Court of Appeal
Supreme Court
Sydney

Decisions of interest

5 August 2019 – 30 August 2019

Summaries of recent decisions of the New South Wales Court of Appeal and other Australian intermediate 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. **Insurance: aggregation of claims; retention**

Bank of Queensland Limited v AIG Australia Limited **[2019] NSWCA 190**

Decision date: 6 August 2019

Bathurst CJ, Macfarlan JA, White JA

Bank of Queensland Limited ('BOQ') had taken out a claims-made policy with the respondent insurers. Under the policy, the liability limit for all claims was $40 million, and a retention of $2 million applied to each claim. BOQ claimed that it was entitled to an indemnity – subject to a single retention of $2 million – in respect of a sum of $6 million it paid in order to settle a representative proceeding brought against it in the Federal Court, and in respect of BOQ's costs in the proceedings. The representative proceeding had been brought by a superannuation fund on its own behalf and on behalf of other investors, alleging that BOQ had failed to protect their interests when BOQ became aware of a fraud being committed by a financial planner using BOQ bank accounts.

BOQ commenced proceedings against the insurers in the Commercial List of the Supreme Court, seeking declarations and other relief to the effect that it was entitled to an indemnity (subject to a single retention). Before the primary judge, the insurers argued that BOQ's loss arose out of multiple claims – it was, after all, a representative proceeding – and that a $2 million retention applied to each claim. The insurers argued that, since no single claim exceeded $2 million, BOQ was not entitled to anything under the policy. The primary judge found in favour of the insurers. BOQ appealed.

On appeal, there were three issues: (1) whether the institution of the representative proceedings in the Federal Court (and other steps taken by or on behalf of the investors) constituted multiple claims or a single claim under the policy; (2) whether, if there were multiple claims, these claims were to be treated as a single claim by reason of an aggregation clause in the policy; and (3) if there was a single claim, whether the claim was to be disaggregated by reason of a disaggregation clause in the policy.

Held:

- Appeal allowed: [29], [107], [113].
- In relation to (1): there were multiple claims under the policy, as a reasonable businessperson, taking each investor separately, would consider that the representative proceeding was a 'suit or proceeding' brought by that investor within the meaning of the policy: [5], [64]. White JA dissented on this point, holding that the representative proceeding constituted only a single claim under the policy, because it was a 'suit or proceeding' brought by the superannuation fund on behalf of the investors, not by the investors individually : [114].
- In relation to (2) and (3): the multiple claims arose out of, were based on, or were attributable to one or a series of related wrongful acts, and should therefore be aggregated. As such, only one retention was applicable: [27]-[28], [71]-[104].

2. Defamation: amending pleadings; adopting contextual imputations

State of New South Wales v Wraydeh **[2019] NSWCA 192**

Decision date: 14 August 2019

McCallum JA, Emmett AJA, Simpson AJA

Mr Wraydeh commenced defamation proceedings against the State of New South Wales in the District Court. The proceedings arose out of press statements made by police in the course of their investigation of a fatal car crash. Broadly, the statements suggested that Mr Wraydeh had been driving the car in which a female passenger suffered serious injuries; that he fled from the scene leaving her to die; and that a manhunt was underway to find him. Mr Wraydeh pleaded an array of imputations. The State pleaded a defence of contextual truth, relying on two contextual imputations, including an imputation that 'the plaintiff is a criminal'. Mr Wraydeh then sought leave to amend his pleading to adopt the contextual imputations. The primary judge allowed the amendment, which had the effect of depriving the State of what could have been a good defence. The State sought leave to appeal from that decision, and that leave was granted.

The State's challenge to the primary judge's decision to allow Mr Wraydeh to amend his pleadings essentially involved two claims. First, the State submitted that in an application to amend, the moving party bears an *onus* of proving that the amendment is brought in good faith or is not an abuse of process. The State submitted that, in the absence of evidence as to why Mr Wraydeh had not originally pleaded the imputations that he sought to add in his amended pleading, it should be inferred that he was pursuing the amendment for an improper purpose – namely, to deprive the State of a defence, not to vindicate his reputation. Second, the State argued that the primary judge had erred in finding that the evidence of Mr Wraydeh's prior convictions was insufficient to constitute proof of the imputation that 'the plaintiff is a criminal'. (If the primary judge had held, as the State contended, that Mr Wraydeh's criminal record proved the truth of the imputation, then Mr Wraydeh could not have argued that the imputation was defamatory.)

