Court of Appeal
Supreme Court
Sydney

Decisions of interest

28 October 2019 – 8 November 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. **Contracts: personal contracts; what constitutes performance**

***Advanced National Services Pty Ltd v Daintree Contractors Pty* Ltd [2019] NSWCA 270**

Decision date: 5 November 2019

Gleeson JA, White JA, Barrett AJA

Advanced National Services Pty Ltd ('Advanced') commenced proceedings in the District Court against Daintree Contractors Pty Ltd ('Daintree') claiming a liquidated sum of $368,876.90 owed under a contract to perform commercial cleaning services or, alternatively, damages for breach of contract in the same amount. Clause 4.5 of the contract between Advanced and Daintree contained a prohibition on assigning or subcontracting any portion of the contract without Daintree's prior written approval. Both parties accepted that approximately 90% of the cleaning services that had been carried out under the contract were carried out by subcontractors. This was in breach of cl 4.5.

At trial, Advanced made no claim based on *quantum meruit* – its claim was solely for either a liquidated sum or damages. The primary judge held that Advanced was only entitled to a payment of approximately 10% of the sum that it sought, representing the component of the cleaning services that Advanced performed personally. The primary judge ordered that Daintree pay Advanced a liquidated sum of $47,660 (including interest).

Advanced appealed against that part of the decision which rejected the balance of its liquidated claim. The key issues on appeal were: (1) whether, as at the date of termination of the contract by Daintree, Advanced had performed the cleaning services such that it had 'earned' the whole of the liquidated sum it sought; and (2) if the answer to the first question was 'yes', whether an express term of the contract affected an accrued right to receive the contract price after the valid termination of the contract by Daintree.

Held:

- Appeal dismissed with costs: [91]-[94].
- (1) The express terms of the contract required Advanced to undertake the cleaning services personally or through the use of an authorised subcontractor. Other terms of the contract – which placed great significance on the particular manner and conditions of performance and provided important protections for Daintree's benefit – supported that construction, and would have been rendered futile if Advanced could discharge its performance obligations by using unauthorised subcontractors. Accordingly, Advanced had not performed the cleaning services under the contract, and had therefore not 'earned' the whole of the sum it sought: [65]-[75], [87].
- (2) Because of the conclusion on (1), this issue did not arise: [88]-[90].

2. **Insurance: double insurance; contribution between insurers**

Allianz Australia Insurance Ltd v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCOM0430 **[2019] NSWCA 271**

Decision date: 7 November 2019

Bathurst CJ, Macfarlan JA, Meagher JA

Mr Thomas Dempsey, a roadworker employed by a subcontractor to Baulderstone Hornibrook Pty Ltd ('Baulderstone') was injured when he was struck by a car in the course of his employment. Baulderstone was insured under two different policies, issued by Allianz Australia Insurance Ltd ('Allianz') and Lloyd's of London ('Lloyd's') respectively.

The Allianz policy was issued to the Roads and Traffic Authority of NSW ('RTA'); Baulderstone was insured as a contractor of the RTA. The Allianz policy relevantly included an "other insurance" provision which converted the cover against loss under the policy into excess insurance in the event that there was other "valid and collectible" insurance.

The Lloyd's policy was issued to Baulderstone's parent company, and Baulderstone was indemnified under it as a subsidiary. This policy contained an "escape" clause, providing that the policy did not cover liability which "forms the subject of insurance by any other policy".

Mr Dempsey contained a consent judgment for $1,025,000 in proceedings that he brought against Baulderstone. Allianz indemnified Baulderstone in respect of that judgment. Allianz then commenced proceedings in the Supreme Court, seeking a declaration that Lloyd's was liable to indemnify Baulderstone under the Lloyd's policy, and seeking equitable contribution from them in respect of the indemnity that Allianz had afforded Baulderstone.

The primary judge ordered that a separate question be determined prior to other matters in the proceedings, namely, whether on the proper construction of both policies, Lloyd's would have been liable to indemnify Baulderstone in respect of the loss arising out of Mr Dempsey's injury if Allianz had not done so. The primary judge answered that question 'no', and so held that Allianz's proceedings should be dismissed. Allianz appealed.

Held:

- By majority, appeal allowed: [13], [77]. Macfarlan JA dissented: [53].
- The majority held that the separate question should have been answered 'yes'. Each of the policies denied liability because of the existence of the other. Properly construed according to the rule in *Weddell v Road Transport and General Insurance Company Ltd* [1932] 2 KB 563, the clauses cancelled each other out with the consequences that Baulderstone had double insurance in respect of its liability to Mr Dempsey, and that Allianz was entitled to equitable contribution from Lloyd's: [3], [12], [66].

