Court of Appeal
Supreme Court
Sydney

Decisions of Interest

15 September 2021 – 15 October 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

Contracts: construction; Insurance

Allianz Australia Insurance Limited v Rawson Homes Pty Ltd **[2021] NSWCA 224**

Decision date: 20 September 2021

Meagher, Leeming and White JJA

Rawson Homes Pty Ltd ('Rawson') was insured by Allianz Australia Insurance Ltd ('Allianz') against damage to its construction projects. Rawson claimed in respect of 122 houses damaged in a hailstorm. The policy's insuring clause provided for indemnification against Indemnifiable Events in respect of an Insured Contract only. "Insured Contract" meant a contract entered into by Rawson within the insurance period. Rawson had entered into separate building contracts for each damaged house. "Indemnifiable Event" meant any damage to insured property not otherwise excluded. The indemnity was limited to losses included in the "Sums Insured", specified in the Schedule as the maximum amounts payable "for any one loss or series of losses arising out of the one event covered by this Policy for any one Insured Contract" after deduction of the relevant Deductible. Deductible referred to specified amounts that the insured had to contribute "for all claims arising out of one event". An "Application of Deductible" clause provided that where multiple benefits are payable for a claim arising from a single event, the insured will only be required to pay a single deductible. The primary judge held that, in accordance with that clause, the deductible applicable to damage caused by the hailstorm should only be applied once in relation to all losses by the insured. Allianz appealed.

Held: Allowing the appeal

- While the word "event" in the "Application of Deductible" clause refers to the cause of loss rather than the loss itself (as distinct from the defined term "Indemnifiable Event": [39]-[43]), the starting point must be the insuring clause itself: [10]-[12], [49]. Cover was provided in respect an Insured Contract and limited to losses included in the Sum Insured, which itself referred to specified amounts for any loss or losses arising out of one event *for any one Insured Contract* after deduction of the deductible: [49]. Thus the scheme of the policy was that cover was provided, and a relevant deductible applied, in respect of each Insured Contract: [50]. A deductible applied to each and every "claim", but that term was undefined. In the context of the scheme of the policy, that term necessarily describes a claim in accordance with the Basis of Settlement, being one for losses included in the Sum Insured, which are limited to losses arising out of one event *for any one Insured Contract*: [45]. As cover was provided for each Insured Contract, there was one claim, and thus one deductible, for each damaged house: [47]-[48]. There was no room for any *contra proferentem* construction of the policy, as the natural meaning of the words used was unambiguous: [58]-[61]. The cover obtained by Rawson was effectively analogous to an "open cover", operating as though a separate policy had been issued in relation to each commenced construction contract: [5]-[6].

Costs: proceedings discontinued or dismissed; Torts: trespass to land

McIntosh v Morris **[2021] NSWCA 225**

Decision date: 20 September 2021

White and Brereton JJA, Emmett AJA

The Applicants' predecessor in title had laid pipes, a stormwater pit and electrical conduits encroaching upon the Respondents' land before either party purchased their respective property. The Respondents sought a mandatory injunction requiring the Applicants to remove the encroachments and remediate the land, as well as damages for trespass. By a *Calderbank* letter the Respondents proposed that the Applicants remove or render inoperable the encroachments and pay the Respondents' costs. The Applicants counter-offered that the costs of the works be shared between the parties and the Applicants' predecessor in title, and later proposed partial removal of the encroachments at their expense and that the parties bear their own costs of the litigation. The Respondents did not purport to accept this offer but granted the Applicants access to remove or render inoperable the encroachments. The Applicants engaged a plumber who rendered the utilities inoperable to the extent of the encroachment. The Respondents then consented to orders dismissing their statement of claim. The primary judge, finding that the Respondents' case had excellent chances of success, ordered the Applicants to pay the Respondents' costs, including on an indemnity basis from a reasonable time after receipt of the *Calderbank* offer. The Applicants sought leave to appeal.

