Decisions of Interest

7 November 2022 – 20 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

Environment and Planning: waste disposal

Weston Aluminium Pty Ltd v Environment Protection Authority **[2022] NSWCA 236**

Decision date: 17 November 2022

Ward P, Basten AJA and Preston CJ of LEC

Weston Aluminium Pty Ltd ("Weston") constructed a thermal treatment facility on its premises. Under s 48 of the *Protection of the Environment Operations Act 1997* (NSW) ("the Operations Act"), an occupier of premises requires an environment protection licence to carry on a "scheduled activity" on those premises. Weston's licence was amended to include "Waste disposal (thermal treatment)", which allowed it to carry on activities scheduled under cl 40 Sch 1 of the Operations Act, including the processing of waste by burning, incineration, gasification or other thermal means. The Environment Protection Authority advised Weston that, as licensee of a "scheduled waste facility", s 88 of the Operations Act required it to pay a contribution in respect of waste received at the facility Weston commenced proceedings in the Land and Environment Court seeking a declaration that it was exempt from paying a contribution under cl 20(3) of the *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) ("the Waste Regulation"), because it was not a "scheduled waste disposal facility". A scheduled waste disposal facility is "a waste facility that is required to be licensed under the Act because it is used for the disposal of waste": Waste Regulation cl 3(1). The dispute was whether Weston's facility met this definition. The primary judge gave disposal its ordinary English sense of "getting rid of" and, applying this meaning, found that Weston's facility was a "disposal facility". He therefore found Weston liable to pay contributions. Weston appealed that decision. The question on appeal was whether the primary judge correctly interpreted the meaning of "waste disposal facility" under the Operations Act and Waste Regulation.

Held: allowing the appeal

- The primary judge erred by adopting the ordinary meaning of "disposal": [31]. The term "disposal" appears in the heading, but not the operative provisions, of cl 40 Sch 1 of the *Operations Act*, and a heading does not form part of the instrument, although it may be relevant extrinsic material: [28]. To determine the actual meaning, it is necessary to return to the context, and particularly the text of the statute: [32]-[35].
- The appellant's thermal treatment facility was not a scheduled waste disposal facility. First, cl 20(3) of the *Protection of the Environment (Waste) Regulation 2014* (NSW) contemplates that there could be a scheduled waste facility on which the relevant metallurgical activities are carried out but which is not used for the "disposal of waste": [1], [23], [37], [40]. Secondly, the definition of scheduled waste facility covers the quintuple activities of "storage, treatment, processing, sorting or disposal of waste". Because Sch 1 cl 40 refers to treatment and processing, but not disposal, the requirement for a licence arises because the facility is used for the treatment and processing of waste, and not for the disposal of waste: [37], [55]-[57], [59]. Thirdly, the use only of the term "disposal of" in the broader definition of scheduled waste facility militates against the adoption of the broader understanding of the definitions: [38]-[39].

Equity: constructive trusts

NSW Trustee and Guardian v Togias **[2022] NSWCA 225**

Decision date: 9 November 2022

Mitchelmore JA, Basten and Griffiths AJJA

Ms Togias and Mr Subakti were de facto partners. In 2000, Mr Subakti purchased a residential property in Wentworthville and started a business as a sole trader called "Bio-Form". During their relationship, a property in Glenwood ("the Glenwood Property") and a property in Seven Hills ("the Seven Hills Property") were purchased in Mr Subakti's name. In 2010, the respondent ended her relationship with Mr Subakti when he was arrested on a drug-related charge. Mr Subakti was subsequently convicted and sentenced to a period of imprisonment. In 2014, the Supreme Court made a Forfeiture Order, pursuant to the *Criminal Assets Recovery Act 1990* (NSW), in relation to Mr Subakti's interests in property, including the Glenwood Property and the Seven Hills Property. In 2020, the respondent commenced proceedings in the Supreme Court against the State of NSW and the NSW Trustee and Guardian asserting a beneficial interest in the Glenwood Property and Seven Hills Property. The primary judge held that, by virtue of the respondent's various financial and non-financial contributions, a remedial constructive trust arose over both properties. His Honour declared that the appellant held 50 per cent of both properties on trust for the benefit of the respondent. The NSW Trustee and Guardian appealed that decision.

Held: appeal allowed in part

- The primary judge erred in relying on Ms Togias' post-January 2010 financial contributions as supporting the existence of a joint endeavour because those contributions were made after the cessation of the relationship and do not bear on the terms of the constructive trust as between Ms Togias and Mr Subakti: [90]-[91], [107].

