Court of Appeal
Supreme Court
Sydney

# Decisions of interest

## 30 July 2018 – 10 August 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. **Building and construction: contract, warranties; statutory interpretation**

   ***The Owners – Strata Plan No 66375 v King*** **[2018] NSWCA 170**

   **Decision date:** 3 August 2018

   Ward JA; Leeming JA; White JA

   The appellant Owners Corporation sued Mr and Mrs King (**the respondents**), in relation to alleged building defects at a property in Camperdown, previously owned by the Kings. The primary judge dismissed the claim on the basis that the Kings were not "developers" as defined by the *Home Building Act 1989* (NSW) (**the Act**), s 3A, because they were not parties to the relevant building contract with the builder. He also held that even if the Kings were "*developers*", they were not liable for certain "design defects", because the builder was not liable for those defects under the implied statutory warranty contained in s 18B(c). Section 18C extended the benefit of the warranties to an immediate successor in title to a developer as if the developer were "*were required to hold a licence and had done the work under a contract with that successor in title to do the work*". The appellant argued that the primary judge had erred: (i) in failing to draw the inference that the Kings were parties to the building contract (grounds 1 and 2); and (ii) in finding that in any event the Kings were not liable for the "design defects" (grounds 3 and 4).

   **Held:**

- The Court allowed the appeal. With respect to grounds of appeal 1 and 2, the most likely inference was that the Kings formally executed the building contract, and did so in their personal capacities: [210]; [220]; [232]; [336]; [388].

- On grounds 3 and 4, Ward JA held that on proper construction of the Act, s 18C, the Kings were liable under the notional contract for breach of the statutory warranty implied by s 18B(c), irrespective of the builder's liability. Even if the Kings' liability was limited to the scope of the builder's liability, they would still be liable in the same amount, for the reasons given by White JA: [327]-[328]; [332].

- White JA held that the Kings were liable under s 18C for breach of the statutory warranty implied by s 18B(c), because the builder was liable for breach of that warranty. The builder warrants that the construction of the work in accordance with the plans and specifications will comply with the law: [389]-[390]; [408]-[410].

- Leeming JA held, dissenting on grounds 3 and 4, that the Kings did not breach the statutory warranty, because they were taken to have performed the building works in accordance with the plans and specifications in the hypothetical contract between them and the Owners Corporation. Based on the submissions advanced, the statutory warranties should not be construed so as to impose on a builder liability for failing to identify defects in plans and specifications which it was not engaged to prepare: [368]; [385]; [387].

2. **Constitutional law: extra-territorial operation of legislation; inconsistency**

***Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development*** **[2018] NSWCA 174**

**Decision date:** 8 August 2018

Bathurst CJ; Beazley P; Basten JA

The appellants, Ralph and Jack Lavender, were convicted of various fisheries offences in the Local Court and unsuccessfully appealed their convictions to the District Court. Ralph Lavender had been convicted of two offences of threatening a fisheries officer under s 247(2) of the *Fisheries Management Act 1994* (NSW). Jack Lavender had been convicted of two offences of contravening provisions of the Fisheries Management (Abalone Share Management Plan) Regulation 2000 (NSW) (**the Regulation**) relating to the taking of abalone. The primary ground of challenge to their convictions was that the Regulation was invalid, with issues on the summons relating to whether the operation of the Regulation was supported outside the limits of New South Wales (**NSW**) by various NSW and Commonwealth statutes, including the *Fisheries Management Act*. There was also an issue as to whether the Regulation contravened s 123 of the Constitution by altering the limits of New South Wales.

**Held:**

- The Court dismissed the summons. The *Fisheries Management Act 1994* (NSW) was valid and capable of supporting the operation of the Regulation outside the limits of New South Wales. The Commonwealth did not have exclusive legislative power over the territorial sea. The operation of the Regulation, both within and outside the limits or "coastal waters" of NSW, was supported by the *Fisheries Management Act*, s 7. No Commonwealth legislation was identified which gave rise to any relevant inconsistency under the Constitution, s 109: [53]-[61]; [161]-[166]; [170]-[175].