Other Australian intermediate appellate decisions of interest

3. **Torts: damages; exemplary damages**

State of South Australia v Holder **[2019] SASCFC 135**

Decision date: 31 October 2019

Kourakis CJ, Kelly J, Stanley J

In January 2009, armed members of the police Special Tasks and Rescue Group went to Mr Holder's house in order to arrest his half-brother. His half-brother was unlawfully at large. When the police arrived, Mr Holder's half-brother fled out the back of the house. He was arrested and restrained in due course. Police then directed Mr Holder to come outside in aggressive, threatening terms. Mr Holder replied 'You can come in.' An officer stated that if Mr Holder did not immediately walk backwards out of the house with his hands on his head, he would be dragged out. Mr Holder walked out as directed. He was told to get down onto the ground. Mr Holder did not do so. An officer then ran up to Mr Holder, forced him to the ground and tried to pull Mr Holder's arms behind his back. Another officer stood on one of Mr Holder's knees and then on his legs. In this altercation, Mr Holder suffered injuries to his head and ribs. He was then detained by police on the premises for 20 to 30 minutes while the house was searched and made to sit facing a wall of the house for that time. Mr Holder commenced proceedings in the District Court, claiming damages for assault, battery, and false imprisonment. The key issue at trial was whether the officers had lawful authority to detain Mr Holder and search his house after his half-brother had been arrested. The trial judge found in Mr Holder's favour, awarding him $135,185.90 in damages, which included exemplary damages in the amount of $35,000. The State of South Australia appealed. The State challenged the award of exemplary damages on three grounds: (1) that the primary judge erred in not providing any or any adequate reasons as to why exemplary damages were awarded or as to the quantum awarded; (2) that the primary judge's factual findings did not warrant or support an award of exemplary damages; (3) that the primary judge's factual findings did not warrant or support the quantum of exemplary damages awarded.

Held:

- Appeal dismissed: [1], [39], [40].
- (1) The primary judge's reasons were not inadequate in the manner alleged. They clearly explained that exemplary damages were awarded because the assaults on Mr Holder were committed in the course of conduct which constituted a serious abuse of the police's powers of entry, search and detention: [31].
- (2) The award of exemplary damages was justified by the primary judge's finding that Mr Holder had done nothing to warrant the aggressive and high-handed conduct of the officers: [34]-[36].
- (3) There was no appellable error in the primary judge's assessment of the quantum of exemplary damages: [37].

4. **Evidence: penalty privilege; privilege against self-incrimination**

Meneses v Directed Electronics OE Pty Ltd **[2019] FCAFC 190**

Decision date: 1 November 2019

Moshinsky J, Wheelahan J, Abraham J

Directed Electronics OE Pty Ltd ('Directed Electronics') commenced proceedings against OE Solutions Pty Ltd ('OE Solutions'), a one-person company, and its sole director-shareholder, Mr Meneses. In broad outline, Directed Electronics alleged that Mr Meneses dishonestly arranged for OE Solutions to be an intermediary in the supply of goods to Directed Electronics and dishonestly charged a mark-up, together with various other allegations, including of breaches of directors' duties and fiduciary duties on the part of Mr Meneses. On application of Directed Electronics, the docket judge made a search order, directed, among others, to Mr Meneses and OE Solutions. The search took place. Mr Meneses and OE Solutions sought to resist production of some of the documents seized on the basis of the common law the privilege against self-incrimination and the common law privilege against self-exposure to penalties. The primary judge dismissed the claims to privilege. Mr Meneses and OE Solutions sought leave to appeal; Directed Electronics sought leave to file a notice of contention. The key issues on appeal were: (1) whether the primary judge erred in his framing of the questions arising on the application resisting production; (2) whether the primary judge erred in his answers to those questions; (3) whether the primary judge erred in ordering Mr Meneses to produce the relevant documents.

Held:

- Leave to appeal granted; leave to file notice of contention granted; appeal allowed; notice of contention dismissed; claims of privilege remitted to a single judge of the Federal Court to be re-determined: [155]-[158].
- (1) The primary judge erred in asking whether the documents *belonged* to Mr Meneses or OE Solutions; in the context of discovery, the correct question was whether the documents were in the *control* of OE Solutions: [149]-[150].
- (2) The primary judge erred by focusing on whether the nature of the documents in question gave rise to privilege, rather than on whether the act of production of the documents gave rise to a real and appreciable risk of self-incrimination or self-exposure to penalty. The latter question is the relevant inquiry in the context of the two common law privileges in question: [151].
- (3) The primary judge erred in ordering Mr Meneses *personally* to produce the relevant documents. The Court considered, however, that in circumstances where a one-person company controls documents with respect to which the company's director-shareholder wishes to claim privilege in their personal capacity in order to resist production, the Court can appoint a receiver to produce the documents on the company's behalf. Such a mechanism preserves the individual's right to claim common law privileges while ensuring that the claims against the company can proceed fairly: [152]-[153].

