Court of Appeal
Supreme Court
Sydney

Decisions of Interest

27 February 2023 – 12 March 2023

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

Statutory Interpretation; Constitutional Law

***Attorney General for New South Wales v FJG* [2023] NSWCA 34**

Decision date: 6 March 2023

Bell CJ, Ward P and Beech-Jones JA

FJG and FJH, the defendants, married in New South Wales in 2009 and registered their marriage under the *Birth, Deaths and Marriages Registration Act 1995* ("the NSW Act") by entering the particulars of their marriage in the Register of Births, Deaths and Marriages in accordance with the "official certificate of their marriage" produced under s 50 of the *Marriage Act 1961* (Cth) ("the *Marriage Act*"). FJG's details were entered in the Register under the description "bridegroom". FJG was born in Victoria in 1975. FJG's birth certificate was issued under the predecessor of the *Births, Deaths and Marriages Registration Act 1996* (Vic) ("the Victorian Act") and recorded FJG's sex as "male". In 2018, FJG effected a change of name under Pt 4 of the Victorian Act and in 2020, FJG acknowledged her sex as "female" in accordance with Pt 4A. In 2009, FJG self-identified as female but satisfied the legal concept of "male" as used in the *Marriage Act*. In 2021, the defendants applied to have the Registrar of Births, Deaths and Marriages "correct" the entry in the Register, under s 45 of the NSW Act, to reflect FJG's change of name and acknowledgement of sex. The Registrar refused the application. FJG applied for review of the decision by the New South Wales Civil and Administrative Tribunal. NCAT set aside the Registrar's decision and remitted the application for reconsideration. The Registrar appealed to the Appeal Panel, which joined the Attorney General for NSW and referred various questions of law to the Court of Appeal.

Held: making declarations largely in the form sought by the Attorney-General for NSW

- Section 45 of the NSW Act does not enable the Registrar to "correct" the Register's entry of the defendants' marriage to reflect FJG's change of name and acknowledgement of sex. The NSW Act creates a register of "registrable events". The relevant registrable event is the marriage as defined and described by the *Marriage Act* as in force from time to time. The only method of effecting registration of that event is the provision of the "official certificate of marriage". The Register captures a "snapshot" of information about the solemnisation of the marriage as recorded in the official certificate of marriage, including the designation of each of the parties as either the "bridegroom" or "bride". The power to correct the Register does not extend beyond ensuring that the particulars of the marriage that are recorded accord with that certificate: [67]–[69]. Both changes of name and sex, including acknowledgements of sex under the Victorian Act, are "registrable events" under the NSW Act. However, the NSW Act does not treat changes of name and sex as being changed for all purposes and at all times. The provisions of the NSW Act dealing with change of name and sex do not affect the registration of marriages: [71]–[74].

- Section 45 of the NSW Act and ss 50 and 51 of the *Marriage Act* should be construed to be consistent with each other and to give the scheme of registration of marriage a harmonious operation. To this effect, s 45 cannot require the correction of the Register in a way that is inconsistent with the "official certificate of marriage": [82]−[83]. There was no need to decide whether s 45 of the NSW Act authorises a "correction" to the Register's entry for a marriage so that it records a marriage between two persons of the same sex if, at the time the marriage occurred, same sex marriage was not lawful under the Marriage Act: [84].

