Court of Appeal
Supreme Court
Sydney

Decisions of Interest

16 August 2021 – 31 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.

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New South Wales Court of Appeal Decisions of Interest

Costs: non-party costs order against legal practitioner

Muriniti v Mercia Financial Solutions Pty Ltd **[2021] NSWCA 180**

Decision date: 18 August 2021

Bell P, Gleeson JA and Emmett AJA

Mr Muriniti was the solicitor for the defendant in underlying substantive proceedings in which a cross-claim was brought alleging fraud against his client. The cross-claim was dismissed by the primary judge and the Court of Appeal, with both judgments noting the absence of any evidence capable of supporting the allegations of fraud. In the subsequent costs judgment the primary judge ordered Mr Muriniti to pay 65% of the costs of the cross-defendants pursuant to s 99 of the *Civil Procedure Act 2005* (NSW) ('CPA') (costs incurred by solicitor negligence or misconduct) and cl 5 of Sch 2 of the *Legal Profession Uniform Law Application Act 2014* (NSW) ('Uniform Law') (legal services provided without reasonable prospects of success). Mr Muriniti filed a summons seeking leave to appeal but did not accept that leave was required.

Held: dismissing the appeal

- Leave to appeal is not required in relation to costs orders against a solicitor. Such orders require serious findings to be made against a practitioner and so fall outside of s 101(2)(c) of the *Supreme Court Act 1970* (NSW), which refers to orders "as to costs only which are in the discretion of the Court": [25]-[27].

- Allegations of fraud require cogent proof and engage the ethical obligations found in cl 2 of Sch 2 of the Uniform Law: [73]-[74]. To resist a costs order under CPA s 99 a practitioner must establish that there was not "serious neglect, serious incompetence or serious misconduct" in the conduct of the case, including in relation to serious allegations of fraud: [83]. A practitioner will be afforded the opportunity to lead evidence as to the reasonableness of his or her conduct: [84]. The presumption arising under cl 6 of Sch 2 of the Uniform Law, that the legal services in question were provided without reasonable prospects of success, is rebuttable and was treated as such by the primary judge. Nothing in *King v Muriniti* (2018) 97 NSWLR 991 suggests otherwise: [92]-[93].

- The primary judge did not deny Mr Muriniti procedural fairness or treat the findings in the substantive judgment as beyond challenge: [96]. There was nothing to be gained by mere repetition of arguments already rejected in the substantive judgment and again on appeal: [86]-[87], [101]. Moreover, it was insufficient to show a genuine and honest belief as to the cogency of the reasoning underpinning the allegations of fraud. The s 99 inquiry turns on the existence of an objective reasonable basis for the allegations, which Mr Muriniti's submissions failed to disclose: [103]-[104]. General suspicion as to the honesty of a person's conduct does not, without more, authorise the making of specific allegations of fraudulent or conspiratorial conduct: [117].

Commerce: restraint of trade

***Belflora Pty Ltd v Vinflora Pty Ltd* [2021] NSWCA 178**

Decision date: 19 August 2021

Bathurst CJ, Brereton JA and Emmett AJA

Mr Belcastro and Mr Uppalapti each held an equal number of shares in Belflora International Pty Ltd, through which they traded as flower wholesalers at the Sydney Flower Markets. In 2018, as a result of disputes between the two, the business was divided: Mr Belcastro, through the newly incorporated Belflora Pty Ltd ('Belflora'), and Mr Uppalapti, through the newly incorporated Vinflora Pty Ltd ('Vinflora'), each became entitled to certain stalls previously operated by Belflora International Pty Ltd. The agreement dividing the business included a restraint provision whereby Vinflora was prohibited from importing and displaying South American flowers, only being allowed to purchase such flowers from Belflora in order to fulfill orders. Belflora was subject to an equivalent restraint in respect of Kenyan flowers. The stated reason was so that the two did not have identical stands. Vinflora began importing and displaying South American flowers and Belflora sought an injunction to restrain it from doing so. The primary judge held the restraint provision void as an unreasonable restraint of trade. Belflora appealed.