Held:

- Appeal dismissed: [41], [49], [59].
- As to the first issue: Mr Wraydeh did not bear the onus alleged by the State; in the circumstances of the case, the primary judge did not have to be satisfied that Mr Wraydeh's application to amend was brought in good faith before allowing that application: [25], [30], [55].
- As to the second issue: whether the fact that a person has a criminal history makes them a 'criminal' is a question for the jury; the primary judge was correct to hold that evidence of Mr Wraydeh's prior convictions could not conclusively prove the truth of the imputation 'the plaintiff is a criminal' such that Mr Wraydeh could not have properly pleaded that imputation: [39]-[40], [58].

3. **Probate: testamentary capacity; suspicious circumstances**

Mekhail v Hana; Mekail v Hana **[2019] NSWCA 197**

Decision date: 14 August 2019

Basten JA, Leeming JA, Emmett AJA

The late Nadia Mehkail made a will dated 12 December 2014. That will left the whole of Nadia's estate to 'my daughter Georgette Hana', and appointed Georgette executrix; in the event that Georgette predeceased Nadia, the will left the whole of the estate to Georgette's husband, Adel, and appointed him sole executor. The description of Georgette as Nadia's daughter was incorrect; the two women were unrelated.

A previous will, executed in 2001, had left legacies of $10,000 to two Coptic churches, and left Nadia's residuary estate to her husband, and if he predeceased her (as he did – he died in 2012), to each of his five nephews in equal shares. In December 2014, Nadia's main asset was her home in South Strathfield.

The primary judge found that 'suspicious circumstances' attended the execution of the 2014 will. The two which he specifically identified as having the effect that Georgette bore an onus of showing that Nadia knew the contents of the 2014 will and appreciated its effect were: (i) the fact that the lawyer who drafted the will was led to believe that Georgette was Nadia's daughter; and (ii) the fact that the will falsely described Georgette as Nadia's daughter. Having identified these circumstances as sufficient to place this onus on Georgette, the primary judge concluded that Georgette's case had rebutted the doubts raised, and granted probate of the 2014 will to Georgette.

Two of Nadia's husband's nephews appealed, seeking to have the grant of probate of the 2014 will revoked, and to have a grant of probate of the 2001 will made. The primary issue on appeal concerned whether the primary judge had erred in principle in approaching the analysis of the 'suspicious circumstances' attending the execution of the 2014 will.

Held:

- Appeal allowed; probate of the 2014 will revoked; probate of the 2001 will granted: [1], [189], [191].
- The primary judge erred in principle in the manner in which he assessed the magnitude of the onus which Georgette bore. The primary judge did not assess the gravity of the suspicious circumstances; that is, having been satisfied that the onus had shifted to Georgette, he did not examine the quantity and quality of the matters giving rise to suspicion. That approach is unduly circumscribed: in order to determine whether Georgette had discharged the onus the she bore, it was necessary to first determine the full nature of the suspicious circumstances: [134]-[136].
- On the facts, there were many more suspicious circumstances attending the execution of the 2014 will than the two mentioned by the primary judge; Georgette did not discharge the onus she bore: [147], [162].

