Court of Appeal
Supreme Court
Sydney

Decisions of Interest

12 September 2022 – 25 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

Contracts: formation; acceptance; subsequent conduct

Forte Sydney Construction Pty Ltd v N Moit & Sons (NSW) Pty Ltd **[2022] NSWCA 186**

Decision date: 23 September 2022

Ward P, Meagher and Gleeson JJA

Forte Sydney Construction Pty Ltd ("Forte") (the appellant) and N Moit & Sons (NSW) Pty Ltd ("Moit") (the respondent) were in the business of construction. In April 2018, Forte sought a fee proposal from the respondent for work at a site in Ryde, New South Wales. Following various iterations of "Tender Submissions", at 9.50am on 21 May 2018, Forte rejected the most recent tender submission, and provided a subcontract document. At 12.15pm, Moit provided its "Final Tender Revision" and at 6.00pm, Forte provided a revised "contract" for execution. Between May and November 2018, the respondent carried out work on the site. A dispute arose in which Forte contended that the relevant works were undertaken pursuant to the subcontract document, as amended by an oral agreement. Moit contended that the works were undertaken on the basis of the "Final Tender Revision". Forte commenced proceedings in the District Court. Moit cross claimed. The primary judge held that Forte had accepted the respondent's offer when Moit had commenced work and that the "Final Tender Revision" governed the contractual arrangements. Forte appealed this decision.

Held: allowing the appeal

- The Subcontract propounded by Forte was the contractual basis for the works. Moit's offer contained in the "Final Tender Revision" had been rejected by Forte's provision of the amended Subcontract which contained inconsistent terms (*Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523): [99]. Although the Letter of Engagement provided by Forte prescribed a manner of acceptance (by a stipulated time) that was not complied with by Moit, it did not follow that the offer lapsed when there was not a complying acceptance: [101]. A reasonable person in the position of Forte must have understood that the conduct of Moit was done with the intention of accepting the offer embodied in the Forte Subcontract (*Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665; [2011] NSWCA 396): [102].
- Acceptance of the variation claims was not sufficient to amount to an admission that the contractual arrangements were on the basis of the "Final Tender Revision"; and, to the limited extent that this post-contractual conduct was relevant in determining whether a contract was formed, the Court considered that it was of no assistance: [137].

Administrative Law: police regulation

SAS Trustee Corporation v Colquhoun **[2022] NSWCA 184**

Decision date: 20 September 2022

Meagher and White JJA and Griffiths AJA

Mr Colquhoun (the respondent) resigned from the police force in 1993. In 2012, he applied for an annual superannuation allowance ("the pension") pursuant to s 10 of the *Police Regulation (Superannuation) Act 1906* (NSW) ("the *Act*"). In 2019, the District Court determined that at the time of his resignation he was incapable of performing the duties of his office due to anxiety/depression. In 2020, the Commissioner of Police determined that this was caused by being injured on duty, entitling him to the pension. In February 2021, SAS Trustee Corporation ("STC") (the respondent) decided that the commencement date for the pension should be the date it received the application. Section 9A(4) of the *Act* provides that the pension is payable from the date of lodgement of the application or such earlier date as STC may determine in exceptional circumstances. On a *de novo* appeal to the District Court, the primary judge held that exceptional circumstances existed that merited the backdating of the pension by ten years. STC appealed this decision.

Held: dismissing the appeal

- The appellant's submission that circumstances explaining, or relevant to, the delay in making the application are the only exceptional considerations the STC can consider was rejected: [41]-[42]. Amendments that took place in 2006 created a default position that unless the STC exercised the discretion provided by s 9A(4)(b), the allowance would be payable from the date of the application. The amendment removed the potential for the STC to determine that the allowance might be payable only after the date of the application, but provided that the STC could only determine that the allowance would be payable at a date earlier than the date of the application if it were satisfied that there were exceptional circumstances: [32]-[35]. For a circumstance to be exceptional, it must not be a circumstance regularly, routinely or normally encountered, but it does not have to be unique, unprecedented or very rare (*Baker v The Queen* (2004) 223 CLR 513; [2004] HCA 45): [35]. There is nothing in the text of the legislation that warrants the restricted meaning of "exceptional circumstances" for which the appellant contends: [36]-[38].
- STC's submission that the judge provided no logical basis for backdating the allowance by ten years was rejected: [48]-[49]. This submission does not identify an error of law, any income that the respondent later received does not disentitle him from receiving the pension, and the primary judge referred to reasons both for and against backdating the pension prior to coming to a conclusion: [50]-[52].

