Court of Appeal
Supreme Court
Sydney

Decisions of Interest

29 August 2022 – 11 September 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

Insurance: home and contents; Limitation period

Ali v Insurance Australia Limited **[2022] NSWCA 174**

Decision date: 8 September 2022

Ward P, Leeming and Mitchelmore JJA

In June 2013, the appellant, Mukhtar Ali, took out a home and contents insurance policy with the respondent, Insurance Australia Ltd. On 10 October 2013, following a break-in at his home on the previous day, Mr Ali made a claim under the policy, which the respondent denied on 20 May 2014. On 16 October 2019, Mr Ali commenced proceedings against the respondent in the District Court, seeking damages for failure to comply with the policy. The respondent, relying on s 14 of the *Limitation Act 1969* (NSW), argued that Mr Ali's action was brought outside of the relevant six-year limitation period, and was statute-barred. The respondent claimed that its liability under the policy arose on the occurrence of the break-in (9 October 2013), and not the later date on which it denied cover. The primary judge found that the respondent's liability under the policy arose on the occurrence of the claimed break-in, meaning that Mr Ali's claim had been brought out of time, and the proceedings were dismissed. Mr Ali appealed this decision.

Held: granting leave to appeal and allowing the appeal

- The Court refused leave to challenge *Globe Church Incorporated v Allianz Australia Insurance Limited* (2019) 99 NSWLR 470; [2019] NSWCA 27 ("*Globe Church*"): [9]. Mr Ali's policy of insurance was drafted in distinctly different terms from the policy considered in *Globe Church*, such that the decision in *Globe Church* was not determinative of the construction of the present policy: [9].
- The primary judge erred in concluding that the word "cover" had a largely fixed meaning throughout the policy documentation that was interchangeable with the word "indemnify": [11]. The use of "cover" does not constitute a clear contractual promise to the effect that the respondent is liable under the policy to indemnify an insured upon the occurrence of a listed event. The word "cover" instead performed the function of delineating the particular events to which the policy of insurance applied: [51]-[52], [61]. It was unlikely that a reasonable non-expert in insurance law would understand "cover" to mean "indemnify", still less that "indemnify" would have a special legal meaning: [62], [77].
- The primary judge erred in determining that the respondent was liable from the date of the break-in: [11]. The respondent's promise under the policy was to compensate a claimant for their loss following the process described in the Product Disclosure Statement ("PDS"). The cause of action arose on the respondent's decision to accept or decline the claim: [74]. In circumstances where the respondent had a choice as to the wording of the PDS, it could not escape an unfavourable outcome by relying on the plain English drafting: [78].

Appeals: cross-vesting

***Guan v Li* [2022] NSWCA 173**

Decision date: 5 September 2022

Bell CJ, Ward P and Meagher JA

Mr Tang and Ms Guan were separated while living together in the matrimonial home. On 1 September 2021, they purported to enter into a binding financial agreement ("the BFA"). The BFA provided for the transfer to Ms Guan of Mr Tang's interest in the property of which they were previously joint tenants. On the previous day, Schmidt AJ had entered judgment for Mr Li against Mr Tang in the sum of $1,909,356.39. Mr Li, unaware of the BFA, proceeded to register a writ of execution against the property. Several weeks later, Mr Tang filed for bankruptcy and a trustee in bankruptcy was appointed. In March 2022, Ms Guan and the trustee entered into a deed of settlement and release ("The Settlement Deed") pursuant to which the trustee agreed to transfer Mr Tang's interest in the property to Ms Guan for a consideration of $135,000. This amount was subsequently paid. Following the commencement of proceedings in the Supreme Court by Ms Guan and the Federal Circuit and Family Court of Australia ("FCFCOA") by Mr Li, Mr Li filed a notice of motion in the Supreme Court seeking an order that Ms Guan be restrained from dealing with Mr Tang's interest in the property ("the freezing order"). On 15 June 2022, Cavanagh J granted the freezing order. On appeal, Ms Guan submitted that Mr Li did not have reasonable prospects of succeeding in his claim in the FCFCOA as s 90K of the *Family Law Act 1975* (Cth) ("the *Act*") did not confer jurisdiction on the FCFCOA to set aside the Settlement Deed. The primary judge upheld the freezing order. Ms Guan sought leave to appeal this decision.

