Decisions of interest

15 December 2017 – 25 January 2018

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal decisions of interest

1. **Real property; procedure; agency**

The Owners Strata Plan No 57164 v Yau **[2017] NSWCA 341**

Decision date: 21 December 2017

Beazley P, Leeming JA, Emmett AJA

A dispute arose between the Owners Corporation of a large strata scheme (**the Owners**) and the registered proprietors of one of the commercial lots in the scheme, when the registered proprietors sought access to a grease arrestor and exhaust system located on common property for the purposes of their restaurant. The Owners commenced proceedings, and at a meeting of the Owners Executive Committee (**EC**) on 13 August 2013, their counsel was instructed to settle the matter. The meeting did not satisfy the 72 hour notice requirement under the *Strata Schemes Management Act 1996* (NSW). The next day, a settlement agreement was entered into, and consent orders were made.

On 17 December 2014, the Owners commenced proceedings to set aside the consent orders. At this stage, most of the orders had been complied with. These proceedings were dismissed with costs on 2 August 2016.

The central issues on appeal were whether the legal representatives for the Owners Corporation had authority to settle the proceedings, and whether, as a matter of law, the consent orders could be set aside.

Held:

- The Court dismissed the appeal.
- *Procedure:* Non-compliance with the notice requirements under the *Strata Schemes Management Act 1996* (NSW) did not result in the invalidity of resolutions passed at such a meeting: [116]; [195]; [226].
- *Agency:* Given the nature of the decision made by the EC, Senior Counsel for the Owners had actual authority to enter the settlement agreement. In the alternative, Senior Counsel had ostensible authority to enter into the agreement, as a result of the principle that counsel retained to conduct litigation ordinarily have ostensible authority to bind their client to a compromise of those proceedings: [172]; [177]; [196]; [226].
- *Consent orders:* The Court, in its inherent jurisdiction, has discretion in whether to set aside consent orders that have been entered into, if the underlying agreement upon which they are based is void or voidable. In the circumstances of this case, the consent orders ought not to be set aside: [81]-[84]; [195]; [226].

2. **Statutory interpretation; contract**

Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd **[2017] NSWCA 339**

Decision date: 21 December 2017

Beazley P, Payne JA, Barrett AJA

A dispute arose between Ryde Developments Pty Ltd, the builders of a large mixed residential and commercial development, and the Property Investors Alliance Pty Ltd (**the Property Investors**), the corporate agent who sold the residential units in the development to third parties. Together they were parties to two exclusive agency agreements (**the Agreements**).

After successful sale of the residential units, Ryde Developments commenced proceedings against the corporate agent, seeking orders declaring that they were not required to pay commission on the sale of the units due to breaches of the *Property, Stock and Business Agents Act 2002* (NSW) (**the Act**) and the *Property, Stock and Business Agents Regulation 2003* (**the Regulations**). Section 55 of the Act provided that a licensee was not entitled to a commission unless there was an agency agreement compliant with any applicable regulations. Section 55A provided relief from disentitlement in circumstances where there was a 'minor failure' to comply with the Act. The primary judge dismissed the claim.

Held:

- The Court unanimously allowed the appeal.
- The failure of the Property Investors to provide a sales inspection report as part of the Second Agreement constituted a breach of the regulations. The requirement under the Regulations that the agency agreement contain a copy of "any" report prepared under the Regulations did not contemplate that an agency may not prepare such a report: [77]-[84].
- The failure to provide a sales inspection report was a "minor failure" within the meaning of s 55A, meaning the Property Investors were entitled to relief. The applicant suffered no loss in relation to the Second Agreement by reason of the failure. It would be unjust to deny the commission when the applicant, a sophisticated counterparty, had received what it had bargained for and expressly waived reliance on the minor failures to comply with the Regulations upon which it now relied: [97]; [100]; [102].
- The primary judge was correct in applying the reasoning in *Overmyer Industrial Brokers Pty Ltd v Campbell's Cash & Carry Pty Ltd* [2003] NSWCA 305, to find that estoppel does not lie in the face of Section 55 of the Act: [117]; [120].