Equity: discretionary trusts; Corporations: accounts

***Australian Karting Association Ltd v Karting (New South Wales) Incorporated* [2022] NSWCA 188**

Decision date: 21 September 2022

Meagher and Gleeson JJA and Simpson AJA

Australian Karting Association Ltd ("Karting Australia") has been the national body responsible for promoting the sport of "go-kart" racing ("karting") in Australia since 2013. Prior to that time, Australian Karting Association Incorporated ("AKA Inc") was the responsible national body. Karting (New South Wales) Incorporated ("Karting NSW") is responsible for promoting the sport and conducting karting races in New South Wales and the Australian Capital Territory. A discretionary trust, the AKA Track Development Fund, was established by AKA Inc in 2005 and of which Karting Australia, became trustee. From October 2005, State member organisations would collect and remit driver levies paid by every driver who entered a race to AKA Inc and later Karting Australia, who would invest these funds in bank deposits and receivables; the latter comprising of loans to State organisations and local karting clubs, for the purpose of track development. The obligation to pay interest was suspended, subject to the borrower complying with the terms of the loan. In the event of a default, the principal sum and interest became immediately payable at the option of Karting Australia. Karting NSW was expelled as an ordinary member of Karting Australia on 21 January 2019, which Karting Australia relied upon as an event of default under three loans. Karting Australia commenced proceedings in the Supreme Court seeking repayment of the loans. Prior to the hearing, two loans had been repaid. The primary judge held that the accelerated payment provisions of the loan agreements were a penalty and therefore unenforceable. Karting Australia appealed this decision.

Held: dismissing the appeal

- Karting Australia's "conditional distribution" argument was rejected. First, the trustee's liability to Karting NSW was not a contingent liability as suggested by Karting Australia (*Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455; [1969] HCA 47): [66]-[69]. Second, the unpaid distributions recorded in the accounts of the Trust were made by the trustee crediting the beneficiaries' loan account and were payable at call: [71]. Third, the notes to the accounts of the Trust from 2015 were consistent with the trustee's intention being to distribute the income of the Trust by crediting the unpaid distributions to the beneficiaries' loan account and acknowledging the debt to beneficiaries in the accounts, but were inconsistent with the conditional distribution argument: [76]-[93]. Fourth, there was no evidence the accounts were inaccurate or mistaken: [94]-[95].

- As an incorporated association, AKA Inc was not required by the trust deed to pass any resolution of its committee of management to exercise its power of distribution: [115]-[116]. The conduct of AKA Inc as trustee in crediting the distributions to Karting NSW's loan account from 2005 to 2012 and acknowledging the debt owing to Karting NSW in its audited accounts, justifies the inference that the trustee's intention was to make the unpaid distributions to beneficiaries, including Karting NSW: [115]-[116]. In determining the evidentiary effect under s 1305 of the *Corporations Act* of matters stated or recorded in the books of Karting Australia as trustee, the court is required to consider all the evidence and attribute such weight to the entries in the financial statements as is appropriate in the context of the evidence as a whole (*Hoh v Ying Mui Pty Ltd* [2019] VSCA 203): [128]-[136]. AKA Inc and Karting Australia's conduct as trustee in approving the audited accounts of the trust, for the periods 2005-2012 and 2013-2018, justifies the inference that the trustee informally resolved to make distributions to beneficiaries, including Karting NSW: [117]-[121], [138]. There was no common intention of the trustee and the beneficiaries to accumulate the income of the trust until the date of vesting: [122]-[124], [141]-[144].

Succession: family provisions; claim by adult child

Scott v Scott **[2022] NSWCA 182**

Decision date: 20 August 2022

Ward P, Meagher and Kirk JJA

The appellant (Charlene) and respondent (Coralynne) are adult sisters, with one brother (Clifton Jnr). Their mother died in July 2019. By her will dated 16 May 2019, the deceased left the family home to Charlene and gifts of $40,000 to Coralynne and Clifton Jnr, with the residue to be divided equally between the three children. The deceased had taken her interest in the family home upon the death of her husband in 2016, pursuant to "mirror" wills executed by them in 2015. By those wills each left their estate to the other, or otherwise to the children in equal shares. Accompanying the 2019 will was a testamentary statement purporting to justify the 2019 will leaving no interest in the family home to Coralynne and Clifton Jnr. Coralynne commenced proceedings in the Supreme Court seeking a family provision order pursuant to s 59 of the *Succession Act 2006* (NSW). The primary judge ordered that Coralynne receive a sum of $180,000 out of Charlene's share of the estate. Charlene appealed this decision.

