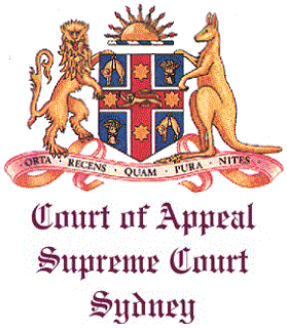

Decisions of interest

23 April 2018 – 4 May 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. **Contracts: incorporation of terms; commercial arbitration**

Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd **[2018] NSWCA 81**

Decision date: 24 April 2018

Bathurst CJ; Beazley P; Emmett AJA

In 2009, the respondent companies entered into an Agreement with Warner Brothers Feature Productions Pty Ltd (**WB Productions**) to supply the services of Mr Miller and Mr Mitchell for the production and direction of the film *Mad Max: Fury Road.* Under the Agreement, as amended, the respondents were entitled to a bonus payment and other benefits if the "*net cost*" of the film was below an agreed figure. They brought proceedings alleging that WB Productions had breached the Agreement by failing to make the bonus payment, and preventing the respondents from seeking a co-financier for the film. WB Productions' parent company (**WB Entertainment**) was alleged to have induced the latter breach. They also claimed that the appellants had engaged in misleading and deceptive conduct with respect to which costs were included in the "*net cost*".

The appellants sought a stay of proceedings in NSW. WB Productions argued that the Agreement included a term requiring the dispute to be submitted to arbitration in California, as incorporated into the Agreement by cl 21. The clause provided that the *"balance of terms"* would be *"WB standard for 'A' list directors and producers"* (**WB standard**), subject to *"good faith negotiations*". WB Entertainment argued that NSW was clearly an inappropriate forum because the claim against it was closely related to the claim against WB Productions. The primary judge dismissed the application. The issues on appeal were (i) whether the Agreement incorporated terms which were WB standard prior to good faith negotiations occurring, and (ii) whether the arbitration clause was incorporated into the Agreement because it was a term which was WB standard.

Held:

- The Court allowed the appeal. The intention of the parties, ascertained by reference to the text, read in the context of the Agreement as a whole, was for the terms which were WB standard to be immediately incorporated, while leaving room for subsequent negotiations about their precise effect. Without immediate incorporation of "WB standard" terms, critical provisions of the Agreement would be rendered meaningless: [54]-[58].

- The arbitration clause was a standard term, as it was one which had been habitually proffered by companies in the WB group for agreements with "A" list directors and producers. The evidence established that such a clause had been in use since the early 2000s, including in the "form agreements" current in 2009: [75]-[86]; [103]-[104].

2. **Negligence: breach of duty, causation, contributory negligence**

Rail Corporation New South Wales v Donald; Staff Innovations Pty Ltd t/as Bamford Family Trust **[2018] NSWCA 82**

Decision date: 24 April 2018

Beazley ACJ; McColl JA; Meagher JA

Mr Donald was employed by the second respondent, which hired out his labour to the appellant. He worked as a labourer, primary, although not solely as a jackhammer operator, removing old railway sleepers and replacing them with new ones. Mr Donald brought proceedings against the appellant and second respondent for a back injury, which he claimed had been suffered due to the nature and conditions of his employment. The primary judge held that Mr Donald sustained injury due to the negligence of the appellant. He also entered judgment against the second respondent in accordance with the *Workers Compensation Act 1987* (NSW). The appellant appealed and the second respondent cross-appealed with respect to the findings on liability.

Both parties argued that they had not breached their duty of care. With respect to the appellant's breach of duty, there was an issue as to whether Mr Donald was required to work without the benefit of adequate rest breaks, in circumstances where the worker he was teamed with did not undertake the full range of tasks and did not jackhammer, as well as whether the risk of harm was "*not insignificant*". The parties also raised a causation issue, and challenged the finding that Mr Donald was not contributorily negligent.