Land Law: strata title; Limitation of Actions

The Owners – Strata Plan No 74232 v Tezel **[2023] NSWCA 35**

Decision date: 6 March 2023

Gleeson, Mitchelmore and Kirk JJA

This appeal concerned whether a respondent's claim against the applicant owners' corporation for loss of rent was out of time because of s 106(6) of the *Strata Schemes Management Act 2015* (NSW) ("SSM Act"). The respondent owned a unit in a strata scheme in Bondi Beach. In 2013, following periods of heavy rain, she observed water leaking into her unit. During that year, she removed the carpet and ceased living in the unit. The unit has been unoccupied since 2016, when the respondent unsuccessfully attempted to rent it out. On 6 November 2020, the respondent commenced proceedings against the applicant in the New South Wales Civil and Administrative Tribunal seeking to recover loss of rent from 6 November 2018, pursuant to s 106(5) of the SSM Act. The Tribunal dismissed the respondent's claim, concluding that it was barred by s 106(6) because the relevant limitation period began in 2016, when the respondent first became aware of the rental loss. The respondent successfully appealed this decision to the Appeal Panel. The applicant appealed that decision. The respondent sought leave to cross-appeal on the basis that the Appeal Panel constructively failed to exercise its jurisdiction in failing to grant damages for future loss and when making its order for costs.

Held: granting leave to appeal, allowing the appeal and dismissing the cross-appeal

- The respondent first became aware of the loss of rent in 2016, at which point the two-year limitation period began to run. The respondent's claim was therefore brought out of time: [12], [29], [49].
- The phrase "first becomes aware of the loss" in s 106(6) refers to the time at which the lot owner was first aware of the kind or type of loss that they were entitled to recover pursuant to s 106(5) (subject to establishing the elements of the cause of action). The phrase does not require that the loss be reasonably foreseeable, nor does it refer to the particular loss that the lot owner is seeking to recover under s 106(5): [41]-[42].
- It was not the case, contrary to the argument of the lot owner, that the loss recurred on a rolling basis until the breach of s 106 was remedied such that the respondent's knowledge of that loss reset on each day that the breach continued: [45]-[46].
- The grounds of the cross-appeal do not raise questions of law and in so far as the respondent sought to narrow Ground 1 of the cross-appeal at the hearing, that question should await a case that requires its determination (*Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd* [2022] NSWCA 150): [14], [54].

Corporations: statutory derivation action

Mount Gilead Pty Ltd v Macarthur-Stanham (as executor of the Estate of the late Lee Macarthur-Onslow) **[2023] NSWCA 37**

Decision date: 7 March 2023

Bell CJ, Ward P and White JA

Lady Katrina Hobhouse (the applicant) and the now late Mr Lee Macarthur-Onslow ("Lee") were siblings. Lee was a director of Mount Gilead Pty Ltd ("MGPL") and, from 2013, was MGPL's governing director. The applicant had been a director of MGPL until 2004. MGPL owned a property comprising three lots near Campbelltown named "Mount Gilead". In 2015 ("the Lendlease Transaction"), MGPL, while under the control of Lee, granted Lendlease Communities (Mt Gilead) Pty Ltd options to purchase two of the lots. The applicant sought leave under s 237 of the *Corporations Act 2001* (Cth) (the "Act") to bring proceedings in MGPL's name against Lee, asserting that the Lendlease Transaction had been entered into at a significant undervalue and seeking compensation for MGPL's resulting loss. The applicant relied on a similar, earlier commercial agreement (the "Australand Option Agreement"). The primary judge dismissed the application for leave and proceedings which had been commenced by the applicant and MGPL against Lee, Mr Martin, Old Mill Pty Ltd and Jones Lang Lasalle in anticipation of a grant of leave under s 237. As against Lee, the primary judge's conclusion turned principally upon his Honour's construction of a settlement deed that had been entered into relevantly by the applicant, MGPL and Lee in relation to earlier proceedings in the Supreme Court. Lady Katrina Hobhouse, acting on behalf of MGPL, appealed that decision.

Held: granting leave to appeal but dismissing the appeal

- Clause 11.1 of the settlement deed precluded the applicant from bringing the proposed action against Lee, even while acting on behalf of MGPL, the result of which was that there was no serious question to be tried : [45], [58]. The putative action proposed on behalf of MGPL was a "Claim" (as defined) that the applicant "had", within the meaning of the settlement deed: [54]-[55].

