Court of Appeal
Supreme Court
Sydney

Decisions of interest

30 September 2019 – 11 October 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. **Environment and planning law: community consultation processes**

   DeBattista v Minister for Planning and Environment **[2019] NSWCA 237**

   Decision date: 1 October 2019

   White JA, McCallum JA, Emmett AJA

   Mr DeBattista was the owner of two parcels of land within Shoalhaven City Council's local government area. Relying on height restrictions contained in the Shoalhaven Local Environmental Plan 2014 ('SLEP2014'), Mr DeBattista incurred substantial expenses in preparing development proposals for the land. Following Council elections in September 2016, the membership of the Council changed. By means of a planning proposal ('PP023'), the newly constituted Council sought to amend SLEP2014 so as to lower the height restrictions applicable to Mr DeBattista's land. If the restrictions were so lowered, the extent of development permitted on the land would be substantially restricted and the value of the land to Mr DeBattista would be significantly reduced. Mr DeBattista commenced proceedings in the Land and Environment Court ('LEC'), seeking an order that the Council withdraw PP023. He claimed this relief on two bases: first, that there was a reasonable apprehension that the Council might not apply an impartial mind to the question of whether SLEP2014 should be amended; and second, that he had been denied procedural fairness. The primary judge made a declaration that the community consultation process undertaken by the Council with respect to PP023 was void and of no effect on the basis that the process had not complied with relevant statutory requirements. His Honour held, however, that the processes being undertaken by the Council were of a political and policy nature, and not of an administrative nature sufficiently similar to curial or quasi-curial processes to permit intervention on the basis of apprehended bias. Mr DeBattista appealed, broadly making two arguments: (1) that the primary judge erred in holding that the processes being undertaken by the Council were of such a nature that the LEC could not intervene even if apprehended bias or a denial of procedural fairness could be shown; and (2) that the primary judge erred in failing to find a reasonable apprehension of bias in the employees and some of the elected councillors of the Council.

   Held:

   - Appeal dismissed: [1], [15], [84].
   - (1) The effect of the primary judge's order was that a community consultation process in relation to PP023 must be conducted according to law. In those circumstances, it was inappropriate to make any further order with respect to the Council's handling of PP023. If, after the consultation period, a person wished to complain about how the Council dealt with submissions made during the consultation process, then a remedy could be available: [79]-[82].
   - (2) Given the conclusion on (1), it was unnecessary and undesirable to consider questions of apprehended bias: [83].

2. **Civil procedure: representative proceedings; multiplicity of proceedings**

***Wigmans v AMP Ltd* [2019] NSWCA 243**

Decision date: 8 September 2019

Bell P, Macfarlan JA, Meagher JA, Payne JA, White JA

Following testimony given by executives of AMP Ltd ('AMP') at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, five class actions were commenced within a short time of each other on behalf of AMP shareholders who had made investments during periods of time in which it was said that AMP ought to have disclosed certain information to the market. All five class actions were 'open' in the sense that the act of investing in AMP within the period specified in the relevant group definition was sufficient to render a person a group member. Four of the five class actions were commenced in the Federal Court, but were then transferred to the Supreme Court. Two of the sets of proceedings were then consolidated so that five became four. The four were led by: Ms Wigmans, Komlotex Pty Ltd ('Komlotex'), Wileypark Pty Ltd ('Wileypark'), and Mr Georgiou. Ms Wigmans filed her proceedings first. Each of these plaintiffs brought applications to stay each of the other sets of proceedings. AMP did not file a stay application, but supported an outcome in which it would only face one set of proceedings.

Exercising the Court's inherent powers and those in ss 67 and 183 of the *Civil Procedure Act* 2005 (NSW), the primary judge ordered that the representative proceedings commenced by Ms Wigmans, Wileypark, and Mr Georgiou be permanently stayed. Each of Ms Wigmans, Wileypark, and Mr Georgiou fell within the definition of a group member in the Komlotex proceedings. Ms Wigmans applied for leave to appeal from that decision.

Held:

- Leave to appeal was granted with respect to the issue of what principles apply to applications to stay and counter-stay multiple open representative action proceedings. The appeal was dismissed: [100], [101], [102], [111].
- Contrary to a submission put by Ms Wigmans, the Court held that subsequently commenced representative proceedings are not prima facie vexatious or oppressive. While the order of filing of proceedings is a relevant consideration in an application for a stay of proceedings, it is less relevant where, as here, the proceedings have been commenced within a short time of each other: [59]-[62], [68]-[69], [83], [110].
- The Court held that the primary judge exercised the discretion vested in her by reference to a range of relevant considerations. The manner in which she exercised that discretion was open to her, and she committed no error in making the orders that she did: [91]-[94].