Held: Granting leave to appeal and allowing the appeal

- No trespass was alleged by the use of the encroaching utilities: [66]. If their placement had been with the consent of the Respondents' predecessor in title it would not have been a trespass ([68]-[70]). Where the original placement is trespassory, a successor may be liable for a continuing trespass: [72]. However, if the original placement was not trespassory, it is arguable that the Applicants would not be liable in trespass for failure to remove the utilities where these had become fixtures on the Respondents' land: [74], [98]-[107]. Even if there were a continuing trespass by the Applicants, without evidence of any damage suffered by the Respondents it was highly unlikely that they would succeed in obtaining a mandatory injunction or damages: [76], [120]. Thus the primary judge erred in concluding that the Respondents' case had excellent prospects of success: [77].
- The default position, where an order is made dismissing proceedings, is that the defendant is to pay the plaintiff's costs. The onus falls on a plaintiff to show why some other order is appropriate: [79]. While a defendant's capitulation would justify such an order, here there was no such capitulation, as the relief sought included removal of the encroachments, reinstatement of the land and damages: [78]-[82]. There was no basis for indemnity costs as no order was obtained bettering the *Calderbank* offer: [85], [96]-[97]. The proper exercise of the costs discretion where both sides have acted reasonably until settlement is that there be no order as to costs: [86]-[87], [94]-[95].

Costs: proceedings discontinued or dismissed

***Nadilo v Eagleton* [2021] NSWCA 232**

Decision date: 23 September 2021

Meagher and Brereton JJA, Preston CJ of LEC

The Respondents installed air conditioning units and a heat pump on the outside of their house, facing the Applicant's neighbouring house. The Applicant complained that the devices caused excessive noise and brought proceedings in the Land and Environment Court alleging breaches of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (NSW) ('Exempt Development SEPP') and of provisions of the Protection of the Environment Operations (Noise Control) Regulation 2017 ('Noise Control Regulation'). The substantive dispute between the parties was resolved before a final hearing by the Respondents enclosing the air conditioning units and replacing the heat pump with a silent hot water heater. Consent orders were therefore made, including that the proceedings be dismissed. The Applicant sought an order that the Respondents pay her costs. The primary judge rejected the application, made no order as to the costs of the proceedings and ordered the Applicant to pay the costs of the motion. The Applicant sought leave to appeal.

Held: Granting leave to appeal and allowing the appeal

- The guiding principle underlying the exercise of the costs discretion is that costs should be borne in a way that is fair having regard to the responsibility of each party for the incurring of costs by the other: [6]. UCPR 42.20 does not establish a presumption but reflects the default position, where proceedings are dismissed, that costs will follow the event. A different order would be justified where, for example, proceedings are dismissed due to a plaintiff having obtained practical extra-curial success: [7]. Where one party effectively surrenders to another, as distinct from a compromise, it need not be shown, in order to justify a costs order in favour of the other party, that the surrendering party acted unreasonably before the surrender: [9], [12] (cf Preston CJ of LEC at [94]).

- In this case there was no question of compromise: the Applicant obtained the substance of the relief sought, namely that the machinery in question be made compliant: [10]. As the Applicant would inevitably have succeeded in relation to the Exempt Development SEPP breach, entitling her to the relief sought, it was irrelevant that she might not have succeeded in relation to the Noise Control Regulation breach. The primary judge erred in declining to make a costs order on the basis that success on the latter point was not guaranteed: [11], [68]-[70], [91]. It is an error to undertake a close comparison of outcomes achieved with the terms of the prayer seeking relief. The relevant inquiry must look to the substance, not the form, of the outcomes achieved: [92]-[93]. The injustice justifying interference with the primary judge's exercise of the costs discretion is that the Applicant was forced to go to court to obtain the relief to which she was entitled and to bear her own costs of doing so: [13], [84].

Costs: *Chorley* exception

***Spencer v Coshott* [2021] NSWCA 235**

Decision date: 8 October 2021

Bell P, Emmett and Simpson AJJA

Mr Spencer is the principal and sole director and shareholder of an incorporated legal practice, Kejus Pty Ltd ('Kejus'). Mr Coshott brought unsuccessful proceedings against Mr Spencer and had a costs order made against him. Those costs were assessed, and Mr Coshott sought a review of that assessment. The review panel disallowed costs claimed by Mr Spencer representing the professional fees charged to Mr Spencer by Kejus for acting on his behalf in the proceedings. Mr Spencer unsuccessfully appealed to the District Court, and then sought judicial review of the District Court decision for error of law on the face of the record.

