Court of Appeal
Supreme Court
Sydney

Decisions of Interest

18 July 2022 – 31 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.

Contents

New South Wales Court of Appeal Decisions of Interest 2

Australian Intermediate Appellate Decisions of Interest 6

Asia Pacific Decisions of Interest 8

International Decision of Interest 9

New South Wales Court of Appeal Decisions of Interest

Civil Procedure: exercise of non-federal jurisdiction by State Court; Constitutional Law: external affairs power

Zurich Insurance PLC v Koper **[2022] NSWCA 128**

Decision date: 20 July 2022

Bell CJ, Ward P, Beech-Jones JA

Zurich Insurance PLC ("Zurich") and Aspen Insurance UK Ltd ("Aspen") (together, "the Insurers") insured Brookfield Multiplex Constructions NZ Ltd ("BMX NZ"), an entity incorporated in New Zealand with no assets or presence in Australia. BMX NZ had designed and constructed the Victopia Apartments in New Zealand. Mr Koper, and the group members he represented, were the registered proprietors of residential units in those apartments. In 2012, Mr Koper and other registered proprietors of the units brought proceedings against BMX NZ seeking damages in respect of various building defects. BMX NZ was placed into liquidation in December 2012. In 2017, judgment was obtained against BMX NZ. In 2021, Mr Koper filed a Summons in the Supreme Court of New South Wales, pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("the *Claims Act*"), to bring representative proceedings against Zurich under s 4. Aspen was joined as a party. The primary judge found that the territorial criterion of operation of s 4 of the *Claims Act* depended upon whether the proceedings against BMX NZ could properly have been brought in New South Wales. The primary judge granted leave to Mr Koper on the basis that s 9 of the *Trans-Tasman Proceedings Act 2010* (Cth) ("the *TTPA*") would have authorised service of the notional New South Wales proceedings against BMX NZ. The primary judge rejected the Insurers' argument that ss 9 and 10 of the *TTPA* were constitutionally invalid insofar as they purported to confer non-federal jurisdiction on the Supreme Court of New South Wales. The Insurers sought leave to appeal.

Held: granting leave to appeal and dismissing the appeal

- The external affairs power in s 51(xxix) of the *Australian Constitution* is, like other heads of legislative power, to be given broad plenary construction and to be read "with all the generality that the words used admit": [40]. Section 51(xxix) is not to be read down by reference to other heads of power, except where a head of power expressly abstracts from Commonwealth legislative competence a particular subject matter: [39]-[41]. Section 51(xxix) should not be interpreted as abstracting from its scope the legislative power to authorise service of process in New Zealand simply because there is another head of power (s 51(xxiv)) authorising service within and throughout the Commonwealth: [43].

- Sections 9 and 10 of the *TTPA* do not invest the judicial power of the Commonwealth in every "Australian court" to which that Act applies: [52]. Those provisions concern "personal" jurisdiction, which is not a constitutional concept and therefore is not a topic regulated by Ch III of the *Constitution*: [52]-[54]. The primary judge was correct to conclude that ss 9 and 10 of the *TTPA* were not to be read down so as to apply only to service of process involving the exercise of federal jurisdiction and were not otherwise invalid: [55].

- It was not open to the Insurers to run their argument based on *Melbourne Corporation* as the question was not a pure question of law and the factual basis against which the argument must fall to be considered has not been laid: [57]-[63].

Contracts: construction; "step-in" clause

***MP Water Pty Ltd in its capacity as Trustee for the MP Water Trust v Veolia Australia Pty Ltd* [2022] NSWCA 127**

Decision date: 21 July 2022

Ward P, Macfarlan and Mitchelmore JJA

MP Water Pty Ltd in its capacity as Trustee for the MP Water Trust ("MP Water") and Veolia Australia Pty Ltd ("Veolia") were parties to a Services Provider Agreement ("SPA"). The SPA related to the Springvale Water Treatment Facility ("the Facility"), which is adjacent to two underground coal mines and provides treated water for use at a nearby power station. During an ongoing dispute as to whether the applicant had handed over a Mine Water Buffer Pond to the respondent as required, the flow of mine water into the Buffer Pond exceeded the maximum capacity specified in the SPA, causing the applicant to request the mine operator to cease the flow of mine water into the Facility. After the applicant had issued a Services Provider Default Notice to the respondent, on 13 May 2013, MP Water issued a notice under cl 44 of the SPA directing Veolia to provide the Services it had contracted to provide, including to treat the mine water in accordance with the SPA. Clause 44(a) relevantly provided that, in certain circumstances, MP Water could elect, and Veolia would "assist … to ensure that [MP Water] is able to", among other things: "temporarily take or assume total or partial possession, management and control of the Facility (or any part of the Facility) and the provision of the Services (or any of them)". The applicant commenced proceedings in the Supreme Court, seeking orders that the respondent comply with the notice. The primary judge dismissed MP Water's application, holding that although the applicant could exercise its rights under cl 44, the notice was not authorised because the respondent's obligation to "assist" the applicant did not require it to comply with directions to perform its SPA obligations. MP Water appealed this decision.

