Court of Appeal
Supreme Court
Sydney

Decisions of Interest

16 July 2021 – 31 July 2021

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

Contents

New South Wales Court of Appeal Decisions of Interest

Environment and Planning: validity of Environmental Impact Statements

North Parramatta Residents' Action Group Inc v Infrastructure New South Wales (No 2) **[2021] NSWCA 146**

Decision date: 16 July 2021

Bathurst CJ, Basten and Leeming JJA

The Minister for Planning and Urban Spaces ('the Minister') granted a development consent to Infrastructure New South Wales ('the proponent') for the construction of the Powerhouse Museum at Parramatta. North Parramatta Residents' Action Group Inc (NPRAG) challenged the consent on the basis that the Environmental Impact Statement ('EIS') failed to consider alternative sites and designs that would have preserved a local heritage building, Willow Grove. Clause 7(1)(c) of Schedule 2 of the Environmental Planning and Assessment Regulation 2000 (NSW) provides that an EIS must include "an analysis of feasible alternatives to the carrying out of the development … having regard to its objectives". This obligation is "subject to" any Environmental Assessment Requirements ('EARs') imposed by the Planning Secretary ('Secretary'). In this case, the Secretary required that the EIS "outline the design process which informed the proposal … including any designs which could have retained Willow Grove". The Parramatta Local Environmental Plan required a competitive design process for the project. NPRAG appealed from the dismissal of its application in the Land and Environment Court.

Held: dismissing the appeal

- The fact that only the winner of a competitive process could found a valid development consent informed the scope of the obligations to consider alternatives: [19]. The "objectives" with regard to which "feasible" alternatives were to be identified for cl 7(1)(c) are those of the development, not the EIS: [23]-[25]. Where EARs modify the Schedule 2 requirements the former will prevail; where they are more specific they will add to those requirements: [28].

- The proponent was not obliged to consider alternative sites, as the choice of site was an antecedent step not subject to review by the consent authority: [30]. The requirement to outline alternative designs, however, was not rendered moot by the outcome of the competitive process, as that information may nonetheless have informed the consent decision: [39]-[41]. That the EAR's post-dated the conclusion of the design contest reinforces this conclusion ([42]-[45], [50]) and is consistent with an intention that the public understand how heritage considerations were addressed: [46]. The requirement is not satisfied by an honest belief that there are no such alternatives: [54]-[55]. However, evidence of a feasible alternative was not sufficient to show a material failure of disclosure in relation to cl 7(1)(c): [70]-[72]. Non-compliance with the EARs was also insufficient to invalidate the EIS, as it could be inferred that the Secretary was ultimately satisfied that there had been substantial compliance: [76]-[77].

Anti-Discrimination law: workplace sexual harassment

Vitality Works Australia Pty Ltd v Yelda (No 2) **[2021] NSWCA 147**

Decision date: 19 July 2021

Bell P, Payne & McCallum JJA

Ms Yelda, a Sydney Water employee, agreed to be photographed for a workplace health and safety campaign conducted by Vitality Works Australia Pty Ltd ('Vitality Works'). Without her knowledge, the image was used on a poster, displayed in her workplace, beneath the words "Feel great – lubricate!". The NSW Civil and Administrative Tribunal determined that, by displaying the poster, both Sydney Water and Vitality Works had contravened s 22B of the *Anti-Discrimination Act 1977* (NSW) by engaging in "other unwelcome conduct of a sexual nature" in relation to another workplace participant in the workplace. The determination was confirmed by the Appeal Panel. Vitality Works sought leave to appeal to the Court of Appeal.

