Court of Appeal
Supreme Court
Sydney

Decisions of interest

4 March 2019 – 15 March 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.

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New South Wales Court of Appeal decisions of interest

1. **Land: compulsory acquisition; heads of compensation under *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)***

   ***Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41**

   Decision date: 6 March 2019

   Basten JA, Macfarlan JA, Payne JA, Sackville AJA, Preston CJ of LEC

   United Petroleum Pty Ltd ('United') operated a service station on a parcel of land on the Pacific Highway between Woolgoolga and Ballina. The land was owned by related parties that had an oral lease with the respondent. Roads and Maritime Services ('RMS') compulsorily acquired the land in August 2015. United was unable to relocate its business.

   United sought compensation in the Land and Environment Court for loss attributable to disturbance under s 59(f) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). In April 2018, the LEC awarded United compensation on two bases: first, $2 million as the capitalised sum for the loss of the business; and second, $83,000 for the additional rent paid to the acquiring authority for continuing possession in the period between compulsory acquisition and vacant possession. (That is, rent which exceeded what United had been paying to the previous lessors.)

   RMS appealed, challenging both elements of the award of compensation. As to the first, the appellant argued that existing authority did not permit recovery of an amount equal to the capitalisation of projected future profits of the business as "loss attributable to disturbance" caused by the acquisition. As to the second, the appellant argued that compensation for a rent increase in the period between compulsory acquisition and vacant possession should not be awarded, as the loss is not a direct and natural consequence of the acquisition, and such recovery would therefore be inconsistent with s 34 of the Act, which outlines the rights of lawful occupiers of land that is compulsorily acquired

   Held:

   - The appeal was allowed. The Court accepted both of RMS' challenges to the award of compensation, set aside the award, and ordered that the respondent bear the appellant's costs in the appeal: [15], [54], [64].

   - In accepting RMS's first argument – that capitalisation for projected future profits could not be characterised as a "loss attributable to disturbance" caused by the acquisition – all members of the Court, in separate reasons, held that the Court's decision in *Health Administration Corporation v George D Angus Pty Ltd* (2014) 88 NSWLR 752; [2014] NSWCA 352 on the interpretation of s 59(f) should not be followed: [54], [72], [73], [119]-[120], [128].

2. **Civil procedure: determination of a separate question; framing of questions; appropriateness of separate question mechanism in the circumstances**

State of New South Wales v Dargin **[2019] NSWCA 47**

Decision date: 14 March 2019

Basten JA, Leeming JA, Sackville AJA

Mr Travis Dargin and Ms Kristy Green commenced proceedings in the District Court, suing the State of New South Wales as vicariously liable for the tortious conduct of police officers. They sued in respect of actions allegedly committed by police performing bail compliance checks in respect of Mr Dargin. The plaintiffs sued in trespass to land on two bases. First, they argued that no enforcement condition had been imposed by a court pursuant to the *Bail Act 2013* (NSW), and so each entry by the police onto the premises where the plaintiffs lived constituted a trespass. Second, they argued that to the extent that there was an implied licence to enter property, it did not extend to compliance checks "in the manner and in the circumstances pleaded … including banging loudly on the doors, windows and walls of the house on the property and shining lights into the house through its windows, frequently, in the middle of the night, and with a heavily pregnant woman and small child residing at the premises." Those allegations were denied by the State.

In the District Court, the State formulated a separate question, and requested that it be determined; the plaintiffs did not oppose that course. The question was:

> "Whether (in the context of the *Bail Act 2013* (NSW)) a bail compliance check can be lawfully conducted in the absence of court ordered bail enforcement order?" [sic]

The primary judge answered that question with the order "Judgment for the Plaintiff". On appeal, the parties agreed that that meant 'No'.

The State sought leave to appeal from the primary judge's determination of the separate question, seeking to have the primary judge's answer set aside, and to have the Court of Appeal answer a different, more carefully worded series of questions. The plaintiffs – respondents in the Court of Appeal – sought to defend the answer given by the primary judge, and opposed the Court of Appeal answering different questions.

Held (Leeming JA, Basten JA and Sackville AJA agreeing):

- The appeal was allowed, in that the Court ordered that the answer given by the primary judge be set aside, and the separate question instead be answered 'It is inappropriate to answer this question.' The Court declined to answer the State's amended questions: [46]-[47].
- The Court referred to *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 and *Atwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, warning that the procedure for the determination of a separate question should be used cautiously, as proceeding in a factual vacuum can, as here, prove inutile: [7], [8], [46].

