Court of Appeal
Supreme Court
Sydney

Decisions of interest

29 January – 9 February 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. Environment and planning

***Liverpool City Council v Moorebank Recyclers Pty Ltd* [2018] NSWCA 7**

Decision date: 7 February 2018

Basten JA, Leeming JA, Emmett AJA

Moorebank Recyclers Pty Ltd (**Moorebank**) applied for approval under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) to construct and operate a materials recycling facility (**MRF**). This was on land which was zoned in the Liverpool Local Environmental Plan (**LEP**) as "E2 Environmental Conservation". The application was opposed by Liverpool Council, and the registered proprietor and occupier of land adjoining the proposed development.

The Planning Assessment Commission approved the application subject to conditions. This was appealed to the Land and Environment Court. The primary judge granted the approval, finding that the MRF was consistent with the Liverpool LEP, with revised conditions to manage the environmental impact. The Council, and the registered proprietor and occupier (**the objectors**) appealed separately to the Court of Appeal, and both appeals were held together.

The issues on appeal were: (i) whether the primary judge erred in the way in which he considered the Liverpool LEP, (ii) whether he erred in his consideration of the noise impacts of the development, and (iii) whether he had arrived at a decision that was legally unreasonable.

Held:

- The Court dismissed both appeals: [172]. The primary judge was permitted, but not required, to take into account the provisions of an environmental planning instrument such as the Liverpool LEP. There was no error in law in his Honour considering that the objectives of the E2 zone had little relevance in circumstances where a recycling facility was expressly made a permissible use on the Moorebank land under the Liverpool LEP: [133]. That clause was expressed to have effect despite any clauses to the contrary: [136].

- The primary judge correctly surmised that the noise mitigation measures proposed were not designed to control noise on the land in the R3 zone, and were therefore insufficient to ensure acceptable noise amenity on at least part of that land: [162]. Given the impractically high cost of further measures, the primary judge was not in error when he concluded that it was not appropriate to require such measures: [42]; [56]; [163].

- The primary judge had not arrived at a legally unreasonable decision. The objectors could not establish that the decision was outside the range of "decisional freedom" in which reasonable minds might differ: [169]-[170].

2. **Real property: validity of easement**

Stolyar v Towers **[2018] NSWCA 6**

Decision date: 5 February 2018

Gleeson JA, Simpson JA, White JA

The appellant (**Mrs Stolyar**) and the respondents (**the Towers**) owed adjoining properties with frontages on the eastern shore of Rose Bay. An easement had been created and registered in 1990 by Mrs Stolyar's predecessor in title. This granted a right of vehicle parking and garaging which burdened Mrs Stolyar's property (**the servient tenement**) and benefited the Towers' property (**the dominant tenement**).

There was a single garage on the easement area, and room in front of it to park another vehicle. The Towers had parked vehicles in the garage and the area in front for a number of years. Adjacent to this garage, on Mrs Stolyar's property, was a double garage used by the Stolyars. In 2015 and 2016, there were numerous disputes about parking and garaging. The Towers brought proceedings against the Stolyars, claiming they had wrongfully interfered with the Towers' rights under the easement. The Stolyars denied these allegations, and contended that the easement was invalid because the rights it conferred were so extensive as to amount to joint occupation and substantially deprive Mrs Stolyar of the proprietorship and possession of that part of the property. This argument was rejected at trial.

On appeal, the Stolyars a sought a declaration that the easement was invalid, or in the alternative, that it was invalid in part, to the extent that it permitted the parking of motor vehicles in front of the single garage.

Held:

- The Court unanimously dismissed the appeal. The trial judge did not err in finding that the rights granted by the easement to the Towers did not substantially deny Mrs Stolyar her rights of proprietorship or possession in the easement area. The Stolyars' contention could not be established in the absence of evidence concerning the inability to turn motor vehicles in the area in front of the double garage or along the driveway by making more than three turns: [72]-[73].

- The trial judge also did not err in finding that Mrs Stolyar retained reasonable use of the servient tenement in its entirety: [73].

- The conclusion would have been the same irrespective of whether the validity of the easement was assessed as at the date of the grant (which was consistent with authority), or as at the date of litigation: [75]-[76].

- There was no authority for the contention that the court could declare the grant of an easement to be partially invalid: [79].

