Court of Appeal
Supreme Court
Sydney

Decisions of Interest

15 August 2022 – 28 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

Health Practitioners: misconduct and discipline

Health Care Complaints Commission v Robinson **[2022] NSWCA 164**

Decision date: 26 August 2022

Leeming and Kirk JJA and Simpson AJA

The respondent, an ophthalmologist, was consulted by a young woman complaining of eye pressure. During the consultation, the respondent conducted breast and abdominal examinations, and asked various invasive questions. After the patient complained, the Health Care Complaints Commission ("the Commission") applied to the NSW Civil and Administrative Tribunal ("the Tribunal") seeking findings that the respondent was guilty of unsatisfactory professional conduct and professional misconduct. The Tribunal found the respondent guilty of the former only, having deferred for further consideration what orders should be made consequent upon those conclusions. It did so according to the common practice in the Tribunal of dividing hearings into two stages, being: first, an inquiry into whether unsatisfactory professional conduct or professional misconduct were established; and secondly, an inquiry into what consequential orders ought to be made. The Commission appealed this decision.

Held: allowing the appeal

- The Court found that an appeal lay as of right insofar as the appeal raised a question of law: [85]. A decision made at "stage 1" of an inquiry that a health practitioner is guilty or not guilty of unsatisfactory professional conduct or professional misconduct pursuant to the *Health Practitioner Regulation National Law (NSW)* ("the *National Law*"), is not an "ancillary" or "interlocutory" decision for the purposes of cl 29 of Sch 5 of the *Civil and Administrative Tribunal Act 2013* (NSW) ("the *CAT Act*"): [18], [79], [81]

- The Tribunal failed to deal with a "substantive, clearly articulated argument" (*Dranichnikov v Minister for Immigration & Multicultural Affairs* [2003] HCA 26; (2003) 214 CLR 496) by equating "inappropriate conduct of a sexual nature" with conduct that is sexually motivated and did not address the Commission's submission that the issue did not depend upon motivation, and in that way constructively failed to exercise its jurisdiction and erred in law: [103].

- By s 38 of the *CAT Act*, subject to any legislative provision, the Tribunal may determine its own procedure. That does not necessarily entail a rigid division of the issues into two steps: [56], [110]. A finding of professional misconduct under s 139E of the *National Law* requires that the conduct in question be found sufficiently serious to justify suspension or cancellation: [27]. Therefore, a "stage 1" hearing seeking to determine whether conduct constitutes professional misconduct necessarily involves some consideration of potential remedy (*Council of the New South Wales Bar Association v EFA (a pseudonym)* (2021) 106 NSWLR 383; [2021] NSWCA 339): [33]. The Tribunal should clearly delineate in advance whether the issue of characterising the conduct as professional misconduct is to be determined at a "stage 1" hearing: [39].

Equity: fiduciary duties

Cassaniti v Ball as liquidator of RCG CBD Pty Limited (in liq) and related matters; Khalil v Ball as liquidator of Diamondwish Pty Ltd (in liq) and related matters **[2022] NSWCA 161**

Decision date: 25 August 2022

Gleeson, Leeming and Mitchelmore JJA

Five companies and their liquidator commenced proceedings in the Supreme Court claiming breach of fiduciary and statutory duty, and accessorial liability in equity and under statute for knowing assistance or knowing involvement in those breaches of duty. Five appeals were brought by Gino Cassaniti, five by the Khalil parties, and five by the liquidator. Eleven of the appeals raised a single issue concerning the "release" defence relied upon by those parties, which the primary judge rejected, namely, that the liquidator's release of a party who was said to be primarily liable for the relevant breaches of fiduciary duty, and other parties said to be accessorily liable for such breaches, meant that the liquidator can no longer pursue claims for knowing assistance. Gino Cassaniti, the Khalil parties, and the Borg parties as respondents to one of the liquidator's appeals appealed this decision.

Held: dismissing the appeals

- Section 95 of the *Civil Procedure Act 2005* (NSW) ("the *CPA*") impliedly abrogates the common law rule that a release of one joint and several wrongdoer releases all other joint and several wrongdoers: [87]. At common law, the release of a joint and several liability was effective to release all of the obligees: [55]. Section 95 of the *CPA* is a re-enactment of s 97 of the *Supreme Court Act 1970* (NSW) ("the *SCA*") and both provide that they do not apply to a judgment to which s 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) applies: [58]. Section 5(1)(a) abrogated the rule that obtaining judgment against one joint tort-feasor discharged all other joint tortfeasors: [59]. Applying the dispositive reasoning in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574; [1996] HCA 38 produces the result that s 97 must impliedly abrogate the concept that the non-tortious cause of action was one and indivisible and s 97(2)(a), in its application to co-obligors who are not joint tortfeasors, impliedly abolishes the rule that the release of one co-obligor releases the others: [73].

