Court of Appeal
Supreme Court
Sydney

Decisions of Interest

1 August 2022 – 14 August 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

Contract: Releases; Consumer Law: Unconscionable Conduct

Reid v Commonwealth Bank of Australia **[2022] NSWCA 134**

Decision date: 1 August 2022

Bell CJ and Leeming and White JJA

Mr and Mrs Reid guaranteed loans provided by the Commonwealth Bank of Australia ("the Bank") to three companies. Their guarantees were secured by a mortgage over a property they owned at Menangle. Following the commencement of various proceedings, Mr and Mrs Reid entered into deeds of settlement with the Bank. Clause 5.1 of the deed of settlement entered into by Mr Reid contained a release. Both deeds provided that the parties would execute a document entitled "Consent Judgment" which provided for judgment to be given for the Bank against Mr and Mrs Reid in the sums of $1,268,512.22 and $1,225,291.11 respectively, and for possession of the Menangle property. The deeds of settlement provided that the judgments would only be enforced from the proceeds of sale against the Menangle property. After the Bank took possession of the Menangle property, the property was vandalised, following which the property was sold for $2.201 million with an allowance to the purchaser for damage to the property of $370,000. Mr Reid commenced proceedings in the District Court in December 2019. In November 2020, Mr Reid filed a notice of motion seeking leave to amend his statement of claim. In February 2021, the Bank filed a notice of motion seeking an order that the proceeding be summarily dismissed. The primary judge dealt with the Bank's summary dismissal application "…on the assumption that [Mr Reid] was permitted to rely upon his proposed amended pleading". The primary judge summarily dismissed Mr Reid's claim. Mr Reid sought leave to appeal.

Held: granting leave to appeal and allowing the appeal

- A submission that a judge has denied a party procedural fairness is serious and should not be made lightly (*Daley v Donaldson* [2022] NSWCA 96 at [52]). the primary judge 'was favourable to Mr Reid' by dealing with the summary dismissal application on the basis that his motion to amend the pleadings was successful. As such, it was "baseless" to suggest that procedural fairness was denied to Mr Reid: [115]-[118].

- The primary judge erred in holding that Mr Reid did not have a triable cause of action in respect of the alleged breach by the Bank of its duty as mortgagee to take reasonable care to prevent damage to the Menangle property: [131]. First, the Bank relied upon the release as covering all claims which Mr Reid at any time in the future may have against the Bank for, or by reason, or in respect of any act, cause, matter or thing in connection with, or incidental to, the sale of the Menangle Property: [127]. The words "in connection with or incidental to" were undoubtedly wide, but the conduct of the Bank about which Mr Reid complained had no direct or necessary relation to the Bank's exercise of its power of sale: [128]-[129]. Secondly, although it was not adverted to in the proceedings before the primary judge, it was arguable that pursuant to the deeds of settlement, the Bank was only entitled to recover $1,268,512.22 from the proceeds of sale of the Menangle property as Mr and Mrs Reid's liabilities were joint and several: [134]-[138].

- The primary judge was correct to reject Mr Reid's invocation of s 76(1) of the National Credit Code (within Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth)) as misconceived, because the Deed of Settlement was not a credit contract as defined in s 4: [148], [151]. Mr Reid's claims under s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) should also have been rejected. The release in cl 5.1 would apply to such claims and Mr Reid did not plead any facts as to why the Bank engaged in unconscionable conduct, or why the release was unjust: [156], [157].

Worker's Compensation: definition of "injury"

***Iqbal v Hotel Operation Solutions Pty Ltd* [2022] NSWCA 138**

Decision date: 4 August 2022

Brereton and Mitchelmore JJA and Basten AJA

Between 2008 and 2010 Mr Iqbal (the appellant) was an employee of Hotel Operation Solutions Pty Ltd (the respondent) which provided labour hire for hotels. In 2010, the appellant reported pain and pins and needles in his right hand and the right side of his neck. In 2012, Mr Iqbal obtained CT scans of the cervical and lumbar regions of his spine. The scan of his cervical spine showed disc protrusions with spinal cord compression. In 2016, a neurosurgeon performed an anterior cervical discectomy and fusion involving cervical discs. In 2020, the appellant instituted proceedings in the Workers Compensation Commission alleging his injuries resulted from the nature and conditions of his employment. An arbitrator held that Mr Iqbal sustained injury to his cervical spine as a result of the nature and conditions of his employment, but was not satisfied that there was an employment-related injury to the lumbar spine. Mr Iqbal was referred to an approved medical specialist for an assessment of whole person impairment with respect to the cervical spine and consequential injuries. On an internal appeal, Deputy President Snell confirmed the arbitrator's determination. Mr Iqbal appealed this decision.

