Court of Appeal
Supreme Court
Sydney

Decisions of Interest

21 November 2022 – 4 December 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

Negligence; duty of care

Bellvarde Constructions Pty Ltd v L'Officina by Vincenzo Australia Pty Limited **[2022] NSWCA 246**

Decision date: 2 December 2022

White and Brereton JJA and Simpson AJA

The first respondent was working as a sub-contracted carpenter on a residential building site. The head contractor was the appellant, Bellevarde Constructions Pty Ltd ("Bellevarde"), and the second respondent and cross-appellant ("L'Officina") was responsible for the supply and installation of a heavy metal clad door weighing approximately 200kg. The door was delivered to the site but could not be installed then because the footings were inadequate to support it. The following day, Mr Monahan responded to a call from another Bellevarde employee, to assist in loading the door onto the back of a tabletop truck. While doing so, Mr Monahan suffered a debilitating injury to his lumbar spine and has since been unable to work, forfeited his visa, and returned to his home in Ireland. Mr Monahan sued Bellevarde and L'Officina in the District Court. The primary judge awarded him damages of $750,000 against both defendants jointly and severally. On cross-claims for contribution between the defendants, the primary judge apportioned liability 80% to Bellevarde and 20% to L'Officina. Bellevarde appealed that decision, contending that it should have been held liable for only a minority share of the judgment. L'Officina cross-appealed, contending that it should not have been found liable at all.

Held: dismissing the appeal and allowing the cross-appeal

- The requirement for the door to be moved arose from Bellevarde's failure to have adequate footings in place for its installation and its desire for space on site. The lifting of the door was performed on a site which Bellevarde controlled, at the instigation of Bellevarde, under the supervision of a Bellevarde employee, by personnel recruited for the purpose by that Bellevarde employee, and was orchestrated and directed by Bellevarde's employee: [43]-[45], [48].
- The primary judge erred in concluding that L'Officina owed any relevant duty of care to Mr Monahan. No one from L'Officina invited Mr Monahan to participate in lifting the door. There is no evidence that anyone from L'Officina was involved in planning or directing the carrying and lifting of the door. Even if L'Officina's truck driver was involved in assisting with the lift, there is no evidence that he was involved in requesting, directing or orchestrating the activity. Even if there were some benefit to L'Officina in moving the door, essentially by way of reducing the risk of damage to it before it was installed, and L'Officina was motivated to cooperate in its temporary removal, it does not follow that L'Officina owed a duty of care to whomever Bellevarde might enlist to assist with that task. L'Officina was not vicariously liable for the negligence, if any, of its subcontractors: [42]-[45], [48].

Contracts: sale of land; wrongful termination

***Hong v Gui* [2022] NSWCA 245**

Decision date: 1 December 2022

Macfarlan JA, Simpson and Basten AJJA

On 26 September 2019 the appellant, Ms Hong, entered into a contract to purchase two strata properties from Mr Gui. The contract provided for a deposit of 10% of which 5% was paid upon signing. Settlement was to be effected through a PEXA workspace on 26 May 2020. On 3 August 2020, following various attempts by the vendor's solicitors to contact the purchaser's solicitors and effect settlement, the vendor's solicitors sent a notice to complete "on or before 4pm on 21 August 2020" and advised that failure to complete would entitle the vendor to terminate the contract. On 24 August 2020, the vendor's solicitors served a signed notice to terminate following the purchaser's failure to complete. On 26 August 2020, the purchaser's solicitors responded with their own notice of termination that stated that the vendor had not been "ready, willing or able to complete" because he had not served a land tax certificate in accordance with the contract. The purchaser also described the vendor's earlier purported termination as a repudiation of the contract, which the purchaser said she accepted. The vendor's new solicitors sent a copy of the land tax certificate and attempted to effect settlement. In late October, the purchaser commenced proceedings in the Supreme Court seeking the return of the 5% deposit. On 5 November, the vendor's solicitors served a second notice of termination. The primary judge held that the vendor was not entitled to terminate on 24 August 2020, as he was not ready and able to complete, not having served the land tax certificate at least 14 days earlier. Further, the purchaser's silence and inactivity did not amount to anticipatory repudiation. The primary judge held that the vendor's purported termination did not amount to repudiation because his conduct was consistent with an intention to complete the contract. The primary judge held that the vendor had validly terminated the contract on 5 November 2020 and was entitled to the unpaid balance of the deposit with interest. Ms Hong appealed that decision.

