Court of Appeal
Supreme Court
Sydney

Decisions of Interest

4 July 2022 – 17 July 2022

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

Taxes and Duties: payroll tax; employment agents

***Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115**

Decision date: 6 July 2022

Bell CJ, Gleeson and Leeming JJA

E Group Security Pty Ltd (E Group) sought a review pursuant to s 97 of the *Taxation Administration Act 1996* (NSW) of payroll tax assessments in which E Group was determined to be liable for payroll tax as an employment agent under the *Payroll Tax Act 2007* (NSW) (the Act). During the primary hearing, it was common ground that the definition of 'employment agency contract' in s 37 of the Act should be construed in accordance with *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (2006) 102 ATR 577 (*UNSW Global*). However, following the hearing at first instance, judgment was delivered in *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441 (*Bonner*) which appeared to suggest that *UNSW Global* was erroneous. Consequently, the Chief Commissioner of State Revenue (the Commissioner) appealed

Held: dismissing grounds 1-3 of the appeal

- The Court rejected the Commissioner's submission that the legislative history of s 37 suggests that the requirement that the worker 'carry out duties of a similar nature to those of an employee' was deliberately omitted in amendments occurring after 1985, suggesting that the gloss on the word 'for' introduced by *UNSW Global* was effectively re-instating the omitted proviso: [21], [23]. Regarding the earlier amendments, the 1998 legislation was hastily enacted, suggesting that there was no conscious decision to depart from the earlier interpretation: [25]. Following *UNSW Global*, the Act was amended fifteen times with two substantial amendments, with no alteration of s 37, thus militating strongly against overturning the *UNSW Global* interpretation: [26], [42].
- There was no compelling reason to depart from the *UNSW Global* test as that construction accords with the purpose of the Act by taking relationships which fall short of transitional employer/employee relationships and deeming them to be such: [43]-[49].
- Any alterations to the test in *UNSW Global* would likely be adopted by other jurisdictions due to harmonised legislation, thus altering the legal meaning of legislation not merely in New South Wales, but throughout the country. Furthermore, altering the test will have retrospective effect, meaning that any changes should be enacted by legislation with clear transitional provisions: [50]-[53].

Evidence: *Briginshaw* principle; Negligence: dual vicarious liability

***Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D* [2022] NSWCA 119**

Decision date: 6 July 2022

Bell CJ, Gleeson and Brereton JJA

Plaintiffs A, B, C and D (the respondents) alleged that B and D, of whom A and C were their respective mothers, were assaulted by Mr Bird while attending Footprints Childcare Centre (Footprints), owned by Little Pigeon Pty Ltd (Little Pigeon), between 2008 and 2010. A further two children made a series of disclosures to the police. The primary judge admitted the four children's disclosures to the police as tendency evidence in B and D's claims. Admissions by Mr Bird made to the police in 2010, and A and C's perceptions of their children's behaviour were similarly admitted. The primary judge found Mr Bird, Little Pigeon and its director, Ms Clancy, liable for breach of duty of care and breach of contract to A and C. Ms Clancy, Footprints and Mr Bird appealed this decision.

Held: allowing the appeal, dismissing A and B's proceedings and remitting C and D's proceedings to the Common Law Division.

- Clause 4(1)(f) of pt 2 of the Dictionary in the *Evidence Act 1995* (NSW) (the Act)is concerned with steps taken to get the witness to court physically which requires the issue and service of a subpoena: [67]-[68]. The fact that giving evidence may be detrimental to a witness' psychological health and welfare does not render the witness unavailable within the meaning of s 63: [70].

- Section 87(1)(c) of the Act requires that a common purpose be present when the representations were made: [114]. Consequently, the trial judge erred in determining the common purpose to be defending the charges against Mr Bird, as he had not been charged when the representations were made: [115].

- The primary judge erred by failing to consider *Briginshaw v Briginshaw* (1938) 60 CLR 336 and s 140(2) of the Act when determining whether the tendency evidence should be accepted: [173]. The analysis required regarding the admissions was: first, whether Mr Bird's answers in his police interview amounted to admissions which demonstrated the tendencies; secondly, whether each particular tendency established an overarching tendency for "inappropriate sexual dealings with children in his care"; thirdly, whether that tendency strongly suggested that the specific allegation in respect of which the tendency evidence was being deployed in fact occurred: [42].

- The Court reaffirmed that Australia does not ascribe to the doctrine of dual vicarious liability: [197]-[198].

- The requirement that volunteers be "accompanied" by a member of the primary contact staff, when in the presence of children, under cl 57 of the *Children's Services Regulation 2004* (NSW) does not involve more than that a member of the primary staff also be in the presence of the children: [209]-[210].