- Ms Togias' labours at home and in the Bio-Form business supported the existence of a joint endeavour with Mr Subakti, the purpose of which was to enhance their material wellbeing: [93]. The primary judge did not err in concluding that the Glenwood Property was purchased in the course of, and for the purpose of, the joint endeavour pursuant to which the respondent made those contributions: [95]. Nor did his Honour err in concluding that it would be unconscionable for Mr Subakti (or the appellant) to assert a legal interest over the whole of the Glenwood Property as against the respondent without making any allowance for her contributions: [96], [151]. Although the contributions that the respondent made operated to free Mr Subakti up to earn an income to put towards the purchase of the Glenwood Property and the mortgage, the fact that he was responsible for making all financial contributions overcame the presumption that equity is equality. The respondent's beneficial interest was assessed at a quarter share, rather than a half-share: [108]-[111], [153].

- A distinction of substance between the Glenwood Property and Seven Hills property, which the primary judge did not separately consider, was that the latter was financed and purchased for a solely commercial purpose. Although the respondent sought to characterise that business as a partnership, such a characterisation was inconsistent with her role which was, in effect, that of a clerical assistant. Having regard to the respondent's contributions, the acquisition of the Seven Hills Property did not form part of the joint endeavour: [94], [99]-[100], [119], [133].

Contracts

***Australian Rugby League Commission Limited v New South Wales Rugby League Limited* [2022] NSWCA 226**

Decision date: 8 November 2022

Bell CJ, Meagher JA and Simpson AJA

The Australian Rugby League Commission Limited ("ARLC") delegated the management and administration of certain matches of the State of Origin competition to the New South Wales Rugby League Limited ("NSWRL"). The performance of this function is governed by a "Services Agreement" which required that the NSWLR provide the Services "with due care and skill and to the best of its knowledge and expertise" (cl 3.2(b)) and "in accordance with all reasonable and lawful instructions and directions" given to the NSWRL by the ARLC (cl 3.1(c)). In February 2022, the NSWRL held an annual general meeting ("AGM") at which elections were held for two positions on the NSWRL's Board of Directors (the "Board"). The NSWRL received three nominations; however, one individual was disqualified. The two incumbent candidates were appointed unopposed. Following the AGM, the ALRC sought to review the NSWRL's governance practices relating to the election of Board members. The NSWRL broadly asserted that the ARLC had no power to conduct an investigation. In April 2022, the ARLC sent the NSWRL a letter alleging that the NSWRL was in breach of cl 3.1(b) because its Board had not been validly appointed, and in breach of cl 3.1(c) because it had refused to comply with instructions from the ARLC to provide information and documents concerning the election. It asserted that the ARLC would have the right to terminate the Services Agreement if fresh elections for the NSWRL Board were not held within 30 days. In April 2022, the NSWRL commenced proceedings in the Supreme Court seeking interlocutory and declaratory relief. The primary judge ultimately found that the NSWRL was not in breach of the Services Agreement. The ARLC appealed this decision

Held: granting leave to appeal but dismissing the appeal

- The primary judge was correct in concluding that the NSWRL was not in breach of its obligations under cl 3.1(b) to provide the Services efficiently, with due care and skill and to the best of its knowledge and ability. The ARLC did not provide or point to any instance of the provision of Services which it contended had been or were in the course of being provided deficiently. Any issue as to the validity of the appointment of the Board, its composition and performance and its existence did not bear upon the NSWRL's discharge of its contractual obligations: [50]–[56].

- The primary judge was correct in concluding that the NSWRL was not in breach of its obligations under cl 3.1(c) to provide the Services in accordance with reasonable and lawful instructions and directions from the ARLC. The NSWRL's obligation to comply with the ARLC's instructions and directions was not at large or in the abstract, but was in connection with the provision of the Services, which had as their subject matter the management, administration and staging of State of Origin matches. The directions or instructions purportedly given by the ARLC in relation to the election of Board members were not in relation to that subject matter: [57]–[62].

- It was not necessary to determine whether certain members of the Board were validly appointed, or whether it was open in the proceedings for the ARLC to challenge the validity of the election of Board members by way of a defence to the NSWRL's claim for declaratory relief: [53], [63].

