Court of Appeal
Supreme Court
Sydney

Decisions of Interest

10 October 2022 – 23 October 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

Criminal Procedure; Constitutional Law

***Landrey v Director of Public Prosecutions (NSW)* [2022] NSWCA 211**

Decision date: 21 October 2022

Ward P, Simpson and Basten AJJA

Geoffrey Vance Landrey (the applicant), was charged with indictable offences. Mr Landrey commenced proceedings in the Supreme Court challenging the Constitutional validity of Ch 3, Pt 2 of the *Criminal Procedure Act 1986* (NSW) ("*CPA*") which governs the procedures and powers of the Local Court in conducting committal proceedings for offences to be prosecuted on indictment. Following the issue of a court attendance notice, the prosecutor must file and serve on the accused a charge certificate certifying that the evidence available to the prosecutor is capable of establishing each element of each offence. There must be at least one case conference between the prosecutor and the accused's legal representative, following which, the prosecutor must file a case conference certificate. Finally, the magistrate must commit the accused person for trial or for sentence. The applicant contended that, since amendments to Ch 3, Pt 2 of the *CPA* which commenced in 2018: the function of assessing the capacity of the evidence to established each element of the offence charged has been removed from the magistrate conducting a committal proceeding and conferred on the prosecutor; that the committal by the magistrate has become a rubber-stamping of the prosecutor's opinion, and that to impose such a function on a judicial officer contravenes the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1.. The matter was removed into the Court of Appeal by the Chief Judge at Common Law.

Held: dismissing the summons

- The purpose of a committal proceeding is to ensure proper case management of the criminal process, with the dual intention that cases are not listed for trial until the possibilities of guilty pleas and challenges to the evidence of prosecution witnesses have been explored, to limit the need for interruption to the trial: [31].
- Committal proceedings are not an exercise of judicial power: [38]. Case management is an established role for judicial officers and is ancillary to the judicial function. As such it is constitutionally valid: [32].
- Accepting the traditional view that a committal proceeding is an administrative process, particularly when conducted in a state court where it is not necessary to determine whether there is a "matter" inviting the characterisation as the subject of judicial power, the question is whether the form of the administrative function is incompatible with the judicial functions of the court: [61].
- Chapter 3, Pt 2 of the *CPA* does not enlist a judicial officer into the executive and give them a non-discretionary duty to rubber-stamp a finding by an executive officer: [68]. It is not possible to imply from this statutory scheme any obligation on the part of the magistrate to assess the merits of the prosecution case, nor to assess the correctness of the content of the charge certificate: [71]. Following the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW), the magistrate is not required to assess the merit or validity of the charge certificate: [72].

Contracts; breach; Corporations: financial services

Australia Capital Financial Management Pty Ltd v Australian Financial Complaints Authority Limited **[2022] NSWCA 204**

Decision date: 12 October 2022

Bell CJ, Meagher JA and Basten AJA

Australian Financial Complaints Authority Limited ("AFCA") (the respondent) resolves disputes in accordance with the AFCA Complaint Resolution Scheme Rules ("AFCA Rules"). Mr Bai, Ms Yang and Mr Lee conducted a business through Australian Sheepskin & Hide Pty Ltd ("ASSH"). ASSH entered into a loan agreement with Australia Capital Financial Management Pty Ltd ("ACFM") (the applicant). Mr Bai and Ms Yang guaranteed this loan and granted mortgages over two properties, one of which had been used as a place of residence. ASSH defaulted on the loan and ACFM commenced proceedings in the District Court against Mr Bai and Ms Yang to recover the loan. In 2016, judgment was given in favour of ACFM. That judgment was set aside by the District Court by consent. In 2019, Mr Bai and Ms Yang lodged a complaint with AFCA, claiming that ACFM had acted inappropriately or unconscionably, such that the guarantees and mortgages were unenforceable. ACFM wrote to AFCA seeking that the complaint be excluded pursuant to r C.2 of the AFCA Rules on several bases, including that the District Court was a more appropriate forum to deal with the complaint. AFCA rejected this application. AFCA carried out its investigation into the complaint and made its final determination in 2021 which found that the guarantee and mortgages were unfairly obtained and were invalid and unenforceable. ACFM commenced proceedings in the Supreme Court, challenging this determination. The primary judge found that AFCA had jurisdiction to entertain the complaint and to award the remedy that it did. ACFM appealed this decision.

