Court of Appeal
Supreme Court
Sydney

Decisions of Interest

22 March 2021 – 4 April 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

Administrative law: judicial review; inquiry into criminal convictions

***Folbigg v Attorney General of New South Wales* [2021] NSWCA 44**

Decision date: 24 March 2021

Basten, Leeming and Brereton JJA

Ms Folbigg was convicted in 2003 of one count of manslaughter and three counts of murder in relation to the deaths of her four children, aged between 19 days and 18 months, between 1989 and 1999. In 2018 she petitioned the Governor under s 76 of the *Crimes (Appeal and Review) Act 2001* (NSW) seeking an inquiry into her convictions. An inquiry was conducted by a judicial officer, the primary focus of which was new medical evidence which, Ms Folbigg submitted, suggested plausible natural causes of death in each of her children. In 2019 the judicial officer sent his Report of the inquiry to the Governor, which concluded that there had been no miscarriage of justice and was no reasonable doubt as to Ms Folbigg's guilt. Ms Folbigg sought judicial review of the judicial officer's determinations in the Report.

Held: dismissing the summons seeking judicial review

- The judicial officer's task in conducting the inquiry was to consider the evidence at the trial and the conduct of the trial, in light of the further evidence and submissions received in the inquiry, in order to determine whether there was a reasonable doubt as to Ms Folbigg's guilt: [96]-[98]. The conclusions of the report could only be overturned on the basis of legal error, it being no part of the Court's function in review proceedings to form its own view as to the existence of a reasonable doubt: [9]. Potential legal errors would include incorrect identification of the legal principle to be applied, procedural unfairness or manifest unreasonableness: [19]-[23].

- There was no error of principle in the judicial officer's assessment of the evidence in the inquiry; that assessment involved a holistic, rather than a staged, approach to the evidence, with the officer's conclusions depending on a synthesis of competing and complicated factors: [104]. The officer did not apply the discredited "Meadow's Law" that three infant deaths in one family is a homicide until proven otherwise: [54]. The medical evidence, which was the focus of the inquiry, revealed no genetic element common to all four children. One variant in a gene associated with cardiac conditions was found in both daughters and Ms Folbigg, but the absence of any phenotypic presentation consistent with the associated conditions indicated a non-pathogenic variant. A 2019 paper on the subject did not significantly affect this position: [84]-[89].

- Ms Folbigg was not denied procedural fairness in any aspect of the judicial officer's conduct of the inquiry. Many of the matters complained of either could have been raised at the inquiry but were not or, upon proper consideration of the judicial officer's Report, lacked any factual basis: [109], [113], [116], [117], [134]-[136], [140], [149], [153]-[154], [156], [158]-[159].

Equity: injunctions; Private international law: anti-suit injunctions

Qantas Airways Ltd v Rohrlach **[2021] NSWCA 48**

Decision date: 26 March 2021

Bathurst CJ, Bell P and Brereton JA

Mr Rohrlach was employed by Qantas Airways in Singapore. The employment agreement contained post-employment restraints that would be engaged by Mr Rohrlach terminating the agreement. The agreement was governed by the laws of Singapore, with the parties agreeing "to submit to the exclusive jurisdiction of the Courts of Singapore". It was also stated to constitute the parties' entire agreement, subject to modification by subsequent express written agreement. In accordance with the terms of the employment agreement, Mr Rohrlach was relocated to Japan, agreeing to the terms of an assignment letter and attached deed poll. The deed poll was governed by the laws of Japan and contained separate post-employment restraints, stated in the assignment letter to operate independently of the employment agreement restraints. The deed poll contained no jurisdiction clause, exclusive or otherwise, and no entire agreement clause. Mr Rohrlach gave notice of his resignation in late 2020 and later sought to commence employment with a competitor in apparent breach of both sets of post-employment restraints. Pre-empting threatened actions by Qantas, he commenced proceedings in Singapore seeking declarations that the restraints were void and unenforceable. Qantas then commenced proceedings in NSW to enforce the deed poll restraints, also seeking an anti-suit injunction restraining the continuation of the Singapore proceedings and an anti-anti-suit injunction restraining Mr Rohrlach from seeking an anti-suit injunction in Singapore restraining the NSW proceedings. The Primary Judge held that Qantas' claim in the NSW proceedings should be stayed by reference to the exclusive jurisdiction clause in the employment agreement. Qantas appealed.

