Court of Appeal
Supreme Court
Sydney

Decisions of interest

12 March – 23 March 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. **Industrial law: powers of the Industrial Relations Commission**

   Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary **[2018] NSWCA 39**

   Decision date: 14 March 2018

   Bathurst CJ, Gleeson JA, Simpson JA

   A dispute arose between the appellant (**the Union**) and the Department of Family and Community Services. The Union notified that the Department that it had resolved to take industrial action for 24 hours commencing on 14 February 2017. It posted a flyer on its website notifying members of the details of the proposed action and encouraging them to participate.

   The Industrial Relations Secretary (**the Secretary**) filed a dispute notification with the Industrial Relations Commission (**IRC**), and after an attempted conciliation, the Commission made dispute orders on 2 February 2017 under the *Industrial Relations Act 1996* (NSW), s 137(1)(a). The orders directed the Union to *"cease organising and refrain from taking any form of industrial action"*, and not to *"induce, advise, authorise, encourage, direct, aid or abet"* its members to organise such action. After the orders were made, the Union continued to display the flyer, and posted a bulletin to the effect that it would continue with the action and *"cop a fine"* if necessary for a contravention of those orders.

   On 9 February, the primary judge found that the Union had contravened dispute orders, but reserved the penalty decision. The bulletin and the flyer remained on the Union's website until at least 15 February, and over 500 employees participated in the action. The judge subsequently imposed a penalty of $84,000 on the Union. The issues on appeal were whether the IRC had the power to make the orders, and whether the judge had erred in the penalty determination.

   Held:

- The power under s 137(1)(a) to *"order a person to cease or refrain from taking industrial action"* extends to ordering an industrial organisation to refrain from directing its members to engage in or organise industrial action. A contravention of such orders is not conditional on the action actually occurring: [124]-[125].

- The primary judge was correct in treating what occurred as a single contravention of the orders made by the Commission. The principle of totality is not concerned with a single course of conduct: [149]. However, the overall penalty imposed was manifestly excessive and should be set aside. This was because the contravention involved *"passive"* conduct in failing to take down the flyer and bulletin, and the penalty was well in excess of any penalty previously imposed: [155]-[160].

2. **Costs: indemnity costs; indemnification by legal practitioner**

Newell; Muriniti v De Costi **[2018] NSWCA 49**

Decision date: 20 March 2018

Beazley P, Gleeson JA, White JA

Mr Newell, counsel, and Mr Muriniti, solicitor (**the lawyers**), acted for the plaintiffs/cross-claimants ('**the Wachtenheim parties**') in proceedings involving certain franchise agreements. The Wachtenheim parties cross-claimed against the franchisors and others ('**the De Costi parties**'). The cross-claim was dismissed and the De Costi parties sought orders that the appellants indemnify them in respect of costs arising from the cross-claim, pursuant to the *Legal Profession Act 2004* (NSW), s 348, and the *Civil Procedure Act 2005* (NSW), s 99. Neither Mr Newell nor Mr Muriniti gave evidence in the costs proceedings.

At the first stage of the cost proceedings, the primary judge found that the presumption was satisfied pursuant to the *Legal Profession Act*, s 349(1) that legal services were provided without reasonable prospects of success in relation to the claim against Mrs Androulla Costi. The lawyers successfully sought orders dismissing the s 348 claim except insofar as it related to Mrs Costi. At the final stage, the primary judge ordered the appellants to indemnify the De Costi parties in respect of costs payable in the proceedings under s 348 and s 99. He indicated the orders he would have made in respect of each section, but imposed a combined order for wasted costs.

The issues on appeal were whether the primary judge erred (i) in finding the lawyers liable to provide indemnification under s 348, and in the method adopted to quantify those costs, (ii) in finding the lawyers liable to provide indemnification under s 99, and in the method adopted to quantify those costs, and (iii) in drawing adverse inferences against them for their failure to give evidence.

Held:

- Section 348 did not require that the party in whose favour an indemnity order were made be the party against whom proceedings were brought without reasonable cause: [47]-[49]; [246]. The five De Costi parties had engaged the services of one law practice, but it did not follow that 20% of the costs of the whole claim constituted "costs payable" in respect of Mrs Costi: [61]-[63]; [248].

- Although the judge had misstated the rule in *Jones v Dunkel* (1959) 101 CLR 298 with respect to adverse inferences, the majority of his findings should stand regarding where the lawyers had engaged in *"serious neglect, serious incompetence or serious misconduct"* under s 99: [211]-[214]. Legal professional privilege did not prevent the lawyers from explaining their conduct.