Other Australian intermediate appellate decisions of interest

3. **Administrative law: migration; relationship between *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth); jurisdiction of Administrative Appeals Tribunal**

***Fahme v Minister for Home Affairs* [2019] FCAFC 41**

Decision date: 1 March 2019; published 11 March 2019

Rares, Perram and Farrell JJ

Mr Fahme applied for a medical protection visa. On 22 August 2017, a delegate of the Minister refused to grant that visa. Mr Fahme applied to the Administrative Appeals Tribunal to have that decision reviewed. He applied on the 22nd day after the decision of the delegate had been emailed to him. It was common ground that the delegate's decision was a "Part 5-reviewable decision" within the meaning of s 338(2) of the *Migration Act 1958* (Cth).

Section 347(1)(b)(i) of the Act provides that 'An application for review of a Part 5-reviewable decision must: … be given to the Tribunal within the prescribed period, being a period ending not later than: (i) if the Part 5-reviewable decision is covered by subsection 338(2) … 28 days after the notification of the decision'. Regulation 4.10(1)(a) of the *Migration Regulations 1994* (Cth) prescribes a period of 21 days after the day on which notice of the delegate's decision was received in which an applicant could file a valid application for review of a Part 5-reviewable decision. Section 348(1) relevantly provided that the AAT must review applications for review validly made under s 347.

Upon receipt of Mr Fahme's application, the AAT decided that it had no jurisdiction, on the basis that he had filed outside of the time prescribed in reg 4.10(1)(a). Mr Fahme sought judicial review in the Federal Circuit Court, where he was unrepresented. The trial judge upheld the Tribunal's decision. Before the Full Court of the Federal Court, Mr Fahme's submissions focused on the difference between the time period provided for in the Act, and that prescribed in the Regulations. He argued that because his application had been filed within the period legislated for by Parliament, the AAT could treat it as a valid application, notwithstanding the shorter period prescribed in the Regulations.

Held:

- The appeal was dismissed: [13], [24], [25].
- The relationship between s 347(1)(b)(i) and reg 4.10(1)(a) was authoritatively dealt with in *Xie v MIMEA* [2005] FCAFC 172, which was upheld in *Tay v MIAC* (2010) 183 FCR 16. In those decisions, it was held that the effect of the phrase "prescribed period" in s 347(1)(b)(i) is that while s 347(1) fixes the maximum period in which valid applications can be made, the regulations can prescribe a shorter period within that limit: [7], [9], [11], [12], [18]-[19].
- As an inferior tribunal, the AAT's powers are limited to those set out in statute; Part 5 confers no power to hear a review application other than that in s 348: [21].

4. **Equity: tracing; life insurance policies**

Hanson & Anor v Goomboorian Transport Pty Ltd & Ors **[2019] QCA 41**

Decision date: 12 March 2019

Gotterson JA, McMurdo JA, Douglas J

On 30 October 2006, when 23 years old, Norma Hanson took out a life insurance policy with Asteron Life Ltd. The sum insured was initially $1,000,000. Under the policy, she paid the premiums in advance in monthly instalments. The policy was to expire on 30 October 2082 or when cover ceased in one of the ways specified under the policy. Norma's parents were named as the beneficiaries of the policy in equal shares. At the time when she took out the policy, Norma was employed by the first plaintiff/respondent, Goomboorian Transport Pty Ltd. In 2011, due to a corporate restructure, she became the accounts manager for all of the plaintiff/respondent companies. In her role, she had access to internet and phone banking facilities. Norma took advantage of this access, fraudulently transferring money from the accounts of the plaintiff/respondent companies to herself. On four occasions, she used stolen funds to pay for her insurance premiums. One of those occasions was the final premium paid. Norma died suddenly on 23 September 2014, aged 31 years. By that time, 95 monthly instalments had been paid on the policy. The sum insured had increased to a little more than $1,427,000. Asteron paid the sum insured in equal shares to Norma's parents. The plaintiff companies commenced proceedings in the Supreme Court of Queensland, seeking declarations that the whole of the proceeds of the Asteron policy were received by Norma's parents as trustees for the companies. The primary judge gave judgment for the plaintiffs, construing the policy as effectively providing a series of separate monthly covers. Because the final premium payment was made using stolen funds, the company from which those funds was stolen was entitled to trace into the policy, and then into the proceeds, and claim a proportionate share of the proceeds (in this case, the whole of the proceeds). The appellants – Norma's estate, together with her parents – appealed, arguing for a construction of the policy on which all premiums paid contributed to the existence of the cover and its amount at the date of death, not just the final payment.

Held:

- Appeal allowed: rightly characterised, the policy provided cover that was singular in nature; it was not a series of sequential monthly covers. Further, the fact that retention of cover depended on continuity of premium payments meant that the primary judge erred in making the entitlement to the proceeds of the policy depend entirely on the final monthly premium payment: [57], [60], [66], [67], [72].

