Decisions of Interest

24 October 2022 – 6 November 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.

Contents

New South Wales Court of Appeal Decisions of Interest

Restitution: nature of restitutionary liability

Coshott Family Pty Ltd v Lyons **[2022] NSWCA 216**

Decision date: 27 October 2022

Meagher and Kirk JJA and Griffiths AJA

Coshott Family Pty Ltd (the appellant) commenced proceedings in the District Court against Mr Lyons (the respondent), a solicitor, for money had and received. The appellant alleged that its director, Mr Coshott, had paid $197,200.50 to the respondent to be held in a controlled money account, that it requested the money be repaid, and that the respondent only repaid $8,419.32. The respondent claimed that there had been transfers out of the account but that these occurred pursuant to "written and/or oral authority" from Mr Coshott. The parties accepted at trial that the case turned on the question of onus. The primary judge found for the respondent, on the basis that it was for the appellant, as plaintiff, to prove that the transfers had not been authorised. The appellant appealed.

Held: dismissing the appeal

- The necessity for a claimant to establish some "qualifying or vitiating factor" in order to make out a claim for money had and received has been reiterated by the High Court a number of times. The presence of such a factor goes to establish that money the defendant received is held to the use of the plaintiff so as to found a claim to restitution: [22]. Recognised categories of such factors include mistake, duress, illegality or failure of consideration, but the categories are not closed: [22].
- The appellant did not point to any case in which a claim for money had and received was made out on similar facts. There is, however, an established category of case where money paid by a principal to an agent subject to an authority to dispose of the money in a particular manner may be recovered in a claim for money had and received: [27]. Such cases suggest that proof that the agent had not paid on the money at the time the countermand is issued, or proof of the agent having paid money out inconsistently with the purpose, goes to the essence of what the principal must establish: [31]. Some of the cases rely on proof of failure of consideration: [35].
- It was not sufficient for the appellant to prove that the payment was made into the account, held for its benefit, and then not returned in full when requested. The appellant had failed to establish any qualifying or vitiating factor: [53].
- If the point is expressed in terms of a total failure of consideration, the evidence did not establish that the state of affairs contemplated as the reason for the payment had failed to sustain itself, except to the extent of the small remainder in the account: [54]. If the point is expressed in terms of the cases relating to agents, the appellant has not sought to show that he countermanded the purpose prior to the respondent giving it some effect. Nor did it show that the respondent paid out money inconsistently with his directions, including because of an absence of any further directions: [55].

Constitutional Law; Personal Injury Claims

***Searle v McGregor* [2022] NSWCA 213**

Decision date: 26 October 2022

Bell CJ, Ward P and Kirk JA

Mr McGregor was injured in a motor vehicle collision with Mr Searle in Albury. Mr McGregor resided in NSW and Mr Searle in Victoria. Mr Searle was indemnified by the Transport Accident Commission of Victoria. Mr McGregor wished to make a claim for common law damages against Mr Searle consistently with the *Motor Accident Injuries Act 2017* (NSW). Certain preconditions for making such a claim had not yet been satisfied. Mr McGregor commenced proceedings in the District Court under s 26 of the *Personal Injury Commission Act 2020* (NSW) ("the *PIC Act*") by way of filing a statement of claim, which claim also sought damages. On the hearing of the application, however, Mr McGregor sought to proceed by way of summons only such that his claim for damages was not being immediately pursued. In effect, Mr McGregor sought to "park" his matter in the District Court. Prior to making his application under s 26, Mr McGregor's solicitors had submitted a PIC Application form to the Personal Injury Commission ("PIC") seeking resolution of an issue or dispute. However, the only application actually made in that form was for PIC to grant leave to proceed in the District Court. There is no statutory power for PIC to grant such leave. Mr McGregor did not identify any particular issue or dispute which he sought to be determined in either his application to PIC or to the District Court. The primary judge delivered an ex tempore judgment holding that the requirements of s 26 had been met.

Held: granting leave to appeal and allowing the appeal

- Section 26 should be construed in the context of the *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15 ("*Burns v Corbett*") constitutional limitation to which it was responding. A dispute will only be within federal jurisdiction when resolution of the claim or issue in question would involve the exercise of judicial power such that there is a justiciable controversy, and the dispute is of a kind that falls within the nine types of dispute comprehended by ss 75-76 of the Constitution. The *Burns v Corbett* principle does not prohibit State administrative tribunals from taking steps or resolving issues which do not involve the exercise of judicial power: [14], [22].

