Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 February 2021 – 14 February 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

Native Title: extinguishment; statutory interpretation

***Lawson v Minister for Environment & Water (SA)* [2021] NSWCA 6**

Decision date: 11 February 2021

Bathurst CJ, Basten and McCallum JJA

Dorothy Lawson sought compensation under the *Public Works Act 1912* (NSW) ('PWA') as a descendant of the holders of possessory or native title to lands in the Lake Victoria Area resumed under the PWA in 1922. In 1914 an intergovernmental agreement was made concerning the development of the Lake Victoria Area, clause 55 of which provided that NSW was to transfer and vest in South Australia an estate in fee simple in the Lake Victoria Area. In 1917 the *River Murray Waters Act 1915* (NSW) ('RMWA') came into effect, s 18 of which provided that lands referred to in the agreement "are hereby vested in South Australia for an estate of fee-simple". Dorothy Lawson's eligibility for compensation relied on title to the land in question not having been extinguished prior to the 1922 resumption. A separate question was put before the primary judge: was the land in question vested in South Australia for an estate in fee simple under s 18 of the RMWA upon its commencement, and if so was the effect of that vesting to extinguish any possessory or native title rights? The primary judge answered both questions in the affirmative. Dorothy Lawson appealed to the Court of Appeal.

Held: Answering the first of the separate questions: No

- Section 18 of the RMWA was intended to ratify the undertaking given in cl 55 of the intergovernmental agreement. Sections 14-16 of the RMWA provide for the Government of South Australia to exercise the powers of the NSW Minister for Public Works under the PWA, including for the appropriation, resumption or purchase of land, but subject to like conditions, including the provision of compensation: [19]-[23], [50]-[54]. The RMWA provided a power to extinguish outstanding interests, but also a mechanism to provide compensation: [24].

- Per Bathurst CJ: The proper construction of s 18, whilst inconsistent with the ordinary or literal meaning of the words used, reflects the context and purpose of the RMWA as a whole. The literal construction relied on by the Respondents, involving an immediate grant of the fee simple estate in the lands, would have deprived persons of vested property rights without compensation contrary to the apparent purpose of the RMWA. [25].

- Per Basten JA: The proper construction of s 18 does not require departure from the ordinary or literal meaning of the words used. The words "hereby vested" indicate that it is *by the Act* (and in accordance with the mechanism provided for in the RMWA) that land is vested in South Australia, but the time of the vesting is under the control of the South Australian Government, which could request the resumption of land or exercise the powers of the NSW Minister: [40]-[48].

Equity: trusts and trustees; private international law; whether apportionment legislation procedural or substantive; negligence; scope of solicitor's duty of care

***Australian Executor Trustees (SA) Limited v Kerr* [2021] NSWCA 5**

Decision date: 4 February 2021

Gleeson and Leeming JJA, Emmett AJA

Australian Executor Trustees (SA) Limited ('AET') was the professional trustee of a number of forestry schemes under which investors were entitled to receive a share of proceeds of timber sales from lands held by S.E.A.S Sampfor Forest Pty Ltd ('the Forest Company'). A number of encumbrances were registered on the title to land owned by the Forest Company in favour of AET, securing the interests of investors in amounts owing to them by the Forest Company. The Forest Company subsequently became a subsidiary of Gunns Ltd, which decided to sell the scheme land and trees as part of a larger sale to pay off some of its debts. AET consented to the sale and discharged the encumbrances, subsequently receiving only a nominal amount from the sale for the benefit of investors, with the tree sale proceeds paid into Gunns' overdrawn account. A court-appointed trustee commenced actions seeking equitable compensation for breach of duty from AET, in respect of the release of the encumbrances, and damages for negligent or misleading and deceptive conduct from AET's lawyers Sparke Helmore. AET cross-claimed against Sparke Helmore for negligent advice, alternatively seeking a finding of apportionable liability. The primary judge found against AET on breach of fiduciary duty, but did not find that Sparke Helmore's conduct had been shown to have caused the loss in question. The primary judge also found that that the claim was not apportionable, as the relevant (SA) legislation did not permit apportioning of claims for breach of fiduciary duty. AET appealed in relation to quantum and its cross-claim against Sparke Helmore.