Held: dismissing the appeal

- The vendor's failure to provide the land tax certificate was a "factual error" on his part and could not reasonably be inferred to constitute a denial of his legal obligation under the contract. There would have been a case of repudiation had the purchaser confronted the vendor with his error and the vendor remained insistent upon his position and rejected any suggestion that the issue be resolved by a court. However, the appellant took neither of these steps prior to seeking to terminate the contract herself: [32]-[37]. The vendor's notice of termination of 24 August 2020 could not be viewed in isolation from the surrounding circumstances known to the recipient of the notice. A reasonable purchaser would have understood the notice as the final step in a process, which included the prior communications received from the vendor's solicitors, to which there had been no response: [43], [49].

- The vendor's communication of 3 August 2020 was not a repudiation of the contract because it contained advice that the vendor believed he would be entitled to terminate if the purchaser failed to complete: [50]-[52]. Pursuant to cl 9 of the contract, the vendor had a right to rescind in circumstances where the purchaser had failed to prepare for and attend settlement without any explanation. The provision of a draft notice to terminate on 20 August 2020 was a continuation of that intended effect: [50]-[52], [54]-[55], [58].

Employment and Industrial Law; Administrative Law

***Pascoe v SAS Trustee Corporation* [2022] NSWCA 244**

Decision date: 1 December 2022

Ward P, Kirk JA and Basten AJA

In 1988, Mr Pascoe sought a medical discharge from the Police Force for injuries sustained while undertaking police duties. Section 10 of the *Police Regulation (Superannuation) Act 1906* (NSW) ("Police Superannuation Act") provided for payment of an annual superannuation allowance to an officer who was discharged after being certified to be incapable, from a specified infirmity of body or mind, of discharging the duties of their office. Section 10B provided that the State Authorities Superannuation Board ("the Board") was responsible for making this determination. The Board had delegated those functions to the Police Superannuation Advisory Committee (PSAC). In 1989, PSAC notified the appellant that it was unable to certify his infirmity, but that the appellant was entitled to "appeal" to the Board pursuant to s 26 of the *Superannuation Administration Act 1987* (NSW) ("Superannuation Administration Act"). The appellant took that step. On 3 September 1990 the Board advised the appellant that it had reversed PSAC's decision and was issuing a certificate that he was "incapable due to the specified infirmity of 'generalised anxiety disorder'". The letter also advised the appellant that he had a right of appeal to the Industrial Commission within six months under s 27 of the Superannuation Administration Act. The appellant commenced Industrial Commission proceedings, challenging the Board's finding on the basis that the certified infirmity was unduly restricted. The appellant discontinued those proceedings in 1993. In 2018, the Court of Appeal in *SAS Trustee Corporation v Rosetti* [2018] NSWCA 68 held that, in relation to claims for a superannuation allowance, an appeal from a Board decision lay to the District Court and not the Industrial Commission. In 2020, the appellant commenced District Court proceedings pursuant to s 21 of the Police Superannuation Act, seeking review of the Board's 1990 decision. The primary judge dismissed the application, finding that he did not have jurisdiction because the application was brought outside the time limitation. Mr Pascoe appealed that decision.

Held: dismissing the appeal

- In delegating the function of determining claims for certification of incapacity resulting from a specified infirmity to PSCA, the Board did not abandon its own authority and power to decide such claims. Accordingly, PSAC was not *functus officio* after it made and notified its decision and the Board could exercise its power to reconsider the claim: [49], [52], [55].
- The Board's letter of 3 September 1990 provided sufficient notification of the decision such that the notification requirement in s 21(1) of the Police Superannuation Act was satisfied. It should not be inferred from the legislation that the purpose of the notification is frustrated where actual notification is accompanied by a representation which may turn out to be factually incorrect advice as to the availability of review: [62], [79]-[80]. The former understanding as to the right of appeal did not preclude the appellant from undertaking an appeal to the Industrial Commission from the Board's decision. It would be contrary to the interests of justice to allow the appellant to reagitate medical questions some 30 years after the expiry of the time limitations: [63], [70], [72]-[74]. The Board's letter did not result in procedural unfairness as it offered the appellant the opportunity of review by appeal to the Industrial Commission: [82].