Held: granting leave to appeal and allowing the appeal

- MP Water's submission that paragraphs (1) to (6) prescribe the circumstances that trigger the election referred to in the unnumbered paragraph, and do not each constitute a "Step-in Right" was accepted: [85]. Clause 44(a) authorises MP Water to give a direction to Veolia as to the operation of part of the Facility, or the provision of some or all of the Services, of which MP Water takes or assumes possession, management, and control: [92]. The obligation imposed on Veolia is triggered by MP Water making an election under paragraphs (7), (8), or (9) and extends to Veolia operating the Facility and providing the services at MP Water's direction: [87], [94]. Consequently, the primary judge erred in adopting a more limited construction of "assist": [95]-[100].

- The primary judge was correct to dismiss the argument that Veolia raised on the Notice of Contention. Veolia's submissions in reliance on the definition of Facility and Mine Water Buffer Pond, if accepted, would subvert the regime in the SPA dealing with commencement of those obligations, and the primary judge was correct to describe it as unworkable having regard to the many components and parts included within each of the nine elements making up the Facility: [112]-[113]. Her Honour's construction was consistent with the commercial purpose of the SPA and also the safety objects which its provisions were intended to serve: [114].

Contract: loan agreement

***Fayad v B & G Properties Pty Ltd* [2022] NSWCA 129**

Decision date: 22 July 2022

Bell CJ, Leeming JA, Basten AJA

Mr Fayad (the appellant), was the guarantor of a $4 million loan by B & G Properties Pty Ltd (the respondent), to his company, NR Developers Pty Ltd. The money was advanced pursuant to a written agreement dated 16 February 2015 which provided for repayment of the principal after 6 months, plus interest at a rate of 25% pa. The interest component was to be paid in two instalments of $250,000. Clause 4 provided in part that "Default fees and charges will be at the rate of thirty (30%) per centum of the advance per annum or part thereof." It was common ground that no repayment of the principal sum was made. Payments of some interest were made. By Deed of Variation in July 2018 and Deed of Further Variation in November 2018, the Final Repayment Date was amended to 15 November then 15 December 2018. The outstanding "fees and charges" were ultimately specified at $1,483,333. Clause 4 was not amended. Save for $300,000 in December 2019, no further repayments were made. B & G Properties commenced proceedings in the Supreme Court in 2021 to recover the debt. The primary judge held that cl 4 imposed the default rate of 30% upon all outstanding indebtedness, not merely the $4,000,000 principal, and that the default rate was not a penalty. Mr Fayad appealed this decision.

Held: dismissing the appeal

- Mr Fayad's submission that cl 4 only applied to the $4 million, and not the other fees and charges, was rejected due to its inconsistency with the emphatically general language in the first and second sentences: [26]. Mr Fayad also accepted that the ordinary 25% rate applied to amounts owing other than unrepaid principal: [27]. Consequently, there was no sound commercial reason for applying different rates of interest on the same debt from the same lender to the same borrower which is in default: [28]. Although terms of a guarantee will be construed strictly with ambiguities resolved in favour of the guarantor (*Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561; [1987] HCA 15), that principle has no application to the construction of cl 4: [30]. The default rate of 30% applied to the whole of the sum outstanding as at 15 December 2018, until paid: [31] and [44].
- In circumstances where no challenge was made to the 25% per annum rate for short term lending for the purposes of property development, the increase from 25% to 30% was a modest increase; the default rate was not penal: [36]-[37], [45].