Held: dismissing the appeal

- The appellant's submission, that his injuries were "contracted" in the course of his employment and were not the aggravation of an existing degenerative condition turned on a categorisation of degenerative changes as "biological" and trauma-based changes as "pathological", was ultimately rejected: [44]. However, the term "disease" in s 4(b) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("the Act") should be given its broadest meaning. In accordance with *Federal Broom Company Pty Ltd v Semlitch* (1964) 110 CLR 626, such meaning does not depend on its cause: [40], [44].
- Mr Iqbal's submission that there was no evidence of any pre-existing degenerative condition was rejected as this would invert the onus of proof: [61], [64]. Further, in accordance with *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, Mr Iqbal was not entitled to rely upon his own evidence to establish that there was no evidence of any pre-existing condition: [62].
- The existence and significance of a symptom involved a question of fact: [68]. The appellant must establish an error "in point of law" pursuant to s 353 of the Act: [13].
- There is no right of appeal to the Court of Appeal from the issue of a medical assessment certificate: [70]-[71]. Rather, an appeal may be brought pursuant to s 327 of the Act: [71].

Personal Injury: motor accident; pre-existing susceptibility to mental illness

***J v D* [2022] NSWCA 147**

Decision date: 10 August 2022

Leeming, White and Brereton JJA

On 23 January 2012 a motor vehicle accident occurred between J (the appellant) and D (the respondent). D admitted liability through her insurer. J commenced proceedings against D in the District Court in 2014. The particulars of J's injury included injury to her spine and both knees, and a Generalised Anxiety Disorder resulting in continuing disabilities of anxiety, panic attacks, shortness of breath, agoraphobia, social phobia, depressive symptoms including sleep disturbance, reduced energy, tiredness, reduced motivation, variable appetite, difficulties with concentration and loss of enjoyment of social life and interaction with friends. There were indications of issues concerning J's mental health before the motor vehicle accident. The question at trial was whether J's psychiatric condition was caused by the negligence of D in driving her motor vehicle so as to cause an accident in which J suffered physical injury. The primary judge found that J suffered symptoms of post-traumatic stress disorder after the accident. However, the primary judge assessed the quantum of damages on the basis that "… the defendant's negligence accelerated the development of a psychotic condition by 4 years … which the plaintiff would have suffered in any event". J appealed this decision.

Held: dismissing the appeal

- By referring to acceleration, the primary judge meant that J's symptoms of post-traumatic stress disorder persisted for four years after the accident, up to 2016, after which J would have been incapacitated by reason of her underlying psychotic condition even in the absence of the motor vehicle accident: [37]. The primary judge did not err in reaching this conclusion, although the basis for it was imperfectly expressed: [2], [3], [37], [38], [41].
- The appellant's submission that the primary judge erred in failing to give adequate reasons for the finding that the motor vehicle accident accelerated the development of the appellant's psychiatric condition by four years was rejected. It proceeded on the misconceived basis that the primary judge found that in the absence of the motor vehicle accident, J's psychotic condition would have manifested in 2020 rather than 2016: at [2], [36], [42].
- The primary judge did not err in assessing damages on the basis that the effects of the motor vehicle accident had ceased by February 2016, as this conclusion was consistent with the opinions of Dr Cocks and Dr Allnutt: at [1], [3], [37], [38].

