Court of Appeal
Supreme Court
Sydney

Decisions of Interest

5 December 2020 – 31 January 2021

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.

Contents

New South Wales Court of Appeal Decisions of Interest

Succession: construction of wills

***De Lorenzo v De Lorenzo* [2020] NSWCA 351**

Decision date: 22 December 2020

Gleeson, Leeming, White JJA

The late mother of Christopher, Vincent and Jo-Ann de Lorenzo made a bequest of shares in three companies to her children "as tenants in common in equal shares". The relevant clause specified that if, in the division of shares in accordance with the clause, the shares were not divisible by three, her daughter Jo-Ann was to receive more of such shares than her brothers so as to achieve the intent of the clause. At the time of execution of the will and at all times thereafter the deceased owned precisely two shares in each of two of the named companies. Christopher and Jo-Ann sought a declaration that the two shares in each company are not divisible by three, and that all should be distributed to Jo-Ann. Vincent denied that this was the proper construction of the will and opposed the summons. The deceased's shareholding in each of the two companies, while small, had the significant potential to break any deadlock between other shareholders. The primary judge rejected Christopher and Jo-Ann's proposed construction. They appealed that decision.

Held: dismissing the appeal [46], [72].

- On its proper construction, the clause did not require a division into separate shareholdings. It was accepted by the parties that no single construction reconciled all elements of the clause [37]. On the one hand, the provision made for a method of dividing the shares and references in the clause to "*the* division" suggest that the shareholding was to be divided: [11]. If the intended division was only equitable, that part of the clause would be left with no work to do: [26]. On the other hand, the mechanism described is qualified by the words 'so as to achieve the intent of this Clause'. This intent appears, from the clause's opening words, to be to effect as close to equal a distribution as possible: [42]-[45].

- The possibility of a tenancy in common for choses in action in general and shares in particular raises important questions of principle: [29]. The proposition that choses in action cannot be held by tenants in common is not universally true: [30]. Practical considerations may speak against the tenancy in common of certain choses in action: [33]-[34]. There is insufficient Australian authority on the question: [35].

- In this case it is possible to give effect to the testatrix's intentions without resolving those questions: [36], [60]. The three children are able to hold the shares on trust for themselves as equitable tenants in common in equal shares: [42]. The statutory remedy of partition under s 66G of the *Conveyancing Act 1919* (NSW) would allow for the division of the shareholding should the beneficiaries so desire, but such a division is not required by the will: [53]-[60].

Child Welfare: working with children [alternatively: Administrative Law]

***CXZ v Children's Guardian* [2020] NSWCA 338**

Decision date: 17 December 2020

Basten, McCallum JJA, Simpson AJA

CXZ applied to the Children's Guardian for a working with children check clearance pursuant to s 13(1) of the *Child Protection (Working with Children) Act 2012* (NSW). The Guardian formed the view that CXZ posed a risk to the safety of children and denied his application. CXZ applied for review of that decision in the NSW Civil and Administrative Tribunal (NCAT), which set aside the decision of the Guardian and substituted a decision granting CXZ the clearance. The Children's Guardian successfully appealed to the Supreme Court, which set aside NCAT's decision and remitted it to the Tribunal. Specifically, the primary Judge found that NCAT had improperly applied the principles outlined in *M v M* (1988) 166 CLR 69, which outlined three steps to addressing allegations in a risk assessment: (i) is the decision-maker satisfied that the allegation is true? (if so, it should be given the weight that the decision-maker considers appropriate); (ii) if not, is the decision-maker satisfied that the allegation is groundless? (if so, the allegation bears no weight at all); (iii) if no positive conclusion can be reached as to the truth or falsity of the allegation, then any "lingering suspicion" must be taken into account. NCAT was found not to have subjected each individual allegation to this process, and to have failed to count "lingering suspicions" against the applicant. CXZ brought an appeal challenging these findings and seeking reinstatement of NCAT's decision.

Held: granting leave and allowing the appeal: [30], [87].