- If there was a similar rule in equity applicable to co-obligors subject to equitable obligations, it did not survive the enactment of s 97 of the *SCA* and s 95 of the *CPA*: [88]. Although authorities have not been unanimous as to whether the common law release rule applies in equity, at the level of principle there is no reason for an unjust and disfavoured rule at common law to be followed in equity, where liability is conceptually different, is subject to discretionary defences and is apt to be measured differently as between defendants: [120].

- The primary judge correctly stated the test of knowledge for an accessorial liability claim but did not make an express finding that George Said's knowledge of Gino Cassantiti's breaches of duty answered one of categories (i) to (iv) in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509: [130], [153]. However, the finding of liability should be upheld as the facts as known to George Said would have indicated to an honest and reasonable person that the invoices he was creating were contrived and that the payments and cash withdrawals lacked any genuine commercial purpose (category (iv)): [162], [165].

Dust Diseases: causation

Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt **[2022] NSWCA 151**

Decision date: 23 August 2022

Brereton, Beech-Jones and Mitchelmore JJA

The Appellant, Amaca Pty Limited (Under NSW Administered Winding Up) ("Amaca"), employed the late Mr Gatt for approximately two years around the early 1960s, during which he was exposed to asbestos in circumstances that involved a breach of a duty of care owed to him by Amaca. During this time and until around 2007, Mr Gatt was a smoker. In 2015 Mr Gatt was diagnosed with carcinoma of the lung and bilateral calcified pleural plaques. In 2018, he commenced proceedings in the Dust Diseases Tribunal ("the Tribunal") against Amaca for damages for personal injury. The Respondent's case on causation, being the substantive issue in the proceedings before the Tribunal, was that Mr Gatt either developed asbestosis or lung cancer as a result of his exposure to asbestos fibres during his employment. The primary judge found that both were established. Amaca appealed this decision.

Held: dismissing the appeal

- Section 32(1) of the *Dust Diseases Tribunal Act 1989* (NSW) ("the *Act*") provides that "[a] party who is dissatisfied with a decision of the Tribunal in point of law or on a question as to the admission or rejection of evidence may appeal to the Supreme Court": [29]. *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 indicates the significant limitations on the review of findings of primary fact by an inferior court where the appeal is restricted to demonstrating an error of law: [30]. Since there was evidence capable of supporting the primary judge's finding that Mr Gatt acquired asbestosis, any complaints about illogicality, perverseness or ignoring contrary evidence in relation to that finding do not raise any complaint about an error of law: [32].

- The primary judge erred in misunderstanding and misapplying the concept of "material contribution" in causation by equating evidence which might have been capable of suggesting that there was a material chance of asbestos exposure causing Mr Gatt's lung cancer with evidence that it in fact made a material contribution to the causation: [80].To establish a cause of action in negligence a plaintiff must prove on the balance of probabilities that the defendant's wrong caused or materially contributed to his or her loss: [74]. It is not sufficient for the plaintiff to show that the wrong only materially increased the risk of harm: [74].

- The primary judge did not decide the matter inconsistently with *Judd v Amaca Pty Ltd* (2003) 25 NSWCCR 125; [2003] NSWDDT 12 ("*Judd*") or s 25B of the *Act*: [88]-[89]. *Judd* left open the possibility that evidence could be led that a doubling of the relative risk occurs at a cumulative exposure lower than 50 fibres/ml.years and that a worker with a relative risk of less than 2 could nevertheless have their lung cancer attributed to asbestos exposure: [87].

