Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 September 2021 – 15 September 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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Sydney Seaplanes Pty Ltd v Page **[2021] NSWCA 204**

Decision date: 7 September 2021

Bell P, Lemming JA and Emmett AJA

Mr Page sought damages in the Federal Court for the death of his daughter on a flight operated by the Appellant. As the flight took place within NSW, the Federal Court did not have jurisdiction. By the time an order was made dismissing the claim, more than two years had passed since the accident. By s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ('the Commonwealth Act'), incorporated into NSW law by s 5 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) ('the NSW Act'), failure to bring a claim within two years extinguishes any right to damages. Mr Page thus sought an order under s 11 of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) ('the State Jurisdiction Act') that the dismissed proceeding be treated as a proceeding of the NSW Supreme Court, as if brought in that Court on the day it was commenced in the Federal Court. Such an order may be made in respect of "a proceeding in which a relevant order is made"; "relevant order" is defined to include a Federal Court order dismissing a proceeding relating to a State matter for want of jurisdiction; "State matter" is defined to include matters in which the Supreme Court has jurisdiction other than by reason of a law of the Commonwealth or another State and matters in respect of which a relevant State Act (which includes the NSW Act and the State Jurisdiction Act) purports or purported to confer jurisdiction on a federal court. The primary judge made the s 11 order and the Appellant appealed.

Held: allowing the appeal

- While the order dismissing the Federal Court proceedings fell within the literal meaning of a "relevant order" ([25], [133]), context and purpose needed to be considered: [26]-[34]. Statutory purpose should not be inferred on the basis of overly broad *a priori* assumptions about a statute's intended reach, the beneficial construction of remedial legislation being merely a manifestation of the general principle that legislation is to be construed purposively: [36], [85], [97]. While not always the case, extrinsic materials may be especially helpful where legislation is enacted in response to a particular judicial decision: [37]-[41].

- The Sate Jurisdiction Act was a legislative response to the ineffective conferral of jurisdiction addressed in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('*Wakim*') ([43]-[49], [87], [160]-[164]), as confirmed by the extrinsic materials: [50]-[51]. In keeping with that narrower remedial purpose, the want of jurisdiction in the definition of "relevant order" refers specifically to the constitutionally invalid conferral of jurisdiction addressed in *Wakim*: [52]-[56], [137]-[148]. The literal meaning must be read down to exclude cases where there has been no purported conferral of jurisdiction on the Federal Court in a matter but simply an error by the party commencing proceedings: [56]-[58], [144], [168].

Torts: standard of care of public authorities

Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd **[2021] NSWCA 206**

Decision date: 8 September 2021

Basten, Meagher and Leeming JJA

The appellant ('Seqwater') owns and operates two dams that flow into the Brisbane River. The dams supply drinking water for South East Queensland and serve to mitigate downstream flooding by storing excess water during peak rains. Operations during flood events are directed by flood engineers in accordance with a Flood Operations Manual ('the Manual'). The Manual prescribes different strategies based on the maximum predicted water level. These reflect a hierarchy of priorities, from preventing inundation of downstream bridges, to preventing urban inundation, to preventing structural collapse of the dam. A higher predicted water level will lead to the adoption of a strategy sacrificing lower-level priorities for higher-level priorities by releasing greater volumes of water. In January 2011 torrential rains fell in the catchment areas. Large volumes were released from the Wivenhoe dam to prevent it overtopping, which water, in combination with downstream flows, flooded urban areas. The Respondent commenced a class action against Seqwater, SunWater Ltd and the State of Queensland to recover damages for losses caused by the floods, alleging negligent failure to release sufficient water in advance of the heaviest forecast rain. The primary judge found that the flood engineers had failed to take reasonable care, apportioning 50% responsibility to Seqwater. Seqwater appealed.

Held: allowing the appeal

- Seqwater's dam management functions attract the attenuated standard of care for public authorities in s 36 of the *Civil Liability Act 2003* (Qld), which is not limited to causes of action for breach of statutory duty nor rendered inapplicable by Seqwater's obligation to undertake its functions "as a commercial enterprise": [68]-[122]. The Court must thus be satisfied that Seqwater, acting on its own understanding of the relevant circumstances and applicable law, adopted an approach to the exercise of its functions which fell outside the range of reasonably available options: [123]-[140]. A counterfactual reasonable course of action, in circumstances where the Manual relies on professional judgment, would not suffice to show breach of the s 36 standard: [148], [163]-[169].