Held: Dismissing the appeal and the cross-appeal

- The obligation of a defaulting trustee is essentially one of restitution: [95]. In determining the relevant counterfactual scenario by reference to which quantum was to be assessed, the burden of proof was on AET whose breach of trust had created the difficulties of proof: [128]. In these circumstances, the trial judge was entitled to make the relevant findings of fact concerning how much Gunns would have been prepared to pay for the discharge of the encumbrances in order to proceed with the larger land sale: [110]-[155].

- Apportionment legislation is not procedural but substantive, so that the law to be applied is the *lex loci delicti*: [227]-[230]. The law of South Australia, as the *lex loci delicti*, did not permit apportionment of the claim in question: [91].

- The better view is that there is no 'penumbral duty' requiring lawyers to act beyond the scope of a retainer, but simply a question of fact in each case as to what reasonable care requires: [258]. Where a sophisticated client (such as a professional trustee) seeks specific advice within a narrow retainer, this tells against any duty to give advice beyond the scope of the retainer: [268].

Statutory Interpretation: amendment; workers compensation

***Theoret v Aces Incorporated* [2021] NSWCA 3**

Decision date: 2 February 2021

Leeming and McCallum JJA, Garling J

Patricia Theoret was injured at work on numerous occasions, including by a serious assault in 2002. She first became entitled to weekly compensation payments, in respect of a different injury, in 2004. Her entitlement to weekly payments in respect of the assault was not determined until 2019. In 2012, before determination of her entitlement to compensation, the *Workers Compensation Act 1987* (NSW) was amended, with s 82A introducing a new mechanism for the indexation of weekly compensation payments. Compensation payments are calculated by reference to "pre-injury average weekly earnings", which for Ms Theoret refers to her earnings in 2002. Section 82A(1) provides for the amount of a payment for an injury "to be varied on each review date after the day on which the worker became entitled to weekly payments in respect of that injury" in accordance with a given formula. 'Review Date' is defined as 1 April or 1 October of each year. Section 82A(4) provides that the State Insurance Regulatory Authority is to declare, on or before each review date, the factor representing the change in the Consumer Price Index in the previous six months by reference to which payment indexations are calculated. The Workers Compensation Commission upheld an arbitrator's decision applying indexation from the first review date after the commencement of the amendments (being April 2013). Ms Theoret appealed.

Held: Allowing the appeal

- The Appellant's proposed construction – whereby the relevant amount is to be indexed from the time she first became entitled to receive weekly benefits – does not involve giving s 82A a 'retrospective' operation: [23]. It would not attach any new legal consequences to facts or events existing prior to commencement.
- The indexation process provided for by s 82A is clearly intended to be iterative: [25]. It is the only safeguard against inflation: [17]. It is clear that if a wage is 'frozen' for any significant period, then a subsequently indexed amount of compensation will nonetheless be out of kilter with contemporary wages: [26].
- Section 82A(1) is the "leading provision" in the sense referred to in *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355. It can be given effect on its own terms: [28]-[30]. Section 82A(4), on the other hand, is the subordinate provision, being merely mechanical or procedural: [30]. While the function given to the Authority under s 82A(4) is of practical assistance [31], failure to declare the relevant factor for the indexation calculation as at a particular date cannot affect the construction of the Act: [32]. The factor can be objectively ascertained, and should be so ascertained in order to give effect to s 82A(1) in respect of each review day from the moment at which a worker became entitled to weekly payments in respect of an injury: [47].