Asia Pacific decisions of interest

5. Practice and procedure: slip rule

Supreme Court of Justice of Papua New Guinea

Rimbunan Hijau (PNG) Limited v Enei **[2019] PGSC 73**

Decision date: 29 October 2019

Salika CJ, Kandakasi DCJ, Toliken J

In September 2017, the Supreme Court of Justice of Papua New Guinea dismissed an appeal brought by Rimbunan Hijau (PNG) Limited ('Rimbunan Hijau'). That appeal had been brought against a judgment of the National Court which had ordered Rimbunan Hijau to pay damages for trespass and continued trespass and illegal use of Moga Clan's customary land.

In May 2019, Rimbunan Hijau made an application under the slip rule, alleging that the judgment of September 2017 had been affected by a number of errors. Those alleged errors included: (1) that the Supreme Court wrongly considered that Rimbunan Hijau had not raised particular evidentiary issues at trial, and was therefore precluded from raising them on appeal; (2) that the Supreme Court took the wrong approach in its assessment of damages for trespass; (3) that the Supreme Court erred in failing to reject certain evidence relating to assessment of damages as inadmissible hearsay, or alternatively, that the Supreme Court erred in failing to find that that evidence had no probative value; (4) the Supreme Court erred in finding that there should be an award of exemplary damages, failing to take into account statutory provisions said to be relevant by Rimbunan Hijau; and (5) the Supreme Court erred in upholding an award of special damages. Rimbunan Hijau's application was opposed by the respondent in the original appeal, Ina Enei, acting for and on behalf of the Moga Clan.

Held:

- Application dismissed: [34].
- None of the alleged slips were established: [16], [17], [23], [25], [28], [31].
- The Court considered that Rimbunan Hijau's application amounted to an attempt to reopen issues finally determined in the original appeal: [32].
- While the Court did not order that Rimbunan Hijau pay costs on a solicitor/client or indemnity basis, it warned that it would be prepared to do so in the future in order to 'deter unnecessary and baseless' slip rule applications: [33].

6. **Land law: customary law; clan titleholders; reconsideration of factual findings**

Supreme Court of the Republic of Palau

Rekemel v Tkel **[2019] PWSC 36**

Decision date: 31 October 2019

Rechucher J, Foley J, Castro J

Cashmere Tkel and Matsko Filibert commenced proceedings against Kemmots Rekemel and Satski Florencio, claiming that Rekemel and Florencio had wrongly represented themselves as being the clan titleholders of Sechedui Clan of Teliu Hamlet, Peleliu State. The dispute arose because Rekemel and Florencio sent a letter to Tkel and Filibert's niece, demanding that she stop clearing certain land that belonged to the clan. Tkel and Filibert asserted that their niece was an *ochell* clan member (that is, a member of the clan in virtue of her mother being a member of the clan) who had permission to clear the land. They further asserted that Rekemel and Florencio were not *ochell* clan members (in addition to not being the clan titleholders), and that they had no authority over clan land. Tkel and Filibert sought a declaration that they were the clan titleholders and an injunction restraining Rekemel and Florencio from holding themselves out as being the clan titleholders and from purporting to act on the clan's behalf. The trial court found that Tkel and Filibert were clan members, but that none of Tkel, Filibert, Rekemel, or Florencio were *ochell* members, and that none of them were the clan titleholders. Rekemel and Florencio applied under Rule of Civil Procedure 59(e) to have the decision reconsidered on the basis that the trial court's decision was based on an error of fact. That error was said to concern Rekemel and Florencio's ancestry. They submitted that once the error was corrected, it would be apparent that they were *ochell* members of the clan with higher status than Tkel and Filibert. The court granted the motion for reconsideration in part, correcting the finding as to Rekemel and Florencio's ancestry; but the court did not make a declaration that they were *ochell* members and nor did it reconsider its decision on the key issue, namely, whether any of the parties were clan titleholders. Rekemel and Florencio appealed, apparently against both the primary decision and the decision on the motion for reconsideration. They challenged the primary decision on the basis that the trial court failed to explicitly address evidence given by Florencio that she had been appointed female titleholder. They challenged the decision on the motion for reconsideration on the basis that, having corrected the error, the court below should have reconsidered its whole decision.

Held:

- Appeal dismissed: [9].
- The trial court did not err in its treatment of Florencio's evidence; it was clear from the reasons given that the trial court did not find that evidence credible: [7].
- There was no error in the decision on the motion for reconsideration: The corrected findings may have altered the relative statuses of the parties within the clan, but the correction made no difference to the decisive question in the proceedings – namely, whether any of the parties were clan titleholders: [8].

