
Court of Appeal
Supreme Court
Sydney

# Decisions of Interest

10 May 2021 – 31 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

## Statutory interpretation: jurisdiction; Mental health

***JKL by his tutor Jennifer Thompson v Justice Health and Forensic Mental Health Network* [2021] NSWCA 94**

**Decision date:** 19 May 2021

Bell P, Macfarlan and Meagher JJA

In 2003 JKL became a "forensic patient" under the *Mental Health (Forensic Provisions) Act 1990* (NSW) ('MHFP Act') (recently repealed by the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ('MHCFIP Act')) and was detained at a mental health facility. While on conditional release he committed further offences for which he was sentenced to imprisonment. At a periodic review before the Mental Health Review Tribunal ('the Tribunal') JKL applied to be transferred to the Forensic Hospital. The Tribunal, noting the number of patients waiting to be transferred to the Forensic Hospital, ordered that JKL be transferred there "when a bed becomes available". Section 48 of the MHFP Act (now s 82 of the MHCIFP Act) provided that the Tribunal "may make an order for the transfer of a forensic patient to a mental health facility, correctional centre or other place". JKL challenged the order on the basis that the Tribunal either lacked power to make such a temporally conditioned order or took into account an irrelevant consideration in having regard to the availability of beds.

**Held:** granting leave to appeal, but dismissing the appeal

- The express power in s 48 of the MHFP Act carries with it an implied incidental power to do everything necessary to give effect to the express statutory power: [50]. The implied powers of the Tribunal are analogous to those of a Court: [54]. A power to specify *when* a transfer is to take place is reasonably necessary for the effective exercise of the s 48 power: [57]. The statute permits the Tribunal to have regard to all relevant considerations, and the capacity of a facility to accommodate and treat a patient is clearly such a consideration: [60]. The applicable principles found in s 68 of the *Mental Health Act 2007* (NSW) explicitly acknowledge considerations of "practicability" in the care and treatment of forensic patients: [61]-[62]. That the Tribunal has power to order a temporally conditioned transfer is supported by the context that it is an offence to fail to comply with an order of the Tribunal ([64]) and that the Tribunal may order transfers to specific facilities: [66]-[70].

- The situation is not analogous to sentencing. In the sentencing context Mason P and Hodgson JA in *Winters v Attorney-General (NSW)* [2008] NSWCA 33 observed that the Court should presume that correctional facilities will be made available, with practical concerns irrelevant to the exercise of the discretion: [84], [91]. The s 48 power, by contrast, operates in a context where a forensic patient is already within the criminal justice system, and confers a broad discretion as to the appropriate location of such a patient within that system: [84].

## Equity: promissory estoppel; Contract; building and construction; variation

***Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)*** **[2021] NSWCA 93**

**Decision date:** 19 May 2021

Bell P, Macfarlan and Leeming JJA

Valmont entered into a contract with Armani for construction and fit-out of a store. The contract sum was described as a "fixed project price inclusive of all items – excluding those items supplied by client". One such item to be supplied by the client (Armani) was joinery. Shortly after work had commenced, Armani's joinery supplier advised that it would not be able to meet the schedule. Armani thus requested that Valmont supply the joinery itself. The contract provided that Armani could direct Valmont to perform variations by issuing a formal variation direction, but that Valmont must not perform any variation until its cost and timing had been confirmed in writing. Failure by Valmont to give notice that it considered a direction other than a formal variation direction to involve a variation would release Armani from any claim in connection with the purported variation. The request for joinery was not a formal variation request. Nonetheless, Valmont supplied the joinery. After completion, Armani refused to pay for the joinery. Valmont commenced proceedings to recover the costs of supplying the joinery in the District Court. The primary judge held that Valmont was entitled to recover costs incurred up until 11 April 2016, from which point the primary judge considered that an estoppel preventing Armani from relying on the relevant clause of the contract had ceased to operate.

