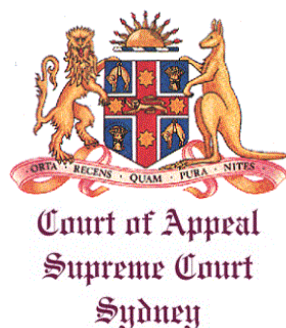

Decisions of Interest

22 October 2018 – 2 November 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 2

Other Australian intermediate appellate decisions of interest 4

Asia Pacific and other international decisions of interest 6

New South Wales Court of Appeal decisions of interest

1. **Representative proceedings; consumer law; damages: *Civil Liability Act***

   ***Scenic Tours Pty Ltd v Moore* [[2018] NSWCA 238]**

   Decision date: 24 October 2018

   Payne JA; Sackville AJA; Barrett AJA

   Mr Moore booked a European river cruise with the appellant (**Scenic**). The cruise (**Cruise 8**) was seriously affected by high water levels. The passengers experienced substantial disruptions to their itinerary, including being required to spend many hours on buses rather than cruising on a "luxury" vessel. Mr Moore commenced a class action alleging contraventions of Australian Consumer Law (**ACL**) guarantees. The trial involved 13 European river cruises conducted by Scenic or associated entities. The primary judge found that in Mr Moore's case, Scenic had supplied services without due care and skill (**the Care Guarantee**): s 60; that the services provided were not fit for the purpose for which Mr Moore had acquired them: s 61(1) (**the Purpose Guarantee**); and were not of a nature and quality as could reasonably be expected to achieve the result that Mr Moore and each group member wished the services to achieve: s 61(2) (**the Result Guarantee**). The judge awarded compensation to Mr Moore in relation to the Care Guarantee for the reduction in the value of services below the price paid: s 267(3); and damages for distress and disappointment caused by the breaches of the Purpose and Result guarantees: s 267(4). He also determined a number of questions said to be common to all group members. Scenic appealed.

   Held:

- The Court allowed the appeal in part. Scenic had failed to comply with the Purpose Guarantee in relation to Cruise 8, and such findings were open for other cruises: [237]; [256]; [266]-[269]; [271]-[272]; [277]; [279] . Scenic had also failed to comply with the Result Guarantee: [283]. The primary judge erred in finding that Scenic had failed to comply with the Care Guarantee by its pre-embarkation acts or omissions. Non-compliance based on post-embarkation conduct could be sustained for four cruises: [296]; [298]; [302]-[304].

- The primary judge erred in assessing the reduction in the value of services provided to Mr Moore under s 267(3)(b) by reference to subjective considerations. This issue was remitted to the primary judge: [331]; [335]; [399].

- Mr Moore should not have been awarded damages for distress and disappointment. This was because s 275 picked up and applied the *Civil Liability Act 2002* (NSW), s 16, as a surrogate federal law. Mr Moore could not satisfy the statutory threshold for damages for non-economic loss under ss 15-16: [364]; [372]; [381]. Section 16 applied notwithstanding that the contraventions in Mr Moore's case had occurred outside Australia: [388]. Group members were also precluded from seeking damages for distress and disappointment: [397].

2. Administrative law; statutory interpretation; the legal profession

***Council of the Law Society of New South Wales v Levitt* [2018] NSWCA 247**

Decision date: 26 October 2018

McColl JA; Basten JA; Macfarlan JA

After an investigation, the appellant (**Council**) resolved to refer two complaints made against Mr Levitt to the NSW Civil and Administrative Tribunal (**the Tribunal**), pursuant to the *Legal Profession Act 2004* (NSW) (**LPA**), s 537. Under s 537(2), "*unless s 540 applies*", the Council is required to commence Tribunal proceedings if it satisfied there is a "*reasonable likelihood*" that the legal practitioner will be found by the Tribunal to have engaged in unsatisfactory professional conduct or professional misconduct. Section 540 applies if, amongst other factors, the Council is satisfied that there is a "*reasonable likelihood*" the legal practitioner will be found by the Tribunal to have engaged in unsatisfactory professional conduct (but not professional misconduct). Mr Levitt brought judicial review proceedings. The primary judge made orders quashing the decisions of the Council and restraining it from taking further steps in the Tribunal proceedings in respect of its resolutions. The key issues on appeal were: whether the primary judge erred (i) in construing ss 537 and 540 in finding that s 540 was a "*preliminary conclusion to which the decision maker must advert before concluding that proceedings should be commenced in the Tribunal*"; and (ii) in finding that the Council failed in respect of each decision to consider on the facts as found whether there was a reasonable likelihood of the Tribunal finding Mr Levitt guilty of professional misconduct, as opposed to some lesser course of conduct.