- The "no release" assumption relied on by the Respondent, which would require higher releases at an earlier stage, was not required by the Manual. It would result in the adoption of strategies directed toward higher-level priorities in circumstances where there was no real risk of the relevant consequences: [263]-[281]. Once it was accepted that it was reasonably open to the flood engineers, on the basis of rain forecasts, to terminate an earlier flood event on 2 January, there could be no negligence in complying with the Manual, which prohibited further releases until a new flood event had begun: [319]-[322], [455]-[460]. The management of the subsequent flood event did not breach the s 36 standard.

Contract: specific performance

***Paolucci v Makedyn Pty Ltd* [2021] NSWCA 215**

Decision date: 14 September 2021

Leeming, White and McCallum JJA

Mrs Paolucci transferred a parcel of rural land, recently rezoned as residential, to Makedyn Pty Ltd ('Makedyn'). Makedyn was to subdivide the land and reconvey to Mrs Paolucci two newly created lots on which it was to have built a house and a duplex. Reconveyance was to take place by May 2017, but subdivision was not achieved until early 2018. Layout plans for the residences, supposed to have been annexed to the reconveyance contract in 2015, were only provided by Makedyn in October 2018. At that point a dispute arose as to the dimensions of the duplex, defined as "a residential dwelling divided into two (2) three (3) bedroom residences on the one (1) lot of no less than 241.45m^2", which dimensions Mrs Paolucci contended described each residence rather than the entire dwelling. Mrs Paolucci sought an order that Makedyn convey to her the newly created lots as vacant lots, with damages under s 68 of the *Supreme Court Act 1970* (NSW) to reflect the diminished value of the reconveyed land. She eventually also sought a declaration as to the dimensions of the duplex. The primary judge dismissed the claim and rejected Mrs Paolucci's construction of the dimensions. Mrs Paolucci appealed.

Held: dismissing the appeal

- Mrs Paolucci did not seek specific performance in the strict sense, but an order requiring Makedyn to perform a contractual term: [10]. That would be quite different from the parties' bargain, given that Makedyn is in the business of constructing and selling homes: [14]-[15]. Mrs Paolucci relies on a historic breach (failure to provide layout plans in 2015) in support of her claim for specific performance, arguing that that breach is causally responsible for the present failure to have constructed the dwellings and reconveyed the lots: [19]-[20]. However, no order for specific performance can be made in respect of a historic breach long since remedied, and no relief can issue for failure to construct the dwellings where there remains a dispute as to their dimensions but Makedyn is ready and willing to perform the contract according to its correct construction once that is established. Any alleged causal relationship between the historic breach and the extant breach is irrelevant to the availability of specific performance: [22]-[24], [93]-[94]. The discretion to award *Lord Cairns Act* damages under s 68 is thus also unavailable: [27]-[30], [41].

- While breach of an obligation on the basis of an honestly asserted but false construction of a contract will entitle a plaintiff to damages for resulting losses, no intention to repudiate will be imputed to the party asserting the incorrect construction. The failure to perform an obligation on the basis of an honestly asserted construction will thus be unlikely to provide a basis for specific performance as damages will remain an entirely adequate remedy: [95]. In any case, Makedyn's construction of the duplex dimensions was correct: [131]-[138].

Environment and planning; Statutory interpretation

KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc **[2021] NSWCA 216**

Decision date: 14 September 2021

Basten and Payne JJA, Preston CJ of LEC

KEPCO Bylong Australia Pty Ltd ('KEPCO') applied for development consent for a proposed coal mine in the Bylong Valley, intended to produce coal for its power stations in Korea. Considerations for the consent authority, the Independent Planning Commission ('IPC'), were set out in the State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 ('Mining SEPP'). Clause 14(1) mandates consideration of whether consent should be issued subject to conditions aimed at minimising certain environmental impacts to the greatest extent practicable; cl 14(2) mandates consideration of an assessment of greenhouse gas (GHG) emissions, including downstream emissions, having regard to any applicable State or national policies, programs or guidelines concerning GHG emissions. The IPC refused consent on the basis of failures to sufficiently minimise GHG emissions and groundwater impacts, having regard, in relation to the former, to the NSW Climate Change Policy Framework ('the NSW Policy'). KEPCO appealed from judicial review proceedings in the Land and Environment Court.