Held: granting leave to appeal but dismissing the appeal

- Whether conduct amounts to "other unwelcome conduct of a sexual nature" is a question of fact with two parts: whether conduct is "unwelcome" is a subjective question, judged from the point of view of the person subjected to the conduct; whether the conduct is of a sexual nature is an objective question: [34]. The breadth of the proscribed conduct should not be read down by reference to any limitations not found within the statute: [35], [97]. There is no requirement that a perpetrator intend to sexually harass the victim ([81]-[82], [96], [98]) nor that relevant conduct instil fear or otherwise inflict damage: [107]. There is no requirement that conduct be sexually explicit, as opposed to merely suggestive: [108]-[109]. Moreover, conduct capable of being characterised as "horseplay" is not immune from being found to constitute sexual harassment: [36]. The suggestion that conduct cannot amount to sexual harassment unless it is sexually explicit ignores the subtlety of human interaction and the historical forces that have shaped women's subordination in the workplace: [125]. Whether a reasonable person, having regard to all of the circumstances, would have anticipated that the victim would be offended, humiliated or intimidated by the conduct is also an objective question of fact: [37].

- The phrase "workplace participant" refers to a broad relational connection clearly engaged on the facts of this case by Ms Yelda's status as a Sydney Water employee and Vitality Works' status as a contractor undertaking activities at the relevant depot: [39], [85]. The *Anti-Discrimination Act* does not preclude joint responsibility for conduct amounting to sexual harassment, *a fortiori* in a case involving two corporate defendants to whom the acts of various employees and agents may be attributed: [57]. The conduct of Vitality Works' agents was attributable to it, both at common law and under s 53 of the Act: [43], [70]. The design, publication, display and distribution of the poster were all plainly unwelcome conduct of a sexual nature ([76]-[77], [109]-[109]) for which Vitality Works was both legally and factually responsible: [120].

Consumer law: misleading or deceptive conduct

***Johnson v Mackinnon* [2021] NSWCA 152**

Decision date: 21 July 2021

Macfarlan and Brereton JJA, Simpson AJA

Ms Johnson was one of two partners in the Sports Trading Club Partnership ('STC'). STC purported, through a document issued to prospective investors ('the Proposal') to operate a betting syndicate using sophisticated methods to guarantee high returns on investment. It was in fact the vehicle of notorious conman Peter Foster, and essentially all investor funds were lost. Mr Mackinnon, having advanced $200,000 to STC, was the representative plaintiff in a suit against Ms Johnson and eleven other defendants. The primary judge held Ms Johnson liable for the whole sum for contraventions of s 18 of the Australian Consumer Law, having engaged in misleading and deceptive conduct both by representing the contents of the Proposal to be true and by failing to disclose the involvement of Mr Foster. Ms Johnson appealed against the finding of liability and against the primary judge's disallowance of a late defence of apportionment. The respondent, by notice of contention, argued for the judgment to be upheld on the alternative basis of deceit.

Held: dismissing the appeal

- It is logical that investors should have relied on the proposal and that knowledge of Mr Foster's involvement would have been a serious deterrent: [71]. The potential gullibility of investors would not undermine any finding of reliance: [72]. Whether or not Ms Johnson knew of the existence and contents of the proposal (see Brereton JA at [131], [141]; Macfarlan JA and Simpson AJA contra, at [3], [301]-[303]), she was sued as a partner and liable for misrepresentations made by other partners in the ordinary course of the business of the partnership, which included the Proposal representations: [143]-[144].

- As to the Foster representations, while misleading or deceptive conduct by silence requires refraining, otherwise than inadvertently, from disclosing some fact ([248]-[249]), it is only necessary to establish a deliberate omission where the actual conduct, taken in its relevant context, is incapable of constituting misleading or deceptive conduct: [245]-[254]. In this case, Ms Johnson knowingly lent her name, image and reputation to the promotion of STC, even if she did not know the detail of that promotion, in a manner calculated to confer an appearance of respectability: [255]. Such conduct, without disclosing Mr Foster's involvement, was itself misleading and deceptive regardless of Ms Johnson's knowledge: [257]. However, relevant matters were also within her actual and constructive knowledge ([236]) and, had it been necessary, the evidence would have sufficed to show that she took deliberate steps to conceal Mr Foster's involvement: [258]. That knowledge and deliberation is relevant to the cause of action in deceit, in which Ms Johnson was also liable by reason of the Foster representations. As that liability was not apportionable, the question of reliance on a defence of apportionment was moot: [284]-[288].