Family Provisions: claim by alleged de facto partner

Sun v Chapman **[2022] NSWCA 132**

Decision date: 26 July 2022

Leeming, White, Brereton JJA

Ms Wei (Rose) Sun (the appellant and cross-respondent) and the late Robin Alan Richard Chapman (the deceased) commenced living together in 1998. Between 1998 and the deceased's death on 2 February 2019 Ms Sun and the deceased lived together. Ms Sun cooked and cleaned for the deceased. Ms Sun deposed that they had an intimate relationship for about four or five years from about 1999, and witnesses reported seeing Ms Sun and the deceased holding hands in public. The deceased declared in a statutory declaration in 2003 that he and Ms Sun were living together in a de facto relationship. However, there was evidence of considerable antagonism between Ms Sun and the deceased during the last five years of the deceased's life. Ms Sun received no benefit under the deceased's last will. Mr Michael Chapman (the respondent and cross-appellant) is the Executor of the deceased's estate. Ms Sun applied to the Supreme Court for an order under s 59 of the *Succession Act 2006* (NSW) that provision be made for her maintenance and advancement in life out of the estate of the deceased. Ms Sun's application for a family provision order was dismissed and the primary judge declined to order costs against Ms Sun. Ms Sun appealed this decision and the Executor cross-appealed the costs order.

Held: allowing the appeal, dismissing the cross-appeal

- The primary judge erred in concluding that the de facto relationship had ended by reference to records which conveyed the overall impression that the relationship between the deceased and Ms Sun was that of patient and carer: [68]. The relationship of patient and carer is not inconsistent with a continued relationship of husband and wife or de facto husband and wife: [69]. Nor does a de facto relationship cease because it becomes fractitious and the parties seek to love each other: [70]

- The Court affirmed *Page v Page* [2017] NSWCA 141, where the appellate standard of review in *Warren v Coombes* (1979) 142 CLR 531 rather than *House v The King* (1936) 55 CLR 499 was applied to the issue of whether parties are or were in a de facto relationship because it is not a discretionary decision: [8] and [115]. Rather, an appeal raising a factual challenge as to whether a criterion for a claimant to be an eligible person for the purposes of s 57(1) of the *Succession Act 2006* (NSW) has been met, is not to be accorded the deference given to a discretionary decision which admits a range of lawfully correct outcomes: at [13], [189].

- Adequate provision for maintenance and advancement in life would often require further provision to provide a fund for contingencies. But having regard to the financial needs of several of the beneficiaries, coupled with the fact that Ms Sun's needs are largely the result of her very generous gifts to her son and his wife who would have their own moral duty to support her, the deceased's moral obligation does not extend beyond provision of funds that would discharge her mortgage debt: [181]-[182].

Australian Intermediate Appellate Decisions of Interest

Migration: generalised fear of harm; Practice and procedure: extension of time

***CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 124**

Decision date: 22 July 2022

Katzmann, Charlesworth and Burley JJ

The applicant arrived in Australia, from Sudan, in 2004 with his family. The applicant has a long criminal history. Consequently, the applicant cannot pass the character test prescribed in s 501(6) and s 501(7) of the *Migration Act 1958* (Cth) ("the Act"). After he was sentenced in May 2018, a delegate of the Minister cancelled the applicant's visa under s 501(3A). The applicant made representations urging the Minister to revoke the cancellation decision, in accordance with s 501CA(4), and another delegate declined to do so ("the non-revocation decision"). The Administrative Appeals Tribunal ("the Tribunal") affirmed the non-revocation decision. The applicant applied to the Federal Court for judicial review of the Tribunal's decision. That application was dismissed by the primary judge. The applicant appealed that dismissal to the Full Federal Court. The applicant also sought an extension of time to appeal and leave to adduce further evidence on the appeal.

Held: allowing the appeal

- The appellant's application for extension of time was granted. In referring to the principles expounded in *BQQ15 v Minister for Home Affairs* [2019] FCAFC 218, the Court determined that the delay was not insignificant and lacked a satisfactory explanation: [13]-[18] and [28]. However, given that the appellant was initially self-represented, the new ground raised questions of law and had merit, the Minister did not point to any injustice or prejudice he would suffer, and the Tribunal's decision had serious consequences for the appellant, the application was granted: [31].

- The Court's discretion to receive further evidence in an appeal is remedial (*August v Commissioner of Taxation* (2013) 94 ATR 376 at [116]) and addressed by s 37M(3) of the *Federal Court of Australia Act* 1976 (Cth) which imposes an obligation on the court to exercise any such power in the way that best promotes the facilitation of the just determination of disputes as quickly, efficiently and inexpensively as possible: [33]-[35].

- Section 197C(1) of the Act provides that for the purposes of s 198, it is irrelevant whether Australia has non-refoulment obligations in respect of an unlawful non-citizen. In their practical application, ss 197C and 198 operate so as to mandate the removal of unlawful non-citizens from Australia in circumstances that amount to a breach of Australia's obligations under international law: [54]-[56].