Land Law: Torrens title

***Ippin Textiles Pty Ltd v Winau Aust Pty Ltd* [2021] NSWCA 9**

Decision date: 12 February 2021

Macfarlan, Leeming and Brereton JJA

183 Eastwood Pty Ltd (the third Respondent) owned three parcels of land ('the Lands'). Mr Scott Chan fraudulently executed, purportedly on behalf of 183 Eastwood Pty Ltd but without its authority, mortgages over the Lands in favour of the Appellants as security for a loan of $4 million. The registered mortgage documents referred to a "Schedule A" (not registered), which listed Mr Chan as "Guarantor", and alongside 183 Eastwood as "Debtor" and "Mortgagor. The registered documents also included a "Redacted Schedule A", which referred only to 183 Eastwood, and included a "Special Condition" to the effect that, if the (unregistered) unredacted Schedule A were to become wholly or partly void or unenforceable, it would be replaced by the Redacted Schedule A contained in the registered documents. The mortgagees paid the loan amount into a bank account fraudulently opened by Mr Chan in the name of 183 Eastwood. After not receiving any repayments, the mortgagees sold the Lands, paying the proceeds of sale into court pending the outcome of the proceedings below. The primary judge formulated a separate question to be determined at the outset, namely whether the registered mortgage, properly construed, secures anything in favour of the mortgagees against the Lands. This question was answered in the negative. The Mortgagees appealed.

Held: Dismissing the appeal

- The title conferred on the mortgagees by way of security was indefeasible notwithstanding the role played by Mr Chan's fraud: [25]. Though various provisions of the mortgage documents were relied on to show acknowledgment of receipt by 183 Eastwood of the "advance" intended to be secured by the mortgage, provisions in the registered documents could not displace the facts as proved concerning the receipt of money by 183 Eastwood: [26]-[28].

- Payment to the bank account in the name of 183 Eastwood did not constitute payment to 183 Eastwood Pty Ltd: [29]. An obligation to *repay* money could not exist in respect of money that had never been advanced to a party [39]. No clauses to this effect can create an estoppel or prevent the mortgagor from going behind the stated amount of principal to show that no money has in fact been advanced: [40]-[42]. The distinction between a standard "all monies" mortgage and the specific reference in the current mortgage to a specified "principal amount" has no bearing on important questions of proof concerning whether or not a particular amount has in fact been advanced: [43].

- The unregistered, unredacted Schedule A, even if it could be regarded as incorporated by reference within the registered mortgage documents, would in any case be excluded from the mortgage by operation of the special condition: [32].

Australian Intermediate Appellate Decisions of Interest

Arbitration: international arbitration

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. **[2021] FCAFC 3**

Decision date: 1 February 2021

Allsop CJ, Perram and Moshinsky JJ

Infrastructure Services Luxembourg S.à.r.l. ('ISL') obtained an award against the Kingdom of Spain under the provisions of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ('ICSID') to which Australia and Spain are both parties. ISL applied to the Federal Court seeking orders that Spain pay the amount of the arbitral award. Spain claimed immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth) ('FSIA'), which provides that, except as provided by the FSIA, foreign states are immune from the jurisdiction of Australian courts. Section 10 provides that a foreign state will not have immunity in a proceeding in which it has submitted to jurisdiction. ISL argued that Spain's accession to the ICSID constituted a submission to jurisdiction for the proceedings below. Article 54(1) of the ICSID provides that each State shall recognise and enforce an award as if it were a final judgment of a domestic court. Article 54(2) sets out the mechanism by which a party should be able to seek recognition or enforcement of an award. Article 54(3) provides that execution shall be governed by domestic laws concerning the execution of judgments. Article 55 provides that nothing in Article 54 shall be construed as derogating from domestic laws concerning foreign state immunity from execution. The primary judge found accession to the ICSID constituted submission to jurisdiction for the purposes of the proceedings below. Spain appealed.

Held: allowing the appeal, but awaiting further argument on the correct form of orders for the recognition of the arbitral award

- Recognition is distinct from execution or enforcement: [22], [26]. Art. 54(1) of the ICSID requires the recognition of awards, while Art. 54(2) explicitly contemplates distinct applications for recognition and enforcement: [27], [29]. 'Execution' as referred to in Art. 55 includes enforcement: [25], [37]. Art. 55 does not refer to recognition and cannot be construed as including such a reference: [32]-[33].