Held: dismissing the summons for leave to appeal

- The matters the applicants sought to raise, being that the primary judge erred in failing to take into account the viability and strength of Mr Li's case in the FCFCOA, were not matters for determination arising under the *Act*: [52]-[54]. The proposed grounds of appeal did not require the determination of a right or duty owing its existence to the *Act*, or depend on that Act for its enforcement, even if and to the extent that they may involve some interpretation of s 90K of the Act: [44]-[54]. Accordingly, they did not deprive the Court of Appeal of jurisdiction by reason of s 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (*Boensch (as trustee of the Boensch Trust) v Pascoe* (2016) 349 ALR 193, [2016] NSWCA 191): [41]–[42], [60].

- The Court found that considering whether the interpretation of s 90K(3) of the *Act* sought by Mr Li in the FCFCOA was reasonably open did not amount to determining a matter arising under s 90K(3) of the *Family Law Act*: [55]. The process of reasoning required of the Court by ground 6(a) arguably has a weaker nexus to a federal law than that considered in *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; [1965] HCA 61: [56].

Limitation of Actions: suspension; disability

Binetter v Binetter **[2022] NSWCA 169**

Decision date: 1 September 2022

White and Mitchelmore JJA and Basten AJA

In May 2018, Mrs Wolff, by her tutor, commenced proceedings in the Supreme Court against her nephew Mr Ronald Binetter, to recover a loan of $1,000,000 made in September 2010. Mrs Wolff died in September 2018 and Mr Steven Binetter, as legal representative of her estate, continued the proceedings. The six-year limitation period for the recovery of debts had expired in September 2016 pursuant to ss 14 and 63 of the *Limitation Act 1969* (NSW) ("the *Act*"). Mr Steven Binetter submitted that the running of the limitation period had been suspended whilst Mrs Wolff had been under a disability which impacted her ability to manage her affairs in relation to the recovery of the loan. Evidence of Ms Binetter, Mrs Wolff's medical and hospital reports and an expert report by Dr Eikens, a rehabilitation physician, were relied on to establish that Mrs Wolff had suffered such a disability. The primary judge found that Mrs Wolff had given a loan to Mr Ronald Binetter which had not been repaid, but that Mrs Wolff had not been under a relevant and sufficient disability and the limitation period had expired. Mr Steven Binetter appealed this decision.

Held: dismissing the appeal

- Under s 11(3)(b)(i) of the *Act* there are three elements to that limb of the definition of being "under a disability" which are material. First, there must be a disease or impairment of the person's physical or mental condition: [10]. Second, the impairment must operate for a continuous period of at least 28 days to render the person incapable of, or substantially impeded in, the management of his or her affairs: [11]. Third, the incapacity or substantial impediment must relate to the management of the person's affairs in relation to the commencement of proceedings: [12].

- The primary judge did not err in finding that Dr Eikens' report did not directly address the matters identified in s 11(3) of the *Limitation Act*, identified above: [72]. Evidence that Mrs Wolff's abilities to consider "complex legal issues" and to "manage and/or control her own affairs" did not address Mrs Wolff's capacity to give instructions to commence legal proceedings, especially given that the legal issues involved in recovering the loan were not "complex": [56].

- The primary judge was entitled to place limited reliance on contemporaneous medical reports where the authors were not called for cross-examination: [84]. Rule 31.29 of the *Uniform Civil Procedure Rules 2005* (NSW) imposes no obligation to cross-examine in circumstances where that would not otherwise be thought necessary: [93].

- The possibility that if proceedings are commenced the plaintiff may need a tutor does not necessarily demonstrate that the plaintiff was under a disability in relation to the commencement of proceedings sufficient to engage the suspension of the limitation period under the *Act* (*Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369): [82].

