii) whether it had been "unconscientious" for Nelmeer to terminate the agreement on the grounds of surprise or mistake.

   Held:

- The Court dismissed the appeal: [67]. After the option granted in the lease had been exercised and the sale agreement entered into, any subsisting equitable interest in the PMPs conferred by the option was 'spent'. No provision of the agreement purported to convey any other interest: [51]-[55]. Prior to repudiation and termination, the only interest Auburn Village had in the PMPs was an equitable interest commensurate with its right to specific performance: [56]-[58].

- The primary judge did not err in finding that it was not unconscientious for Nelmeer to terminate the agreement on the grounds of surprise: [61]. Neither Auburn Village's incorrect belief that it was entitled to refuse to complete the sale until it was compensated; or its belief that completion of the sale was "linked" to the resolution of the proceedings which were on foot were 'mistakes' which made it unconscientious for Nelmeer to terminate the agreement: [64]-[65].

2. **Contracts: construction of terms; unjust enrichment; precedent**

Benson v Rational Entertainment Enterprises Ltd **[2018] NSWCA 111**

Decision date: 25 May 2018

Beazley P; Leeming JA; Emmett AJA

Mr Benson used a poker website to operate an online 'account' with companies in the 'Full Tilt Group'. Account-holders could operate an 'affiliate account', where funds were deposited if the account holder referred new players, and a 'player account', to play poker and withdraw funds. Withdrawing funds took time, such that Mr Benson provided a 'cash out service', whereby other account-holders would 'transfer' funds to his account, he would withdraw those funds and in the meantime, his company, Intercash Pty Ltd, would transfer the value of the debt now owed to him to the transferor's bank account, less a commission. In June 2011, his account was frozen, after companies in the group were subject to restraining orders from a United States (**US**) Court. The account balance included US$285,000 transferred by iBus Media Ltd for the purpose of using the cash out service. Intercash did not transfer the funds, and iBus sued Mr Benson in the District Court. The proceedings were settled by a deed (**the District Court Deed**) to which both Mr Benson and Intercash were parties.

The US proceedings were compromised on terms which required the 'PokerStars companies' (including the first and third respondents) making available "*for immediate cash withdrawal … account balances of all non-U.S. players*". In late 2012, Mr Benson visited the website and entered into an End User Licence Agreement (**EULA**) with the fourth respondent. A representative from the PokerStars companies stated that $285,000 had been deducted from the account because it represented "affiliate earnings" transferred from iBus. Mr Benson sued to recover the sum in contract and alternatively for monies had and received. The primary judge dismissed the claim.

Held:

- The Court allowed the appeal in part [132]. It rejected the submission that Mr Benson had not suffered any loss or damage. The District Court Deed was limited by the context such that Intercash did not release Mr Benson. In any event, a release could not prevent the claim, being a liquidated claim for the payment of a debt which did not require him to suffer any loss: [49]; [61]; [66].

- It was an implied term of the EULA that the fourth respondent would assume the liability of the Full Tilt Group and transfer the entirety of the balance of Mr Benson's account to him, not the balance less $285,000: [91]-[92]; [159]. The agreement did not bind the first to third respondents: [95].

- The principle enunciated by Gaudron J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1998) 165 CLR 107, 176 as to unjust enrichment at the expense of third parties is not recognised by Australian law: [3]; [117]-[124].

Other Australian intermediate appellate decisions of interest

3. **Consumer law: misleading and deceptive conduct; proportionate liability**

***Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84**

Decision date: 1 June 2018

McKerracher J; Rangiah J; Markovic J

Reed Constructions Australia Pty Ltd (**Reed**) entered into a design and construct contract with the respondent (**St Kilda Road**), as principal, for the development of a building. The contract provided for Reed to make payment claims on a monthly basis for "work under contract" undertaken in that month. Under cl 38.1, if requested, Reed was to support a payment claim with documentary evidence of the payment of monies due to workers and sub-contractors. Under cl 38.2, St Kilda Road could reject a payment schedule to the extent it related to such monies until cl 38.1 was complied with. Reed served payment claim 15 in December 2011, accompanied by a statutory declaration by Reed's chief operating officer (**Robinson**) that to the best of his knowledge, having made reasonable enquiries, all sub-contractors or suppliers had been paid in full. St Kilda Road duly paid the $1,426,641.70 claimed.

