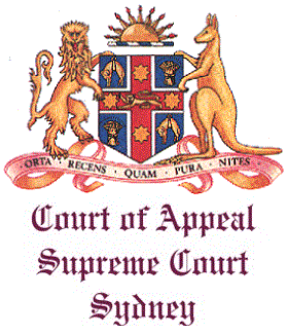

Decisions of interest

27 May 2019 – 7 June 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. **Public law: government contracts; fettering executive discretion**

Searle v Commonwealth of Australia **[2019] NSWCA 127**

Decision date: 31 May 2019

Bathurst CJ, Bell P, Basten JA

Mr Searle was enlisted in the Royal Australian Navy as a marine technician. He subsequently entered into a contract with the Commonwealth, under which he was to receive training over a four year period that would qualify him for a Certificate IV in Engineering. A number of other people enlisted in the armed forces entered into similar contracts with the Commonwealth. Mr Searle did not receive the training contemplated by the contract. He commenced representative proceedings against the Commonwealth in the Common Law Division of the Supreme Court, seeking damages for breach of contract. The primary judge dismissed his claim, holding that the contract fettered the exercise of the Commonwealth's power of naval command, and it was therefore beyond the power of the Commonwealth to enter the contract. The primary judge also found that the contract was not supported by consideration on the part of Mr Searle. Had the contract been valid, the primary judge would have assessed Mr Searle's damages for breach of contract at $60,000.

Mr Searle appealed. The three key issues on appeal were: (1) whether the contract had the effect of fettering the exercise of the Commonwealth's power of naval command; (2) whether Mr Searle provided consideration; and (3) whether the primary judge erred in his contingent assessment of damages.

Held:

- Appeal allowed: [1], [241]-[245], [246].
- On the fettering issue: where a broad power to contract is conferred on the executive or a public authority, and a contract is entered into that is not specifically enforced or enforceable, that contract cannot be said to have the effect of fettering the Commonwealth's exercise of discretion unless the award or potential award of damages itself had or has that effect. An award of damages for breach of Mr Searle's contract would not impermissibly fetter the Commonwealth's power of naval command: [139]-[145], [151]-[152], [155].
- On the consideration issue: Mr Searle provided valid consideration, because the period or minimum period of service that he undertook to perform under the contract exceeded the period or minimum period that he undertook to serve at the time of enlistment: [6], [159]-[161].
- On the damages issue: the primary judge did not err in his contingent assessment of damages. Accordingly, Mr Searle was awarded $60,000 plus interest in satisfaction of his claim for breach of contract: [209]-[211], [241].

2. **Criminal law: perverting the course of justice; relationship between common law and statutory offences**

***Johnston v R* [2019] NSWCCA 108**

Decision date: 27 May 2019

Simpson AJA, Johnson J, R A Hulme J

After a social function, J, an off-duty police sergeant, was pulled over for a random breath test. A probationary constable stationed at the same police station as J tried to administer the test. J prevented him from doing so. According to the constable, J asserted that it would be a conflict of interest for him to administer the test to her.

J was charged in the District Court with doing an act intending to pervert the course of justice, contrary to s 319 of the *Crimes Act 1900* (NSW). That section provides that: 'A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.' The Crown case was that J had used her rank and authority to avoid the administration of a RBT, and did so contemplating the possibility of criminal proceedings against her for an alcohol related driving offence. The jury returned a guilty verdict, J was convicted, and sentenced to a term of imprisonment of 1 year and 4 months, with a non-parole period of 1 year.

J appealed against her conviction on two grounds. First, she asserted that the directions given to the jury contained an error of law. She submitted that the trial judge had erred in failing to direct the jury that it is an element of the s 319 offence that the act or omission said to constitute the offence had a *tendency* to pervert the course of justice. Second, she submitted that the jury's verdict was unreasonable and could not be supported having regard to the evidence, on the basis that the evidence could not negative the possibility that J had some intention other than to pervert the course of justice in acting as she did.

Held:

- Appeal dismissed: [99]-[101].
- On the first ground: At common law, it was an element of the offence of perverting the course of justice that the act or omission in question had a tendency to pervert the course of justice. That common law offence was abolished by statute in NSW in 1990, and replaced with the s 319 offence. The Court held that it is not an element of the statutory offence that the act or omission in question has a tendency to pervert the course of justice, and so held that the trial judge did not err in the manner alleged: [21], [48], [74].
- On the second ground: it was open to the jury to be satisfied beyond reasonable doubt that the Crown had proved that J had the necessary intention. Accordingly, this ground was also rejected: [97].