Defamation: imputations; justification; honest opinion; offer of amends

Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd **[2022] NSWCA 150**

Decision date: 18 August 2022

Leeming and Mitchelmore JJA and Simpson AJA

Mr Massoud was a sports journalist employed by Channel 7 in Sydney. He believed that a colleague had posted an exclusive story on social media, contrary to an embargo. He said to the employee, "If you weren't so young, I'd come up there and rip your head off and shit down your throat". A number of newspaper, radio, television and online publications covered Mr Massoud's subsequent suspension and dismissal. Mr Massoud brought five actions for defamation in the District Court against five publishers based on 16 publications. The primary judge entered verdicts for all defendants, finding that many of the publications conveyed the primary imputation Mr Massoud contended and all but one of the imputations were substantially true. Her Honour rejected a defence of honest opinion, but upheld defences of contextual truth for all imputations. Her Honour found that Radio 2GB Sydney's offer of amends was a complete defence, and that Mr Massoud was not entitled to damages or injunctive relief. Mr Massoud sought leave to appeal these decisions.

Held: granting leave to appeal and dismissing the appeal

- The primary judge erred in determining that Mr Massoud's secondary imputation better encapsulated the publication, as opposed to whether the primary imputation was conveyed. The "single meaning rule" does not mean that a plaintiff is precluded from alleging that a publication conveys more than one imputation: [57]. The approach in *Gatto v Australian Broadcasting Corporation* [2022] VSCA 66 is difficult to reconcile with the "real review" which is to be conducted on an appeal by way of rehearing involving a challenge to whether or not an imputation has been conveyed by a publication which is in writing or on electronic media: at [67].

- The plaintiff's submission that the primary judge erred in having regard to her own viewing of the film "Stand By Me" was rejected. The general rule that a court's decision should be made on the basis of the evidence and argument in the case, and not on the basis of information or knowledge which is independently acquired is directed to the rule against bias: *Re Media Entertainment & Arts Alliance; Ex parte Hoyts Corporation Pty Ltd (No 2)* [1994] HCA 66; 68 ALJR 179 at 182: [122]. The judge is free, subject to the requirements of procedural fairness, to take judicial notice of a wide range of information which is not reasonably open to question and is capable of verification by reference to a document the authority of which cannot reasonably be questioned: *Evidence Act 1995* (NSW), s 144: [124].

- The primary judge erred in rejecting the honest opinion defence, as advanced by Fox Sports: [217]. *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309; [1993] HCA 64 and *O'Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166; [1970] HCA 52 illustrate that the distinction between expressions of opinion and statements of fact will depend upon all the circumstances:[196]-[203].

- Radio 2GB Sydney's offer of amends was not a "correction" within the meaning of s 18 of the *Defamation Act 2005* (NSW): [233]. The proposed "correction" did not acknowledge that it had published something which was incorrect, nor state what the correct position was: [230].

Australian Intermediate Appellate Decisions of Interest

Administrative Law: standing; Planning Law

The People of the Small Town of Hawkesdale Incorporated v Minister for Planning & Ors **[2022] VSCA 167**

Decision date: 18 August 2022

Emerton P, Niall and Kennedy JJA

In 2008, the Minister for Planning issued a planning permit pursuant to s 97F of the *Planning and Environment Act 1987* (Vic) ("the *Act*") permitting the development and use of land proximate to Hawkesdale as a wind farm ("Wind Farm"). The second and third respondents are corporate entities with an interest in the development of the Wind Farm. The permit was amended and the period for completion of the Wind Farm was extended on more than one occasion. On 2 November 2020, a further extension of time to complete the development of the Wind Farm was granted ("the Extension"). Eight people from the township of Hawkesdale and surrounds incorporated an association that would serve as the vehicle to challenge the Extension ("the Association"). The Association was formally incorporated in January 2021, following which it commenced proceedings in the Trial Division of the Supreme Court seeking judicial review of the Extension. The primary judge dismissed the proceedings, finding that the Association did not have standing. The Association appealed this decision.

Held: refusing leave to appeal

- The primary judge did not err in finding that the Association lacked standing: [80]. The fact that a body has been established for the purpose of conducting litigation does not give it a special interest in the subject matter of that litigation (*Binginwarri Friends of the Jack and Albert River Catchment Area Inc v VicForests* [2021] VSC 824): [67]. Although the courts gave weight to the interests of the members of an association when recognising its standing in *Ex parte Helena Valley/Boya Association (Inc) v State Planning Commission* (1990) 2 WAR 422 and *Re MacTiernan; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138, these cases are distinguishable as the former involved an association which was incorporated before most of the impugned decisions occurred and had carried out a number of activities in relation to the development prior to commencing proceedings, and the latter involved an association in which its members had engaged in conduct as a collective for the purpose of common endeavour: [73].