- The proceedings raised an important question of principle concerning the correct means of assessing whether a person poses a risk to the safety of children: [30], [43]-[44]. Basten JA dissenting: [7].
- The relevant principles for assessing future risk are set out in *Tilley v Children's Guardian* [2017] NSWCA 174: [3], [28]. These principles do not involve a gloss on the statutory language, but rather a method for risk assessment: [7], [28]. The method in question should not be elevated to supplant the language of the statute itself [29]-[30]. There is only a single process. The task of the tribunal is to determine, even if it is unable to be satisfied one way or the other as to the truth of all or any of the allegations, whether, by reason of the possibility that the alleged conduct occurred, the applicant poses a risk to the safety of children: [7], [54]-[57], [77]. Failure to explicitly address allegations in the three steps outlined in *M v M* does not amount to an error.
- The proposition that a "lingering doubt" should "count against" an applicant is of no legal significance, though the use of the phrase does not itself demonstrate error: [7], [29]. It may be unhelpful in cases involving multiple and disparate allegations against an applicant to the extent that it directs the decision-maker to compartmentalise the allegations: [79].

Administrative Law: particular administrative bodies

***Ghosh v Health Care Complaints Commission* [2020] NSWCA 353**

Decision date: 22 December 2020

Bell P, Payne JA, Stevenson J

The Health Care Complaints Commission applied to the Occupational Division of the NSW Civil and Administrative Tribunal to cancel the registration of Dr Ratna Ghosh pursuant to s 149C of the *Health Practitioner Regulation National Law 2009* (NSW) ('*National Law*') for unsatisfactory professional conduct, professional misconduct, impairment detrimentally affecting her capacity to practise the profession, and incompetence. At a directions hearing not attended by Dr Ghosh, the Tribunal determined that the hearing, originally set down for five days, should be "dispensed with" and the matter dealt with on the papers. The Commission's submissions and evidentiary materials were served on Dr Ghosh, but no provision was made for her submissions in response. After consideration of the matter, the Tribunal handed down orders to the effect that (1) if Dr Ghosh were still registered as a medical practitioner, it would have cancelled her registration; (2) that Dr Ghosh should be disqualified from being registered as a medical practitioner for 18 months; and (3) that those orders should be stayed to "allow [Dr Ghosh] to make an application to show cause why the orders should not be made". The Tribunal also made findings, *inter alia*, that Dr Ghosh had "behaved in a dishonest, vindictive and retaliatory manner to colleagues who had made professional complaints about her", conduct not alleged or particularised in any complaints made by the Commission.

Held: allowing the appeal with costs.

- Sections 165I and 165J of the *National Law* provide for a medical practitioner's right to attend and to be represented at an inquiry. These sections prevail over s 50 of the *Civil and Administrative Tribunal Act 2013* (NSW), which would permit the Tribunal to dispense with a hearing altogether: [104]. Provision in s 165J for an inquiry to go ahead in the absence of the medical practitioner concerned only authorises the Tribunal to proceed in circumstances where a practitioner, appropriately notified of the inquiry, does not appear at the appointed time and place: [96]. In accordance with the potentially serious consequences for a practitioner of disciplinary proceedings in the Tribunal, there is no provision for an inquiry to be heard on the papers: [95].

- Compliance with the above conditions is a precondition of the valid exercise of the Tribunal's powers to hear the complaints: [109]-[112]. The Tribunal's proposed 'show cause' procedure could not rectify failure to comply: [123]-[126].

- Elements of the Tribunal's substantive reasons failed to discharge the basic duties imposed on Tribunal members by the *National Law*: [177]. The requirements of procedural fairness in respect of many of the findings made by the Tribunal were not met, especially the case of findings concerning matters not alleged by the Commission and of which Dr Ghosh had no notice: [164]-[174].