Easements: application to extinguish right of way; abandonment

Sheppard v Smith **[2022] NSWCA 167**

Decision date: 29 August 2022

Gleeson and Beech-Jones JJA and Basten AJA

Mr Dean Sheppard and Ms Meredith Chapman, and Mr Dean Smith and Ms Emma Munro are the owners of adjacent properties in inner Sydney (being "Number 6" and "Number 8" respectively). Number 8 has the benefit of a right of way over an L-shaped strip of land at the rear and side of Number 6 which if trafficable would provide access from the rear of Number 8 to the street (the "L-shaped strip"). The right of way was granted in 1885. It was expressed in unqualified terms, although its purposes at least included the facilitation of the removal of "night soil". Indefeasible title to Number 8 was granted in 2010, at which time the respondents took "active steps" to record the right of way on the title. After the connection of sewers in around 1908, the L-shaped strip fell into disuse. Both the appellant and respondent erected structures impeding the right of way, including fences, garden beds, a shed, and a pond. In 2019, the appellants commenced proceedings in the Supreme Court against the respondents seeking an order under s 89(1) of the *Conveyancing Act 1919* (NSW) that the right of way be extinguished on the basis of abandonment, obsoletion, impediment with no practical benefit and that the proposed extinguishment of the easement "will not substantially injure the persons entitled to the easement". The primary judge dismissed the proceedings. Mr Sheppard and Ms Chapman appealed this decision.

Held: dismissing the appeal

- The primary judge did not err in finding that the respondents manifested an intention not to abandon the right of way by having the right of way noted on the certificate of title. Taking steps to record the existence of a right of way onto a certificate of title which is then available to anyone who searches the register is a public form of affirmation of the existence of the right of way (*Treweeke v 36 Wolseley Road Pty Ltd* (1973) 128 CLR 274; [1973] HCA 27 ("*Treweeke*")): [56].
- The primary judge did not err in failing to find an intention on the part of the respondents to abandon the right of way by their actions from the time they acquired the property. The primary judge considered their failure to use the right of way and the features they built on Number 8 that impeded access to the right of way. However, in a context where the respondents had relatively recently taken "active steps" to record the right of way on their title, the erection of those non-permanent features did not manifest an intention to abandon the right of way (*Treweeke*): [66], [71].
- The primary judge did not err in finding that the right of way was not obsolete: [93]. There was nothing in the terms of the grant of the right of way or anything else that warranted any finding that the purpose of the right of way was restricted: [94]. There had been no relevant change in the "character of the neighbourhood": [92]. A genuine intention to use the right of way is not irrelevant at least when accompanied by a realistic means to make the right of way trafficable (*Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18,099; [2000] NSWCA 28): [93].
- The primary judge did not err in requiring the appellants to prove that the probability of the use of the easement by the owners of Number 8 was "so remote" and the financial value to them of the easement was "so small" as to be of no present substance. In a case involving a right of way which is not trafficable and has not been used for some time, the use of the phrases was meant to convey nothing more than the necessity to undertake an evaluative exercise as to whether the extinguishment of the easement would not substantially injure the respondents: [99].

Partnerships: dissolution; rights of individual partners

Lastavec & Anor v Effective Security Pty Ltd & Anor **[2022] QCA 171**

Decision date: 6 September 2022

Morrison and McMurdo JJA and Boddice J

In 2006, Paul Lastavec and Maria Topic (the applicants), and Steven Lastavec and one of his companies (the respondents) entered into a partnership conducting, relevantly, two development projects, being the Treetops project, which was profitable, and the Stowe Road project, which was not profitable. It was undisputed that the partners were entitled to share equally in the profits of the business and had to contribute equally towards the losses. The funds of the partnership, including undistributed profits in excess of $200,000, were at all times in the hands of the respondents. The applicants had not received the return of any of the capital which they had contributed. Following a dispute, the partnership was dissolved. Proceedings were commenced in May 2010. The primary judge declared that the partnership was dissolved on 19 March 2010 and held that the applicants were liable to pay to the respondents the sum of $57,630.56, arrived at by apportioning the loss on the Stowe Road project equally between the two sides. The primary judge otherwise dismissed the respondents' cross-claim. The applicants sought leave to appeal this decision.

Held: granting leave to appeal and allowing the appeal

- The respondent's submission the applicants could not rely on s 47 of the *Partnership Act 1891* (Qld) once the primary judgment had been given was not accepted: [38]-[39]. There were no other rules which had been agreed between the parties by which their dispute was to be resolved. Although s 47 was not raised until after the primary judgment, there is no basis to conclude that the partners had agreed to displace the rules prescribed by s 47, and that the applicants had thereby compromised their entitlements to the return of the capital and their share of the profits: [39].