- Section 26 of the *PIC Act* refers to an "application" that had first been made to PIC or its President. This means an application to determine some particular dispute or issue that had arisen in the course of dealing with a claim. It is not a generic reference to claims arising from a workplace or motor accident injury: [65].

- In this case Mr McGregor did not present any application relating to a particular issue or dispute requiring determination. The application he did submit was beyond the power of PIC to determine. The requirement in s 26(4)(a)(i) of the *PIC Act* had thus not been met, nor had the first and third criteria of s 26(3): [76]-[77].

Limitation of Actions: motor accidents; explanation for delay

Stein v Ryden **[2022] NSWCA 212**

Decision date: 26 October 2022

Macfarlan and Gleeson JJA and Griffiths AJA.

The applicant, Ms Stein, was injured in a motor vehicle accident on 7 February 2014. The respondent's compulsory third-party insurer admitted liability for the accident. Ms Stein approached Stacks Goudkamp for legal advice on 21 May 2014. A claim was lodged with the Claims Assessment and Resolution Service ("CARS") on 2 September 2020. CARS was replaced by the Personal Injury Commission ("PIC") on 1 March 2021. PIC did not have jurisdiction to determine Ms Stein's claim because it related to residents of two different States and therefore involved federal jurisdiction. Accordingly, it became necessary for Ms Stein to commence proceedings in the District Court. Pursuant to s 109(1) of the *Motor Accidents Compensation Act 1999* (NSW) ("*MACA*"), proceedings must not be commenced more than three years after the date of the accident without leave of the Court. Pursuant to s 109(3)(a), the Court must not grant leave unless the claimant has provided "a full and satisfactory explanation … for the delay". Ms Stein gave unchallenged evidence, which was accepted by the primary judge, to the effect that she was unaware of the relevant limitation period until early May 2021. The primary judge found, however, that her explanation was neither full nor satisfactory because only one of the several solicitors who had carriage of her matter in the preceding years gave evidence stating that no advice had been given to Ms Stein in respect of the limitation period. Ms Stein appealed this decision. The respondent filed a notice of contention submitting that the primary judge's decision should be affirmed on the basis that the primary judge ought to have found, in the alternative, that Ms Stein's explanation was neither full nor satisfactory as she did not give evidence that she was not told by her solicitors of the requirements of the *MACA*.

Held: granting leave to appeal and allowing the appeal

- The primary judge erred in finding that the lack of direct evidence from the solicitors who had carriage of the applicant's matter was fatal to her application for leave: [41]. The applicant's explanation for the delay was the central focus of the inquiry and the applicant gave unchallenged evidence that she had no knowledge or awareness at any relevant time of limitation period requirements and that she relied upon her solicitors to progress her claim: [39], [45]. It was unnecessary in the particular circumstances of this case for the applicant to adduce further evidence from individual solicitors who had carriage of her matter in order for her to comply with the statutory requirement that she provide a "full and satisfactory explanation" for the delay. Her explanation was sufficiently full to enable an evaluation to be made of whether it was satisfactory in the sense that a reasonable person in the position of the applicant (being one who had no knowledge of the limitation periods) would have been justified in experiencing the same delay: [40].

Legal Practitioner; Tribunal Jurisdiction

***Terepo v Council of the Law Society of New South Wales* [2022] NSWCA 210**

Decision date: 25 October 2022

Bell CJ, Macfarlan and Mitchelmore JJA

Ms Terepo was a sole practitioner and the principal of a law practice. In 2014 she gave her husband access to her law practice's trust account. Her husband made some 38 unauthorised transfers from the trust account into the law practice's office account or Ms Terepo's account. Ms Terepo made one unauthorised transfer from the trust account to her personal account. The transfers amounted to $13,020.50 in total. The Law Society of NSW ("Law Society") sent letters to Ms Terepo requesting information regarding her trust account irregularities. Ms Terepo's responses did not provide full information and disclosure. The Law Society commenced proceedings in the NSW Civil and Administrative Tribunal, which found that Ms Terepo was guilty of professional misconduct and unsatisfactory professional conduct. In a further decision, the Tribunal recommended that Ms Terepo's name be removed from the Roll. Ms Terepo appealed these decisions. Before the hearing, the parties agreed on consent orders designed to dispose of both proceedings. The consent orders included a declaration that Ms Terepo was guilty of professional misconduct but did not provide for her name to be removed from the Roll. Instead, they provided for her to be precluded from applying for a new practising certificate unless a stipulated educational condition is satisfied. Further, they provided for the Tribunal's finding of unsatisfactory professional conduct to be left undisturbed. The parties presented the consent orders to the Court for it to satisfy itself that it was appropriate to make those orders.