3. **Civil procedure: summary dismissal; collateral abuse of process**

Burton v Office of the Director of Public Prosecutions **[2019] NSWCA 245**

Decision date: 11 October 2019

Bell P, White JA, McCallum JA

Mr Burton faced ten criminal charges arising from his publication of material on Facebook concerning the case of a child in respect of whom care proceedings were brought in the Children's Court. The publications were alleged to have contravened both the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and non-publications order made by the Children's Court pursuant to the *Court Suppression and Non-Publication Orders Act 2010* (NSW) ('*CSNO Act*'). Mr Burton contended that three of the charges – relating to an order made under the *CSNO Act* – could not possibly succeed on the basis that the non-publication order he was charged with breaching did not specify either the place where it would apply or the period for which it would operate. On the basis of that contention, Mr Burton commenced proceedings in the District Court against the Office of the Director of Public Prosecutions, seeking damages for the tort of collateral abuse of process. He alleged that the criminal proceedings against him for alleged breaches of the defective non-publication order were instituted for the collateral purpose of causing him vexation. The Director applied to have Mr Burton's tortious proceedings summarily dismissed on the ground that Mr Burton's claim disclosed no reasonable cause of action. A judge of the District Court granted that application, summarily dismissing Mr Burton's tortious claim.

The primary judge held that the improper purpose alleged by Mr Burton – namely, that the criminal proceedings were brought for the purpose of vexing him – did not amount to a purpose outside the lawful scope of the criminal process. The primary judge also held that the non-publication order in question was an 'interim order' (within the meaning of s 10 of the *CSNO Act*) – and so did not need to specify the period for which it operated. Mr Burton sought leave to appeal.

Held:

- Leave to appeal granted; appeal allowed; matter remitted to the District Court to continue: [46], [67], [123].
- The Court held that bringing criminal proceedings to vex or harass a defendant is plainly outside the scope of the purpose of criminal proceedings. The primary judge erred in holding otherwise. Accordingly, the primary judge's decision to summarily dismiss Mr Burton's claim on this basis was in error: [2], [52], [97].
- The primary judge erred in holding that the Children's Court order was an interim order within the meaning of the *CSNO Act*: [10], [54], [114].
- Bell P discussed the elements of the tort of collateral abuse of process; White JA generally agreed with Bell P's summary of those elements: [25]-[42]; [62].

Other Australian intermediate appellate decisions of interest

4. **Real property: compulsory acquisition of land; personal injury**

Anderson v Commissioner of Highways **[2019] SASCFC 119**

Decision date: 4 October 2019

Kelly J, Blue J, Stanley J

For many years, Mr Anderson's parents owned a property at Bedford Park in South Australia. Mr Anderson had lived at that address for significant portions of his life with his parents, and later with his wife and children also. He also conducted home businesses from the property.

Pursuant to the provisions of the *Land Acquisition Act 1969* (SA), the Commissioner of Highways compulsorily acquired the property for the purpose of undertaking major road works. Mr Anderson's parents had been paid compensation and had moved to another home in a nearby suburb.

Mr Anderson's evidence was that from July 2014 (about the time when the Commissioner notified Mr Anderson and his parents of the proposed acquisition) to May 2016, he suffered from an adjustment disorder, with symptoms including anxiety, mental stress, forgetfulness, insomnia, depression, feelings of hopelessness and helplessness, and suicidal ideation.

In the course of negotiating the compensation to be paid for the land, a question was referred to the Supreme Court: is a personal injury of the nature suffered by Mr Anderson compensable as a loss arising under s 22B of the Act, as qualified by s 25? Section 22B ('Entitlement to compensation') provides that 'Subject to this Act, a person is entitled to compensation for the acquisition of land under this Act if – (a) the person's interest in land is divested or diminished by the acquisition; or (b) the enjoyment of the person's interest in land is adversely affected by the acquisition.' Section 25 ('Principles of compensation') relevantly provides that the compensation payable under the Act 'shall be such as adequately to compensate [a claimant] for any loss that [they have] suffered by reason of the acquisition of the land'.

The primary judge answered the question in the negative. Mr Anderson appealed to the Full Court.

Held:

- Appeal dismissed: [1], [2], [90].
- Properly construed, the expression 'any loss' in s 25 did not extend the entitlement to compensation under s 22B to loss in the nature of a personal injury resulting from the acquisition of land. When the Act is read as a whole, and in the context of its legislative history, it is clear that the expression 'any loss' must be understood as referring to a loss of an economic nature connected with an interest in the land: [9], [49], [55].