Held: Allowing the application for judicial review

- A self-represented litigant cannot ordinarily recover the value of time or skill expended in litigation. The *Chorley* exception, for recovery of professional costs by self-represented solicitors, was abrogated in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 ('*Bell Lawyers*'). However, the effect of that abrogation on a solicitor litigant represented by an incorporated legal practice of which he or she is the principal and sole director and shareholder was left open: [16]-[21].

- Errors of law apparent on the face of the record included: (i) departure from the reasoning of Keane J (in related costs proceedings between Mr Coshott and Mr Spencer) by disregarding the separate legal personality of the incorporated legal practice ([65]); (ii) reliance on *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 (concerning legal services rendered by partners of an unincorporated partnership) where it has no application to the present situation ([66]-[68]); (iii) adoption of the review panel's decision, where the panel mistakenly considered itself bound by *Bell Lawyers* ([69]); (iv) reliance on a "balance of authority" purportedly supporting the application of an agency principle in relation to the costs of an incorporated legal practice: [70]-[77].

- As Mr Spencer had entered into a binding costs agreement with Kejus, this was precisely the situation left open by *Bell Lawyers*: [86]. Though doubts may arise as to the legitimacy of distinguishing cases such as the present, as many of the policy reasons given in *Bell Lawyers* for rejecting the *Chorley* exception still apply, those reasons were put forward as reasons for rejecting an *exception* to the indemnity principle, not as reasons for cutting down the indemnity principle by disregarding the separate legal personality of an incorporated legal practice: [97]-[98]. When the High Court in *Bell Lawyers* said that the ability of an incorporated legal practice that is a vehicle for a sole practitioner to recover costs is a matter for the legislature, it should be taken to have meant that the existing law, recognising the separate legal personality of an incorporated legal practice, should be applied unless and until the legislature intervenes: [102]-[104].

Estoppel: proprietary estoppel; Strata title: owners corporation

Trentelman v The Owners – Strata Plan No 76700 **[2021] NSWCA 242**

Decision date: 13 October 2021

Bathurst CJ, Bell P, Leeming JA

In 2007 an easement was created in favour of lots 9 to 48 of Strata Plan No 76700 ('the Strata Plan') for the use of a swimming pool on lot 7. In 2009, Ms Trentelman and her husband purchased all of the lots in the Strata Plan, which they began to sell off individually from 2010. In 2014, wanting to free certain lots from the strata scheme for development and resale, and to construct townhouses on lot 7, the Trentelmans put special resolutions to that effect to the Owners Corporation at its AGM. Documents outlining the proposal indicated that easements would exist giving lot owners and occupiers a continuing right to use the pool, which Mr Trentelman repeated and emphasised orally. The resolutions were passed unanimously and the proposals implemented, but in 2017, when the original easement expired, the Trentelmans excluded all but a few lot owners from the pool area. The Owners Corporation successfully invoked a proprietary estoppel to obtain an order that Ms Trentelman grant an easement in favour of the Owners Corporation allowing use of the swimming pool on the lot owned by her. Ms Trentelman appealed.

Held: dismissing the appeal

- Proprietary estoppel by encouragement requires a representation by an owner of property encouraging another to alter his or her position in the expectation of receiving a proprietary interest, and detrimental reliance on that expectation such that it would be unconscionable for the representor to resile from it: [116]-[118]. The representation need not be sufficiently clear to found to a contract. It will suffice if it is reasonable for the representee to have interpreted it in a given way and to have relied on the resulting assumption: [120]-[121]. The nature of the proprietary interest need not be defined, as equity will look to the substance rather than the form of a representation. The requisite level of clarity will depend on context, with no bright line distinction between commercial and personal or domestic situations: [146]-[147], [204]-[207].