Held: dismissing the appeal

- The impugned provision clearly operated as a restraint of trade, both in limiting the exporters and wholesalers from whom Vinflora could acquire flowers and in restraining the activities of and products sold by two corporations that would otherwise be in competition with one another: [22], [43]. A restraint of trade is contrary to public policy and thereby void unless it is reasonably necessary to protect the interests of the parties and is reasonable in the interests of the public: [26], [44]. The doctrine reconciles two conflicting policies: the freedom to put one's skills and expertise to their best use, and the sanctity and enforceability of covenants: [45]. Reasonableness as between the parties requires (i) the existence of a legitimate protectable interest, and (ii) that the restraint in question be no more than is reasonably necessary for the protection of that interest: [46]. Legitimate interests which may be the subject of protection are proprietary in nature, including trade secrets, confidential information or goodwill; a mere restraint against competition *per se* is unenforceable: [26], [46].

- In this case, no legitimate interest of Belflora was protected by the restraint on Vinflora. No evidence was led as to the existence of a relationship with particular suppliers that might warrant protection, and in any case the restraint in question extended beyond any such protectable interest to an entire subcontinent: [30], [50]. The mutuality of the restraint, the fact that it was freely bargained for, and the alleged mutual interest in protecting each party from competition from the other were all irrelevant as there can be no entitlement to protection from competition *per se*: [31], [51]-[57]. The restraints did not serve to protect any legitimate protectable interest and were therefore void: [30], [58]-[60].

Appeals: nature of appeal; *Crimes (Appeal and Review) Act* s 11(1)

Lunney v Director of Public Prosecutions **[2021] NSWCA 186**

Decision date: 25 August 2021

Meagher, White and McCallum JJA

The applicant was convicted of a domestic violence offence in the Local Court. He appealed against his conviction to the District Court under the *Crimes (Appeal and Review) Act 2001* (NSW) ('CARA') s 11(1). CARA s 18 provides that a conviction appeal is to be "by way of rehearing on the basis of the evidence given in the original Local Court proceedings". An application under that section to lead fresh evidence was rejected. The appeal raised two specific allegations of error in the Local Court judgment, neither of which the District Court judge found was made out. The applicant sought judicial review of the District Court decision, contending that the judge failed to discharge his appellate function by failing to consider the whole of the evidence from the Local Court and form his own view of the applicant's guilt.

Held: dismissing the summons seeking judicial review

- The nature of a right of appeal is determined by the proper construction of the terms of its grant: [16]. While the phrase "by way of rehearing" is used to describe appeals both against conviction and against sentence ([18]), the term "rehearing" does not always carry the same meaning: [30]. An appeal against sentence under s 11(1) is "by way of rehearing of the evidence" given in the Local Court (s 17), while an appeal against conviction is "by way of rehearing on the basis of evidence" given in the Local Court. The difference indicates that each appeal involves a different task: [18]. Moreover, while a sentence appeal carries an unqualified right to adduce fresh evidence, on a conviction appeal leave is required and the circumstances in which it will be given limited: [19]. While the appeal against sentence is akin to a rehearing *de novo* ([20]) the same can no longer be said of the appeal against conviction following the replacement of the former "all grounds" appeal with the current statutory provisions: [21]-[22].

- A s 11(1) conviction appeal is neither a rehearing *de novo* nor a species of judicial review in which the judge is relieved of any obligation to consider the case on its merits: [33]. However, the District Court is not necessarily required to review the whole of the record of the Local Court proceedings: [34]. In some cases a trial judge's assessment of the credibility of witnesses will be decisive: [39]. The scope of review required will be informed by the arguments formulated on appeal: [4], [43]-[44].

