Court of Appeal
Supreme Court
Sydney

Decisions of interest

27 August 2018 – 7 September 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. **Public law: compulsory acquisition of property, improper purpose**

   Roads and Maritime Services v Desane Properties Pty Ltd **[2018] NSWCA 196**

   Decision date: 6 September 2018

   Bathurst CJ; Ward JA; Payne JA

   Since at least 2015, the appellant had indicated the necessity of acquiring privately-owned properties, including the respondent's, for construction of Stage 3B of the NSW Government's WestConnex project. This involved construction of an underground interchange at Rozelle and a harbour tunnel. In July 2016, the Government publicly announced that following completion of the construction work, the area over the interchange would provide up to 10 hectares of parkland and open space. The proposed area included the respondent's property. In May 2017, the appellant issued the respondent a Proposed Acquisition Notice (**PAN**) under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Act**). Whilst the PAN and compensation form reflected the information in the Act, they departed in some respects from the form for such notices which had been approved by the Minister under s 15(a). The respondent brought proceedings claiming that the PAN was invalid for failure to comply with the Approved Form, and that the appellant was actuated by an improper purpose in issuing the PAN because it sought to acquire the property for meeting the Government's parkland commitment irrespective of whether the interchange project proceeded. It also sought an injunction preventing the appellant from acting on the PAN. The primary judge found for the respondent but refused to grant injunctive relief. The appellant appealed and the respondent cross-appealed on the failure to grant an injunction.

   Held:

- The Court allowed the appeal and dismissed the cross-appeal. The PAN was not invalid. The Act evinced an intention that failure to comply with Pt 2 did not go to its validity: [206]-[224]. The Approved Form did not cease to be able to validly invoke the machinery of the Act following the 2016 amendment to the Act: [249]-[254].

- The terms of the Act did not indicate that the PAN was required to comply strictly with the Approved Form. The *Interpretation Act 1987* (NSW), s 80(1) applied to make it sufficient that the PAN was substantially compliant, as it was in this case: [225]-[230]. There was no implied requirement under the Act for a valid PAN to state the public purpose for which acquisition was sought. In any event, the covering letter to the PAN clearly identified the public purpose: [255]-[280].

- The appellant was not actuated by an improper purpose; the critical time for assessing purpose being at the point of acquisition. At the time the PAN was issued, RMS sought to acquire the property to be used as a construction site for the interchange. To the extent the appellant contemplated use of the property for parkland, this was not until after the construction would be concluded: [301]-[311].

2. **Contract; solicitors: retainer, client conflict, confidentiality**

Técnicas Reunidas SA v Andrew **[2018] NSWCA 192**

Decision date: 31 August 2018

Bathurst CJ; Leeming JA; White JA

A dispute arose between the appellant and one of its sub-contractors (**Downer**). The appellant retained two Australian partners of Pinsent Masons, who at all relevant times worked in the firm's Sydney office, to give advice whilst the dispute with Downer was crystallising (around August-October 2015). Since early 2015, Downer had retained two partners of the firm Norton Rose Fulbright Australia, who were at all times based in Melbourne. In 2016, Downer commenced an arbitration against the appellant. In May 2016, the appellant informed Pinsent Masons that they had retained law firm White & Case for the arbitration. In June and August 2016, Pinsent Masons made overtures by email to the appellant as to its willingness to assist with the arbitration. The appellant did not respond. In 2017, the Norton Rose partners and some of the solicitors in their team took steps to join Pinsent Masons (Australia), bringing with them their client Downer in December 2017. The Australian firm and associated firms put in place procedures said to effectively quarantine the information derived from the work previously done for the appellant. The appellant sought an injunction in the Supreme Court preventing the partners from acting for Downer in the arbitration. The primary judge dismissed the proceedings. On appeal, the appellant advanced three bases for its claim to injunctive relief. The appellant argued that when the partners changed firms, Pinsent Masons had a continuing retainer with it, such that it was in breach of its fidcuariy duty of loyalty to it. It also invoked the need to protect the appellant's confidential information. The appellant also relied upon the Court's inherent jurisdiction to protect the proper administration of justice.