Shortly afterwards, all of Reed's sub-contractors abandoned the site. Reed provided a 'creditors list' showing that payments were overdue to the sub-contractors. St Kilda Road ultimately terminated the contract with Reed, on the basis that Reed had committed a substantial breach by knowingly providing the false statutory declaration. Reed later went into liquidation. The primary judge found Robinson liable for misleading and deceptive conduct and negligent misstatement and awarded damages for the full amount paid under claim 15. Robinson challenged the findings on causation and the extent of loss or damage, and argued that liability should have been apportioned equally between Robinson and Reed under the *Competition and Consumer Act* (Cth), s 87CB(3).

Held:

- The Court dismissed the appeal. This was an "*all or nothing*" case, which did not depend on the respondent proving, as at the relevant date, that any particular amount was owing. When the false statutory declaration was given, it did not satisfy the requirements of cl 38.1, such that the liability to meet a payment under the clause did not arise. Even if this construction were wrong, the primary judge was entitled to conclude that had the respondent known the true position, it would not have made the payment: [15]-[18]; [127]-[131].

- Section 87CB(3) did not apply. The very concept of apportionment requires an assessment of the degree of wrongdoing by the contributory wrongdoer. There was no evidence of any wrongdoing on the part of Reed, but for the actions of Robinson himself: [47]-[56].

4. **Misleading and deceptive conduct; case not on the pleadings**

Leda Commercial Properties Pty Ltd v Brenda Hungerford Pty Ltd **[2018] ACTCA 17**

Decision date: 23 May 2018

Elkaim J; Loukas-Karlsson J; Bromwich J

A tenancy dispute arose in relation to the lease of premises at Tuggeranong Hyperdrome, a shopping centre. Leda Commercial Properties Pty Ltd (**Leda**) sub-leased premises to a particular business, which was bought by Brenda Hungerford Pty Ltd (**BHPL**). In 2005, Leda sold the centre to Tuggeranong Town Centre Pty Ltd (**TTC**), and assigned its interest in the sub-lease to TTC. In 2008, BHPL abandoned the premises and ceased to pay rent and other amounts owing. TTC made a claim against BHPL for a debt and for damages. BHPL brought a counter-claim against TCC and a third party claim against Leda for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth).

The primary judge ordered judgment for TTC and dismissed the counter-claim. He ordered that Leda pay damages for misleading and deceptive conduct, on the basis that one of its representatives had failed to disclose certain matters, and had they been disclosed, Ms Hungerford would not have purchased the relevant business. The issues on appeal were: (i) whether the primary judge's findings were based on a case which fell outside the pleadings and should not have been made; (ii) whether there was a reasonable expectation that the undisclosed facts would have been disclosed, and (iii) whether Ms Hungerford had in fact relied on the non-disclosure to her detriment. TTC, BHPL and Leda also appealed against certain costs orders made in the proceedings.

Held:

- The Court allowed Leda's appeal: [126]. An examination of the proceedings demonstrated that Leda and TTC did not acquiesce to the Court dealing with the misrepresentation by silence argument; nor could his Honour's finding on liability otherwise fall within the existing pleadings: [60]-[65]. The authorities also confirm that a complaint of misrepresentation by silence must be specifically identified and pleaded. An exception to this rule could not arise, as Leda was never faced with evidence indicating a different case to that which was pleaded: [66]-[69].

- The primary judge had failed to perform a "*reasonable expectation analysis*" to determine whether BHPL was relevantly misled by Leda's conduct: [82]-[84]. Moreover, Ms Hungerford's evidence that she would not have bought the business had the information been disclosed could not be corroborated, and once removed from consideration, the case on reliance fell away: [99].

- The impugned costs orders were set aside. TTC and Leda were required to defend unjustified and extensive claims against them, such that BHPL should be required to pay TTC and Leda's costs in the court below: [125].

Asia Pacific decisions of interest

5. **Standing: entitlement to bring proceedings in custom; trusts**

Court of Appeal of Solomon Islands

Maeke v Pukuvati **[2018] SBCA 1**

Decision date: 11 May 2018

Goldsbrough P; Hansen JA; Young JA

The respondents were the joint owners of a perpetual estate, which they held on trust for the members of certain specified tribes. The relevant land was leased to the Commissioner of Lands, and the Solomon Islands Water Authority drew water from it. The appellants instituted proceedings, alleging that the respondents, in their capacities as trustees for the beneficiary tribes, had failed properly to distribute money earned from the lease to the beneficiaries. The appellants obtained an *ex parte* interim injunction which prevented money being paid by the Water Authority to the respondents and required that money to be paid to the appellants. Further orders were made relating to the disclosure of previous payments made to the respondents.