- The primary judge did not err in holding that the applicant lacked good faith in circumstances where the action was brought 17 years after she ceased being a director of MGPL and in breach of the settlement deed. Generally, the greater the gap in time between a person ceasing to hold the office entitling that person to make an application under s 237 and the events that are said to be the subject of the claim brought on behalf of a company, the more difficult it will be to establish the requirement of good faith: [66]-[67]. The claim against Mr Martin depended on there being a serious question to be tried as to the existence of a retainer between Mr Martin personally and MGPL: [80]. Mr Martin's involvement in the Lendlease Transaction was as an officer of Old Mill Pty Ltd: [83], [86].

- The primary judge was correct to find that there was no serious question to be tried as to whether MGPL had suffered loss or damage. While a "complete proof" of evidence of such loss need not be presented, the onus is on the applicant to satisfy the dual requirements of a serious question to be tried and that the grant of leave would be in the company's best interests: [116]. Generally, uncompleted contracts and option agreements are insecure foundations for calling into question the fair value of a later transaction, especially one completed many years later. In this instance, the Australand Option Agreement was no evidence of loss or damage: [107]-[110].

Consumer Law: misleading or deceptive conduct; Contracts: breach

***Larsen v Tastec Pty Ltd* [2023] NSWCA 39**

Decision date: 9 March 2023

Ward P, Mitchelmore and Kirk JJA

The appellants, Floyd and Derek Larsen, are the trustees of the Larsen Superannuation Fund (the "Fund") which owns a property in Glen Alice, NSW. The Larsens entered into a contract with the first respondent, Tastec Pty Ltd, for the supply and assembly of a prefabricated house on the property. The second respondent, Mr Sainsbury, is a registered architect and a director of Tastec. The contract initially contemplated that the roof and walls of the house would be clad in a product called "Maxline 340". Later, the parties varied the contract to specify a different cladding product the respondents referred to as "Extraline 294". The cladding manufacturer did not produce a cladding product under that name. Instead, the product was one which the Larsens had rejected on a previous occasion, with a modification. When the Larsens became aware of this, they instructed Tastec to proceed using the unmodified, previously rejected panels. The Larsens commenced proceedings in the District Court alleging that Tastec's supply and assembly of the house was defective and that both respondents had made misleading or deceptive representations about the cladding material, which caused defective cladding product to be installed. They sought damages against Tastec for breach of contract, and damages and/or compensation under the Australian Consumer Law. They separately sought orders against Mr Sainsbury. The primary judge dismissed the claims, finding that there was the Larsen's had failed to establish: a contractual relationship with the respondents in respect of which they could bring a claim, damage and/or causation in respect of the contractual claims, and that the respondents had made false or misleading representations on which the Larsens had relied to their detriment. The Larsens appealed that decision.

Held: allowing the appeal

- When determining whether the Tastec's conduct was misleading or deceptive, it was necessary to consider objectively and determine the character of that conduct in relation to the appellants, bearing in mind what matters of fact each knew, or may be taken to have known, about the other as a result of the nature of their dealings and the conversations between them. The conduct of the person alleged to have engaged in the misleading or deceptive conduct must be viewed as a whole: [103]. In relation to the question of reliance, there is no requirement that the contravening conduct be the sole cause of loss or damage. It will suffice that the conduct "make some non-trivial, material, or substantial, contribution to the decision of a claimant to act in a particular way": [122]. Contrary to the primary judge's conclusions, the first respondent engaged in conduct that was misleading or deceptive or was likely to mislead or deceive, which the appellants relied on in deciding to proceed with the cladding solution ultimately installed: [8], [102]. The primary judge erred by failing to assess reliance at the time when the appellants executed the variation to the contract that led to the change in cladding material. This error also infected her Honour's conclusions as to the loss or damage sustained by the appellants: [123], [133].

- The Fund was the owner of the land on which the house was built, such that the appellants had no capacity to enter into the contract with the respondents other than as trustees of the Fund. The primary judge erred in concluding to the contrary: [9], [139].