Held: dismissing the appeal

- The text of the AFCA Rules supports the construction that whether a property is the complainant's primary place of residence is to be determined at the time the claim is made. The extension of jurisdiction operates by way of exception to the exclusion of jurisdiction on the basis of the value of a claim. That exclusion expressly looks to the value of the claim "when the complaint is submitted to AFCA": [94]. Because this conclusion was not dispositive of the appeal, it was not necessary to decide what standard of review is applicable to a challenge to AFCA's determination as to its own jurisdiction: [96].

- It is unnecessary to determine whether the guarantees were secured against the Complainants' primary place of residence, as the complaint was otherwise held to fall within the $1 million monetary cap. If the issue were to be determined, the preferable outcome would be that the guarantees were supported by security over their primary place of residence: [89], [154].

- The language of r C.1.2(e) expressly and solely focuses upon the value of the Complainants' claim "when the complaint is submitted to AFCA": [97]. The value

of the Complainants' claim at the time when it was submitted to AFCA did not exceed $1 million. Accordingly, there is no basis for interfering with the primary judge's decision in this respect: [98].

- The judicial review of a decision by AFCA as to whether a complaint falls within the scope of its functions is subject to constraints on judicial intervention (*Cromwell Property Securities Ltd v Financial Ombudsman Service Ltd* (2014) 288 FLR 374; [2014] VSCA 179 and *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456; [2012] VSCA 185): [134]-[141]. Accordingly, neither the primary judge nor this Court can engage in a de novo assessment of whether the complaint falls within a particular exclusion or not. The proper conclusion is not that the claim was not excluded under r C.1.2(e), but rather that there was no reviewable error on the part of AFCA in determining that the claim was not excluded under r C.1.2(e): [142].

- The primary judge did not err in finding that the amount of compensation awarded did not exceed the $1 million limit: [104]-[110]. As Mr Bai would have had a right of contribution against his co-guarantor, the value of the setting aside of the guarantee would have depended upon the value of his right to obtain contribution from Ms Yang: [107]. Accordingly, the value of setting aside Mr Bai's guarantee was not readily calculable, with the consequence that the value of compensation awarded to him as direct financial loss cannot be said to have exceeded the $1 million limit: [109].

- The primary judge did not err in finding that AFCA's finding that the mortgages given by the Complainants were effectively to secure the guarantees was not unreasonable: [120]. AFCA's conclusion was open to it, and the high hurdle presented by a challenge on grounds of legal unreasonableness had not been surmounted: [119]. Relevantly, the mortgages were executed simultaneously with the guarantees, being third party mortgages given by guarantors: [118].

Negligence: motor vehicle accident

***Zaya v Damirdjian* [2022] NSWCA 203**

Decision date: 11 October 2022

Bell CJ, Gleeson JA and Griffiths AJA

In 2016, Mr Damirdjian (the first respondent and cross-appellant) was riding his motorcycle down Nile Street, Fairfield Heights, when a parked white van pulled out in front of him to make a U-turn. Mr Damirdjian braked heavily and lost control of the motorcycle. He sustained significant bodily injuries. Mr Damirdjian commenced proceedings alleging negligence against the Nominal Defendant (the second respondent and cross-appellant), having been unable to identify the motor vehicle involved in the accident. His daughter, Ms Damirdjian (the first respondent and cross-appellant), also commenced proceedings against the Nominal Defendant for mental harm arising from the negligence of the driver of the white van. In 2017, Mr Zaya (the appellant and cross respondent), who lived on Nile Street and owned a white van, was joined as the second defendant in both proceedings. Mr and Ms Darmidjian ran alternative cases against the Nominal Defendant and Mr Zaya. In 2021 the primary judge delivered judgment for Mr Damirdjian and Ms Damirdjian against Mr Zaya, being satisfied on the balance of probabilities that the white van involved in the accident was Mr Zaya's. His Honour relied heavily on the evidence of Mrs Douglas, a resident of Nile Street. Her evidence was internally inconsistent and inconsistent with other evidence. Mr Zaya appealed both of these decisions. Mr and Ms Damirdjian filed cross-appeals seeking more generous costs orders.