Held:

- The Court dismissed the appeal (Basten JA dissenting). McColl JA considered that, on its proper construction, s 537(2) must be read with s 540. The relevant decision maker must undertake a compound exercise which includes predicting the likely outcome in the Tribunal, having regard to the nature of the conduct which may be referred to it, but considering whether s 540 applies: [56]-[58].
- Macfarlan JA considered that, if, for the purposes of s 537(2), the Council concludes that there is a reasonable likelihood of a finding of unsatisfactory professional conduct, there will clearly be room for the possible operation of s 540 as that section is essentially concerned with such conduct: [126].
- The primary judge did not err in inferring from the absence from the Council's reasons for each resolution of any consideration of the matters set out in s 540(1)(b) which it was required to consider, that it did not do so: [69].
- Basten JA (dissenting) held that s 540 only applied if there was a reasonable likelihood of a finding of unsatisfactory professional conduct but no reasonable likelihood that the Tribunal would find professional misconduct: [105]-[107].

Other Australian intermediate appellate decisions of interest

3. **Crime: proceeds of crime, third parties; statutory interpretation**

***Commissioner of the Australian Federal Police v Kalimuthu* [[2018] WASCA 192]**

Decision date: 30 October 2018

Buss P; Murphy JA; Beech JA

During 2014, Mr and Mrs Ganesh, who were Malaysian residents, transferred large sums of money from Malaysia to Australia. Mr Ganesh gave Malaysian Ringgits to a 'money changer', who arranged for the Australian dollar equivalent amounts to be deposited into three Australian bank accounts in the name of one or the other of the respondents. Most of the deposits were under $10,000, and thus below the reporting threshold under anti-money laundering legislation. A restraining order was made in relation to the funds standing to the credit of the accounts, on the basis that, pursuant to the *Proceeds of Crime Act 2002* (Cth) (**the Act**), s 19, there were reasonable grounds to believe the funds were the proceeds of an offence. The Ganeshs applied to have their interests in the bank accounts excluded from the order. The primary judge granted the application on the basis that the interests had ceased to be the "*proceeds of an offence*" under s 330(4)(a), as they had been acquired by the Ganeshs as third parties for sufficient consideration without them knowing, and in circumstances that would not arouse a reasonable suspicion, that their interests were such proceeds. The Commissioner appealed. Before judgment was delivered, the New South Wales Court of Appeal relevantly handed down its decision in *Lordianto v Commissioner of the Australian Federal Police* [2018] NSWCA 199, which dealt with the construction of s 330(4)(a).

Held:

- The Court allowed the appeal. On the majority reasoning in *Lordianto*, a "*third party*" for the purposes of s 330(4)(a) was someone who was not party to the transaction by which the property became proceeds of an offence, as opposed to simply not being party to the criminal offence itself. Murphy and Beech JJA considered that, but for *Lordianto*, they would have reached a contrary construction, but the majority reasoning in that case was not plainly wrong: [458]-[461] (*cf* Buss P, who agreed with the majority in *Lordianto*: [193]).

- The Ganeshs were thus not third parties: [194]; [463]. Murphy and Beech JJA found that the Ganeshs had not provided sufficient consideration. Buss P considered that, but for *Lordianto*, he would found otherwise: [234]; [239]-[240].

- Mr Ganesh had not established that he had acquired the property in circumstances that would not arouse a reasonable suspicion that the deposits were the proceeds of an offence. However, no such conclusion could be drawn in relation to Mrs Ganesh: [299]; [302]-[304]; [497]-[504].