Procedure: compromises and settlements

***Thumbiran v Silver Chef Rentals Pty Ltd; Thumbiran v Silver Chef Rentals Pty Ltd* [2022] NSWCA 148**

Decision date: 11 August 2022

Leeming, Brereton and Mitchelmore JJA

In 2018, Silver Chef Rentals Pty Ltd ("Silver Chef") entered into various equipment rental agreements with Donny's Pizzeria Pty Ltd whose obligations were guaranteed by Mr Telese and Absolute Pump Services Pty Ltd, a company controlled by Mr Thumbiran. Clause 38 of the guarantee provided that any Guarantors charge all their real and personal property with the payment of all amounts owed under the contract. Silver Chef contended and Mr Thumbiran denied, that he personally guaranteed Donny's Pizzeria's obligations. The focus of that dispute was a letter sent by Silver Chef to Mr Thumbiran which he (electronically) signed. At least five caveats were lodged upon properties owned by Mr Thumbiran by Silver Chef. When the caveats came to Mr Thumbiran's attention, Silver Chef offered, by email, to remove the caveats and settle all disputes for $150,000 which was to be paid in instalments. Mr Thumbiran accepted this offer and transferred the first instalment but declined to execute a deed proffered by Silver Chef. Silver Chef applied to the Supreme Court for orders pursuant to s 73 of the *Civil Procedure Act 2005* (NSW) determining that a binding compromise had been reached. The primary judge found that the proceedings had been settled on the terms of the email, and ordered Mr Thumbiran to execute a deed of settlement and, in the event that he failed to do so, authorised a Registrar of the Court to do so on his behalf. Mr Thumbiran refused to execute any of a series of amended proposed deeds until, in due course, a Registrar of the Court did so on his behalf. No submission was made that the deed did not fairly encapsulate the agreement between the parties. Mr Thumbiran and Absolute Pump Services commenced separate proceedings seeking, relevantly, orders permanently restraining any steps to enforce the settlement deed, and declarations that the deed was of no force and effect, and that Mr Thumbiran was never a guarantor. Silver Chef successfully moved for these proceedings to be summarily dismissed in the Commercial List. Mr Thumbiran appealed.

Held: granting leave to appeal and allowing the appeal

- The deed which a judge of the Division ordered to be executed on behalf of Mr Thumbiran went materially beyond the agreement upheld by his Honour: [35]-[37]. Clause 4.1 conditioned the removal of the caveats upon no default occurring and payment of the settlement sum in full. This materially departed from the agreement because the promise to withdraw the caveats in the agreement was conditioned merely upon the provision of the $150,000: [35]. Clause 17.1 included an exclusive jurisdiction clause which was absent in the agreement: [36].

- Silver Chef's submission that the recitals which went beyond the agreement were severable and had not been relied upon by the primary judge, such that the error did not impact upon the summary dismissal, was rejected: [38]-[39]. First, this amounted to a strained reading of the primary judge's reasons as a judgment would not reproduce recitals if they were irrelevant. Secondly, it was bad in law as this was not a case where the validity of the caveatable interest was something which was legally indispensable to the Court's judgment as the only issue to determine was whether the parties had reached agreement (*Blair v Curran* (1939) 62 CLR 464; [1939] HCA 23): [39].

- Signing the letter did not without more make Mr Thumbiran a guarantor or amount to his granting a charge over his real property to secure his obligations as guarantor. The letter was not contractual, but rather was expressed to be an acknowledgement of the consequences which would flow if another document was executed: [41], [43].

Australian Intermediate Appellate Decisions of Interest

Statutory Interpretation: Acts of Parliament

***Carne v Crime and Corruption Commission* [2022] QCA 141**

Decision date: 5 August 2022

McMurdo and Mullins JJA and Freeburn J

Mr Carne (the appellant) was a former Public Trustee of Queensland until his resignation on 31 July 2020. In 2018, the Crime and Corruption Commission ("the Commission") received an anonymous complaint which accused Mr Carne of corrupt conduct which they investigated. Subsequently, Mr Carne and the Attorney-General were advised that the Commission was not proposing that there be any criminal proceedings against the appellant. On 4 September 2020, the Commission advised Mr Carne that the Commission intended to publish a report regarding "the investigation and the outcomes". The statutory basis for this report was said to be s 69(1)(b) of the *Crime and Corruption Act 2001* (Qld), which provides, relevantly, that upon the Parliamentary Crime and Corruption Committee ("the PCCC") directing that a Commission report be given to the Speaker of the Legislative Assembly, it be tabled in the Legislative Assembly. No such direction by the PCCC had been given; it was the Commission's stated intention to ask the PCCC to give it. On 8 October 2020, the appellant commenced proceedings in the Supreme Court of Queensland seeking declaratory and injunctive relief. The primary judge concluded that this would be a report which the Commission would have to provide under s 69(1), should the PCCC direct the Commission to do so; and that the Commission's preparation of the report and the resolution of the Commission to seek a direction from the PCCC were proceedings of the Parliament which, by reason of s 8 of the *Parliament of Queensland Act 2001* (Qld), could not be impeached or questioned. Mr Carne appealed this decision.