- Given this, it was unnecessary to rely upon the *Coastal Waters (State Powers) Act 1980* (Cth) or the *Coastal Waters (State Title) Act 1980* (Cth) to support its operation. If it had been necessary to rely upon the *Coastal Waters (State Powers) Act*, then s 5(a) of that Act was valid and capable of supporting the Regulation: [180]-[194].

- If it had been necessary to rely upon the *Coastal Waters (State Powers) Act 1980* (Cth) to support the operation of the Regulation outside the limits of New South Wales, and s 5(a) of the *Coastal Waters (State Powers) Act 1980* (Cth) was valid, then there would be no basis upon which to contend that s 16(2)(b) of *Seas and Submerged Lands Act 1973* (Cth) was invalid: [63]; [182].

- The Regulation did not "*alter*" the limits of New South Wales within the meaning of s 123 of the Constitution. To the extent it was relevant to whether an "*alteration*" had occurred, abalone were not to be treated as "*minerals*" on the sea floor: [64]-[65]; [195]-[200].

# Other Australian intermediate appellate decisions of interest

3. **Insurance: non-disclosure, payment of defence costs**

***Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003*** **[2018] FCAFC 119**

**Decision date:** 3 August 2018

Allsop CJ; Lee J; Derrington J

Mr Onley and Mr Cranston (**the applicants**) were facing proceedings under the *Criminal Code Act 1995* (Cth) on charges of conspiring together with the intention of deliberately causing loss to the Australian Taxation Office. Separately, the Australian Federal Police Commissioner had brought proceedings seeking recovery under the *Proceeds of Crime Act 2002* (Cth). The respondent underwriters had issued a broadform Liability policy to various companies of which the applicants were directors. Under that policy, cover, including for defence costs, was extended to each director. The applicants sought indemnity in relation to the costs they had occurred and would incur in relation to the two sets of proceedings.

The insurer argued that the conduct the foundation of both proceedings was dishonest conduct, occurring in part prior to the inception of the policy, that the applicants were aware of its materiality, and had failed to disclose it. The insurer sought to avoid the policy on the ground of fraudulent non-disclosure, or alternatively on the basis that it was entitled to reduce its liability to nil if the non-disclosure was not fraudulent, pursuant to the *Insurance Contracts Act 1984* (Cth) (**the Act**), s 28. The applicants argued that the language of the Extension required the insurer to meet defence costs unless or until the criminal or dishonest conduct was established by judgment or otherwise admitted, regardless of whether they had breached their disclosure obligation. The Full Court of the Federal Court determined the indemnity issue as a separate question.

**Held:**

- There was nothing in the terms of the policy or any other reason which prevented the respondent insurer from exercising its rights: [83]. As a matter of construction, the defence costs Extension did not diminish or contractually qualify the insurer's right to rely upon its remedies under the Act: [52]-[54]; [64]; [65]; [72]. Moreover, as a matter of public policy, courts will not normally allow a party to contract out of the consequences of their own fraudulent conduct: [6]; [76]-[79].

- The applicants could not succeed on a waiver argument. The insurer could only be said to have waived its s 28 entitlements if the Extension had operated to advance defence costs in respect of non-disclosed claims: [80].

- The Court noted that an insurer could not avoid its obligation to advance defence costs on a bare allegation of non-disclosure; consistent with an obligation of good faith, there must be a real or substantial ground for alleging non-disclosure: [7].

4. **Issue estoppel: privity of interest; abuse of process: re-litigation, finality**

***Commissioner of State Revenue v Mondous*** **[2018] VSCA 185**

**Decision date:** 1 August 2018

McLeish JA; Niall JA; McDonald AJA

Kameel was trustee of a discretionary family trust. Mr and Mrs Mondous (**the respondents**) were the specified beneficiaries. They were the directors of Kameel from 1988 to 2005; after which Mr Mondous was sole director. In 1990, Kameel executed an instrument seeking to distribute certain land to the respondents (**first transfer**). It was never lodged with the Titles Office. A notice was lodged with the Commissioner, and the land tax payable by Kameel was greatly reduced. *Ad valorem* stamp duty was avoided. In 1991, a contract of sale, backdated to 1989, was executed. The Commissioner was not told the respondents had purported to acquire the land via purchase, or that Kameel remained registered proprietor. In 1999 the respondents executed an instrument of transfer (**second transfer**). The 1989 contract was provided in connection with the stamping of the second transfer.