- The Court ordered that the appellants held the proceeds of the policy on trust for the respondent companies in proportion to the amounts fraudulently applied to make premium payments. This amounted to 4/95ths of the proceeds: [66].

Considered:

- *Foskett v McKeown* [2001] 1 AC 102; [2000] UKHL 29

Asia Pacific decisions of interest

5. **Public law: freedom of information; *Open Government Act* 1 PNC §§ 901-908**

Supreme Court of Palau

***Akitaya & Ors v Obichang* [2019] PWSC 8**

Decision date: 6 March 2019

Ngiraklsong CJ, Rechucher and Michelsen JJ

Section 906(a) of the *Open Government Act* 1 PNC §§ 901-908 provides that

> "Within ten (10) days of any request, all public records produced by a governing body shall be available by an person during regular business hours, unless the disclosure will take more time to produce due to exceptional circumstances or the volume of information requested, is in violation of the Constitution of the Republic, other law of the Republic, or is exempted under this chapter."

Section 907(c) provides that civil fines can be imposed for failure to comply with s 906.

In 2015, the government of Palau was in negotiations with Japanese companies concerning the renovation of the Roman Tmetuchl International Airport. On January 8, 2015, five senators – the plaintiffs/appellants – sought access to specified documents relating to the status of those negotiations. Eight days later, the Minister of Public Infrastructure, Industries & Commerce responded, saying that the plaintiffs already possessed the documents (or substantially similar versions), and expressing concern that the documents may fall within the exemption from disclosure in s 905(a)(2), which protects "information related to negotiations with ... [a] foreign entity that has its principal place of business in another country." Despite these hesitations, on January 25, 2018, the Minister provided the documents to the President of the Senate. On January 29, the plaintiffs filed their petition alleging that they had not received the documents within the statutory 10 day window. They submitted that the language of s 906(a) meant that providing access within 10 days was the only response open to a government body. At first instance, the primary judge gave summary judgment for the Minister, holding that the deadline for a *response* to a request had been met. On appeal, the appellants sought a declaration that s 906(a) had been violated, an order requiring the documents sought to be delivered up, and an order that a civil fine be imposed on the Minister.

Held:

- The trial judge's summary judgment was upheld, and the appeal dismissed: [19]
- The appellants' construction of s 906(a) was rejected. The Court held that the statutory language requires a *response* to be made within 10 days, but that response can take one of four forms: (1) making the documents available within business hours; (2) indicating that disclosure will take more time; (3) declining to provide the information because of the operation of another law; (4) asserting that the requested records are protected by a statutory exception: [12].

6. **Contracts: government contracts; authority to contract**

Fiji Court of Appeal

Office of the Attorney-General & Ors v Digicel Fiji Limited **[2019] FJCA 39**

Decision date: 8 March 2019

Lecamwasam JA, Almeida-Guneratne JA, Jameel JA

Digicel Fiji Limited commenced proceedings against three government bodies – the Office of the Attorney-General, Information Technology & Computing Services, and the Ministry of Finance. Digicel claimed $200,011.36 for telecommunications services provided to those bodies over a 25 month period, pursuant to a putative contract between the parties. That agreement purportedly provided for a free 15 day trial period. After the trial period, the defendants/appellants did not take any steps to cancel the agreement. In the absence of any indication to the contrary, Digicel continued to provide telecommunications services to the government bodies for 25 months. In the High Court, the primary judge gave judgment in favour of Digicel. The government bodies appealed. The two key issues on appeal concerned whether the contract was void for want of authority on the part of the governmental employee who signed it, and whether the appellants could claim that the trial period was never validly brought to a close, with the result that they had incurred no liability under the contract.

Held:

- The appeal was dismissed with costs: [24], [26], [27].
- On the question of authority, it was common ground that the authority to contract was vested in the Permanent Secretary for Finance, not directly in the Manager from Information Technology & Computing Services who in fact signed the contract. But this prima facie lack of authority was not a basis for holding the contract void. The decision to enter the contract was an institutional decision: by analogy with established public law principles concerning the delegation of administrative functions, it was clear that the Manager had signed the contract as an authorised delegate of the Permanent Secretary. This conclusion is reinforced by the fact that it was not within the knowledge or power of Digicel, in dealing with government officers, to ascertain whether the Manager was authorised to sign the contract. Further, the agreement contained a clause representing that the signatory on behalf of Information Technology & Computing Services had authority to do so, and the appellants could not deny that representation: [3], [5], [7]-[11], [13]-[14].
- On the issue of whether the trial period was validly brought to an end, the onus was on the appellants to provide written notice of cancellation. There was evidence that they knew they had not done so – apparently because of an "oversight". In those circumstances, the appellants could not claim that that the trial period continued and they had incurred no liability under the contract: [17].

