Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 March 2021 – 21 March 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.

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New South Wales Court of Appeal Decisions of Interest

Courts and judges: bias; applications for recusal

Polsen v Harrison **[2021] NSWCA 23**

Decision date: 3 March 2021

Bell P, Basten JA and Simpson AJA

The Applicant had brought an action against the Respondent for medical negligence. On the third day of the hearing, reference was made to the report of a joint conclave of medical experts, of which the trial judge had received a copy only that morning. The judge expressed the view that a particular psychiatrist should not have attended the conclave, that he dominated on matters outside his area of expertise, and that his participation amounted to "advocacy in the extreme". These views were expressed as "flagging" to counsel potential issues arising from the report, but were strongly worded. Counsel for the Applicant did not dispute that the psychiatrist should not have been present, but subsequently requested that the trial judge recuse herself in light of the fact that the psychiatrist in question was expected to give important evidence for the Plaintiff later in the proceedings. The judge refused, and the Applicant sought leave to appeal from that refusal.

Held: granting leave to appeal, but dismissing the appeal

- An appeal lies from a trial judge's failure to recuse him or herself without the need for a formal order denying the request or any further order or direction that might form the basis of an interlocutory appeal: [40]-[42].
- Whether a fair-minded lay observer would reasonably apprehend bias on the part of a judicial officer must be considered in the context of the ordinary judicial practice of active case management. The expression of tentative views in the course of argument as to a matter on which parties are permitted to make full submissions will not alone manifest partiality or bias: [23]-[24], [46](xii).
- The fair-minded lay observer is taken to know the nature of a decision and the context in which it is made, but is not taken to have a detailed knowledge of the applicable law. He or she will not make snap judgments, and will assess the whole of the circumstances of a case rather than taking a short and emotional exchange out of context or weighing it in isolation. Subsequent statements by a judge, indicating that an earlier view was not final, will be relevant to the assessment of any impugned conduct or comments: [46].
- In this case, the fair-minded lay observer would have been cognisant of the fact that the trial judge was not ruling on the admissibility of evidence (on which full submissions would be made in due course); that the trial judge had responsibility, as part of active case management, for drawing the parties' attention to potential issues; and that if impressionistic views expressed at an early stage of proceedings as to a particular matter were wrong, then counsel could be relied upon to correct them: [50]

Equity: breach of confidence; commerce: restraint of trade

Agha v Devine Real Estate Concord Pty Ltd & Ors **[2021] NSWCA 29**

Decision date: 9 March 2021

Payne, White and McCallum JJA

Mr Agha was an employee and shareholder of Devine Real Estate, and subject to overlapping confidentiality and competition restraints contained within his shareholder and employment agreements. He and another employee, Mr Coombe, forwarded client lists to their personal email addresses. Mr Agha subsequently gave notice of his intention to sell his shares and resign, but had his employment terminated when his employer discovered the forwarding of client lists. Mr Agha and Mr Coombe both entered into employment contracts with a competitor and took steps to act for former clients of Devine Real Estate. The primary judge granted injunctions against Mr Agha to enforce the restraint of trade covenants and prevent the disclosure of confidential information, and declaratory relief against both men in respect of breaches of confidentiality and restraint of trade agreements. Both Mr Agha and Mr Coombe appealed, claiming *inter alia* (i) that Mr Coombe had not entered into any relevant contractual agreement that included a restraint of trade or confidentiality clause; (ii) that Mr Agha had not breached his contractual obligations of confidentiality; (iii) that the filing of the summons and tendering of evidence including the client lists in question mean that those lists ceased to be confidential; (iv) that the restraint of trade clauses in question were invalid.