Other Australian intermediate appellate decisions of interest

3. Land law: resumption; principles of valuation; *Pointe Gourde* principle

***Pfeiffer Nominees Pty Limited v Chief Executive, Department of Transport and Main Roads* [2019] QCA 101**

Decision date: 28 May 2019

Morrison JA, McMurdo JA, Mullins J

The applicant owned land adjacent to the Captain Cook Highway, north of Cairns. In 2007, some of that land was resumed for the purpose of upgrading the highway. By operation of the *Acquisition of Land Act 1967* (Qld), the applicant was entitled to compensation for the land resumed. The amount of that compensation was to be assessed according to s 20(2) of the Act, which relevantly provided that the amount of compensation was to be assessed by reference to 'the value of the estate or interest of the claimant in the land taken on the date when it was taken.' Though the land was adjacent to the highway, a Declaration by the Commissioner of Main Roads made in 1983 had the effect of prohibiting access from the applicant's land to the highway unless the Commissioner first gave consent. It is well established that the clear terms of s 20(2) can be qualified by operation of the *Pointe Gourde* principle (from *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565). This principle provides that compensation for the compulsory acquisition of land cannot include an increase or decrease in value which is entirely due to the scheme underlying the acquisition. A disagreement arose between the parties as to the sum to be paid in compensation for the resumed land. The dispute turned on whether the compensation should be assessed on a basis that took into account or disregarded the effect of the 1983 Declaration on the value of the land. The evidence before the Land Court was that if the Declaration was taken into account, the value of the land should be assessed at $580,000. If the Declaration was disregarded, the value should be assessed at $2,170,000. A Member of the Land Court held that the Declaration should be disregarded in the assessment of value. The Member held this on the basis that the resumption of land here formed part of a 'scheme' – namely, one concerned with the ongoing upgrade of the highway – that had been in place since at least 1983, and arguably earlier. The Land Appeal Court reversed that decision, preferring a narrower understanding of the 'scheme' in question, such that the 1983 Declaration did not form part of the same scheme as the resumption decision. The consequence was that under the *Pointe Gourde* principle, the devaluation flowing from the Declaration could be taken into account. The applicant appealed.

Held:

- Appeal dismissed: [1], [42], [43].
- The Court of Appeal upheld the Land Appeal Court's narrower understanding of the 'scheme' in question here, holding that the land had not been resumed to further a purpose for which the Declaration was made: [24], [38]-[41].

4. **Inquiries: coroners; admission of evidence; procedural fairness**

Attorney-General v Copper Mines of Tasmania Pty Ltd **[2019] TASFC 4**

Decision date: 7 June 2019

Blow CJ, Pearce J, Marshall AJ

Copper Mines of Tasmania Pty Ltd ('CM') leased and operated a mine where one of its employees was killed as a result of a sudden rush of mud and water. A coroner had commenced an inquest in relation to the death. The State of Tasmania engaged an expert, Mr Webber, to write a report relating to the incident. His report did not take the form that an expert witness' report should take. Among other defects, the report: did not identify the facts and assumptions on which Mr Webber's opinions were based; did not clearly distinguish between the facts known to him, information supplied to him, and assumptions he had made; and it did not distinguish facts from opinions, or make explicit the reasoning process on which his opinions were based. In writing the report, Mr Webber took into account seven source documents commissioned by CM in the years preceding the accident. Upon learning of the coroner's intention to hold an inquest, CM commenced proceedings in the Supreme Court of Tasmania, seeking orders in the nature of prohibition that would prevent the coroner from receiving oral evidence from Mr Webber, his report, or the seven sources. Though a coroner holding an inquest is not bound by the rules of evidence (s 51 *Coroners Act 1995* (Tas)), CM submitted that Mr Webber's report so substantially fell below the standard of admissibility for expert evidence that CM would be denied procedural fairness if the inquest received the report as evidence, or if the source documents were received without their authors being called as witnesses, or if Mr Webber gave oral evidence. CM claimed these would be denials of procedural fairness because it would not be able to test the facts, assumptions, or opinions in that evidence. The Attorney-General intervened. The primary judge made an order prohibiting the coroner from receiving the seven source documents into evidence, but did not prohibit the coroner from receiving Mr Webber's report or oral evidence. The Attorney-General appealed, arguing that orders in the nature of prohibition should not have issued. CM cross-appealed, arguing that the coroner should be prohibited from receiving Mr Webber's report and oral evidence.

Held:

- Appeal allowed, cross-appeal dismissed: [3], [47], [48], [50].
- Concerning the seven source documents (the appeal): there was no evidence that the coroner had closed his mind to the possibility of calling the authors of the source documents; it remained open for CM to request that they be called. There had therefore been no denial of procedural fairness and nor was one likely, so it was premature to issue orders in the nature of prohibition: [44]-[46].
- On the cross-appeal: the coroner's duty to afford CM procedural fairness did not require the coroner to narrow the investigation by not receiving Mr Webber's evidence or report: [41].