Held: dismissing the appeal

- The primary judge did not err in omitting Coralynne's superannuation entitlements from a table of assets and liabilities set out in his reasons when assessing Coralynne's financial "need": [41]-[42]. In the absence of evidence as to when Coralynne might access her superannuation or how her doing so might affect her eligibility for the age pension, there was no compelling basis for treating those entitlements as an asset with a present value rather than as an entitlement to a stream of income to be considered with any other potential sources of income after she had retired: [43]-[45].

- Human experience supported the primary judge's inference that, in circumstances where Coralynne knew of the 2015 "mirror" wills, she provided ongoing financial assistance to her parents with a continuing expectation of equal treatment with her adult siblings: [46]-[51].

- The primary judge was not to be understood as saying that the falsity of the grounds relied on to justify Coralynne's disinheritance constituted a sufficient reason for finding that inadequate provision had been made. Rather, his Honour's reasoning was that, the grounds relied on as justifying the 2019 will were false and the true position was that, from the deceased's perspective, nothing had materially changed since the 2015 wills were executed: [57]. Accordingly, her testamentary intention expressed in the 2015 will was to be given significant weight as evidence of her sound testamentary judgment as to what was adequate and proper provision for her adult children in 2019: [52]-[59].

- The primary judge did not disregard Charlene's competing claim as principal beneficiary under the 2019 will. The reference to the statement in *Taylor v Farrugia* [2009] NSWSC 801 was made in consideration of the adequacy or otherwise of the provision made for Coralynne by the 2019 will: [82]-[89].

Australian Intermediate Appellate Decisions of Interest

Procedure: consent for self-executing orders

Saltmarsh v Westpac Banking Corporation **[2022] TASFC 8**

Decision date: 16 September 2022

Brett and Jago JJ and Martin AJ

Michael and Jillian Saltmarsh (the appellants) operated a signwriting business. In 2004, they borrowed $42,000 from Westpac Banking Corporation (the respondent). In 2008, they borrowed a further $296,000 to purchase their business premises and changed the business structure from a partnership to a company. The business ceased to operate for financial reasons. In 2017, the appellants commenced proceedings seeking declarations that the loan agreements were null and void, and damages for unconscionable conduct. The respondent counterclaimed. On 12 December 2018, pursuant to a consent memorandum executed by solicitors for the parties, an order was made requiring the appellants to provide particulars of loss and damage by 21 January 2019 and that in the event of failure to comply, judgment be entered in favour of the respondent dismissing the appellants' claim, allowing the respondent's counterclaim and ordering that possession of the premises be given to the respondent ("self-executing order"). The appellants did not comply. On 12 April 2019 those orders were made. The appellants' appeal against the self-executing order was dismissed by Holt AsJ. The appellants filed an interlocutory application in the Supreme Court seeking that the judgment of 12 April 2019 be set aside. The primary judge dismissed the application. Michael and Jillian Saltmarsh appealed this decision.

Held: dismissing the appeal

- Although the appellants' inexperienced solicitor acted under a mistaken apprehension as to the nature of the particulars required when signing the consent memorandum, this does not explain the failure to comply with orders: [73]. Furthermore, the appellant's submission that, as a result of "undue" pressure, the consent signed by the solicitor was not a "real consent" was rejected. Although the solicitor felt under pressure, there was "nothing inappropriate" in the conduct of the respondent's solicitor: [78].

- Holt AsJ did not have a duty to go behind the consent memorandum and explore the circumstances in which it was signed: [80]-[81]. No information had been provided to suggest there was cause for concern about mistakes or undue pressure and it is not for the Court to question the parties as to the wisdom or otherwise of the proposed orders: [82]. Furthermore, failing to make the orders in open Court was not in breach of r 340 of the *Supreme Court Rules 2000* (Tas) as the discretion to adjourn an application for judgment by consent if the judge considers that the application "ought to be dealt with in open court" is not fettered in any way: [83].

- The appellant's submission that the particulars provided by the appellants complied with the primary judge's order for particulars was rejected: [102]. While a figure of loss for each financial year was identified, the causal link between the losses and the borrowing and purchase of the Wellington Street property was not identified, especially given that it was the appellants personally who incurred the liability to the respondent, together with expenses associated with the property, not the company [90]-[100].

- Although agreeing with Martin AJ, Brett J emphasised that upholding the primary judge's reasons should not be viewed as an endorsement of the technical adequacy or appropriateness of a self-executing order of this type. This order, in the circumstances, derives its validity and effect from the fact that it was made by consent: [2]-[4].