Administrative Law: status of minority reasons

***Ghosh v Health Care Complaints Commission* [2022] NSWCA 229**

Decision date: 11 November 2022

Ward P, Basten AJA and Adamson J

On 12 May 2021, the Health Care Complaints Commission ("the Commission") commenced proceedings in the Occupational Division of the New South Wales Civil and Administrative Tribunal ("the Tribunal") seeking disciplinary findings and orders against Dr Ratna Ghosh (the appellant), an unregistered medical practitioner. The Tribunal was constituted by Balla ADCJ, Dr G Yeo, Senior Member, Professor P Morris AM, Senior Member and Dr C Berglund, General Member. Two health professionals were required to be on the Tribunal: s 165B(2) of the Health Practitioner Regulation National Law (NSW) ("the National Law"). It was accepted that Dr Yeo, a general practitioner, and Professor Morris, a psychiatrist, fulfilled this statutory requirement. On 13 October 2021, the Tribunal, by majority, made orders which included an order cancelling the appellant's registration as a medical practitioner. Professor Morris dissented and found that the appellant should be permitted to practise medicine subject to conditions. His dissenting view was based on impressions he formed of the appellant and a diagnosis he purported to make based on those observations. Dr Ghosh appealed this decision.

Held: refusing leave to appeal in respect of grounds 1, 2, 3, 4, 5, 6, 7, 10 and the first sentence of ground 9. Otherwise, dismissing the appeal

- Leave to appeal was not required on the issue as to whether the majority of the Tribunal was in error in failing to have regard to, and address in its reasons, the reasons of the dissenting member, as an alleged failure to consider a mandatory relevant consideration is an error of law (*Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24; [1986] HCA 40): [7], [49].

- The reasons of Professor Morris were not evidence which the majority was required to take into account or address in their reasons. Reasons for decision of a dissentient are the end product of reasoning and do not constitute evidence. Nothing in s 165M of the National Law requires dissenting reasons to be addressed in the Tribunal's reasons: [7]-[8], [53].

- The role of the Tribunal is arbitral and adjudicative. It is required to choose between competing arguments and opine on the correctness of medical evidence, not to form its own opinions on medical questions by applying its own medical expertise. Professor Morris' qualifications as a psychiatrist did not give his reasons the status of evidence (*Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43): [10]-[11], [57].

- It was open to the Tribunal to infer that the appellant's negative attitude explained, at least in part, why she was not being frank and forthcoming to the Commission or the Tribunal. The appellant's attitude to the disciplinary process was relevant to her obligation of candour to the Commission and the Tribunal (*Lee v Health Care Complaints Commission* [2012] NSWCA 80): [65].

Australian Intermediate Appellate Decisions of Interest

Real Property: meaning of "in relation to the lot"

Bank of Queensland Limited v Y & L Promising Pty Ltd **[2022] QCA 217**

Decision date: 8 November 2022Morrison JA, Williams and Cooper JJ

The Bank of Queensland ("BOQ") is the lessee of commercial premises in Coolangatta on land owned by Y & L Promising Pty Ltd ("Y&L"). The lease was entered into in April 2016, at which time the land was owned by Well Property Holdings Pty Ltd ("WPH"). The lease provided that the Landlord will remove any asbestos found in the Premises and will remove it at the Landlord's cost and that any associated costs incurred by the Tenant with the removal of the asbestos will be the responsibility of the Landlord, and provided for a right of set-off(cl 35.4(a)). In 2017, asbestos was detected at the premises and BOQ notified WPH that it was required to remove the asbestos. WPH repeatedly refused to remove the asbestos or pay the costs of the work that BOQ ultimately arranged. In 2020, the premises were transferred to Don & Sons Investments Pty Ltd ("DSI") who likewise refused to pay the costs of the remediation works. Y&L became the registered owner of the premises in 2021. Y&L executed a deed poll as buyer which relevantly provided that Y&L would "abide by the terms of the Lease on the part of the lessor to be performed, fulfilled or observed on or after the Settlement Date". BOQ demanded payment of the costs of the remediation works from Y&L and Y&L refused. The appellant commenced proceedings in the District Court seeking damages for breach of a lease. Upon the respondent's application, the primary judge summarily dismissed the appellant's claim. BOQ appealed this decision.

Held: allowing the appeal and granting BOQ leave to replead

- On the proper construction of s 62 of the *Land Title Act 1994* (Qld), personal obligations or liabilities of the owner of land will vest in a transferee upon registration of the transfer of the land only if they are incidental to the present and future ownership of the land. An accrued liability to pay damages for a completed breach of a lease covenant on the part of the transferring owner exists independently of the lease obligations. Therefore, those liabilities were not liabilities "in relation to the lot" for the purposes of s 62: [60]-[62].
- Properly construed, the Deed Poll was directed to ensuring that Y&L would comply with the provisions of the lease which fell to be performed going forward from the date of transfer of the lease. That is, the Deed Poll operates prospectively and not retrospectively: [80]-[81]
- The primary judge erred in summarily dismissing the matter as BOQ could have improved its position by amending its pleadings: [107]. It was reasonably arguable that: the right of set-off conferred by s 35.4(a) gave rise to a personal liability on the part of WPH which, because the liability affected the amount of future rent which WPH would be entitled to recover from BOQ, was incidental to the present and future ownership of the land and intimately connected with the right of ownership being transferred; unlike the accrued liability of WPH to pay damages for its completed breach, the liability to have future rent payments reduced by reason of the contractual set-off did not exist independently of the lease obligations; and the liability created by the right of set-off had a sufficient connection to the ownership interest that it could properly be described as a liability "in relation to the lot" for the purposes of s 62(1) of the LTA: [95], [101].