- The applicant's submission that s 69 of the *Act* prescribes an exclusive and mandatory code for the extension of a permit was rejected: [111]. Construing s 62(2) as allowing permit conditions to be made that specify the circumstances in which an extension of the permit may be granted is in keeping with the objective of the planning framework in Victoria, being to facilitate development which achieves the objectives of planning and planning objectives in planning schemes: [115]. The fact that s 69 makes provision for the extension of permits does not confine the power to make a permit condition that operates on the same subject matter. Section 69 does not purport to confine the power to impose conditions under s 62(2): [117].

Migration: whether s 501BA of the *Migration Act 1958* (Cth) is invalid

***Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 142**

Decision date: 26 August 2022

Mortimer, Bromwich and Thomas JJ

Mr Tereva was born in 1963 in New Zealand. He has lived in Australia since he was 16 years old. He held an Absorbed Person visa within the meaning of s 34 of the *Migration Act 1958* (Cth) ("the *Act*"). The appellant had a lengthy criminal history in Australia. In 2015, the appellant's visa was cancelled. However, the cancellation was revoked. In 2020 the appellant was convicted in Queensland of driving a motor vehicle while disqualified and while having an excess blood alcohol level. He was sentenced to a term of imprisonment of at least 12 months, part of which was to be served in custody. On 6 March 2020 the appellant's visa was mandatorily cancelled by a delegate of the Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs ("the Minister") under s 501(3A) of the *Act*. On 20 October 2020 the delegate decided, under s 501CA of the *Act*, not to revoke the cancellation decision. The appellant applied to the Administrative Appeals Tribunal seeking a review of the decision of 20 October 2020. The Tribunal set aside the delegate's decision and reinstated the appellant's visa. On 3 March 2021, the Minister set aside the Tribunal's decision. By originating application filed 21 May 2021, the appellant sought orders to quash the decision the Minister made on 3 March 2021 and orders in the nature of *habeas corpus*. On 27 October 2021, the originating application filed on 21 May 2021 was dismissed. Mr Tereva appealed this dismissal.

Held: dismissing the appeal

- The primary judge did not err in failing to find that the Minister's discretion under s 501BA of the *Act* miscarried or was not properly exercised, or that the Minister exceeded the proper boundaries for the determination of the "national interest": [22], [37], [160]. Judicial supervision of the boundaries of national interest does not involve any second-guessing of the evaluation made by the decision-maker: [20]. *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195; 395 ALR 57 ("*CWY20*") clarified that the repository's task was evaluative, and like the concept of "public interest", involves a "discretionary value judgment", although even more so: [20]. The Minister is empowered, subject to remaining within the boundaries of the concept of the "national interest", and the boundaries of legal reasonableness and rationality, to simply take an entirely different view of the facts and circumstances to that taken by the Tribunal: [155]-[156].

- The applicant's submission, that s 501BA(3) impermissibly confines or restricts the judicial power conferred on the High Court under s 75(v) of the *Constitution* and is therefore invalid, was rejected: [29], [37], [167]. The proposition that Parliament cannot, consistently with the Constitution, confer a power to defeat, destroy or adversely affect the rights and interests of a person, including their right to liberty, without affording the person a reasonable opportunity to be heard, has not been accepted (*Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; 243 CLR 319 at [74]): [30]. What Parliament cannot do is to preclude a court exercising jurisdiction "under or derived from" s 75(v) from enforcing the limits of the law as Parliament has defined those limits in statute, expressly or impliedly: [34].

Asia Pacific Decision of Interest

Property Law: protected tenants; Review Jurisdiction

S. Madhusudhan Reddy v V. Narayana Reddy **[2022] INSC 819**

Decision date: 18 August 2022

Ramana CJI, Murari and Kohli JJ

The late Shri Chandra Reddy and the late Shri Chenna Reddy were protected tenants in respect of separate parcels of land situated in different survey numbers. The recorded landlord of the protected tenants was the late Venkat Anantha Reddy who was the Karta (manager) of a joint family comprising of himself and his brother, the late Laxma Reddy. On the basis of an oral partition of the land that took place between the two brothers, the subject land fell to the share of the late L. Harshavardhan Reddy (the sixth respondent). The respondents contended that both the late Shri Chandra Reddy and the late Shri Chenna Reddy had surrendered their protected tenancy rights on submitting written applications to the Tehsildar (tax officer). The names of the protected tenants were struck off from the final records of tenancy on 31 March 1967. The appellant appealed the striking off before the Joint Collector in 2002 and was successful. The respondents appealed this decision in the High Court of Andhra Pradesh and were unsuccessful. In 2013, the respondents appealed this decision in the High Court and were again unsuccessful. The respondents again appealed to the High Court and were successful. The legal representative for the late Shri Chandra Reddy and the late Shri Chenna Reddy appealed this decision.