Held:

- The Court granted leave but dismissed the appeal. There was an implied agreement between the parties to terminate the retainer by September 2016. As the appellant did not allege any continuing duty of loyalty surviving termination of the retainer, this was not a basis for injunctive relief: [45]-[59].

- Pinsent Masons had discharged their onus of establishing that there was no real risk that the appellant's confidential information would be disclosed to the Melbourne-based partners and employees who acted for Downer, given Pinsent Mason's unchallenged evidence as to their information barriers, read in light of what had actually occurred; the geographical separation the new partners and those who had acted for the appellant, and the fact that the information barriers were not *ad hoc* but reflected existing and well-developed procedures: [60]-[70].

- In the circumstances, a fair-minded and reasonably informed member of the public would not conclude that the proper administration of justice required that Pinsent Masons be restrained from acting for Downer: [82].

Other Australian intermediate appellate decisions of interest

3. **Class actions: competing actions; limitation periods; federal jurisdiction**

Wileypark Pty Ltd v AMP Limited **[2018] FCAFC 143**

Decision date: 29 August 2018

Allsop CJ; Middleton J; Beach J

In 2018, four open class actions were filed against AMP Limited under the *Federal Court of Australia Act 1976* (Cth) (**FC Act**), Part IVA. Shortly prior, the Wigmans proceeding was filed under the *Civil Procedure Act 2005* (NSW) (**CP Act**), Pt 10. AMP filed applications to have the Federal Court (**FC**) actions transferred to the Supreme Court under the *Corporations Act 2001* (Cth) (**CA Act**), s 1337H. These were listed for 14 August. The FC applicants sought, without success, to have the Wigmans proceeding transferred to the FC. In July, after Lee J directed the FC applicants to inform the Court whether any application would be made to preserve the status quo pending the 14 August hearing, Ms Wigmans filed a so-called "*anti-anti-anti suit*" injunction. This was refused and consent orders were made holding the position pending the FC applications. The applications were heard by the Full Court. The interests behind one of the proceedings (Komlotex) argued that transfer would destroy the protection of the *FC Act*, s 33ZE(1), which suspends the running of any limitation period applying to a group member's (**GM**) claim "*upon commencement of a representative proceeding*", until the GM opts out, or the proceeding is resolved: s 33ZE(2). The *CP Act*, s 182, is in similar terms. Under the *CA Act*, s 1317K, proceedings must be started within 6 years. AMP argued, and Komlotex conceded, that commencement of representative proceedings "*on behalf of*" GMs was the "*start*" of proceedings for the purposes of s 1317K.

Held:

- The Court ordered that the four proceedings be transferred to the Supreme Court. This would enable that Court to determine which action(s) should go forward, taking into account all relevant matters and the best interests of GMs: [23]-[25].

- The preferable view was that GMs did not "*start*" proceedings under s 1317K, as they were brought on their behalf: [29]; [62]. However, on the premise that s 1317K was engaged, the fact that the transfer provisions required the Supreme Court to treat the proceeding thereafter as if it had been commenced there did not destroy the antecedent protection in s 33ZE(1), by the event of the commencement that had in fact occurred. If, to the contrary, s 33ZE(1) did not apply, s 182(1) would be picked up by the *Judiciary Act 1903* (Cth) to govern the proceedings, as occurring in the federal jurisdiction: [37]; [39]-[48]. Once transferred, s 182(2) would be 'picked up' under the *Judiciary Act* to govern the end of the suspension: [38]; [50].

- Beach J considered that, on proper construction of s 1317K, the 'limitations clock' stopped for group members when representative proceedings were filed by virtue of the operation of s 1317K, rather than on account of s 33ZE(1): [72]; [85].