5. **Constitutional law: federal judicial power; summary judgment**

Deputy Commissioner of Taxation v Buzadzic **[2019] VSCA 221**

Decision date: 11 October 2019

Kyrou JA, McLeish JA, Niall JA

The Deputy Commissioner of Taxation brought proceedings in the Trial Division of the Supreme Court of Victoria against Mr Danny Buzadzic and Mrs Leisa Buzadzic seeking recovery of income tax over a nine year period. The amounts sought were approximately $4.5m and $1.1m respectively. The Buzadzics filed defences relying on three main matters. First, they submitted that the Commissioner's exercise of the power to make income tax assessments had been affected by various jurisdictional errors. Second, they submitted that because they had proceedings pending in the AAT for review of the assessments, they were not indebted to the Commonwealth in the amounts claimed by the Commissioner. Third, they submitted that certain aspects of the income tax regime outlined above were constitutionally invalid on the bases that they impermissibly vested the Commissioner with federal judicial power, that they required the Court to act in a manner inconsistent with its position as a repository of federal judicial power, and that they imposed an incontestable tax.

The Commissioner applied for summary judgment on the basis that these defences had no real prospect of success: the first defence was said to be hopeless on the basis of a 'no invalidity' provision and a 'conclusive evidence' provision that applied to income tax assessments; the second defence was said to be hopeless on the basis of s 14ZZM of the *Tax Administration Act 1953* (Cth) which provided that '[t]he fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending'; the constitutional arguments were said to be hopeless because it is settled that the income tax regime does not breach the Ch III jurisprudence in the manner that the taxpayers alleged, and does not impose an incontestable tax. The primary judge refused the application for summary dismissal on the basis that if the Commissioner's construction of the relevant provisions was correct, then those provisions impermissibly conferred judicial power on the Commissioner and required the Court to act in a manner inconsistent with its position as a repository of federal judicial power. Alternatively, the judge held that it was not in the interests of justice to deal with the proceedings summarily. The Commissioner sought leave to appeal.

Held:

- Leave to appeal granted; appeal allowed; summary judgment entered for the Commissioner: [122].
- None of the defences had any real prospect of success: [76], [82]-[83], [95]-[96], [100], [104], [109], [115]-[116].
- Further, the primary judge erred in holding that it was not in the interests of justice to dispose of the proceedings summarily: [118]-[121].

Asia Pacific decisions of interest

6. Civil procedure: Mareva injunctions in aid of foreign court proceedings

Court of Appeal of the Republic of Singapore

Bi Xiaoqiong v China Medical Technologies Inc **[2019] SGCA 50**

Decision date: 30 September 2019

Menon CJ, Phang JA, Prakash JA, Tay JA, Chong JA

Ms Bi had been involved in the management of China Medical Technologies Inc ('CMT'). CMT was wound up in July 2012. After investigating the affairs of CMT and one of its wholly-owned subsidiaries, the liquidators of CMT concluded that up to US$521.8m had been fraudulently misappropriated from the companies by members of their former management. Accordingly, the liquidators commenced proceedings against Ms Bi (and other former members of management) in both Hong Kong and Singapore.

Two suits in Hong Kong were further advanced than that in Singapore. Pending the determination of the Hong Kong proceedings, the liquidators applied to the Singapore High Court for a stay of the Singapore proceedings against Ms Bi (because they considered Hong Kong the most appropriate forum for the dispute). The liquidators had also applied for a Mareva injunction (a freezing order) to prevent Ms Bi from removing her assets from Singapore, or dealing with them within the country in a manner which would take the total value of her assets below US$17.6m. The primary judge heard the stay application and the application for a Mareva injunction together, and granted both.

Ms Bi appealed. On appeal, there were two key issues: (1) whether the High Court had the power to grant a Mareva injunction in aid of foreign court proceedings; and (2) if the High Court did have that power, whether the primary judge erred in the exercise of that power in Ms Bi's case.

Held:

- Appeal dismissed: [156].
- (1) The High Court does have the power to grant a Mareva injunction in aid of foreign court proceedings. The source of that power is 4(10) of the Civil Law Act – a broad provision that gives the power to make interlocutory injunctions generally. To issue a Mareva injunction against a person, the court must have *in personam* jurisdiction over that person, and the applicant must have a reasonable accrued cause of action against that person in Singapore. Contrary to Ms Bi's submission, there is no additional requirement that for a Singapore court to issue a Mareva injunction, the cause of action on which that injunction is premised must also terminate in a judgment by the Singapore court: [61], [62], [103].
- (2) There was no error in the primary judge's exercise of the power to issue a Mareva order binding Ms Bi: [130]-[131], [140], [144], [156].