- The primary judge should not have adopted a global approach to the s 99 costs calculation without specifying which of the lawyers was responsible for each instance of misconduct, nor imposed a combined order: [228]-[232].

Other Australian intermediate appellate decisions of interest

3. **Local government; torts: negligent misstatement**

Central Highlands Regional Council v Geju Pty Ltd **[2018] QCA 38**

Decision date: 16 March 2018

Fraser JA, McMurdo JA, Brown J

On 9 May 2007, Ford Property contracted to sell land to three corporations (**the Mayfair Group**). The land was in the Rural Zone. Ford Property applied to the Council to reconfigure the relevant lot into two lots, and for a material change of use from the Rural Zone to Industrial use. The predecessor Council approved the application, subject to land use conditions. The change from Rural to Industrial zoning would lapse if the approved use did not take place by 24 August 2011. The Mayfair Group settled their purchase of one of the two lots, Lot 70. After an application by the Mayfair Group's solicitors, the Council issued them with a limited planning and development certificate (**the Certificate**) which incorrectly referred to the land as "zone: town", "precinct: industrial", when the correct zone was "rural". The land would have been more valuable if it had been zoned industrial, rather than rural with an approved change of use in place.

Geju Pty Ltd (**Geju**) entered into a contract to purchase Lot 70 from the Mayfair group. The controller of the respondent was given the Certificate and was told that the land was an industrial block. The trial judge found that the Council was liable for loss suffered by Geju in the land purchase stemming from its reliance on the negligent misstatement in the Certificate. The Council appealed.

Held:

- The Court upheld the appeal. To recover for pure economic loss resulting from a negligent misstatement, the plaintiff must prove that the defendant knew or ought to have known that the information would be communicated to the plaintiff either individually or as a member of an identified class, for a purpose very likely to lead the plaintiff to enter into the kind of transaction the plaintiff does enter into, and that the plaintiff does so in reliance on the information: [25].

- It was foreseeable that the Mayfair Group might pass on zoning information in the Certificate to one or more persons in the very broad class of persons who might rely upon the information to make serious financial decisions (e.g., owners, tenants, lenders, investors). However, there was no evidence to conclude that the Council knew or ought to have known that the Mayfair Group might do so, much less that a person would buy Lot 70 in reliance on the Certificate: [26]. This case was distinct from *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] 44 FCR 290, in which the relevant council knew and intended that potential purchasers would rely on the certificate: [31].

4. **Corporations: insolvency; trustees**

Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq) **[2018] FCAFC 40**

Decision date: 21 March 2018

Allsop CJ, Siopis J, Farrell J

Killarnee Civil & Concrete Contractors Pty Ltd (**the Company**) carried on business solely as the corporate trustee of the Thompson Family Trust (**the Trust**). The creditors resolved to wind up the Company. Mr Jones, among others, became the Company's Liquidator for the purposes of the winding-up. The trustee was disqualified from holding office under the Trust Deed because it was a company which had entered into liquidation. The Liquidator received the balance of money realised by the administrators and caused the Company to realise the remaining assets of the Trust. They also recovered an amount of $4.5 million as an unfair preference. At no time prior to the realisation of any assets did anyone seek to appoint a new trustee, apply for the appointment of a receiver and manager, or for a judicial sale of the trust assets.

The matter was heard in the original jurisdiction of the Court. The key issues were: (i) whether the assets of the Trust were assets in the winding up of the Company such that the liquidator had the power to sell under the *Corporations Act 2001* (Cth) (**the Act**), s 477; and (ii) whether the proceeds of the realisation of the trust assets and the unfair preference proceeds were to be dealt with under the priority regime of the Act.

Held:

- The right of indemnification by way of exoneration and the lien in its support were property of the trustee company, and in turn, fell under the control of the liquidator: [69]; [79]. *Re Enhill Pty Ltd* [1983] 1 VR 561 was wrongfully decided in relation to the availability of trust assets to pay creditors of the insolvent corporate trustee who were not trust creditors, and the approach in *In re Suco Gold Pty Ltd (In Liq)* (1983) 33 SASR 99 should be preferred: [78]; [197].

- The Liquidator could not derive the power to sell the trust assets from the Trust Deed, and ss 477(c) and (m) were not wide enough to encompass the sale of property which was not the property of the company, but was trust property in which the trustee had a proprietary interest by way of a lien to secure its right of exoneration: [89].