Held: Making the proposed consent orders

- Consistently with the parties' agreed positions, the Tribunal exceeded its jurisdiction by finding that Ms Terepo was guilty of reckless indifference when that finding went beyond the allegations put to it by the Law Society (*Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33): [27].

- The Court made the proposed consent orders as it was satisfied that they were appropriate: [34]–[35]. The setting aside of the recommendation that Ms Terepo's name be removed from the Roll, was appropriate as it was in part based on the Tribunal's impermissible finding of recklessness. In any event, whilst the findings of professional misconduct against Ms Terepo were serious, they were not, in light of the circumstances in which Ms Terepo's conduct occurred, so serious as to warrant an order for the removal of her name from the Roll and, in any case, the Law Society no longer sought such an order: [31]. The order which related to the Tribunal's finding of unsatisfactory professional conduct, will be left unaffected by the orders to be made on this appeal: [32]. In light of the contrition expressed by Ms Terepo and the circumstances applicable when her conduct occurred, it was sufficient that, as contemplated by this Court's orders, her conduct be addressed by a finding of professional misconduct and, in one respect, a finding of unsatisfactory professional conduct, together with a restriction on her ability to apply for a practising certificate: [33].

Australian Intermediate Appellate Decisions of Interest

Superannuation; Statutory Construction

MetLife Insurance Limited v Australian Financial Complaints Authority Limited **[2022] FCAFC 173**

Decision date: 27 October 2022

Middleton, Jackson and Halley JJ

In 2018, Mr Edgecombe complained to the Australian Financial Complaints Authority Limited ("AFCA") in respect of an adverse decision of Metlife Insurance Limited ("MetLife") concerning a claim under an insurance policy issued by MetLife to the trustee of Mr Edgecombe's superannuation fund ("the 2018 Complaint"). AFCA initially decided that, pursuant to the AFCA Complaint Resolution Scheme Rules ("AFCA Rules"), the 2018 Complaint was out of time. In 2019, however, AFCA wrote to MetLife stating that page 126 of the AFCA Operational Guidelines states that, where a fund member does not meet the time limits for a Superannuation complaint, AFCA 'may be able to accept a complaint under our general jurisdiction'. In April 2019, AFCA purported to determine the 2018 Complaint adversely to MetLife and stated that the adverse determination had been made under the AFCA Rules. In May 2019, MetLife commenced proceedings in the Australian Federal Court seeking a declaration that AFCA's determination was not binding on the basis that AFCA lacked the authority to determine the 2018 Complaint, as it was a "complaint relating to superannuation" within the meaning of s 1053 of the *Corporations Act 2001* (Cth) ("the *Corporations Act*"), but it did not satisfy any of sub-ss 1053(1)(a)-(j). AFCA filed a cross-claim seeking specific performance of AFCA's determination of the 2018 Complaint. The primary judge ordered that the question as to whether AFCA had jurisdiction to make the determination be determined separately.

Held: allowing the appeal

- The grammatical and ordinary sense of the words in the chapeau to s 1053(1)(a) is that a complaint that relates to superannuation can only be made under Pt 7.10A of the *Corporations Act* (the "AFCA Scheme") if it falls within the ten types of complaints specified in sub-ss 1053(1)(a)-(j): [90]-[93].
- By reason of s 1053(1)(a), the 2018 Complaint could still have been made under the AFCA Scheme as a complaint against a superannuation trustee that had made a decision that is alleged to be unfair or unreasonable, in the case of the 2018 Complaint a decision not to pursue the insurer for indemnity, and the insurer could then be joined to the complaint pursuant to s 1054(1): [107]. Section 1053(4) provides that complaints about decisions of a trustee of a self-managed superannuation fund ("SMSF") and complaints about certain conduct or decisions of an insurer, under an annuity policy maintained by a trustee of an SMSF are not "superannuation complaint[s]": [109].
- AFCA's notice of contention, which claimed that the 2018 Complaint was not a "complaint relating to superannuation" within the meaning of s 1053(1)" was rejected: [156], [161]. AFCA's contention that the parties had agreed that the 2018 Complaint could be determined by AFCA as a non-superannuation complaint was rejected because the contractual provisions in the AFCA Rules cannot consensually be expanded beyond statutorily defined limits: [165], [178], [182], [187].