Held: allowing the appeal

- The primary judge's finding that Mr Zaya was liable as the owner of the white van involved in the accident was erroneous because the primary judge failed to give cumulative effect to several evidentiary matters which cast strong doubt on the reliability of Mrs Douglas' evidence: [65]–[66]. The primary judge also failed to address and determine a submission advanced several times below to the effect that the reliability of Mrs Douglas' evidence had to be assessed by reference, inter alia, to records of Roads and Maritime Services: [69]–[70].

- There was no error in the primary judge's conclusion that Mr Damirdjian was not contributorily negligent: [81]. The evidence given by the attending police officer at the scene about the distance of skid and gouge marks left on the road by Mr Damirdjian's motorcycle, from which an expert "reconstruction" of Mr Damirdjian's speed immediately prior to the accident was attempted, was unsatisfactory and unreliable: [81]–[86]. No appellable error had been established in relation to the primary judge's acceptance of Mr Damirdjian's own evidence as to the speed at which he was travelling (being 50kph, if not slightly less) at the time of the accident: [87]–[89].

Contract: restraint of trade

McMurchy v Employsure Pty Ltd; Kumaran v Employsure Pty Ltd **[2022] NSWCA 201**

Decision date: 11 October 2022

Gleeson, Leeming and Kirk JJA

In 2019, Employsure Pty Ltd ("Employsure") (the respondent) launched BrightHR and BrightSafe, software programs to automate human resources functions for small to medium enterprises. Mr McMurchy (the applicant) and Mr Kumaran were employed by Employsure in senior roles. Both of their employment contracts included confidentiality and exclusive employment covenants and a post-employment restraint that they would not be engaged in a business in competition with Employsure for a period of up to 12 months. In October 2020, ELMO Software Ltd ("ELMO") launched a competing "self-service HR platform" product, Breathe. In December 2020, Mr McMurchy accepted a position with ELMO and provided Mr Kumaran's name to ELMO's recruiter, having earlier approached Mr Kumaran about a role with ELMO. In 2021, Employsure gave Mr McMurchy three months' notice of termination, Mr Kumaran accepted employment with ELMO, and Mr Kumaran's employment with Employsure ended. Employsure commenced proceedings against Mr McMurchy and ELMO, and Mr Kumaran and ELMO, to enforce the confidentiality obligations and the competitor restraint. The primary judge found that the exclusive employment covenants were reasonable, Mr McMurchy breached those covenants, a post-employment restraint for nine months was reasonable, Mr McMurchy breached his contract by encouraging Mr Kumaran to leave his employment with Employsure and ELMO assisted in this breach. Mr McMurchy, Mr Kumaran and ELMO appealed this decision.

Held: granting leave to appeal and dismissing the appeal

- Employsure's legitimate interest in the performance of Mr McMurchy's duties included that he devote the whole of his skill, time and attention during normal business hours to his duties, and that he observe the obligations imposed in respect of confidential information including, to keep any confidential information which he has received secret and confidential and refrain from using it in any manner which will or may cause or be calculated to cause injury or loss: [43].

- By taking employment with ELMO to manage a sales team selling ELMO's competing software product and to manage, whilst still employed by Employsure, ELMO's support for users of Breathe software, Mr McMurchy proposed to do exactly what the covenant restrained: [44]. The restraints were directed at the absorption, not sterilisation, of Mr McMurchy's capacity by securing the proper performance of his duties: [45]. The exclusive employment covenants were reasonable, including during the three-month period of "gardening leave": [46].

- Protection against the misuse of confidential information or trade secrets to an employer's detriment after the departure of an employee is recognised as a legitimate protectable interest that can justify a post-employment restraint: [51]-

[53]. It is not necessary to identify the confidential information with precision at the time the contract was entered into: [54].

- A post-employment restraint of nine months for Mr McMurchy was reasonable (being six months from termination of employment on 12 April 2021): [70]. There was no error in this evaluative assessment which took into account the contractual consensus of a restraint of 12 months, the length of time the confidential information remained current, and Mr McMurchy's status as Manager: [69]. There was no error in the discretionary decision that injunctive relief should be granted enforcing the restraint for a period of six months from 12 April 2021, nor in granting a declaration to that effect in lieu of an injunction: [85].