Held:

- The Court dismissed the appeal. There was no evidentiary basis to support the inferences of the primary judge that Mr Donald had been called to perform more of his share in the cleaning work, and that he would have been left frequently to his own devices to perform all of the tasks: [84]-[86]. Even so, there was evidence supporting the finding that the appellant was negligent in failing to provide him with a safe system of work, where he was the only worker required to jackhammer, and where he undertook heavy lifting without assistance. This work was generally to be undertaken by two workers under the de facto system: [87]-[88]; [127]-[128]. The risk of harm was not insignificant: [142].

- The primary judge did not err in preferring the evidence of one expert to the effect that Mr Donald had suffered from an internal disc disruption. Nor did he err in accepting the evidence of a medical specialist that cumulative trauma could be a cause of an injury such as that sustained by Mr Donald: [179]-[191].

- There was no error in finding that Mr Donald was not contributorily negligent: [204]-[205]; [229]. Nor was there an error in finding that the second respondent had breached its non-delegable duty of care, notwithstanding its lack of input or control over the system of work under which Mr Donald was required to work: [225]; [228].

3. **Constitutional law; statutory interpretation: *Proceeds of Crime Act* (Cth)**

***AD v Commissioner of the Australian Federal Police* [2018] NSWCA 89**

Decision date: 30 April 2018

Beazley ACJ; McColl JA; Meagher JA

On 20 March 2015, the appellant was convicted of and sentenced for two offences under the *Criminal Code* (Cth), both of which constituted "*serious offences*" within the meaning of the *Proceeds of Crime Act 2002* (Cth) (**the Act**), s 338. In April 2012, restraining orders had been made in respect of items of the appellant's property, pursuant to the Act, s 18. Under s 92, if a person is convicted of a serious offence, property that is the subject of a restraining order is forfeited to the Commonwealth unless the property is excluded from forfeiture, at the end of a six month period starting on the "*conviction day*", or an extended day fixed by the Court, ending no later than 15 months from the start of the "*conviction day*". The initial forfeiture date was extended to 19 May 2016.

On 1 December 2015, the appellant sought an exclusion order in respect of certain items of restrained property. The primary judge dismissed his application on 6 May 2016 and, on 4 August 2016, the property was declared to have forfeited to the Commonwealth at midnight on 19 May 2016. The issues on appeal were: (i) whether an exclusion order could be made in respect of forfeited property; (ii) whether the Act, ss 18, 26(4), 92, 95 and 338(a)(ii), (a)(iv) and (g) of the definition of "*serious offence*" were constitutionally invalid, and (iii) whether there was fraud in obtaining the restraining orders.

Held:

- The Court dismissed the appeal. On its correct construction, there was no power under the Act to make an exclusion order with respect to the restrained property, as the property had already been forfeited. Nor was there the power for the court to make an order extending the time in which an exclusion order could be made: [45]–[73].

- The "*conviction day*" was the day on which a person was first sentenced for the offence of which they had been convicted, whether summarily or on indictment. Even if this could be construed as referring to the day on which a person was resentenced on appeal, this would not assist the appellant, as they had not applied for an exclusion or extension order within six months of that date, as required by the legislation: [74]-[80].

- The impugned provisions were constitutionally valid. The court's constitutional integrity was not compromised in the making of a restraining order: [90]-[106]. Nor did the scheme for the forfeiture of property constitute a tax: [109]-[112].

- The appellant should not be permitted to raise fraud as a ground of appeal, where it had not been advanced in the court below, and where the appellant had not advanced any cogent material to support the allegation: [114].

4. **Administrative law: validity of delegated legislation**

Racing NSW v Lewin **[2018] NSWCA 93**

Decision date: 3 May 2018

Bathurst CJ; Basten JA; Macfarlan JA

Mr Lewin, held a bookmaker licence issued by Racing NSW (**the appellant**), which was valid until 30 June 2017. On 6 July 2017, He applied for a new licence. On 10 August 2017, the applicant determined that Mr Lewin was not a fit and proper person to hold the licence, and resolved not to issue the new licence. Mr Lewin successfully obtained a declaration in the Supreme Court that he had a right of appeal from the appellant's decision to the Racing Appeals Tribunal (**the Tribunal**), pursuant to the *Racing Appeals Tribunal Act 1983* (NSW) (**the Act**), s 15(1)(d). The Racing Appeals Tribunal Regulation, cl 5, stipulated the specific types of decisions from which an appeal lay to the Tribunal. The declaration was made on the basis that the effect of the decision was that Mr Lewin had been "*disqualified*", such that his right of appeal was preserved under cl 5(2)(a). The Minister for Racing and the State of New South Wales were joined in the proceedings below, and therefore on appeal.