Constitutional Law: implied freedom of political communication

***Burton v Director of Public Prosecutions* [2022] NSWCA 242**

Decision date: 30 November 2022

Bell CJ, Leeming and Kirk JJA

Section 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("the Act") prohibits the publication or broadcasting of the name of a child who is connected to care proceedings or procedures under the state's child welfare system, which are governed by the Act. Mr Paul Burton and Mr Andrew Katelaris were charged with contravention of the section. The charges involved conduct occurring between 31 May and 14 July 2017. They brought proceedings in the Supreme Court alleging that s 105, as it stood during that period, was invalid for impermissibly burdening the implied constitutional freedom of communication on political and government matters. That argument was rejected by the primary judge. Mr Burton and Mr Katelaris sought to appeal that decision.

Held: granting leave to appeal but dismissing the appeal

- The prohibition in s 105 of the Act only applies when there is some connection in the publication or broadcast between identification of the child on the one hand, and on the other pending, contemplated or completed court proceedings, non-court proceedings or a relevant report: [30]. Despite the apparent anomaly on the face of the text of s 105, it is implicit that the ability of a young person to consent to publication or broadcast does not cease upon them turning 18 (*Taylor v The Owners - Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9): [34].
- The constitutional freedom is burdened insofar as people are prohibited from publicly protesting or discussing the removal of particular children by governmental action: [41]. That burden is not insignificant, but it is limited because: it is only directed to one topic of governmental action, there are means by which consent for identification may be given, and the prohibition is content neutral in the sense that it does not attack criticism any more than it targets praise of government policies or action: [41]-[48].
- The long-recognised purpose of protecting the privacy of children and young persons involved in the state care system does not conflict in any way with the maintenance of the constitutionally prescribed system of representative government: [49]-[55]. Section 105 is a suitable means to achieve the identified purpose, in the sense of having a rational connection to that purpose: [56]. The burden is necessary, in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom: [59]-[66]. Section 105 is adequate in its balance in that it is not unduly burdensome on the freedom, taking account of the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom: [67]-[71].

Australian Intermediate Appellate Decisions of Interest

Statutory Interpretation; Limitation Periods

***Walker v Members Equity Bank Ltd* [2022] FCAFC 184**

Decision date: 28 November 2022

Wigney, Lee and Abraham JJ

On 25 May 2021, the appellant, an officer of the Australian Securities and Investments Commission ("ASIC"), together with the Commonwealth Director of Public Prosecutions ("the prosecutor"), commenced summary criminal proceedings in the Federal Court of Australia against the respondent, Members Equity Bank Ltd ("ME Bank"), in respect of 44 charges against ss 12DB(1)(g) and 12GB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act") and 18 charges against either s 64 or s 65 of sch 1 of the *National Consumer Credit Protection Act 2009* (Cth) ("National Credit Code"). The primary judge ordered a separate hearing on the question of whether a subset of the alleged offences, which were all offences against ss 12DB(1)(g) and 12GB(1), were statute barred. Section 12GB(6) of the ASIC Act provided that a prosecution for the relevant offences "may" be commenced within three years after the offence was committed. The primary judge found that, under s 12GB(6), the prosecutions for the relevant offences were statute barred, because each offence was allegedly committed more than three years before 25 May 2021. The prosecutor appealed that decision.

Held: dismissing the appeal

- The text, context and legislative history of s 12GB(6) of the ASIC Act supported the primary judge's construction: [55]-[57], [77]. The prosecutor's construction was that the provision imposed a three year limitation period only when some other statutory provision would otherwise impose a shorter limitation period. If correct, this would mean that there was a three year limitation period when the offender was an individual principal (because s 15B(1)(b) of the *Crimes Act 1914* (Cth) ("Crimes Act") would otherwise apply a one year limitation), but no limitation when they were a corporation or an accessory to a corporation: [27]. This construction found little or no support in the text of the provision.

- Although the word "may" generally indicates that the act or thing may be done at the discretion of the person, court, or body, if it had that meaning in s 12GB(6), then the section would have no sensible meaning: there is no point in a provision informing the prosecution they can, but need not, commence proceedings within three years: [45]. Rather, in s 12GB(6), "may" means that the act of commencing a prosecution may be done only if done the specified circumstances, namely within three years after commission of the offence: [43]-[45]. There is a close parallel for this mandatory use of "may" in s 15B(1) of the Crimes Act: [46]-[50]. Further, the prosecutor conceded s 12GB(6) did impose a "hard" limitation when the offender was an individual: it would be irrational to read "may", in s 12GB(6), as sometimes meaning "must" and at other times not: [46].