Contracts: implied terms; breach; parties; repudiation

EMClarity Pty Ltd v BSO Network Inc & Anor **[2022] QCA 177**

Decision date: 6 September 2022

McMurdo and Bond JJA and Flanagan J

EMClarity Pty Ltd ("EMC") (the appellant) is a microwave and millimetre-wave radio technology company. BSO Network Inc ("BSO") is an IT and telecommunication services company of which Apsara Networks Inc ("Apsara") is a wholly owned subsidiary (together "the respondents"). In 2018, BSO contracted with EMC for EMC to develop and supply W Band radio equipment ("the 2018 agreement"). Each party partly performed this agreement. Further agreements were made in 2019 ("the 2019 agreements"). The respondents commenced proceedings in the Supreme Court, claiming that BSO entered into these agreements on its own behalf, and not as an agent for Apsara. BSO's competitor, McKay Brothers, became aware of the agreements, acquired EMC, then told the respondents EMC would "pause" all shipments of radios pending a "Quality Review". The primary judge found, relevantly, that BSO had contracted as a principal, the 2019 agreements were made between EMC and Apsara, EMC had repudiated them by manifesting an intention to perform them only "if and when" it suited it to do so, and there was an implied term of the 2019 agreement that the radios were to be supplied within a reasonable time but such a time had not yet expired. EMC appealed this decision and the respondents cross-appealed.

Held: allowing the appeal in part

- The primary judge erred in finding that EMC breached its equitable duty of confidence by disclosing the quote and the purchase orders to four of its directors: [91]-[97]. EMC's argument that the respondents could have had no reasonable expectation of a duty of confidentiality beyond that which the parties had put in place in 2018 was rejected, however, the argument that the disclosure to these individuals was an internal communication to EMC's governing minds, so that it did not involve a disclosure by EMC, was accepted: [88]. These agreements were a proper subject for the attention of EMC's board because the allocation of resources towards EMC's performance of the agreements warranted the supervision and guidance of the directors: [90].

- The primary judge did not err in finding that the quality review was not a sham, designed to slow the development and production of Apsara's radios to achieve a competitive advantage for McKay Brothers: [129]. It does not follow, however, that the pursuit of the quality review was something which extended what would otherwise have been a reasonable time for the performance of these agreements: [130]. What constituted a reasonable time for performance must be assessed by reference to what was fair to both parties and given EMC's history as a competent supplier, an allowance was not to be made for whatever time EMC might require for this review: [131].

- The burden of proof was upon Apsara to prove that a reasonable time had elapsed, unless there had been circumstances beyond the control of EMC which had arisen since the agreements were made and which had caused, or but for the quality review, would have caused, a delay: [137]. An evidential burden passed to EMC to show that there was sufficient evidence to raise an issue that such a circumstance did arise: [138].

- BSO and Apsara, sought a declaration that the implied term as to a reasonable time was a condition of the 2019 agreements, or that the breaches of the implied term were "substantial" or "sufficiently serious". However, this relief was not sought at the trial, nor were those issues ones which the parties agreed should be determined: [156].

Asia Pacific Decision of Interest

Companies: receivership; meaning of "director"

Grant v Montgomerie **[2022] NZCA 483**

Decision date: 17 October 2022

Gilbert, Goddard and Simon France JJ

Mr Grant (the appellant) was appointed receiver of Bassett 43 Ltd ("the Company"), of which Mr Montgomerie (the respondent) was the sole director. Mr Grant wrote to Mr Montgomerie multiple times seeking information about the property and affairs of the Company pursuant to ss 12 and 14 of the *Receiverships Act 1993* (NZ) ("the *Act*"). Mr Montgomerie was unresponsive. Mr Grant commenced proceedings in the High Court seeking an order under s 12(2) of the *Act* requiring Mr Montgomerie to produce books, records and documents of the Company. Prior to this, Mr Montgomerie had been adjudicated bankrupt, meaning he was disqualified from holding office as a director. The primary judge held that the High Court would only have jurisdiction to make this order under s 12 if Mr Montgomerie was a director of the Company when the order was made, and that the Court did not have jurisdiction to make these orders under s 34 of the *Act*. Mr Grant appealed this decision.