**Held:** allowing the appeal

- Armani's request for joinery constituted a direction to Valmont: [79]. Valmont, having received such a direction, reasonably understood it to be not a variation but a separate, extra-contractual request ([87]-[88]) or else considered that approval for the variation was implicit in the original instruction: [102]. Valmont was entitled to expect to be paid for the supply of the joinery unless disabused of that understanding: [89]. Nothing in the correspondence between the parties sufficed to displace the assumption induced by Armani: [85]. While Valmont was denied express written approval for a number of variations (not including the joinery) nothing in that denial, or in the general statement that "there are no variations in this project", could disabuse Valmont of the assumption induced by Armani; the fact that Valmont continued to incur costs in relation to the joinery after that correspondence demonstrates that it had not: [96]-[99], [102]. In light of Armani's subsequent encouragement to Valmont to complete outstanding works in relation to joinery which Armani knew it had originally undertaken to supply itself, it would be unconscionable for Armani to resist payment: [105].

- The duty to inform a party labouring under a particular assumption that the basis of that assumption is incorrect must be discharged clearly; similarly, any intended departure from an assumed state of affairs must be flagged in sufficiently clear terms to the party relying on it: [93]-[95].

## Sentencing: criminal contempt

***He v Sun* [2021] NSWCA 95**

**Decision date:** 20 May 2021

Bell P, Gleeson and McCallum JJA

Mr He was found to be in contempt of court for deliberately deleting a considerable amount of electronic material from various devices before allowing an independent solicitor to enter his premises to carry out a search order. The primary judge sentenced Mr He to six weeks' imprisonment. The *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA') does not apply to proceedings for contempt in the Court's civil jurisdiction, such that a number of alternatives to imprisonment for which that Act otherwise provides are not available. However, the power to suspend a sentence of imprisonment remains available under Pt 55 r 13 of the *Supreme Court Rules 1970* (NSW). Mr He appealed against his sentence alleging manifest excess and that the primary judge failed to consider suspending the sentence.

**Held:** dismissing the appeal

- Part 55 r 13 of the *Supreme Court Rules* does not give any guidance as to the criteria for suspension of a term of imprisonment. Although a suspended sentence is frequently referred to as the penultimate penalty known to the law, in substance it is a significantly lesser punishment than an actual custodial sentence: [40], [44]. The primary judge's conclusion that nothing less than a custodial sentence was appropriate clearly carried with it the conclusion that a suspended sentence would not be appropriate: [45]. There is no requirement that a sentencing judge expressly state that alternatives to imprisonment have been considered: [43]. In any case, the appeal being by way of rehearing ([35]-[37]), a suspended sentence would have been inappropriate for the very serious contumacious conduct in question: [45].

- In an appeal against sentence, the basis for intervention is in accordance with the principles in *House v The King*. Intervention is not justified simply because a sentence is markedly different from sentences imposed in other cases; it will only be warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even if not evident from the reasons: [41], [42]. A history of sentences cannot establish a "correct range" of sentences, meaning that statistics may be of limited utility: [42]. Similarly, there are limitations on the use that can be made of "comparable cases": [51]. In the present case, the primary judge correctly attended to the objective seriousness of the offence and the relevant subjective factors of the offender in determining the sentence: [55]-[57].

- (McCallum JA): principles of criminal sentencing do not necessarily apply without qualification to sentencing for contempt. The objects of the former are well understood and stated in s 3A of the CSPA, while the primary purpose of the latter is to vindicate the Court's authority: [66]

## Damages: consequential loss; Appeals; requirement of leave; costs

***Housman v Camuglia* [2021] NSWCA 106**

**Decision date:** 20 May 2021

Bell P, Leeming and White JJA

The Appellants undertook substantial construction works, including excavation works, on their land, causing damage to Ms Camuglia's neighbouring property. The stairway giving access to four of the six units in an apartment building let out by Ms Camuglia was damaged when its supporting foundations collapsed, with the stairway showing visible signs of damage. Temporary propping was installed, which an engineer's report indicated was adequate to ensure safety until a permanent solution could be implemented. The leasing manager of the apartments nonetheless advised Ms Camuglia that the property was incapable of being advertised to let. At trial Ms Camuglia was awarded damages, including damages for consequential loss, being lost rent from units in the building. The Appellants challenged the award of damages for consequential loss, as well as the costs order against them.