4. **Civil procedure: leave to join further defendants; summary dismissal**

Bakewell v Anchorage Capital Master Offshore Ltd **[2019] NSWCA 199**

Decision date: 14 August 2019

Bell P, Macfarlan JA, White JA

Mr Bakewell was, at all material times, the Chief Financial Officer of the Arrium Group of companies. Various companies in that group entered into facility agreements with various financiers. The companies drew down on those facilities, and certain debts owed by the lenders were assigned to Anchorage Capital Master Offshore Ltd ('Anchorage'). In April 2016, certain members of the Arrium Group were placed into voluntary administration, at which time approximately $2.8 billion plus interest was owing under the facility agreements. Anchorage commenced proceedings in the Commercial List of the Supreme Court against various officers of the Arrium Group. Anchorage alleged that certain notices issued by borrowers pursuant to the facility agreements contained negligent misstatements or misrepresentations. Anchorage then sought leave to amend its pleadings to add other plaintiffs and to join Mr Bakewell as a defendant. Mr Bakewell opposed that application on the basis that the plaintiffs lacked standing to bring the claims they sought to bring against him. He submitted that the plaintiffs were assignees of bare causes of action, and as such, the assignments were invalid and ineffective. On his submission, the plaintiffs did not come within the second exception contemplated in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 – that is, they did not have a legitimate commercial interest beyond that of the cause of action itself. The primary judge rejected Mr Bakewell's submissions, holding that it was at least open to argue that plaintiffs had a legitimate commercial interest beyond that of the cause of action itself. Leave was granted to join Mr Bakewell as a defendant. He sought leave to appeal from that decision. The core of his draft notice of appeal was the submission that the primary judge erred in finding that it was arguable that the plaintiffs had a legitimate commercial interest beyond that of the cause of action itself.

Held:

- Leave to appeal refused: [77], [78], [79].
- Leave to appeal was refused for three reasons. First, in circumstances where certain claims brought against Mr Bakewell were untouched by the issues concerning assignments, case management considerations and the principles in *Wickstead v Browne* (High Court, 30 April 1993, unrep) favoured the approach taken by the trial judge. Second, within the scope of existing authority, it was at the very least arguable that the assignments were valid – and so summary dismissal, as urged for by Mr Bakewell, was inappropriate. Third, the principle preventing the assignment of bare causes of action – and the public policy underlying it – cannot be regarded as settled beyond argument such that the matter could be determined on a summary interlocutory application: [48]-[51], [54], [58], [71]-[73].

5. **Contracts: valuation; interpretation; meaning of 'have regard to'**

Strike Australia Pty Ltd v Data Base Corporate Pty Ltd **[2019] NSWCA 205**

Decision date: 21 August 2019

Bell P, Basten JA, Ward JA

Strike Australia Pty Ltd ('Strike') sub-leased premises ('the Premises') at King Street Wharf from Data Base Corporate Pty Ltd ('Data Base'). The parties entered into the sub-lease in 2007. It was to run for 10 years, with two five year options to renew. In 2017, Strike gave notice that it was exercising the first option to renew. A rent review was to take place at the beginning of the first further term, and in the absence of agreement, the new rent was to be determined by an independent valuer in accordance with the terms of the sub-lease. The key paragraph of the sub-lease provided that the valuer must 'have regard to … market rents … for comparable premises in the vicinity of the Premises.' In determining the market rent, the valuer had regard to rents in the King Street Wharf complex, retail rents for basements in the Sydney CBD, as well as properties in Macquarie Park and at Bondi Beach. The valuer then made a rental determination. By summons filed in the Equity Division of the Supreme Court, Data Base sought a declaration that the rental determination was not carried out in accordance with the provisions of the sub-lease. The primary judge made that declaration, holding that the valuer did not have regard to relevant market rents as required by the sub-lease, and erroneously had regard to market rents of premises not 'in the vicinity of the Premises'. The primary judge found that, as a result, the determination was not binding on parties. Strike appealed. There were three grounds of appeal. First, whether the primary judge erred in finding that the valuer did not have regard to the mandatory considerations outlined in the sub-lease; second, if the first ground failed, whether the primary judge erred in finding that the valuer had erroneously taken into account rents for premises not 'in the vicinity of the Premises'; and third, if the first two grounds were made out, whether the primary judge erred in finding that the determination of market rent by the valuer was not binding on Strike and Data Base as parties to the sub-lease.