Child Welfare: Appointment of guardian ad litem for parent

***CM v Secretary, Department of Communities and Justice* [2022] NSWCA 120**

Decision date: 7 July 2022

Leeming and Kirk JJA, Simpson AJA

On 13 April 2022, the District Court made an order appointing a guardian ad litem for the applicant under s 101 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) in a pending appeal to the District Court from a decision of the Children's Court. The pending appeal concerns a decision regarding who should have parental responsibility for an eight-year-old boy. The applicant sought judicial review of the order appointing the guardian.

Held: dismissing the appeal

- The Court rejected the applicant's submissions that prior to a court appointing a guardian ad litem, there must have been legal representatives acting for that person. Rather, the court being able to assess the instructions which have in fact been given by the person to his or her legal representatives is simply one way of assessing incapability: [25]. Further, if it were necessary to order that a person be legally represented, this would conflict with the requirement for expedition in s 94: [26].
- The use of pronouns "his or her or their" in s 101(1), in contrast with the use of "a" in s 100(2) does not suggest a precondition requiring that there first be an appointment of a legal representative for the parent: [27].
- Although *CM v Secretary, Department of Communities and Justice* [2021] NSWSC 1442 suggests that a court must often first go through the gateway of s 98, by determining that an individual is not capable of representing themselves, prior to invoking s 101, this is not a necessary precondition as "the judgment can be made without the prior appointment of a legal representative": [28]. Consequently, there will be cases when it is possible for a court to be satisfied simultaneously that a person cannot represent themselves and cannot instruct lawyers: [30].
- The applicant failed to demonstrate that any jurisdictional error or error of law on the face of the record affected the order made by the District Court: [31]-[33].

Civil Procedure: monetary threshold; proportionality between value of matter and costs of proceedings

***Cheng v Motor Yacht Sales Australia Pty Ltd t/as The Boutique Boat Company* [2022] NSWCA 118**

Decision date: 6 July 2022

Bell CJ, Ward P and Basten AJA

In 2016, the applicant, Ms Cheng made an offer of $1,180,000 to purchase a yacht from the respondent, Motor Yacht Sales Australia Pty Ltd t/as The Boutique Boat Company (MYSA). Ms Cheng paid a $20,000 deposit but withdrew her offer four days later. MYSA claimed that the withdrawal was too late and that a binding contract for sale had come into effect. Ms Cheng refused to complete the contract, following which, MYSA sought to mitigate its loss by selling the yacht for $1,200,000. MYSA claimed that it has suffered a loss as a result of Ms Cheng's failure to perform the contract and commenced proceedings seeking damages comprising expenses incurred in mitigating its losses. The primary judge awarded damages of $62,720 to MYSA. Ms Cheng sought leave to appeal that decision pursuant to s 101(2)(r) of the *Supreme Court Act 1970* (NSW), as the amount in issue was less than $100,000.

Held: refusing leave to appeal

- Ms Cheng failed to identify any issue of principle, question of public importance or reasonably clear injustice, going beyond something merely arguable to warrant a grant of leave to appeal, in accordance with *Daily Examiner Pty Ltd v Mundine; Brown v Mundine* [2011] NSWCA 126 : [15], [18]. Not only were these general criteria for granting leave to appeal not met, but the size of the underlying claim was wholly disproportionate to the costs of the proceedings: [32].
- In establishing the monetary threshold in s 101(2)(r), Parliament intended that matters involving relatively small amounts in issue should not come before the Court of Appeal, save for those satisfying the general criteria for leave to appeal. The legislative purpose underpinning s 101(2)(r) necessarily encompasses the need for proportionality between the value of a claim and the costs of proceedings, in accordance with *Ritson v Commissioner of Police, New South Wales Police Force* [2019] NSWCA 106: [15]-[20].

Australian Intermediate Appellate Decisions of Interest

Legal Practitioner: professional misconduct; conflict of interest

***Staffa v Legal Profession Complaints Committee* [2022] WASCA 83**

Decision date: 13 July 2022

Quinlan CJ, Vaughan JA, Tottle J

From 2012, Mr Staffa provided various legal services to a Mr W (W), a former director and employee of a company (the Australian Company), and the Australian Company itself. The Australian Company was a subsidiary of another company (the German Company). In June 2016, W, then the managing director of the Australian Company, was advised by the German Company that his employment was terminated. W requested advice from Mr Staffa who advised him on various matters. The German Company lodged a complaint against Mr Staffa with the Legal Profession Complaints Committee (the Committee). The Committee successfully applied to the State Administrative Tribunal (the Tribunal) alleging that Mr Staffa engaged in professional misconduct and unsatisfactory professional conduct by: acting for clients with adverse interests; billing the Australian Company for services provided for W's personal benefit; advising W to transfer funds from the Australian Company; and providing false and misleading statements to the Committee. The Tribunal concluded that Mr Staffa's conduct amounted to both professional misconduct and unsatisfactory professional conduct, and consequently transmitted a report to the Full Bench of the Supreme Court of Western Australia recommending that Mr Staffa's name be removed from the roll of practitioners. Mr Staffa appealed the findings of professional misconduct and the recommendation that his name be removed from the roll.