4. Representative actions: approval of funder's commission and legal costs

***Botsman v Bolitho & Ors* [2018] VSCA 278**

Decision date: 1 November 2018

Tate JA; Whelan JA; Niall JA

Banksia Securities Limited (**Banksia**) was a rural non-bank lender which collapsed, and as a result, owed its debenture holders around $600 million. Two proceedings were brought against Banksia's Trust company. Mr Bolitho brought a representative action on behalf of group members under the *Supreme Court Act 1986* (Vic) (**the Act**). Banksia (in liq) brought an action, for which special purpose receivers (**SPRs**) were appointed. The proceedings were compromised and the settlement recorded as a single deed. Mr Bolitho brought an action for approval of the settlement of the group proceeding, and the SPRs made a separate application to authorise the settlement of their proceeding. The judge concluded that the settlement was fair and reasonable and granted both applications. Confidentiality was claimed, and ultimately ordered, in respect of the deed of settlement, the costs report, and certain affidavits, submissions and opinions of counsel. Ms Botsman, a debenture holder, sought leave to challenge the judge's orders approving the settlement of the group proceeding and authorising the settlement of the special purpose receivers' proceeding.

Held:

- The Court granted leave and allowed the appeal. The confidentiality orders significantly hindered the ability of the parties and group members to advance submissions on matters that were central to the applications for approval of the settlement and payment of legal costs and the funder's commission. The SPRs were also contractually obliged to support the settlement. The Court was therefore denied the benefit of a proper content on the reasonableness of the payment: [5]; [276]-[277]; [320].

- The problems occasioned by the confidentiality orders, and the potential for a conflict of interest between the funder and group members, could have been resolved by appointing a contradictor. The judge erred in not so doing: [5]; [336].

- There was thus a miscarriage in the process by which the distributions for the funders' commission and legal costs were approved: [6]. However, there was no error in the finding the overall settlement sum of $64 million to be fair and reasonable in the circumstances: [341]-[347].

- Under the settlement deed, the approval of the settlement was a separate and distinct step from determining the funder's applications for payment of its commission and costs. It was also independently within the Court's power under the Act, ss 33V and 33ZF to approve the settlements whilst declining to approve the distributions from the settlement sum in respect of the funder's commission and legal costs. The Court remitted to a different judge determination of the issue of approval of the distributions for those items: [7]; [369]; [381]; [400].

Asia Pacific and other international decisions of interest

5. **Private international law: contract, exclusive jurisdiction clauses**

***Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [[2018] SGCA 65]**

Decision date: 22 October 2018

Menon CJ; Leong JA; Prakash JA; Kwang JA; Chong JA

The appellant (**Vinmar**) entered into four contracts to purchase certain commodities from the respondent (**PTT**) and its parent company. The parties would agree to key terms via email, and PTT would then send a Supply Agreement to Vinmar containing the full terms of the contract. All four contracts contained an exclusive jurisdiction clause (**EJC**) providing that any disputes should be resolved by the English High Court. None included an execution page for the parties' signature. Vinmar then entered into another supply contract with PTT (**the Contract**). PTT sent Vinmar a 'Deal Recap' setting out key contractual terms on 21 November 2014, which Vinmar confirmed. An EJC was contained only in a subsequent set of 'Written Terms' which PTT sent to Vinmar on 27 November. The email referred to this as a 'draft contract' and stated that PTT would return with a final contract in due course. A dispute arose and PTT brought proceedings in Singapore. Their pleaded position was that the terms of the Contract were fully set out in the Deal Recap, and not in the Written Terms. Vinmar applied for a stay of the Singapore proceedings on the basis that the EJC formed part of the Contract. The Assistant Registrar (**AR**) dismissed the application, finding that the stay should be refused because Vinmar did not have a genuine defence. This was upheld on appeal to a single judge. Vinmar appealed to the Singapore Court of Appeal.

Held:

- The Court allowed the appeal and granted the stay. There was a good arguable case that the EJC had been incorporated by a course of dealings, when the Contract was formed on 21 November. Vinmar was entitled to infer that the Contract included certain standard terms set out in the four agreements; that PTT would prepare a standard agreement including those terms, and such terms bound the parties without the need for execution of that document: [59]-[66].

