Court of Appeal
Supreme Court
Sydney

Decisions of interest

22 July 2019 – 2 August 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. **Judicial review: use of dictionaries in statutory interpretation; transitional provisions; unreasonableness**

   Commissioner of Victims Rights v Dobbie **[2019] NSWCA 183**

   Decision date: 25 July 2019

   Basten JA, Leeming JA, McCallum JA

   As a child, Mr Dobbie had been a victim of domestic violence. He made a claim for compensation under the *Victims Compensation Act 1996* (NSW). He received an interim payment, but before his claim was finally determined, the statutory scheme changed; he therefore fell within certain transitional provisions under the *Victims Rights and Support Amendment (Transitional Claims) Regulation 2015* (NSW). After an initial assessment, Mr Dobbie received compensation as a victim of domestic violence in the amount of $10,000. He also had a claim for compensation concerning a chronic psychological or psychiatric disorder that was 'severely disabling'. Such a claim would, if successful, attract compensation between $30,000 and $50,000. This claim was dismissed by an assessor. Mr Dobbie exercised a right of internal review, and a delegate of the Commissioner upheld the assessor's decision. Mr Dobbie sought judicial review of the delegate's decision in the Common Law Division of the Supreme Court. The primary judge ordered that the delegate's decision be set aside and that the matter be remitted to the Commissioner for redetermination according to law. The Commissioner sought leave to appeal, and undertook to pay Mr Dobbie's costs. The Commissioner of Victims Rights contended that the issues raised in this case could affect the operation of the transitional provisions in other cases, though would not affect the new statutory scheme. The three issues on appeal were: (1) whether the primary judge erred in holding that the delegate had misconstrued the term 'severely disabling' by making use of dictionary definitions in an impermissible manner; (2) whether the primary erred in holding that the delegate's decision was legally unreasonable; (3) whether the delegate had erred in her findings as to whether the violence inflicted on Mr Dobbie caused his psychological injury.

   Held:

   - Leave to appeal refused: [56], [57], [67].
   - Concerning (1): the primary judge was 'rightly critical' of the delegate's use of dictionary definitions; but despite 'infelicitous reasoning', the delegate made no error of law on this point: [21], [29], [57] (Basten JA, Leeming JA agreeing). McCallum JA dissented on this point: [59]- [64].
   - Concerning (2): the primary judge did not err in the manner alleged: [50], [57], [65].
   - Concerning (3): the Commissioner acknowledged that the delegate's findings on causation were inconsistent, and in at least one respect, were erroneous: [51], [66].

2. **Costs: displacement of ordinary rule; stay of proceedings; delay on part of successful party**

Moubarak by his tutor Coorey v Holt (No 2) **[2019] NSWCA 188**

Decision date: 31 July 2019

Bell P, Leeming JA, Emmett AJA

On 9 December 2016, Ms Holt commenced proceedings in the District Court against Mr Moubarak, seeking damages for alleged historic sexual assaults. At that time, Mr Moubarak was severely demented. A defence was filed on his behalf on 12 April 2018, and on 5 June 2018, a notice of motion was filed seeking a permanent stay of proceedings. There was, apparently, no explanation for the elapse of time before the filing of the notice of motion.

On 24 September 2018, a judge of the District Court refused to grant the stay. On 25 October 2018, a notice of intention to appeal was filed. On 20 December 2018, an application for leave to appeal from that decision was filed; again, the delay in filing the application for leave was unexplained. By 20 December 2018, the proceedings had been set down for hearing in the District Court to commence in late January 2019. On 24 April 2019, the Court of Appeal granted leave to appeal, allowed the appeal, and ordered a permanent stay of proceedings in the District Court. The parties were ordered to make further submissions as to costs if they were unable to agree as to where they should lie. The question in these proceedings was whether the ordinary rule that costs follow the event should be displaced.