Held:

- By majority, appeal dismissed: [67], [186].
- The majority, Ward JA and Basten JA, held that the primary judge did not err in the manner alleged in any of the grounds of appeal. They each construed the terms of the sub-lease such that the valuer was obliged to take into account market rents for comparable premises within the vicinity of the Premises, but had gone beyond what the parties would have contemplated in taking into account rents in places as distant as Macquarie Park and Bondi Beach: [51], [54]-[55], [66], [140], [145], [159], [165].
- Bell P would have allowed the appeal. As a matter of construction, and consistent with the nature of valuation and what it means to act as an expert (as the valuer was required to act), the sub-lease was not exhaustive as to the matters to which regard could be had: [22]-[29].

Other Australian intermediate appellate decisions of interest

6. Contracts: insurance; construction; surplusage

Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson t/as Holgerssons Complete Home Service **[2019] WASCA 114**

Decision date: 8 August 2019

Buss P, Beech JA, Pritchard JA

Mosman Bay Construction Pty Ltd ('Mosman Bay') was a builder. It took out a policy of construction and legal liability insurance with Tokio Marine & Nichido Fire Insurance Co Ltd ('Tokio') to cover its building activities. The McMurrays engaged Mosman Bay to renovate their home. Mosman Bay engaged a painter, Mr Holgersson (t/as Holgerssons Complete Home Service) ('Holgersson'), as a sub-contractor in those renovations. A fire during the renovations caused substantial damage to the McMurrays' house. The McMurrays claimed against Tokio. Tokio granted an indemnity to Mosman Bay and, exercising its rights of subrogation, Tokio required Mosman Bay to maintain proceedings against Holgersson. A preliminary question arose as to whether Holgersson was an insured under the policy between Tokio and Mosman Bay. The policy comprised a 24 page document ('the Policy Wording') together with a one page Schedule. The Policy Wording indemnified those persons referred to as 'You, Your, or Insured' throughout the Wording. 'You, Your, Insured' was defined to mean 'the Person(s) or legal entity named in the Schedule.' The Schedule stated that the Insured was 'Mosman Bay Construction Pty Ltd and all Principals, Contractors and Sub-Contractors.' (Despite being capitalised, these last three terms are not defined terms.) The primary judge determined that, properly construed, the phrase 'Principals, Contractors and Sub-Contractors' included Holgersson, so Holgersson was within the class of persons 'named' as Insured in the Schedule, and so came within the definition of 'You' in the Policy Wording. The primary judge therefore determined that Holgersson was covered by the policy. Tokio appealed from that determination. On appeal, Tokio's core submission was that the words 'Principals, Contractors and Sub-Contractors' in the Schedule should be treated as having no effect. Two alternative arguments were put in support of this construction. First, those words do no work because they do not amount to 'naming' of a person or persons to be insured; naming, it was said, requires a proper noun. Second, even if the words in the Schedule amount to a 'naming', such a naming is so inconsistent with the terms of the Policy Wording that it should be seen as an obvious mistake and given no effect.

Held:

- Appeal dismissed: [111].
- As to the first of Tokio's arguments, the Court held that, in its ordinary and natural meaning, 'naming' is not confined to identification by a proper noun. As to the second, the Court was not persuaded that the naming of a non-contracting party as an 'Insured' in the Schedule was an obvious mistake: [88]-[90], [102].

7. **Taxation: capital gains; double taxation; foreign income tax offset**

Burton v Commissioner of Taxation **[2019] FCAFC 141**

Decision date: 22 August 2019

Logan J, Steward J, Jackson J

Mr Burton is an Australian tax resident. In the 2011 and 2012 income years, investments that he had made in the US (relating to oil and gas wells) yielded capital gains. He paid tax on those gains under US law. Those gains were also taxable in Australia. So far as his Australian tax liability was concerned, Mr Burton sought to have the tax he had paid in the US counted as a foreign tax credit pursuant to art 22(2) of the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1983] ATS 16 or as a foreign income tax offset ('FITO') under s 770-10 of the *Income Tax Assessment Act 1997* (Cth).