Held: granting leave to appeal and dismissing the appeal

- Whether Qantas' claim in respect of the deed poll restraints was caught by the employment agreement's exclusive jurisdiction clause is a matter of the proper construction of the latter clause, there being no inconsistent jurisdiction clause or entire agreement clause in the deed poll or assignment letter: [56]-[58].

- The exclusive jurisdiction clause must at least have been intended to apply to disputes in connection with the employment agreement. The entire agreement clause and commercial common sense both support this construction: [67]-[68], [86]. The parties would not have intended that the jurisdiction clause should cease to apply if Mr Rohrlach was relocated as contemplated in the employment agreement, the terms of which he continued to be subject to: [72], [91].

- Though Qantas only sought to rely on the deed poll restraints, the dispute in question was sufficiently connected with the employment agreement to the extent that it arose, and the deed poll restraints were only engaged, following Mr Rohrlach's termination of the employment agreement as contemplated in the terms of that agreement: [73]-[74], [91]-[93].

Local government: powers, functions and duties; rates and charges

***Mangoola Coal Operations Pty Ltd v Muswellbrook Shire Council* [2021] NSWCA 46**

Decision date: 25 March 2021

Bell P, Macfarlan and Brereton JJA

Mangoola Coal owned land within the Muswellbrook Shire Council. Though previously categorised for rating purposes under the *Local Government Act 1993* (NSW) as "farmland", the Council re-categorised the land in question for the 2016/17 and 2017/18 financial years as "mining" land on the basis that its dominant use had changed during that period. The land in question was adjacent to an open-cut coal mine. It was subject to an access licence agreement with a cattle-grazing enterprise, but grazing activities in the relevant years had been reduced or stopped entirely due to drought. Parts of the land were subject to easements for the purpose of supplying water and electricity to the adjacent mine. Other parts of the land were used as Aboriginal Cultural Heritage Offset and Habitat Enhancement Offset areas, as required by conditions of the mine's approval. The land also had some environmental monitoring equipment on it and was intermittently used for mining exploration activities. Mangoola Coal appealed the Council's categorisation decision to the Land and Environment Court, and then to the Court of Appeal.

Held: allowing the appeal, and remitting the proceedings to the Land and Environment Court for determination according to law

- In considering grazing activities on the land, the relevant years could not be looked at in isolation. A hiatus in grazing activity or some other use is not the same as abandonment of that use of the land. Consideration of the relevant years in their context would have revealed that grazing was intended to be resumed after the drought, and that the associated farming use had accordingly not ceased: [40]-[43].

- In considering the easements over the land, it was an error to focus on the significance of the easements to the adjacent mine rather than on the nature and extent of their use and the associated impact on the use of the land in question. While the use of the easements constituted a use of the land for mining purposes, that use had minimal impact on the use of the land for grazing. The same was true with respect to use of the land for environmental monitoring equipment or exploration activities: [52]-[55], [62]-[63].

- Although the existence of the offset areas was a condition of the mine's approval, their use was for purposes that were the antithesis of a mining use: [60]. The purpose of an acquisition does not cause a change in use of the land acquired. *Peabody Pastoral Holdings Pty Ltd v Mid-Western Regional Council* [2013] NSWLEC 86 stands for the proposition that the mere holding of land for mining purposes is not a use of that land for a mine, so that the holding of the lands designated as offset areas, as a condition of the mine's approval, did not make the use of that land "for a mine": [70]-[73].

