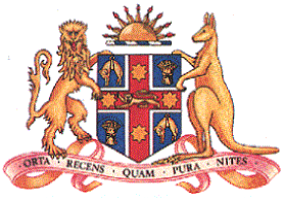

Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 August 2021 – 15 August 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

Damages: related proceedings; partnership goodwill

Bartier Perry Pty Ltd v Paltos **[2021] NSWCA 158**

Decision date: 3 August 2021

Payne, White and McCallum JJA

Mr Paltos and Mr Milevski were partners in a law firm until Mr Paltos suffered two strokes and became unable to work for an extended period. A put option was exercisable by a partner suffering total and permanent disability, with a requirement that the partner have been unable to work for six months, the option expiring three months after its accrual. Bartier Perry Pty Ltd ('Bartier Perry') advised Mr Paltos, before six months had elapsed, that the put option was not available to him "at this time". Shortly afterwards, consent orders were made dissolving the partnership and appointing receivers. In pending proceedings Mr Paltos claims from Mr Milevski and the receivers 70% of the net partnership assets as at the date of dissolution ('the partnership proceedings'). In proceedings against Bartier Perry for breach of contract, breach of duty and misleading or deceptive conduct, the primary judge gave judgment for Mr Paltos, awarding damages in the amount to which Mr Paltos would have been entitled upon the exercise of the put option. The award of damages was subject to an undertaking by Mr Paltos to repay to Bartier Perry any amount received in the partnership proceedings on account of partnership goodwill, which he would not have recovered under the put option. Bartier Perry appealed.

Held: allowing the appeal in part

- Bartier Perry's advice was insufficient to discharge its duty ([60]-[86]) as well as misleading and deceptive, being a dangerously incomplete statement of Mr Paltos' rights: [87]-[90]. On its proper construction the put option would have survived the partnership's threatened dissolution ([96]-[98]) and the evidence suggested that Mr Paltos, if properly advised, would have exercised it: [116].

- No exception to the common law rule that damages be awarded in a lump sum, once and for all, applied: [142]-[147]. The undertaking undermined finality in litigation ([154]); its value was subject to the risk of Mr Paltos' insolvency ([156]); and it incentivised Mr Paltos to seek to maximise his return in the partnership proceedings while bargaining away sums referable to goodwill: [157].

- The onus fell upon Bartier Perry to prove the amount likely to be recovered on account of goodwill, that sum representing a benefit to be obtained by Mr Paltos by reason of Bartier Perry's breach: [175]-[176]. The value of goodwill must reflect the fact that each partner would be entitled to compete with a hypothetical purchaser, of which fact former partners as potential purchasers are taken to be aware: [211]-[221]. An assertion that all partnership goodwill was personal goodwill is contrary to principle: [233]. Mr Paltos' share of the partnership goodwill must be reduced by 30% to reflect the uncertainties of litigation: [235].

Contracts: termination

Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 **[2021] NSWCA 162**

Decision date: 4 August 2021

Bathurst CJ, Payne and McCallum JJA

In 2001 Australia City Properties Management Pty Ltd ('ACPM') entered into a caretaking agreement with the owners of Strata Plan No 65111 ('the OC'), for a term of ten years with options to renew extending until 2026; 2010 and 2015 deeds of variation added further options that, if exercised, would have extended until 2041. 2002 amendments to the *Strata Schemes Management Act 1996* ('SSMA') limited new caretaker agreements to a term, including any options to renew, of 10 years. Clause 9 of the agreement allowed for termination by the OC for gross misconduct or negligence. Clause 10 set out the procedure on termination, entitling ACPM to sell its interest in the agreement. In 2019 the OC served a notice of termination on ACPM, but did not follow the cl 10 procedure, asserting that ACPM had no further rights under the agreement. ACPM purported to accept a repudiation based on the OC's breach of cl 10 and sought loss of bargain damages. The primary judge found conduct of ACPM amounting to gross negligence or misconduct and that the OC's breach of cl 10 did not amount to a repudiation, so that ACPM was not entitled to loss of bargain damages. ACPM appealed.