Torts: negligence

Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354

Decision date: 22 December 2020

Basten, McCallum JJA, Emmett AJA

Gengiz Capar was employed as a security guard at Lidcombe Power Centre. In March 2010 an intruder entered the premises by climbing through a gap above an external roller door and up the fire stairs. In February 2010 an intruder had accessed the premises in the same way. Mr Capar, having seen the intruder outside the premises on CCTV and subsequently lost sight of him, left the control room to investigate. The intruder, when found, was carrying an axe and approached Mr Capar threatening to kill him. Mr Capar returned safely to the control room, but subsequently suffered psychiatric harm as a result of the incident. Mr Capar brought claims alleging negligence on the part of the owner of the premises, the company providing security services to the premises and his own employer. The primary judge dismissed all three claims, finding that Mr Capar, by leaving the safety of the control room, was the "author of his own downfall" and had voluntarily assumed the risk in question. Mr Capar appealed.

Held: Allowing the appeal (Emmett AJA in dissent)

- Each of the respondents owed a duty of care. The enquiry demanded by s 32 of the *CLA* is not whether the circumstances were reasonably foreseeable, but whether, given those circumstances, a person of "normal fortitude" might suffer psychiatric illness: [91]-[92]

- Each of the respondents breached its duty of care by failing to provide safe premises or a safe system of work: [148], [153], [145]. Emmett AJA, dissenting: the duty of an occupier of premises does not extend to protecting a security guard from the risk of an intruder: [248]-[255].

- Reliance on the concept of 'inherent risk' in section 5I of the *CLA*, where the existence of a duty of care has been established, is misguided. The possibility that a defendant could be held liable for breach of a duty of care in respect of a risk, materialisation of which cannot be avoided by the exercise of reasonable care, is incoherent: [172]

- Voluntary assumption of risk involves knowledge of a specific risk of injury and voluntary agreement to incur that risk of injury. Sections 5F and 5G of the *CLA* create a presumption of knowledge in the case of 'obvious risks', but voluntariness must still be shown: [43]-[44]. Attendance at an unsafe workplace does not establish consent to unsafe work conditions: [49]-[53]. Moreover, in circumstances involving emergencies, persons who put themselves in the way of danger are not subject to the doctrine of voluntary assumption of risk: [53]-[60]. There was no contributory negligence, as the appellant acted appropriately in the circumstances, in line with the expectations of his employers: [175].

Statutory Interpretation; Criminal Law; Animal Welfare

Will v Brighton **[2020] NSWCA 355;** see also ***Will v Brighton (No 2)*** **[2021] NSWCA 8**

Decision date: 23 December 2020; 12 February 2021

Bell P, Basten JA, Simpson AJA

Mr Brighton was charged with two counts of serious animal cruelty under s 530 of the *Crimes Act 1900* (NSW) ('the Act'), alleging that, with the intention of inflicting severe pain upon the animal, he did commit a serious act of cruelty upon a dog and did seriously injure and kill the animal. Mr Brighton was convicted following a trial in the Local Court, with the magistrate finding that the dog in question was not a "pest animal" for the purposes of the defence to the charge in s 530(2)(b). The mental element of the offence was not addressed. Mr Brighton appealed to the Supreme Court, contending that the deceased dog was in fact a "pest animal" such that his conduct fell within the scope of the s 530(2)(b) defence for the "extermination of pest animals". The primary judge upheld the appeal. RSPCA Inspector Will sought leave to appeal to the Court of Appeal.

Held: Granting leave and allowing the appeal

- The phrase "with the intention of inflicting severe pain" in s 530(1) of the Act refers to an actual, subjective intention: [63]-[71]. This reflects the purpose of the provision as supplementing an existing scheme by addressing particularly egregious acts of animal cruelty, and is most consistent with the general language of the provision and the ordinary meaning of "intention": [64]-[68].

- While the dog in question could be described as a "pest animal" (Simpson AJA disagreeing: [135]-[137]) it is the entire phrase in s 530(2) – "in the course of or for the purposes of … the extermination of pest animals" – that must be construed. Use of the plural "pest animals" suggests that the animal must share its pest characteristics with comparable animals: [83]-[96], [117]-[124].