The respondents applied to set aside the *ex parte* orders and put the appellants to proof that they were representatives of the relevant tribes and able to bring the proceedings. Under r 3.42 of the Civil Procedure Rules, any person entitled in custom to represent a tribe may sue or be sued on behalf of the relevant group; however, the Court may require a person to prove their entitlement to so act before any further step in the proceeding may take place. The primary judge found that neither appellant had standing to bring a claim as they had not proved that they were entitled in custom to represent the tribes who owned the Kongulai water source. The injunction was discharged and the claim struck out.

Held:

- The Court allowed the appeal and remitted the proceedings to the court below for hearing: [27]. Neither the appellants nor the respondents had presented evidence in the court below from the chiefs of the relevant tribes as to the appropriate custom, such that the primary judge was left with competing claims from the litigants. He gave no reason why he preferred the position of the respondents. In those circumstances, the primary judge should have required evidence from the relevant chiefs be put: [19].

- In their supporting documentation, the appellants had also asserted that the proceedings were personal, because as beneficiaries under the trust, they were entitled to challenge the actions of the trustees. The primary judge did not consider whether this gave the appellants standing: [20]. The Court observed that once a tribal representative is appointed as trustee, their obligations are to act fairly towards all beneficiaries, not just those from their own tribe: [25].

6. **Remedies: compensatory damages**

Supreme Court of Palau

Otei v Smanderang **[2018] PWSC 4**

Decision date: 21 May 2018

Ngiraklsong CJ; Rechucher AJ; Michelsen AJ

The appellants were the grown children of the late Leleng Otei. The respondents (appellees in the judgment) were her surviving siblings. Leleng and two of her sisters each maintained a family dwelling on particular land. In November 2013, a typhoon destroyed Leleng's house. The government enacted the Super Typhoon Disaster Relief Program (**the Program**), providing funds for affected citizens to rebuild damaged property, and allocating a number of pre-fabricated houses to those whose homes had been destroyed. The cost of each house, together with labour, was estimated to be between $80,000 and $90,000. Owens Otei was selected to receive one of these houses, but when he attempted to start construction, the respondents objected, arguing that the house would be too close to the existing houses, and that the appellants had shown a lack of respect to their elders in commencing the work without consultation.

In February 2014, the respondents issued a document purporting to halt construction on the basis that they had not consented. In response, the male chief titleholder told the respondents that he had given the appellants his oral consent. In the face of further protest from the respondents, he suggested the house be built on a different tract of land. In October 2014, he issued a written use formally giving consent. By this point, funds in the Program had been exhausted. The primary judge granted declaratory relief, finding that the appellants had the legal right to rebuild their mother's home on either tract of land, but did not award the $90,000 in damages sought by the appellants. The issue on appeal was whether the primary judge was right not to award damages.

Held:

- The Court dismissed the appeal: [21]. A lower court's findings of fact concerning damages will be reversed only if no reasonable trier of fact could have reached the same conclusion based on the evidence on the record: [10]. The appellant's argument was flawed, as they did not base their alleged entitlement to compensatory damages under any specific form of action that would entitle them to monetary relief: [12]. Moreover, the proper exercise of a lawful right cannot form the basis of a claim, even if the act results in damage to another: [14].

- It was reasonable for the trial court to conclude that the delay in granting a written use right was not caused by the respondents, but by the lawful actions of the male chief titleholder in attempting to reach consensus among the clan members: [8]; [16]. The appellants had failed to adequately substantiate their argument that the respondents had violated Palauan customary law: [17]-[20].

Other international decisions of interest

7. **Arbitration: employment agreements requiring individualised proceedings**

***Epic Systems Corp v Lewis*, No 16-285 (2018)**

Decision date: 21 May 2018

In each of the cases heard by the United States Supreme Court, an employer and employee entered into a contract which provided for individualised arbitration proceedings to resolve disputes between the parties. Notwithstanding this, each employee sought to litigate their claims through class actions or collective actions under the Fair Labor Standards Act (**FLSA**) and related state claims. The Federal Arbitration Act (**FAA**) generally requires courts to enforce arbitration agreements as written; however, a 'saving clause' under the FAA allows courts to refuse to enforce such agreements "*under such grounds as exist at law or in equity for the revocation of any contract*". The employees argued that the saving clause applied, because, by requiring individualised proceedings, the agreements violated the National Labor Relations Act (**NLRA**).