Contracts: total failure of consideration

Great Northern Developments Pty Ltd v Lane **[2021] NSWCA 150**

Decision date: 21 July 2021

Bathurst CJ, Leeming JA and Emmett AJA

Great Northern Developments Pty Ltd ('GND'), via its director, proposed to the respondent an investment in a development project. They entered into a deed under which the respondent was to advance a sum to GND and GND was to procure a Preferred Investor Agreement ('PIA') between the respondent and the developer, Arden, for the purchase of a unit in the development at a discounted price. The purchase price for the unit was not to exceed $919K, with the respondent to advance an investment amount of 70% ($643K). The respondent advanced the investment amount to GND and signed two different PIAs (with the stipulated investment amount and purchase price) only later to discover that the only PIA executed by Arden, and apparently executed by the respondent, stipulated a purchase price of $935K and an investment amount of $561K. The respondent denied signing a PIA in those terms and entered into a deed of termination with Arden, under which she received $561K with interest. GND claimed an entitlement to retain the difference ($82K) as a commission, relying on statements in the recital to the deed to the effect that the developer had agreed to pay GND a commission. The respondent sought to recover that amount from GND either as damages for breach of contract or on a restitutionary basis for total failure of consideration. GND appealed from the District Court judgment in the respondent's favour, including on a ground alleging that the District Court lacked jurisdiction to determine the claim.

Held: dismissing the appeal

- If the claim (for an amount in excess of $20K) were for relief against fraud or mistake, it would not fall within s 134(1)(d) of the *District Court Act 1973* (NSW), but would nonetheless be a claim "of a kind" to which that section applied, thus also not falling within s 134(1)(h): [87]-[88]. However, whether a claim is for relief against fraud or mistake turns not on inferences from ultimate findings of fact, but on issues raised by the originating process: [95]-[96]. In this case no fraud or mistake was pleaded: [102]. The action for recovery of money based on a total failure of consideration (an action for money had and received) is a common law, not an equitable, action: [44]-[48], [102].

- The deed of termination with Arden did not waive any of the respondent's rights against GND: [59]. There was no basis for GND to retain any sum by way of commission: no PIA as contemplated was ever executed, and the recitals in no way suggested that a commission would effectively be paid by the respondent: [63]-[68]. While potentially difficult to assess, it was not contended that damages for breach of contract would have been less than the restitutionary claim on which the respondent was entitled to recover: [70]. The purpose of any settlement with Arden was irrelevant, as total failure of consideration looks to the consideration bargained for, not any other benefit in fact received: [75].

Defamation: qualified privilege

Wraydeh v Fairfax Media Publications Pty Limited; Wraydeh v Nationwide News Pty Limited **[2021] NSWCA 153**

Decision date: 21 July 2021

Bell P, Gleeson JA and Simpson AJA

Mr Hassan Wraydeh, the appellant's brother, was involved in a crash in which his passenger was seriously injured and later died in hospital. Hassan left the scene immediately. Some time later the appellant attended the scene and spoke with a police officer. Police subsequently issued a number of media releases and a Facebook post alerting the media and the public of the need to locate the driver. The Facebook post and one of the media releases named the appellant as a person believed to have vital information. The respondent news organisations subsequently published a number of articles reporting on the collision and naming the appellant as the suspected driver. The appellant sued the respondents for defamation, with a jury finding most of the pleaded imputations to have been conveyed and defamatory, and rejecting defences of justification. The trial judge, however, upheld the defence of qualified privilege at common law in relation to all of the imputations in respect of which it was pleaded. The judge contingently assessed total damages at $35K, with $7.5K awarded for the one imputation not subject to the defence. The appellant appealed in relation to qualified privilege and the quantum of damages.

