Court of Appeal
Supreme Court
Sydney

Decisions of interest

8 July 2019 – 19 July 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. **Building and construction: payment schedules; requirement to provide reasons**

   Style Timber Floor Pty Ltd v Krivosudsky **[2019] NSWCA 171**

   Decision date: 16 July 2019

   Bell P, Leeming JA, Simpson AJA

   Under the *Building and Construction Industry Security of Payment Act 1999* (NSW), a party who claims to be entitled to a progress payment can serve a 'payment claim' on the person who may be liable under the construction contract to make the payment. A person on whom a payment claim is served then has 10 days to serve a 'payment schedule', indicating its position with respect to the claim. Failure to serve a valid schedule in time results in a respondent becoming liable to pay the full amount claimed. Section 14 of the Act provides that a payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment that the respondent proposes to make (the 'scheduled amount'). Section 14(3) provides that: '(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.' Style Timber Floor Pty Ltd (STF) and Mr Krivosudsky were parties to a building sub-contract. A dispute arose between the parties as to the quality of Mr Krivosudsky's work, and STF refused to pay certain invoices. On 28 November 2017, Mr Krivosudsky served a payment claim on STF for $106,166.50. On 30 November 2017, STF replied by email, inviting Mr Krivosudsky to attend STF's office, where 'I will show you the working agreement …, many emails, photos, videos, back charges from builders and other trades, complains from my clients. You will understand why I can't pay you. The damages you done is more than what you claimed. Then, it's up to you want you want to do next.' [sic] Mr Krivosudsky commenced proceedings in the District Court, seeking summary judgment for the claimed amount. STF tendered a body of email correspondence between the parties, claiming that when read with that correspondence, its email of 30 November 2017 constituted a valid payment schedule. A Judicial Registrar gave summary judgment of Mr Krivosudsky, holding that STF's email of 30 November was not a valid payment schedule as it did not indicate STF's reasons for refusing to pay. STF sought leave to appeal to the Court of Appeal.

   Held:

   - Leave to appeal granted; appeal dismissed with costs: [1], [81], [82].
   - While payment schedules need not be as detailed as, say, a pleading, they must sufficiently describe the dispute to apprise the recipient of the case it would have to meet in an adjudication. STF's email did not meet that standard: [47], [70]-[76].
   - Section 14(3) can be satisfied by serving a document that incorporates other documents by reference, provided that such documents are identified with sufficient particularity. Here, STF's reference to 'many emails, …' was insufficiently specific: [3]-[5], [76].

2. Workers compensation: weekly compensation; worker with highest needs

***Hee v State Transit Authority of New South Wales* [2019] NSWCA 175**

Decision date: 17 July 2019

Meagher JA, White JA, Simpson AJA

Mr Hee was a bus driver. In October 2013, he injured his cervical spine when he tripped and fell while helping a passenger board the bus he was driving. He underwent surgery, and did not work from 24 January to 31 May 2014. He returned to his pre-injury duties on 1 June 2014. Mr Hee made a claim for compensation under the *Workers Compensation Act 1987* (NSW). The State Transit Authority (STA) agreed to pay compensation pursuant to ss 36 and 37 of the Act for the period from 21 January to 31 May 2014. Mr Hee made a claim for weekly compensation under s 38A for the period from 1 June 2014. Section 38A provides that:

> (1) If the determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision results in an amount that is less than $788.32, the amount is to be treated as $788.32.
> (2) If the amount specified in subsection (1) is varied by operation of Division 6A, a weekly payment of compensation payable to a worker with highest needs before the date on which the variation takes effect is, for any period of incapacity occurring on and after that date, to be determined by reference to that amount as so varied.

It was not disputed that Mr Hee was a 'worker with highest needs'. STA did dispute, however, that Mr Hee was entitled to compensation under s 38A. Mr Hee referred his claim to the Workers Compensation Commission for determination. There, he contended that any entitlement under s 38A was independent of any entitlement to a determination of compensation under s 37. The arbitrator rejected that construction of s 38A, holding that, on the assumption that Mr Hee had 'current work capacity' within the meaning of the Act, he would receive no compensation under s 37, and was therefore not entitled to any under s 38A. Mr Hee appealed to the President of the Commission. The President rejected Mr Hee's construction of s 38A, and also concluded that Mr Hee was not entitled to a determination of compensation under s 37, as he was not a worker with 'current work capacity'. This conclusion involved holding that the effect of the arbitrator's factual findings was that Mr Hee had returned to his pre-injury employment. Mr Hee appealed again, raising two issues: (i) whether the President erred in law in finding that Mr Hee was able to return to his pre-injury employment and was a worker with 'current work capacity' (this issue bore on whether Mr Hee was entitled to a determination of compensation under s 37), and whether such an error was material; and (ii) whether the President erred in the construction and application of s 38A.