Until 2012, the courts and the National Labor Relations Board (**the Board**) considered that such agreements were enforceable. In 2012, the Board ruled that the NLRA effectively nullified the FAA in these kinds of cases. After this point, courts agreed with or deferred to the Board's position. The issue for the Court was whether such agreements were required to be enforced.

Held:

- The majority held that arbitration agreements providing for individualised proceedings must be enforced, with neither the 'saving clause' nor the NLRA indicating anything to the contrary. The 'saving clause' in the FFA recognises only "*generally applicable contract defences, such as fraud, duress or unconscionability*". It does not cover defences seeking to interfere with the "*fundamental attributes of arbitration*". Here, the employees sought precisely to challenge the individualised and informal nature of arbitration.

- The Court's duty is to interpret statutes as a harmonious whole, rather than in conflict with each other. The NLRA focuses on the rights of employees to unionise and to bargain collectively; it does not mention class or collective action procedures or evince a manifest intention to displace the FAA.

- In dissent, Ginsburg J (Breyer, Sotomayor and Kagan JJ agreeing) noted the labour market imbalance between employers and employees, and legislative efforts, including the NLRA, which sought to rectify that imbalance. Recognition and protection of employees' rights to engage in collective employment litigation is "*firmly rooted in the NLRA's design*". Even assuming that the NLRA and the FAA were inharmonious, the NLRA should prevail, as the later-in-time and more specific legislation.

8. **Insurance: scope of indemnity under marine insurance contract**

***Navigators Insurance Company Limited v Atlasnavios-Navegacao LDA* [2018] UKSC 26**

Decision date: 22 May 2018

Lord Mance; Lord Sumption; Lord Hughes; Lord Hodge; Lord Briggs

In August 2007, the 'B Atlantic', a vessel owned by the appellant, was used by unsuccessful third parties in an attempt to export drugs from Venezuela. When the drugs were discovered, the vessel was detained and the crew were arrested. Two officers were ultimately convicted of complicity in drug smuggling, and the vessel was confiscated in accordance with Venezuelan law. Following the appellant's detention in Venezuela, and the expiry of a period of more than six months, the owners served a notice of abandonment. The appellant's cover was afforded on the terms of the Institute War and Strikes Clauses Hulls-Time (**the Institute Clauses**). If the peril which materialised fell within its scope, this would be effective to constitute the vessel a "*constructive total loss*" under cl 3.

The Institute Clauses covered loss of or damage to the vessel caused by, *inter alia*, "*capture seizure arrest restraint or detainment, and consequences thereof or any attempt …*" (cl 1.2); "*any terrorist or any person acting maliciously or from a political motive*" (cl 1.5), and "*confiscation or expropriation*" (cl 1.6). Under cl 4.1.5, the insurance excluded "*arrest restraint detainment confiscation or expropriation… by reason of infringement of any customs or trading regulations*". It was common ground in the Courts below that the vessel's loss fell within cl 1.5. The Court of Appeal concluded, contrary to the primary judge, that exclusion in cl 4.1.5 applied, because the vessel's loss could be attributed both to a malicious act and to detainment arising from infringement of customs regulations. On appeal, the Supreme Court considered it necessary to re-examine the common premise, being whether the vessel's loss fell within cl 1.5.

Held:

- The Court reached the same result as the court below, on different reasoning. The third parties were not "*acting maliciously*". Read in context, and in light of existing authority at the time the Institute Clauses were drafted, the concept of "*any person acting maliciously*" relates to situations where a person acts in a way which involves an element of spite, ill-will, or the like in relation to the property insured, or to other property or persons, with consequential loss of, or damage to, the injured vessel or cargo: [28]. Although the risk of detection was foreseeable, their detection and any consequent loss or damage to the vessel was the exact opposite of the smugglers' aim or expectation: [14]; [29]-[30].

- Even if the loss fell within the scope of cl 1.5, it would have been excluded by cl 4.1.5 because it arose, at least concurrently, from detainment by reason of infringement of customs regulations: [55]. Neither as a matter of construction nor of causation was there any basis for concluding otherwise: [39].