4. **Administrative law: procedural fairness, self-represented litigant**

Doughty-Cowell (Victoria Police) v Kyriazis **[2018] VSCA 216**

Decision date: 29 August 2018

Maxwell P; Beach JA; Niall JA

Mr Kyriazis represented himself on an appeal *de novo* to the Victorian County Court against his convictions on two minor traffic offences relating to his failure to produce his driver's licence or identify himself to police. Prior to the hearing, he sent provocative correspondence to the Court. From the start of the hearing, he refused to accept the judge's ruling that he could make a sound, but not a video recording of the proceeding, eventually resulting in the judge threatening him with contempt charges and requesting that he go into the dock. Mr Kyriazis did so. He subsequently refused to participate in his own appeal. The judge proceeded to call upon his subpoenas, examine documents, and release them to Mr Kyriazis. The prosecution evidence was led, but apart from the occasional objection, Mr Kyriazis did not participate. He (and some of his supporters, who made numerous interjections) directed considerable hostility, anger and aggression towards the Court during the proceedings. The judge found the charges proved. He convicted but discharged Mr Kyriazis. Mr Kyriazis filed an application for judicial review in the Victorian Supreme Court, contending that he had been denied procedural fairness. The primary judge found that the County Court judge had not accorded Mr Kyriazis a fair hearing and was ostensibly biased. The informant in the traffic matters, who was the second defendant in the Supreme Court proceedings, sought to appeal. The issues on appeal were whether the primary judge erred in finding (i) a denial of procedural fairness, (ii) that the judge was disqualified by reason of ostensible bias, and (iii) that the judge was "*anything but*" calm for significant periods of time, and had displayed "*aggression rising beyond anger and frustration"*. The appellate Court had access to a full video recording of the relevant County Court hearing.

Held:

- The Court granted leave and allowed the appeal. Mr Kyriazis had not been denied a fair hearing. In assessing Mr Kyriazis' need for assistance and its content, the judge was plainly entitled to have regard to the litigant's conduct and attitude. He provided all the assistance Mr Kyriazis could reasonably expect. Despite Mr Kyriazis' ongoing disrespectful behaviour, he continued throughout the hearing to attempt to engage him and inform him of his options. Mr Kyriazis was not a naïve litigant and was evidently aware of the essential elements of the process: [70]-[78].

- Far from thinking that the judge might not have brought an impartial mind to the case, a fair-minded lay observer would have concluded that a busy judge was merely vexed by a rude and disrespectful litigant. Even if it might be thought that at some point the judge had been discourteous or impatient, there was no basis for concluding that the judge showed ostensible bias. The judge's reaction was mild compared with the aggression and provocation he had faced: [83]-[86].

5. **Corporations: *Corporations Act 2001* (Cth), s 597; discretionary trusts**

***Pleash (Liquidator) v Tucker* [2018] FCAFC 144**

Decision date: 29 August 2018

McKerracher J; Farrell J; Banks-Smith J

The appellants were the liquidators of Equititrust Limited. Mr Tucker was previously a director of Equititrust and its former solicitor. The other respondents were related entities of which Mr Tucker was the sole director of (or in one case, a director), and six of the respondents were corporate trustees. A Federal Court judge ordered that Mr Tucker be summonsed under the *Corporations Act 2001* (Cth) (**the Act**), s 596A, for examination about Equititrust's affairs. A Deputy Registrar later made orders under s 597(9) requiring Mr Tucker to produce relevant documents at the examination. On review of the Deputy Registrar's orders, the primary judge ordered the production of some documents but excluded the remainder. The excluded documents related to assets and liabilities of discretionary trusts (held by the respondent corporate trustees) of which Mr Tucker was the primary (but not the sole) beneficiary, and a superannuation fund in which he had an interest. The issues on appeal were whether property must be owned by a prospective defendant to be relevant to the potential recovery of a judgment debt in the context of examinable affairs; whether the liquidators could rely on a prospective tracing investigation to justify production of the excluded documents; and whether the *Bankruptcy Act 1966* (Cth) provided a reason to justify production of the documents.