Held: allowing the appeal

- The appellant's submission that the High Court ought not to have entertained successive review petitions filed by the respondents was accepted: [34]-[36]. In accordance with s 114 and Order XLVII of *The Code of Civil Procedure 1908* (India), a review application would be maintainable on discovery of new and important matters or evidence which, after exercise of due diligence, were not within the knowledge of the applicant or could not be produced by him when the decree was passed or the order made; on account of some mistake or error apparent on the face of the record; or for any other sufficient reason: [11]-[13], [26]. According to *Parsion Devi and Others v. Sumitri Devi and Others* (1997) 8 SCC 715, an error that is not self-evident, being one that has to be detected by the process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review: [15]-[16]. Further, the Court cannot reappreciate the evidence to arrive at a different conclusion even if two views are possible in a matter (*Kerala State Electricity Board v Hitech Electrothermics & Hydropower Ltd. and Others* (2005) 6 SCC 651): [17]-[19], [26].

International Decision of Interest

Succession: intestacy: Property: the relation back doctrine

Jogie v Angela Sealy (Trinidad and Tobago) **[2022] UKPC 32**

Decision date: 15 August 2022

Arden, Leggatt, Burrows, Stephens and Rose LJJ

Cynthia Abbott, Angela Sealy's mother (the respondent), acquired a statutory lease over a plot of land in north-west Trinidad in 1981 for 30 years. Mohan Jogie (the appellant) is the original landlord's son; he acquired the title to the land from his father, subject to the lease, in 2006. Ms Abbott died intestate in 2006 without having served a notice to renew the lease for a further term before she died. On 12 January 2011, Angela Sealy, who is one of Ms Abbott's four surviving children, served a written notice to renew the lease on Mr Jogie. In March 2011, Mr Jogie began clearing the land and redeveloping it. He did not accept that the renewal notice was effective to renew the lease and maintained that the lease accordingly expired on 31 May 2011. Ms Sealy commenced proceedings in the High Court of Trinidad and Tobago on 1 February 2012. However, at that stage, she had still not obtained the grant of administration. The primary judge held that Ms Sealy was entitled to the benefit of the statutory lease. Mr Jogie appealed this decision.

Held: allowing the appeal

- The doctrine of relation back did not apply to validate the renewal of the lease: [39]. By majority, the Court found that *Mills v Anderson* [1984] QB 704 was correct in taking the wider view which recognises that relation back can extend to acts carried out for the objective benefit of the estate rather than just being concerned with the administrator's standing to sue in respect of a cause of action accruing to the estate after the death: [24], [88], [105], [160]. *Bodger v Arch* (1854) 10 Exch 333 indicates that relation back can validate, for example, the making or renewal of a contract by the administrator before the grant provided that that act was objectively beneficial to the estate: [25]-[26]. *Long v Burgess* [1950] 1 KB 115 makes clear that relation back will not apply where it results in retrospectively depriving a landlord of proprietary rights: [27]-[30].

- It is clear law, as laid down by the Court of Appeal in England and Wales in, for example, *Ingall v Moran* [1944] KB 160 ("*Ingall*"), and applied recently in *Millburn-Snell v Evans* [2011] EWCA Civ 577; [2012] 1 WLR 41, that the relation back doctrine does not apply to validate retrospectively proceedings that were a nullity when commenced: [42]. Subsequent legislative reform in England and Wales, being s 35(7) of the *Limitation Act 1980* (UK) and *Civil Procedure Rules 1998* (UK) r 17.4(4) operates to remove *Ingall* only in the situation where a limitation period has expired, however, there is no equivalent to this provision in Trinidad and Tobago: [46], [68], [121]-[124], [133].

- *Consolidated Civil Proceedings Rules 2016* (Trinidad and Tobago) r 21.4 concerns representative proceedings but it is not concerned to outflank the established role of executors and administrators and the way in which they are appointed: [60], [128]. The order made under that rule could not cure Ms Sealy's lack of title to sue: [127].