**Held:** dismissing the appeal

- The Appellants' evidence consisted of statements by an engineer to the effect that the propping of the stairway was adequate to ensure safety: [18]. Ms Camuglia's evidence, admitted on a limited basis, included her statement of what she had been told by the leasing manager, and the leasing manager's statement of his perceptions of the damage to the stairs and his opinion of the likely effect of that visible damage on prospective tenants: [25], [29]. On an appeal by way of rehearing, with no issues of credibility, the adequacy or otherwise of the primary judge's reasons is irrelevant: [33]. As the propping was temporary, and in the absence of any evidence as to how long it was intended to last, it was not unreasonable for Ms Camuglia to delay letting the premises where a permanent solution was expected in the short term: [36]. Irrespective of the engineer's safety advice, the advice of the leasing manager was inherently plausible; it did not go to the safety of the propping but to the likely impression on a prospective tenant, which did not involve using the evidence for a purpose other than that for which it was admitted: [37], [39].

- Regarding the appeal against costs: both s 127(2)(b) of the *District Court Act 1973* (NSW) and s 101(2)(c) of the *Supreme Court Act 1970* (NSW) impose a leave requirement for appeals from a judgment or order "as to costs only". However, in cases like the present where there is a substantive ground of appeal as of right, even if that substantive ground fails the appellant may nonetheless challenge the costs order without any requirement for leave: [83]. The statement to the contrary in *Road Chalets Pty Ltd v Thornton Motors Pty Ltd* (1986) 47 SASR 532 is incorrect and ought not to be followed: [81]-[83]. This is because an appeal raising substantive grounds as well as costs is not an appeal "as to costs only": [84]. In this case however, no basis on which to re-exercise the discretion as to costs was made out: [90].

## Land law: adverse possession; Interpretation: *Real Property Act*

***Sidoti v Hardy* [2021] NSWCA 105**

**Decision date:** 26 May 2021

Basten and Brereton JJA, Simpson AJA

The Sidotis and Mr Hardy are registered proprietors of adjoining parcels of land. A narrow strip of land, at all times included within the surveyed boundaries of the Sidotis' property, was occupied by Mr Hardy in a manner amounting to adverse possession from at least early 2005. In late 2005 the Sidotis' property was brought under the *Real Property Act 1900* (NSW) ('RPA') as a qualified and limited folio. In 2018, by which time the cautions relating to its qualified title had been removed, the Sidotis became the registered proprietors and sought to reclaim the occupied strip of land. Mr Hardy commenced proceedings claiming title to the land, which the primary judge found he had acquired by adverse possession. The Sidotis appealed.

**Held:** Brereton JA and Simpson AJA dismissing the appeal (Basten JA in dissent)

- Apart from the *RPA*, title to land may be acquired by adverse possession by operation of the *Limitation Act 1969* (NSW): [10], [84]-[85], [180]-[183]. However, s 8(1)(a) of the *Limitation Act* provides that nothing in that Act affects the operation of s 45C of the RPA. RPA s 45C(1) provides that no title shall be acquired against a registered proprietor by adverse possession except by an application under s 45D ([87]), but no avenue provided by s 45D is applicable to the current case: [25]-[30], [90], [196]-[199]. However, by s 45C(2), s 45C(1) does not prevent acquisition of title by reason of adverse possession commencing *before* the creation of a qualified or limited folio: [87]. The essential question is whether s 45C(2) creates an exception to indefeasibility: [88].

- Per Brereton JA: RPA s 28U(2) has the effect that the general indefeasibility provision in s 42(1) does not protect a registered proprietor of land from adverse interests in any land incorrectly included by wrong description in a limited folio: [127]. Land will be incorrectly included by wrong description if the folio fails to reflect the occupational boundaries by including land in which another has a possessory interest, including an inchoate interest: [161]. Mr Hardy had such an interest in the land when it was brought under the RPA in 2005, so that his claim falls within the s 28U(2) exception to indefeasibility: [163]

- Per Simpson AJA: Mr Hardy could not have had possessory title to the land at the time the folio was created in 2005, so there was no wrong description for s 28U(2): [200]-[202] However s 45C(2), by excluding s 45C(1) where adverse possession commenced before the creation of a qualified or limited folio, allows the *Limitation Act* to apply and Mr Hardy's claim to succeed: [203]-[210].