Other Australian intermediate appellate decisions of interest

3. **Property; nature of partner's interest in partnership property**

Commissioner of State Revenue v Danvest Pty Ltd **[2017] VSCA 382**

Decision date: 20 December 2017

Tate JA, Santamaria JA, McLeish JA

The Faircourse Unit Partnership owned land which it leased for the operation of an aged care business. Danvest Pty Ltd and Bullhusq Pty Ltd (**the respondents**) purchased partnership units in February 2014, upon which they each held 50% of the partnership units. They wrote to the Commissioner for State Revenue (**the Commissioner**) seeking confirmation that they would not be required to pay duty on the purchases.

Under the *Duties Act 2000* (Vic) (**the Act**), duty was payable on transfers of dutiable property and 'any other transaction that results in a change in beneficial ownership of dutiable property'. Dutiable property was defined as 'an estate in fee simple'. The Commissioner issued an assessment to pay duty on the basis that a partner's interest included a beneficial interest in all the assets of the partnership. This assessment was overturned by the trial judge.

The issue on appeal was whether sale and purchase of the interests of the respondents constituted a transfer of an interest in an estate in fee simple.

Held:

- The Court unanimously dismissed the appeal.
- Close analysis of the authorities relied upon by the Commissioner revealed the 'true nature' of a partner's interest in partnership property: [5]. The authorities revealed the following propositions: [2]; [83]; [164]-[165].
    - A partner's interest in the partnership is an equitable chose in action, by which a partner has a 'beneficial interest' in each and every asset of the partnership. There is no title or entitlement to specific property owned by the partnership.
    - The interest consists of an presently existing equitable right to a proportion of the surplus after the realisation of the assets and payment of the debts and liabilities of the partnership;
    - It does not consist of any title to partnership assets prior to dissolution.
- Accordingly, the trial judge was correct to conclude that the respondents did not acquire interests in an estate in fee simple, and as such, the partnership interests were not dutiable property under the Act.

4. **Private international law; statutory interpretation; consumer law**

Valve Corporation v Australian Competition and Consumer Law Commission **[2017] FCAFC 224**

Decision date: 22 December 2017

Dowsett, McKerracher and Moshinsky JJ

Valve Corporation (**Valve**), a company based in the United States, operated an online game distribution network known as Steam, which included more than two million Australian subscriber accounts. Valve had no business premises, staff, or real estate in Australia. Payments for subscriptions were made in US dollars and processed in the State of Washington. However, Valve owned servers in Australia with a retail value of US $1.2 million. These were stored in spaces leased from Australian company Equinix under a lease agreement.

At trial, the Australian Competition and Consumer Commission (**ACCC**) alleged a number of breaches of the Australian Consumer Law (**ACL**), based on alleged representations made in the Steam Subscriber Agreement, Refund Policy, and by customer support operatives. The primary judge found that some of the breaches had been established, and imposed penalties. Valve appealed the judgement, and the ACCC cross-appealed with respect to certain representations that were not found in breach. Neither party contested the finding that the proper law of the contract was that of the State of Washington.

Held:

- The Court dismissed all grounds of appeal. Section 67 of the ACL did not confine the operation of the consumer guarantees and their associated remedies to cases where the objective proper law of the contract was that of a part of Australia. Neither the text of the provision, nor their consumer protection purpose, supported the confined reading argued by Valve: [111].

- The trial judge had not erred in finding that Valve had made the relevant representations (and thus engaged in conduct) in Australia. If a business is based overseas and has a relationship with customers in Australia, it is likely that the representations will take place where the customer accesses and reads the representations on their computer. Sections 18 and 29 of the ACL do not require loss or damage to be established; therefore determination of the existence or location of loss or damage is not necessary when determining the place where representations were made: [134].

- Valve was carrying on business within Australian within the meaning of the *Competition and Consumer Act 2010* (Cth). Valve engaged in transactions with a large number of Australian consumers, and owned servers in Australia of significant value, upon which Steam content was “deposited”: [151].

- There were no errors in the trial judge’s conclusions as to which alleged representations were in contravention, or the penalties imposed: [214]; [224].