- The legislative history of s 12GB(6) supported the conclusion that the section imposes a "hard" limitation period. There was nothing to indicate that s 79(6) of the *Trade Practices Act 1974* (Cth) ("the Trade Practices Act"), which was transplanted into the ASIC Act in the form of s 12GB(6), created anything other than a mandatory limitation period. This provision, both in the Trade Practices Act and the ASIC Act, was continued in force even after s 15B(1)(b) was introduced into the Crimes Act. The legislature therefore intended for the three year limitation in s 12GB(6) to remain in force both in the case of individual principals *and* corporations. If that outcome was instead a result of legislative oversight, it was an oversight that should be corrected by the legislature, not by the Court giving a strained meaning to the provision [90]-[103], [136].

Succession: family provision

***Karimalis v Kapodistrias* [2022] TASFC 10**

Decision date: 1 December 2022

Pearce and Brett JJ and Porter AJ

The appellant was the wife of the late Theodoros Karimalis who died in 2020. At that time, they were living together in a house in Shepherd Street, Sandy Bay ("the marital home") owned by the testator. The respondents are the executors and trustees of the estate. Prior to his death, the testator had purchased a house in Coolabah Road, Sandy Bay in his wife's name. The testator's will made provision for his wife by creating a "fund" to be administered by the trustees, consisting of one of three housing flats owned by the testator. The trustees were directed to pay to the appellant the net income of the fund so that the distribution was no less than the equivalent of an individual's age pension. They could use the capital to increase the income stream in certain circumstances. The remainder of the estate was left to the first respondent. The wife commenced proceedings in the Supreme Court of Tasmania by way of an application pursuant to the *Testators Family Maintenance Act 1912* (Tas) ("the Act"). The primary judge found that the appellant had been left without adequate provision for her proper maintenance and support. The primary judge determined that the wife be given a life estate in the marital home and $300,000 out of the estate in substitution for the income stream from the flat as provided in the will. The wife appealed that decision.

Held: allowing the appeal in part, upholding the provision of a life estate but increasing the capital sum to $650,000

- The primary judge did not err in including the Coolabah Road property when assessing whether the appellant's own assets could make up "the sum necessary to provide capital from which an income can be drawn for life": [28], [31]. That is because, when determining a family provisions application, s 7B of the Act requires the Court or judge to have regard to "whether any such person is entitled to independent means, whether secured by any covenant, settlement, transfer, or other provision made by the deceased during his life or derived by any source whatsoever": [30].

- It was not against "community standards" for the Court to award the appellant a life estate in the matrimonial home. "Community standards" are to be understood as the court's perception of what fair and reasonable members of the community would expect a testator to provide for the applicant, not something that is to be proved as a standard against which the court's judgment is to be made (*Steinmetz v Shannon* [2019] NSWCA 114; (2019) 99 NSWLR 687): [63]-[65].

- The primary judge did not err in granting the wife a life estate, as opposed to an estate in fee simple. The appellant had sufficient security of accommodation in the home and the Act did not require her to receive a fee simple interest: [76]-[77].

- However, the provision of the capital sum of $300,000 was insufficient. The sum was dependent on the sale of Coolabah Road and therefore uncertain market conditions; the sale of that property also deprived the appellant of an annual net income of about $26,000 a year: [68]-[70]. Second, it was not reasonable to establish a capital fund based on expected annual expenditure and designed to be exhausted by the appellant's date of expected death: [71]. Due to the contingencies of significant ill health before or after the expiry of statistical life expectancy,, the need to find more suitable accommodation and other adverse contingencies, the capital sum should be $650,000: [84]-[85].

Asia Pacific Decision of Interest

Human Rights: voting; freedom from discrimination

Make It 16 Incorporated v Attorney-General **[2022] NZSC 134**

Court: The Supreme Court of New Zealand

Decision date: 21 November 2022

Winkelmann CJ, Glazebrook, O'Reagan, Ellen France and Kós JJ

The minimum voting age in New Zealand is 18 years. The appellant, Make It 16 Incorporated ("Make It 16"), is campaigning to have the voting age lowered to 16 years. Make It 16 sought declarations in the High Court that the provisions setting the minimum voting age in the *Electoral Act 1993* (NZ) ("the Electoral Act") and the *Local Electoral Act 2001* (NZ) ("the Local Electoral Act") are inconsistent with the right to freedom from discrimination on the basis of age, which is enshrined by s 19 of the *New Zealand Bill of Rights Act 1990* (NZ) ("the Bill of Rights")and which applies to those aged above 16 years. The High Court declined to make the declarations sought on the basis that the limit on the freedom from discrimination on the grounds of age was a justified limit under s 5 of the Bill of Rights. On appeal, the Court of Appeal disagreed that the limit was justified but declined to make the declarations sought referring, amongst other matters, to the political nature of the issue. Make It 16 appealed that decision.