Held: allowing the appeal.

- ACPM's failure to pay for electricity in a lot that it owned breached an implied term not to use its position to obtain an unauthorised benefit, which, in the context of ACPM's deception on the issue, amounted to gross misconduct: [88]-[98], [105]. Failure to report fire safety concerns, where ACPM had relied on assurances from a contractor, did not amount to gross negligence for the purpose of the termination provision as it was not an act or omission inimical to the contractual relationship demonstrating an inability to exercise the necessary judgment: [162]-[165]. The electricity breach amounted to a repudiation ([287]) but the terms of cl 9 were apt to cover any repudiatory conduct, so that such conduct did not give rise to any separate right to terminate at general law: [290], [295]. The OC's repudiatory breach of cl 10 did not entitle ACPM to terminate as it was itself in breach and unwilling to perform its obligations: [303]. However, the cl 10 breach deprived ACPM of the right to assign the management rights under the contract, for which loss ACPM was entitled to damages: [308].

- The 2002 amendments served to limit the extent to which lot owners could be bound by long-term contracts struck between developers and caretakers: [331]. The exception in the transitional provisions for agreements already in force served to protect caretakers who had already acquired such rights at significant expense: [332]. It did not apply to the agreement as varied by each deed ([333]-[335]) with the result that the interest in the caretaking agreement that ACPM would have been entitled to sell only extended until 2025: [346].

Succession: knowledge and approval; severance

Lewis v Lewis **[2021] NSWCA 168**

Decision date: 6 August 2021

Meagher, Leeming and Payne JJA

Ms Pamela Lewis left two wills. A 2011 will and three codicils effected an equal distribution of her estate between her four sons. In 2011, at the instigation of her son David and in breach of her duties to a family company, Pamela transferred assets of the company to a series of newly established trusts. Another son, Peter, had a liquidator appointed to the company who successfully brought proceedings against Pamela and the trustee companies to recover the assets, which were found to be held on constructive trusts. Following this, the bulk of the assets were no longer held by Pamela through her shareholding in the family company but on trusts which would continue after her death, with Pamela able to determine control of the trustee companies. A fourth codicil to the 2011 will and a subsequent 2014 will, drafted by David, had the effect of empowering David to alter the equal distribution of the assets by giving him control of these trustee companies. Peter propounded the 2011 will and three of its codicils; David propounded the 2014 will and its codicils. The primary judge found that while Pamela had testamentary capacity at the relevant times, she was not shown to have known or approved of the clauses conferring power on David. The remaining clauses of the 2014 will, in substantially the same terms as the 2011 will, were admitted to probate. David appealed.

Held: dismissing the appeal

- There was no evidence of instructions from Pamela in relation to the clauses drafted by David, which were verbally and legally complex and whose effect had not been explained to Pamela, who did not appear to understand how her assets were to be distributed: [108], [114]. There is no rule that the reading of a will to a capable testator satisfies the requirement of knowledge and approval: [130], [141], [150]. The onus on a proponent of a will to show that its effect has been brought home to the mind of the testator will vary depending on the degree to which the circumstances are suspicious, the sophistication of the testator and the complexity of the will: [179]-[186]. It will not be of much assistance to the proponent of a will, in suspicious circumstances, merely to establish that the testator knew the contents of the will where that alone did not carry with it knowledge that its effect was to confer a benefit on that person: [170]. The mistake doctrine, historically limiting the power of courts to rectify mistakes as to the legal effect of words used in a will, does not suggest otherwise: knowledge and approval is a central element of validity of a will, reflecting important public policy, and should not be undermined by an exceptional doctrine which has in any case been significantly eroded by statute: [155]-[163], [185].

- There is no reason in principle to prevent only those clauses of a will of which a testator is found to have known and approved being admitted to probate: [192], [210]. Such severance is not limited to “self-contained” clauses: [194]-[199].