Practice and Procedure: scope of inherent jurisdiction, mistake

Collgar Wind Farm Pty Ltd v RJE Global Pty Ltd **[2022] WASCA 139**

Decision date: 1 November 2022

Buss P, Murphy and Mitchell JJA

In 2009, Collgar Wind Farm Pty Ltd ("Collgar") engaged Vestas-Australian Wind Technology Pty Ltd ("Vestas") to provide wind turbine generators at Collgar's wind farm. Vestas retained Robin John Engineering Pty Ltd ("RJE") (now known as "ACS") as a subcontractor to undertake electrical cable installation and termination work. In 2015, there were two failures in cable feeding transformers. On 1 February 2021, Collgar issued a writ indorsed with a statement of claim naming RJE Global Pty Ltd ("RJE Global") as defendant. On 8 February 2021, a copy of the writ was served at the principal place of business of RJE Global and Australian Contracting Services Pty Ltd ("ACS"). Collgar's solicitor, who issued the writ, deposed, in effect, that in identifying the defendant he relied on various expert reports commissioned by Collgar, which referred to "RJE" as the original installer of the transformers. The in-house counsel for RJE Global contacted Collgar's solicitor and stated that RJE Global was not incorporated until 25 August 2015. On 26 February 2021, Collgar applied to amend the name of the defendant to ACS. On 20 April 2021, Collgar filed an amended application to amend the name of the defendant from RJE Global to ACS, pursuant to *Rules of the Supreme Court 1971* (WA) O 21 r 5, and alternatively pursuant to the inherent jurisdiction of the Court. The primary judge dismissed this application. Collgar appealed this decision.

Held: allowing the appeal

- Order 21 r 5 (prior to the amendment on 1 March 2018), insofar as it encompassed an application to correct the name of a party, was a remedial provision which should be given the widest interpretation its language would permit. It should be interpreted to cover cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description: [44]. The deletion of former subrules (2)-(5) does not alter the beneficial nature of O 21 r 5, or the scope of the power to include those cases. Former subrules (2)-(5) essentially had a limited, confirmatory effect on the proper construction of O 21 r 5, and were otherwise superfluous (*Belgravia Nominees Pty Ltd v Lowe Pty Ltd* [2017] WASCA 127): [46]. It is unnecessary for present purposes to determine whether O 21 r 5 is potentially wider in its operation than its predecessor: [47].

- There is no reason to suppose that the court's power to amend in its inherent jurisdiction in this context, is more confined than that expressed by the generality of the language in O 21 r 5. The respondent's contentions that the inherent jurisdiction does not extend to cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the identity of the person who answers that description, and/or to allow, in appropriate circumstances, an amendment in which the name of one legal entity is replaced with the name of another legal entity: [53].

Asia Pacific Decision of Interest

Contracts; Procedure: summary judgment; stays

SRG Global Remediation Services (NZ) Limited v Body Corporate 197281 **[2022] NZCA 518**

Decision date: 2 November 2022

French, Courtney and Dobson JJ

Body Corporate 197281 ("the Body Corporate") entered into a construction contract with TBS Remcon Ltd ("TBS") for $7,590,272.58 "or such greater or lesser sum as shall become payable under the Contract". When it was discovered that more extensive work was required, a total fixed contract price of $35 million was agreed upon. TBS's parent company Hellaby Resource Services Ltd ("Hellaby") sold TBS and assigned the outstanding debt to SRG Contractors NZ Ltd ("SRG Contractors"). The Body Corporate was advised of the assignment but resisted payment due to defective construction. Hellaby commenced proceedings in the High Court seeking recovery of the debt and applied for summary judgment. The primary judge held that the deed of assignment was ineffective due to a clause in the construction contract which prohibited assignment of contractual rights without the consent of the other party and that Hellaby did not have standing to apply for summary judgment. TBS was joined as a second plaintiff to the proceeding and leave was obtained to bring a second application for summary judgment. In 2020, the Body Corporate filed a statement of defence to TBS's claim and, relevantly, a counterclaim against TBS. TBS filed a protest to jurisdiction on the grounds of an arbitration agreement. The primary judge held that the Body Corporate had no arguable defence to the application for summary judgment, stayed enforcement of the judgment pending determination of the counterclaim and declined to refer the counterclaim to arbitration. SRG (Contractors) appealed this decision.