- The Tribunal erred in failing to consider the appellant's well-founded fear of persecution in South Sudan on account of his Dinka ethnicity: [85]-[87]. A tribunal is required to consider claims which, although not expressly made, "clearly arise" and are raised "squarely" on the face of the material before it (*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1): [88]. A claim giving rise to international non-refoulement obligations can be "clear from the facts of the case", even if not expressly articulated by the former visa holder: [96].

Procedural fairness; Equity: unconscionable dealing; undue influence

Gunn v Meiners **[2022] WASCA 95**

Decision date: 29 July 2022

Mitchell, Beech and Vaughan JJA

Ms Gunn (the appellant) is Ms Meiners' (the respondent's) eldest daughter. Ms Meiners did not have a close relationship with any of her four children, including Ms Gunn, prior to the death of Ms Meiners' second husband. Following the death of her second husband, Ms Meiners sold her matrimonial home and transferred $372,717.43 to Ms Gunn. $320,000 of those funds were applied by Ms Gunn to the purchase of a property she subsequently moved into. Ms Gunn claimed the $372,717.43 was a gift and, consequently, Ms Meiners had no legal or equitable interest in the purchased property. Ms Meiners commenced proceedings in the Supreme Court alleging that the transfers of money were, relevantly, consequences of Ms Gunn's unconscionable conduct and products of Ms Gunn's undue influence over Ms Meiners. Ms Gunn was self-represented throughout the trial. The primary judge found that the transactions constituted unconscionable dealings but rejected the other causes of action. Ms Gunn appealed this decision on the basis that unconscionable dealing was never pleaded and that, in the alternative, the primary judge erred by applying the wrong test for knowledge of Ms Meiners' special disadvantage. Ms Meiners sought to uphold the judgment on the bases of the failure of the parties' joint endeavour and undue influence.

Held: allowing the appeal and remitting the unconscionable dealings claim for a retrial

- The trial judge erred in finding against Ms Gunn on a basis that was not open on Ms Meiner's pleaded case: [116]. Pleadings define the issues for decision so that the court can control the preparation of the case and the conduct of the trial and ensure a fair trial by putting the other party on notice of the case to be met: [110]. By informing Ms Gunn on three occasions that the pleadings limited the matters for determination by the court, the primary judge was obliged to inform Ms Gunn that she may be found liable on some other basis than that which the pleadings suggested: [119].

- The primary judge erred by adopting an objective, reasonable person test when determining whether the special disadvantage or disability was sufficiently evident: [182], [200]. By failing to refer to *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, the primary judge incorrectly considered that the effect of what was said by Mason J in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 was, or at least may be, that constructive knowledge of the other party's disadvantage was sufficient: [184]. The finding of special disadvantage or disability was very general thus creating difficulties in determining whether the disabling condition was sufficiently evident to Ms Gunn such that Ms Gunn's conduct was unfairly exploitive of Ms Meiner's weakness: [187]-[188]. The primary judge erred by considering whether the stronger party was aware of facts that would raise the possibility in the mind of "a" reasonable person, as opposed to "any" reasonable person: [192].

- Ms Meiner's attempt to challenge the primary judge's rejection of the constructive trust claim based on failure of joint endeavour failed because of the same procedural fairness problem referred to above and the primary judge's upholding of the unconscionable conduct claim infects the claim based on the failure of the joint endeavour: [203], [210]. The primary judge was correct in applying the test in *Mercanti v Mercanti* (2016) 50 WAR 495 when determining undue influence: [226] and [232].

Asia Pacific Decision of Interest

Partnership: knowledge and approval of equal partner; defence of laches

Ng Lim Lee (as administratrix and trustee of the estate of Lee Ker Min, deceased) v Lee Gin Hong (as executor and trustee of the estate of Ng Ang Chum, deceased) and another **[2022] SGCA 47**

Decision date: 21 July 2022

Steven Chong JCA, Woo Bih Li JAD and Quentin Loh JAD

Lee Ker Min and his late mother were equal partners of a business ("the Partnership") which commenced in 1958. The appellant commenced litigation in the High Court against the estate of his late mother and the executors personally for half of the liability due and owing under an overdraft facility which was extended to the Partnership by United Overseas Bank ("the UOB overdraft facility"). The late mother's estate counterclaimed, alleging that he withdrew monies from the UOB overdraft facility and other Partnership bank accounts for his own real estate purchases and investments. The appellant's only pleaded defence was that he deposited money in excess of his withdrawals between 2002 and 2014 which he claimed to be the relevant period. The appellant also claimed that his mother knew and approved of his withdrawals, and that the defence of laches applied. The primary judge found that the partnership was solvent, the appellant had overdrawn sums which far exceeded the amount due under the overdraft facility and the appellant had breached the fiduciary duties he owed to his late mother. The primary judge rejected the appellant's defences of laches, and knowledge and approval as neither were pleaded. The appellant's claim was dismissed, and the counterclaim was allowed. Lee Ker Min's estate appealed this decision.