Held:

- The Court granted leave but dismissed the appeal. There was no basis to extend the scope of 'examinable affairs' under the Act to a consideration of what assets outside of those comprising a prospective defendant's property might voluntarily be directed to payment of a judgment debt: [53]. This was consistent with authority to the effect that at general law, a beneficiary's control over a trustee did not operate such that the income and capital of a discretionary trust could be treated as if it were property of the beneficiary: [43]-[46].

- Investigation of the potential to trace money into third party entities might in some circumstances fall within the examinable affairs of a company. However, the appellants had not satisfied the onus of showing this issue should be dealt with on appeal, where it was not relied upon as a basis before the primary judge: [73].

- It was open for the primary judge to conclude that the possibility of orders being made against one or more of the trusts if Mr Tucker became bankrupt was too remote and too dependent on unrelated contingencies to support the appellants' access to the documents at this time on the basis of the *Bankruptcy Act*: [74]-[78].

- This appeal was not an appropriate vehicle to reconsider whether the scope of 'examinable affairs of the company' should extend at all to documents going to the worth of a potential defendant: [79].

Asia Pacific decisions of interest

6. **Statutory interpretation; administrative law: considerations**

Pauamac5 Incorporated v Director-General of Conservation **[2018] NZCA 348**

Decision date: 4 September 2018

Cooper J; Clifford J; Williams J

Two commercial cage diving companies operated off New Zealand's Tītī Islands. They used berley and bait to draw great white sharks into the vicinity of their vessels, from which tourists could observe them from inside submerged cages. The respondent issued unconditional authorities to the companies to undertake this activity, under the *Wildlife Act 1953* (NZ) (**the Act**). The appellant, who represented commercial pāua quota owners in the Tītī Islands, feared its divers' lives were being put in danger as a result. It sought declarations that the respondent had no power to authorise cage diving, or if he did, that the safety of pāua divers was a mandatory consideration in deciding whether and on what conditions authorities should be granted. The respondent argued that he had the power to authorise cage diving under the Act, s 53(1), which allowed him to authorise persons to "*catch alive or kill*" protected wildlife, and absent permission, the activity was an offence under s 63A. Section 63A prohibited "*hunt[ing] or kill[ing]*" protected marine wildlife without lawful authority. "*Hunt and kill*" was defined in s 2 to "*include … pursuing, disturbing, or molesting any wildlife*". The primary judge reasoned that shark cage diving was not an offence, such that the respondent did not have jurisdiction to control it under s 53. The issues for the New Zealand Court of Appeal were whether shark cage diving was a s 63A offence; if so, whether the respondent had the power to authorise the activity; and whether the respondent was required (or permitted) to consider pāua divers' safety when making a decision under s 53(1).

Held:

- The Court dismissed the appeal, on different reasoning. On its proper construction, "*pursuing, distributing, or molesting*" a protected species would each be sufficient to constitute an offence, irrespective of whether a person intended to hunt or kill the animal in the ordinary sense of those words. What constituted 'pursuing' or 'disturbing' was a question of fact determined by reference to the Act's primary purpose, being to facilitate the protection of species and regulate human interaction with them: [39]-[43]. Shark cage diving was an offence under s 63A: [45].

- However, s 53(1) did not authorise shark cage diving. On its proper construction, "*catch alive and kill*" was a subset of "*hunt and kill*", rather than being co-extensive to it. "*Kill*" and *"catch alive*" were to be attributed their ordinary meanings: [49]-[60].

- Assuming the respondent did have the power to authorise shark cage diving, he had correctly conceded that public safety was a permissible relevant consideration. In the context of this case, it would be irrational for him not to consider whether the activity posed a safety risk to pāua divers when making a decision: [62]-[66].