Held: Allowing the appeal

- This was not a report of a kind to which s 69(1)(b) applies, because it was not a report which was made by the Commission in the performance of any of its statutory functions. Section 69 is not itself the source of a further power or duty of the Commission to report, and the Commission's relevant function, namely its corruption function, having been performed, the Commission was not empowered or required by any other provision of the Act to make this report. Consequently, this report could not be the subject of parliamentary privilege: [15], [51], [65], [80]. The purpose of s 69 is to facilitate the availability to the public of certain of the Commission's reports, by requiring them to be tabled in the Legislative Assembly, with the immunities and privileges of a report so tabled and published: [66]- [67].
- In dissent, Freeburn J considered that the report did attract parliamentary privilege: [141]. Section 8(1) of the *Parliament of Queensland Act 2001* extends parliamentary privilege to "proceedings in the Assembly" which is defined in s 9(1) to "include all words spoken and acts done in the course of, or for the purposes of or incidental to, transaction business of the Assembly or a committee": [143]-[144]. *Erglis v Buckley* [2005] QSC 25 should be distinguished on the basis that the report in question was not sent by a citizen to a parliamentarian, but rather prepared by the Commission then submitted to the PCCC which is a committee of the parliament: [155]-[156].

Commercial Arbitration

Berry v Andrews **[2022] FedCFamC1A 120**

Decision date: 3 August 2022

Tree, Jarrett and Campton JJ

Ms Berry (the Mother) and Mr Andrews (the Father) commenced a relationship and co-habitation in 2008 and separated in 2010. The only child of the relationship was X who was born in 2010. By reference to orders made in 2012 and 2014, the child lived with and spent time with each parent for a considerable amount of her life, until early 2020. In December 2019 the child commenced spending time with the Father, for the first half of the 2019 Christmas school holidays, in accordance with the then current court order. When the child was to return to the Mother, the Mother refused to accept the child and ceased communication with her. In 2020 arrangements were made for the child to spend time with the Mother on the child's birthday. The Mother refused to comply with the 2014 order regarding the child spending time with the Father. In 2020, the Mother removed the child from school, enrolled the child in distance education and left the area for a lengthy period to go on a road trip with the child. On 17 December 2020 the Father commenced contravention proceedings in the Federal Circuit and Family Court of Australia (Division 2) due to the child not spending any time with the Father. The primary judge ordered that the Father have sole parental responsibility for X, that X live with him, and for her to spend five weekends of supervised time with the Mother and thereafter unsupervised time each alternate weekend from Friday afternoon until Sunday afternoon. In his Honour's reasons, he referred to an article authored by J B Kelly and J R Johnston entitled "The Alienated Child: A Reformulation of Parental Alienation Syndrome". The Mother appealed this decision

Held: dismissing the appeal

- The Mother's submission that the primary judge failed to accord her procedural fairness as she was not given the opportunity to cross-examine, respond to, or introduce contrary evidence in relation to the academic article was upheld: [55]. However, this breach was not material as the findings of fact made by the primary judge were unchallenged and those findings informed his Honour's conclusion: [57]. The orders made by the primary judge would not have been different had the breach of procedural fairness not occurred: [58].

- The primary judge identified the article but did not set out or summarise the importance or significance of the article to his reasoning process: [48]. Again, while this amounted to a breach of procedural fairness and hence an error of law, it was not material to the ultimate orders made. His Honour remained focussed on the facts of the case and the article was not significant or important to the decision: [53]-[63].

Asia Pacific Decision of Interest

Taxation

The Commissioner of Inland Revenue v Koo Ming Kown and Another **[2022] HKCFA 18**

Decision date: 5 August 2022

Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Stock NPJ and Mr Justice Gleeson NPJ

The tax returns of Nam Tai Electronic & Electrical Products Limited ("NT") for the years 1996/97, 1997/98 and 1999/2000 were found by the Board of Review ("the Board") to have been incorrect. Mr Koo and Mr Murakami ("the Applicants") were directors of NT at the time. Mr Koo signed the first and third of those returns, and Mr Murakami signed the second. Section 82A of the Inland Revenue Ordinance (Cap 112) ("the IRO"), does not make specific reference to the potential liability of an officer of a corporation who signs the corporation's tax return, but it covers the case of a person who makes an incorrect return by omitting or understating anything in respect of which he is required to make a return on behalf of another person. On that basis, the Board held the Applicants were liable to be assessed to additional tax under s 82A(1)(a). The Applicants contended that they do not fall within that statutory description. Justice G Lam in the Court of First Instance of the High Court agreed. On appeal, the Court of Appeal upheld G Lam J's decision. The Commissioner of Inland Revenue (the "CIR") appealed this decision.

Held: dismissing the appeal

- Section 82A(1)(a) does not cast the net of liability for any incorrectness in a company's tax return as widely as possible. For example, it does not impose liability on those directors who did not sign the return, even if they voted in favour of a resolution to adopt the accounts reflected in the return. As between the people referred to in s 57(1), the identity of the individual who signs a company's return may be a matter of happenstance: [64].