- The unfair preference proceeds were treated in accordance with the priority regime, by agreement of the parties: [93]-[94]. For different reasons, Allsop CJ and Farrell J found that the proceeds of realisation of the trust assets should be dealt with under the priority regime: [109]; [223]. It followed that the Liquidator should be directed to deal both categories of proceeds as assets in the winding up of the company: [110]; [224].

Asia Pacific decisions of interest

5. **Civil procedure: whether 'offshore case'**

Singapore International Commercial Court

BNP Paribus v Jacob Agam and Anor **[2018] SGHC(I) 03**

Decision date: 15 March 2018

Vivian Ramsey IJ

BNP Paribus Wealth Management (**the bank**) was a private bank incorporated in France, which conducted business in Singapore through its Singapore-registered branch. The bank commenced an action in the Singapore High Court against the two Israeli citizens (**the defendants**) to recover monies owing, which were claimed to be due by jointly and severally by the defendants as personal guarantors for particular loans. On 5 April 2016, the proceedings were transferred to the Singapore International Commercial Court (**SICC**).

On 13 December 2017, the SICC issued a judgment finding for the bank and awarded the claimed amounts plus interest. The defendants appealed against the judgment to the Singapore Court of Appeal. They also filed an offshore case declaration claim dated 5 December 2017 (**the Declaration**). In response, the bank applied for a declaration that the action was not or no longer was an offshore case (**the Application**). An *"offshore case"* is defined in the Rules of Court as *"an action which has no substantial connection with Singapore"*. Where the case is an offshore case, the parties may be represented by foreign lawyers.

Held:

- The Declaration was not a valid offshore case declaration under the Rules of Court, as it was filed long after the stipulated time period: [11]. The judge held that an application for a declaration that an action is not an offshore case was to be determined by a first-instance SICC Court: [15]. With respect to the Application, this was not a case where there was no substantial connection with Singapore. Although the relevant Facility Agreements, being the underlying transactions for the personal guarantees, were entered into outside Singapore, they were entered into by the bank's Singapore branch, and were to be performed in Singapore: [23].

- The place of performance of the obligations under the relevant transactions was fundamental to the offshore case determination. It was relevant that a number of the bank's witnesses were in Singapore, that documents relevant to the dispute were likely to be in Singapore, and that funds connected with the dispute would have passed through Singapore. However, these factors would not have been sufficient on their own without performance occurring in Singapore: [29]. The fact that the case was transferred to the SICC was not relevant to the question of its connection with Singapore, as not all SICC cases were 'offshore cases': [31].

6. **Civil procedure: dealing with confidential documents**

B2C2 Ltd v Quoine Pte Ltd **[2018] SCHC(I) 04**

Decision date: 20 March 2018

Simon Thorley IJ

Quoine Pte Ltd (**Quoine**) was a Singapore registered company operating a currency exchange platform enabling parties to trade virtual currencies for other virtual or fiat currencies. B2C2 Ltd (**B2C2**) operated as an electronic market maker. The platform displayed orders from buyers and sellers from each pair of currencies on an electronic 'Trading Dashboard', as well as real time pricing data for completed trades, using a software program.

B2C2 sought to buy and sell Ethereum, a virtual currency, for Bitcoin. Due to a technical glitch which prevented the program from setting a true market price, B2C2 was able to place and complete orders for the sale at a rate around 250 times the previously quoted rate. Quoine became aware of this glitch, and unilaterally reversed the trades. A summary judgment application was dismissed. One of the defences held to be arguable was unilateral mistake. Quoine argued that B2C2 must have known that the price was set in error. B2C2 adverted to the orders being automatically placed by their trading software.

Quoine made a discovery application for B2C2 to disclose certain documents related to B2C2's automated trading system. B2C2 objected to the application and contended that it was more desirable to order a single court expert to report on the system. The Rules of Court allowed production orders if no grounds of objection applied, which included *"grounds of commercial or technical confidentiality that the Court determines to be compelling"*.

Held:

- There is a public interest in open justice and ensuring a fair trial in which parties have access to all relevant material. This competes with an interest in ensuring that confidential information does not become exposed to misuse as a result of legal proceedings, particularly where the parties are competitors: [16]. *"Compelling grounds"* are grounds which lead the Court to conclude that in the circumstances of the case, there is no solution open other than refusal: [32]. However, this does not fetter the Court from taking measures short of refusing disclosure as would ensure the best balance between the interest of confidentiality and the interest of a fair trial: [34].

- A court expert was not to be appointed. B2C2 was at liberty to appoint an independent expert with access to identified categories of documents. The document list was to be filed in Court and served on Quione. Quione was to later receive a redacted expert report. An unreacted copy was to be supplied to Quione's solicitors with an undertaking that they would not disclose the unredacted material to Quione or any third party without consent: [48]-[51].