7. **Contract: breach, damages; evidence: onus of proof**

PT Bayan Resources TBK v BCBC Singapore Pte Ltd **[2018] SGCA(I) 6**

Decision date: 29 August 2018

Menon CJ; Prakash JA; Heydon IJ

A dispute arose between the appellants (**BR** and **BI**) and the respondents (**BCBCS** and **BCBC**) over a joint venture (**JV**) relating to a coal briquette processing plant in Indonesia. The respondents were indirect wholly owned subsidiaries of White Energy Company (**WEC**), a listed Australian company. An Indonesian joint venture company (**KSC**) was incorporated. The parties and KSC later entered into various agreements. This included a Priority Loan Funding Agreement (**PLFA**), under which BCBCS advanced a capital facility to KSC, and BR was to provide KSC with a 'Coal Advance', under which they supplied coal to KSC at market price but required a lesser payment. KSC also entered into coal supply agreements with BR's subsidiaries. In November 2011, the appellants indicated they wished to exit the JV, and were willing to sell their shares in KSC to BR, BI and WEC. BR later instructed its subsidiaries to cease supplying coal to KSC. The respondents commenced proceedings. On 21 February 2012, BR purported to terminate the deed. On 2 March, BCBCS responded alleging this was a wrongful repudiation of the deed, which it accepted. Issues in the dispute were dealt with by the Singapore International Commercial Court (**SICC**) in two separate tranches. An appeal was brought to the Singapore Court of Appeal only in relation to the second judgment, which dealt primarily with whether the parties had breached their obligations under the joint venture, and if so, what consequences flowed from such breaches.

Held:

- The Court dismissed the appeal against the finding that there was a repudiatory breach by the appellants, and remitted the matter on the issue of whether the first respondent had the financial ability to fund KSC by itself: [177]-[178].

- On proper construction of the agreements, BR was obliged to procure and/or ensure the supply of coal to KSC under the JV and/or the PLFA during the period from November 2011 to 2 March 2012. The Court upheld the finding that BR had breached this coal supply obligation. As it was fundamental to the joint venture, BR's breach was repudiatory of the JV Deed: [103]-[112].

- The Court rejected each ground said to justify issue of the termination notice: [157]. It cast doubt on *Seldon v Davidson* [1968] 1 WLR 1083, insofar as that case held that where a party admitted to having received a sum of money, there was *prima facie* an obligation to repay. The relevant question was not whether a party had admitted to receiving a sum, but whether it had admitted to incurring a debt: [144].

- The Court below had erred in reserving its decision to the next tranche of the trial with respect to whether BCBCS was able to fund KSC by itself. This was relevant to whether BR's breaches of the deed had caused any loss. This issue had been squarely and properly before the Court and ought to have been decided: [175].

Other international decisions of interest

8. **Human Rights: European Convention on Human Rights; social security**

In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland) **[2018] UKSC 48**

Decision date: 30 August 2018

Lady Hale; Lord Mance; Lord Kerr; Lord Hodge; Lady Black

Widowed parent's allowance (**WPA**) was a contributory, non-means-tested social security benefit payable to people with dependent children who were widowed before March 2017. Under the *Social Security Contributions and Benefits (Northern Ireland) Act 1992* (**the Act**), s 39A, the widowed parent could only claim a WPA if they were married to or the civil partner of the deceased. Ms McLaughlin and Mr Adams had lived together for 23 years before his death in 2014, and had four children together. He had made sufficient National Insurance contributions for Ms McLaughlin to be able to claim a WPA, had they been married or in a civil partnership. The Northern Ireland Department of Communities refused her claim for a WPA. She sought judicial review contending that s 39A unjustifiably discriminated against the survivor and/or the children on the basis of martial or birth status, contrary to the European Convention on Human Rights (**ECHR**), Art 14, read together with the right to respect for family life (Art 8) or the protection of property rights under Art 1 of the First Protocol (**A1P1**). The primary judge made a declaration of incompatibility. This was reversed by the Court of Appeal.