Held: allowing the appeal in part

- Mr Staffa's submission that advising W to transfer the funds cannot amount to professional misconduct due to the absence of a relevant rule in the *Legal Profession Conduct Rules 2010* (WA) (Conduct Rules) or elsewhere, was rejected: [154]. The Court referred to *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 which stated that the Conduct Rules do not exhaust the meaning of unsatisfactory professional conduct or professional misconduct: [153]. Rather, the terms are defined by reference to standards which must be observed: [152].

- The Tribunal's reliance on submissions which Mr Staffa had not identified as documents upon which he relied amounted to a denial of procedural fairness under s 32 of the *State Administrative Tribunal Act 2004* (WA). However, this did not deprive Mr Staffa of the possibility of a successful outcome in accordance with *Stead v State Government Insurance Commission* (1986) 161 CLR 141: [181]. The outcome reliant on the submissions was the non-binding recommendation provided to the Full Bench: [186]. Consequently, as the outcome would have been the same despite that reliance by the Tribunal, the breach of procedural fairness was immaterial: [187]-[188].

- The applicant's submission that the Tribunal's recommendation to the Full Bench was punitive rather than protective was rejected. The protection of the public is achieved by the imposition of disciplinary sanctions due to personal and general deterrence: [193]. Consequently, the Tribunal's reference to Mr Staffa suffering a "consequence" is a recognition that the protection of the public requires that there be consequences for legal practitioners' wrongdoing: [194].

Industrial Law: meaning of "attributable to" in s 19(2)(a) of the *Fair Entitlements Guarantee Act 2012* (Cth)

***Secretary, Attorney-General's Department v Warren* [2022] FCAFC 118**

Decision date: 12 July 2022

Rares, Thawley and Anderson JJ

Mr Warren worked in the coal mining industry. Mr Warren's contract of employment purported to: designate Mr Warren's employment as casual; compensate Mr Warren for any and all benefits with respect to paid annual leave, other forms of leave and severance pay (cl 3.3); and discharge the Company's obligations with respect to these benefits or set off against the paid amount as over-award loading in the event any of the benefits became payable (cl 3.4). Mr Warren's employment was terminated in 2016 due to his employer's insolvency. Mr Warren applied for financial assistance under s 14 of the *Fair Entitlements Guarantee Act 2012* (Cth) (*FEG Act*). Mr Warren's employer conceded that he was a permanent employee. Mr Warren's application was initially refused. On appeal, the Administrative Appeals Tribunal concluded that the loadings paid to Mr Warren were "attributable" to his "employee entitlements" under ss 19(2) and (3) of the *FEG Act*. He then appealed to the Federal Court of Australia. In allowing the appeal, the primary judge held that the loadings were not attributable to his employee entitlements. The Secretary, Attorney-General's Department appealed this decision to the Full Court.

Held: allowing the appeal

- The primary judge erred in holding that the loading pay to Mr Warren was not attributable to the annual leave or redundancy pay entitlements because: first, the question of whether the employer's obligations with respect to annual leave and redundancy pay were discharged by payment at the loaded base rate should not be conflated with whether the payments were "attributable" to the "entitlement"; second, the language of the *FEG Act* indicates that a payment can be "attributable" to an entitlement whether or not it is made in conformity with the *Fair Work Act 2009* (Cth) *(FW Act)* or an award; and third, although the employment contract was ineffective to displace the statutory obligations of the employer, cl 3.4(ii), which states that loading is to be set off against any entitlement to payment of the various benefits which might be found to arise, indicates a mutual intention that the loadings be "attributable": [41]-[47].

- The Court considered whether an employer, facing a claim for underpayment, could set off casual loadings paid to an employee incorrectly treated as a casual employee. This issue was considered in *WorkPac v Rossato* (2020) 378 ALR 585 but did not require resolution on appeal to the High Court. However, following the primary judgment, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) came into effect: [48]-[51]. This amendment inserted a definition of "casual employee" into the *FW Act* and provided that an award of compensation for permanent employee entitlements payable to an employee mistakenly treated as a casual must be reduced by the amount of any identifiable casual loading paid to the employee.