It was common ground on the appeal that the characterisation of the decision adopted by the primary judge could not be supported. The questions on appeal, were: (i) whether the applicant's decision was a decision to "*revoke*" a licence within the meaning of the Regulation, cl 5(2)(b), such that an appeal could be brought under the Act, s 15(1)(d) and, (ii) in the alternative, whether cl 5 was invalid insofar as it precluded an appeal by Mr Lewin under s 15(1)(d).

Held:

- The Court allowed the appeal. It would be contrary to the ordinary meaning of the term "*revoke*" to expand it to encompass a refusal to licence. Cl 5 expressly referred only to revocation and suspension of a licence; it did not cover a refusal to licence (whether initially, or on renewal). The distinction between the two types of decision was reflected in the language of the *Thoroughbred Racing Act 1996* (NSW), s 14(2), which distinguishes between the powers of cancellation/suspension, and the power to refuse a licence: [31]-[33]; [44]-[48].

- The Act allowed for regulations to be made limiting the classes of determinations from which appeals could be brought to the Tribunal. It could not be said that cl 5 was capricious, arbitrary, or irrational. There was a logical and sensible basis upon which the distinction between the two decision types could be made, as only revocation dealt with an extant legal right: [27]-[29]; [44]; [48]-[49].

- There is no rigid rule that the State (or other relevant polity) must be joined whenever a challenge is mounted to the validity of a regulation or an Act. A statement to that effect in *State of New South Wales v Macquarie Bank* (1992) 30 NSWLR 307 should not be followed. The State need not have taken an active role in proceedings and should bear its own costs: [38]-[41].

Other Australian intermediate appellate decisions of interest

5. **Corporations: directors' duties; appeals: inferential reasoning**

Australian Securities and Investments Commission v Geary **[2018] VSCA 103**

Decision date: 23 April 2018

Ferguson CJ; Weinberg JA; Sifris AJA

The Australian Securities and Investments Commission (**ASIC**) brought civil penalty proceedings against Mr Geary, a former officer of the Australian Wheat Board (**AWB**), for alleged breaches of his duties under the *Corporations Act 2001* (Cth), s 180 (care and diligence), and s 181 (good faith). The breaches were said to arise out of various payments made by the AWB between 1999 and 2003. A number of these payments were made under the guise of being a fee for the distribution of wheat in Iraq, which ASIC alleged was a means by which Iraq could obtain internationally traded currency, contrary to United Nations (**UN**) Resolutions. ASIC further alleged that AWB had breached the UN Resolutions in relation to compensation payments for contaminated wheat, and inflated wheat prices to pay a debt owing to a third party.

ASIC instituted proceedings against various AWB directors and officials. The essence of the case against Mr Geary was that he knew or ought to have known of the improper conduct, and that public revelation of such conduct was likely to cause substantial and enduring harm to AWB. In failing to act to prevent any of this conduct, he contravened his obligations as an officer of the company. At trial, Mr Geary contended that he reasonably believed that the payments had been approved by both the Department of Foreign Affairs and Trade (**DFAT**), and the UN, and that legal advice had been obtained to the effect that the wheat compensation payments were lawful. The primary judge dismissed the claim.

Held:

- The Court dismissed the appeal. The grounds of appeal on which ASIC sought to rely required the Court to conduct a 'real review' of the voluminous evidence lead at trial, being a difficult task: [208]; [224]. Although, pursuant to *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; (2016) 331 ALR 550, an appellate court should not interfere with a judge's findings of fact unless they are demonstrably wrong, this stringent approach should not be applied to purely inferential reasoning: [216]-[223].