- Accession to the ICSID constitutes submission to recognition proceedings: [37]. Though s 35 of the *International Arbitration Act 1974* (Cth), giving effect to the ICSID, only refers to proceedings for enforcement of an award, s 34 presumes s 35 to deal with recognition as well: [43]-[44]. Section 35 should be construed to give effect to the ICSID obligation to allow for recognition proceedings: [46]-[48].

- Recognition may be useful for purposes other than the enforcement of pecuniary obligations: [54]. It may be achieved either by entering judgment in the amount imposed by the award or by ordering that the award be recognised 'as if' it were a judgment of the court: [58], [60].

Land Valuation and Compensation: statutory interpretation

***Mason v Head, Transport for Victoria* [2021] VSCA 19**

Decision date: 12 February 2021

Beach, Emerton and Osborn JJA

Roger Mason owned a property part of which was reserved for a public purpose in 2010. In 2011 Roger Mason died, leaving the property to his wife and children (the Applicants). In 2017 the Applicants entered into a put and call option deed to sell the property for $56 Million. A valuation estimated that the property's value in the absence of the reservation would be approximately $100 Million. Though compensation will be payable upon compulsory acquisition of the reserved land, this is unlikely to happen until 2030. Section 98(1) of the *Planning and Environment Act 1987* (Vic) ('the Act') provides for compensation for loss suffered by owners as the "natural, direct and reasonable consequence" of the reservation of land for a public purpose. Section 99(b) provides for such a right to arise on sale of the affected land. Section 108(2) provides that a person does not have a claim for compensation in respect of land acquired after a declaration of reservation. The Applicants sought a declaration as to their eligibility for compensation. The primary judge reserved for the Victorian Court of Appeal the questions whether the Applicants were ineligible for compensation on the basis that (i) they were not owners at the time of the reservation (s 98(1)), or (ii) they 'acquired' the land after the reservation (s 108(2)).

Held: Answering both separate questions: No

- The Applicants were owners for the purposes of s 98(1). Reference in s 98(1) to the land 'being reserved' is to the event rather than the continuing state of reservation: [41]. However, s 98(1) does not require the owner seeking compensation to have been the owner at the date of reservation: [87]. Section 99 is not a 'merely procedural' provision postponing payment for a loss suffered at the date of reservation; rather, the right arises and the loss is ascertainable at the time specified in that section: [89]. It is sufficient that a claimant be the owner at the date the right to compensation arises: [7], [90].

- The applicants did not acquire the land after the reservation within the meaning of s 108(2). The overarching principle is that compensation is payable for the natural, direct and reasonable consequences of reservation: [71](4), [72](3). The purpose of s 108(2) is to exclude persons who may be regarded as having actual or constructive notice of a reservation prior to their acquisition of the land: [53], [55]. Any such loss would not be the natural, direct and reasonable consequence of the reservation itself: [85]-[86]. The word 'acquire' in s 108(2) must accordingly be given its active meaning, excluding, for example, recipients of property under a will: [56]. The alternative construction would work unfairness through the adventitious circumstances of different ownership arrangements, and inhibit efficient economic use of land by discouraging owners of inherited land from selling or subdividing prior to compulsory acquisition of reserved land: [60].

Asia Pacific Decision of Interest

Crime: bail

***HKSAR v Lai Chee Ying* [2021] HKCFA 3**

Decision date: 9 February 2021

Cheung CJ, Ribeiro and Fok PJ, Chan and Stock NPJJ

Mr Lai was arrested in December 2020 and charged with an offence under the *National Security Law* ('NSL') of "collusion with a foreign country or with external elements to endanger national security". He was initially refused bail by the Chief Magistrate, applying Article 42(2) of the NSL, but was subsequently granted conditional bail by Alex Lee J. Art. 42(2) of the NSL provides that "no bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security". The prosecutor sought leave to appeal to the Court of Final Appeal concerning the correct interpretation of Art. 42(2).