Held:

- Ms Holt was ordered to pay Mr Moubarak's costs of the application for leave to appeal in the Court of Appeal and the costs of, and incidental to, the hearing of the notice of motion determined in the District Court on 24 September 2018. Mr Moubarak was ordered to pay any costs incurred by Ms Holt in the period between 20 October 2018 and 24 April 2019 in preparing for the trial of the District Court proceedings initially set down for late January 2019: [34], [35], [38].
- Applications for a permanent stay of proceedings should be brought promptly, as a plaintiff is entitled to know that such a stay is sought, and tardiness in seeking a stay can waste court time: [13]-[14].
- Where a matter is urgent, it is inappropriate (in the absence of a compelling explanation) for a party to allow a significant period of time to elapse by using a notice of intention to appeal, and then an application for leave to appeal: [27]-[28].
- The dilatoriness on the part of those acting for Mr Moubarak to move on the right to seek leave to appeal and the unexplained failure to seek expedition of the proceedings in the Court of Appeal were both unsatisfactory. In the circumstances, it was therefore appropriate to depart from the ordinary rule that costs follow the event, and make the special costs orders indicated above: [29].

Other Australian intermediate appellate decisions of interest

3. **Torts: deceit; assessment of damages; presumption against wrongdoer**

Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd **[2019] FCAFC 119**

Decision date: 23 July 2019

Allsop CJ, Yates J, O'Bryan J

Mr Stewart was an executive director of an accounting consultancy and a partner of an accounting partnership, together referred to here as 'Pitchers'. Mr Calabro was a director of Neville's Bus Service Pty Ltd ('NBS'). NBS engaged Pitchers to assist in the preparation of a tender for the right to operate buses in a particular area of Sydney to be awarded by Transport for New South Wales (TfNSW). NBS was awarded the tender. TfNSW required that the successful tenderer meet the costs of acquiring certain buses the incumbent operator – the costs of so-called 'transfer-in' buses. In the course of preparing materials for the tender, Mr Stewart discovered an amortisation error in the work he and others at Pitchers had done. In essence, the price in the tender did not include the anticipated costs associated with the transfer-in buses. Mr Stewart did not alert Mr Calabro to the error; rather, Mr Stewart untruthfully represented to Mr Calabro that the price in the tender (prepared by Mr Stewart and others at Pitchers) accurately and appropriately provided for the costs of the 'transfer-in buses'. Relying on that lie, Mr Calabro caused NBS to enter into finance leases in order to take over the transfer-in buses, believing that the contract price that TfNSW would pay NBS would substantially cover the costs associated with the transfer-in buses. NBS commenced proceedings against Pitchers in deceit. The primary judge awarded NBS damages calculated on the basis that the costs associated with the transfer-in buses were to the tune of $660,000 per year over the (anticipated) 9-year life of the contract. Pitchers appealed. A central aspect of that challenge was the submission that it was necessary for NBS to prove that it would have entered into a different, more favourable transaction, but for Mr Stewart's fraud. Not having proved that, and having entered into an otherwise profitable transaction, Pitchers submitted that NBS had not proved that Mr Stewart's deceit had caused it to suffer a compensable loss. By notice of contention, NBS submitted that, in the alternative to the action in deceit, its claim could have been one for damages for misleading and deceptive conduct, in contravention of the Australian Consumer Law.

Held:

- Appeal dismissed: [6].
- To obtain damages in deceit, it was not necessary for NBS to prove that it would have entered into a different, more favourable transaction – particularly as Mr Stewart's fraud contributed to the difficulties of proving that fact. The damages awarded represented the loss directly caused by the deceit: [116], [122], [124].
- While it was unnecessary to consider the notice of contention, the Court considered that NBS would have been entitled to the same sum in damages under the ACL as the primary judge awarded it for the action in deceit: [130].

4. **Civil procedure: cause of action estoppel; workers compensation**

Stephenson v Return to Work Corporation of South Australia **[2019] SASCFC 89**

Decision date: 25 July 2019

Kourakis CJ, Nicholson J, Parker J

While working as a chef in January 2009, Mr Stephenson suffered a spinal injury in the course of his employment. In June 2009, he underwent a spinal infusion operation. He was prescribed various medications including opioids and antidepressants after the operation.