Held: dismissing the appeal

- The assessment process mandated by the *Environmental Planning and Assessment Act 1977* (NSW) and cl 14 of the Mining SEPP involves a single step in which the consent authority determines whether to grant consent, with or without conditions, or refuse it: [25]-[34], [90]-[105]. Statements by the IPC that the proposal failed to minimise GHG emissions and groundwater impacts did not indicate a failure to consider the possibility of imposing conditions. The IPC's conclusion, after consideration of a revised project proposal including 36 pages of conditions, reflected its view that no proposed conditions would satisfy the requirements of cl 14(1): [35]-[52], [131]-[158]. The IPC was under no separate obligation to formulate conditions that would have that effect: [51]. Critically, the IPC found that no proposed conditions were directed to minimising the project's downstream emissions, representing 98% of total emissions: [44], [146]-[147].

- The language of cl 14(2) is broad and not limited to policies directed to the assessment of GHG emissions as opposed to the emissions themselves. Even if the NSW Policy were not a mandatory consideration under s 14(2), it could not be suggested that it was a prohibited consideration: [65]-[68], [173]-[188]. The IPC's conclusion that there was "no evidence" that, if the proposal were refused, inferior quality coal would have to be sourced elsewhere for KEPCO's Korean power plants simply reflected the IPC's view that the evidence provided by KEPCO was not capable of satisfying it on the issue: [70]-[81], [201]-[207]. Further, the IPC emphasised that an unacceptable impact does not become acceptable because the Applicant may end up pursuing an alternative development that has unacceptable impacts: [81].

Criminal procedure: referral of questions of law

Gibson v Director of Public Prosecutions (NSW) (No 2) **[2021] NSWCA 218**

Decision date: 14 September 2021

Bell P, Basten and Meagher JJA

Mr Gibson had certain Local Court convictions quashed on appeal to the District Court and was resentenced for others. After the appeal he sought to have twelve purported questions of law referred to the Court of Criminal Appeal pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW). The District Court judge's refusal to refer the questions was relayed to Mr Gibson via an email from the Local Court Registrar noting that the judge "has advised that she is *functus officio* (that is, a valid result has been imposed after a lawful hearing) and she cannot reopen the case" and accordingly that her Honour had "declined to state a case in this matter". Mr Gibson sought judicial review of the decision not to refer the purported questions of law.

Held: dismissing the summons seeking judicial review

- Decisions of judges should generally be formally delivered and recorded, to avoid potential uncertainty as to the timing of a decision, the reasons for it, and whether those reasons are in fact those of the judge: [18]-[22], [48]-[53]. In this case, the basis for the judge's decision is uncertain: [22], [54]. Elements of the email suggest that the judge did not misconceive her function in relation to the s 5B referral, and that she in fact exercised her discretion not to refer discursive and argumentative "questions" that may have been interpreted as amounting to a request to reopen the hearing: [25]-[26], [57]-[59].

- Section 5B requires pure questions of law, whose character as such is clear on their face, and which do not draw the Court of Criminal Appeal into questions of fact: [27]. A judge to whom a s 5B request is made must consider whether the questions are in fact questions of law, whether they arise in relation to the trial, and whether there is a real question as to the correct answer: [40]. Notably, s 5B does not create a right of appeal: [33], [41]. In this case the proposed questions were clearly not questions of law and thus relief could be refused in the exercise of the Court's discretion: [27]-[30]. The email would not be invalidated by any failure to give reasons as reasons are not required for every decision, though a party would be able to request reasons for such a decision if not given: [61]-[62].