Asia Pacific decisions of interest

5. Human rights: discrimination; justification; same-sex marriage

Hong Kong Court of Final Appeal

Leung Chun Kwong v Secretary for the Civil Service & Ors **[2019] HKCFA 19**

Decision date: 6 June 2019

Ma CJ, Ribeiro PJ, Fok PJ, Tang NPJ, Gleeson NPJ

The appellant is a Hong Kong permanent resident of Chinese nationality. In 2003, he commenced employment with the Hong Kong Government as an immigration officer, and was therefore subject to the Civil Service Regulations ('CSRs'). Under the CSRs, various medical and dental benefits extend to a civil servant's family, and particularly, their spouse. Further, under Hong Kong's Inland Revenue Ordinance ('IRO'), spouses can elect to have their income tax liabilities assessed jointly. In 2014, the appellant and his same-sex partner got married in New Zealand. Same-sex marriage is not recognised by the laws of Hong Kong. Following his marriage, the appellant was the subject of two decisions. First, the Secretary for the Civil Service decided that the appellant's same-sex marriage was not a marriage recognised under Hong Kong law, so the appellant's partner was not entitled to spousal benefits under the CSRs (the 'Benefits Decision'). Second, the Commissioner of Inland Revenue decided that the appellant was not entitled to elect for a joint assessment of his and his partner's income tax liabilities, because their same-sex marriage was not a 'marriage' for the purposes of s 2(1) of the IRO (the 'Tax Decision'). The appellant sought judicial review of both decisions, challenging them on the basis that they unlawfully discriminated against him on the ground of his sexual orientation. The Court of First Instance held that the Benefits Decision constituted unlawful discrimination, but that the Tax Decision did not. The Secretary appealed the primary judge's decision on the Benefits Decision, and the appellant (in the final proceedings) cross-appealed from the primary judge's decision on the Tax Decision. The Court of Appeal allowed the Secretary's appeal, and dismissed the cross-appeal. The appellant was granted leave to challenge both aspects of the Court of Appeal's decision in the Court of Final Appeal.

Held:

- Appeal allowed: [81]-[82].
- Both the Benefits Decision and the Tax Decision constituted differential treatment on a prohibited ground (sexual orientation). The question was whether that treatment was justified. The Court held that it was not: even accepting that protecting the understanding of marriage embedded in Hong Kong law (ie, heterosexual, public, exclusive) is a legitimate aim, the differential treatment to which the appellant was subject was not rationally connected to that legitimate aim. The differential treatment was therefore unjustified, and constituted unlawful discrimination: [58]-[62], [67]-[77].

6. **Civil procedure: interim injunction restraining call on performance bond; full and frank disclosure**

Court of Appeal of the Republic of Singapore

Bintai Kindenko Pte Ltd v Samsung C&T Corporation & Anor **[2019] SGCA 39**

Decision date: 1 April 2019; reasons published 30 May 2019

Tay Yong Kwang JA, Woo Bih Li J

Samsung C&T Corporation ('Samsung') engaged Bintai Kindenko Pte Ltd ('Bintai') as a sub-contractor. The terms of the contract between Samsung and Bintai provided that Bintai was to furnish Samsung with a guarantee (or 'performance bond') issued by an approved bank. The contract also purported to incorporate an exclusion clause which relevantly provided that:

> 'the Contractor [Samsung] agrees that except in the case of fraud, the Sub-Contractor [Bintai] shall not for any reason whatsoever be entitled to enjoin or restrain: (a) the Contractor from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond … on any other ground including the ground including the ground of unconscionability.

A dispute arose between Samsung and Bintai, and Samsung called on the guarantee. Bintai made an *ex parte* application for an interim injunction to restrain Samsung from calling on the guarantee. That interim injunction was granted. Samsung then filed a summons in the High Court seeking the discharge of the interim injunction. The primary judge granted that application. The Court of Appeal granted Bintai leave to appeal against the primary judge's decision to discharge the interim injunction. The issues on appeal were: (1) whether the primary judge erred in holding that Bintai was contractually excluded from seeking to rely on unconscionability in its efforts to restrain Samsung's call on the guarantee; (2) whether the primary judge erred in finding that Samsung's call on the guarantee was not fraudulent; (3) whether the primary judge erred in declining to discharge the injunction solely on the basis that Bintai had not provided full and frank disclosure of all material facts on the *ex parte* application.

Held:

- Appeal dismissed: [85].
- On the first issue: the primary judge erred as to the burden of proof; as the party seeking to rely on the exclusion clauses, it was for Samsung to show that Bintai had no right to invoke unconscionability. There was, however no seriously triable question as to whether the exclusion clauses had been validly incorporated into the agreement, so this error was of no moment: [48]-[49], [54]-[56].
- On the second issue: Bintai did not establish a strong prima facie case of fraud; accordingly, the trial judge did not err on this point: [77].
- On the third issue: the trial judge did err on this point: a party seeking an interim injunction *ex parte* has a duty of full and frank disclosure of all material facts; Bintai failed to disclose material facts, and the interim injunction should have been discharged on that basis (as well as the bases on which it was): [80], [84].