- Per Basten JA: the effect of s 45C(2) is limited to Pt 6A of the RPA, meaning that it does not provide an exception to s 42(1) indefeasibility: [37]-[40]. Section 28U(2) does not apply because there is no wrong description where a merely inchoate claim is omitted from the folio: [31]-[34].

## Unconscionable conduct; compensable loss

***MacDonald v Yakiti Pty Ltd & Ors*** **[2021] NSWCA 114**

**Decision date:** 1 June 2021

Macfarlan, White and McCallum JJA

Ms MacDonald borrowed substantial sums, secured by unregistered mortgages against her property, from the first Respondent company ('Yakiti') though its sole director and shareholder, the second Respondent Mr Moini. She used that money to make unsecured loans to the Henley Group. Mr Moini and a Mr Prin also lent substantial sums to the Henley Group directly. In October 2016 the Henley Group was in financial difficulty. Ms MacDonald was unable to repay her loans from Yakiti. On 31 October Ms MacDonald, Mr Moini, Mr Prin and Mr Henley discussed incorporating a company to acquire the businesses of the Henley Group, with Ms MacDonald to advance $330,000 to the venture. Ms MacDonald was subsequently hospitalised. Early in her hospitalisation Mr Moini sent an email reassuring her as to the strength of her relations with the other venturers. However, negotiations continued in her absence, with corporate entities controlled by Mr Moini, Mr Prin and a Mr Huang ultimately set up to take over the businesses of the Henley Group. By cross-claim in Yakiti's action for recovery of its loans to her, Ms MacDonald sought relief against Mr Moini and Mr Prin for contraventions of ss 12CA and 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), which prohibit unconscionable conduct. The primary judge found that Ms MacDonald laboured under a special disadvantage, but that Mr Moini and Mr Prin had not taken unconscientious advantage. Ms MacDonald appealed.

**Held:** Dismissing the appeal

- Sections 12CA and 12CB of the ASIC Act do not extend the principles of unconscionable conduct beyond those recognised in equity: [37]. In light of the reassurances provided to Ms MacDonald, the agreement between Mr Prin and Mr Moini to exclude her, inconsistently with the impression conveyed to her, was conduct "so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience": [15], [222]. [Per White JA (in dissent on this point): Ms MacDonald may have been naïve in hoping to recover her unsecured loans from the insolvent Henley Group, but at no point did Mr Moini suggest that the mortgages would not be enforced: [185], [194]. The financial situation required urgent action, and Ms MacDonald's illness precluded her further involvement at a critical juncture: [206].]

- Ms MacDonald did not demonstrate that she suffered any compensable loss as a result of Mr Moini and Mr Prin's unconscionable conduct: [1], [219], [222]. It is unlikely that, but for the impugned conduct, any part of her loans to the Henley Group would have been recoverable: [203]. A proportional share of the value of the companies at the time when she alleges she should have been brought in, while potentially appropriate for breach of an enforceable contract, was not an appropriate measure of damages for the impugned conduct: [212]-[216].

# Australian Intermediate Appellate Decisions of Interest

## Migration: Australian citizenship; PNG independence

***Minister for Home Affairs v Lee*** **[2021] FCAFC 89**

**Decision date:** 31 May 2021

Logan, Kerr and Banks-Smith JJ

Mr Lee was born to two Australian citizen parents in the then Australian External Territory of Papua on 20 May 1975. Both of his parents had acquired Australian citizenship by naturalisation under the *Australian Citizenship Act 1948* (Cth). On 16 September 1975, Papua New Guinea achieved independence. Regulation 4 of the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) provided that a person who was an Australian citizen immediately before independence and upon independence became a PNG citizen ceased to be an Australian citizen. The effect of ss 64 and 65 of the PNG Constitution at independence was that no person who, immediately before independence, had been granted a right to permanent residency in Australia could become a PNG citizen. Mr Lee moved with his family to Australia in 1982. He was issued a series of Australian passports until 2016, when he was officially informed that he was not an Australian citizen. He was later informed by the Deputy Chief Migration Officer of PNG that he was not a citizen of that country. He successfully sought a declaration that he was an Australian citizen. The Minister appealed.