Real Property: sale by mortgagee

***Almona Pty Ltd v Parklea Corporation Pty Ltd* [2021] NSWCA 171**

Decision date: 11 August 2021

Bathurst CJ, Basten and White JJA

Almona Pty Ltd ('Almona') was the registered proprietor of land over which the third respondent ('SAP'), part of the Pacific Alliance Group ('PAG'), held a mortgage. Almona defaulted and a sales process was conducted. The highest bidder in the first round, Wesco Capital Pty Ltd ('Wesco') later reduced its bid substantially, leaving Dyldam Developments Pty Ltd ('Dyldam') the highest bidder. Parklea Corporation Pty Ltd ('Parklea') was established to be the purchaser and entered a contract of sale with SAP for a price of $85.35M with vacant possession or $81.1M if Almona's principal, whose home was on the land, remained in possession. The purchase price was later varied to $81.1M. Representatives of PAG and Dyldam met prior to settlement. At settlement, the bulk of the finance came from another PAG entity, which had an option to acquire an 80% interest in Parklea. Companies associated with Wesco also ended up with interests in Parklea. Prior to settlement, SAP delayed providing information to Almona and expedited the settlement process in order to avoid Almona's attempt to settle its debt. After settlement, Almona sought to have the sale set aside for fraud. The primary judge awarded Almona $4.25M against Parklea for failure to reveal the occupation condition but otherwise rejected Almona's primary claim. Almona appealed and Parklea cross-appealed.

Held: dismissing the appeal (White JA dissenting) and dismissing the cross-appeal

- A mortgagee is required to exercise its power of sale in good faith, but is not a trustee of the mortgage: [56]-[64], [105]-[115], [296]-[305]. It is essential that there be an independent bargain: [58], [108], [318]. Good faith must be assessed at the time of execution of the contract of sale: [65]. That a mortgagee ends up with a stake in the purchaser is not conclusive: [67]. There was no evidence of a collateral purpose at the time of execution: [198], [226]. Once executed, even subject to a condition subsequent, the contract was binding upon SAP and extinguished any right of Almona to insist on settlement of its debt: [77]-[78], [184]-[195]. However, failure to inform of the occupation condition was a breach of the mortgagee's duty, of which the purchaser was aware: [207]. An inference of collusive bidding involving Wesco was available but never pleaded: [49], [236]. Mere suspicion of collusive bidding, where failure to call contrary evidence could not be relied on, was insufficient: [54]-[55], [258]-[262].

- White JA, in dissent: there was no independent bargain in circumstances where PAG controlled the sale from both sides: [324]. SAP's duty to obtain the best price consistent with its right to realise the security does not appear to have been given absolute preference over PAG's desire that an associated entity should obtain a good bargain: [332]. No fraud needed to be alleged in relation to Wesco's bid as the evidence was sufficient to cast upon SAP and Parklea the onus of proving the validity of the transaction: [336].]

Australian Intermediate Appellate Decisions of Interest

Consumer law: misleading or deceptive conduct; Google advertisements

***Australian Competition and Consumer Commission v Employsure Pty Ltd* [2021] FCAFC 142**

Decision date: 13 August 2021

Rares, Murphy and Abraham JJ

Employsure Pty Ltd ('Employsure') is a private company providing workplace relations advice to employers. It is not affiliated with any government agency. Employsure used Google's ad services to promote its services in advertisements published between 2016 and 2018. It selected as keywords in its search engine marketing strategy phrases such as "fair work Australia" or "fair work ombudsman" that it was aware were used by consumers to visit the websites of government agencies. When the relevant search terms were entered, the first result would be a paid ad for Employsure offering, for example, "Fair Work Ombudsman Help – Free 24/7 Employer Advice", with the phone number of its advice line and links to landing pages on its website. URLs used in the advertisements included, for example, "www.fairworkhelp.com.au/Fair-Work/Australia". Employsure was not mentioned in any of the ads. The Australian Competition and Consumer Commission ('ACCC') alleged that by the publication of the Google ads Employsure represented that it was, or was affiliated with, a government agency, and that this amounted to misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law. The primary judge found for Employsure. The ACCC appealed.