- This was the paradigm of a case in which the magistrate who saw and heard the witnesses enjoyed an advantage that could not be replicated in the appeal: [82]. The applicant did not seek in the District Court to impugn the magistrate's assessments of credibility: [85]. The submission that the magistrate's decision did not turn on such matters was rightly rejected, leaving no argument the resolution of which required the whole of the evidence to be reviewed: [7], [86].

Insurance: measure of indemnity; damages

***Worth v HDI Global Specialty SE* [2021] NSWCA 185**

Decision date: 26 August 2021

Macfarlan, Meagher and McCallum JJA

The appellant's home and the business she operated from it were insured by the respondent against property damage and 12 months business interruption losses respectively. The home was substantially destroyed by fire. The respondent ultimately rejected the appellant's claim on the basis of a police report concluding the fire had been deliberately lit. The appellant commenced proceedings seeking the costs of reinstating her home and 12 months business interruption losses, as well as damages for consequential losses after the expiry of the 12 month period and for personal inconvenience and distress, the latter damages on the basis of alleged breaches by the respondent of its statutory duty of utmost good faith and its alleged contractual duty to indemnify the appellant within a reasonable time. The primary judge concluded that the fire had been deliberately lit and gave judgment for the respondent. The appellant appealed.

Held: allowing the appeal and addressing the question of relief

- The circumstantial evidence did not give rise to a "reasonable and definite inference" that the appellant intentionally caused the fire: [3]-[5], [235], [270]-[279]. Cf Meagher JA, dissenting: [67], [92].
- The policy provided for settlement of property damage claims on a reinstatement basis provided that reinstatement was commenced with reasonable despatch, and otherwise on an indemnity basis: [171]. Failure to commence reinstatement could not be justified on the basis of the respondent's refusal to indemnify: [173]. That non-payment may be a cause of an insured's inability to reinstate could not prevent the insurer from relying on the proviso: [175].
- A claim under an insurance policy is a claim to unliquidated damages, arising immediately on the happening of the insured event, albeit with the amount to be calculated in accordance with the policy: [179]. Authorities supporting the availability of damages for losses consequential upon a failure to indemnify rely on a view of the nature of the insurer's obligation rejected in *Globe Church Incorporated v Allianz Australia Insurance* (2019) 99 NSWLR 470: [188]. No damages are payable for the late payment of damages as such, and calculation of damages in accordance with the policy precludes recovery of business losses outside of the period for which the appellant was insured: [189]-[190]. There is no implied term to pay damages within a reasonable time, breach of which might separately give rise to a right to damages for consequential loss: [191].
- Exceptions to the rule against recovery of damages for inconvenience and distress, such as where a plaintiff suffers physical inconvenience as the result of a breach of contract and mental suffering directly related to that physical inconvenience, were not engaged in this case: [201]-[203].

Negligence: obvious risks of dangerous recreational activities

***Cox v Mid-Coast Council* [2021] NSWCA 190**

Decision date: 31 August 2021

Meagher and Payne JJA, Emmett AJA

Mr Cox was injured when the light aircraft that he was piloting collided with a Ferris wheel during an attempted landing at the Old Bar Aircraft Landing Area ('ALA'). An ALA is an unlicensed aerodrome, not subject to any regulatory oversight. The Ferris wheel had been erected by the Mid-Coast Council ('the Council') two days earlier and encroached on the splay of the grass airstrip, being the area through which aircraft may travel when taking off or landing. A claim against the Council by a passenger of the Ferris wheel was successful. However, when Mr Cox sued the Council for negligence the primary judge found that his claim was precluded by s 5L of the *Civil Liability Act 2002* (NSW) ('CLA') as the harm suffered was the result of the materialisation of an obvious risk of a dangerous recreational activity. On appeal Mr Cox accepted that he was engaged in a dangerous recreational activity but challenged the primary judge's conclusions concerning the obviousness of the risk.