- Any error of law in characterising proposed questions otherwise than as questions of law would be an error within jurisdiction. *Franklin v Director of Public Prosecutions* (NSW) [2021] NSWCA 83, to the extent that it held that a district court judge was obliged to refer questions that were not frivolous or baseless, and that mischaracterisation of proposed questions would constitute jurisdictional error, should not be followed: [31]-[32], [42]-[43]. A decision under s 5B constitutes an adjudication on an appeal for the purposes of s 176 of the *District Court Act 1973* (NSW), so that judicial review is limited to jurisdictional error and not available for mere error of law on the face of the record: [44]-[46].

Private international law: appropriate forum; standard of proof

***Joshan v Pizza Pan Group Pty Ltd* [2021] NSWCA 219**

Decision date: 14 September 2021

Bell P, Gleeson and McCallum JJA

The Applicants, through a franchisee company Joshan Transport Pty Ltd, operated a Pizza Hut restaurant in South Australia under a franchise agreement between the franchisee company and the Respondent, the sub-franchisor of Pizza Hut in Australia. The Respondent commenced proceedings against the Applicants, as franchisee guarantors, in the District Court of NSW, alleging that abandonment of a viable franchise restaurant had resulted in losses for which the Applicants were liable as guarantors. The Applicants sought a stay of the proceedings under s 20 of the *Service and Execution of Process Act 1992* (Cth) ('SEPA'), contending that the appropriate court to determine the proceedings was the District Court of South Australia. The primary judge dismissed the stay application, finding that the Applicants had failed to establish a "clear and compelling basis" for relief, and attributing significant weight to a non-exclusive jurisdiction clause in favour of NSW. The Applicants sought leave to appeal and later cross-claimed against the previous owners of the restaurant, with all cross-defendants resident in South Australia.

Held: allowing the appeal

- SEPA s 20 involves an inquiry as to "*the* appropriate court", so that where there are two equally appropriate courts, the conditions enlivening the discretion to order a stay will not be met: [54]. Appropriateness is determined by reference to the issues in dispute, which will inform an assessment of the need for oral or documentary evidence, the significance of different witnesses' evidence, and the extent to which particular evidence is likely to be controversial: [55]-[57]. The list of factors in s 20(4) is not exhaustive, and the availability of AVL facilities should also be considered, though not so as to circumvent the requirement that the court not give any weight to the place of commencement: [58]. Notably, s 20(4) only refers to exclusive jurisdiction clauses: [61]. The applicant bears a persuasive onus, but only to the ordinary civil standard of satisfaction: [62]-[63].

- The requirement for a "clear and compelling basis" for the relief sought, derived from *Rick Cobby Pty Ltd v Podesta Transport Pty Ltd* (1997)139 FLR 54, finds no support in the text of s 20 and is apt to lead to error: [72]-[78]. Moreover, a non-exclusive jurisdiction clause does not have the significance attributed to it in the dictum of Palmer J in *Asciano Services Pty Ltd v Australian Rail Track Corp Ltd* [2008] NSWSC 652. Such a clause does not manifest a shared preference for a particular jurisdiction and says nothing as to the appropriate court: [81]-[93].

- In this case, the main issue in dispute is the viability of the business, on which issue the key witnesses, including the cross-defendants, are all resident in South Australia: [108]-[110]. South Australia is the 'centre of gravity' of the dispute, and its Supreme Court is the appropriate Court to determine the proceedings: [115].

Australian Intermediate Appellate Decisions of Interest

Limitation of actions: compensation to relatives; Statutory interpretation

Callow v Petersen **[2021] WASCA 167**

Decision date: 15 September 2021

Quinlan CJ, Mitchell JA and Hill J

The Appellant's mother died on 5 October 2013 after being struck by an automobile driven by the Respondent. On 17 September 2019 the Appellant commenced an action under s 9 of the *Fatal Accidents Act 1959* (WA) ('FAA') for the benefit of herself and seven other family members. Of the family members, three were adults at the time of Ms Ryan's death, while the remaining four and the Appellant were all under the age of 15. Section 14 of the *Limitation Act 2005* (WA) provides that an action under the FAA cannot be commenced more than three years after the date of death. However, s 14 is subject to s 30, which provides that the limitation period for a person aged under 15 years at the date at which a cause of action accrues is six years. The Respondent successfully applied to have paragraphs dealing with the relatives who were adults at the time of death struck out from the Statement of Claim as statute barred. The Appellant appealed.