Held: Allowing Mr Coombe's appeal, and substantially dismissing Mr Agha's appeal

- There was no evidence that Mr Coombe had entered into an employment agreement containing the relevant covenants. The extent of his collusion with Mr Agha to assiduously divert business from his employer could not support a finding that he entered into a contract precluding him from doing so: [92]-[98].
- Differences in the contractual obligations of confidentiality imposed on Mr Agha by the shareholder and employment agreements were inconsequential, as there was no suggestion of inconsistency [130]-[131]. Moreover, client lists would be protected in equity even in the absence of an express contractual restraint: [132]. Reading of the affidavit and tendering of the client lists as evidence did not place that information in the public domain, especially where orders were made preserving the confidentiality of certain evidence [134]-[136]. In any case, placing of the information in the public domain would not have relieved Mr Agha of his contractual obligations: [139].
- The restraint of trade clauses in question were reasonable for the protection of Devine Real Estate's interests: [164]-[167]. In particular, the period of restraint provided for in the shareholder agreement bore a clear rational connection to the time that it would take for Devine Real Estate, as the purchaser of the goodwill of Mr Agha's former business, to recover the purchase price: [161].

Courts: jurisdiction; Children's Court

***Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27**

Decision date: 10 March 2021

Basten, Leeming and McCallum JJA

The Applicant was an Aboriginal teenager facing criminal charges in the Children's Court. The Prosecution case was to involve footage of the Applicant being strip-searched following her arrest, which was also to be relied upon by the Defence to prove the unlawfulness of the search. The footage contained two short segments of sensitive material. The Applicant provided evidence that showing parts of a woman's body was considered women's business and, if conducted in the presence of men, would result in cultural shame and extreme distress. The Applicant sought orders that the matter be heard by a female magistrate and that no men be present for the playing of the footage. The Magistrate refused the application on the basis that the latter order, if made, would prevent certain male officers involved in the prosecution case from commenting on the footage. The Applicant sought review in the Supreme Court under s 53(3)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW) ('the Act'), which provides for appeals from interlocutory orders of the Children's Court. The primary judge held that the Magistrate's decision concerning the hearing of the matter by a female magistrate was not amenable to appeal, and further that the magistrate lacked power to make either of the orders sought. The Applicant sought leave to appeal from that decision.

Held: granting leave to appeal, but dismissing the appeal

- The application before the Magistrate was an application for a conditional permanent stay, and the refusal of such an application is an interlocutory order amenable to appeal under s 53(3)(b) of the Act: [43-]-[45], [82]-[83]. (Per Basten JA: the proposed order requiring the matter to be heard by a female magistrate concerned intra-curial arrangements and would only be open to challenge on limited grounds, where refusal of the application would fatally compromise the fair and proper administration of justice: [19]-[20]).
- The Children's Court has power, in an appropriate case, to order that a matter be heard by a magistrate of a particular sex: [25]-[26], [45], [117]-[119].
- The Children's Court has power, in an appropriate case, to order that certain evidence not be viewed by persons of a particular sex. The source of such a power may be found in s 8(1)(e) of the *Court Suppression and Non-publication Orders Act 2010* (NSW) or s 10 of the *Children (Criminal Proceedings) Act 1987* (NSW): [29], [31], [85].
- However, the Magistrate in this case did not refuse the application on the basis that he lacked power to make the orders sought, and so the appeal should be dismissed: [36], [41], [120].