- The primary judge erred in ordering the applicants to pay anything, and ought to have ordered that they be paid their capital contributions and one half of the undistributed partnership profits: [10]. The judge erred in apportioning only the loss on the Stowe Road project without apportioning the profit on the Treetops project: [42]. Because the partnership business was profitable, each side should have been able to obtain the return of capital as well as its share of the profits: [43]. The return of the respondents' capital contributions could not be seen from accounts of the partnership, because all of the funds were at all times in the company's hands: [44]. However, the applicants' capital contributions were effectively still in the hands of the respondent company: [45]. The "ultimate residue" in this case would be the overall profit of the business, which was to be divided in the agreed proportions of 50/50: [47].

- The primary judge was correct to find that the applicants' obligation to make equal contributions of capital was dependent upon the due provision to them of access to the books and records of the firm: [55], [60]. To the extent that this was a problem which resulted from their failure to keep books and records of the firm separate and distinct from those of the company and its business, that was no answer to the applicants' entitlement to access of such records of the partnership which existed: [56].

Contracts; Consumer Law; Class Actions; Exclusive Jurisdiction Clause

***Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149**

Decision date: 2 September 2022

Allsop CJ, Rares and Derrington JJ

The "Ruby Princess" was a cruise ship travelling from Sydney to Sydney via New Zealand. During the voyage, an outbreak of COVID-19 occurred as a result of which, it is alleged, a number of passengers contracted the disease and fell ill or died, while others sustained distress, disappointment or psychiatric injury. The passengers commenced a class action in the Federal Court against Carnival plc ("Carnival") and its subsidiary Princess Cruise Lines Ltd ("Princess") in respect of this. The primary judge refused a stay application principally on his determination that the US Terms and Conditions, which contained an exclusive jurisdiction clause in favour of the United States District Courts in California, Los Angeles, as well as a clause pursuant to which Mr Ho waived any entitlement to participate in any class action (the "class action waiver") were not incorporated into 695 of the passengers' (the "US subgroup members"), including Mr Ho's, contracts, because the tickets were booked by travel agents who were acting as intermediaries. Mr Ho, as the representative of the US subgroup members, appealed this decision.

Held: allowing the appeal

- The primary judge erred in concluding that the travel agent was an intermediary rather than an agent: [133]. If Mr Ho's travel agent was merely some form of intermediary, the only offer they were authorised to convey to Mr Ho from Princess in the process of making a booking was of a cruise on the terms of Princess's passage contact: [133].

- The primary judge erred in concluding that the US Terms and Conditions did not form part of the passage contract: [209]-[211]. At the conclusion of the Booking Confirmation, a notice appeared indicating that upon booking the Cruise, each passenger explicitly agreed to the terms of the Passage Contract and provided a link to the relevant terms: [210]. Whether the URL contained within the notice was hyperlinked or the fact that the terms and conditions were not printed on or annexed to the document itself, does not necessarily mean that reasonable notice had not been given: [212], [215]-[216], [222].

- The primary judge erred in concluding that the class action waiver was an unfair term within s 23 of the *Competition and Consumer Act 2010* (Cth) Schedule 2 (*Australian Consumer Law*): [245], [272]-[273]. There is nothing to suggest that the class action waiver tilted the parties' rights and obligations under the contract significantly in Princess's favour: [259]. Princess had a legitimate interest in requiring actions brought against it to be conducted in the jurisdiction from which it carried on its business and that the actions be brought on an individual rather than a group basis: [262]. The Court found that the resolution of the potential extraterritorial operation of s 23 of the ACL and the relationship of s 23 with s 5(1)(g) of the *Competition and Consumer Act 2010* (Cth) should await an occasion where its resolution is necessary and the Court receives submissions covering the full ambit of the relevant issues: [20], [276].

- The primary judge correctly construed pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("the *Federal Court Act*") by permitting parties in the free and fair exercise of the right to contract to agree not to participate in class actions: [11], [350]-[363]. In dissent, Derrington J considered that because Mr Ho had a claim, as a group member, that is properly the subject of the representative proceeding, it would be against the public policy of pt IVA of the *Federal Court Act* for this Court to stay that claim or to order him not to pursue it: [85].