Held: allowing the appeal

- The class to whom the advertisements were directed (business owners or employers searching for employment-related advice on the internet) includes a wide and heterogenous cross-section of the public, which heterogeneity must be taken into account: [132]-[136]. Small business operators need not be particularly shrewd, digitally literate or commercially sophisticated, and the advertisements were intended to be read by a class including the less shrewd, the digitally incompetent and the unsophisticated: [136], [155]. An advertisement may still be misleading or deceptive even if it fails to mislead or deceive the intelligent or wary: [136]. The assessment of reasonable responses requires the identification of outer limits of reasonableness, not of a finite number of acceptable reasonable responses: [137].

- A first impression of an advertisement is likely to be determinative of the representation conveyed in circumstances where the level of scrutiny is likely to be low: [98], [142]-[149]. The alleged representations were conveyed not as a result of selective attention or want of reasonable care but as a natural consequence of Employsure's advertising strategy: [151]-[159]. Failure to notice the 'Ad' symbol or appreciate differences between the paid ads and organic search results was not unreasonable: [163]-[169].

Contracts: construction; third party interference

Gold Valley Iron Ore Pty Ltd v FE Accommodation Pty Ltd & Anor **[2021] NTCA 2**

Decision date: 16 August 2021

Grant CJ, Barr and Brownhill JJ

The appellant (purchaser) entered into an agreement with the two respondents (vendors) for the purchase of a mining camp and plant and equipment ('the chattels') located on mineral leases held by a third party, then in liquidation. The purchaser was given a right to possession under licence upon execution, with ownership to pass upon settlement. Both parties were aware that the mineral leases were expected to be sold shortly, and that an in principle agreement had been reached with the prospective owners to permit removal of the chattels. The eventual purchaser, Britmar (Aust) Pty Ltd ("Britmar'), granted permission to the vendors or their nominees to remove the chattels. Settlement was delayed, and Britmar wrote to the parties asserting that it had the sole right to access the chattels and would only remove them at the cost of the purchaser, paid in advance. The purchaser proceeded to remove certain items from the mining leases, prompting the vendors to obtain an injunction preventing the removal of further chattels. The purchaser claimed that Britmar's position placed the vendors in breach of the agreement. Both parties purported to terminate and sought damages for the other's alleged breach. The primary judge gave judgment for the vendor, and the purchaser appealed.

Held: dismissing the appeal

- The contract gives rise to a constructional choice: either the vendors contracted to give the purchaser what they did not have at the time of execution (namely unimpeded access to and use of the chattels) or the purchaser contracted to pay a substantial sum for what turned out to be very little (qualified access to remove the chattels from the mineral leases) but which had the potential, at execution, to be much more valuable (namely unimpeded access to the chattels if the purchaser were to acquire the mineral leases, or the ability to lease or on-sell them to the purchaser of the leases): [31]-[33]. That the former would place the vendors in immediate breach upon execution speaks against that construction: [34]. The purchase price reflected the risk accepted by the purchaser: [37].

- Undertakings by the vendors to provide the chattels "free of any charge or encumbrance in favour of any third party" do not assist the purchaser, as Britmar's claim is not founded on any right or interest in the chattels: [39]-[50]. The meaning of "quiet possession", which the vendors undertook to give, depends on the context, and here refers to those entitlements which it was, to the knowledge of both parties, within the vendors' power to give: [51]-[57], [74]. The vendors' injunction was not an interference with the purchaser's rights under the contract, as the vendors were entitled to require payment in full before the chattels were removed, the provision to that effect confirming that the risk of being unable to access and use the chattels fell on the purchaser: [64], [89].