Held: dismissing the appeals

- A "privileged occasion" is not the same thing as a "privileged communication": [43]. An occasion will be privileged by reason of the commonality of interest of publisher and recipient in the subject matter: [44]. It was not disputed that the occasion of publication in each case was privileged: [50]. However, not every communication made on an occasion of privilege is protected: [52]. That question does not depend on any test of 'necessity' in relation to the purpose of the privilege ([57]-[62]), but on whether the communication is "relevant to the occasion": [64]. Relevant communications in this case were not limited to the information contained in the press releases: [71]-[73]. The respondents were not confined to a role of mere intermediaries between the police and the public ([74]-[75]) but were free to publish information "germane" to the occasion, whatever its source, provided that the communication was honestly made, and that they honestly and properly conducted themselves in the exercise of the privilege: [76]. Inaccuracy does not deprive a communication of a sufficient connection to an occasion of privilege: [77]-[78]. As the reporters honestly believed that the appellant was suspected of being the driver, the relevant communications were protected by the privilege: [79]-[83].

- It was open to the primary judge to find that the appellant was not significantly distressed by the publications on the basis that no attempt was made to correct the record: [19]. [99], [102]-[104]. Without evidence of damage to reputation, the damages as assessed were not shown to be manifestly inadequate: [107]-[111].

Australian Intermediate Appellate Decisions of Interest

Contracts: interpretation

Rankin Investments (Qld) Pty Ltd & Anor v CMC Property Pty Ltd & Ors **[2021] QCA 156**

Decision date: 30 July 2021

Sofronoff P, Bond JA and Applegarth J

Mr Rankin and his company Rankin Investments (Qld) Pty Ltd (together: 'the Rankin interests') were one of the "joint venturers" (as defined) in a joint venture agreement for the redevelopment of the Big Pineapple, to be undertaken by the corporate vehicle Big Pineapple Corporation Pty Ltd ('the Company'). The other "joint venturer" was CMC Property Pty Ltd ('CMC') and Messrs Kendall and Ahern (who controlled and owned CMC). The Board of the Company was given control over the project, with its decisions to bind the joint venturers (cl 5.4). By cl 6.1 of the agreement the parties undertook: (a) to take all necessary steps to give full effect to the agreement, and (c) not to do any act whereby the continued enjoyment of the Land for the purposes of the joint venture might be jeopardised. The Board resolved to and did engage various consultants to undertake work for the purposes of the joint venture. Mr Rankin later unilaterally contacted a number of consultants and instructed them to stop work. The other parties issued a Notice of Default for breach of the agreement, which notice, if valid, would allow for the purchase of the defaulting joint venturer's interests by the other. The Rankin interests unsuccessfully sought a declaration of the notice's invalidity before appealing.

Held: dismissing the appeal

- An important part of the enjoyment of "the Land" for the purposes of the joint venture, as described in cl 6.1(c), was that it be developed. Asking consultants engaged by the Company to stop work might plausibly jeopardise that development: [41]. The prohibition in cl 6.1(c) was not limited to actions jeopardising the *availability* of the land for development: [42]-[43]. Moreover, a breach of the obligations by one constituent part of a defined "joint venturer" amounts to a breach of the obligations of that "joint venturer": [55].

- Though unnecessary to resolve, the positive obligation under cl 6.1(a) also necessarily implied a prohibition on taking actions inconsistent with, or that would impede, necessary steps: [82]. Though it may overlap with the negative obligation in cl 6.1(c), the prohibition is not identical. It might be engaged in circumstances falling outside cl 6.1(c): [87]. Thus the implication of a negative stipulation in cl 6.1(a) was not precluded or rendered improbable by the presence of express negative obligations: [92]. Nor did an entire agreement clause have any effect on the implications to be found in the agreement's express terms: [93]. The prohibition must be implied as a matter of necessity to allow each party to enjoy the benefit of the obligation imposed on the other by cl 6.1(a): [98]-[103]. The implied negative stipulation was clearly breached: [106].