Contract: contractual construction

***AMA Group Limited v ASSK Investments Pty Limited* [2021] NSWCA 45**

Decision date: 26 March 2021

Bell P, Leeming JA and Emmett AJA

AMA Group Ltd ('AMA') and ASSK Investments Pty Ltd ('ASSK') negotiated and entered into a "Binding Heads of Agreement" ('HOA') by which they agreed to "enter into Business Sale Agreements subject to the terms and conditions set out in this Heads of Agreement". Clause 6 of the HOA provided that ASSK, as vendor of certain businesses, was to make available to AMA all things necessary for AMA to carry out comprehensive due diligence on the businesses, and that "subject to the above, the transaction will be recorded in a Business Sale Agreement". Clause 7 was headed "Conditions Precedent" and listed, at 7(b), "all necessary third party consents, authorisations and approvals being obtained (including the Purchaser's Board approval)". Only AMA had a right to waive any of the Conditions Precedent. Clause 9 provided that AMA could, at its discretion, insert further warranties which it (acting reasonably) considered necessary by reason of its due diligence enquiries. Following the conclusion of its due diligence process, AMA concluded that the deal did not meet the requirements for board approval and accordingly terminated the HOA. ASSK successfully sought an order for specific performance of the HOA. AMA appealed.

Held: allowing the appeal

- In construing cl 7(b), "third party" must be taken to apply to "consents" and possibly "authorisations", but cannot be taken to apply to "approvals" in light of the express reference to approval by AMA's Board (which was not a third party). The phrase "all necessary" is nonetheless distributive, applying to approval by AMA's Board consistently with the whole of cl 7(b) constituting a condition precedent. Clause 7(b) is a condition precedent to the performance of the obligations contained in the HOA, rather than to the formation of an agreement in the *Masters v Cameron* (1954) 91 CLR 353 sense: [47](i)-(iii).

- It can be inferred from cl 6 that comprehensive due diligence was still to take place when the parties entered into the HOA, and a construction that would involve a publicly listed company committing itself to a $6 million acquisition in those circumstances would be contrary to business common sense: [47](v).

- The existence of other subclauses in cl 7 that could not rationally be viewed as conditions precedent to the sale transactions does not undermine the conclusion that cl 7(b) is such a condition: [47](vii). Provision in cl 9 for amendment of warranties following due diligence does not change that position, as such amendment could not alter the conclusion, if it were reached, that the businesses were not worth the purchase price: [56]. Clause 7(b) should not be construed as permitting the capricious withholding of approval so as to render the consideration moving from AMA illusory: [58]-[61].

Australian Intermediate Appellate Decisions of Interest

Administrative law: judicial review; jobkeeper eligibility

Commissioner of Taxation v Apted **[2021] FCAFC 45**

Decision date: 24 March 2021

Allsop CJ, Logan and Thawley JJ

Mr Apted recommenced business activities, following a period of retirement, in the second half of 2019. On 31 March 2020 he applied to have a previously cancelled Australian Business Number (ABN) reinstated, which was done with a date of effect of 31 March. In April 2020, Mr Apted applied for a jobkeeper payment under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth). Rules made under that Act (the 'CERP Rules') set out eligibility criteria for the payments at s 11, including, at subs (3), that an "entity is *not* entitled to a jobkeeper payment … unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner)". Mr Apted's initial application for a jobkeeper payment was rejected. He then successfully applied to have the date of effect of the reinstatement of his ABN changed to 1 July 2019. Nonetheless the Commissioner again rejected Mr Apted's jobkeeper application, on the basis that he did not have an ABN on 12 March 2020, and declined to exercise the "later date" discretion. It was not in dispute that Mr Apted had been operating a business on 12 March 2020. Mr Apted applied to the AAT for merits review under s 13 of the CERP Rules and obtained a decision in his favour. The Commissioner appealed.

Held: dismissing the appeal

- Whether a person had an ABN on 12 March 2020 is to be determined by asking what would have been shown if the register had been inspected on that date, not whether a person has an ABN with a date of effect including that date. This point-in-time construction is supported by the definition of ABN in the CERP Rules (referring to an ABN shown in the register) and by further requirements in s 11 also reflecting a point-in-time test: [10], [76]-[84].

- The right to merits review under s 13 of the CERP Rules extends to review of a decision not to exercise the "later time" discretion, as that decision forms part of a determination of ineligibility as described in s 13(2)(a): [18]-[20], [94], [105]. Regardless, by s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) the Tribunal was empowered to exercise any discretion conferred on the Commissioner: [89]-[91]. Parliament is unlikely to have intended the various undesirable consequences of the Commissioner's proposed construction: [106].