Held: dismissing the appeal

- Despite the unusualness of the Ferris wheel, it was not necessary to specify the nature of the object obstructing the splay when characterising the risk for the purposes of s 5L. The relevant risk is to be characterised with a degree of generality, but with sufficient precision to capture the harm in fact resulting from its materialisation on the particular facts of the case, requiring a combination of foresight and hindsight: [36]. A degree of generality is necessary in order to preserve the intent of the provision in allocating the burden of harm: [43]. Any structure in the splay of an ALA creates a risk of collision and serious injury, and it is sufficiently commonplace for structures to appear in the splay of an ALA that pilots are advised to conduct detailed safety checks prior to attempting a landing. In those circumstances the risk of harm is appropriately characterised as the risk of Mr Cox's plane colliding with a hazard or built structure in the splay, without needing to further specify that the structure in question was a Ferris wheel: [44]. There is no requirement that the risk identified for the purposes of s 5L be characterised in the same terms as that identified for the purposes of s 5B; the former is to be characterised from the perspective of the plaintiff, the latter from the perspective of the defendant: [48].

- The identified risk was obvious within the meaning of s 5F. Though reasonable to expect that the splay would be clear of obstacles, it remained a pilot's responsibility to ensure that it was in fact clear: [64]. The fact that others landing at the ALA had seen the Ferris wheel was relevant to the assessment of obviousness; though Mr Cox did not see the Ferris wheel on his flyover, the reason for the flyover was the obvious risk that an obstacle might be in the splay: [65]-[66]. That a risk was not 'expected', in that it had a low probability of occurring, does not affect the characterisation of that risk as obvious: [68].

Australian Intermediate Appellate Decisions of Interest

Procedure: production of documents; Statutory interpretation

SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor **[2021] QCA 172**

Decision date: 20 August 2021

Fraser and Morrison JJA, Lyons SJA

SDA alleges that he was sexually abused by the former superintendent ('M') of an orphanage managed at the time by the respondent diocese, and that the latter is both vicariously liable for the actions of M and liable in negligence for various alleged omissions to take reasonable care to prevent the abuse. A notice of claim was served on the diocese pursuant to the *Personal Injury Proceedings Act 2001* (Qld) ('PIPA') and various requests for information were made. The respondent acknowledged that it possessed information concerning complaints made about M many years after his retirement as superintendent. PIPA s 27(1)(b)(i) provides that a respondent must give a claimant, if asked, "information that is in the respondent's possession about the circumstances of, or the reasons for, the incident". "Incident" is relevantly defined to mean "the accident, or other act, omission or circumstance, alleged to have caused all or part of the personal injury". The respondent denied that it was obliged to provide information concerning the complaints to SDA. The primary judge found for the respondent, and SDA appealed.

Held: allowing the appeal

- The purpose of s 27, as stated in the PIPA, is "to put the parties in a position where they have enough information to assess liability and quantum in relation to a claim": [6], [82]. The "incident", in this case, comprehends each alleged act of abuse: [13]. Though the respondent may not have any belief or knowledge as to the accuracy of statements made in complaints about M, the statutory purpose of the provision would not be served by allowing information to be withheld on the basis that the respondent had formed an honest belief, short of knowledge, that the information was not true: [16]-[20]. [Cf Morrison JA: information must be known to be true or capable of being proved, but the critical question is what constitutes the information in a given case: [89], [100]-[108].]

- The statutory context and purpose indicate that s 27(1)(b)(i) must comprehend information relevant to liability and quantum, thus requiring reference to the notice of claim: [26]. While "circumstances of the incident" refers to what happened, the "reasons for" an incident are broader and may also include information relevant to the existence of a duty: [31], [118]-[122]. Where a claim involves omissions to take reasonable care, or allegations that a respondent knew or ought to have known of a risk, information related to the alleged similar incidents (bearing upon the effectiveness of steps that might have been taken or upon the respondent's knowledge of relevant circumstances) is capable of being regarded as information about the reasons for the incident: [31]-[34], [124]-[133].