- The Court departed from previous authority, holding that the merits of a defence should be irrelevant to the question whether there was "*strong cause*" to refuse a stay. The previous rule was, *inter alia*, inconsistent with the principle of party autonomy, led to costs and delays at the interlocutory stage, and was premised on a flawed doctrinal basis: [114]-[125].

- There was no "*strong cause*" to refuse the stay application. The Court accepted that abuse of process could be a general ground upon which a stay might be refused, but this was not made out in this case: [128]-[132]; [147]; [148].

6. **Crime: securities, insider trading; statutory construction**

***Lee Kwok Wa v The Securities and Futures Commission* [[2018] HKCFA 45]**

Decision date: 31 October 2018

Ma CJ; Ribeiro PJ; Tang PJ; Fok PJ; Spigelman NPJ

Betty, a solicitor, was seconded to a bank (**SCB**) to assist with the legal work leading up to that bank's friendly takeover of another bank (**Hsinchu Bank**). The respondent's case was that Betty learnt of the recommended tender price and gave this information to her friend Eric. Eric's sister Patsy then opened a securities trading account, and purchased a substantial number of shares in Hsinchu Bank. When the tender offer became public, Patsy accepted the tender. The profits were split between Betty, Eric, Patsy, and another sibling, Stella.

The respondent brought proceedings alleging that Betty, Eric and Patsy had contravened the Securities and Futures Ordinance (**SFO**). Section 300 provides that a person "*shall not, directly or indirectly, in a transaction involving securities*", "*employ any device, scheme or artifice with intent to defraud or deceive*" or "*engage in any act, practice or course of business which is fraudulent or deceptive*". The primary judge found that Betty, Eric and Patsy had contravened s 300 and ordered them to disgorge their profits. A similar order was made against Stella, on the basis that, although she had not breached s 300, she had been involved in the contravention. An appeal was unsuccessful. Three of the defendants then appealed to the Hong Kong Court of Final Appeal. The issues on appeal were (i) whether "*transaction*" should be interpreted to include conduct taking place before the purchase and sale of securities; and (ii) how one should determine whether an alleged fraudulent or deceptive act or scheme occurred in a "*transaction involving securities*".

Held:

- The Court dismissed the appeal. Construed in light of the context and purpose of s 300, the word "*transaction*" should be given a wide meaning. The phrase "*transaction involving securities*" covered, *inter alia*, dealings with a view to profit or avoidance of loss by the use of inside information. It was capable of covering the whole course of dealings, including the disclosure of the information, opening of the securities account, and the giving of trading instructions: [7]; [17]-[28]; [45]; [58]-[61].

- The Court rejected the argument that the fraud or deception had to be practised by a counterparty to the transaction before it could be regarded as being "*in a transaction*": [6]; [54]. It could not be disputed that insider dealing was a species of fraud and a crime on the public. It was not a victimless crime: [39].

- The appellants' conduct would have amounted to insider dealing under s 291, but for the fact that the shares were not listed in Hong Kong. Such conduct should be regarded as a crime coming within the terms of s 300: [34]-[40].

7. **Constitutional law: judicial power; courts: criminal appeal**

***Abdul Kahar bin Othman v Public Prosecutor* [[2018] SGCA 70]**

Decision date: 25 October 2018

Menon CJ; Prakash JA; Kwang JA; Tin SJ; Ean J

The applicant was convicted on drug trafficking charges. Under the *Misuse of Drugs Act* (Cap 185, 2008 Red Ed) (**the MDA**), the mandatory death sentence did not apply if the applicant's role was restricted to that of a courier: s 33B(2)(a); or if the Public Prosecutor (**PP**) certified that the person had substantively assisted the Central Narcotics Bureau (**CNB**) in disrupting drug trafficking: s 33B(2)(b). Under s 33B(4), the determination whether to issue a certificate of substantive assistance (**CSA**) was at the sole discretion of the PP and was not appealable unless it were done with bad faith or malice. The applicant was ultimately found not to be a courier, and the PP did not to issue a CSA. The applicant was sentenced to death. An appeal against conviction and sentence was dismissed (**CA 4**). The applicant filed a motion (**CM 1**) seeking that his appeal be re-opened and reviewed. He argued that the test for re-opening a criminal appeal set out in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 did not apply to CM 1 and should be confined to the facts of that case. He then argued, *inter alia*, that s 33B(2)(b) was unconstitutional because the PP's role was a usurpation of judicial power; and that s 33B(4) was so difficult to establish as to be "*self-defeating*", and infringed the constitutional rules of natural justice.