7. **Private international law: foreign defendants; jurisdiction to grant interim relief**

Court of Appeal of New Zealand/Te Kōti Pīra O Aotearoa

Commerce Commission v Viagogo AG **[2019] NZCA 472**

Decision date: 2 October 2019

Clifford J, Gilbert J, Goddard J

The New Zealand Commerce Commission ('the Commission') commenced proceedings in the High Court of New Zealand against Viagogo AG ('Viagogo'), a company incorporated and based in Switzerland. Viagogo operated a ticket reselling website. The Commission alleged that Viagogo breached the *Fair Trading Act 1986* (NZ) by making false, misleading, or deceptive representations to New Zealand consumers as to the quantity of tickets available for an event, the price of tickets, the validity of such tickets, and as to Viagogo's status as an 'official' ticket seller.

Viagogo declined to accept service on its lawyers in New Zealand and advised the Commission that if proceedings were served on it in Switzerland, it would object to the High Court's jurisdiction to determine the Commission's claims.

Before the proceedings had been served on Viagogo in Switzerland, the Commission applied without notice for an interim injunction against Viagogo. If granted, that injunction would prevent Viagogo from making certain representations to New Zealand consumers through its website.

The primary judge held that the High Court had no jurisdiction to grant interim relief against Viagogo before Viagogo had been served with the proceedings. The Commission appealed. The key question on appeal was whether the Court's power to issue interim relief against Viagogo depended on the Commission having first established that the Court had *in personam* jurisdiction over Viagogo.

Held:

- Appeal allowed; due to a change in circumstances since the application was first heard in the High Court, the matter was remitted to the High Court for reconsideration on the merits should the Commission continue to seek interim relief: [104].

- The primary judge erred in holding that the High Court had no jurisdiction to grant interim relief against Viagogo in the circumstances. The Court's power to grant interim relief of the kind sought is grounded in both statute and the Court's inherent jurisdiction. There is no principled distinction between the Court's (unchallenged) power to grant interim relief against a domestic defendant prior to service and the Court's power to grant such relief against an overseas defendant. Nor does the fact that a protest as to jurisdiction remains undetermined necessarily preclude the High Court from granting interim relief against the protesting defendant: [61], [72], [75], [80]-[81].

Other international decisions of interest

8. **Police powers: common law powers of arrest; breach of the peace by a third party**

Supreme Court of Canada

***Fleming v Ontario* 2019 SCC 45**

Decision date: 4 October 2019

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

In February 2006, protestors who were a part of the First Nation called Six Nations of the Grand River had occupied a piece of land in Caledonia, Ontario and had hung Indigenous flags along Argyle St, a street that bounded that land. In June 2006, the Crown purchased the land and allowed the protestors to continue to occupy it.

In response to the occupation and the Crown's actions, other groups in the community organised counter-protests. One counter-protest group intended to hold a "flag rally" on 24 May 2009. Mr Fleming intended to participate in the flag rally. On the day, he was walking along Argyle St towards the place where he was meeting other counter-protestors. He was carrying a Canadian flag. As he walked one way down the street, a police squad travelling the other way saw him, turned, and headed towards him. The officers' intention was to place themselves between Mr Fleming and the Six Nations protestors. Mr Fleming saw the police vans moving fast towards him. In order to avoid them, he moved off the shoulder of the road, down into a ditch, then up the other side and over a low fence, into the contested property. Six Nations protestors saw him and began approaching him. While they were still some way off, a police officer arrested Mr Fleming and escorted him off the property. When Mr Fleming refused to drop his flag, officers forced him to the ground and handcuffed him. He was charged with obstructing a police officer. Nineteen months later, the charge was withdrawn.

Mr Fleming commenced civil proceedings against the Province of Ontario and the police, seeking damages for assault and battery, wrongful arrest, false imprisonment, and violations of his rights under the *Canadian Charter of Rights and Freedoms*. The trial judge found in Mr Fleming's favour and awarded him substantial damages. An appeal to the Ontario Court of Appeal succeeded by majority and the trial judge's orders were set aside. Mr Fleming appealed to the Supreme Court of Canada. The key issue on appeal was whether the police had a common law power to arrest someone who was acting lawfully in order to prevent an apprehended breach of the peace by another person.

Held:

- Appeal allowed: [120].
- The police had no power at common law to arrest Mr Fleming in order to prevent an apprehended breach of the peace by other persons: [69]-[74], [88]-[95], [101]-[102].