- No material error could be discerned in relation to the findings of the primary judge, including that there was a prevailing view within AWB, shared by Mr Geary, that the inland transport fee had been approved by DFAT and the UN: [298]; [332]. Nor had the judge erred in not applying *Jones v Dunkel* so as to infer that Mr Geary had read certain documents: [257]; [264]; [270].

6. **Workers' compensation; statutory construction**

***Comcare v Drinkwater* [2018] FCAFC 62**

Decision date: 26 April 2018

Kenny J; Flick J; Perry J

Mr Drinkwater had been employed as a Customs Worker for a number of years, performing duties in the International Terminal at Sydney Airport. On 4 April 2015, pursuant to the mobility policy of the relevant Department, Mr Drinkwater was informed that he had been selected for transfer to a position in Client Services at Customs House, a different location. The mobility policy had been reinstated in 2013. Mr Drinkwater expressed his desire not to move on a number of occasions, however, the transfer was confirmed on 31 October 2015. His medical condition deteriorated and he became incapacitated from work.

Comcare denied his compensation claim, on the basis that the relevant injury was excluded by the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the Act**), s 5A(2)(f). Section 5A(1) defined "*injury"* to exclude injuries "*suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment*". Section 5A(2) stipulated that reasonable administrative action was taken to include types of action listed therein in sub-sections (a)-(f).

The Administrative Appeals Tribunal (**the Tribunal**) overturned Comcare's decision. It was not in dispute that Mr Drinkwater suffered from an adjustment disorder associated with anxiety, and that his employment by the Department had made a significant contribution to his condition. The issues on appeal were whether the Tribunal had misconstrued the phrase "*in respect of the employee's employment*", and whether it had failed to take into account a relevant consideration, being the operation of s 5A(2)(f).

Held:

- The Court allowed the appeal. The relevant "*administrative action*" was the decision to transfer Mr Drinkwater to a different position. This was plainly "*in respect of*" his employment, because it was directed specifically to his employment and taken in respect of it. The earlier Department decision to reinstate the mobility policy was not the relevant action as it did not give rise to the disorder for which Mr Drinkwater sought compensation. Nor did it matter that the decision to transfer him would not have occurred but for the decision to implement the policy: [70]-[73].

- Because the exclusion under s 5A(1) of the Act clearly applied in the circumstances, it was not necessary to consider the second issue. Nothing turned on whether the relevant action fell within the Act, s 5A(2)(f). The list of examples of "*reasonable administrative action*" was in its terms non-exhaustive and did not qualify the meaning of that expression in s 5A(1): [76].

Asia Pacific decisions of interest

7. **Contract: incorporation of terms, mistake, misrepresentation; equity**

Singapore International Commercial Court

Macquarie Bank Ltd v Graceland Industry Pte Ltd **[2018] SGHC(I) 05**

Decision date: 4 May 2018

Sir Henry Bernard Eder IJ

Macquarie Bank Ltd (**Macquarie**) entered into a commodity swap arrangement with Graceland Industry Ltd (**Graceland**), a Singapore-based company. Mr Wolfe was at all times employed as a Senior Advisor at the bank. Macquarie brought a claim for US $1.2 million. The basis of the claim was that the relevant Transaction incorporated the standard 2002 International Swaps and Derivatives Association Inc Master Agreement (**the ISDA Form**), that Graceland wrongfully repudiated the Transaction, and that this enabled Macquarie to terminate the Transaction, as it did. The bank further claimed that the sum of $1.2 million was recoverable as the "Close-out Amount", defined in the ISDA Form.

By way of defence and counterclaim, Graceland disputed the nature and terms of the Transaction, and denied the claim on a number of grounds, alleging that the Transaction was void *ab initio* and/or had been rescinded. These grounds were: (i) unilateral mistake, (ii) mutual mistake, (iii) breach of fiduciary duties, and (iv) fraudulent misrepresentation or non-disclosure. It was common ground that all these issues were to be determined in accordance with English law.

Held:

- The judge found that there was a binding agreement between Macquarie and Graceland, which was effective to incorporate the ISDA terms: [111]. He rejected all the defences, and dismissed the counterclaim.