- In this case a representation was clearly made to the effect that the Owners Corporation would receive an ongoing interest in the pool for the benefit of lot holders: [148]-[153]. Reliance by the lot holders, in consenting to the proposal, may be considered reliance by the Owners Corporation: [129]-[130]. An artificial distinction between the two should not defeat a claim: representations made to a corporation are necessarily made to natural persons as its agents, and reliance by a corporation is necessarily reliance of one or more natural persons treated as that of the corporation: [173]-[179]. Though there may have been other inducements, the lot owners constituting the Owners Corporation were clearly sufficiently influenced by the representation to make out the element of reliance, and suffered detriment as a result of the passing of the resolutions such that it would be unconscionable for Ms Trentelman to resile from it: [156]-[165].

Negligence: public authorities; Statutory interpretation

Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2) **[2021] NSWCA 246**

Decision date: 12 October 2021

Bathurst CJ, Bell P, Leeming JA

The Murray Darling Basin Authority ('the Authority') was established as a body corporate by the *Water Act 2007* (Cth), the stated object of which is "to enable the Commonwealth, in conjunction with the Basin Sates, to manage the Basin water resources in the national interest". A Ministerial Council on which NSW is represented gives directions to the Authority. The Authority's staff are appointed as Commonwealth employees. While some of its relevant functions are funded solely by the Commonwealth, others are funded in part by NSW. Representative plaintiffs sued the Murray Darling Basin Authority ('the Authority') in negligence for damage allegedly caused by releases of water made in breach of duty. The Authority relied in its defence on various provisions of Part 5 of the *Civil Liability Act 2002* (NSW), which would only apply if the Authority or its delegates were a "public or other authority" within the meaning of s 41 of that Act. The relevant paragraphs on which the Authority relied provided that "public or other authority means: … (e) any public or local authority constituted by or under an Act, or (e1) any person having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions". A separate question was referred to the Court of Appeal to determine whether the Authority or its delegates meet that definition.

Held: Answering the separate question: No

- That the *Water Act* is in part supported by a referral of power by NSW does not alter its status as a Commonwealth law: [45]-[46]. The conventions governing reference to other statutes (ss 65 and 66 of the *Interpretation Act 1987* (NSW)) indicate that 'Act' in s 41(e) means 'NSW Act', thus excluding the Authority: [73].

- Section 41(e1) is instead directed towards the nature of functions exercised by a person. The use of "person" in (e1) contrasts with the words "person or body" in (f) and (g). The bracketed words concerning employment suggest that the paragraph is confined to natural persons, as it is unlikely that the words would denote an attribute which cannot be held by certain members of the group to which they apply: [76]-[78]. Section 41(e1) was enacted in response to a specific judicial decision concerning psychiatrists in private practice who also worked for a "public or other authority" such as an Area Health Service. That context speaks against an intention to provide special defences to the emanations of other polities engaging in conduct governed by NSW law: [79]-[82]. Delegates of the Authority exercise functions under the Commonwealth *Water Act* and not public official functions of NSW: [83]. NSW's role in the Ministerial Council and its funding of the Authority do not make the Authority's functions public official functions of NSW. Nor do permits granted to the Authority under NSW legislation for certain of its operations change the nature of the relevant functions: [84]-[87].

Australian Intermediate Appellate Decisions of Interest

Estoppel: promissory estoppel; Contracts: construction

***Commercial and General Corporation Pty Ltd v Manassen Holdings Pty Ltd* [2021] SASCFC 40**

Decision date: 24 September 2021

Stanley, Nicholson and Livesey JJ

The Respondent agreed, by an Underwriting Agreement, to subscribe for units in a unit trust of which the Appellant was the trustee, subject to certain conditions precedent and up to a maximum value of $40M, in order to facilitate the Appellant's settlement of a purchase of land. The Respondent was entitled to a base fee of $1.2M as well as a daily fee of $20K, accruing for up to 30 days from 1 November, if the Respondent "subscribes or may be required to subscribe" at any time on or after 1 November, payable at the earlier of the Date of Closing (settlement) or the "Relevant Date". The latter was defined as 31 October, unless Closing was delayed beyond that date by reason only of a failure to obtain Foreign Investment Review Board ('FIRB') approval, in which case it would be 30 November. Closing was repeatedly delayed until the vendor terminated the sale contract on 14 December. The Respondent was paid the base fee and successfully sued for the daily fee from 1 to 30 November, but a promissory estoppel claim for fees to 14 December was rejected. The Appellant appealed in relation to the November fees, the Respondent cross-appealed in relation to the estoppel claim, and the Appellant filed a notice of contention that promissory estoppel cannot provide a positive source of legal rights.