Other Australian intermediate appellate decisions of interest

3. **Evidence: privilege against self-exposure to penalties**

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union **[2018] FCAFC 4**

Decision date: 30 January 2018

Kenny, Tracey and Bromwich JJ

The Australian Building and Construction Commissioner (**the Commissioner**) brought civil penalty proceedings against the Construction Forestry, Mining and Energy Union (**CFMEU**) and Mr MacDonald, an official of the CFMEU, under the *Fair Work Act 2009* (Cth). During the course of being examined in evidence in chief, Mr MacDonald indicated that he was concerned about giving certain evidence because it might incriminate him. An application was made on his behalf for a certificate under the *Evidence Act 1995* (Cth) s 128 (**the Act**).

The provision is engaged if a witness objects to giving evidence on the ground that the evidence may tend to prove that they have committed an offence or are liable to a civil penalty. If the Court is satisfied that there are reasonable grounds for the objection, they must inform the witness that they need not give evidence unless required, and give the witness a certificate if they willingly give evidence or do so after being required by the Court.

The primary judge rejected the application on the basis that Mr MacDonald was not compellable to give the evidence objected to, and therefore did not fall within the section. In doing so the judge followed the decision of *Song v Ying* (2010) 79 NSWLR 442; [2010] NSWCA 237 (**Song**). The issue on appeal was whether Song was plainly wrong and should not be followed.

Held:

- The appeal was dismissed. The construction advanced by Mr MacDonald strained the word “objects”. An objection to giving evidence is not merely a means of electing for certificate protection to advance a forensic desire: [59].
- Section 128 should be understood as being directed to preserving a witness’ common law right to refuse compulsion to give evidence on the grounds that it might be incriminatory, and provide compensation and protection when that right to silence was overruled: [58]. This was consistent with the Australian Law Reform Commission’s Interim Report on Evidence (ALRC Report 26), which preceded the enactment of s 128: [63].

High Court Cases considered:

- *Cornwell v The Queen* (2007) 231 CLR 260; [2007] HCA 12

4. **Summary judgment: limitation periods; courts and judges**

Bodycorp Repairers Pty Ltd v Holding Redlich **[2018] VSCA 17**

Decision date: 8 February 2017

Whelan JA, Santamaria JA, T Forrest AJA

Bodycorp Repairers Pty Ltd (**Bodycorp**) consulted with solicitors to draft a restraint of trade clause (**the restraint clause**) as part of an agreement with its insurer (**AAMI**), such that if any of its franchisees terminated a franchise agreement, its insurer would not trade with the franchisee for 6 months. Bodycorp brought a proceeding against AAMI for contravention of the clause, however, the clause was held to be void and unenforceable.

Bodycorp brought a claim contending that the judgment in the first proceeding had been procured by fraud. It made an attempt to retain senior counsel. The claim was dismissed. Bodycorp then brought proceedings against its solicitors alleging negligent preparation of agreements with AAMI and franchisees. The solicitors (**Holding Redlich**) applied for summary judgment. Bodycorp applied for an order restraining the legal practitioners of the solicitors, arguing that confidential information had been supplied to senior counsel and the Court should conclude he shared this with instructing solicitors.

Before judgment was delivered, Bodycorp brought an application to reopen the summary judgment application, including on the grounds that senior counsel had continued to assist the solicitors after withdrawing from the matter. The primary judge held that the claim was statute barred, and dismissed the application to reopen, without adjudication. Bodycorp appealed, arguing that: (i) the judge acted with a reasonable apprehension of bias, (ii) it was denied natural justice, and (iii) the claim should not have been statute barred.

Held:

- The Court dismissed the appeal. There was no logical connection between the types of judicial conduct adverted to by Bodycorp and the feared deviation from the course of deciding the case on its merits. Nor was the asserted apprehension of bias reasonable: [90]; [98].

- The primary judge did not err in dismissing the application to reopen the summary judgment application without hearing submissions. It was open to him, having read the material, to conclude that the issues sought to be raised could have no bearing on his eventual decision or reasons for it: [105]-[107].