The Commissioner reissued the 1991-1999 assessments on the basis that Kameel owed land tax. Rejecting Kameel's appeal, the Tribunal found the 1989 contract to be a sham, and the first transfer not to have conveyed the equitable estate to the respondents (**the land tax proceeding**). In 2014, the Commissioner reassessed stamp duty on the second transfer, finding that the respondents had not held an equitable interest before 1999, such that stamp duty was to be assessed at the transfer date. A differently constituted Tribunal upheld the assessment. This was overturned by the primary judge. The main issues on appeal were whether the judge erred in finding that it was an abuse of process for the respondents to re-agitate the finding in the land tax proceeding that they were not equitable owners of the land; in interfering with the Tribunal's finding that the respondents and Kameel were privies for issue estoppel purposes, and in overturning the finding that the respondents were not equitable owners of the land under a 'distribution'.

**Held:**

- The Court allowed the appeal. The interest of the respondents in the subject matter of the land tax proceeding was confined to their interest as beneficiaries of a discretionary trust. Mr Mondous' control of Kameel and its conduct in that proceeding could not supply the requisite legal interest to establish privity. The assumption that he was pursuing a course for the respondents' overall benefit did not take their interest beyond a purely economic one: [93]-[95]; [219]-[220].

- McLeish JA (McDonald AJA agreeing) held that there was an abuse of process because the respondents sought to impugn findings, which, if done successfully, were binding on them by virtue of their privity with Kameel. If the respondents' were equitable owners, they would be objects of a bare trust, such that Kameel had a right to claim indemnity from them personally for land tax. This would make them privies: [140]-[144]. Niall JA disagreed with the privity analysis but held that re-litigating the equitable interest findings was still an abuse of process: [263].

# Asia Pacific decisions of interest

5. **Defamation: public interest defence, responsible communication**

***Durie v Gardiner*** **[2018] NZCA 378**

**Decision date:** 31 July 2018

French J; Winkelman J; Brown J

The appellants were Sir Edward Durie, a retired High Court Judge and co-chair of the New Zealand Māori Council, and Ms Donna Hall, his wife, a high profile lawyer specialising in Māori legal issues. They commenced defamation proceedings against the Māori Television Service (**Māori TV**) and one of its senior news reporters, Mr Gardiner, arising out of a story broadcast on Māori TV and put up on its website. The appellants contended that the publications, which related to certain dealings and relationships between the appellants and the Māori Council, implied that they had, *inter alia*, acted unlawfully, unprofessionally, and put themselves in positions that engendered conflicts of interest. The respondents pleaded a "Qualified Privilege/Public interest defence", being that the publications were "neutral reportage, and/or subject to the *Lange v Atkinson* privilege; or an extension thereto; and/or were responsible journalism/ communications on matters of public interest; or protected by a sui generis public interest defence". The appellants sought to strike out the defence. The primary judge held that a defence in the terms pleaded was as a matter of law available in New Zealand, and that it could not be said that the defence would inevitably fail on the facts. The issue for the Court of Appeal was whether there was a general public interest defence to defamation claims in New Zealand, and if so, its scope.

**Held:**

- The appeal was allowed in part. New Zealand should recognise a standalone defence of public interest communication not confined to parliamentarians or political issues. Societal and legal developments in the 18 years since the rejection of the defence in *Lange* indicate that it now should be recognised. These include the increasing role played by non-state actors in public policy, changes in mass communication, the emergence of social media and the 'citizen journalist', and developments in other common law jurisdictions: [56]; [82].

- The defence requires that (i) the subject of the publication is of public interest, and (ii) the communication is responsible: [56]; [58]. Whether the defence is made out is matter for the trial judge: [62]-[68]. Reportage, being the neutral reporting of attributed allegations, is not a separate defence, but should be pleaded as a particular of the public interest defence where applicable: [69]-[81].