Held: Allowing the appeal, dismissing the cross-appeal and the notice of contention

- As Closing had not occurred by 31 October for reasons other than a failure to obtain FIRB approval, the Respondent acquired an unconditional right of termination ([46]-[47]) and thus could not have been required to subscribe for the period to 30 November: [80]-[91]. The possibility of being compelled to subscribe if it waived that right does not affect this conclusion: [92]-[95].
- Money spent in reliance on the assumption but for which the Respondent was later reimbursed could not amount to a detriment for the purposes of promissory estoppel: [136]-[140]. There was no evidence of any detriment allegedly suffered by keeping the funds available for an extended period, and mere non-fulfilment of a promise to pay could not establish an estoppel: [142]-[160]. However, *Saleh v Romanous* (2010) 79 NSWLR 453 and *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 83 NSWLR 728 do not conclusively establish the inability of promissory estoppel to create positive rights: [167]-[174]. Other authorities, which should be followed in South Australia, suggest that promissory estoppel may preclude a party from denying that a legal relationship has arisen, in which case the parties' obligations will be determined by reference to the postulated legal relationship: [175]-[185]. A representation that is insufficient to found a contractual claim may nonetheless give rise to promissory estoppel: [186]-[199].

Asia Pacific Decision of Interest

Constitutional law: freedom of speech: online falsehoods

***The Online Citizen Pte Ltd v Attorney-General* [2021] SGCA 96**

Decision date: 8 October 2021

Menon CJ, Phang Boon Leong, Prakash, Yong Kwang and Chong JJCA

The *Protection from Online Falsehoods and Manipulation Act 2019* ('the Act') empowers any Minister to issue a Correction Directive ('CD') requiring a publisher to issue a correction notice in respect of any false statement of fact communicated in Singapore. CDs were issued to the Appellants, The Online Citizen Pte Ltd ('TOC') and the Singapore Democratic Party ('SDP'), by the Minister for Home Affairs and the Minister for Manpower respectively, in relation to TOC's reporting of a Malaysian news article alleging the use of illegal execution methods in Changi prison and SDP posts claiming decreases in local skilled employment. Applications for cancellation of the CDs and subsequent High Court appeals were unsuccessful. The Applicants appealed to the Court of Appeal, including on the ground that provisions of the Act violated the right to freedom of speech conferred by s 14(1)(a) of the Constitution.

Held: Dismissing the constitutional challenge but allowing the appeal in part

- While false statements do not attract constitutional protection, CDs may be issued in relation to statements that a Minister merely believes to be false, which speech remains constitutionally protected at least until judicial determination of its falsehood: [57]-[61]. However, a CD does not curtail the right of a publisher to continue publishing an alleged falsehood, or to make clear that a CD is being challenged. Thus there is no restriction of the s 14(1)(a) right, nor of any negative right not to be compelled to express views a publisher does not hold: [62]-[79]. In any case, the Act is directed towards the threat of a loss of trust in government and public institutions, which purpose would bring any restriction on the right within the range of legitimate restrictions in the interest of public order: [84]-[102]. CDs issued in respect of statements that are only rendered false when taken out of context still fall within that legitimate legislative imperative, which is focussed on the deleterious *effects* of online falsehoods: [106]-[113].

- A CD will be valid where the meaning attributed to a statement by the Minister is a reasonable meaning that an appreciable segment of the publication's audience might adopt and that is false, regardless of the publisher's intended meaning or the availability of alternative interpretations: [141]-[155]. The Applicant bears the initial burden of showing a *prima facie* case for setting aside a CD, at which point the evidential burden shifts to the relevant Minister: [165]-[184]. The TOC appeal fails, despite the impugned article merely reporting allegations made elsewhere, as it could reasonably have been interpreted as containing the alleged factual assertions: [242]-[244]. The SDP appeal succeeds only to the extent that one of the identified statements, as interpreted by the Minister, would not have been so construed by an appreciable segment of its audience: [228]-[233].