- The finding that Mr McMurchy materially influenced Mr Kumaran's decision to leave Employsure and join ELMO was open: [93]-[96]. This case is distinguishable from situations where one employee had discussed employment opportunities with other potential employers with another employee who had already independently decided to leave their employment: [103]-[104].

- Employsure had a legitimate interest in protecting its confidential information by a restraint against competition. It was reasonably contemplated that Mr Kumaran would have access to confidential information, and that having regard to Employsure's growth the parties contemplated that Mr Kumaran could be promoted during his employment: [133], [135]. That Mr Kumaran in fact had access to confidential information, including about the productivity of the sales team and about customer data, identities and dealings, given his client-facing role ([125], [127]), was relevant to what was foreseeable at the time of entry into the restraint: [139]. A restraint to protect against misuse of confidential information was reasonable: [142].

- The primary judge's finding that a restraint for a duration of nine months was reasonable was irreconcilable with the related finding that much of the information to which Mr Kumaran was exposed would no longer be in his memory: [147]. Employsure did not submit that if the restraint for nine months was found to be unreasonable, the restraint should be read down to a lesser duration. In these circumstances, it is unnecessary to consider any of these alternatives: [152].

Australian Intermediate Appellate Decisions of Interest

Arbitration; Torts; Contracts

Tesseract International Pty Ltd v Pascale Construction Pty Ltd **[2022] SASCA 107**

Decision date: 21 October 2022

Livesey P, Doyle and Bleby JJA

Tesseract International Pty Ltd ("Tesseract") (the applicant) provides engineering consultancy services. Pascale Construction ("Pascale") (the respondent) is a building company. Tesseract and Pascale entered into a sub-contract ("the Contract") by which Tesseract agreed to provide engineering consultancy services in relation to the design and construction of a warehouse building for Bunnings Group Ltd. Tesseract and Pascale are referred to in the Contract as the Consultant and the Builder respectively. A dispute arose in which Pascale alleges, inter alia, that Tesseract's work was not performed to the standard required under the Contract and that it has thereby suffered loss and damage. The Contract contains a process for resolving disputes, including a process of arbitration. The dispute was referred to arbitration. The Honourable Wayne Martin AC KC was appointed arbitrator (the Arbitrator). In its statement of claim, Pascale alleged that Tesseract's work was in several respects deficient and not performed to the standard represented and required under the Contract. Pascale's allegations included claims for breach of the Contract, for breach of a duty of care in negligence, and for misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law (ACL) (which appears in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA)). Pascale sought common law damages and damages under s 236 of the ACL. Tesseract denied any breach of the contractual or tortious duties pleaded against it, or that it engaged in any misleading or deceptive conduct in contravention of s 18 of the ACL. In the alternative, Tesseract pleaded that any damages payable by it should be reduced by reason of the contributory negligence of Pascale, under s 7 of Part 2 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("the *Law Reform Act*") in the case of the allegations of breach of a contractual or tortious duty of care, and under s 137B of Part XI of the CCA in the case of the allegations of misleading or deceptive conduct under s 18 of the ACL. Tesseract also pleaded, in the alternative to its denial of liability, that any damages payable by it should be reduced by reason of the proportionate liability provisions under Part 3 of the *Law Reform Act* (in the case of the allegations of breach of a contractual or tortious duty of care), and Part VIA of the CCA (in the case of the allegations of misleading or deceptive conduct under s 18 of the ACL). In invoking these proportionate liability provisions, Tesseract pleaded that a Mr Penhall was a wrongdoer vis-à-vis Pascale. In particular, Tesseract alleged that Mr Penhall was engaged by Pascale to assist it in preparing its tender for the design and construction of the warehouse building; that Mr Penhall owed Pascale a duty of care in carrying out that work; that Mr Penhall breached his duty of care to Pascale; and that in the event that Pascale

establishes an entitlement to recover a sum in damages from Tesseract, Mr Penhall was a concurrent wrongdoer, with the result that any damages payable by Tesseract should be reduced to an amount reflecting its proportionate responsibility for the loss and damage suffered by Pascale under s 8(2) of the *Law Reform Act* or s 87CD of the CCA. In its reply, Pascale denied the applicability of these proportionate liability provisions. It did so both on the basis that these provisions do not apply on the facts of the present case, and on the more fundamental basis that Tesseract was not entitled to invoke those provisions in the Arbitration proceedings. The Arbitrator made an order that by 10 December 2021 Tesseract shall, pursuant to s 27J of the *Commercial Arbitration Act 2011* (SA), make an application to the Court of Appeal for leave to obtain a determination of any question of law arising in the arbitration. That application was duly made, with the parties agreeing that the question of law be stated as follows: Does Part 3 of [the *Law Reform Act*] and/or Part VIA of [the CCA] apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [*Commercial Arbitration Act*]? Leave was granted to make an application for the determination of this question of law.