Held:

- The Supreme Court allowed the appeal, making a declaration of incompatibility: [45]; [54]. It was clear that the denial of a contributory social security benefit fell within the ambit of the protection of property in A1P1; [16]. It also fell within Art 8, as a positive measure evincing the state's respect for children and family life: [19].

- There had been a difference in treatment between two persons in analogous situations, the relevant facet in this case being not public commitment but the co-raising of children. The children's situation was the same whether or not their parents were married, but had they been married, their treatment would have been very different: [26]-[27]; [47]-[49]. It was well accepted also that being unmarried was a status for the purposes of s 14, just as being married could be: [31].

- The promotion of marriage and civil partnership was a legitimate aim: [36]-[37]. However, it was not a proportionate means of achieving this aim to deny Ms McLaughlin and her children WPA because she and Mr Adams were not married. Their responsibilities to their children were the same irrespective of marriage: [39].

- The exclusion of all unmarried couples from WPA would not always amount to unjustified discrimination; however, the legislation would inevitably operate incompatibly in a legally significant number of cases to require a declaration: [43].

9. Constitutional law: human rights, decriminalisation of homosexuality

***Navtej Singh Johar v Union of India* (2018)**

Decision date: 6 September 2018

Misra CJI; Nariman J; Khanwilkar J; Chandrachud J; Malhotra J

Section 377 of the Indian Penal Code, a Victorian-era provision enacted in 1860, criminalised "*carnal intercourse against the order of nature*". This included the criminalisation, *inter alia*, of consensual sexual conduct between members of the same sex. In 2009, the Delhi High Court declared that s 377 was invalid, to the extent that it criminalised consensual sexual acts between adults in private, effectively decriminalising homosexuality: *Naz Foundation v Government of NCT of Delhi*, (2009) 111 DRJ 1. This decision was overturned by two judges of the Supreme Court of India in 2014: *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1 (**Koushal**). In *Koushal*, the Court considered that the High Court had overlooked that "*a miniscule fraction of the country's population"* constituted LGBT persons, and that there had been less than 200 persons prosecuted under s 377 in the past 150 years, such this was not a sound basis for declaring the section to be *ultra vires* provisions of the Indian Constitution. A number of petitions were subsequently filed seeking that the Supreme Court overturn the decision in *Koushal* and declare s 377 unconstitutional. Provisions of the Constitution relied upon to support this argument included Art 14 (equality before the law), Art 15 (prohibition of discrimination), Art 19 (freedom of expression) and Art 21 (protection of life and personal liberty).

Held:

- The Court held that s 377 was invalid insofar as it criminalised consensual sexual conduct between adults of the same sex. In so doing, the Court overruled the decision in *Koushal*, considering that the mere fact that LGBTIQ persons constituted a minority did not go towards the validity of s 377 and could not be a ground upon which to deprive those individuals of fundamental constitutional rights.

- The section was partially struck down on the basis that it violated Art 14, Art 19(1)(a), and Art 21 of the Constitution. In relation to Art 14, all judges found that s 377 was manifestly arbitrary; *inter alia*, it failed to distinguish between non-consensual and consensual sexual acts, subjected LGBTIQ persons to stigma and discrimination, as well as to excessive punishments up to the order of life imprisonment. Section 377 also violated the right to freedom of expression under Art 19(1)(a), as well as the right of LGBTIQ persons to self-determination, dignity, autonomy and privacy as encompassed by Art 21.

- A number of judges observed that the Indian Constitution was transformative, in the sense that the interpretation of its provisions ought not be limited to their literal meaning, but given a construction reflective of their intent and purpose in changing times. This fostered the rights and dignity of individuals and their opportunity to develop socially, economically, and politically.