On 13 January 2011, Employers Mutual Fund Ltd ('EMF'), acting on behalf of Return to Work Corporation of South Australia ('RTW'), consented to pay Mr Stephenson a lump sum by way of compensation on the basis that he had suffered a 16% whole person impairment (WPI) of the lumbar spine and a 1% WPI of the skin. Subsequently, Mr Stephenson made a claim for compensation for injuries to his thoracic spine and left shoulder. EMF initially rejected the claim, but after a conciliation conference, consent orders were made on 21 February 2013 awarding Mr Stephenson compensation for a 10% WPI relating to the thoracic spine and left shoulder. The consent orders included the words: 'The worker has no further or other entitlement pursuant to section 43 of the [*Workers Rehabilitation and Compensation Act 1986* (SA)] arising from his compensable injuries sustained [in January 2009].'

Mr Stephenson subsequently made a further claim for compensation which was relevantly for impairments to his upper and lower digestive system, his ability to chew and swallow, and to his skin. He claimed that these injuries were caused by the medication he took for pain relief following surgery. That claim was disputed by EMF, and so went before the South Australian Employment Tribunal (SAET). At first instance, a presidential member of the SAET found that the words quoted in the consent orders above did not preclude Mr Stephenson from pursuing claims for future impairments, and made lump sum compensation awards for the injuries claimed. RTW appealed against those awards to the Full Bench of the SAET. The Full Bench allowed the appeal, set aside the awards, and confirmed EMF's rejection of Mr Stephenson's claim. The Full Bench reasoned that a cause of action estoppel, founded on the consent orders of 21 February 2013, precluded Mr Stephenson from pursuing those claims. Mr Stephenson appealed to the Full Court of the Supreme Court of South Australia, where the key issue was whether he was estopped from pursuing his claims by reason of the consent orders.

Held:

- Appeal allowed: orders of the Full Bench set aside, and those made at first instance in the SAET reinstated: [55]-[57].
- The Full Court held that the SAET did not have the power to order or to determine that there could never be a future entitlement with respect to an impairment that had not yet been the subject of a claim, or that had not been occasioned at the time when earlier consent orders were made: [44]-[45], [54].

5. **Statutory interpretation: interpretation acts; contrary intention; natural persons and corporations. Standing: special interest.**

Caratti v Commissioner of the Australian Federal Police **[2019] FCAFC 123**

Decision date: 2 August 2019

Kerr J, Steward J, Banks-Smith J

In January 2015, the Australian Federal Police executed search warrants at two premises. They seized books and records, in both hard and soft copy. Those books and records included the books and records of a number of companies. Mr Caratti was a director or a 'shadow director' of each of those companies at the time. The premises were the registered offices or registered principle places of business of the companies. Mr Caratti was present when each of the warrants was executed. In 2017, liquidators of the companies requested that the AFP provide them with copies of the records seized. That request was made pursuant to s 3N of the *Crimes Act 1914* (Cth). That section relevantly provides that: '…if a constable seizes, under a warrant relating to premises: (a) a document, film, computer file or other thing that can be readily copied; or (b) a storage device the information in which can be readily copied; the constable must, if requested to do so by the occupier of the premises or another person who apparently represents the occupier and who is present when the warrant is executed, give a copy of the thing or the information to that person as soon as practicable after the seizure.' Mr Caratti sought an injunction, restraining the AFP from providing the liquidators with copies of the records sought. The primary judge refused to grant the injunction sought. On appeal, the two issues were: (1) whether Mr Caratti had standing to seek such an injunction; (2) whether the companies were 'occupier[s] of the premises' for the purposes of s 3N.