- Individual words or expressions should not be construed in isolation: [51]. Though dictionaries may be useful for the identification of a range of possible meanings, heavy reliance on them should be avoided: [52]-[57]. Reference to dictionaries can be conducive to error by (i) removing attention from the statutory context, and (ii) identifying a range of possible meanings not relevant to the interpretation of the phrase: [111]-[116].

- The word "extermination" in the phrase "extermination of pest animals" does not take its ordinary or dictionary meaning of "to destroy utterly, to get rid of or to eliminate". It connotes a systematic process designed or directed to eliminate or reduce the numbers of a particular class of pests: [92]-[96], [120]. It must be read in the context of other NSW legislation concerned with cruelty to animals. Section 22(10) of the *Companion Animals Act 1998* (NSW), for example, allows for the destruction of a dangerous dog, but only "in a manner that causes it to die quickly and without unnecessary suffering": [95].

Torts: malicious prosecution

***Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360**

Decision date: 24 December 2020

Leeming JA, Emmett AJA, Preston CJ of LEC

Mr Young was charged by the RSPCA with five offences under the *Prevention of Cruelty to Animals Act 1979* (NSW) in relation to his treatment of a horse. He was found guilty of all offences in the Local Court. Mr Young appealed to the District Court where the judge, without making any findings in relation to the charges, proceeded to deal with the application of s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). Section 32 provides that where it appears to a Magistrate that a defendant, who is not a mentally ill person, is suffering from a mental condition for which treatment is available in a mental health facility, and that it would be more appropriate to deal with the defendant in accordance with Part 3 of the *Mental Health Act* than otherwise in accordance with law, the magistrate may make orders that the charges be dismissed and the defendant discharged on condition of attendance on a person specified for assessment and/or treatment of the condition. Mr Young subsequently brought an action against the Respondents in the District Court for malicious prosecution. The primary judge in the District Court summarily dismissed the proceedings on the basis that the prosecution had not been terminated in Mr Young's favour. Mr Young applied to the Supreme Court to have that summary dismissal set aside, and the matter was removed to the Court of Appeal.

Held: Setting aside the orders for summary dismissal

- The words of s 32(4) of the *Mental Health Act* – that the making of orders under that section "does not constitute a finding that the charges against the defendant are proven or otherwise" – do not deprive a plaintiff of a finding that the proceedings have been terminated favourably to him or her: [42]-[45].
- The element of the tort of malicious prosecution requiring that the proceedings in question be terminated favourably to the plaintiff reflects the concern of the law with the consistency of judicial determinations: [75]. Favourable termination accordingly means not that there has been an acquittal, but that the proceedings have been terminated without a conviction, eliminating the risk of diverse determinations by different courts on the same facts between the same parties: [47], [76]. Accordingly, the proceedings in question, when terminated by an order under s 32 of the *Mental Health Act*, were terminated favourably to Mr Young.
- Where the District Court is asked to distinguish or depart from a reasoned judgment of the Supreme Court, in respect of which an appeal has been dismissed by the Court of Appeal, this should be a powerful consideration against a summary dismissal: [39].

Contracts: formation

***GC NSW Pty Ltd v Galati* [2020] NSWCA 326**

Decision date: 11 December 2020

Gleeson, White JJA, Emmett AJA

Mrs Galati and two of her siblings' families each owned one of three neighbouring parcels of land. Greencapital Development Pty Ltd sought to acquire the lots for subdivision and redevelopment. In 2015 Greencapital entered into a put and call option agreement for the sale of Mrs Galati's property. In 2016, Greencapital and Mrs Galati entered into a deed granting Mrs Galati a right to purchase five "approved lots" in the completed development at a fixed price per square metre. On 17 March 2017 Bruno Galati (on behalf of Mrs Galati) met to discuss the sale with Greencapital's project director. An email dated 20 March 2017 set out the substance of the meeting as follows: that the put and call option agreement was to be rescinded, and that Greencapital was to nominate a special purpose vehicle for the exchange of contracts in relation to the sale of the property and the sale back of five of the developed lots. GC NSW Pty Ltd was subsequently incorporated. On 24 March, GC NSW entered into contracts for the sale of each of the properties. GC NSW then refused to enter into contracts for the sale back of the five lots. Mrs Galati commenced proceedings seeking specific performance of the 17 March agreement and was successful. GC NSW appealed to the Court of Appeal.