Held: answering the question "No".

- While the proportionate liability regimes under the *Law Reform Act* and CCA form part of the substantive law governing the resolution of the dispute between the parties under s 28(3) of the *Commercial Arbitration Act*, that section does not operate to require that every substantive law within that system be applied to the arbitration proceedings. It is therefore necessary for the provisions to apply either by force of their own terms, or by reason of an implied term in the parties' arbitration agreement: [70]-[72].

- The proportionate liability provisions in the *Law Reform Act* and the CCA do not apply to arbitration proceedings by force of their own terms in arbitration proceedings: [177]. The parties have, through the dispute resolution provisions in the contract, impliedly conferred the arbitrator with the power to determine their dispute as though it were being determined in a court of law with appropriate jurisdiction: [45], [158]. However, this conferral of power was subject to such qualifications as required by statute (*Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206): [45], [176]. There are features of the proportionate liability regimes under both the *Law Reform Act* and the CCA that indicate an objective intention on the part of the relevant legislature that they not apply arbitration proceedings: [187], [189]-[200]. Therefore, it was not appropriate to conclude that the parties intended to confer the Arbitrator with authority to apply these provisions in this changed way; or indeed that the relevant legislatures intended that the regimes they enacted might be 'picked up' and applied, in a materially changed way, by an implied term of an arbitration agreement: [202].

Worker's Compensation:

***WorkCover Queensland v Yang* [2022] QCA 196**

Decision date: 11 October 2022

Morrison and McMurdo JJA and Crow J

In 2020, Mr Yang (the respondent) suffered a heart attack at work and applied for workers' compensation on the basis that work related stress was a significant contributing factor. WorkCover Queensland (the respondent) ("WorkCover"), the insurer, rejected his application. However, following a review, the Workers' Compensation Regulator set aside WorkCover's decision and substituted a new decision to accept the application in accordance with s 32 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("the *WCRA*"). It preferred the expert opinion of a doctor who had examined the applicant twice to the opinion of a doctor who had not personally examined him. The applicant then began to receive weekly workers' compensation payments. WorkCover made further inquiries and obtained the opinion of a new doctor who stated: "I do not think the cerebral haemorrhage is secondary to hypertension caused by work stress." Two days after the opinion was given a representative of WorkCover purported to terminate the applicant's entitlement to workers' compensation. Mr Yang commenced proceedings in the Supreme Court seeking a review of this decision. The primary judge held that s 168 of the *WCRA* refers to a person's entitlement to compensation rather than the circumstances under which a person was found to have an entitlement to compensation and that WorkCover's termination of Mr Yang's entitlement to worker's compensation be set aside. WorkCover appealed this decision.

Held: dismissing the appeal

- It is by s 108 that a person is entitled to compensation. An application for the payment of compensation is not determined in a vacuum: it is decided by an assessment of whether the claimant is entitled to compensation. The compensation becomes due and payable only when the application is allowed. But the entitlement to compensation derives from the worker suffering an injury as defined: [55]. In any event, if a person's entitlement to compensation derives not from suffering an injury, but from their application for compensation being allowed, how might that entitlement change so as to enliven the power of review under s 168? In this case, the regulator's decision still stood: [56].

- Once the claim is accepted, it cannot be unaccepted, however, the *WCRA* does not provide for open-ended benefits in favour of a claimant, that is, the scheme is not a long-tailed or infinite type scheme, but rather a short-tailed or finite scheme. Four provisions of the *WCRA* which place finite limits on benefits that a worker is entitled to are: ss 144A, 144B, 168 and 190: [88]. It can be observed that in respect of most WorkCover claims, the entitlements will cease when the incapacity for work related injury stops or other statutory limits are met under s 144A and 144B or alternatively, subsequent to the provision of a notice of assessment under s 190: [89].