Administrative law: availability of equitable estoppel in public law

McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) **[2021] FCAFC 152**

Decision date: 23 August 2021

Allsop CJ, Besanko and Mortimer JJ

Mr McHugh was born in the Cook Islands and brought to Australia as a child by a couple who would later become his adoptive parents. His adoptive father was an Australian citizen. Although eligible to apply for Australian citizenship, Mr McHugh never did so because he and his adoptive parents had always understood that he was a citizen. In 2018 his absorbed persons visa was cancelled by operation of s 501(3A) of the *Migration Act 1958* (Cth) ('the Act'). Exercising the power in s 501CA(4), the Minister refused to revoke that cancellation. Mr McHugh successfully sought judicial review of that decision and, while a fresh decision was pending, applied for orders that would restrain the Minister from treating him as a non-citizen, except for the purpose of granting him a visa, and a declaration that it was in the public interest that he be granted a visa. These orders were sought on the basis of an estoppel alleged to have arisen by reason of representations made to Mr McHugh about his citizenship. The primary judge refused the orders sought, and Mr McHugh appealed.

Held: dismissing the appeal

- The grant and issuing of a passport to Mr McHugh, the endorsement on that passport, an invitation to Mr McHugh to enrol as an elector and his entry onto the electoral roll were all representations made to Mr McHugh by the Commonwealth to the effect that he was accepted as an Australian citizen. Mr McHugh reasonably relied on those representations to his detriment by failing to apply for the citizenship which he believed he already had: [43].

- The tide of authority in Australia has held that the manner in which a repository of a statutory discretionary power exercises that power cannot be affected by principles of equitable estoppel: [65]-[67]. The estoppel that Mr McHugh sought to rely on would fly in the face of the scheme of the Act and the fundamental distinction drawn between citizens and non-citizens: [75]. The Act requires Mr McHugh to be treated as a non-citizen, and the Minister must approach the exercise of the s 501AC(4) power on that basis: [76]. In light of representations made to Mr McHugh, the Minister is obliged to consider and engage with those representations, but not necessarily to treat them as determinative: [77]. Any declaration that it is in the public interest to grant Mr McHugh a visa would be inimical to the personal, non-compellable nature of the s 195A power: [95].

- The US Court of Appeals in *Schwebel v Crandall* (2020) 967 F.3d 96 held that public law estoppel is available in the "most serious of circumstances" involving "affirmative misconduct by the government". Though deserving of careful consideration, such an approach must be for the High Court to take: [79]-[83].

Asia Pacific Decision of Interest

Contract: bills of lading

The "Luna" and another appeal **[2021] SGCA 84**

Decision date: 20 August 2021

Judith Prakash and Steven Chong JJCA, Quentin Loh JAD

The respondent sold bunker fuel on standard terms. Payment was due 30 days from the date of loading. The respondent's customers nominated barges onto which the fuel would be loaded. Upon loading, documents were generated including three original bills of lading recording the port of destination as "bunkers for ocean-going vessels". These documents were sent to the respondents, who would later email scanned copies along with their invoice to the buyers. Originals were only supplied after receipt of payment. Fuel was generally delivered to numerous different ocean-going vessels within a few days of loading and without production of the original bills of lading, which remained with the respondent. In this case the buyer defaulted on payment. The respondent demanded delivery of fuel from the appellants, the barge owners, claiming that, as holder of the bills of lading, it was entitled to possession. The primary judge found for the respondent and the barge owners appealed.

Held: allowing the appeal

- Bills of lading ordinarily serve three functions: (a) a receipt by the carrier acknowledging the shipment of goods; (b) a memorandum of the terms of the contract of carriage; (c) a document of title to the goods: [29]. In determining whether the bills of lading in this case were intended to have contractual force and operate as documents of title, the inquiry is as to the existence of a contract rather than its interpretation. The Court is thus able to consider commercial arrangements between the respondents and the buyer in order to ascertain the parties' objective intentions in relation to the bills of lading: [30]-[42].