- The primary judge did not err in the respects advanced by the appellants in dismissing their claim for loss and damage in relation to the external doors and windows. There was also no error in her Honour's conclusion regarding the claim for breach of contract in relation to the internal doors: [9], [151], [155]-[157].

Australian Intermediate Appellate Decisions of Interest

Equity: tracing

RnD Funding Pty Limited v Roncane Pty Limited [2023] FCAFC 28

Decision date: 9 March 2023

Beach, Derrington and Halley JJ

RnD Funding Pty Ltd was a company controlled by Mr Nakat, and Roncane Pty Ltd was a company controlled by Mr Hillam. RnD sought to recover $1,670,000 which it advanced to Australian Tailings Group Pty Ltd ("ATG"), another entity then controlled by Mr Hillam, pursuant to a loan facility. ATG and other companies controlled by Mr Hillam granted security for the repayment of the loan, extending to any funds held in the several companies' bank accounts. RnD claimed that, after the security crystallised, ATG disposed of money in one of its accounts by purchasing shares in Goldus Pty Ltd in Roncane's name. RnD commenced proceedings in the Federal Court, claiming that it was entitled to trace its security interest into those shares, and seeking a declaration that it was entitled to ownership of them. RnD argued that when the security crystallised, that it became beneficially entitled to the funds held in ATG's accounts. Its claim that ATG's use of those funds constituted a "theft" amounted to an assertion that the security transferred legal title to the funds, which the primary judge held was incorrect. However, RnD also argued that the Goldus shares held by Roncane were were subject to a constructive trust in RnD's favour.. The primary judge refused to allow tracing.

Held: allowing the appeal

- The primary judge erred in concluding that "[e]quity only affords the characteristics of property that allows for tracing into the hands of third parties where the interest takes the form of a vested beneficial interest in trust property" and that, "there appears to be no Australian decision that has embraced a complete departure from the requirement that there must be a fiduciary relationship before tracing can apply on the basis of an equitable foundation.": [45]. Instead, the right to trace was founded on the existence of some "sufficient" equitable property interest: what counts as a "sufficient" interest was not determined, but includes at least rights under an equitable charge or equitable mortgage: [113].
- Tracing is a tool used to vindicate or enforce proprietary rights, and in that sense, is different in principle from claims seeking compensation or a remedy for loss of a right: [54]. Yet, while tracing is process, it is not devoid of all "substantive" character: by evidencing sequential transactions involving a misappropriated asset, tracing creates "latent assumptions" that rights to that asset endure across its various transmutations: [55].

Procedure; Professions and Trades

Medical Board of Australia v Adams **[2023] WASCA 41**

Decision date: 3 March 2023

Mitchell, Beech and Hall JJA

In 2021, the Medical Board of Australia suspended consultant paediatrician Dr Adam's registration as a medical practitioner because it believed that, due to allegations about Dr Adam's conduct, he posed a serious risk to persons and that "immediate action" to protect public health and safety was necessary. Dr Adams commenced proceedings in the State Administrative Tribunal, seeking review of that decision. At the hearing, he accepted that immediate action was appropriate, but challenged the form of that action adopted by the Board. He submitted that an undertaking would sufficiently protect public health and safety. In support of his case before the Tribunal, Dr Adams relied on an affidavit in which he denied the allegations forming the basis for his suspension and offered the undertaking. At the hearing before the Tribunal, the Board sought leave to cross-examine Dr Adams on his affidavit to demonstrate Dr Adams' lack of candour, which, in turn, would demonstrate that he could not be trusted to comply with his undertaking. The Tribunal refused to permit the Board to cross-examine Dr Adams, accepted the undertaking, and set aside the suspension of his registration. The Board sought leave to appeal that decision. It pointed in particular to s 32(6)(c)(ii) of the *State Administrative Tribunal Act 2004* (WA) ('the Act'), which required the Tribunal to "take measures that are reasonably practicable" to ensure parties have the opportunity to examine, cross-examine or re-examine. At the same time, the Board began substantive proceedings against Dr Adams, seeking to prove the allegations against him.