Held:

- Appeal allowed (Meagher JA dissenting on (i) and in the orders): [116], [173].
- As to issue (i): the President did so err, and the error was material: [80]-[87], [161]-[163].
- As to issue (ii): the President did so err: s 38A only applies when there is an entitlement to an 'amount' of weekly compensation; that 'amount' can be zero. Though this literal interpretation can produce anomalous results, the Court cannot rewrite the statute: [31], [33]-[34], [113], [170]-[172].

3. Torts: assessment of damages; judicial notice; procedural fairness

Wollongong City Council v Papadopoulos **[2019] NSWCA 178**

Decision date: 19 July 2019

Basten JA, Leeming JA, McCallum JA

Sofia Papadopoulos was the licensee of the Stanwell Park Reserve Kiosk. The Kiosk stood on land owned by a reserve trust and was managed by Wollongong City Council. Ms Papadopoulos both ran her business out of the Kiosk and lived there. In October 2015, the Council disconnected the range hood, oven, and stove equipment in the Kiosk, on the basis that the electrical wiring was unsafe. Ms Papadopoulos continued to operate the Kiosk, using mobile cooking appliances, and ceased to pay rent. Eventually, she was evicted.

Ms Papadopoulos commenced proceedings in the District Court, seeking damages of some $380,000. After the hearing, the primary judge, by his Associate, contacted counsel for the Council, seeking to find a time for a further hearing at which 'to address the Court on the use of public records for the purposes of computing lost earnings.' Counsel did not take up that invitation. The primary judge gave judgment in her favour in the amount of $147,835.32. In calculating that figure, his Honour referred to benchmarks published by the Australian Taxation Office as a guide to the average costs of operating small businesses.

The Council appealed. There were two issues on appeal, though there was no challenge to the primary judge's findings on liability. First, the Council submitted that it had been denied procedural fairness, claiming that it had not been provided with an opportunity to make submissions on the appropriateness of referring to the ATO benchmarks for the purposes of assessing damages. Second, the Council submitted that the primary judge had erred in assessing the damages to which Ms Papadopoulos was entitled by relying on the benchmarks to calculate her loss. The Council submitted that no judicial notice could be taken of the benchmarks.

Held:

- Appeal allowed in part: the primary judge's award of damages to Ms Papadopoulos was set aside, and in its place, an unquantified judgment in Ms Papadopoulos' favour was entered; the matter was remitted to the District Court on the question of damages: [1], [86], [87].

- On the first issue: there was no denial of procedural fairness. The Council was invited to be heard and declined that invitation; it could not later complain that it had had no opportunity to be heard: [59].

- Judicial notice could be taken of the benchmarks, in accordance with *Evidence Act 1995* (NSW) s 144. But it was an error for the primary judge to use the benchmarks in calculating the damages to which Ms Papadopoulos was entitled: [70]-[71].

Other Australian intermediate appellate decisions of interest

4. **Contempt of court: *mens rea* for party not bound by orders allegedly breached**

***Jorgensen v Fair Work Ombudsman* [2019] FCAFC 113**

Decision date: 8 July 2019

Greenwood J, Reeves J, Wigney J

Mr Jorgensen operated a business that ran tours in Far North Queensland. The administrative and financial operations of that business were irregular in various respects. The Fair Work Ombudsman (FWO) brought proceedings in the Federal Circuit Court against 828 Pty Limited (one of Mr Jorgensen's companies) and Mr Jorgensen, alleging that they had underpaid certain employees. The FWO succeeded in those proceedings, and pecuniary penalties were imposed on 828 Pty Limited and Mr Jorgensen. They were also ordered to comply with the notices. The FWO then sought and obtained ex parte freezing orders, restraining 828 Pty Limited from dealing with or disposing of its assets other than in certain ways. The orders permitted 828 Pty Limited to deal with or dispose of assets 'in the ordinary and proper course of [its] business'. The FWO then commenced proceedings in the Circuit Court against Mr Jorgensen, alleging that he was in contempt of court. The FWO alleged that Mr Jorgensen caused 828 Pty Limited to breach the freezing orders by causing funds to be transferred from two specified bank accounts on nine occasions. At the hearing, the FWO also appeared to suggest that Mr Jorgensen knowingly impeded the administration of justice. The trial judge convicted Mr Jorgensen of 9 counts of contempt of court, and sentenced him to imprisonment for 12 months. Mr Jorgensen appealed from his conviction and sentence. On appeal, the issues were whether: (i) the trial judge's excessive intervention in the hearing had denied him a procedurally fair hearing; (ii) the trial judge had misconstrued the scope of the 'ordinary and proper course of … business' exception; (iii) the trial judge had used an exhibit in a procedurally unfair way; and (iv) the trial judge had misdirected himself as to the mental element of the contempt charges.