Held: allowing the appeal

- The High Court had jurisdiction under s 12 of the *Act* to make the order sought by the Receiver, because the term "director" includes former directors. If it did not, that would undermine the purpose of s 12 and of the *Act*: [12], [26]. Section 2(1) provides that "the definition [of director] is … not exhaustive": [15]. The purpose of ss 12 and 14 of the *Act* is to ensure that receivers can obtain the information required to carry out their functions: [20]. It would frustrate the purpose of s 12 if the term "director" did not extend to former directors as a sole director such as Mr Montgomerie, could resign as a director upon appointment of a receiver or when information is requested: [22]. Surrendering the documents to the receiver is not an act done on behalf of, or in the course of managing, the company such that this broader reading of "director" would be contrary to Mr Montgomerie's disqualification: [24]. This broader interpretation imposes obligations on all former directors, no matter how long ago they held office: [25].

- The appellant's submission that a receiver may be able to inspect books and documents in receivership that are in the possession or under the control of a former director in reliance on s 14(2)(g), but in this case, the Receiver's requests to Mr Montgomerie were to provide information, not to permit inspection of it at Mr Montgomerie's home or workplace, so s 14 is not relevant to this application.

- The primary judge was correct in finding that the High Court does not have jurisdiction under s 34 of the *Act* to make the order sought. The purpose of s 34 is to enable receivers to seek guidance from the Court, not to enable a receiver to seek orders against some other person (*Simpson v Commissioner of Inland Revenue* [2012] NZCA 126; (2012) 2 NZLR 131): [28].

International Decision of Interest

Expropriation: state regulation of land use; constructive taking

Annapolis Group Inc v Halifax Regional Municipality **[2022] SCC 36**

Decision date: 21 October 2022

Wagner CJ and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

The Annapolis Group Inc (the appellant) ("Annapolis") gradually purchased 965 acres of land in the Halifax area. In 2006, Halifax Regional Municipality ("Halifax") (the respondent) adopted a 25-year Regional Municipality Planning Strategy for land development. It included the Annapolis lands. The planning strategy indicated some of those lands would be zoned for a public park with the rest designated for "serviced development", such as residential neighbourhoods, which required the adoption of a resolution authorizing a "secondary planning process". From 2007, Annapolis made several unsuccessful attempts to develop the lands. In 2016, Halifax adopted a resolution refusing to initiate the secondary planning process. Annapolis commenced proceedings in the Supreme Court of Nova Scotia claiming, relevantly, that Halifax had expropriated private property for a public park, which amounted to a "constructive taking". In 2019, Halifax sought summary judgment to dismiss this claim. The Court found that the claim raised issues that needed to be decided at trial. Halifax appealed to the Nova Scotia Court of Appeal and the primary judge found that Annapolis had no reasonable chance of success. Annapolis appealed this decision.

Held: allowing the appeal

- The primary judge erred in finding that a public authority's alleged encouragement and financial support of trespass can never amount to an acquisition of a beneficial interest. The Court affirmed the test in *Canadian Pacific Railway Co v Vancouver (City)* [2006] 1 SCR 227 ("*CPR*") in relation to a constructive taking, being: whether the public authority has acquired a beneficial interest in the property or flowing from it, and whether the state action has removed all reasonable uses of the property: [44]. The term "beneficial interest" is concerned with the *effect* of a regulatory measure on the landowner, and not with whether a proprietary interest was actually acquired: [25], [38]-[40], [58], [68]. This is because: requiring actual acquisition would collapse the distinction between constructive (*de facto*) and *de jure* takings; and interpreting "beneficial interest" broadly ensures *CPR*'s coherence with *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101 and *The Queen in Right of the Province of British Columbia v Tener* [1985] 1 SCR 533: [25], [38]-[40]. In dissent, Kasirer, Jamal, Karakatsanis and Martin JJ consider the *CPR* test to be limited to a proprietary interest: [85], [100]-[104]
- The primary judge erred in finding that that "[m]otive is not a material fact in the context of a [constructive] expropriation claim": [51]. The public authority's intention is not an element of the test for constructive takings at common law. Again, the mischief addressed by the doctrine is one of advantage and effects, not that a public authority acted in bad faith or with an otherwise ulterior motive: [52]. Intent may constitute a "material fact" in the context of a constructive taking claim, however, the focus of the inquiry must remain on the effects of state action: [53]-[57]. The dissent rejected this as a departure from the *CPR* test, which is limited only to the effects of the public authority's regulatory activity: [86], [119]-[129].
- The Court of Appeal erred in concluding that there had been no taking, partly on the basis that the zoning rules had not changed, as this approach fails to consider Halifax's application of the regulatory scheme: [71]. The dissent characterised Halifax's alleged conduct as mere "refusal to up-zone": [73], [87], [90], [91], [110]. The majority rejected this as Annapolis did not acquire the Lands as a "speculative bet" and the dissenters were unable to point to a single reasonable use of the property: [74]-[79].