Asia Pacific decisions of interest

5. Constitutional law: whether notice of claim filed in time

Supreme Court of Papua New Guinea

Boochani v Independent State of Papua New Guinea **[2017] PGSC 44**

Decision date: 15 December 2017

Kirriwom, Hartshorn and Makail JJ

The applicants were asylum seekers who had been detained on Manus Island Processing Centre (**MIPC**) in Papua New Guinea pending the processing of their asylum claims. This was pursuant to an agreement between the Governments of Papua New Guinea and Australia.

On 26 April 2016, the Papua New Guinea Supreme Court held that the applicants' detention was unconstitutional and ordered their release: *Belden Namah v Rimbink Pato & Ors* (2016) SC1497 (**the Decision**). This was communicated to the applicants by 27 April 2016.

On 4 November 2016, the applicants gave notice of their intention to make a claim against the state to seek enforcement of their Constitutional rights. Section 5 of the *Claims By and Against the State Act,* 1996 (**the Act**) states that no action lies against the state unless notice is given "within a period of six months after the occurrence out of which the claim arose", or if sufficient cause is shown to extend the time. The State of Papua New Guinea filed an application to dismiss the claim. The issue was whether the cause of action arose from the date of the Supreme Court decision, or whether it arose on 12 May 2016 when the gates of MIPC were opened and the applicants were permitted to leave.

Held:

- The Court dismissed the application.
- The applicants were released upon 12 May 2016, when they were free to come and go from MIPC of their own free will. Although there had been relaxations on the use of contraband and on movement between centres following the date of the Decision, this merely supported the submission that detention did not cease upon notification of the judgment: [36]; [38].
- As the applicants were not released from detention upon notification, their continuing detention was unlawful and they were entitled to seek enforcement of their constitutional rights from the date of notification until their release. The six month period ran from the date of release: [33]; [39].
- The entitlement to bring a claim for pre-judgment breaches also ran from 12 May 2016, as these breaches continued until the applicants were released from detention: [40].

6. **Constitutional right to a fair hearing; professional misconduct**

Cook Islands Court of Appeal

George v Cook Islands Law Society **[2017] CKCA 6**

Decision date: 15 December 2017

Fisher JA, White JA and Grice JA

In September 2016, a complaint was initiated against Mr George, a barrister and solicitor practicing in the Cook Islands. This concerned his failure to make appropriate arrangements for the representation of two defendants in the September 2016 sessions of the Cook Islands High Court, while he was away from the jurisdiction.

The complaint was initiated by Weston CJ, Chief Justice of the Cook Islands, who was to preside over the September sessions. Mr George responded to the complaint by letter on 28 October 2016. On 31 October 2016, Weston CJ retired as Chief Justice and was succeeded by Williams CJ. On 9 January 2017, Williams CJ found Mr George to be guilty of professional misconduct, pursuant to the *Law Practitioners' Act 1993-94* (**the Act**). This decision was made "on the papers" rather than by way of an oral hearing. Final penalty orders were made on 22 May 2017.

On appeal, Mr George argued that:

- There had been a breach of Mr George's right to a fair hearing under Article 65(1)(d) of the Constitution of the Cook Islands; and
- The Act did not permit an order that Mr George publish at his own expense a statement relating to the findings in the first decision and the penalties.

Held:

- It is well-established under common law and constitutional principles that an oral hearing is not a mandatory requirement for procedural or substantive fairness: whether it is required will depend on the circumstances. An oral hearing was not necessary because there were no factual or credibility issues requiring resolution at the liability stage: [31]-[35].
- A fair-mined and informed observer would not have assumed a lack of impartiality on the part of Williams CJ. The Chief Justice who initiated the complaint did not investigate or determine it. The Court rejected the submission that Williams CJ was indistinguishable from his predecessor for the purposes of the fair hearing principle: [25]-[29].
- Under the Act, it was not open to the Chief Justice to require Mr George to publish the decision. However, the Court had the power to direct that the Registrar publish the statement, and that Mr George reimburse the costs of publication: [51]-[52].