- The 30 day credit period reflected common practice where buyers purchase on credit, on-sell within the credit period, and use the proceeds to repay the seller: [43]. Payment was required upon presentation of the invoice, with no reference in the agreement to bills of lading: [44], [47]. Title and possession were to pass upon loading: [45]-[46]. The buyer, not the respondents, directed the appellants as to the delivery of fuel to ocean-going vessels: [48]. Buyers were clearly entitled to deal with the fuel immediately: [49]. The extension of credit would otherwise serve no commercial purpose: [50]. Thus as between the respondent and its customers, the bills of lading were a non-essential document with no force or effect as a contract of carriage or document of title: [51]. In light of that arrangement, the respondents knew that the bills of lading would not entitle them to possession ([53]), a conclusion supported by the course of dealing ([55]-[56]) and the terms of the bills of lading, which were incompatible with the presentation rule: [61]-[66], [69]. The respondents' acceptance of the risk of non-payment could not result in a transfer of that risk to the appellants: [71]-[74].

International Decision of Interest

Contract: lawful act economic duress

Pakistan International Airline Corporation v Times Travel (UK) Ltd **[2021] UKSC 40**

Decision date: 18 August 2021

Reed PSC, Hodge DPSC, Lloyd-Jones, Kitchin and Burrows JJSC

Times Travel (UK) Ltd ('TT') was a travel agent depending almost exclusively on the sale of plane tickets to and from Pakistan. Pakistan International Airline Corporation ('PIAC') was the sole operator of those flights. In 2012 numerous agents alleged that PIAC had not been paying certain commissions. However, under pressure from PIAC, TT did not participate in proceedings. Later that year PIAC cut TT's fortnightly ticket allocation from 300 to 60 and then threatened to terminate its relationship with TT unless TT entered into a new contract releasing PIAC from all claims it might have had under the old contract. None of PIAC's actions were unlawful. TT later sought to rescind the new contract for duress. The primary judge gave judgment for TT but was overturned by the Court of Appeal. TT appealed to the Supreme Court.

Held: dismissing the appeal

- Duress requires an illegitimate threat by the defendant that causes the plaintiff to enter into a contract: [78]. Though rejected in other jurisdictions, including by the NSW Court of Appeal in *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344, lawful act duress is a ground for rescission in English law: [82]-[86]. The case law refers to "illegitimate" rather than "unlawful" pressure, and civil duress should not exclude threats of lawful acts when blackmail does not: [87]-[88]. In light of the common law's recognition of economic duress, numerous cases in which lawful threats had entitled a party to rescind for undue influence should now be understood as involving lawful act duress: [89]-[91].

- Lawful act duress has been recognised (i) where a defendant has used knowledge of criminal activity to obtain a benefit by the threat of reporting the crime and (ii) where a defendant, exposed to a civil claim, has used means which the law considers illegitimate to deliberately manoeuvre the plaintiff into a position of vulnerability to force the plaintiff to waive the claim: [4]-[16]. Illegitimacy has here been synonymous with unconscionability: [17]-[22]. In the absence of a doctrine of inequality of bargaining power or of general contractual good faith, the scope for lawful act economic duress is narrow: [26]-[30]. Illegitimacy does not turn on the absence of an honest belief in a defendant's entitlement to make the demand: bad faith assertions of pre-existing entitlements are likely common in commercial dealings, but would form an unprincipled, uncertain and potentially unhelpful basis for lawful act duress, with a demand for a waiver, whether or not a party believes it is entitled to it, being in principle no different to a demand for payment of a sum prior to entering into a contract: [48]-[56] (cf Burrows SCJ at [62], [102], [112]). PIAC did not act unconscionably in applying commercial pressure to TT: [58]-[60].