Held:

- Appeal dismissed: [35].
- As to (1): Mr Caratti lacked standing to bring proceedings seeking the injunction in question. He had no sufficient personal interest in the documents that would enable him to bring the proceedings (for example, he had no proprietary interest in the documents). Further, he has no 'special interest' in the subject matter of the litigation that might afford him standing to prevent the violation of a public right. As between the liquidators and the AFP, Mr Caratti was no more than a 'phantom busybody or ghostly intermeddler': [14], [18].
- While it was strictly unnecessary to decide question (2), the Court considered that the companies were not 'occupier[s] of the premises' for the purposes of s 3N. In the broader context of Pt IAA, Div 2 of the *Crimes Act* (in which s 3N is found), the Court considered that references to 'occupier[s]' should be understood as references to natural persons. As such, the rule in the *Acts Interpretation Act 1901* (Cth) that expressions used to denote persons generally include corporate persons was displaced by what was said to be a contrary intention in Pt IAA, Div 2 of the *Crimes Act*: [28]-[30].

Asia Pacific decisions of interest

6. Contracts: formation; construction

Court of Appeal of New Zealand/Te Kōti Pīra O Aotearoa

Tower Insurance Limited v Nicon Limited **[2019] NZCA 332**

Decision date: 25 July 2019

French J, Miller J, Lang J

Following the Christchurch earthquakes of 2010 and 2011, there was a large amount of demolition work to do in the city. An insurer, Tower Insurance Ltd ('Tower'), appointed Qusol NZ Limited (formerly known as Stream Group (NZ) Pty Limited) ('Stream') to be its project manager and loss adjuster. Mr Giltrap was the sole director and shareholder of a demolition contractor, Nicon Ltd ('Nicon'). By a letter (sent by a contractor), Stream advised Nicon of its intention to utilise its demolition and site clearance services on an 'as and when needed' basis. Mr Giltrap, relying on the letter, kept Nicon available to take on such work when it arose. A few months later, Nicon was in a tight situation commercially: it was not getting enough work from Tower/Stream, and in remaining available for Tower/Stream, it was missing out on other demolition work. My Giltrap informed Stream, and received a document titled 'Heads of Agreement', printed on Stream letterhead, and signed by the chief executive. The document relevantly read:

> 'In exchange for the provision of this service by the contractor it is also then agreed that Stream will offer the opportunity to undertake the demolition work for Tower and its contracted partners to Nicon Ltd as a preferred contractor.
> The agreement shall not preclude Stream from engaging other contractors if required to facilitate the timely remediation of the complete claim volume. Stream reserves the right to enter into a competitive tendering process for any of its contracts, at any stage, to ensure a market rate for demolition contracts is maintained.'

Nicon subsequently received a considerable volume of work from Tower/Stream. In time, however, that work was given to other contractors. Nicon commenced proceedings in the High Court, seeking damages for lost income. In those proceedings certain agreed preliminary questions were determined before trial, including: (1) was the Heads of Agreement legally binding?; and (2) if yes, did the Heads of Agreement oblige Tower/Stream to offer all the demolition work to Nicon in respect of properties for which Nicon had provided assessments? The primary judge answered those questions 'Yes' and 'No' respectively. Tower/Stream appealed.

Held:

- Appeal dismissed: [62].
- As to (1): though the Heads of Agreement was a sparse document, it contained agreement on the essential terms, and the subsequent conduct of the parties indicated that it was intended to be legally binding: [34], [41]-[43].
- As to (2): rightly construed, the Heads of Agreement required Tower/Stream to offer Nicon all demolition work in respect of which Nicon had provided an assessment. Tower/Stream could only use another contractor if Nicon was unable to complete the work in the required time frame, or if, following a competitive tender, Nicon's rate was not a market rate: [55], [60].