Held:

- Appeal allowed in part: conviction quashed; matter remitted for retrial: [229].
- As to (i): the error asserted was established: [105], [151]-[152].
- As to (ii): the trial judge erroneously made reference to objective standards of business administration; the relevant question, however, was whether the payments made were in the ordinary and proper course of *this* business: [180].
- As to (iii): the trial judge used the exhibit to make findings in a procedurally unfair manner; those findings were also unsupported by evidence: [197], [208].
- As to (iv): Mr Jorgensen was not bound by the freezing order. As such, to be in contempt of it, it had to be proved that he knew of the order, knew that the conduct involved a breach of the order, and did not have an honest but mistaken belief as to the meaning or operation of the order. The trial judge misdirected himself as to the mental element of the charges, making no findings concerning Mr Jorgensen's knowledge of belief: [222]-[226].

5. **Constitutional law: federal judicial power; courts and tribunals**

Attorney-General for the State of South Australia v Raschke & Anor **[2019] SASCFC 83**

Decision date: 11 July 2019

Kourakis CJ, Kelly J, Hinton J

Ms Firinauskas owned residential premises. Mr Raschke rented those premises. Ms Firinauskas sought vacant possession on the basis that Mr Raschke had failed to pay outstanding rent. She served him with a notice in the appropriate form. On 14 May 2018, pursuant to its jurisdiction to hear and determine disputes under the *Residential Tenancies Act 1995* (SA), the South Australian Civil and Administrative Tribunal held that the notice Ms Firinauskas had served validly terminated the lease, and ordered Mr Raschke to vacate the premises in due course.

Mr Raschke sought internal review of that decision. An important fact was disclosed at a preliminary hearing for that review: Ms Firinauskas was a Victorian resident; Mr Raschke was a South Australian resident. Given this interstate dimension, the question arose as to whether the Tribunal could determine the dispute. That question was referred to the President of the Tribunal, who held that undertaking an internal review of the decision of 14 May 2018 would involve an exercise of federal judicial power; the Tribunal cannot exercise such power, as it is not a court; so the order of 14 May 2018 was set aside, so far as was necessary.

The Attorney-General for South Australia appealed against the President's decision. The Attorney accepted that the Tribunal is not a court. She challenged the President's decision that the Tribunal would be exercising judicial power if it conducted the review sought by Mr Rashcke. The Attorney contended that the power exercised by the Tribunal was not judicial on two grounds. First, the discretions which the *Residential Tenancies Act* conferred on the Tribunal were said to be too wide to be exercises of judicial power. Second, the Tribunal's inability to enforce its own decisions (except through its bailiff) was said to indicate that the powers it exercised under the Act were administrative.

Held:

- Appeal dismissed: [102]-[104].
- The Court held that in determining the dispute between Ms Firinauskas and Mr Raschke, the Tribunal was exercising judicial power because, among other reasons: the subject matter of the controversy (recovery of possession of leased premises) has historically been a matter for the common law courts to determine; determining the dispute involves applying existing law to facts as found; the dispute only affects the parties to it; and the enforcement of the Tribunal's order (by the bailiff) is mandated by statute: [96], [101].

Asia Pacific decisions of interest

6. **Constitutional law: constitutional amendment; parliamentary system**

Court of Appeal of the Republic of Vanuatu

Saemon v Tallis **[2019] VUCA 44**

Decision date: 19 July 2019

Saksak J, Mansfield J, Hansen J, Fatiaki J, Andrée Wiltens J

The Bill for Constitution (Seventh) (Amendment) No 1 of 2019 was passed by the Parliament of Vanuatu on 29 March 2019. The Bill purported to amend Chapter 7 of the Constitution (which concerns the Executive) by inserting Article 46A, a provision that would govern the appointment and removal of parliamentary secretaries.

After the Parliament had passed the Bill, the Clerk of the Parliament presented it to the President, His Excellency Pastor Obed Moses Tallis, for assent. The President had concerns that it could be unconstitutional for him to give assent to the Bill by reason of art 86 of the Constitution of Vanuatu. Article 86 relevantly provides that: 'A bill for an amendment of a provision of the Constitution regarding … the parliamentary system, passed by Parliament under Article 85, shall not come into effect unless it has been supported in a national referendum.' The President filed a Constitutional Referral, seeking the opinion of the Supreme Court on the constitutional validity of the bill.

Before the Chief Justice, there was no dispute that the requirements of art 85 had been met. The question was whether the Bill was one regarding 'the parliamentary system'. The Chief Justice held that it was, and so it would be unconstitutional for the President to give his assent to the Bill in circumstances where no referendum had been held.

