Court of Appeal
Supreme Court
Sydney

Decisions of Interest

26 April 2021 – 9 May 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: procedural fairness; judicial intervention

Manly Fast Ferry Pty Ltd v Wehbe **[2021] NSWCA 67**

Decision date: 23 April 2021

Gleeson and Leeming JJA, Simpson AJA

Mr Wehbe was injured when a ferry operated by Manly Fast Ferry Pty Ltd ('MFF') crashed. MFF admitted liability, with damages the only issue at trial. Mr Wehbe claimed that the injury prevented him from continuing his occupation as a tiler, and that he had developed a "compensatory" injury to his right knee as a result of the injury to his left knee. The parties' experts disagreed fundamentally, with MFF's expert effectively suggesting that Mr Wehbe was malingering and disputing the scientific basis of Mr Wehbe's expert's claim that an injury to one lower extremity can lead to a compensatory injury in the other extremity. The primary judge ultimately rejected MFF's expert evidence and awarded damages accordingly. MFF appealed, alleging denial of procedural fairness by reason of the frequency and nature of the primary judge's interventions in the cross-examination of the experts.

Held: Gleeson JA and Simpson AJA dismissing the appeal (Leeming JA in dissent)

- Denial of procedural fairness based on excessive judicial cross-examination should not be conflated with apprehended or actual bias: [164]-[166]. Principles from criminal jury trials apply to civil trials before a judge as follows: excessive judicial intervention may give rise to a real risk that a trial has been unfair when it either (i) impedes the presentation of a party's case, (ii) interferes with the ability of a witness to give his or her account of the relevant events, or (iii) deflects the judge from an objective assessment of the material presented by counsel: [168].

- These principles must be applied in the context of the pre-trial exchange of evidence: [183]. The experts had met in a conclave and had the opportunity to respond to each other's views, and reduced their primary evidence to reports put before the trial judge. There was no question of interruption of the flow of evidence or interference with a witness's capacity to explain his or her position. No issue of assessment of demeanour or credibility arose: [185], [208]. While the primary judge's reasons may have unfairly characterised the Appellant's expert evidence, this did not amount to evidence of self-persuasion: [76], [217].

- Leeming JA, in dissent: irrespective of the relevance of assessing demeanour, excessive judicial intervention raises issues of institutional values and the role of the judge: [118]. There is an important distinction between intervention during submissions and during the giving of evidence: [121]. Given the significance of competing expert evidence to this case, any judicial cross-examination should have been limited: [136]. The fact that it was not takes on greater significance in circumstances where the judge's reasons for rejecting MFF's expert evidence did not fairly summarise responses to judicial questioning: [146]-[148], [156].

Contract: construction contract; NSW government general conditions

***Lahey Constructions Pty Ltd v The State of New South Wales* [2021] NSWCA 69**

Decision date: 26 April 2021

Bathurst CJ, Bell P and Gleeson JA

Lahey Constructions Pty Ltd ('Lahey') entered into contracts with the NSW Department of Education ('the Department'), which provided for expert determination of claims. Clause 71.8.2 of the incorporated NSW Government General Conditions of Contract prohibits litigation in respect of matters determined by an expert unless the determination requires one party to pay the other an amount in excess of $500,000, calculated without regard to any amount paid pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW)" (the SoP Act). Lahey raised numerous claims for determination. While the expert determinations were pending, Lahey also made claims under the SoP Act. These were adjudicated, and payments made to Lahey by the Department, before the expert ultimately determined that Lahey was entitled to significantly lesser sums, with the Department thus entitled to repayment of the difference. Proceedings brought by Lahey in respect of matters determined by the expert were summarily dismissed on the basis of cl 71.8.2. The primary judge calculated the relevant sum by disregarding in their entirety all claims in respect of which the amount determined by the expert had already been paid pursuant to the SoP Act, only considering claims in respect of which the expert had determined that an amount remained payable by the Department to Lahey. Lahey sought leave to appeal.