- The limitation period operated to bar the claim. The interest infringed by the alleged negligence was Bodycorp's interest in preserving its income-stream from franchisees. The relevant damage was suffered by June 2000, when the franchisees left and the insurer did not comply with the restraint clause. The cause of action therefore accrued from this point, not from when the clause was held to be unenforceable in 2013: [192]-[194].

Asia Pacific decisions of interest

5. Judicial review; statutory interpretation

Chamberlain v Minister of Health **[2018] NZCA 8**

Decision date: 7 February 2018

Harrison, Asher and Brown JJ

Mr Chamberlain was a middle aged man with a profound level of intellectual disability. His elderly mother, Mrs Moody, was his full time carer, and had been for most of his life. The Ministry of Health provided funding for Mrs Moody's performance of 17 hours of care weekly as well as funding third parties to perform additional services. Mr Chamberlain and his mother contended that he was entitled for funding for family care up to the maximum of 40 hours weekly. They contended that the Minister of Health, through the contracted agency of private assessors, had erred in exercising the statutory decision-making power.

The High Court of New Zealand declined an application for a declaration that the Minister's decision was unlawful for want of consistency with the relevant family care policy (**the Policy**), a legal instrument made under the *Public Health and Disability Act 2000* (NZ). The appeal was confined to whether the Judge had correctly determined that Mr Chamberlain's funding eligibility was limited to his mother's performance of discrete services identifiable within the phrases "personal care" and "household management", as used in the relevant specifications. The appellants contended that the eligibility categories must encompass broader services such as safety supervision and intermittent care, in light of the purpose for which family care was funded.

Held:

- The Court allowed the appeal: Although the intermittent type of personal care performed by Mrs Moody could not be quantified discretely or routinely by the Ministry's unit-based measurement model, this did not justify its exclusion. Such a formulaic approach was inconsistent with the spirit and purpose of the Policy. What was required was a fair estimate of the essential care which Mrs Moody provided and which the Policy was intended to support: [83].

- The Court was satisfied that that the providers' assessment of funding eligibility did not recognise the full range of services which could be performed by family members. Such a failure must have stemmed from a misinterpretation of the Policy by the Minister and his agents, and constituted error of law: [85].

- The Court also commented on its unease about the complexity of statutory instruments governing eligibility of funding for disability support services, noting that they verged on "impenetrable", especially for lay people: [90].

6. **Wills and probate: testamentary capacity**

***Loosely v Powell* [2018] NZCA 3**

Decision date: 2 February 2018

French, Cooper and Asher JJ

Allison Slater died on 8 May 2014 from breast cancer. She was a widow and childless. The value of her estate was approximately $2,000,000. She had executed a will six days before her death on 2 May 2014 (**the Final Will**), in which she left her residuary estate to the two children of one of her sisters. This was significantly different from a will executed three years earlier, in which her residuary estate was to be divided equally between all four of her sisters' children and the child of her sister-in-law (**the 2011 Will**).

The New Zealand High Court found that Mrs Slater lacked testamentary capacity when she executed the Final Will. The appellants, in their capacity as executors of the estate, appealed. They argued that: (i) Mrs Slater had sufficient testamentary capacity when she executed the Final will, or in the alternative, (ii) she had testamentary capacity on 29 April 2014 when she instructed the lawyer about the contents of her Final Will, and had sufficient understanding of what she was doing when she executed it, such that the rule in *Parker v Felgate* (1883) 8 PD 171 would apply. They also contended that the trial judge had modified the criteria for testamentary capacity by stipulating that, in respect of deathbed wills, there was a requirement that the court be satisfied with the testator's rationale for deviating from any pattern of disposition identified in previous wills or wishes of testamentary intent.

Held:

- The Court dismissed the appeal. There was evidence that raised Mrs Slaters' lack of capacity as a tenable issue, including evidence of her dire physical condition, her confused mental state, and the influence of opiate medication. That being so, the appellants did not discharge the onus of proving that she had testamentary capacity when she executed the Final Will: [101]; [106].

- The trial judge had not modified the criteria for testamentary capacity. Her approach had been to consider all matters indicative of capacity, including the rationale (or lack thereof) behind any significant changes to the will: [30].

- The rule in *Parker v Felgate* was not satisfied. There was no clear evidence on which to make a retrospective assessment of capacity by reference to the events of 29 April 2014. On balance the Court did not consider testamentary capacity made out. Even if she did have capacity, there was inadequate evidence to conclude that the instructions she gave to her lawyer still represented her intentions when she came to execute the will: [109]; [111].