- Having considered whether the defence should be struck out on the facts, the Court ordered that references to "qualified privilege", "*Lange v Atkinson*" and "reportage" be struck out, as well as the defence in respect of the first website story prior to the publication of a video summarising Ms Hall's response: [101].

6. **Equity: fiduciary duties; tort; contract: remedies, Wrotham Park damages**

***Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*** **[2018] SGCA 44**

**Decision date:** 2 August 2018

Menon CJ; Leong JA; Prakash JA; Kwang JA; Chong JA

SAA Group and the respondent group entered into a joint venture (**JV**) to develop a plot of land referred to as 'Turf City'. SAA Group comprised five people (**Tan Senior, Tan CB, Koh KM, Samuel Ng** and **Ong CK**). SAA Group held 62.5% and the respondents 37.5% of the shares in the JV companies. The site was leased by a company (**SAA**) controlled by SAA Group, which sub-leased premises to the JV companies. The respondents brought minority oppression suits. The parties reached a settlement (**the Consent Order**), which provided for a bidding exercise enabling either party to leave the JV, with KPMG was to conduct a share valuation. There was a delay in issuing valuation reports, during which time, unbeknownst to KPMG and the respondents, SAA renewed the head lease but did not grant sub-tenancies to the JV Companies. After discovering this, the respondents sought revised reports. SAA Group refused and the respondents brought proceedings. The Court of Appeal upheld the primary judge's findings that the Order had been breached (**the repudiatory breaches**). The outstanding issues concerned whether the appellants had breached fiduciary duties to the respondents; which parties were contractually liable for the repudiatory breaches; whether there was scope for '*Wrotham Park*' ([1974] 1 WLR 798) or '*Attorney-General v Blake*' ([2001] 1 AC 268) damages for breach of contract; and liability in tort for non-parties.

**Held:**

- SAA Group and the respondents were not in a fiduciary relationship [42]-[50]. Tan Senior and Tan CB were not liable in contract as they were not parties to the consent order, but SAA and Koh KM were liable for various breaches: [90]. Tan CB and Tan Senior were liable for the torts of conspiring to procure and inducing SAA's breaches of the Consent Order: [385].

- '*Wrotham Park*' damages are part of the law of Singapore. Such damages compensate the plaintiff for the loss of the primary right to performance of the defendant's obligations, which they have been deprived of due to the defendant's breach. The court must be satisfied that (i) orthodox compensatory damages are unavailable; (ii) there has been, in substance, a breach of a negative covenant; and (iii) the case is not one where it would be irrational or unrealistic to expect the parties to bargain for release of the covenant: [168]; [215]-[217]. Damages are measured by a sum of money as might reasonably have been demanded as a *quid pro quo* for relaxing the covenant, objectively assessed, by reference to a hypothetical bargain: [244]. Here, neither (i) nor (iii) were satisfied: [295]; [301].

- The Court tentatively observed that '*Attorney-General v Blake*' damages, being restitutionary, could perhaps be recognised as an exceptional remedy confined to where the law has a legitimate basis for punishing the defendant and/or deterring non-performance. At any rate, this rationale did not apply here: [250]-[255]; [302].

# Other international decisions of interest

7. **Court orders: withdrawal of medical treatment, best interests of patient**

***An NHS Trust & Ors v Y & Anor*** **[2018] UKSC 46**

**Decision date:** 30 July 2018

Lady Hale; Lord Mance; Lord Wilson; Lord Hodge; Lady Black

In June 2017, Mr Y, an active man in his fifties, suffered cardiac arrest. This led to extensive brain damage stemming from a lack of oxygen. He never regained consciousness and was kept alive by way of clinically assisted nutrition and hydration (**CANH**). In September, his treating physician concluded that he was suffering from a prolonged disorder of consciousness (**PDOC**) and that even if he were to regain consciousness, he would have profound cognitive and physical disabilities. A second opinion considered that he had no prospect of improvement. The clinical team and the family agreed it would be in Mr Y's best interests for CANH to be withdrawn, which would result in his death in two to three weeks. In November 2017, the NHS Trust sought a declaration in the High Court (i) that it was not mandatory to seek the court's approval for the withdrawal of CANH from a patient with PDOC when the clinicians and family agreed it was not in the patient's best interests to continue the treatment, and (ii) that no civil or criminal liability would result. The High Court granted a declaration that the court's approval was not mandatory. The primary judge granted permission to appeal directly to the Supreme Court. Mr Y died in the intervening period, however the Supreme Court determined that the appeal was important generally and should proceed.