Other international decisions of interest

7. **Negligence: whether actionable damage suffered**

Dryden and others v Johnson Matthey Plc **[2018] UKSC 18**

Decision date: 21 March 2018

Lady Hale, Lord Wilson, Lord Reed, Lady Black, Lord Lloyd-Jones

The claimants worked for Johnson Matthey Plc (**the Company**) in factories making catalytic converters. The production process involved the use of platinum salts. The company, in breach of its duty at common law and under health and safety regulations, failed to ensure that the factories were properly cleaned. As a result, the claimants were exposed to platinum salts, leading them to develop 'platinum salt sensitisation'. This was, in itself, an asymptomatic condition; however, further exposure to platinum salts was likely to cause a person to develop an allergic reaction with physical symptoms. The sensitisation condition was detected in claimants through the performance of a routine skin prick test. Once detected, the company no longer allowed the claimants to work in places where they might be further exposed to platinum salts and develop allergic symptoms. Two claimants had their employment terminated, and one took up a different job within the company at a lower pay.

The trial judge held that platinum salt sensitisation did not qualify as an actionable personal injury. Further, he held that the claimants could not recover damages for pure economic loss under an implied contractual term, because the implied duty was to protect employees from personal injury, not economic or financial loss in the absence of personal injury. This was upheld by the Court of Appeal, and the claimants appealed to the United Kingdom Supreme Court.

Held:

- The Court, allowing the appeal, determined that the claimants had a cause of action in negligence and statutory duty against the company: [49]. The Court considered authorities on the identifying features of actionable personal injury. They observed that personal injury has been seen as a physical change which makes the claimant appreciably worse off in respect of health or capacity, and that it could be hidden and symptomless: [27].

- The physiological changes to the claimants' bodies had impaired their bodily capacity for work and made them significantly worse off. This amounted to actionable personal injury which was more than negligible: [40]. The Court rejected the argument that this was not actionable because the claimants had not become sensitised to something encountered in *"everyday life"*: [38]-[39].

- Given the conclusion on personal injury, it was unnecessary to consider the alternative argument on recovery for pure financial loss: [49].

8. **Torts: conspiracy by unlawful means**

***JSC BTA Bank v Khrapunov* [2018] UKSC 19**

Decision date: 21 March 2018

Lord Mance, Lord Sumption, Lord Hodge, Lord Lloyd-Jones, Lord Briggs

For a number of years, Mr Ablyazov was the chairman and controlling shareholder of JSC BTA Bank (**the Bank**), incorporated in Kazakhstan. It was alleged that during this period he embezzled US$6 billion of the Bank's funds. The Bank was nationalised and Mr Ablyazov was removed from office. He fled to England and ultimately obtained asylum. The Bank brought proceedings against him in England, alleging misappropriation of its funds, and obtained a disclosure order requiring Mr Ablyazov to disclose the whereabouts of his assets, and a worldwide freezing order over those assets.

The Bank later obtained documents revealing a large number of undisclosed assets and a network of companies through which Mr Ablyazov had sought to hide those assets. They obtained an order committing Mr Ablyazov for contempt of Court. Mr Ablyazov fled the jurisdiction on receipt of the draft judgment. The Bank then brought proceedings against Mr Ablyazov and his son-in-law, Mr Khrapunov. In relation to Mr Khrapunov, who was domiciled in Switzerland, the Bank argued that the tort of conspiracy was made out, because Mr Khrapunov had been at all times aware of the freezing and receivership orders, and had entered into an understanding with Mr Ablyazov to assist him in dissapting and concealing his assets.

Mr Khrapunov contested the jurisdiction of the English court. He submitted that contempt of court could not constitute unlawful means for the tort of conspiracy, because the relevant acts were unlawful only because they were breaches of court orders. He also argued that there was no jurisdiction under the Lugano Convention, because the England was not *"the place where the harmful event occurred"*. Although the conspiratorial agreement was made in England, the acts done pursuant to the agreement occurred outside England.

Held:

- The Court dismissed Mr Khrapunov's appeal: [42]. A consideration of the authorities made it clear that conspiracy was a tort of primary liability. The question of what constitutes unlawful means could not depend on whether such acts would give rise to a different cause of action independent of conspiracy: [11]. An action for conspiracy to commit a contempt of court was not inconsistent with public policy: [23]-[24].

- The place where the conspiratorial agreement was made, being England, was the place of the event which gave rise to and was at the origin of the damage for the purposes of the Lugano Convention: [41].