- *Grounds (i) and (ii)*: Graceland had not been mistaken as to the nature and terms of the Transaction. The evidence did not establish that any of the relevant personnel actually thought or believed that the swap would be effected by Macquarie as agent or broker on behalf of Graceland, or that the transaction was not an 'over-the-counter' commodity swap: [88]; [113]. In light of the factual findings, there was also no mutual mistake: [117].

- *Ground (iii):* Macquarie and Mr Wolfe were not to be regarded as fiduciaries and did not breach any relevant fiduciary duties. The Transaction was one between counterparties acting as principals. Although that premise did not preclude a fiduciary relationship, such a relationship could not be established here: [123].

- *Ground (iv):* On the evidence, the misrepresentations relied upon were not made by Mr Wolfe or Macquarie; the non-disclosure claim also failed as it was based upon the alleged misrepresentations: [65]; [128]-[129].

8. Workers' compensation; insurance

Supreme Court of Fiji

Tebara Transport v Dominion Insurance Ltd **[2018] FJSC 11**

Decision date: 27 April 2018

Chandra J; Keith J; Chitrasiri J

Mr Kishore was a passenger on a bus which was involved in a collision. He was badly injured. At the time, he was on his way to work, the bus was owned by his employers (**Tebara Transport**), and was being driven by one of their employees. The trial judge found that the accident had occurred as a result of the employee's negligence, for which the employers were vicariously liable.

The bus was insured under a motor vehicle compulsory third party policy (**the Policy**), pursuant to its obligations under the *Motor Vehicles (Third Party Insurance) Act*. Under the Policy, s 2, employers, and by extension, defendant employees, were covered if they became "*legally liable for… personal injury to [non fare paying] passengers*" arising from the use of the bus. Clause 22(b) excluded liability for "*death or bodily injury sustained by… any employee of yours"*. The trial judge concluded that the exclusion did not apply, because Mr Kishore had not been acting in the course of his employment at the relevant time. The Court of Appeal took the opposite view, finding that the insurer was not liable to indemnify the employer. The issue for the Supreme Court was whether, and to what extent, the insurers were obliged under this Policy to indemnify the driver and the employers for their liability to Mr Kishore.

Held:

- The Court allowed the appeal. The words "*any employee of yours*", as properly construed, referred only to employees injured in the course of their employment. To conclude otherwise would be anomalous, as it would place an off-duty employee in a worse position than any other passenger in the vehicle who was injured at the same time: [12].

- The insurer argued, *inter alia*, that the exclusion should be construed widely because employers were not required to have cover for off-duty employees under the *Motor Vehicles (Third Party Insurance) Act*. This argument was rejected: the Act dealt with the minimum cover which had to be provided, and said nothing about what additional cover might be agreed. Moreover, if the Policy was intended to restrict cover to the minimum standard, one would expect it to closely track the provisions of the Act: [14]-[16].

- Mr Kishore was not acting within the course of employment at the relevant time. He had not yet reported for work. He was not duty bound by his terms of employment to travel in a bus provided by his employer, nor was the bus being provided solely for the purpose of transporting Tebara Transport employees. Therefore he did not fall within the cl 22(b) exception: [41]-[45].

Other international decisions of interest

9. **Torts: Alien Tort Statute (US)**

***Jenser v Arab Bank, PLC,* No 16-499**

Decision date: 24 April 2018

Claims were brought by on or on behalf of persons who were injured or killed in terrorist acts committed abroad against Arab Bank, PLC (**Arab Bank**), under the Alien Tort Statute (**ATS**). The claimants alleged that Arab Bank, a Jordanian institution, had in part caused or facilitated the terrorist acts by using its New York branch to clear dollar-denominated transactions benefiting the relevant terrorist groups. The ATS provides that "*the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States*".

While the litigation was pending, the Supreme Court held, in *Kiobel v Royal Dutch Petroleum Co*, 569 US 108, that the ATS did not extend to suits against foreign corporations when all the relevant conduct took place outside the United States (**US**). The issue for the Supreme Court on this occasion was whether this left unresolved, and if necessary, how one should resolve the question of whether foreign corporations in general could be sued under the ATS.