- The ability of the Commissioner to issue guidelines does not affect the nature of the discretion to be exercised: [109]. The reason provided by the Commissioner for declining to exercise the discretion – that on 12 March 2020 Mr Apted did not have an ABN – was precisely the foundation for the exercise of the discretion and no proper basis for refusing to exercise it: [110]. It was not unreasonable for the AAT to exercise the "later time" discretion in Mr Apted's favour: [23], [112].

Contract: prevention principle

Bensons Property Group P/L (ACN 063 470 833) v Key Infrastructure Australia P/L (ACN 154 574 937) **[2021] VSCA 69**

Decision date: 24 March 2021

Niall, Emerton and Sifris JJA

Key Infrastructure Australia ('KIA') entered into a Development Management Agreement ('the DMA') with Bensons Property Group ('Bensons') in which KIA undertook to acquire planning permits from Council by a 31 December 2016 sunset date in exchange for a $2M development management fee. The DMA provided that Bensons could elect to make an application to the Victorian Civil and Administrative Tribunal ('VCAT') in respect of a council decision, but was not obliged to do so. By 18 May 2016 it was clear that Council was refusing to decide the application. Bensons wrote a letter to KIA stating that it would not apply to VCAT and claiming (incorrectly) that any application by KIA would constitute a breach of the DMA. On the same day, KIA had already lodged an application with VCAT, which was subsequently withdrawn in response to the letter. It was reinstated on 5 July, with VCAT on 22 December directing Council to issue the permits. On 6 February 2017, after the sunset date, Council issued the pemits. KIA sought payment of the balance of the development management fee. Bensons resisted, on the basis that the permits had not issued in time. The primary judge held that the 22 December VCAT orders did not constitute the issue of the permits as required by the DMA, but that KIA had been prevented from securing the permits in time by the 18 May letter, with Bensons therefore prevented from relying on the time limit. Bensons appealed.

Held: Allowing the appeal

- The prevention principle is not a freestanding legal principle. It only applies by reference to contractual obligations of the parties: [101]. Only breach of a contractual term can give rise to potential application of the principle: [114]. A party relying on the prevention principle must show: (i) wrongful conduct (breach or anticipatory breach of a contractual duty) and (ii) resulting prevention in the performance of a term: [111].

- The duty to cooperate, similarly, is not freestanding but only arises by implication and must give way to express terms: [107]-[108]. It is not a duty to act in the other party's best interests, but to afford the other party the benefit of what he or she has contracted for: [119]. It is not limited to a negative covenant not to engage in conduct which would render performance of an obligation impossible; the test of impossibility sets the bar too high: [125]-[127]. The 18 May letter did not amount to a breach of the duty to cooperate, nor did it prevent KIA from performing its obligation: [131], [183]. There is no duty to correctly construe the terms of the contract: [154]. Rather than causing KIA to proceed on the mistaken basis that the VCAT route was unavailable, the letter prompted a commercial decision to withdraw the application: [134], [161], [162]-[168], [174]. No case for prevention based on repudiation was advanced at trial: [157], [159], [180].

Asia Pacific Decision of Interest

Courts and judges; human rights; gender discrimination

Aparna Bhat v State of Madhya Pradesh **Supreme Court of India No. 329/2021**

Decision date: 18 March 2021

Khanwilkar and Bhat JJ

In a sexual harassment matter the High Court of Madya Pradesh imposed bail conditions requiring the accused to visit the complainant at her home, to have her tie a Rakhi band (a ritual symbolising brotherhood) and to make various gifts to her and her child. The imposition of these and similar conditions in cases concerning sexual offences against women were challenged in the Supreme Court. Directions were sought that all High Courts and trial courts refrain from making observations or imposing conditions in rape and sexual assault cases, at any stage of proceedings, that trivialise the trauma of survivors or adversely affect their dignity. Further directions were sought concerning gender sensitisation of the Bar and Bench. The Attorney-General of India additionally submitted, in support of the appeal, that bail conditions should not mandate or even permit contact between an accused and a complainant; that they must seek to protect a complainant from any harassment by the accused; that they must be free from stereotypical or patriarchal notions about women and their place in society, and kept strictly in accordance with the requirements of the Code of Criminal Procedure ('CrPC'); and that in adjudicating sexual offences the courts should not suggest or entertain any step towards a compromise of marriage between a complainant and the accused, this being beyond their powers and jurisdiction.