Held: Granting leave to appeal and allowing the appeal

- The text of cl 71.8.2 requires "any" payment made pursuant to the SoP Act to be disregarded, not only some or part of such payments. On a literal reading the clause refers to the amount to which the expert determined that Lahey was entitled under the contract, irrespective of whether part or all of that sum had already been paid pursuant to the SoP Act: [51]. As payments under the SoP Act are only provisional and preserve the parties' rights under the contract ([53]) the objective purpose of cl 71.8.2 requires that the ability to litigate a matter be determined by reference to a party's entitlement under the contract, as determined by the expert, unaffected by any provisional payments: [56]. It was irrelevant that Lahey had had the benefit of any moneys paid pursuant to the adjudication: [61].
- Moreover, the construction adopted by the primary judge would create a perverse incentive for a builder not to make progress claims under the SoP Act: [6], [64]. It would give cl 71.8.2 a capricious operation, potentially to the detriment of the Department, depending on the differences between adjudicated amounts and those in an expert determination. This would run contrary to the presumed intention of the parties to create a commercial result: [7]-[8], [36].

Contract: successor clause; reflective loss principle

***Central Coast Council v Norcross Pictorial Calendars Pty Ltd* [2021] NSWCA 75**

Decision date: 7 May 2021

Bathurst CJ, Macfarlan and Gleeson JJA

In 2002 Norcross Pictorial Calendars Pty Ltd ('NPC') and the Central Coast Council ('the Council') entered into a joint venture agreement ('JVA') for the development of land owned by the Council. NPC was to construct a car park on part of the land, and to develop the adjoining land ('the PTL land') into a multi-storey building. As part of the arrangement, the Council granted an option to NPC or its nominee to purchase the PTL land for nominal consideration. The option was exercised by PTL Land Pty Ltd ('PTL') as NPC's nominee. Under the JVA, the Council had agreed to indemnify NPC for any loss incurred in respect of contamination on the land, and to grant such easements as requested by NPC acting reasonably. The land was later found to be contaminated, and when PTL requested an easement over the car park land the Council declined to grant it. PTL sued, claiming the costs of remediation and damages for the Council's refusal to grant the easement. The primary judge awarded damages to PTL, finding it to be the successor to NPC under cl 19.9 of the JVA, which provided that rights and obligations under the agreement were binding upon any successor to a party, but expressly prohibited the assignment of obligations. The Council appealed, and NPC cross-appealed

Held: allowing the appeal

- The phrase "successor to a party" in cl 19.9 does not include PTL as nominee under the option agreement: [56]. The JVA did not contemplate NPC's obligations being carried out by any other entity: [59]. It is unlikely that the Council intended to confer rights and obligations on an unknown party, via the exercise of the option, at a point when most of the obligations of NPC were yet to be performed: [61]. The option agreement was a stand-alone agreement, with the rights and obligations as between PTL and the Council governed by the separate contract for purchase of the land. PTL as nominee only succeeded to NPC's rights under the option agreement: [62]-[64]. The alternative construction, contrary to business common sense, would leave the Council with no say in the identity of the entity undertaking the development: [72].

- Recovery of PTL's losses by NPC was not precluded by the reflective loss principle, which does not apply where the company itself has no cause of action: [103], [110], [120]. However the loss claimed by NPC, being the diminution in value of its interest in PTL, was not covered by the indemnities: [122]-[125]. It could not be said that the object of the transaction was to benefit a third party and that the anticipated effect of a breach would be to cause loss to that party because it was not contemplated that an entity other than PC would carry out work on the project. Moreover, the principle from *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 allowing recovery in those circumstances has not been accepted as part of Australian law: [152]-[153].