Other international decisions of interest

7. Torts: duty of care owed by police

United Kingdom Supreme Court

Robinson v Chief Constable of West Yorkshire Police **[2018] UKSC 4**

Decision date: 24 January 2018

Lady Hale, Lord Mance, Lord Reed, Lord Hudges, Lord Hodge

Two West Yorkshire Police officers were attempting to arrest a suspected drug dealer, when the suspect backed into Mrs Robinson, who was standing nearby. The three men fell on top of her, causing her injury. The officers had not noticed that Mrs Robinson was standing nearby when they attempted the arrest.

At trial, the judge held that the officers had been negligent, but as police officers, they were immune from negligence claims. The Court of Appeal held that most claims against police when engaged in their core functions will fail the third stage of the test in *Caparo Industries plc v Dickman* [1990] 2 AC 605: that it would not be fair, just and reasonable to impose a duty of care. That Court held that the case involved an omission by police, because the suspect had caused the harm to Mrs Robinson, and even if a duty had been owed, it had not been breached.

On appeal to the Supreme Court, the key issues were whether the existence of a duty always depends on application of the "*Caparo* test", whether there was a general rule that police are not under any duty of care when discharging their core functions, and whether the elements of a negligence claim were made out.

Held:

- The appeal was allowed. The *Caparo* test does not apply to all claims under the modern law of negligence. It is normally only in novel cases that the court will need to consider what is fair, just and reasonable. This case involved the application of established principles: [21]; [27]; [30].

- The decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, in line with subsequent cases, is not authority for the proposition that police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime: [55]. Police may liable for negligence where such liability would arise under ordinary principles in tort: [68]; [70].

- This case concerned a positive act, not an omission, being the attempt to effect arrest. The primary judge was entitled to find negligence, in circumstances where the officers had foreseen that the suspect would try to escape, and would not have attempted arrest if they had noticed someone in harm's way: [78]. There was no issue of causation as the chain of events resulting in injury was caused by the attempt at arrest: [79].

8. Indigenous law: fiduciary duty

Supreme Court of Canada

***Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4**

Decision date: 2 February 2018

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

The Williams Lake Indian Band (**the Band**) had traditionally occupied a site near Williams Lake (**the Village Lands**) in British Colombia. In the early days of the colony of British Colombia, settlers began to take up unsurveyed lands on the territory of the band. The colony enacted a proclamation under which "Indian settlements" were not available for pre-emption, however, the responsible officials took no steps to protect the Village Lands or mark them as a reserve. After British Colombia joined the Canadian Confederation, Canada assumed responsibility for the creation of reserves; however they were not prepared to interfere with settlers' rights. They allocated the Band another tract of land.

The Band filed a claim to compensation under the *Specific Claims Tribunal Act* for losses arising from these events. The Tribunal has a mandate to award compensation to First Nations peoples for claims arising from the Crown's failure to honour its legal obligations. The Tribunal found that the Crown had breached a fiduciary obligation to the Band to protect its lands from pre-emption. They also held that the pre-Confederation claim came within the Act. On appeal, the Federal Court of Appeal dismissed the award. The Band appealed.

Held:

- The Court allowed the appeal and restored the Tribunal's decision. A *sui generis* fiduciary relationship existed between the Crown and Indigenous peoples which arose from the Crown's discretionary control over the Band's interest in the Village Lands: [44]; [58]-[60].

- Prior to Confederation, the Imperial Crown had not satisfied the requisite standard of ordinary prudence, which required them to, at minimum, inquire into the extent of the band's settlement so it could be protected. The fiduciary obligation was not satisfied post-Confederation in circumstances where federal Crown officials with knowledge of the circumstances surrounding the pre-emptions did nothing to challenge them: [42]; [63]; [73]-[74].

- The pre-Confederation breach came within the Act's definition of "the Crown", because the obligation breached was a legal obligation that became the responsibility of Canada, and for which Canada would, if it were in the place of the colony, have been in breach. This interpretation was consistent with Parliament's intention to remedy historical injustices, and an Indigenous perspective of the continuity of the fiduciary relationship: [130]-[131].