**Held:** dismissing the appeal

- In determining whether Mr Le had been granted a right of permanent residency at or before independence, the relevant inquiry is not whether he was then an Australian citizen but whether, had he sought to enter Australia, he would have been considered an "immigrant" within the constitutional (s 51(xxvii)) meaning of that term: [74]. A person entering Australia who is already one of the people of Australia cannot be considered an immigrant; immigrant status is a question of fact on which neither place of birth, nor nationality, nor domicile is decisive: [77].

- Since the enactment of the *Australian Citizenship Act*, the acquisition of Australian citizenship under that Act has taken on significant weight for the purposes of determining community membership: [81]. Indeed, the effect of naturalisation is that a person is to be regarded as a member of the Australian community, whose real home is Australia: [85]. Mr Lee's parents were not, at independence, immigrants. They were entitled to enter Australia as of right and permanently reside there, that right being granted under Australian law by virtue of their status as a citizens: [94]-[95]. Their domicile (Australia) was acquired by Mr Lee at birth under the common law: [101]. As a result, Mr Lee was always part of the Australian community; he has never been, and was not at independence, an "immigrant". Thus at independence he had a right to permanent residence in Australia, by reason of which he did not acquire PNG citizenship and remained at all times an Australian citizen: [105].

# Asia Pacific Decision of Interest

## Constitutional law: freedom of expression; Criminal law; sedition

***Vinod Dua vs. Union of India & Ors.*** **Supreme Court of India No. 154/2020**

**Decision date:** 3 June 2021

Lalit and Saran JJ

On 30 March 2020, Mr Vinod Dua, a journalist, posted a video to his YouTube channel in which he made comments critical of the government's preparedness for and response to the COVID-19 pandemic, discussing the possibility, as a result of the government's handling of the crisis, of widespread food riots. On 6 May 2020 a First Information Report ('FIR') was issued against Mr Dua in relation to alleged offences of sedition under, *inter alia*, s 124-A of the Indian Penal Code. Mr Dua sought to quash the FIR issued against him by a petition under Art. 32 of the Indian Constitution for enforcement of his fundamental right to freedom of speech and expression provided for in Art. 19(1)(a) of the Constitution.

**Held:** granting the relief sought

- There is no reason why the petitioner cannot seek constitutional relief under s 32 against the issue of an FIR: [25]. The main question involved in deciding the application is whether the statements of the petitioner impugned in the FIR were merely in the nature of critical appraisal of the performance of the Government or were designed to create unrest among the public: [27].

- The right to freedom of speech and expression in Art. 19(1)(a) of the Constitution is subject to reasonable legislative restriction as referred to in Art. 19(2): [28.6.1]. The relevant penal provisions creating the offence of sedition must be read down so as to come within constitutional limits, namely within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression: [28.8]. In interpreting those provisions, the expression "the Government established by law" must be distinguished from persons for the time being engaged in carrying on the administration. Any acts which have the effect of subverting the Government so defined by bringing it into contempt must do so by tending or intending to create public disorder by the use of actual violence in order to fall within the penal statute. Comments, however strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to public disorder by acts of violence, would not suffice. A citizen has a right to say or write anything about the Government, by way of criticism or comment, so long as it does not incite violence against the Government established by law: [33]. The impugned statements by the petitioner are best described as an expression of disapprobation of the actions of the Government and its functionaries, certainly not tending or intending to incite disturbances of the public peace by resort to violence: [43]. Any prosecution of the kind commenced by the FIR in question would be violative of his s 19(1)(a) rights: [44].