Statutory interpretation: amendment and repeal

In the Matter of Richards Contracting Co Management Pty Ltd **[2021] NSWCA 34**

Decision date: 19 March 2021

Bathurst CJ, Bell P, Meagher and Payne JJA, Emmett AJA

Mr Zeko alleges that he was employed by Richards Contracting Co Management Pty Ltd ('the Company') for periods between 1974 and 1981, during which he was exposed to asbestos. He was certified as suffering from silicosis by the Medical Authority appointed under the *Workers Compensation (Dust Diseases) Act 1942* (NSW) in 2005. The Company was deregistered pursuant to the *Companies (New South Wales) Code 1981* (NSW) ('the Code') in 1984. The Company's workers compensation insurer became insolvent in the 1980's and has since been dissolved. The Insurers' Guarantee Fund (IGF), administered by the State Insurance Regulatory Authority (SIRA), exists to deal with claims against insolvent insurers. Mr Zeko sought reinstatement of the Company in order to obtain a judgment against it and then seek to recover the sum awarded in damages from the IGF. SIRA was joined to the proceedings before the Court of Appeal, but denied that the plaintiff was entitled to sue it directly. The Code was superseded by the *Corporations (New South Wales) Act 1990* (NSW) ('the 1990 Act'), s 85 of which provides that the Code continues to apply of its own force to matters arising before the commencement of the section. However, on 1 July 2008 the Code was repealed as redundant. Mr Zeko was unable to have the Company reinstated under the 1990 Act as the transitional provisions in the corporations law to which it gives effect only applied to companies incorporated before 1 January 1991 and in existence immediately prior to that date (which the Company, having been previously deregistered, was not). Mr Zeko contended that he had an accrued right to have the Company reinstated, which was preserved despite the repeal of the Code by reason of s 30(1)(c) of the *Interpretation Act 1987* (NSW).

Held: ordering that the company be reinstated pursuant to s 459(6) of the Code

- Though there could be no direct claim against SIRA, as entitlement to indemnification from the IGF depends on first establishing the liability of the insured employer, SIRA remains a proper party to proceedings in which a plaintiff's rights against the IGF will be established: [49], [52].
- Mr Zeko had an accrued right to seek the reinstatement of the Company as at the date of repeal of the Code: [109]. This right arose immediately on deregistration of the Company, or, at the latest, when plaintiff's claim against the Company had crystallised (no later than 2005): [102]. The right in question is more than a mere right to approach the Court for the exercise of a discretion in the plaintiff's favour, despite the Court retaining a residual discretion to refuse reinstatement: [104], [107]. As such, the Court retains the power to order the Company's reinstatement by virtue of s 30(1)(c) of the *Interpretation Act*, which power also extends to preserving the means of enforcing the accrued right, including necessary extensions of time: [109], [114].

Australian Intermediate Appellate Decisions of Interest

Defamation: qualified privilege; parliamentary privilege; malice

***Leyonhjelm v Hanson-Young* [2021] FCAFC 22**

Decision date: 3 March 2021

Rares, Wigney and Abraham JJ

Mr Leyonhjelm, while a Senator in 2018, responded to an interjection by Senator Hanson-Young in the Senate Chamber with the comment "you should stop shagging men, Sarah". Mr Leyonhjelm claimed on multiple occasions, constituting the four publications complained of in the defamation proceedings below, that Senator Hanson-Young had said words to the effect of "all men are rapists". The primary judge found that Mr Leyonhjelm honestly but mistakenly believed this. Significantly, he did not claim to remember the actual words spoken. There was no challenge to the primary judge's finding that the imputations complained of were both conveyed and defamatory. Mr Leyonhjelm appealed against the findings in relation to Parliamentary privilege and the defence of qualified privilege.

Held: dismissing the appeal

- The primary judge did not err in receiving and considering evidence of what was said in the Senate Chamber: [29], [55], [237], [255], [357], [385]. Section 16 of the *Parliamentary Privileges Act 1987* (Cth) does not prevent evidence being adduced to prove the fact of what was said in Parliament: [44], [47], [364]. The relevant question is whether evidence or submissions are made or adduced for one or more of the prohibited purposes listed in s 16(3)(a)-(c): [222], [359], [377]. The evidence was adduced to determine whether Senator Hanson-Young said words to the effect of those attributed to her, and to determine whether any issue of parliamentary privilege arose: [53], [227], [230]. As the evidence established that no such words were spoken, no question of parliamentary privilege could arise: [232]-[233]. The mere possibility of evidence being used for a prohibited purpose is irrelevant to its admissibility for a non-prohibited purpose: [251].