Insurance: construction

Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd **[2021] FCAFC 126**

Decision date: 20 July 2021

Allsop CJ, Besanko and Middleton JJ

Liberty Mutual Insurance Company ('Liberty') denied cover to Icon Co (NSW) Pty Ltd ('Icon') for claims arising within the Opal Tower project's 12 month defects liability period, claiming they fell outside the period of insurance. There are two general kinds of third party liability insurance in the construction industry: "annual turnover" policies covering occurrences within a policy year, with premiums referable to total turnover within the period, and "projects commencing" policies covering occurrences throughout the life of a project, with premiums referable to the total value of contracts commenced. Icon's policy provided for "annual turnover" coverage (cl 8) but with provision for a 'run-off' (cl 15) allowing coverage to be extended for incomplete contracts until their completion, expressly including any defects liability period. Icon, in accordance with its usual practice, notified Liberty of the Opal Towers contract, receiving in response an 'endorsement' confirming that cover was in place and noting an "estimated project period" running until the estimated date of practical completion. Liberty contended that cl 15 only allowed for a 'run-off' properly so called, with the endorsements only serving to extend cover until the nominated date (practical completion). Icon contended that cl 15 allowed it to obtain "projects commencing" cover contract by contract. The primary judge accepted Liberty's interpretation but allowed a rectification claim.

Held: dismissing Liberty's appeal and allowing Icon's cross-appeal

- The interpretation of a market specific insurance policy requires ambiguity to be resolved by an appreciation of the market in which the parties operate and the need for commercial efficacy: [152]. Both parties can be taken to have known that Icon was required to maintain third party liability insurance until the conclusion of any defects liability period: [153]. The heading to cl 15, 'run-off', does not dictate a narrow view of its operation: [163]. Icon's proposed construction offers clear commercial flexibility, whereas Liberty's construction would only serve to delay commercial certainty to the insured and receipt of premiums by the insurer until the expiry of a policy period: [164]. The way that premiums were in fact charged, and the fact that Liberty was able to charge a premium representing annual policy cover in addition to life of contract cover, further support Icon's construction: [168]-[170]. Clause 15 was engaged by Icon's notification, and reference by Liberty to an 'estimated project period' should not be construed so as to cut down the cover acquired under it: [179].

- Had it been necessary, the Court would have upheld the rectification claim: [284]. That cover was mutually intended to extend to the end of the defects liability period is supported by the fact that the value of the contract by reference to which the premium was calculated included such a period: [310]-[314].

International Decision of Interest

Equity: equitable compensation; Indigenous interests

***Southwind v. Canada* 2021 SCC 28**

Decision date: 16 July 2021

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

The Lac Seul First Nation ('LSFN') has its reserve on the banks of Lac Seul. In 1929, under an agreement between Canada, Ontario and Manitoba, a hydroelectric dam was built on the lake, raising the water level by three metres and permanently flooding significant parts of the reserve. The project was undertaken with full knowledge of these effects, without the consent of the LSFN, without any compensation and without the lawful authorisation required. In 1991 Mr Southwind, for himself and on behalf of the LSFN, filed a civil claim against Canada for breach of its fiduciary duty, and statutory and treaty obligations. The primary judge held that Canada had breached its fiduciary duty and awarded equitable compensation, calculating the amount of compensation by reference to the hypothetical value of the flooded land if subject to a lawful expropriation. The LSFN appealed against this assessment to the Federal Court of Appeal and then to the Supreme Court.

Held: allowing the appeal

- The fiduciary obligation imposed on Canada is rooted in an obligation of honourable dealing and the ongoing project of reconciliation; it is not a mere 'political trust' but a *sui generis* enforceable duty: [55]-[60]. Its content depends on the nature of the indigenous interest at stake. In the case of indigenous interests in reserve land, reflecting the essential relationship between indigenous peoples and the land, the duty imposed on the Crown includes the protection and preservation of that quasi-proprietary interest against exploitation, including by the Crown itself: [64], [104].