- Compensation may be recovered under s 537(3) only for an offence of fraud (s 533) or offences or attempted offences under ss 123, 408C, or 488 of the *Criminal Code Act 1899* (Qld). Recovery is not permitted in cases where entitlements are paid on

the basis of false or misleading information or documents. Importantly, s 537(2) provides that, even in cases of fraud, an existing entitlement "ends", not that it never existed: [92].

- Sections 537(2) and (7) underline an important structural feature of the *WCRA*, namely, that when a compensation claim is accepted, an entitlement arises from the point at which the claim is accepted, namely by the insurer at first instance, the regulator at second instance, or the industrial court at third instance: [93].

- Section 168(2) provides a power to terminate an entitlement to compensation upon the basis that a person's entitlement to compensation may have changed but not on the basis that a person never had an entitlement to compensation: [94]. If meaning is to be given to every word in s 168, as it must, then the trigger required in s 168(1) to commence a review is alteration in a person's existing entitlement and not a change of view based on any new or other information that could lead an insurer to consider that a person's entitlement to compensation, that has been accepted, in fact never existed. The broad construction urged by the appellant in the present case which, it submits, allows an insurer to reassess a person's entitlement at any time, deprives ss 549(2) and 537 of any real effect: [95].

- In striving to provide meaning to the word "entitlement" in s 168, the correct interpretation is that s 168 does not provide an insurer with an ability to question the existence of a claimant's entitlement, as opposed to its right to question the quantum or continuance of the entitlement on grounds unrelated to its existence. The existence of an entitlement to compensation is something which is the subject firstly of the insurer's own decision to accept or reject, and then the subject of regulator review under Ch 13 and the subsequent appeal procedure: [97].

- In dissent, Morrison JA considered that WorkCover's decision was one that would only affect the entitlement to compensation prospectively, not retrospectively: [39]. While a retrospective approach was unavailable, meaning that the insurer cannot revisit the Regulator's decision to allow a worker's claim to compensation and effectively overturn it, that is not what the decision in question here was doing: [40]. Consequently, the primary judge erred in characterising WorkCover's decision as being that an entitlement never existed, rather than that the claimed injury did not ground payments in the future: [41]-[42]. Secondly, s 168 could not have been intended to be construed as it was below because it is the only section in the *WCRA* giving power to the insurer to terminate a person's entitlement to compensation, and if that power does not exist in the present case, it would have no work to do: [47].