Other international decisions of interest

7. Costs: non-party costs orders; liability insurance

Supreme Court of the United Kingdom

Travelers Insurance Company Ltd v XYZ **[2019] UKSC 48**

Decision date: 30 October 2019

Lord Reed, Lady Black, Lord Briggs, Lord Kitchin, Lord Sumption

In group litigation brought by roughly 1,000 women, one of the defendants, Transform Medical Group (CS) Ltd ('Transform'), operated clinics in England which supplied and fitted silicone breast implants. Travelers Insurance Co Ltd ('Travelers') issued product liability insurance to Transform for the period from 31 March 2007 to 30 March 2011.

Of the claims brought in the group litigation, 623 of them were brought against Transform. Some of those claimants had suffered bodily injury from defective implants during the period covered by the insurance. Others did not come within the Travelers' policy.

The primary judge ordered that four test cases proceed – two involving insured claims, and two involving uninsured claims. In the course of litigation, Transform and Travelers initially did not disclose the nature and limits of Transform's insurance cover (there was no obligation to do so); eventually, that information was disclosed. Transform went into insolvent administration while the litigation was on foot. Eventually, the insured claims were resolved by mediation; the uninsured claims were determined by an award of summary judgment. The uninsured claimants applied, pursuant to s 51 of the *Senior Courts Act 1981* (UK), for a non-party costs order to be made against Travelers. The primary judge made the order sought. The Court of Appeal dismissed an appeal brought from that order. Travelers appealed to the Supreme Court.

Held:

- Appeal allowed: [83], [84], [117].
- In insurance cases, the fundamental question in exercising the power to order a non-party to pay costs concerns the conduct of the non-party: in relation to an insured claim, has the non-party become the real defendant?; and in relation to an uninsured claim, has the non-party intermeddled in a manner that is not justifiable?: [76], [78].
- So far as the uninsured claims were concerned, a costs order against Travelers could only be grounded in some 'unjustified intermeddling' on its part that caused the uninsured claimants to incur costs. None of Travelers' conduct could be said to have amounted to unjustified intermeddling, and even if it did, its conduct could not be said to have caused the uninsured claimants to incur costs in a manner that would justify making a non-party costs order against Travelers: [64], [73]-[74].

8. **Restitution: absentees; pension payments made in error**

Supreme Court of Canada

***Threlfall v Carleton University* 2019 SCC 50**

Decision date: 31 October 2019

Wagner CJ, Abella J, Moldaver J, Karakatsanis J, Gascon J, Côté J, Brown J, Rowe J, Martin J

On 10 September 2007, George Roseme, a retired academic formerly employed by Carleton University ('Carleton'), went missing. He was therefore an 'absentee' within the meaning of the *Civil Code of Québec*. Under art 85 of the *Civil Code*, an absentee is presumed to be alive for seven years, unless proof of their death is made before that period expires. Under the terms of a 'life only' retirement plan, Carleton was obliged to make pension payments to Mr Roseme until his death. Because of art 85, Carleton was required to continue making pension payments to Mr Roseme upon his disappearance. In February 2008, his former de facto spouse, Ms Threlfall, was appointed his tutor. Six years after his disappearance, Mr Roseme's remains were found. It was established that the date of his death was 11 September 2007. The presumption of life in art 85 was therefore rebutted. Between Mr Roseme's disappearance and his remains being found, Carleton had paid approximately $500,000 to him in pension payments. In November 2014, Carleton commenced proceedings in the Quebec Superior Court against Ms Threlfall personally, in her capacity as tutor, and in her capacity as liquidator of the succession, seeking restitution of the pension payments made to Mr Roseme from 11 September 2007 onwards. That claim was a claim for 'receipt of a payment not due', made pursuant to arts 1491 and 1492 of the *Civil Code*. One of the elements of such a claim is that a payment was made in the *absence of debt* between the parties. The trial judge found in favour of Carleton. The Quebec Court of Appeal reached the same result for different reasons. Ms Threlfall appealed. In the Supreme Court of Canada, there were three key issues: (1) whether, properly construed, the retirement plan provided that Ms Roseme was entitled to pension payments until his 'true date of death' or until the date his death was recognised by the State; (2) whether rebuttal of the presumption in art 85 of the *Civil Code* has retroactive effect; and (3) at what time 'absence of debt' is assessed for the purposes of a claim under arts 1491 and 1492.

Held:

- By majority, appeal dismissed: [110].
- (1) Carleton's obligations ended upon Mr Roseme's true date of death: [22], [25].
- (2) Where proof of death is made within seven years of disappearance, the rebuttal of the presumption of life in art 85 has retroactive effect: [38], [72].
- (3) In circumstances like these, absence of debt falls to be assessed retrospectively – that is, from the time when the claim is made, and with knowledge of the true facts. It was therefore no barrier to Carleton's claim that debts *did* exist by operation of the presumption of life; once that presumption was rebutted, those debts did not exist, and so Carleton's payments were made in the absence of debt: [89], [106].