Statutes: validity of legislation; Administrative Law: judicial review

Varnhagen & Anor v State of South Australia & Ors (No 2) **[2022] SASCA 118**

Decision date: 15 November 2022

Livesey P, Doyle and Bleby JJA

The appellants commenced proceedings in the Supreme Court of South Australia challenging the lawfulness of the *Emergency Management (Healthcare Setting Workers Vaccination No 7) (COVID-19) Direction 2022* ("the Seventh Healthcare Setting Direction") issued in response to the COVID-19 pandemic. This direction was purported to have been made under s 25 of the *Emergency Management Act 2004* (SA) ("the Emergency Management Act"), following the declaration of a major emergency. It prohibited the appellants, both nurses, from working at their places of employment, unless they met certain COVID-19 vaccination requirements. Whilst proceedings were underway, the declaration of a major emergency was revoked, and the *South Australian Public Health (COVID-19) Amendment Act 2022* (SA) ("the Amendment Act") was enacted. A transitional provision in the Amendment Act, cl 2(1) of sch 2, purported to continue a relevant direction 'apparently in force' under the Emergency Management Act, as a direction under section 90C of the *South Australian Public Health Act 2011* (SA) (as inserted by the Amendment Act). The respondents successfully applied for the appellants' originating application for review to be summarily dismissed, on the ground that it ceased to have utility following the passing of the Amendment Act. The appellant appealed that decision

Held: dismissing the appeal

- The phrase 'apparently in force', read in context, was nothing more than a descriptive factum, chosen by the legislature as the trigger for a particular consequence, that had no bearing on the underlying question of actual validity of the declaration: [94]. In interpreting that descriptive factum, the Court was not tasked with determining what the law was, or even what it may have been: [95].

- A court charged with determining whether the last relevant emergency declaration was 'apparently in force', is able to do so by reference to the ordinary incidents of that descriptive factum in the context in which it is deployed. Having regard to the purpose of cl 2(1), those incidents were captured by the indicia identified by the primary judge, being that the declaration was styled as a notice issued under the Emergency Management Act; the declaration was promulgated as having been issued by the State Co-ordinator; and the declaration asserted that it had legal force: [93]-[94].

- Clause 2(1) did not constitute an impermissible direction to the Court to treat that which might be invalid as valid. The most that could be said is that Parliament had prospectively deemed the commands contained in the Seventh Healthcare Setting Direction to be within the scope of administrative authority under s 90C of the Amendment Act (*Building Construction Employees and Builder's Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372): [103]-[104].

- As there was no defect or potential defect in validity on the construction adopted, it was not appropriate to hypothesise about the kind of defect that might be said to engage either approach contended for in the Notice of Alternative Contention, being that the provisions should be read down or subjected to the principle of partial disapplication: [106]-[108].

Asia Pacific Decision of Interest

Fiduciary Relationships; Negligence: duty of care

How Weng Fan and others v Sengkang Town Council and other appeals **[2022] SGCA 72**

Court: Court of Appeal of the Republic of Singapore

Decision date: 9 November 2022

Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Tay Yong Kwang JCA and Woo Bih Li JAD

Various Town Councils (the plaintiffs) commenced proceedings in the High Court of the Republic of Singapore against several former and current Town Council members ("Town Councillors") and some of the Town Councils' senior employees and associates ("Employees") (together, the defendants). The dispute concerned the tender processes associated with the award of four contracts for Managing Agent ("MA") and Essential Maintenance Service Unit ("EMSU") services to FM Solutions & Services Pte Ltd ("FMSS"), the process by which payments were approved and made to FMSS and the award of contracts to various third-party contractors. The plaintiffs pleaded that the defendants owed various duties to their respective Town Councils as fiduciaries, under the tort of negligence, and pursuant to various statutes. The primary judge found that the defendants owed fiduciary duties in respect of the award of the four contracts and breaches of these duties in respect of two contracts. The primary judge further found breaches of duties of skill and care in relation to payment "control failures", improper payments made to FMSS and the improper award of contracts to third parties.