- The primary judge erred in concluding that a hypothetical expropriation (the minimum statutory obligation) would have fulfilled Canada's fiduciary obligations: [89]. The legal power and discretion to expropriate the land does not set the limits of the duty; such reasoning would allow Canada to benefit from the discretionary power over the LSFN that is the source of the duty: [96]-[99]. Nor does the Crown's decision that a public work is required in the public interest override the fiduciary duty. The Crown is free to decide that a public work is in the public interest, but the manner in which it proceeds is subject to the duty: [101]-[103]. Expropriation law fails to reflect the non-fungible nature of the indigenous interest in reserve land and the goals of reconciliation: [104]-[106]. In this case, the duty required Canada to compensate the LSFN for the full potential value of the land for its intended use (hydroelectric generation): [111]-[114]. Evidence of negotiated settlements between indigenous groups in similar circumstances but with parties not having the power of expropriation was thus relevant in the assessment of equitable compensation: [134].

Administrative law: judicial review of policy documents

R (on the application of A) v Secretary of State for the Home Department **[2021] UKSC 37;**
R (on the application of BF (Eritrea)) v Secretary of State for the Home Department **[2021] UKSC 38**

Decision date: 30 July 2021

Reed PSC, Lloyd-Jones, Briggs, Sales JJSC and Burnett CJ

The Secretary of State for the Home Department ('the Secretary') had provided a policy document ('the Disclosure Guidance') for police dealing with public requests for information about the offending history of persons dealing with children. The Disclosure Guidance instructed police to consider whether representations should be sought from any person about whom disclosure might be made, but did not further specify the circumstances in which this might be required in accordance with the common law duty to act fairly or Article 8 of the ECHR. Applicant A sought judicial review of the Disclosure Guidance on the basis that it failed to explain the relevant duty.

UK legislation provides for differential treatment of child and adult asylum seekers. The Secretary had issued a policy document ('the Age Guidance') providing that asylum seekers should not be accepted as children if their physical appearance and demeanour strongly indicate that they are significantly over the age of 18 and there is no evidence to the contrary. BF claimed to be 16 years old but was initially assessed as an adult. Later, on a more thorough assessment, he was accepted as under 18. BF argued that the Age Guidance was unlawful because physical appearance is an inherently unreliable indicator of age.

Decisions in both appeals were handed down and intended to be read together.

Held: dismissing A's appeal ([x]); allowing the Secretary's appeal against BF (*[x]*)

- The test to be applied on judicial review of policy documents is set out in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. A policy is unlawful if it sanctions, positively approves or encourages unlawful conduct by the intended recipients: [30]-[38], *[49]*. The question is not whether a policy is 'inherently unfair' or gives rise to an 'unacceptable risk' of unfairness, though it may be approached by asking whether the policy is capable of being operated in a lawful way: [55]-[65]. Policies issued as a matter of discretion serve an important public function and should not be unduly deterred by a demanding standard of review: [39]-[41]. There are three categories of unlawfulness: (i) where a policy makes a positive statement of the law which is wrong and will induce a person to breach their legal duty; (ii) where a public authority is under a duty to provide accurate advice and fails to do so; (iii) where a public authority purports to give a full account of the legal position but fails to do so such that the policy provides a misleading picture of the true position: [46]-[47].

- The Disclosure Guidance was not inconsistent with the police duty to seek representations and was not unlawful merely for failing to outline that duty in greater detail: [42]. In BF's case, the Court of Appeal erred by asking whether the policy 'sufficiently removed the risk' that an immigration officer might make a mistake. That risk is inherent in the law: *[50]-[52]*. The Age Guidance plainly does not direct immigration officers to act inconsistently with their legal duty: *[61]*.