7. **Private international law: anti-suit injunctions; issue estoppel; comity**

Court of Appeal of the Republic of Singapore

Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra **[2019] SGCA 42**

Decision date: 26 July 2019

Steven Chong JA, Belinda Ang Saw Ean J, Woo Bih Li J

The respondent, Mr Jitendra, was a family friend of the appellant, Ms Lakshmi Anil Salgaocar and her late husband, Mr Anil Vassudeva Salgaocar ('Mr Anil'), with whom Mr Jitendra had also enjoyed a long business relationship. At heart, the dispute between the parties concerned the ownership of a single share in a company incorporated in the British Virgin Islands ('BVI') called Million Dragon Wealth Ltd ('MDWL'). In turn, MDWL was the sole shareholder in 22 BVI-incorporated companies which each owned one unit in a property development in Singapore called Newton Imperial. In August 2015, Mr Anil commenced proceedings ('Suit 821') in Singapore against Mr Jitendra, alleging a breach of trust on the part of Mr Jitendra in his dealings with the 22 units, and seeking appropriate relief. Mr Anil died in January 2016, and his wife was appointed administrator of his estate. In May 2017, Mr Jitendra commenced proceedings ('BVI 83') in the BVI, seeking orders to the effect that he was the sole beneficial owner of the share in MDWL. About a month after Mr Jitendra commenced BVI 83, the appellant sought an anti-suit injunction in the Singapore High Court, restraining Mr Jitendra from proceeding in BVI 83. That application was dismissed. The primary judge held that Singapore had not been shown to be the clearly more appropriate forum, and that the appellant had not shown that Mr Jitendra had acted vexatiously or oppressively in commencing BVI 83. In July 2018, the appellant applied in the BVI to have orders authorising service outside of jurisdiction (with respect to BVI 83) set aside, and, or in the alternative, to have BVI 83 permanently stayed on the ground of *forum non conveniens*. The BVI High Court of Justice dismissed that application. Ms Salgaocar appealed from the Singapore High Court's refusal to grant an anti-suit injunction. On appeal, the key issues were: (1) what was the natural forum for the dispute; (2) was the pursuit of BVI 83 by Mr Jitendra vexatious or oppressive; and (3) did the BVI High Court's decision not to stay its proceedings preclude the Singapore Court of Appeal from granting an anti-suit injunction either on the basis of issue estoppel or comity?

Held:

- Appeal allowed; anti-suit injunction against Mr Jitendra granted: [137].
- As to (1): Singapore was the natural forum for the dispute: [58], [78], [80], [84].
- As to (2): the timing of the respondent's commencement of BVI 83 and his conduct in Suit 821 indicated that his pursuit of BVI 83 was vexatious and oppressive: [93], [97].
- As to (3): the fact that a foreign court has declined to stay its proceedings does not – and here, did not – give rise to an issue estoppel that prevents a losing party in the stay application from seeking an anti-suit injunction; and it is not invariably a breach of comity for a domestic court to grant the injunction where it is the clearly more appropriate forum and where the defendant has acted vexatiously or oppressively in commencing the foreign proceedings: [105], [129].

Other international decisions of interest

8. Human rights: application of *Charter* to non-government organisations

Court of Appeal for Saskatchewan

Yashcheshen v University of Saskatchewan **2019 SKCA 67**

Decision date: 30 July 2019

Richards CJ, Caldwell J, Leurer J

Ms Alicia Yashcheshen wished to study law at the University of Saskatchewan. She requested that her application be considered without a Law School Admission Test ('LSAT') score, as, from her perspective, her disabilities prevented her from being able to sit the test.

The University advised Ms Yashcheshen that all applicants to the College of Law had to submit an LSAT score. She submitted an application without an LSAT score; the College did not consider her application, deeming it to be incomplete.

Ms Yashcheshen commenced proceedings in the Court of Queen's Bench, arguing that the College's admissions policy violated her right to equal treatment under the law pursuant to s 15 of the *Canadian Charter of Rights and Freedoms*. Section 15(1) provides:

> 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

A Chambers judge dismissed her application, relevantly holding that the University's administration of its law admissions policy was not subject to the terms of the *Charter*.

Ms Yashcheshen appealed. Her primary argument on appeal was that the Chambers judge had erred in holding that the *Charter* did not apply to the University.

Held:

- Appeal dismissed: [36].
- Section 32(1) of the Charter relevantly provides that 'This Charter applies (a) to the Parliament and government of Canada … ; and (b) to the legislature and government of each province…' The University could not be characterised as a 'government'. Nor could the University be said to be a 'government' on account of the federal or provincial government exercising substantial control over it. And nor could the administration of the College's admissions policy be considered to be an activity that was governmental in nature. Accordingly, s 15 of the *Charter* did not apply to the College of Law in the administration of its admissions policy, and Ms Yashcheshen's argument could not be maintained.