- The primary judge did not err in rejecting the qualified privilege defence on the basis that Mr Leyonhjelm's conduct was unreasonable: [298], [304]-[305], [407]. The relevance of direct perception to the need to take steps to verify the accuracy of a proposed account was limited in circumstances where Mr Leyonhjelm could not be confident of having heard the interjection correctly: [267]-[270], [408]. The political context of the attack did not make the otherwise unreasonable conduct reasonable: [300]. (Rares J in dissent: [84], [94], [101]).

- The primary judge did not err in making a finding of malice: [318], [438]. The intention of shaming Senator Hanson-Young sexually or suggesting promiscuity was clearly relevant to a finding of malice: ([439]). Neither the parallel pursuit of political objectives nor an honest belief in the truth of what was claimed necessarily negated such a finding: [322], [444]. (Rares J in dissent: [136]).

Administrative law: statutory interpretation

***Thayli Pty Ltd v Commissioner of Police* [2021] WASCA 46**

Decision date: 19 March 2021

Murphy, Mitchell and Beech JJA

Thayli Pty Ltd ('Thayli') operates a shooting range open to members of the public. Section 8(1)(m) of the *Firearms Act 1973* (WA) ('the Act') provides that a person may use a firearm owned by an approved club or organisation without a licence "on an approved range that is properly constructed and maintained". "Approved" is defined in the Act to mean approved by the Commissioner of Police. Section 20(1)(ac) of the Act provides that, where satisfied that to do so is in the public interest, the Commissioner may impose reasonable restrictions on a licence, permit or approval granted under the Act. In 2018, the Commissioner varied the conditions on the approval of Thayli's range, imposing conditions related to the conduct and operation of the range, as distinct from conditions related solely to its construction and maintenance. Thayli applied for review of the decision by the State Administrative Tribunal, which determined that the Commissioner only had power to impose conditions related to the construction or maintenance of a range. The Commissioner successfully appealed from the Tribunal's decision to the Western Australian Supreme Court, which held that the Tribunal had erred in law, and that the Commissioner may, when satisfied that it is in the public interest to do so, impose reasonable conditions on the approval of a shooting range without any limitation of the kind proposed by Thayli. Thayli appealed.

Held: Dismissing the appeal

- In the absence of an express provision empowering the Commissioner to issue approvals, the power to approve a range is inherent in and conferred by s 8(1)(m): [20]-[23]. The power to impose conditions on an approval (in s 20(1)(ac)) is conferred in broad terms: [36]. The purpose of the Act is the protection of the public through the regulation of firearm use, so that it would be incongruous if conditions could not be directed to the safe operation of a range: [37]-[38]. Thayli's proposed construction would result in the unlikely scenario that a condition could require the erection of a sign saying that certain dangerous conduct was prohibited but could not actually prohibit that conduct: [39]. The only relevant limitation is the requirement that any conditions be reasonable and that the Commissioner be satisfied that they are in the public interest: [43].

- While s 34(2)(h) of the Act provides that the Governor may make regulations in respect of "the construction and conduct of shooting galleries and ranges", the administrative power to impose conditions on a range approval is unconstrained by this (unexercised) delegated legislative power: [44]. The principle of statutory construction, that a general power cannot be used to do that which is the subject of a specific power to which limitations or qualifications apply, is not engaged by the "limitation" on the s 34 power to the effect that regulations concerning the conduct of ranges can only be made by the Governor: [45]-[47].

Asia Pacific Decision of Interest

Administrative law: judicial review

Small Scale Industrial Manufacturers Association (Regd.) v Union of India & Ors **Supreme Court of India No. 476/2020**

Decision date: 23 March 2021

Bhushan, Subhash Reddy and Shah JJ

On 27 March 2020 the Reserve Bank of India announced a suite of relief measures in response to the COVID-19 pandemic, including a three month moratorium for all term loan payments due between 1 March and 31 May 2020. For borrowers taking advantage of the moratorium, interest would continue to accrue on the outstanding portion of any loan during the moratorium period. Various trade associations petitioned the Supreme Court seeking judicial review of the relief measures and a range of orders directing the Union of India, the Reserve Bank of India and others to (i) direct the waiver of compound interest during the moratorium period, (ii) direct the waiver of all interest during the moratorium period, (iii) extend the moratorium period, and (iv) formulate various sector-specific economic relief packages.