- The CIR's submission that although the corporate taxpayer was the person "primarily required" to make the return, the legislative intention was that an officer of the corporation was to make the return on the taxpayer's behalf by signing it, was rejected: [66]. Section 51(1) notices are to be given to the person who is required to "furnish" a return. If the notice does not mention a particular person, that person cannot be said to be required to make the return, as the language of s 82A(1)(a) dictates: [67].

- The Court observed that the obligation on specific officers to do all things required under the IRO under s 57(1) falls on all the members of the class to which it refers. First, nothing in s 57(1) singled out Mr Koo as subject to a requirement to make NT's tax return: [68]-[69]. Secondly, since the CIR contended that it was NT that was "primarily required to make the return", the collective requirement on the class of persons referred to in s 57(1) must be secondary. In the result, apparently, a primary requirement on the company gave rise to secondary liability in the company: [70]. Thirdly, s 57(1) renders an officer "answerable" for doing certain acts which are required to be done by a corporation: [71].

Other International Decision of Interest

Immigration: meaning of "10 years continuous lawful residence"

Iyieke, R (On the Application Of) v Secretary of State for the Home Department **[2022] EWCA Civ 1147**

Decision date: 11 August 2022

Arnold, Dingemans and Warby LJJ

Mr Iyieke entered the UK lawfully on 13 February 2011. Since then, Mr Iyieke made various successful leave applications allowing him to remain. Between 9 August and 28 November 2014, Mr Iyieke's leave to remain was expired pending him securing temporary admission and ultimately leave to remain on human rights grounds on 26 February 2015. Mr Iyieke applied for Indefinite Leave to Remain ("ILR") on 17 February 2021 on the grounds of 10 years continuous lawful residence. Mr Iyieke's application was refused by the Secretary of State in an email dated 13 June 2021, which stated that Mr Iyieke was not entitled to ILR on the basis of 10 years continuous lawful residence and that the relevant discretion to grant it could not be exercised as he failed to apply within 28 days of his leave expiring. The reasoning in the email contained factual misstatements about leave under s 3C of the *Immigration Act 1971* (UK), the effect of paragraph 39E of the *Immigration Rules 1994* (UK) and relevant dates. Mr Iyieke sought permission to apply for judicial review of this decision to the Upper Tribunal. Permission was refused. Mr Iyieke appealed the refusal.

Held: Permission to apply for judicial review granted and dismissing the claim for judicial review

- The Court granted permission to apply for judicial review, and hence addressed the merits of the judicial review application, because the grounds relating to paragraph 276B were arguable: [15].

- The Court rejected Mr Iyieke's submission that he had 10 years continuous lawful residence: [21]-[28]. The Court upheld *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357; [2020] 4 WLR 154 which had held that the provisions of paragraph 276B(v) qualify paragraph 276B(i). It was common ground that paragraph 39E of the *Immigration Rules* was not engaged. This means that the question was whether Mr Iyieke "has had at least 10 years continuous lawful residence in the United Kingdom" because the gap of 111 days as a period of overstaying between periods of leave "will also be disregarded where the previous application was made before 24 November 2016 and within 28 days of the expiry of leave" (paragraph 276B(v)(a)): [24]. The Act references "the" previous application and not "a" previous application. "The" previous application must have resulted in a period of leave because otherwise there will be other periods of overstaying which need to be disregarded: [26].

- Mr Iyieke's point about the decision in *R(Afzal) v Secretary of State for the Home Department* [2022] 4 WLR 21 ("*Afzal*") being a decision made per incuriam did not arise. It might be thought that the submission that *Afzal* had been decided per incuriam, because the Court had not considered the express use of the word "discounted" in paragraph 276ADE of the *Immigration Rules* where that had been intended, where paragraph 276B(v) had used the word "disregarded", was based on a false proposition. This was that the *Immigration Rules* were drafted in one go as a coherent whole so that it would not readily be assumed that the drafter had used different words to convey the same meaning. However, the rules have been the product of many separate amendments made at different times by different persons: [28].

- The Court rejected Mr Iyieke's submission that the Secretary of State failed to consider their discretion to disregard the 111 days. The discretion provided in the guidance to waive compliance with the rules was based on circumstances such as illness or postal failures: [29]. Therefore, Mr Iyieke's case was not one of those circumstances where discretion will be exercised to mitigate the effect of the *Immigration Rules*: [29].