Other international decisions of interest

7. **Administrative law: migration; Istanbul Protocol; role of medical experts in tribunal decision-making**

UK Supreme Court

KV (Sri Lanka) (Appellant) v Secretary of State for the Home Department (Respondent) **[2019] UKSC 10**

Decision date: 6 March 2019

Lady Hale, Lord Wilson, Lady Black, Lord Briggs, Lord Kitchin

KV is a Sri Lankan national of Tamil ethnicity. He arrived in the UK in February 2011, and claimed asylum. He has scars on his arm and back, which he says are the result of torture at the hands of the Sri Lankan government, while the Home Secretary's case is that they were self-inflicted by proxy (SIBP), that is, someone else was invited to inflict them. KV claims that hot metal rods were applied to his arm while he was conscious, and that when he fell unconscious on account of pain, the rods were applied to his back.

After refusal at first-instance and an unsuccessful appeal to the First-tier Tribunal, KV's case came before the Upper Tribunal. The Upper Tribunal heard evidence from Dr Zapata-Bravo, a medical expert, who considered that the scars were caused by burning with a hot metal rod. Further, he considered that because the marks on KV's arms had blurred edges, whereas the marks on his back had clearly-defined edges, he must have been unconscious when the latter were inflicted. He concluded that his clinical findings were "highly consistent" with KV's account of his torture. The Upper Tribunal dismissed KV's appeal. KV appealed again to the Court of Appeal, which held by majority that the Upper Tribunal's assessment was open to it. The Court of Appeal considered that Dr Zapata-Bravo has exceeded his remit as a medical expert. KV appealed to the Supreme Court.

Held:

- The appeal was allowed, and KV's appeal against the refusal to grant him asylum was remitted to the Upper Tribunal for determination: [36].
- Dr Zapata-Bravo did not exceed his remit as a medical expert. His conclusions were framed in language drawn from the 1999 *Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the Istanbul Protocol). Decision-makers can legitimately be assisted by medical experts offering opinions of the kind that he offered. But assessment of an applicant's credibility always rests with the decision-maker: [20], [24].
- Decision-makers should be attentive to the fact that injuries which are SIBP are likely to be extremely rare; the Upper Tribunal was not sufficiently attentive to this: [31]-[35].

8. **Evidence: inferences from failure to call witness; intentional torts – battery**

Court of Appeal for British Columbia

Singh v Reddy **2019 BCCA 79**

Decision date: 6 March 2019

Newbury, Fenlon, Butler JJ

Ms Singh and Dr Reddy both attended a dinner-dance in November 2007, hosted by what was then known as the India Sanmarga Ikya Sangam Educational and Cultural Society. An incident occurred, which resulted in Ms Singh being injured. Ms Singh commenced tortious proceedings against Dr Reddy, asserting that Dr Reddy had intentionally pushed her to the ground. Dr Reddy denied pushing Ms Singh, and said that she had no motive to injure her; on her account, Ms Singh fell. At trial, the primary judge found for the plaintiff. Before damages were assessed, Dr Reddy appealed. The sole ground of appeal on which she relied was that the trial judge erred in declining to draw an adverse inference by reason of the plaintiff's failure to call a witness, Ms Rangaiya. Dr Reddy also applied for an adjournment of the hearing of the appeal to obtain and introduce fresh evidence.

The adverse inference principle provides that where a party fails to call a witness who might be expected to provide important supporting evidence, and offers no sufficient explanation for that failure to call, an adverse inference *may* be drawn against that party. The inference is not to be drawn if the witness is equally available to both parties, and not unless a prima facie case for the drawing of the inference is established. It is accepted that the drawing of an adverse inference is a discretionary matter; the court is not required to do so.

On appeal, one issue concerned what standard of review applied to decisions concerning adverse inferences. The appellant argued that because such decisions are discretionary, the threshold for appellate intervention was whether the discretion had been wrongly exercised, in that no, or insufficient, weight was afforded to relevant considerations.

Held:

- The relevant standard of review was higher than that urged by the appellant: a reviewing court has to find "palpable and overriding error": [22].

- The primary judge made no such error: the witness was at least as available to Dr Reddy as to Ms Singh, and Ms Singh had offered a legitimate explanation for not calling her. In those circumstances, the trial judge made no error. Accordingly, the appeal was dismissed: [3], [28], [33].

- The application to adjourn was also dismissed: the evidence that Dr Reddy sought to obtain and introduce was not "fresh"; it was discoverable by reasonable diligence before the end of the trial. Further, there was a one-month break during the trial when the evidence could have been obtained: [30].