Other international decisions of interest

7. Private international law: jurisdiction

United Kingdom Supreme Court

Brownlie v Four Seasons Holdings Inc **[2017] UKSC 80**

Decision date: 19 December 2017

Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hughes

In 2010, Lady Brownlie and her husband, international law scholar Sir Ian Brownlie SC, visited Egypt and stayed in the Four Seasons hotel in Cairo. Before leaving England, Lady Brownlie rang the hotel and booked an excursion they had advertised. This was in a hired chauffeur-driven car organised by the concierge. During the excursion the car crashed, killing Sir Ian and his daughter, and seriously injuring Lady Brownlie and other family members.

Lady Brownlie commenced proceedings in England seeking damages in contact and tort against Four Seasons Holdings Inc (**the Company**), the holding company of the Four Seasons Hotel Group. The Company was incorporated in British Colombia. An application was made for service of the originating order out of jurisdiction pursuant to Part 6 of the *Civil Procedure Rules* (UK).

The issues on appeal were: (i) whether the claim had a reasonable prospect of success, (ii) whether the excursion contract was made within the jurisdiction, and (iii) with respect to the tort claims, whether the damage was sustained "within the jurisdiction".

Held:

- The claim did not have a reasonable prospect of success. There was no realistic prospect of establishing that Lady Brownlie had contracted with the Company, or that the Company should be vicariously liable for the negligence of the driver. On the evidence, the Company was a non-trading company that neither owned nor operated the hotel in Cairo, and had no corporate relationship with the company which owned the hotel: [14]-[15].

- Because the Company was not the relevant party to the excursion contract, the court had no jurisdiction to try any of the claims against it. It was therefore unnecessary to make an order on the cross-appeal with respect to jurisdiction to entertain the claims in tort for personal injury: [16].

- In obiter, the majority observed that "damage" should not be interpreted by reference to direct damage which completes the cause of action in tort, but includes all detriment, physical, social or financial, which results from the tortious conduct. This was consistent with the decisions of first instance judges and the decision of the NSW Court of Appeal in *Flaherty v Girgis* (1985) 4 NSWLR 248 on a similar jurisdictional rule: [52]; [64]; [68].

8. **Administrative law: boards and tribunals, interest standing**

Supreme Court of Canada

***Delta Air Lines Inc v Lukács,* 2018 SCC 2**

Decision date: 19 January 2018

McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ

Dr Lukács filed a complaint with the Canadian Transport Agency (**the Agency**), alleging that Delta Air Lines' practices in relation to the transportation of obese passengers was discriminatory and contrary to the *Canadian Transport Act* S.C. 1996 (**the Act**). The Agency dismissed Dr Lukács' claim on the basis that he lacked standing. Lukács did not have private interest standing as he was not a person to whom the policy applied. Public interest standing was denied because the complaint was "not related to the constitutionality of the legislation or the non-constitutionality of administrative action".

Dr Lukács commenced a statutory appeal under the Act. The Canadian Federal Court of Appeal held that a strict application of the law of standing as applied in Canadian courts was inconsistent with the Agency's enabling legislation. The court directed that the matter be returned to the agency to determine, otherwise than on standing, if it would investigate the complaint.

Delta Air Lines appealed to the Supreme Court of Canada, with the Agency as an intervening party. The key issue was whether the Agency had reasonably exercised its discretion to dismiss the complaint.

Held:

- The majority allowed the appeal in part, remitting the decision to the Agency to reconsider the matter in whole, including on the basis of standing: [32].
- The Agency had not reasonably exercised its discretion for two reasons. Any valid complaint against an air carrier would challenge the terms and conditions of a private company, and therefore, by nature, could not be a challenge to the constitutionality of legislation or the illegality of administrative action. Parliament could not have intended the imposition of a test that could never be met, where it conferred a broad discretion on the Agency to decide whether to hear complaints: [17].
- The application of the test in this manner was contrary to how Parliament intended the legislative scheme to operate, as it would preclude any public interest or representative group from ever having standing. The Act requires the Agency to promote accessible transportation, and empowers it to correct discriminatory terms before passengers actually experience harm: [19]-[20].