Other international decisions of interest

7. **Administrative law: judicial review; ouster clauses; trial without jury**

Supreme Court of the United Kingdom

In the matter of an application by Dennis Hutchings for Judicial Review (Northern Ireland) **[2019] UKSC 26**

Decision date: 6 June 2019

Lord Reed (Deputy President), Lord Kerr, Lady Black, Lord Lloyd-Jones, Lord Sales

Dennis Hutchings had been a member of the Life Guards regiment of the British Army. He served in Northern Ireland in 1974. In June 1974, while leading a patrol, he was involved in an incident in which a Mr Cunningham was shot in an area where the Irish Republican Army had been active and had clashed with the Life Guards days before. In 2015, Mr Hutchings was charged with attempted murder and attempting to cause Mr Cunningham grievous bodily harm. Under the *Justice and Security (Northern Ireland) Act 2007*, the Director of Public Prosecutions can issue a certificate directing that a person be tried by judge-alone. The DPP can issue such a certificate if they suspect that any of the relevant conditions are met, and are satisfied that in view of this, there is a risk that the administration of justice might be impaired if the trial was conducted with a jury. The conditions include Condition 4 – 'that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person of group of persons towards another person or group of persons' Further, s 7(1) of the Act ousts judicial review of a certification decision (or purported decision) 'except on grounds of (a) dishonesty, (b) bad faith, or (c) other exceptional circumstances'. In April 2016, the DPP issued a certificate directing that Mr Hutchings be tried without a jury, relying on Condition 4. Mr Hutchings sought to challenge the DPP's decision in judicial review proceedings, challenging the DPP's understanding of the certification power and alleging that the DPP should have given him an opportunity to make representations in advance of the decision being made. He was unsuccessful in the Divisional Court. The question certified for the Supreme Court was whether the true construction of Condition 4 included a member of the armed forces shooting someone he suspected of being a member of the IRA, though the Court considered broader issues.

Held:

- Appeal dismissed: the answer to the certified question was 'yes': [67].
- Any misunderstanding on the DPP's part as to construction of the certification power was irrelevant so long as he acted within power and the misunderstanding was immaterial to any decision taken. That was so here: [44]-[48].
- Mr Hutchings' procedural complaints did not meet the description of bad faith, dishonesty, or exceptional circumstances', so s 7 precluded judicial review: [54], [56].

8. **Tort: negligence; public authorities; exercise of statutory functions**

Supreme Court of the United Kingdom

Poole Borough Council v GN (through his litigation friend "The Official Solicitor") & Anor **[2019] UKSC 25**

Decision date: 6 June 2019

Lady Hale (President), Lord Kerr (Deputy President), Lord Wilson, Lord Hodge, Lady Black

In May 2006, the claimants – then aged 9 and 7 – were placed with their mother by Poole Borough Council in a house on an estate in Poole. According to their pleadings, the following occurred. They were placed in a house next to a family that, to the council's knowledge, engaged in anti-social behaviour. Over a number of years, the claimants and their mother were the subject of harassment and abuse including: vandalism of the mother's car, attacks on their home, threats of violence, verbal abuse, and physical assaults on the mother and one of the claimants. These incidents were reported, and despite various measures being taken against the neighbours, the harassment continued. The claimants commenced civil proceedings against the council, seeking damages for physical and psychological injuries suffered while living in the council property. They alleged that in the exercise of its housing functions and of its functions under the *Children Act 1989*, the council was negligent in failing to protect them from harm at the hands of third parties. The claim was initially struck out on the basis that no relevant duty of care arose out of the statutory schemes relied upon. (There was no relevant statutory cause of action.) The claimants appealed to the High Court in relation to the *Children Act* argument. The appeal was allowed. The council successfully appealed to the Court of Appeal. The claimants appealed to the Supreme Court. The question was whether a council owes a common law duty of care to children affected by the manner in which it exercises or fails to exercise its statutory functions under the *Children Act 1989*, and if so, in what circumstances.

Held:

- Appeal dismissed: [92].
- Public authorities may owe a duty of care in circumstances where private individuals would also owe a duty, unless such a duty would be inconsistent with the legislation from which their powers/duties are derived. Public authorities do not owe a common law duty of care merely because they have statutory functions which, if exercised, could prevent a person from suffering harm. Public authorities can owe a duty of care to protect from harm if, for example, the authority has created the source of danger or assumed a responsibility to protect a claimant from harm – but only if such a duty is consistent with relevant legislation: [65].
- The particulars did not disclose an arguable common law duty: the council had not assumed a responsibility to protect the claimants in any relevant sense: [81], [83], [91].