Held:

- By majority, the Court held that common-law liability under the ATS did not extend to foreign corporate defendants. The ATS was intended to promote international harmony by giving foreign plaintiffs a remedy to hold the US accountable; here, there was minimal connection to the US. Courts should be cautious to recognise new forms of liability, absent intervention from Congress, and especially given the foreign policy issues at play.

- The pluarity (Kennedy J, Roberts CJ and Thomas J joining), observed that corporate liability under the ATS had not been shown as essential to serving the goals of the statute, and noted that the plaintiffs could still sue the individual corporate employees responsible for international law violations under the ATS. Writing separately, Alito J opined that customary international law did not generally require corporate liability, and that to create causes of action against foreign corporations might provoke diplomatic strife. Gorsuch J opined that the separation of powers doctrine should lead federal courts to require a domestic defendant before considering whether to entertain an ATS suit.

- In dissent, Sotomayor J (Ginsburg, Breyer and Kagan JJ, joining), held that it was not necessary to foreclose foreign corporate liability in all ATS actions, irrespective of circumstance or norm, and that there were existing doctrines and means to preclude actions which were not sufficiently connected to the US. The judgment emphasised that corporate liability was not in itself a cause of action, but merely a vehicle for enforcing international norms.

10. Private international law; trusts: trustee's right of indemnity

Investec Trust (Guernsey) Ltd & Anor v Glenalla Properties Ltd & Ors **[2018] UKPC 7**

Decision date: 23 April 2018

Lord Mance; Lord Sumption; Lord Carnwath; Lord Hodge; Lord Briggs

Glenella Properties Ltd, Thorson Investments Ltd, Eliza Ltd and Oscatello Ltd were all companies incorporated in the British Virgin Islands (**BVI**). In 2007, a trust was established, governed by the law of Jersey. Assets and liabilities were transferred into it from a related trust, including shares in the BVI companies, and liabilities to pay sums to Glenella, Thorson, and Kaupthing Bank (**the bank**). The trustees agreed to a reorganisation of the trust, which transferred the shares of BVI companies, including Glenella and Thorson, to Oscatello, and gave security to the bank in exchange for further lending to pay the existing debt. This was intended to be a "*ring-fencing*" arrangement, such that the bank could only have recourse to the assets within that structure. However, the instrument of transfer failed to include the trustees' liability to repay the loans owed to Glenella and Thorson, and the trustee did not correct that failure.

The bank exercised its security rights over the shareholdings and the BVI companies went into liquidation. The joint liquidators brought a claim against the now-former trustees (**I&B**) for payment of the loans due to Glenella and Thorson, and reimbursement of Oscatello's payment of the sum owed by the trust to the bank. I&B commenced proceedings to determine whether they had incurred liability to the BVI companies, and under what terms. If liability was to be determined under the proper law of the transactions, I&B would face unlimited personal liability, however, if the *Trusts (Jersey) Law 1984*, Art 32 applied, liability would be limited to the trust assets. If Art 32 applied, a further issue arose as to whether creditor's claim was limited to claiming through I&B by subrogation to the trustee's indemnity, and whether I&B were not entitled to be indemnified under Art 26, because the liabilities were not "*reasonably incurred*".

Held:

- At common law, a trustee's liability, unless limited by contract, was personal and without limit, albeit with a right to be indemnified out of the trust assets. Art 32 modified this position, by introducing a legal distinction between the two capacities of the trustee, personal, and fiduciary. This meant that the trustee was treated as incurring liabilities 'as trustee', without recourse to their personal estate: [59]-[61]. However, Art 32 did not go so far as to create a direct right of action against the trust by a creditor: [62]-[63].

- Applying the private international law of Guernsey, the law to be applied was Jersey Law, as the proper law of the trust: [102]. Whether a liability had been "*reasonably incurred*" had to be determined at the point when it was originally assumed. Because the BVI loans were reasonably incurred at the outset, this was sufficient to engage the indemnity in Art 26: [106]-[116].