Held: refusing leave to appeal

- It was not in the interests of justice to grant leave to appeal because: the decision was not final; the substance of the Board's interests in the proceedings lies in the protection of public health and safety and the ground of appeal was not directed to that topic; a grant of leave in the "immediate action" matter would have limited value, given the substantive proceedings afoot ([65]-[69]); success in the appeal would not require the Tribunal to make a different decision on "immediate action";; remitter of the immediate action proceedings might have slowed down the progress of the substantive proceedings; that the Board proposed to put on evidence adverse to Dr Adams during substantive proceedings reinforced the Tribunal's concern that it would be unfair to cross-examine Dr Adams before he was confronted with that evidence; the merits of the proposed appeal did not justify the grant of leave: [70]-[75].

- Section 32(6)(c)(ii) of the Act does not provide that the Tribunal must permit parties to examine, cross-examine and re-examine witnesses. It requires the Tribunal to take measures that are reasonably practicable toward the ends identified in each of pars (a), (b) and (c). The presently relevant end in sub par (ii) is to ensure that the parties have the opportunity to examine, cross-examine and re-examine witnesses. The choice of the word 'opportunity' is significant. It is the language of procedural fairness. The test of 'reasonably practicable' also echoes the concept of what is procedurally fair. Reading s 32(6)(c) as a whole, its purpose and effect is to articulate specific aspects of what procedural fairness to the parties entails: [81].

- There is no rule that procedural fairness requires that a party be permitted to cross-examine. Whether it does so depends on all the circumstances: [90]. The limited likely utility of the proposed cross-examination, combined with the prospect of real prejudice to Dr Adams, justified the Tribunal's decision to decline to permit cross-examination: [96], [106]-[109].

Asia Pacific Decision of Interest

Conflict of laws: choice of law; Trusts

Tamar Perry and another v Jacques Henri Georges Esculier and another **[2023] SGCA(I) 2**

Court: Court of Appeal of the Republic of Singapore

Decision date: 2 March 2023

Judith Prakash JCA, Steven Chong JCA and Beverley McLachlin IJ

The appellants and the respondents were victims of a Ponzi scheme operated by a group of five companies (collectively, "Lexinta") with their main office in Switzerland. From 2016 to 2017, the appellants made investments in the scheme by transferring funds to Hong Kong bank accounts belonging to one of the Lexinta companies', Lexinta Group Limited ("LGL"). At this time, the respondents, who were earlier investors, realised their investments from LGL (the "Disputed Moneys"). The Disputed Moneys were paid into the respondents' account with DBS in Singapore. LGL was not a party to the asset management agreements (the "AMAs") under which the investments had been made. Only three of the Lexinta companies were defined in the AMAs as constituting the "Lexinta Group". DBS commenced proceedings in the High Court of Singapore to resolve competing claims to the Disputed Moneys. The appellants claimed that: the Disputed Moneys were not the respondents' return on their investment; Lexinta had been operating the Ponzi scheme before the respondents' first investment in 2014; since LGL was not a party to the AMAs, LGL held the funds on trust for the appellants; and because the respondents had notice of the appellants' claim to the Disputed Moneys when they received it they held it on trust for the appellants. The primary judge found in favour of the respondents and allowed their counterclaim for damages for the freezing of the Disputed Moneys. The appellants appealed that decision

Held: dismissing the appeal

- For the appellants to prove that the Disputed Moneys received by the respondents were not "genuine" returns on their investment, it sufficed to show that the funds the respondents received were in fact the funds transferred by the appellants to LGL. This point could not be seriously denied given the close proximity in time between the appellants' transfers to LGL and LGL's transfers to the respondents: [21]–[23]. The Judge was entitled to find that the start date of the Ponzi scheme was "not proved". Regardless, whether there was a Ponzi scheme was only significant if Swiss law was not the governing law: [26], [29] and [34].