Held: allowing four of the appeals in part and dismissing one of the appeals

- The primary judge erred in finding that the defendants owed the Town Council any fiduciary or equitable duties: [146], [168]-[185], [289]. For a statutory duty to give rise to a concomitant duty of care at common law legal proximity and public policy considerations are required (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*")): [129]-[130]. A public body can be liable in private law if the private body has entered into a legal relationship that is governed by private law and assumed private legal duties under that relationship (*Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133): [142]-[143] Furthermore, the doctrine of separation of powers cautions against the Imposition of fiduciary duties on the defendants: [187]-[189], [211].

- The primary judge was correct in finding that the defendants owed a common law duty of care and skill as factual foreseeability, legal proximity and policy considerations were established (*Spandeck*): [223], [227], [290]. Regarding policy considerations, the defendants did owe a common law duty of care and skill in carrying out the respective duties claimed by the plaintiffs, subject to any applicable limits arising on the proper interpretation of s 52 of the *Town Councils Act* (Cap 329A, 2000 Rev Ed) ("*TCA*"): [235].

- The primary judge erred in finding that s 52 of the *TCA* cannot apply to claims brought by a Town Council against its own members, officers or employees: [254]. The ordinary meaning conveyed by s 52 of the *TCA*, which is not undermined by legislative material, shows that its purpose is to protect individuals attempting to discharge a public duty for a Town Council in good faith from personal liability for their actions: [246]-[248], [255]-[259]. In the context of s 52, the inquiry into good faith should be a subjective one: [281]-[283].

International Decision of Interest

Intellectual Property: patents; accounting of profits

Nova Chemicals Corp. v Dow Chemical Co. **[2022] SCC 43**

Court: Supreme Court of Canada

Decision date: 18 November 2022

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

Nova Chemicals Corporation ("Nova") made and sold products covered by Dow Chemical Company's ("Dow") patent for metallocene linear low-density polyethylenes, which are thin but strong plastics. Dow commenced proceedings in the Federal Court of Canada for patent infringement. The Court found that Nova had violated Dow's patent and ordered an accounting of profits to be assessed by reference. The reference judge awarded Dow a sum equal to Nova's actual revenue from selling the patented plastics minus its actual full costs associated with producing the patented plastics. Nova was only permitted to subtract its actual cost of producing ethylene, the main ingredient in the patented plastics, not the higher market price. For the first time in Canadian law, the Federal Court also awarded some of the profits Nova made after the patent's expiry to account for "springboard profits", being profits causally attributable to infringement of the patent. Nova unsuccessfully appealed this decision to the Federal Court of Appeal. Nova appealed this decision. In the Supreme Court, it advanced the new argument that, in calculating the account, the profits it could have made by manufacturing and selling a similar, non-infringing plastic (in this case, high density polyethylene or "pail and crate plastic") should be deducted from the profits it actually made selling the infringing plastic.

Held: dismissing the appeal

- The reference judge did not err in refusing to deduct the market price of ethylene. When calculating the infringer's profits, courts should consider only actual revenues and costs due to the principle that a patentee must take the infringer as they find them: [36]-[37].
- The pail and crate plastic was not a relevant non-infringing product because the pail and crate plastics markets and patented plastics markets do not overlap: [39]. Whether there is a relevant non-infringing option, being a product that helps courts isolate the profits causally attributable to the invention, is a question of fact: [3], [13], [58], [67]. To protect the patent bargain by disgorging the profits earned from patent infringement to the patentee and ensuring that infringers are deterred but not punished an account of profits requires that the infringer disgorge to the patentee the "portion of the infringer's profits which is causally attributable to the invention": [43]-[47]. A non-infringing option is not simply an infringer's "most profitable" alternative sales product that it "would have" and "could have" sold had it not infringed: [41], [59]-[66].
- The reference judge was correct in ordering springboard profits because springboard profits are an extension of the fundamental principle that, in calculating an accounting of profits, the infringer must disgorge all profits causally attributable to infringement of the invention: [4], [74]-[81]. Disgorgement of springboard profits is different from, but may be complementary to, compensating a patentee by way of a reasonable royalty: [84]
- In dissent, Côté J considered that a hypothetical non-infringing option does not need to be a true consumer substitute for the patented product provided that the patent infringer can establish on the balance of probabilities that, but for the infringement, it could have and would have pursued this alternative course of action: [91], [171], [187], [194]-[197]. This maintains the distinction between damages and accounting of profits: [118].