**Held:**

- The Court dismissed the appeal. The fundamental question when considering the treatment of a person who is not able to make their own decisions is whether it is lawful to give treatment. If treatment is not in the patient's best interests, it would be unlawful to give it, and therefore lawful to withdraw or withhold it: [92].

- When the *Mental Capacity Act 2005* (UK) (**MCA**) came into force, there was no universal requirement, at common law, to apply for a declaration prior to withdrawing CANH to a patient in a persistent vegetative state: [95]. Nor could such a requirement be found in the post MCA case-law [99]. The European Convention on Human Rights (**ECHR**) did not necessitate importing such a requirement. The UK's existing regulatory framework met the factors in ECHR jurisprudence considered relevant to administering or withdrawing treatment: [102]-[114].

- It was difficult to justify treating CANH differently from other forms of life-sustaining treatment; or delineate patients with PDOC in such a way as to justify court involvement being required for those patients and not others: [115]-[119]. If it were apparent that the way forward was finely balanced, there was a difference of medical opinion, or lack of agreement from those with an interest in the patient's welfare, a court application could and should be made: [125].

8. **Human rights: disclosure, Enhanced Criminal Record Certificate**

***R (on the application of AR) v Chief Constable of Greater Manchester Police and Anor*** **[2018] UKSC 47**

**Decision date:** 30 July 2018

Lord Kerr; Lord Reed; Lord Carnwath; Lord Hughes; Lord Lloyd-Jones

AR was acquitted of the rape of a 17 year old woman, allegedly committed whilst he was working as a taxi driver. He was of previous good character, and a qualified teacher. His defence was that there had not been sexual contact. He later applied for an Enhanced Criminal Record Certificate (**ECRC**) as part of an application for a lecturing job. Under the *Police Act 1997* (UK), s 113B, an ECRC is not limited to facts of convictions, but includes information which in the opinion of the Chief Officer is relevant, and '*ought to be included*". An ECRC was issued with details of the rape charge. AR objected on the basis that there was no conviction and the disclosure failed to provide a full account of the evidence and how the jury came to its conclusion. On judicial review, the judge found that there was no breach of AR's rights under Art 8 of the European Convention on Human Rights (**ECHR**) (right to respect for private and family life), as the disclosure was reasonable, proportionate, and no more than was necessary to secure the objective of protecting young and vulnerable persons. The Court of Appeal dismissed AR's appeal.

**Held:**

- The Supreme Court dismissed the appeal. The standard of review adopted by an appellate court is whether the judge erred in principle or was wrong in reaching their conclusion. In the present case, it was sufficient for the Court of Appeal to consider whether there was any such error or flaw in the judge's treatment of proportionality; if there was not, there was no obligation for the Court of Appeal to make its own assessment: [57]; [61]; [64]-[65].

- The primary judge had correctly rejected the procedural aspect of the Art 8 complaint, contending a lack of consultation. The officers were fully aware from the evidence at trial of the nature of AR's defence and his personal circumstances, and took into account the potential impact on his employment prospects. There was no indication of further information AR would have wished to advance: [66].

- With respect to the substantive effect of Art 8, it was not necessary or appropriate for those responsible for an ECRC to conduct a "*detailed analysis*" of the evidence at trial. The judge was entitled to accept the Chief Officer's view that the information was not lacking in substance and "*might be true*". The judge took full account of the possible employment difficulties for AR, but regarded them as "*no more than necessary to meet the pressing social need*" for which the ECRC process was enacted. There was no error in this reasoning: [67]-[71].

- In a postscript, the Court raised general concerns about the ECRC procedure. Careful thought needs to be given to the value in practice of disclosing allegations which have been tested in court and led to acquittal: [72]-[76].