Article 22(2) relevantly provides that:

> '…United States tax paid … in respect of income derived from sources in the United States by a person who, under Australian law relating to Australian tax, is a resident of Australia shall be allowed as a credit against Australian tax payable in respect of the income. The credit shall not exceed the amount of Australian tax payable on the income…'

Section 770-10(1) relevantly provides that:

> 'You are entitled to a tax offset for an income year for foreign income tax. An amount of foreign income tax counts towards the tax offset for the year if you paid it in respect of an amount that is all or part of an amount included in your assessable income for the year.'

Under US law, Mr Burton's gains were taxed at less than half the ordinary income tax rate. Australian law applied a 50% discount to the capital gain as part of the formula used for calculating the amount of that gain to be included in assessable income. The Commissioner did not allow in full either the credit or the offset that Mr Burton claimed. The Commissioner allowed an offset of half of the value of the US tax Mr Burton had paid. On the Commissioner's understanding of art 22(2) and s 770-10(1), an offset (or credit) of half the US tax paid fulfilled the purpose of avoiding double taxation, because under Australian law, only half of the capital gain was included in Mr Burton's assessable income. Mr Burton objected to this approach, claiming that the offset (or credit) should have been for the full amount of US tax he had paid. The Commissioner maintained his position. Mr Burton appealed to the Federal Court, where the primary judge dismissed his appeal, upholding the Commissioner's construction of the provisions. He appealed again to the Full Court.

Held:

- By majority, appeal dismissed: [161], [174]. Logan J dissented: [79], [95].

- The Commissioner's construction of art 22(2) and s 770-10(1) was upheld: there was no inconsistency between the two provisions; and there was no 'double taxation' involved in the Commissioner's approach: [123], [145], [169], [173].

8. **Statutory interpretation: meaning of 'conviction'; summary process**

***Lasker v Holeszko* [2019] QCA 163**

Decision date: 23 August 2019

Gotterson JA, Philippides JA, Bradley J

In April 2016, Mr Holeszko swore a complaint before a justice of the peace, alleging that Mr Lasker had committed four offences under the *Sustainable Planning Act 2009* (Qld). In due course, the Magistrates Court issued a summons, and the summons and complaint were served on Mr Lasker. Over six days between June and October 2017, a Magistrate heard evidence and submissions in respect of the four charges. On 16 August 2018, the Magistrate published 'the decision of the court'. The 'decision' contained a heading that read 'Court Orders'. Three numbered paragraphs were under that heading. The first ordered an amendment of the particulars of each charge. The second and third relevantly read:

> '2. The defendant Benjamin Jon Lasker be found "GUILTY" of each of the four offences…
>
> 3. The court will hear further from the prosecution and the defence in relation to the question of penalty and costs to be imposed on the defendant for the offences which he has been found "GUILTY".'

Immediately after the written reasons were published, the matter was adjourned, by consent, to 16 October 2018 when penalty and costs would be considered. On 14 September 2018, Mr Lasker filed a notice of appeal pursuant to s 222 of the *Justices Act 1886* (Qld). That section relevantly provides that: 'If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge.' The hearing on 16 October was vacated pending the appeal. On 25 October 2018, an application to have Mr Lasker's appeal struck out was filed, alleging that the appeal was incompetent on the basis that the word 'order' in s 222 refers only to orders that finally dispose of a matter; the question of penalty being outstanding, it was said that the orders of 16 August 2018 were not 'orders' within the meaning of s 222. On 7 November 2018, a judge of the District Court struck out Mr Lasker's appeal. Mr Lasker sought leave to appeal from that decision.

Held:

- Leave to appeal refused: [1], [2], [51].
- The District Court judge did not err in striking out Mr Lasker's appeal under s 222: [42].
- In summary processes, a conviction (understood as a finding of guilt) does not generally finally determine the complaint or information – though what 'conviction' means depends on the statutory context. In any case, here, the right to appeal was premised on an 'order' being made that finally determined the charges. Despite the heading 'Court Orders', the 'orders' of 16 August 2018 were not orders within the meaning of s 222, because the question of penalty had not been determined: [22]-[25], [41].