Held:

- The Court dismissed the application. *Kho Jabing* was clearly intended to be a universal test for the court to review a concluded criminal appeal. It did not just apply to eleventh hour applications before a scheduled execution: [22]-[25].

- CM 1 did not meet this test. The non-availability requirement was not satisfied, as all of the applicant's arguments could have been raised at the CA 4 hearing if reasonable diligence had been exercised. Moreover, the applicant could not establish a "*miscarriage of justice*" if his arguments succeeded, because the outcome of his case would not change. If parts of s 33B were disregarded, the law would still require a death sentence to be imposed: [31]-[32].

- There was no merit in the applicant's arguments. The exercise of the PP's discretion was circumscribed by the limited question of whether the offender had substantively assisted the CNB; the discretion whether to impose the death penalty still remained with the Court. Hence, s 33B(2)(b) did not give the PP the power to decide the appropriate punishment for a particular offence: [38]-[49].

- Although s 33B(4) would rarely be satisfied, it was not so difficult as to be inconsistent and self-defeating in purpose. It was not necessary to consider if it was an effective ouster of judicial review, as the applicant had not shown how a breach of natural justice could have led to a different outcome: [53]-[57].

8. **Contracts: good faith, duty to re-negotiate, unforeseeability**

***Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46**

Decision date: 2 November 2018

In 1969, after years of negotiation, the parties entered into a contract setting out the framework for constructing and operating a hydroelectric plant on the Churchill River in Labrador. The respondent undertook to purchase most of the electricity produced by the plant over a 65 year period, whether or not needed, allowing the appellant to use debt financing for its construction. In exchange, the respondent obtained the right to purchase electricity at fixed prices for the entire term of the contract. After changes in the electricity market, the purchase price for electricity in the contract was well below market prices, such that the respondent was making a substantial profit from selling electricity to third parties at market rates. The appellant asked the courts to order that the contract be renegotiated and its benefits reallocated. This was said to be for two reasons: to ensure the contract reflected the equilibrium of the initial agreement, and to enforce the respondent's duty to cooperate with its long-time partner on the basis of its general duty of good faith. The Quebec Superior Court and the Court of Appeal ruled against the appellant. The issues on appeal where whether the respondent could be required to renegotiate the contract because of "*unforeseeable*" changes in the electricity market since it was signed, and if so, whether the Court could grant the relief sought by the appellant.

Held:

- The Court dismissed the appeal. The trial judge had concluded that the contract specifically allocated the risks and benefits of the project; the clear result being that Hydro-Quebec would bear any losses or receive any profits flowing from fluctuations in electricity prices. His conclusion with respect to the paradigm of the contract accurately reflected the parties' intention, and the equilibrium which was sought, maintained, and never disturbed: [82]. There was no palpable and overriding error which would necessitate overturning the factual findings.

- Quebec law did not recognise a doctrine of unforeseeability, as that concept was understood in other civil law jurisdictions, being a rule requiring the renegotiation of a contract following an unforeseeable event. Nor would the doctrine have been met in any event. Renegotiation was not justified on the basis of equity or good faith. The duty to cooperate with the other contracting party did not require a sacrifice of one's own interests. Hydro-Québec was not being unreasonable in insisting on adhering to the words of the Contract: [128].

- There was no legal principle which could support a remedy imposing a new bargain on Hydro-Québec, mandating that the parties renegotiate a price adjustment formula, or absent agreement, the Court imposing one: [131]-[132]. In any event, the appellant's right of action was out of time, the change in the electricity market having occurred at the latest in 1997: [134]-[135].