Asia Pacific Decision of Interest

Costs: *Calderbank* offers

Geostel Vision Limited v Oraka Technologies Limited (in liquidation) **[2022] NZCA 312**

Decision date: 13 July 2022

Gilbert, Mander and Fitzgerald JJ

In 2005, Oraka Technologies Ltd (Oraka) commenced proceedings against Geostel Vision Ltd (Geostel) and Napier Tool & Die Ltd (NTD) alleging breach of copyright. Oraka was initially unsuccessful on liability in the High Court, but following a successful appeal to the Court of Appeal, the matter was remitted to the High Court for an inquiry into damages. In 2015, NTD made a Calderbank offer proposing a payment of $500,000. Oraka did not accept the offer. In the first damages hearing, Oraka was awarded $4.1 million. The second damages hearing was due to commence on 10 July 2017. On 30 June 2017, Geostel sent a Calderbank offer proposing that Oraka pay Geostel $20,484.39, being the total of earlier unpaid costs awards; and Geostel would procure that a third party would agree not to enforce a judgment entered in its favour against Oraka of $154,340.95. Oraka did not accept this offer. The High Court awarded Oraka damages of $510,000 plus interest. On appeal, that award was reduced to $47,000 plus interest with the question of costs remitted to the High Court. The High Court determined Oraka to be the successful party for costs and that neither Calderbank offer reversed the incidence of costs. Geostel appealed this decision.

Held: dismissing the appeal

- The Court upheld the High Court's finding that Oraka was the successful party. Oraka received an award of damages for the breaches it alleged, albeit a modest one: [32]-[36].
- The High Court did not err in finding that Oraka's rejection of the 2015 offer did not entitle Geostel to costs on all subsequent steps. The Court referred to the *High Court Rules 2016* (NZ) rr 14.10 and 14.11, regarding written offers without prejudice as to costs, and concluded that because Geostel did not make the 2015 offer, it does not qualify. It was not unreasonable for Oraka to have rejected the 2015 offer at the time it was made as the High Court, on two successive occasions, awarded damages in an amount in excess of the 2015 offer. The 2015 offer was a matter considered by the Court in reducing Oraka's costs entitlement on the second damages hearing to zero: [44]-[47].
- Although the offer did not comprise an offer to pay a sum of money, it was open for the High Court to conclude that the offer was beneficial to Oraka in accordance with r 14.11(3)(b). The offer was not significantly greater than the award ultimately achieved and was made with limited time for Oraka to consider it. Consequently, the High Court was not bound to conclude that the 2017 offer would reverse the incidence of costs: [54]-[56].

International Decision of Interest

Admissibility: TFEU art 263; meaning of "directly concerned"; Evidence: improper production

***Nord Stream 2 AG v European Parliament and Council of the European Union* (Court of Justice of the European Union, C-348/20 P, ECLI:EU:C:2022:548, 12 July 2022)**

Decision date: 12 July 2022

K. Lenaerts, President, A. Arabadjiev, A. Prechal (Rapporteur), K. Jürimäe, C. Lycourgos, S. Rodin, I. Jarukaitis and N. Jääskinen, Presidents of Chambers, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi and A. Kumin, Judges

The appellant, Nord Stream 2 AG (Nord Stream 2), is the company responsible for the planning, construction and operation of the offshore gas pipeline between Russia and Germany. In 2019, the European Parliament and the Council of the European Union adopted *Directive (EU) of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas 2019/692* [2019] OJ L 117/1 (the Directive) which required that pipelines be produced, operated, and supplied by separate companies. At this time, the pipelines were 95% complete, while over 1,000 km total pipeline had been laid in sea. Nord Stream 2 commenced proceedings in the General Court seeking the annulment of the Directive. The General Court declared the action inadmissible on the basis that companies cannot be directly and individually concerned by directives. Furthermore, improperly obtained documents were deemed admissible under *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents* [2001] OJ L 31/5 (the Regulation). Nord Stream 2 appealed those decisions.

Held: allowing the appeal

- The General Court erred in concluding that directives are unable to directly and individually impact companies and in its application of the two limbs of the fourth paragraph of art 263 of the *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993). Under the first limb, the substance of the impugned act should be examined to assess the effects: [63]. Under the second limb, it should be considered whether the directive at issue left the relevant Member State a margin of discretion in the implementation of the Directive as regards the appellant: [103].

- The General Court erred in exclusively applying the provisions of the Regulation when determining the admissibility of documents improperly produced. The correct approach is to weigh up the interests of the respective parties and public interest as regards international relations: [130]-[146].