Held: Allowing the appeal and making further directions

- The incidence of sexual offences in India has shown no significant decline, and the victims of these offences face formidable challenges: [20]-[25], [30]. Bail conditions imposed under the CrPC must be closely linked to the advancement of the trial process and the fairness or propriety of the investigation or trial: [26]-[27], [44](d). The role of all courts, at all stages of a criminal proceedings, is to ensure that a complainant can rely on judicial impartiality and neutrality: [31], [44](g). Judgments and judicial language have significance beyond the resolution of a particular dispute, and courts should especially desist from expressing any gendered stereotypes, using language or reasoning that tends to trivialise sexual offences, or imposing bail conditions that tend to diminish the harm suffered by a complainant or risk exposing her to secondary trauma: [32], [42], [45]. Rakhi tying as a bail condition, symbolically transforming a molester into a brother by judicial mandate, has the wholly unacceptable effect of minimising the offence of sexual harassment, with the same being true of other proposed compromises involving promises of marriage: [33].

- Additional orders were made requiring the preparation of gender sensitisation materials for the National Judicial Academy and Indian LLB programs: [46]-[48].

International Decision of Interest

Courts: jurisdiction

***Ford Motor Co v Montana Eighth Judicial District Court* 592 US ___ (2021)**

Decision date: 25 March 2021

Roberts CJ, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch and Kavanaugh JJ

Product liability actions were brought against Ford Motor Co ('Ford') in the Supreme Courts of Montana and Minnesota by residents of those States in relation to car accidents in each State. Ford is headquartered in Michigan and incorporated in Delaware, but sells, services and markets its products across the US. Ford sought dismissal of the Montana and Minnesota actions for want of personal (specific) jurisdiction. It argued that, as the vehicles in each case were designed, manufactured and originally sold outside of the forum States, there was no causal link between the claims and Ford's activities in each State. Both States' Supreme Courts rejected Ford's arguments. Ford appealed to the Supreme Court.

Held: Dismissing the appeal

- Ford's activities in each State included advertising, selling and servicing vehicles of the same kind as those alleged to have malfunctioned. That a particular vehicle was designed, manufactured and originally sold elsewhere makes no difference: 1-2. Specific jurisdiction depends on a defendant having such contacts within the forum State that maintenance of the suit is reasonable in the context of federalism and "does not offend traditional notions of fair play and substantial justice": 4. This requires that a defendant has purposefully availed itself of the privilege of conducting business in a State, and that relevant claims "arise out of or relate to" those activities: 5-6. These rules reflect principles of interstate federalism, reciprocity between a defendant and a State, and "fair warning" to a defendant when he or she may become subject to a State's jurisdiction: 6-7. Requiring a *causal* link between a defendant's in-State activities and a claim finds no support in the case law, and indeed the proposition that a claim must "arise out of *or relate to*" the defendant's contacts in the forum includes a non-causal limb: 8-9. In any case it is not clear that such a causal link would not be made out in this case: 13-14. Ford's activities in each State are sufficiently related to the claims to support specific jurisdiction: 18.
- [Alito, Gorsuch and Thomas JJ, concurring (pinpoints refer to separate numbering within each judgment)]: The majority parses a judicial formulation of the test for specific jurisdiction as though it were statute, creating a new non-causal limb to the sufficient connection test: Alito J at 2; Gorsuch J at 2. The innovation is unnecessary to deal with the facts of this case: Alito J at 3, Gorsuch J at 4. It is a causal requirement that would most plausibly limit the otherwise all-encompassing "relates to" formulation: Alito J at 3, Gorsuch J at 3. The "purposeful availment" approach to specific jurisdiction is increasingly irrelevant and in need of reformulation: Alito J at 1, Gorsuch J at 9, 11.