- The primary judge erred in finding LGL to be a party to the AMAs by implication. The relevant inquiry was whether the appellants' transfers to LGL were made pursuant to the AMAs. This was the case because the appellants' transfers were clearly made for the purpose of the investment under the AMAs: [38]–[40]. Since the transfers were made pursuant to the AMAs, Swiss law applied as the express choice of law. In any event, neither of the other two competing laws – Singapore law as the *lex situs* of the Disputed Moneys or Hong Kong law as the law of the place of LGL's incorporation – could apply as the governing law. The "legal foundation" of the appellants' claim was the AMAs: [43], [46]–[47].

- The appellants' claim could not succeed under Swiss law as it was never alleged that the respondents had acted in bad faith or were complicit in the Ponzi scheme and under Swiss law, payment by LGL to the respondents discharged the Lexinta Group's obligations to the respondents under the AMA. Finally, there was no merit to the appellants' alternative case that they could nevertheless recover the portion of the Disputed Moneys representing the interest on the respondents' principal investment even if the respondents were entitled to retain their principal investment sum: [48]–[53].

International Decision of Interest

Statutory Construction

***R (on the application of VIP Communications Ltd (In Liquidation)) v Secretary of State for the Home Department* [2023] UKSC 10**

Court: United Kingdom Supreme Court

Decision date: 8 March 2023

Lord Reed, President, Lord Lloyd-Jones, Lord Sales, Lord Stephens, Lord Richards

This appeal concerned commercial multi-user GSM (Global Systems for Mobile Communications) gateway apparatus ("COMUGs"). GSM gateways are telecommunications equipment which enable phone calls and text messages from landlines to be routed directly on to mobile network without transmitting information such as the identity of the calling party and the user's location. Under s 8(4) of the *Wireless Telegraphy Act 2006* (UK) (the "WTA"), the Office of Communications ("Ofcom") is under a duty to make regulations exempting the installation and use of certain wireless telegraphy equipment from the requirement for a license under s 8(1) of the WTA, if satisfied that the conditions in s 8(5) are met. Under s 5(2) of the *Communications Act 2003* (UK) (the "CA"), Ofcom is under a duty to carry out its functions in accordance with directions given by the Secretary of State on limited grounds, which include the interests of national security and public safety. Ofcom published a notice stating its intention to make regulations exempting COMUGs from licencing requirements. The Secretary of State for the Home Department issued a direction that COMUGs should not be exempted on the basis of national security and public safety concerns (the "Direction"). The High Court held that the Direction was *ultra vires*. The Court of Appeal agreed. The appellant appealed that decision

Held: allowing the appeal

- The use of wireless telegraphy could give rise to national security concerns. National security, along with the other matters listed in s 5(3) of the CA, are core functions of the government. A regulator, like Ofcom, is not equipped to have responsibility for such matters: [33]. Parliament's purpose in enacting s 5 was that the government should continue to be responsible for national security and the other matters listed in s 5(3) of the CA: [39]. This was consistent with the Common Regulatory Framework [35]-[38]. Provisions such as s 5 of the CA and s 8 of the WTA are to be construed as if contained within a single statute: [40]. In circumstances where the legislation has carefully divided responsibility between the government and the regulator, reserving to the former powers only in respect of matters of national interest, it would be very surprising if those powers did not apply so as to prevent the making of an exemption regulation where, in the reasonable and proportionate judgment of the government, the regulation would prejudice those interests: [43]. This was reflected in the language of s 5(2) of the CA. Ofcom is as much carrying out one of its functions when, following a direction by the Secretary of State, it does *not* make exemption regulations as when it does make exemption regulations under s 8: [49].

- The Court of Appeal erred in accepting the existence, as the principal basis for its decision, of a general principle of statutory construction that a statutory power to give a direction does not extend to a direction *not* to comply with a statutory duty arising: [53], [62] In assessing rival interpretations of a provision, it is relevant that one interpretation would permit a direction that has the effect of precluding the performance of a statutory duty: but that is no more than one relevant factor: [62].