Held: allowing the appeal, declaring that the provisions of the Electoral Act and of the Local Electoral Act which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 of the Bill of Rights to be free from discrimination on the basis of age; these inconsistencies are not justified under s 5 of the Bill of Rights.

- The courts below did not err in inquiring into the consistency of the minimum voting age requirements: [34]. Because the Electoral Act's voting age provisions can be altered only by a 75% parliamentary majority or by a plebiscite, the courts should proceed with restraint and an eye to comity when approaching the inquiry. However, these considerations are not a bar to engaging in the inquiry: [27]-[31].

- Section 12 of the Bill of Rights guarantees the voting rights of those aged 18 and over. It would be a breach of those rights to set a minimum voting age above the age of 18; but it would not be a breach to set a minimum age below 18: [35]-[40]. In dissent, Kós J found that s 12 of the Bill of Rights protected those over 18 from any age-based enlargement of the franchise; and, because this right was explicit, it prevailed over the generalised right to freedom from discrimination: [74], [93]-[94]. The Court unanimously found that the provisions of the Local Electoral Act must be declared inconsistent with s 19 of the Bill of Rights, because those provisions stand alone, unaffected and unprotected by s 12: [39], [72], [95].

- The limitation on the right to vote is not justified. The statutory objective adopted by the High Court, namely "to implement the basic democratic principle that all qualified adults [and not children] should be able to vote" was too broad: [45]-[46]. Evidence suggests that the ability to make decisions with deliberation in the absence of high levels of emotion, such as voting, reaches adult levels during the mid-teen years: [52]-[53], [56].

- The Court of Appeal erred in declining to grant the declaratory relief sought: [68]-[69]. The declaration would not be premature because the Royal Commission Report in 1986 said that "a strong case" could be made for reducing the voting age to 16: [65]. This is supported by other factors, including the need to protect the rights of the minority group in question, obligations under international law, and the fact that age 16 is specified in the anti-discrimination provisions: [67].

International Decision of Interest

Scotland Act 1998 (UK): reserved matters; devolution

Devolution issues under the Scotland Act 1998. Reference by the Lord Advocate (Rev 1) **[2022] UKSC 31**

Court: United Kingdom Supreme Court

Decision date: 23 November 2022

Lord Reed (President), Lord Lloyd-Jones, Lord Sales, Lord Stephens and Lady Rose

The Scottish Government wishes to hold a referendum on independence and has drafted a Scottish Independence Referendum Bill. Section 29(1) of the *Scotland Act 1988* (UK) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the parliament. Section 29(2)(b) provides that a provision that relates to reserved matters, as defined in Sch 5, is outside legislative competence. Paragraph 34 of Sch 6 to the *Scotland Act* provides that the Lord Advocate may refer a devolution issue to the Supreme Court. The question referred was: "Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be 'Should Scotland be an independent country?' relate to reserved matters?".

Held: the provision in question does relate to reserved matters.

- The question referred was a devolution issue which the Court had jurisdiction to decide: [47]. The question was one "arising by virtue of" the *Scotland Act* because s 31(1) requires that the relevant person, on or before the Bill's introduction in the Scottish Parliament, state that in their view, the provisions of the Bill would be within the legislative competence of the Scottish Parliament: [9], [16]. The Court accepted the reference because it concerned a question of law with public importance and practical consequences: [54]-[53].

- The question whether the provision of the proposed Bill would relate to matters reserved to the United Kingdom Parliament is to be determined by reference to the purpose of the provision, having regard to its effect in all the circumstances: [56]-[57], [70], [75]. A provision will relate to a reserved matter if it has something more than a loose or consequential connection with it: [57], [71]-[72]. The purpose and effect of the provision may be derived from a consideration of both the purpose of those introducing the legislation and the objective effect of its terms: [73]-[74]. Two reserved matters were relevant: "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" (Sch 5, paras 1(b) and (c)). The latter reservation includes the sovereignty of the United Kingdom Parliament: [76]. The purpose of the Bill was to hold a lawful referendum on the question of whether Scotland should become an independent country, that is, on ending the Union and the sovereignty of the United Kingdom Parliament over Scotland: [77], [82]. Even if the referendum was not self-executing, it would have important political consequences: [78]-[81]. Accordingly, the proposed Bill related to reserved matters and is outside the legislative competence of the Scottish Parliament: [82]-[83], [92].