The Speaker of Parliament, Esmon Saemon, appealed from the Chief Justice's decision. The Speaker's submission on appeal was that the 'parliamentary system' included both the legislature and the executive. Further, executive power is vested in the Prime Minister and the Council of Ministers. The Bill, it was said, could not and does not alter that state of affairs – and so for that reason, did not affect the 'parliamentary system'.

Held:

- Appeal dismissed: [12], [53].
- The Speaker's submission was rejected. The Bill was directly concerned with the 'parliamentary system', as it sought to provide the Prime Minister with powers to more widely spread the 'responsibilities for the conduct of government' to one or more Parliamentary Secretaries: [40]-[41].
- As such, in the absence of a national referendum supporting it, the Bill should not be assented to by the President: [53].

7. Constitutional law: appointment of parliamentary secretaries

Court of Appeal of the Republic of Vanuatu

Kalsakau v Republic of Vanuatu **[2019] VUCA 45**

Decision date: 19 July 2019

Mansfield J, Saksak J, Hansen J, Fatiaki J, Andrée Wiltens J

In 2013, the then Prime Minister of Vanuatu appointed a Member of Parliament to the office of Parliamentary Secretary. The practice of Prime Ministers appointing MPs to be Parliamentary Secretaries continued over the next few years. All the Secretaries so appointed signed contracts of employment and, pursuant to the *Official Salaries Act*, were paid benefits and salaries.

Certain Members of Parliament challenged the constitutional validity of these appointments and the attendant contracts. The applicants made a number of arguments before the primary judge, but focussed on claims that the appointments contravened the fundamental rights enumerated in art 5 of the Constitution of Vanuatu, and contravened art 66(1)(d), which relevantly provides that leaders (including the PM and MPs) have a duty to conduct themselves in such a way so as not to 'endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.' The primary judge dismissed the application, finding that the appointments did not, on their terms, contravene these articles.

The applicants appealed. On appeal, their arguments were focussed on the terms of Ch 7 of the Constitution ('The Executive'), which, in broad outline, vests the executive power of the Republic in the Prime Minister and a limited number of Ministers.

Held:

- Appeal allowed: [7], [37]
- The appointments were unconstitutional by reason of their inconsistency with the provisions of Ch 7: those provisions do not allow executive power to be vested in Parliamentary Secretaries. Further, in light of the decision in *Saemon v Tallis* [2019] VUCA 45 (above), the Prime Minister could not do by executive action what the Parliament could not do without a referendum: [25]-[30].
- Further, the Court noted the inconsistency between the contractual responsibilities of Parliamentary Secretaries and the performance of the duties that Members of Parliament owe to their electorates. It was not necessary to decide the point, but the Court noted the appellants' submission that the terms of the contracts appointing the Parliamentary Secretaries could contravene art 66 of the Constitution, as conflicts of interest could arise (or could be seen to arise) if a Member of Parliament also holds the office of Parliamentary Secretary: [33]-[35].

Other international decisions of interest

8. **Judicial review: 'pith and substance' of by-laws; environmental law**

Court of Appeal for British Columbia

Canadian Plastic Bag Association v Corporation of the City of Victoria **2019 BCCA 254**

Decision date: 11 July 2019

Newbury J, Garson J, Fisher J

An environmental organisation, the Surfrider Foundation, lobbied the Council of the City of Victoria to pass a by-law that prohibited merchants from providing or selling plastic bags to customers. After a process of consultation and development, such a by-law was adopted by the Council in January 2018.

The Canadian Plastic Bag Association – a non-profit organisation representing the interests of plastic bag manufacturers and distributors – sought judicial review of the by-law in the Supreme Court of British Columbia. The Association argued that the by-law was ultra vires on the basis that the terms of the *Community Charter* S.B.C. 2003, c 26 had not been complied with. Section 9 of the *Charter* provides that a by-law 'in relation to' the natural environment cannot be adopted by the Council without the approval of the provincial Minister of Environment. The City argued that the by-law had been adopted pursuant to its powers under s 8 of the *Charter* to regulate 'business' – and that so characterised, the by-law was not a by-law 'in relation to' the environment, and so did not require Ministerial approval.

The Chambers Judge dismissed the application, holding that the by-law was not ultra vires. He reasoned that the by-law regulated transactions and associated packaging, and that the by-law therefore concerned business. The detrimental impacts that plastic bags can have on the environment are a result of the customer's subsequent actions, and were not the focus of the by-law.

The Canadian Plastic Bag Association appealed, arguing that the by-law was, to use language from Canadian constitution law, 'in pith and substance' concerned with the natural environment.

Held:

- Appeal allowed: [1].
- When consideration is had to the purpose, effects, and text of the by-law, it was, in pith and substance, a by-law 'in relation to' environmental protection, and was therefore ultra vires, as the Minister had not approved it: [53]-[54], [58]-[59].