Asia Pacific Decision of Interest

Admiralty and Shipping: arrest; practice and procedure of action *in rem*

The "Jeil Crystal" **[2022] SGCA 66**

Decision date: 7 October 2022

Judith Prakash, Tay Yong Kwang and Steven Chong JJCA

In 2020, Banque Cantonale de Geneve ("BCG") (the respondent) financed a transaction for the purchase of cargo ("the Cargo") by its customer GP Global APAC Pte Ltd ("GP Global"). GP Global chartered *The Jeil Crystal* ("the Vessel"), from Jeil International Co Ltd ("JIL") (the appellant) to carry the Cargo. A set of original bills of lading was issued in respect of the Cargo ("the Original BL"). However, BCG had released and endorsed the Original BL to GP Global. GP Global requested the return of the Original BL, to procure the delivery of the Cargo to its buyer. BCG became concerned that several shipments involving GP Global (including the Cargo) for which it had provided financing appeared questionable. The Cargo had also been discharged without production of the Original BL. On 10 October 2020, BCG obtained in the High Court of Singapore a warrant of arrest for the Vessel ("WA 39") which contained an endorsement of claim in relation to the damages for conversion of the Cargo, breach of contract and negligence against JIL. At the hearing of the application for WA 39, BCG claimed to be the "holder" of the Original BL, which was incorrect. On 11 October 2020, the Vessel was arrested. At that time, JIL was already in possession of the Original BL, and a set of switched bills of lading ("the Switched BL") was issued, pursuant to GP Global's request. On 19 October 2020, JIL furnished security and the Vessel was eventually released. On 4 November 2020, BCG filed its statement of claim ("the SOC") in the High Court. On 30 November 2020, JIL filed its defence & counterclaim ("the D&CC"). JIL averred in the D&CC the abovementioned facts relating to the switching and the cancellation of the Original BL. JIL further averred that the Cargo had been properly discharged into the possession of one Standard Asiatic Oil Company Ltd, which was the consignee of the Switched BL. BCG claimed that it was only upon reviewing the D&CC that it came to its attention that the Original BL had been switched and that it no longer had possession of the Original BL. BCG claimed that it was also only through subsequent internal investigations that it learned that the Original BL had been delivered to GP Global in late-June 2020 pursuant to the latter's request to facilitate the delivery of the Cargo to Prime Oil. On 15 January 2021, BCG filed its reply and defence to counterclaim ("the Reply"). BCG acknowledged that it had, in late-June 2020, voluntarily released the Original BL to GP Global pursuant to the latter's request, but averred that it was unaware that GP Global had requested the Original BL for the purpose of switching the Original BL. It added that if it had known that GP Global had intended to switch the Original BL, it would have denied GP Global's request. On 4 February 2021, BCG filed an application to amend the SOC which was instead based on: an alleged wrongful switch of the Original BL without BCG's knowledge or consent which was a breach of the contract of carriage as evidenced by the Original BL; a breach of JIL's duty to BCG to take reasonable care of the Cargo which resulted in loss and damage to BCG; and a breach of JIL's duty as bailee of the Cargo for reward. A day later, on 5 February 2021, JIL commenced proceedings in the High Court of Singapore seeking to set aside WA 39, to strike out the Writ, the return of the Security, and an order for BCG to pay damages for wrongful arrest. The primary judge did not set aside the warrant for arrest because since the facts in relation to the amended claim

had existed at the time of the arrest, the warrant of arrest should not be set aside notwithstanding the defect in the original claim. JIL appealed this decision.

Held: allowing the appeal

- The primary judge erred in assuming that an amendment to the SOC would have a corresponding effect on both the *in rem* writ and the warrant of arrest. While the former is correct, the latter is not necessarily so because: the warrant of arrest and the *in rem* writ are quite distinct in nature, and while there are express provisions in the Rules for the amendment of writs, there is no equivalent for warrants of arrest: [25].

- The applicant for a warrant of arrest is effectively seeking relief from the court, albeit in the nature of interlocutory relief while proceedings between the parties remain pending: [29]. The procedure by which a warrant of arrest is obtained reinforces the view that it is an order of court: [30]-[31].

- A SOC, although in the nature of a pleading and separate from the endorsement of claim in the writ, is a particularisation of the claim as set out in the endorsement (*Veale v Automatic Boiler Feeder Co Ltd* (1887) 18 QBD 631 at 634): [33]. Where a SOC has been delivered, it supersedes the endorsement in the writ and since the SOC represents a particularisation of the endorsement in the writ, it does not have a life of its own (*Renowden v McMullin* (1970) 123 CLR 584): [33]-[35]. Where only the SOC but not the endorsement in the writ is amended, the inconsistency between them would constitute a "defect or error" in the proceedings coming within O 20 r 8 of the Rules. The court may therefore, "at any stage of the proceedings" and "of its own motion", order the writ to be amended pursuant to O 20 r 8, so as to bring the endorsement in line with the amended SOC: [36].

- Order 20 r 11 is the exclusive provision within the Rules dealing with amendments of an order of court: [39], [48]. Order 20 r 11 allows for an order of court to be amended in circumstances limited to clerical mistakes or where there are errors arising from accidental slips or omissions in the court's judgment or order: [40], [47]. Thus, in the absence of any clerical mistake or accidental error, there would be no basis to invoke O 20 r 11 of the Rules to amend the warrant of arrest: [41].

- JIL's submission that *The Amigo* [1991] 2 HKC 491 stood for the general proposition that a subsequent amendment of the pleadings could not justify the issuance of a warrant of arrest that was wrongly issued in the first place was accepted to some degree: [51]. *The Amigo* stands for the proposition that a warrant of arrest obtained on the basis of a non-existent or fatally defective claim must be set aside, however, it is not clear if it necessarily stands for the proposition that a subsequent amendment to pleadings cannot justify the issuance of a warrant of arrest that was wrongly issued in the first place: [52].