Evidence: business records; Torts: deceit; misleading and deceptive conduct

***Maaz v Fullerton Property Pty Ltd* [2021] NSWCA 79**

Decision date: 7 May 2021

Basten, Gleeson and Brereton JJA

Mr Maaz was the sole director of Project.Built Pty Ltd ('the builder'), a company contracted by Fullerton Property Pty Ltd (Fullerton) to carry out construction works. In the course of the works, the builder claimed progress payments for amounts that included payments to subcontractors. Mr Maaz, as required by the contract, swore statutory declarations averring that all subcontractors had been paid, in reliance on which Fullerton made payments to the builder. Subcontractors later claimed payment from Fullerton directly for unpaid invoices rendered to the builder. Fullerton met these claims and subsequently commenced proceedings against Mr Maaz for deceit and misleading or deceptive conduct, claiming as the loss suffered the sums paid to the subcontractors in satisfaction of their claims. As evidence, Fullerton tendered emails from subcontractors to Fullerton requesting payment, invoices prepared by subcontractors for the builder, and bank account statements showing payments made to subcontractors. The primary judge accepted Fullerton's claims and awarded damages against Mr Maaz. Mr Maaz appealed in relation to the admissibility and weight of various documents and the calculation of loss.

Held: Dismissing the appeal

- The business records exception to the hearsay rule (s 69 of the *Evidence Act 1995* (NSW) ('the Act')) requires a representation to be: (i) contained in the records of an entity kept for the purposes of a business; (ii) made or recorded for the purposes of *that* business; and (iii) made by or on the basis of information supplied by a person who might reasonably be supposed to have had personal knowledge of the asserted fact: [58]. To assess this, s 183 of the Act permits the Court to examine a document and draw reasonable inferences: [23], [59]. Invoices prepared by subcontractors for the builder, though not created for the purposes of Fullerton's business, were nonetheless admissible as business records of the subcontractors: ([62], [70]). Representations of fact contained in a business record are admissible against anyone, not only against the party for whose business they were prepared: [80].

- Evidence as to the provenance or authenticity of a document is not required where inferences can readily be drawn: [22], [82]. While the *Briginshaw* standard represents the relevant standard of proof, in circumstances where the facts are not within the knowledge of the plaintiff but peculiarly within the knowledge of the defendant very little evidence might suffice to meet that standard, especially where no evidence is led to the contrary: [30], [87].

- The consequence of Mr Maaz's deceit was that Fullerton made payments that it would otherwise have withheld, while remaining directly liable to subcontractors. The lump sum contract price was irrelevant to the calculation of loss: [33], [90].

Australian Intermediate Appellate Decisions of Interest

Damages: pre-judgment interest; historical child sexual abuse

***Province Leader of the Oceania Province of the Congregation of the Christian Brothers v Lawrence* [2021] WASCA 77**

Decision date: 6 May 2021

Buss P, Murphy and Vaughan JJA

Mr Lawrence suffered sexual abuse in orphanages operated by the Christian Brothers. The appellant is the current office holder for the purposes of s 15B of the *Civil Liability Act 2002* (WA) ('CLA'). Mr Lawrence's cause of action became statute barred in 1971, but that limitation period was removed by the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) ('CLLA Act'). In Mr Lawrence's claim against the appellants, the primary judge awarded pre-judgment interest on past economic loss pursuant to s 32(1)(a) of the *Supreme Court Act 1935* (WA) ('SCA'), an award only possible following 1983 amendments to the provision. The appellant challenged the application of s 32 to a cause of action having accrued before 1983 and only recently made possible by the CLLA.

Held: dismissing the appeal

- An award of pre-judgment interest serves to compensate a claimant for having been kept out of money theoretically due to him or her at the date the loss commenced: [60]. Not every interference with existing rights will suffice to enliven the presumption ([104]) and the strength of the presumption is a matter of degree, depending on the nature and degree of injustice that would arise from giving a statute a retrospective operation: [113].

- Section 32 of the SCA empowers the court to create a right and obligation which did not exist before the court's order: [116], [135]. In that sense it operates *prospectively*: [120]. There is no acquired or established immunity with which it interferes: [132]-[133]. In any case, in light of the beneficial purpose of the provision, any presumption against its retrospective operation is relatively weak: [139]. The fact that the provision involves a grant of power to a court, necessarily to be exercised judicially, tends in favour of the most liberal construction: [147].