Held: Allowing the appeal

- The parties to the 17 March meeting did not intend to create immediately binding legal relations. To do so on the basis of oral discussions alone would have been at odds with the antecedent dealings of the parties, which generally progressed from in-principle negotiations to formally documented agreements: [62].There was no evidence that the other lot owners could have been bound: [64]-[69]. Particulars allegedly agreed upon at the meeting were incomplete in significant respects, and the magnitude, subject-matter and complexity of the transaction made it unlikely that the parties intended to be bound without more: [70]-[84]. It is objectively unlikely that the parties intended to give up their existing rights (under the put and call option and the deed) until new agreements had been prepared and exchanged. The company with which the arrangements were alleged to have been made was not incorporated at the time of the meeting and its ratification of any alleged terms was not guaranteed: [78], [154].
- The status of the 2016 deed is to be understood in the context of the above findings. Mrs Galati's entry into and performance of a contract for the sale of the land to GC NSW did not evince an intention to abandon the deed with Greencapital. It did not rule out performance of the deed because a party can undertake to sell goods belonging to a third party: [114]. Mrs Galati's statement "as the deed is rescinded" was made on the basis that the 17 March meeting had created legally binding arrangements superseding the deed: [116]. Absent this basis, the deed remained on foot and had been breached by Greencapital.

Australian Intermediate Appellate Decisions of Interest

Insurance: business interruption

Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance **[2020] FCAFC 228**

Decision date: 18 December 2020

Besanko, Derrington, Colvin JJ

Rockment Pty Ltd owned a café and restaurant in Victoria and held an insurance policy with AAI Limited that included business interruption cover. Rockment claimed to have suffered business interruption losses as a result of the Victorian government response to the COVID-19 pandemic. The policy contained an exclusion for claims caused by "any biosecurity emergency or human biosecurity emergency declared under the *Biosecurity Act 2015* (Cth), its subsequent amendments or successor, irrespective of whether discovered at the premises or the breakout is elsewhere." The COVID-19 pandemic was declared a human biosecurity emergency under the *Biosecurity Act* on 18 March 2020, but there was no relevant exercise of the powers enlivened under the Act by that declaration. Instead, it was directions made by the Victorian Chief Health Officer under the *Public Health and Wellbeing Act 2008* (Vic) that limited the operations of Rockment's café and restaurant business. The parties sought the determination of a separate question, namely whether the causal factor by reference to which the exclusion operates is the declared disease.

Held: answering the separate question: No

- The causal link by reference to which the exclusion operates is cast in wide terms: [6]. The causal factor referred to could be the declaration, the emergency, or the disease itself: [15].
- The exclusion explicitly refers to claims caused by an emergency declared under the *Biosecurity Act*, not the declaration. Several factors support this construction: (i) the word "declared" is used to qualify the subject of the exclusion, being the emergency itself: [30]; (ii) the cover operates with respect to losses arising from government-imposed closures, and there is no reason why the exclusion would be limited to closures imposed by the Commonwealth: [37-40].
- The closing words of the exclusion – "irrespective of whether discovered at the premises or whether the outbreak is elsewhere" – suggest that the causal factor is not the emergency or the declaration but the disease itself: [43]-[47]. Such a construction, however, would effectively replace the words "human biosecurity emergency" in the clause. The relevant causal factor must be the emergency.
- "Disease" and "emergency" are conceptually different: [66]. It is not enough if governmental action leading to the closure of an insured's premises is occasioned only by the existence of a listed disease. Ascertaining the operation of the exclusion in a particular case will require close examination of the causes for any government-imposed closures: [67].