- In a situation where the amendment to the SOC is made before the issuance of a warrant of arrest, there would be no legal impediment in ensuring that the claim in the warrant of arrest reflects the amended claim. In a situation where the amendment is made after the issuance of a warrant of arrest and where the warrant of arrest has yet to be executed, it is open to the plaintiff to file fresh court papers including a new affidavit verifying the amended claim together with an explanation on the circumstances which led to the amendment in order to obtain a fresh warrant of arrest: [59].

International Decision of Interest

Equity: trusts; right of indemnity; priority

Equity Trust (Jersey) Ltd v Halabi (Jersey) **[2022] UKPC 36**

Decision date: 13 October 2022

Lord Reed, President, Lord Briggs, Lady Arden, Lord Stephens, Lady Rose, Lord Richards and Sir Nicholas Patten

This matter concerned two unconnected appeals ("the Jersey appeal" and "the Guernsey appeal") which raise common issues about the nature and scope of the right of a trustee under Jersey law to recover from or be indemnified out of the trust assets in respect of liabilities and other expenditure properly incurred by the trustee. Although the proceedings giving rise to the appeals have been brought in Jersey and in Guernsey respectively, both trusts are governed by Jersey law. A trustee's right of indemnity is well established in English law and is confirmed by s 26(2) of the *Trusts (Jersey) Law 1984* ("the TJL"). The dispute in both appeals arose from insolvency in the sense of the assets of the trusts being insufficient to permit the reimbursement of all of the legitimate expenditure and liabilities of the relevant trustees. Both cases concern a contest between successive trustees as to their respective entitlement to be indemnified out of the available trust assets.

Held:

- The right of indemnity confers a proprietary interest in the trust property in favour of the trustee. The English and Australian authorities are inconsistent with the appellants' contention that equity confers no more than a possessory lien, enjoyed for so long as the trustee retains trust assets. There is no doubt that a trustee is entitled to apply, or to seek an order of the court to apply, trust assets in its possession in payment of amounts due under its right of indemnity, and that a trustee is or may be entitled to retain sufficient assets, or require security, before a transfer to a new trustee. Those rights are not, however, inconsistent with a charge over, and proprietary interest in, the trust assets, but are practical means by which such charge or interest may be enforced or protected: [70]-[105].

- The numerous Australian authorities in which the survival of a trustee's proprietary interest in the trust assets after transfer to a new trustee has been considered provide substantial support that such interest is not lost on transfer of the assets to a new trustee: [144]-[164]. The proprietary interest generated by the trustee's right of indemnity survives the transfer of the trust property to a new trustee: [166].

- The issue of whether a former trustee's proprietary interest in the trust assets takes priority over the equivalent interests of successor trustees has not previously been dealt with: [168]. The general rule as to the priority of equitable interests is determined by the order of their creation (*Macmillan Inc v Bishopsgate Investment Trust (No 3)* [1995] 1 WLR 978): [176]. The majority

held that the *pari passu* rule of priority should be preferred: [238]-[240]. Nothing in the typical characteristics of a rolling succession suggests that a first in time rule would work better equity or justice, or even rational common sense, than a *pari passu* rule, if that does the best equity as between trustees who all work together after appointment on different dates, which the majority thinks it does. In the case of a strict succession situation, a first in time rule does not necessarily offer any more just or equitable priority rule than *pari passu* and the latter appears much more appropriate in the case of trustees all serving together, and where serving under a rolling succession: [254]-[268], [310]. Lord Richards and Sir Nicholas Patten, with whom Lord Stephens, in dissent, considered that there is no reason why the "first-in-time" rule should not apply and a *pari passu* distribution treats "trust creditors" as creditors of the trust, rather than as creditors of the trustee with whom they dealt; and will result in outgoing trustees insisting on increased security to guard against future liabilities and a subsequent inadequacy of the fund, creating greater difficulties in the administration of the trust: [177]-[190].

- The primary judge was correct in finding that no analogy can properly be made with the law applicable to Désastre, not only because it is statutory law which does not apply to trusts but also because, in proving its claim against a trust fund, a trustee or former trustee is not proving a claim as a creditor but is establishing the quantum of its proprietary interest in the fund. There is no reason to qualify the trustee's right of indemnity, expressed in article 26(2) of the TJL as being in respect of "all expenses and liabilities reasonably incurred in connection with the trust": [233]-[237].