Held: allowing the appeal and setting aside the decision below

- While the NSL is intended to operate consistently with the rule of law, human rights and fundamental freedoms under the laws of the HKSAR, the NSL contemplates possible inconsistencies and provides that it shall prevail in such cases: [26]-[29]. The NSL is not subject to constitutional review on the basis of alleged incompatibility with the HKSAR *Basic Law* or human rights embodied in the *International Covenant on Civil and Political Rights*: [37].

- The NSL makes clear that HKSAR law shall apply to procedural matters, which includes bail, subject to any specific changes effected by the NSL: [40]. Arts 4 and 5 provide that human rights and freedoms and rule of law values are to provide the context for the interpretation of the NSL: [42]. While Art. 5(3) of the Hong Kong *Bill of Rights* creates a presumption in favour of bail, this presumption, is excluded in the first instance in the application of Art. 42(2) of the NSL, which imposes a more stringent threshold requirement: [47], [53(b)].

- The word 'continue' in Art. 42(2) must be read consistently with the presumption of innocence, so as not to in any way imply that the accused is to be treated as guilty of having committed such acts before trial: [53(c)(i)]. The word 'acts' in Art. 42(2) must be construed as referring to acts capable of constituting offences under the NSL: [53(c)(ii)]. The court is not required, in applying Art. 42(2), to ignore possible bail conditions that may affect the assessment: [57]-[58].

- Art. 42(2) does not impose a burden of proof on the accused. The grant of bail under HKSAR law does not involve a burden of proof on either party, but is a predictive and evaluative exercise in which the judge plays an inquisitorial role: [67]-[68]. However, the court notes that there are other common law jurisdictions where the burden of proof in respect of certain classes of offences is placed on the accused to establish why continued detention cannot be justified: [69].

International Decision of Interest

Insurance: business interruption

***The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] 2 WLR 123**

Decision date: 15 January 2021

Lord Reed PSC, Lord Hodge DPSC, Lords Briggs, Hamblen and Leggatt JJSC

The Financial Conduct Authority (FCA) brought a test case against eight major providers of business interruption insurance, intended to clarify the proper construction of a range of standard business interruption policies in their application to COVID-19 and the UK Government's response to it. The FCA and the insurers appealed on multiple points of interpretation and associated questions of causation.

Held: Substantially allowing the FCA's appeals and dismissing the insurers' appeals

- Where there are multiple proximate causes of a loss, the fact that one or more is not an insured peril (provided it is not specifically excluded) will not prevent recovery of the loss as an insured loss: [171]-[176]. The 'but for' test is of little assistance where results are causally over-determined: [181]-[183], [228]-[230]. Events may be regarded as having caused a given result that taken alone were neither necessary nor sufficient to have caused that result: [185].

- Where interruption is caused by the insured peril and other events arising from the same underlying circumstances, which would naturally be expected to occur concurrently with the insured peril, those other matters are not a separate and distinct risk: [237]-[240]. When losses are quantified in accordance with trends clauses, adjustments should only be made for circumstances unconnected with the insured peril, so as not to detract from the cover *prima facie* provided by the insuring provisions: [262]-[264], [268], [287].

- "Occurrence" of a disease means a case of that disease in a person: [70]-[71]. However, where a radius is specified for occurrences included within the insured peril, cover is not limited to interruption resulting *only* from occurrences within that radius: [71], [95]. No reasonable person would expect an outbreak of a disease to be limited to the given radius, nor for government responses to that disease to be in response just to those cases within the radius rather than to the outbreak as a whole: [194]. Cases of the disease outside the radius cannot be set up as a countervailing cause to displace the causal impact of the insured peril: [195]-[196]. The balancing exercise that this would require would be unworkable: [200]-[202]. Where a radius is specified, cover will extend to the effects of restrictions imposed in response to multiple cases of the disease where at least one such case is within the radius: [207], [212].

- "Inability" to use or access premises must be more than a mere impairment to use, but extends to cases where a discrete part of the premises is unable to be used for the whole or part of the business, or where the whole of the premises is unable to be used for a discrete part of the business: [136]-[137].