Held: allowing the appeal, dismissing the cross-appeal

- The primary judge did not err in finding that the Body Corporate had no arguable defence to TBS' application for summary judgment: [58]. The Body Corporate's claim against TBS was a counter-claim as opposed to an abatement and the circumstances were such that s 79 of the *Construction Contracts Act 2002* (NZ) ("the *Act*") applied: [50]-[52]. The *Act* does not draw any distinctions between recovery of a final payment claim and an earlier one. Nor does it contemplate the court needing to inquire into how the contractor intends to use the money it receives: [53]. Under the *Act*, TBS' entitlement to payment arises from the duly issued payment of schedules: [55]-[57].

- The primary judge erred in staying enforcement of the summary judgment. In granting the stay, the primary judge accepted the same arguments advanced by the Body Corporate that her Honour had previously rejected when it came to the issue of the residual discretion, on the basis that there was a distinction between judgment and enforcement: [86]. The *Act* is a cogent factor pointing away from granting a stay. It meant the case for granting a stay needed to be particularly compelling: [93].

- The primary judge did not err in declining to grant a stay of the counterclaim: [146]. Article 8(1) of the *Arbitration Act 1996* (NZ) contains three prerequisites to the grant of a stay. The third prerequisite, being that the arbitration agreement, was not null and void, inoperative or incapable of being performed was not met because s 13 of the *Act* ceased to be operational one month after issuance of the Final Payment Schedule: [114]-[146].

International Decision of Interest

Planning Law

Hillside Parks Ltd v Snowdonia National Park Authority **[2022] UKSC 30**

Decision date: 2 November 2022

Lord Reed, Lord Briggs, Lord Sales, Lord Leggatt and Lady Rose

In 1967, planning permission was granted ("the 1967 Permission") for a large housing estate in Snowdonia National Park ("the Site"). The approved plan ("the Master Plan") identified the proposed location of each house. Hillside Parks Limited ("Hillside") has been the owner and developer of the Site, since 1988. In 1985, High Court proceedings were brought because nineteen dwellings, which did not conform to the Master Plan, had been built. The High Court declared, relevantly, that development under the 1967 Permission could still be lawfully completed in accordance with the Master Plan "at any time in the future" ("the 1987 Declaration"). Further planning permissions, which departed from the Master Plan ("the Post-1987 Permissions"), were then granted by the local planning authority ("the Authority"). After about 2004, houses which did not conform to the Master Plan were built on the Site without any planning permission. In 2017, the Authority informed Hillside that it could not now implement the 1967 Permission given that it was not possible to adhere to the Master Plan. Hillside brought proceedings seeking declarations that the 1967 Permission remained valid and could be carried out to completion as set out in the 1987 Declaration. At first instance Hillside's claim was dismissed by the High Court. Hillside's appeal to the Court of Appeal was unsuccessful. Hillside appealed that decision.

Held: dismissing the appeal

- Where two separate applications are granted in respect of the same site and one of them is implemented, the test for whether it is lawful to carry out the development contemplated by the other permission is "whether it is possible to carry out the development proposed in that second permission, having regard to that which was done under the permission which has been implemented": *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 ("*Pilkington*"): [31], [42].

- Hillside's submission that *Pilkington* rests on a principle of abandonment was rejected. In *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, the House of Lords held that there is no principle in planning law whereby a planning permission may be extinguished by abandonment: [34]-[40].

- The Master Plan is an integrated scheme which could not be severed into component parts. It followed that carrying out, under an independent planning permission on any part of the Site, development which departed in a material way from that scheme would make it physically impossible and hence unlawful to carry out any further development under the 1967 permission: [46]-[72].

- Hillside's submission that the Post-1987 Permissions merely authorised variations of parts of the Master Plan was rejected: [73]-[94]. The analysis of a planning permission is one of substance, not form, and its interpretation depends on how a reasonable person would interpret the permission. In substance, the Post-1987 Permissions were departures from the 1967 Permission: [26]-[27],[81], [83]-[91].