Held: allowing the appeal

- There is only one action under the FAA, which was validly commenced within time by the Appellant: [54]-[55]. The *Limitation Act* only addresses the commencement of actions; in this context the references to "action" in ss 14 and 30 are to the one indivisible action under the FAA: [56]. The *Limitation Act* is not concerned with the powers or duties of a court in respect of an action properly commenced within time; for present purposes, such powers and duties are found in the FAA: [57]. Once an action is validly commenced, that is the end of the matter for the purposes of the *Limitation Act*. This construction has the advantage of avoiding recourse to extralegislative concepts, as the *Limitation Act* says nothing about claims, claimants, expiry of claims or agency: [58]-[60].

- The FAA itself does not restrict the class of persons for whose benefit an action may be brought by reference to the effluxion of time: [62]. The notion of a "claim" is only used to refer to an incident of the "action" brought by a plaintiff; it is simply shorthand for the interest of a person for whose benefit an action is brought. It should not be reified into an "action within an action" reposed in a beneficiary and subject to limitation by reference to the effluxion of time: [63]-[64]. While "agency" may be a useful analogy to describe the relationship between the person for whose benefit an action is brought and the plaintiff who brings it, is no more than an analogy and should not be used to import limitations not found in the statutory text: [65]-[66]. Once commenced within time by a person capable of doing so, the persons for whose benefit an action may be brought are only limited by the FAA, namely to relatives of the deceased, as defined, whose names have been properly particularised: [67].

Statutory interpretation: planning schemes and instruments

***Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12**

Decision date: 15 September 2021

Blow CJ, Brett J and Porter AJ

The Respondent holds a lease over Halls Island, on land subject to the Central Highlands Interim Planning Scheme 2015 ('the Planning Scheme'). The relevant planning authority is the Central Highlands Council ('the Council'). The land is also reserved land within the meaning of the *National Parks and Reserves Management Act 2002* (Tas) ('NPRM Act') and subject to a management plan approved under that Act. By cl 8.7.1 of the Planning Scheme, the Council must grant a permit if the proposed use complies with the relevant "acceptable solution" but must otherwise assess the proposal against listed performance criteria. For reserved land, the "acceptable solution" in cl 29.3.1 is satisfied if a use is undertaken "in accordance with a reserve management plan". The relevant management plan limits visitor accommodation in the zone to standing camps only. The Respondent applied to the Council for a permit to develop visitor accommodation on Halls Island but the permit was refused. The Resource Management and Planning Appeal Tribunal and the primary judge both found the "acceptable solution" satisfied on the basis that the development would be subject to a management plan. The Appellants appealed.

Held: allowing the appeal and remitting the decision to the Tribunal

- The finding in *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66, that a forestry operation would be "undertaken in accordance with" a forestry agreement if subject to such an agreement, irrespective of compliance with conditions imposed under it, only shows the range of meanings of the phrase "in accordance with": [120]-[129]. The Planning Scheme aims to ensure that land use is consistent with strategies for the management of reserved land. The "acceptable solution" provides a more readily ascertainable way of establishing compliance than the performance criteria: [135]-[137]. However, the "acceptable solution" may still require an evaluative judgment: [140]-[141]. It will not be satisfied by the mere existence of a management plan as (i) in every relevant case a management plan will exist, and (ii) it would be incongruous to mandate the grant of a permit for a use prohibited by the plan: [147]-[151], [162]-[163].

- A full audit of compliance against various broad or aspirational criteria in the management plan would render the performance criteria obsolete: [159]-[161]. Clause 29.3.1 thus requires an assessment of the proposed use as it is regulated by the management plan, while affording deference to the separate approval functions of the Director under the NPRM Act: [168]. The "acceptable solution" requires that a proposed use comply with prescriptive requirements of the management plan relating to whether or not it can be undertaken, as distinct from statements of values or aspirations: [169]-[170]. In the present case, it is a prescriptive requirement that accommodation consist of standing camps only. To satisfy the acceptable solution, a proposal must meet that description: [173].