Held: dismissing the appeal. The primary judge's decision to order an inquiry was affirmed save that its scope was redefined.

- The primary judge was correct in deciding that the appellant had breached his fiduciary duties because: on appeal, neither informed consent or common understanding were pleaded; the appellant's defence was that his mother was involved in the business of the Partnership, although mere involvement does not translate to knowledge and consent of the withdrawals; by requesting the return of his mother's funeral expenses, the appellant undermined his argument that there was a common understanding that the partners were entitled to withdraw monies for their personal expenses; and the appellant could not provide any evidence of his late mother making withdrawals for personal reasons: [75]-[76].

- Given that the appellant's consent defence failed, the defence of laches would likewise fail because the late mother's knowledge determines the reference point from which she could have commenced an action but elected not to do so: [77]. The executors commenced proceedings four years after the passing of the late mother. This cannot be said to be a substantial lapse of time and the length of the delay did not cause the appellant to suffer any prejudice as he was the party who initiated proceedings and the withdrawals in question were well documented: [79]-[81].

- The primary judge was correct in concluding that the appellant was in breach of his fiduciary duty with respect to the Misapplied Sum and Private Profits: [76], [84]-[85]. Consequently, the parameters of the inquiry should be extended from only the sums withdrawn without the consent of the late mother to include any further deposits [90].

International Decision of Interest

Employment Law: Whether the calculation of annual leave is determined according to work pattern or pro-rated

Harpur Trust v Brazel **[2022] UKSC 21**

Decision date: 20 July 2020

Hodge DPSC, Briggs, Arden, Burrows and Rose LJJ

Ms Brazel (the appellant) was a visiting music teacher in a school run by Harpur Trust (the respondent). Ms Brazel was engaged on a zero-hours contract to work during term times, worked a variable number of hours each week and was only paid for the hours that she taught during term time. She received annual leave entitlements only during holiday periods at three times during the school year. Ms Brazel's holiday pay was determined in accordance with s 224 of the *Employment Rights Act 1996* (UK) ("the Act") by calculating her average week's pay, ignoring any weeks in which she did not work, and multiplying that by 5.6 ("the Calendar Week Method"). In 2011, Harpur Trust altered the manner in which Ms Brazel's holiday pay was calculated, in accordance with guidance from the Advisory, Conciliation and Arbitration Service by calculating her hours worked at the end of each term and multiplying it by 12.07% to reflect the proportion of 5.6 weeks to the total working year of 46.4 weeks ("the Percentage Method"). Ms Brazel brought proceedings before the Employment Tribunal in 2015, which were decided against her. She subsequently appealed to the Employment Appeal Tribunal and was successful. Harpur Trust appealed the Employment Appeal Tribunal's decision to the Court of Appeal. Following dismissal of the appeal in that court, Harpur Trust appealed to the Supreme Court.

Held: Dismissing the appeal

- The statutory leave requirement is "retained EU law" as defined by s 6(7) of the *European Union (Withdrawal) Act 2018* (UK) and, according to s 6(3), retained case law continues to apply to questions of interpretation: [2]. The "conformity principle" emerges from the case law of the Court of Justice of the European Union and suggests that the amount of annual leave should reflect the amount of work Ms Brazel actually performed: [2]-[4]. The Court rejected Harpur Trust's submission that the conformity principle requires the amount of leave to which a part-year worker is entitled under a permanent contract to be pro-rated to that of a full-time worker: [52], [76].

- The Court rejected Harpur Trust's various alternative methods for calculating leave as the methods proposed were very different from the statutory method set out in the *Working Time Regulations 1998*; for a worker working an irregular number of hours per week over the course of the year, the calculations were extremely complicated and would require all employers and workers to keep detailed records of every hour worked, even if they were not paid at an hourly rate: [67] and [70].

- Any slight favouring of workers with a highly atypical work pattern is not so absurd as to justify the wholesale revision of the statutory scheme in accordance with the Harpur Trust's alternative methods: [72].

- Section 229(2) of the Act is not a general dispensing provision allowing the Court to recalculate the amount of a week's pay in any way it considers appropriate. That provision is intended primarily to deal with, for example, a lump sum annual bonus related to the whole year's work but paid at a particular date which may or may not be in one of the weeks falling within the reference period for the purposes of s 224: [77].