Asia Pacific Decision of Interest

Marine Insurance

CKH v CKG **[2022] SGCA(I) 6**

Decision date: 30 August 2022

Sundaresh Menon CJ, Judith Prakash JCA and Jonathan Hugh Mance IJ

The case arose from a strongly contested arbitration which had led to an arbitral award ("the Award") made by the Arbitral Tribunal ("the Tribunal"). In previous proceedings, the Court of Appeal upheld the International Judge's decision that the Award failed to take into account the existence and quantum of a debt ("the Principal Debt") owed by the appellant ("CKH") to the respondent ("CKG") in relation to freight and taxes for logs supplied. The primary judge had suspended proceedings to set aside the Award "to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as … will eliminate the grounds for setting aside". The Court ordered that "[t]he Remitted Matters shall be remitted to the Tribunal". When the matter returned to the Tribunal, CKH claimed to raise a number of points relating to the Principal Debt which CKG contended fell outside the scope of the remission ordered. On appeal to the Singapore International Commercial Court, the primary judge held that the Tribunal's role was strictly limited to the exercise defined by the order for remission, and that the further points which CKH claimed to raise were not open to it. CKH appealed this decision.

Held: dismissing the appeal

- The power conferred by Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") to suspend proceedings to set aside the Award "to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside" is on its face a relatively broad power, but the scope of remission is necessarily defined by the terms of the order ordering remission. A carefully defined order, like that in Annex A of the judgment, specifies precisely what the Tribunal can and should do. Apart from the remission ordered, there is no basis on which a party in CKH's position or the Tribunal itself can seek to re-open or expand the subject matter of the award or arbitration. The Tribunal's original Award renders it functus officio, save to the extent that the order for remission gives it revived power. The order for remission defines the limits of the exercise which the parties and the Tribunal can undertake when the matter returns before the Tribunal: [6]-[7].

- CKH's challenges to the recitals and order for remission made by the primary judge were not open to it: [8]. The recitals and order were integral aspects of the remission ordered under Article 34(4) of the Model Law and were res judicata. All that was open on the application before the primary judge and the present appeal were issues of interpretation of the meaning and scope of the remission ordered. In this case, the matters raised by CKH fell outside the scope of the limited remission ordered: [9]-[11].

Zoning: land development

Lysaght v Wakatāne District Council **[2022] NZCA 423**

Decision date: 12 September 2022

French, Cooper and Gilbert JJ

The Whakatāne District Council ("the Council") granted a non-notified application for resource consent by Gulati Enterprises Ltd ("Gulati") to develop an unmanned service station. The site has frontage both to State Highway 30 and an unnamed Māori roadway ("the Roadway"). Vehicles entered the site from the Roadway, having made a left-hand turn off State Highway 30 before turning right into the station. After refuelling, vehicles would leave the site by turning left at a vehicle crossing giving access directly onto State Highway 30. The appellants, Ian and Adrianne Lysaght, were co-owners of the Roadway together with Gulati and two whānau of Ngāti Awa. The Lysaghts had been engaged in property development in the area for decades. They were promoting an industrial subdivision on land opposite the proposed service station. They considered they were adversely affected by Gulati's proposal and commenced judicial review proceedings in the High Court challenging the Council's decision to deal with Gulati's application without either public or limited notification under the *Resource Management Act 1991* (NZ) ("the *RMA*"). The primary judge dismissed the Lysaghts' application. The Lysaghts' appealed this decision.

Held: dismissing the appeal

- The applicants' submission that the High Court was wrong to determine the Lysaghts were not affected parties on the basis of the "condition precedent" principle addressed in *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 ("*Westfield*") was rejected: [30], [66]. *Westfield* concerned the lawfulness of conditions imposed on applicants requiring work to be carried out on property beyond their control and whether applicants would be powerless to bring about the requisite state of affairs, such that the consent itself would be rendered nugatory. However, *Westfield* was distinguished because it was not about protecting the rights of third-party landowners: [63]. Gulati sought resource consent on the basis that it would carry out the works required by the conditions of consent. It voluntarily submitted to the imposition of the conditions, and they must be complied with before it can commence its service station activity. The works can be carried out if the other co-owners of the Roadway consent, or the Māori Land Court makes an appropriate order. *Westfield* does not found an argument for the invalidity of the conditions, still less the consent itself, in these circumstances. The primary judge was correct in concluding that the fact the works will be required on private land as opposed to public land is not a distinction of any significance: [64].

- The primary judge did not err in finding that the effects of the physical impacts on the Roadway, which the Court accepted were adverse on the environment, were not relevant under r 13.4.7.1 of the district plan: [69]. This argument could not overcome the effect of s 95E(2)(b) of the *RMA* with its clear direction that, in assessing an activity's adverse effects on a person for the purposes of the section, the consent authority: 'must, if the activity is a ... restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule ... restricts discretion' [70].