- Section 15B(3) of the CLA, viewed in light of the beneficial purpose of the CLLA that introduced it, does not negate the power in s 32. It provides for a current office holder to hold any liability that the original office holder *would have had* in relation to the cause of action had the original office holder continued to hold the relevant office and been subject to the claimant's action: [175], [179].

- Declining to consider the "extraordinary nature" of the CLLA Act was not a discretionary error: [204]. Any potential unfairness arising from the Christian Brothers' immunity from suit from 1971 until the commencement of the CLLA Act was not raised at trial, making it unnecessary to determine whether that circumstance is a material consideration to the s 32 discretion: [196]-[200].

Administrative law: jurisdictional error; error of law

***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CBW20* [2021] FCAFC 63**

Decision date: 4 May 2021

Perram, Moshinsky and Thawley JJ

In April 2013 CBW20, a Vietnamese citizen, entered Australia by boat and was taken to what was then thought to be a "proclaimed port" for the purposes of the *Migration Act 1958* (Cth) ('the Act'). The effect of the misunderstanding (corrected in *DBB16 v Minister for Immigration and Border Protection* (2018) 260 FCR 447) was that CBW20 was erroneously assumed to be an "unauthorised maritime arrival" as defined in s 5AA of the Act. In 2014 the then Minister purported to exercise the power under s 195A of the Act to grant temporary safe haven visas ('TSHVs') for one week, and bridging visas allowing longer term entry into the community to a cohort of persons in immigration detention including CBW20. The effect of the grant of a TSHV, pursuant to s 91K of the Act, is to bar a person from validly applying for any other visa. The decision was made on the assumption that all visa recipients, as unauthorised maritime arrivals, were already barred from making valid visa applications while in detention (by s 46A of the Act). In 2017 CBW20 applied for a safe haven enterprise visa (SHEV), which was refused in reliance on the s 91K bar. CBW20 applied to the Administrative Appeals Tribunal ('the Tribunal') for review of that decision, submitting that he had never held a valid TSHV because the purported grant of that visa by the Minister was tainted by jurisdictional error. The Tribunal accepted this argument, set aside the decision of the Minister, and proceeded to determine the application on its merits, finding that CBW20 was owed protection obligations under s 36(2)(a) of the Act and so qualified for a SHEV. The Minister sought judicial review of that decision, which was heard by a Full Court.

Held: dismissing the application for review.

- The only condition on the power in s 195A is that the minister considers its exercise to be in the public interest: [50]. Where the exercise of a statutory power is conditioned on the formation of a state of mind, a decision-maker may fall into jurisdictional error if that state of mind is formed on the basis of an error of law: [53]. In CBW20's case, the relevant opinion was based on an erroneous assumption appropriately described as legal because predicated on a view that the location at which CBW20 entered Australia in 2013 had been validly appointed a "proclaimed port" under s 5(5) of the Act: [52]. The Minister may be taken to have proceeded on the incorrect basis that CBW20 was already subject the s 46A(1) bar, such that the legal effect of the decision to grant a TSHV would merely be to substitute one bar for another, whereas the true position was that CBW20 was never subject to the s 46A(1) bar: [52], [58]. The close connection of those errors of law to the decision to grant the TSHV was such that the errors were jurisdictional: [59]. Accordingly, the Tribunal was correct to conclude that CSW20's SHEV application was valid: [61]

Asia Pacific Decisions of Interest

Administrative law: public bodies; freedom of expression

Moncrief-Spittle v Regional Facilities Auckland Ltd **[2021] NZCA 142**

Decision date: 30 April 2021

Kós P, Cooper and Courtney JJ

Regional Facilities Auckland Ltd ('RFAL') is a council-controlled organisation ('CCO') owned by Auckland Council ('the Council'). It owns and manages a number of assets, including the Bruce Mason Centre ('the Centre'). In 2018 the Centre was hired by a promoter to host speakers whose views had attracted controversy overseas. Once details of the event became public, an activist group signalled its intention to blockade the theatre to prevent the event from proceeding. The promoter had not given any notice of the controversial nature of the event, nor provided any bond or guarantee to cover additional security expenses, and had not followed the same procedures it had adopted for overseas events to avoid protests. RFAL cancelled the venue hire agreement ('VHA') on the basis of perceived safety concerns related to the planned protests. Mr Moncrief-Spittle and Dr Cumin sought judicial review of the cancellation decision, arguing that RFAL was in breach of its public law obligations to facilitate the right to freedom of expression under s 3(b) of the *New Zealand Bill of Rights Act 1990* ('BORA'). The primary judge held that the decision was not reviewable. Mr Moncrief-Spittle and Dr Cumin appealed.