Held: Dismissing the petitions except in relation to the waiver of compound interest

- The Court will only interfere with a policy decision where it is "patently arbitrary, discriminatory or mala fide" ([14.3]) or shown to be contrary to some statutory provision or to the Constitution: [14.4]. Even where the Court would strike down a decision as wholly unreasonable or in violation of some statute or the Constitution, it would be hazardous for the Court to venture to lay down alternative policy decisions: [14.5]. Orders directing a waiver of interest during the moratorium period, extensions of the moratorium period or particular sector-specific relief packages all concern policy decisions in which the Court will not intervene: [27].

- However, the situation with respect to the charging of compound interest during the moratorium period is different: [31]. Since the lodging of the petitions, the Government had provided for the waiver of compound interest for loans up to 200 million rupees in a few specific categories of term loans. The waiver applied by reference to the aggregate of all loan facilities with a particular lending institution and to the sanctioned limit of a loan. However, no justification was shown for these restrictions on the waiver, which were both arbitrary and discriminatory: [31]. Moreover, compound interest on a term loan is chargeable on deliberate default of a borrower and so is appropriately characterised as penal interest, such that it would be wholly unreasonable to charge compound interest in respect of non-payment during the moratorium period: [31.1].

- It is ordered that there shall not be any charges of compound interest in respect of the moratorium period, and that any amount already recovered under that head is to be refunded to borrowers: [32].

International Decision of Interest

Constitutional law: federalism

***References re: Greenhouse Gas Pollution Pricing Act* 2021 SCC 11**

Decision date: 25 March 2021

Wagner CJ, Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ

In 2018 the Canadian Parliament passed the *Greenhouse Gas Pollution Pricing Act* ('*GGPPA*'), prescribing GHG pricing mechanisms to come into effect in a province if the Governor in Council is satisfied that the province in question has not enacted sufficiently stringent GHG pricing mechanisms. The constitutionality of the *GGPPA* was challenged in the Alberta, Ontario and Saskatchewan Courts of Appeal and subsequently in the Supreme Court.

Held: Upholding the constitutionality of the *GGPPA*

- The Parliament has power to enact the *GGPPA* as a matter of national concern under the 'Peace, Order and Good Government' clause of s 91 of the Canadian Constitution: [4]. The law should be characterised at a high level of specificity, as a law setting minimum national standards of GHG price stringency in order to reduce national emissions: [57]. The mischief to which the *GGPPA* is directed is the possibility of some provinces failing to implement sufficiently stringent GHG pricing schemes ([61]) with the legislative mechanism designed so as not to displace provincial choice and design of pricing instruments generally: [65].

- The federal role in implementing minimum national standards is qualitatively different from matters of provincial concern exclusively assigned to the provincial legislature under the Constitution: [179]. The Provinces are constitutionally incapable of establishing a binding outcomes-based minimum legal standard ([181]-[182]) and one Province's failure to adequately address GHG emissions would lead to significant extraprovincial harm: [187]. The notion that no individual province's GHG emissions could have a tangible impact on other provinces is rejected, by reference, *inter alia*, to the reasoning in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7: [189]. The proposed federal matter relates only to the risk of non-cooperation between the provinces and impinges on provincial jurisdiction only to the limited extent necessary to address that risk: [195], [206].

- Brown and Rowe JJ (in dissent): the subject matter of the *GGPPA* falls squarely within provincial jurisdiction. That the Act's structure and operation is premised on provincial legislatures having power to enact equivalent schemes is fatal to its constitutionality: [302]. Characterising an Act by reference to the legislative means employed is inappropriate where that means is uniquely federal: [329]. Such an approach would allow a device of "minimum national standards" to artificially expand federal legislative authority in areas of provincial jurisdiction, resulting in an unacceptable "supervisory federalism": [358], [570], [584].