Held: dismissing the appeal

- The relevant statutory scheme contemplates that some local government decision-making will be undertaken by CCOs such as RFAL: [45]. RFAL has legal ownership of various public assets in relation to which it effectively stands in the shoes of the Council: [48]-[50]. Reviewability of a decision turns on the public nature of the power exercised, rather than of the decision-maker: [51]-[52]. RFAL was required to administer its assets not on a strictly commercial basis but on a *prudent* commercial basis consistent with its public objectives: [62]. The hiring out of venues is central to RFAL's statutory function, with the effect of cancellations not limited to parties to a VHA: [63]. The decision was thus reviewable and engaged the right to freedom of expression: [64]-[65].

- The decision was not irrational, perverse or arbitrary, nor an unreasonable limit on the rights engaged. RFAL was entitled to consider the promoter's failures to share information and take precautions in making its own assessment of the risk and how to manage it: [93]. US First Amendment jurisprudence on the 'heckler's veto' has no application to BORA rights that expressly contemplate limitation: [108]. Weight must be accorded to the contractual arrangement under which the promoter had agreed that RFAL would be entitled to cancel on the basis of its own assessment of security issues: [122]-[123]. The decision to cancel was a reasonable response to the promoter's failure to share information or take precautions, and so a justified limitation on the appellants' BORA rights: [127].

Contract: no oral modification clause

***Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43**

Decision date: 22 April 2021

Menon CJ, Leong, Prakash and Chong JJCA and Ean JAD

Mr Lim entered into an agreement with the respondents for the sale of certain shares. The material terms of the agreement included a completion date, that time was of the essence, and that "no variation, supplement, deletion or replacement of any term of this agreement shall be effective unless made in writing and signed by or on behalf of each party" (cl 8.1, the 'no oral modification', or 'NOM' clause). The completion date passed without the transaction taking place. Four years later Mr Lim demanded performance of the agreement. The respondents resisted, arguing that the SPA had been rescinded by mutual agreement in a phone call shortly after the completion date had passed. The primary judge accepted this version of events but did not consider the NOM clause. On appeal, Mr Lim argued that any purported oral rescission would be invalid by reason of that clause.

Held: dismissing the appeal.

- Clause 8.1 does not purport to prohibit rescission. The common denominator of the various modifications listed in the clause is that the agreement will remain on foot: [29]. It is not possible to characterise rescission as a "deletion" of all of the terms of an agreement: [33].
- The several legitimate commercial reasons why parties might choose to incorporate a NOM clause do not provide a basis for preventing parties from varying a contract orally where such an oral variation can be proved: [36]-[37]. The parties are ultimately the master of their contract, and the court should uphold their collective autonomy to agree, orally, to depart from a NOM clause: [40]. NOM clauses are not *sui generis* or otherwise insulated from the power of the parties in the exercise of their collective autonomy to vary any aspect of their agreement: [42], [46]. This coincides with the Australian position as set out in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [219]-[222]: [45].
- The practical effect of a NOM clause is evidential. The test for when it can necessarily be implied that the parties intended to depart from a NOM clause should be whether, at the point when the parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question: [54]. While compelling evidence is required to satisfy this test, it is not intended to operate as a third standard of proof; rather it reflects the inherent difficulty in proving an oral variation in the face of the parties' express agreement to the contrary as demonstrated by the NOM clause: [56]. This also coincides with the treatment of NOM clauses in Australian law as set out in *Mathews Capital Partners v Coal of Queensland Holdings* [2012] NSWSC 462 at [39]: [58].